



1973

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Recommended Citation

Clark, Merle C. (1973) "Character Evidence--The Rules of Admissibility in Criminal Cases in Kentucky," *Kentucky Law Journal*: Vol. 61 : Iss. 4 , Article 7.
Available at: <https://uknowledge.uky.edu/klj/vol61/iss4/7>

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CHARACTER EVIDENCE—THE RULES OF ADMISSIBILITY IN CRIMINAL CASES IN KENTUCKY

INTRODUCTION

To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.¹

As indicated by the Supreme Court in *Michelson v. United States*,² the source of the above quotation, the rules governing the admissibility of character evidence have long been confusing and troublesome. In view of the courts' difficulty with the proper uses of character evidence, there can be little doubt that juries have been even more perplexed when faced with the problem of assigning weight and according proper significance to such evidence. The purpose of this note is to review and analyze the rules governing the use of character evidence in criminal cases in Kentucky. Where the law is in need of revision, possible alternatives will be recommended.

I. CHARACTER AND REPUTATION

Although "character" and "reputation" have sometimes been used interchangeably in court decisions, they are entirely different concepts. Reputation is merely a method for establishing character,³ and may, in some instances, be unreliable since one having a good reputation may in fact lack good character.

Character is defined as one's disposition to act in a particular manner.⁴ It is a trait, or the sum total of traits, that one possesses.⁵ "It is evidence of a condition or characteristic from which the jury may presume or deduce a fact."⁶ Reputation, on the other hand, may be viewed as the community's conception of a person's character. Accordingly, the Court of Appeals in *Shell v. Commonwealth*⁷ defined reputation as "the cumulative effect on the community's mind of a group, or the sum total of one's traits of character." Testimony concerning one's reputation is hearsay, but is admissible as an exception to the hearsay rule because it is believed to satisfy the dual require-

¹ *Michelson v. United States*, 335 U.S. 469, 486 (1948). The Court concluded that character evidence is "archaic" and "paradoxical" but somehow "workable even if clumsy."

² *Id.*

³ 1 J. WIGMORE, EVIDENCE § 52 (3d ed. 1940) [hereinafter cited as WIGMORE].

⁴ 1 WIGMORE, *supra* note 3, § 52. MODEL CODE OF EVIDENCE rule 304 (1942) defines character as the "aggregate of a person's traits."

⁵ *Shell v. Commonwealth*, 53 S.W.2d 524 (Ky. 1932).

⁶ *Id.* at 525.

⁷ 53 S.W.2d 524 (Ky. 1932).

ments of trustworthiness and necessity.⁸ Reputation is distinguished from mere rumor by the fact that reputation embodies the consensus of the community⁹ while rumor is a mere report that has not received general credibility.¹⁰

II. THE MEANS OF PROVING CHARACTER

In Kentucky, character evidence is generally limited to testimony concerning the person's reputation in the community in which he is known.¹¹ Although opinion evidence was once accepted as proof of character, it is now widely rejected, but the rationale for its rejection has been characterized by Professor Wigmore as unsound.¹² Significantly, the Proposed Rules of Evidence for United States Courts and Magistrates [hereinafter cited as Proposed Federal Rules of Evidence] provide that opinion evidence is admissible to prove character.¹³ If approved by Congress, these rules will probably be adopted by many states as were the Federal Rules of Civil Procedure. Thus, the admissibility of opinion evidence to prove character may be revived. Permitting proof of character by both reputation and opinion evidence may be a marked improvement over proof of character by reputation alone. In the view of one commentator, "[t]he personal judgment of a qualified and reliable witness ought to be better than reputation of character based upon the hearsay interchange of gossip of scandal in the community."¹⁴

Consistent with the great majority of jurisdictions,¹⁵ Kentucky prohibits the admission of evidence of particular acts to prove character.¹⁶ Particular acts are inadmissible to prove character, not because they are irrelevant, but rather because they may be "too convincing" and cause undue prejudice. Such evidence is also objectionable because it tends to waste time, cause unfair surprise, and confuse the issues.¹⁷ One can recognize the plight of a juror, if a criminal

⁸ 5 WIGMORE, *supra* note 3, § 1610.

⁹ As will be discussed *infra*, "community" may now be an outmoded concept in the context in which it has been used.

¹⁰ 5 WIGMORE, *supra* note 3, § 1611.

¹¹ *Borders v. Commonwealth*, 67 S.W.2d 960 (Ky. 1935). Reputation testimony is admissible to prove character under MODEL CODE OF EVIDENCE rule 305 (1942), and under UNIFORM RULES OF EVIDENCE rule 46 (1953).

¹² 7 WIGMORE, *supra* note 3, § 1986.

¹³ PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES rule 405 (Revised Draft 1971) [hereinafter cited as PROPOSED FEDERAL RULES OF EVIDENCE].

¹⁴ Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 511 (1939).

¹⁵ 1 WIGMORE, *supra* note 3, § 193.

¹⁶ *White v. Commonwealth*, 4 Ky. L. Rptr. 373 (1882).

¹⁷ 1 WIGMORE, *supra* note 3, § 193.

defendant were permitted to prove his good character by showing numerous benevolent acts and the prosecution were in turn permitted to introduce in rebuttal a like number of malevolent acts.

III. CHARACTER TO PROVE AN ACT

It is generally agreed that character evidence is relevant to show one's disposition to commit a particular act. However, the law is well settled that in a criminal trial the prosecution is prohibited from initially introducing evidence of the defendant's character to prove that the defendant probably committed the act for which he is charged. In *Calhoun v. Commonwealth*,¹⁸ it was held reversible error for the prosecution to introduce evidence of the accused's bad character when the defendant had not offered evidence of his good character. This exclusionary rule is based on the rationale that a jury may tend to convict the accused because he is a bad man rather than because of the persuasiveness of the evidence against him. One of the few studies of the jury system disclosed that the percentage of convictions increased when evidence of the defendant's bad character or prior wrongful acts was introduced.¹⁹ The rule of exclusion is therefore based on the policy of preventing undue prejudice.²⁰ However, when an accused takes the stand to testify, his character for truth and veracity is placed in issue, and he is subject to impeachment the same as any other witness.

Although the prosecution is prohibited from initially introducing proof of the defendant's character to prove his propensity to commit an offense, a defendant is permitted to introduce evidence of a relevant character trait to infer that it is improbable that he committed an act inconsistent and alien to his disposition.²¹ This rule is said to have originated as an outgrowth of the English sporting concept of fair play.²²

An accused who offers proof of his character must limit it to traits which are relevant to the offense charged.²³ In an assault case, character for peace and quiet is a relevant trait.²⁴ Where the charge involves a sex offense, generally the accused's character for chastity and morality is admissible.²⁵ If the charge is a theft related offense,

¹⁸ 64 S.W. 965 (Ky. 1901). *Accord*, *Combs v. Commonwealth*, 169 S.W. 879 (Ky. 1914); *Newman v. Commonwealth*, 88 S.W. 1091 (Ky. 1905).

¹⁹ H. KALVEN & J. ZEISEL, *THE AMERICAN JURY* 160 (1966).

²⁰ 1 WIGMORE, *supra* note 3, § 194.

²¹ *Shell v. Commonwealth*, 53 S.W.2d 524 (Ky. 1932).

²² 1 WIGMORE, *supra* note 3, § 57.

²³ *Stacy v. Commonwealth*, 225 S.W. 37 (Ky. 1920).

²⁴ *Pickelseimer v. Commonwealth*, 290 S.W. 498 (Ky. 1927).

²⁵ *Cox v. Commonwealth*, 162 S.W.2d 201 (Ky. 1942).

honesty is the relevant trait.²⁶ And if the issue is credibility, only the witness's character for truth and veracity is admissible.²⁷ Contrary to the majority view, Kentucky adheres to the rule that evidence of good moral character is admissible where the defendant is charged with any felony offense.²⁸ The rationale for this rule has been explained as follows:

Any felony charge is a stigma, and puts the general moral character in issue. An unblemished character is inconsistent with the commission of crime, and, when indicted for a felony, no good reason can be perceived why the person enjoying such character should not be entitled to prove it as well as that of the particular trait involved.²⁹

Thus, it is recognized that general moral character is relevant to a person's disposition to act criminally irrespective of the particular nature of the offense.

Once the accused has introduced evidence of his good character for a particular trait, the prosecution is allowed to offer proof of bad character in rebuttal but is limited to that trait which the defense presented on direct examination.³⁰ The accused rarely profits from introducing evidence of his character where the prosecution has any basis for rebuttal, and, as will be discussed in detail below, the defendant who introduces a character witness is always subject to the potentially dangerous effects of having his character witness asked on cross-examination whether he has heard of particular wrongful acts committed by the accused. Although the purpose of these questions is to test the credibility of the character witness, the fact that the question is asked creates an inherently unfavorable inference.

IV. REPUTATION TESTIMONY IN KENTUCKY

A. *Proof of Character by Reputation Testimony*

Kentucky does not permit the introduction of evidence of particular acts³¹ or opinion³² to prove character. In *Cox v. Commonwealth*,³³

²⁶ *Gaugh v. Commonwealth*, 87 S.W.2d 94 (Ky. 1935).

²⁷ *Ashcraft v. Commonwealth*, 5 S.W.2d 1067 (Ky. 1928).

²⁸ *Pickelseimer v. Commonwealth*, 290 S.W. 498 (Ky. 1927). In *Pickelseimer*, the Court failed to follow the rule, recognized in *McCandless v. Commonwealth*, 185 S.W. 1100 (Ky. 1916), that in a homicide case character evidence is limited to the accused's reputation for peace and quiet. Cf. *Demaree v. Commonwealth*, 82 S.W. 231 (Ky. 1904) (improper for the accused to prove his character for being gentle and kind).

²⁹ *Pickelseimer v. Commonwealth*, 290 S.W. 498, 499 (Ky. 1927).

³⁰ *Strong v. Commonwealth*, 287 S.W. 235 (Ky. 1926).

³¹ *Owens v. Commonwealth*, 222 S.W. 524 (Ky. 1920).

³² *Borders v. Commonwealth*, 67 S.W.2d 960 (Ky. 1934).

³³ 162 S.W.2d 201 (Ky. 1942).

the defendant attempted to prove his good character by testifying that he had never committed acts of a particular nature. In referring to this method of proving character, the Court of Appeals stated that the defense, like the prosecution, is not permitted to prove character by the use of particular acts.

As in most jurisdictions, proof of character in Kentucky is, with few exceptions, limited to reputation testimony. Reputation testimony may often be opinion evidence in disguise; however, in theory, opinion and reputation are two distinct types of evidence. The distinction between them, as expressed in *Citizens Bank of Morehead v. Hunt*,³⁴ is that while opinion is what a person thinks of another, reputation "is the estimate in which he is held by the people generally with whom he associates and is in contact with in everyday life."³⁵

A penetrating cross-examination of a character witness who has testified to the reputation of an accused often elicits the fact that the testimony is based on the witness's opinion or on particular acts which have come to his attention.³⁶ Where it can be shown that a character witness's testimony is based not on his knowledge of the person's reputation but on evidence of an inadmissible type, the Court should, on proper motion, admonish the jury to disregard the testimony. Where the testimony is deemed so prejudicial as to result in a miscarriage of justice, the jury should be dismissed.³⁷

A character witness is customarily asked whether he knows the reputation of the accused for a particular trait. Originally it was required that the witness be asked whether he knew the person's reputation in the community in which he resides, the requirement having originated at a time when people resided in rural and small town settings. In today's mobile, urbanized society it is more difficult for a person to have an established reputation in the community of his residence; therefore, in many instances the community requirement no longer has relevance.³⁸ This was recognized in *Wilson v. Commonwealth*,³⁹ where the Court pointed out that community has no geo-

³⁴ 154 S.W.2d 730 (Ky. 1941).

³⁵ *Id.* at 731. See also *Davenport v. Commonwealth*, 148 S.W.2d 1054 (Ky. 1941).

³⁶ *Citizens Bank of Morehead v. Hunt*, 154 S.W.2d 730 (Ky. 1941). There, it was brought out on cross examination that a witness who purported to be testifying to the defendant's reputation was in fact testifying to his opinion of the defendant based on the defendant's failure to tell the truth and pay a promissory note.

³⁷ *Borders v. Commonwealth*, 67 S.W.2d 960 (Ky. 1934).

³⁸ Ladd, *Techniques and Theory of Character Testimony*, *supra* note 14. The author points out that since the larger the city the more scattered the sources of comment, reputation testimony is less reliable.

³⁹ 475 S.W.2d 895 (Ky. 1971).

graphical definition and should thus be defined as the area where the person is well known and has established a reputation. Therefore, it would be more proper in some cases to permit testimony of a person's reputation at his place of employment than to require testimony of his reputation in the community where he resides.

A witness is permitted to testify to a person's good character even though he has not heard it discussed by those in the area where the person is known.⁴⁰ In *Davenport v. Commonwealth*,⁴¹ the trial court excluded testimony of the defendant's character witness because the witness had not heard the defendant's character discussed, since there had been no occasion for it. On appeal, the Court held that it was prejudicial error to exclude such testimony where it is shown that the character witness was in a position to have heard derogatory statements concerning the person about whom he is testifying. The Court explained that the witness is competent to testify if he knows the accused and the people in the community where he resides. This rule is based on the assumption that it is human nature to comment on one's demonstrated character flaws, whereas good character is rarely the subject of comment. This type of testimony is thus often called "negative character" evidence.

Since a person's character for violence, immorality, dishonesty, or untruthfulness is more apt to be the subject of comment than one's virtues, proof of bad character is admissible only if it is shown by positive testimony that his neighbors and acquaintances have spoken of his bad character.⁴² An unsavory reputation as to a particular trait of character may sometimes be shown to have originated only after a criminal charge has been placed against the individual. If so, it should be excluded. In *Allen v. Commonwealth*,⁴³ the defendant in a homicide case, after introducing evidence of her reputation for peace and quietude, was confronted with rebuttal testimony. On cross-examination, the defense established that the rebuttal witness's testimony was based on the reputation of the defendant which resulted from the defendant's having had a criminal charge placed against her. The Court of Appeals held that such evidence should be excluded.

B. *Criticisms of Reputation Testimony*

Too often it is forgotten that character rather than reputation is the primary subject of the inquiry. Reputation is merely an indirect

⁴⁰ *Shephard v. Commonwealth*, 327 S.W.2d 956 (Ky. 1959).

⁴¹ 148 S.W.2d 1054 (Ky. 1941).

⁴² *Id.*

⁴³ 119 S.W. 795 (Ky. 1909).

method of establishing character, but, because of the problems inherent in its use, the purpose of the inquiry is sometimes obscured. One of the basic reasons for preferring reputation testimony over opinion evidence is that it is thought to be trustworthy because it represents the consensus of the community. However, the validity of such reasoning is questionable.⁴⁴ Gossip often grows worse as it spreads. Although the facts may be utterly without foundation, they are often accepted as true when passed from person to person. Further, community standards vary and affect the objectivity of one's reputation, but the community cannot be cross-examined. Admitting opinion evidence to prove character could be a better method. The judgment of a witness who has had sufficient opportunity to observe the person in question may be more indicative of his character than the testimony of hearsay multiplied many times.⁴⁵

V. SPECIAL USES OF CHARACTER EVIDENCE

A. *The Character of the Victim in Assault Cases*

When a defendant in a criminal case interposes the plea of self-defense as justification for the act committed, character evidence is admissible for two distinct purposes. First, if the issue is whether the accused or the victim was the aggressor, evidence of the victim's character for violence is admissible to show his disposition to act in conformity therewith on the occasion in question.⁴⁶ In this situation, it is irrelevant that the defendant was unaware of the victim's reputation for violence at the time of the act. The evidence is directed solely to the identification of the aggressor and is not offered to infer that the act was justified because the victim was a violent and vile person. The only trait of character of the victim which is admissible is that of violence or, in rebuttal, peace and quietude; proof of the victim's character for a trait not indicating a disposition to engage in violent acts is irrelevant.⁴⁷

⁴⁴ Ladd, *Techniques and Theory of Character Testimony*, *supra* note 14. Professor Ladd concludes:

Good living consistently pursued is recognized, and marked departures from approved conduct become known and are the subject of comment. On this theory, the law, with few signs of change, accepts reputation as evidence of character. But whether character testimony in the average case is worthwhile at all is a real question, and whether reputation to prove character is satisfactory is even more doubtful.

Id. at 517.

⁴⁵ Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 173-74 (1940).

⁴⁶ *Payne v. Commonwealth*, 58 Ky. (1 Met.) 370 (1858).

⁴⁷ See *Benge v. Commonwealth*, 97 S.W.2d 54 (Ky. 1936), where the

(Continued on next page)

If the accused was the aggressor, the victim's character is immaterial.⁴⁸ Hence the prosecution is not permitted to initially introduce evidence of the victim's character.⁴⁹ Further, the prosecution is not permitted to introduce proof of the defendant's character merely because the defendant has offered proof of the victim's character.⁵⁰

The second purpose for which proof of the victim's character for violence is admissible is to establish an element of the defendant's plea of self-defense, *i.e.*, that he had reasonable grounds to believe at the time of his act that he was in imminent danger of death or great bodily harm. Since the apprehension of the one attacked is crucial, the defendant must have known of the deceased's character for violence at the time he committed the act.⁵¹ The rationale for admitting character evidence in this situation was well expressed in *Conley v. Commonwealth*.⁵² "One would naturally act quicker and on less provocation in the face of a threatening attitude on the part of a dangerous and bad character than on that of a man who had the reputation of being peaceable and law-abiding. . . ." It should be noted that if the victim's reputation for violence can be established, it may create a presumption that the defendant was aware of the victim's character.⁵³

Whether the defendant has introduced evidence of the victim's character for proving that the victim was the aggressor or for showing his own fear and apprehension, the prosecution is entitled to rebuttal. As in most situations where character evidence is admissible, reputation testimony is the sole means of proving the victim's character. However, where the issue is the defendant's fear and apprehension in the face of an attack, the defendant should not be prohibited from introducing proof of particular acts known to him at the time of the incident.⁵⁴

B. *Character of Prosecutrix in a Rape Case*

Character evidence is admissible if relevant to the issue of consent

(Footnote continued from preceding page)

prosecution, over the objection of the defendant, was allowed to introduce evidence of the deceased's good moral character by showing that he was a church member. On appeal, the Court held that the evidence was improper since the accused was not charged "with the slaying of a saint." *Id.* at 56.

⁴⁸ *Morrison v. Commonwealth*, 74 S.W. 277 (Ky. 1903).

⁴⁹ *Parker v. Commonwealth*, 28 S.W. 500 (Ky. 1894). The statement in this case that the prosecution is prohibited from initially introducing evidence of the deceased's character may be subject to question since the danger of unfair prejudice is not present as it is when the accused's character is concerned.

⁵⁰ *Strong v. Commonwealth*, 287 S.W. 235 (Ky. 1926).

⁵¹ *Friley v. Commonwealth*, 255 S.W.2d 483 (Ky. 1953).

⁵² 8 S.W.2d 415 (Ky. 1928).

⁵³ *Trabune v. Commonwealth*, 17 S.W. 186 (Ky. 1891).

⁵⁴ *Contra*, *Blackburn v. Commonwealth*, 234 S.W.2d 178 (Ky. 1950).

in a rape case.⁵⁵ If the accused rapist pleads consent, the character of the prosecutrix for morality or chastity is placed in issue.⁵⁶ If she has an established disposition for unchastity or immorality, it is considered more probable that she consented to the act for which the defendant is charged. If the defendant denies the act, evidence of the prosecutrix's character is immaterial.

In addition to reputation testimony, the defendant is also allowed to introduce proof of particular acts of unchastity and immorality.⁵⁷ The reason particular acts are admissible in this instance was stated by the Court in *Grigsby v. Commonwealth*.⁵⁸

But we hold that evidence of particular acts of immorality with other men occurring shortly before the alleged rape is competent upon the idea that if she made merchandise of her virtue, that fact will strongly militate against the probability that she did not consent in the case at hand.

Similarly, the accused's prior voluntary sexual relations with the prosecutrix are admissible,⁵⁹ but acts subsequent to the alleged offense are inadmissible.⁶⁰

After the defendant has injected the issue of the prosecutrix's character for morality or chastity, rebuttal evidence by the prosecution is admissible. Although some jurisdictions hold that the character of the prosecutrix is not subject to proof by the prosecution until it has been attacked by the defendant, the better rule is to allow the prosecution to introduce such evidence once the accused interposes the plea of consent.⁶¹

VI. CHARACTER EVIDENCE TO IMPEACH A WITNESS

Character evidence is most frequently used to impeach a witness. Section 597 of the Kentucky Civil Code of Practice provided that a witness could be impeached by the party against whom he was

⁵⁵ Although character evidence is admissible in other types of sex crimes where consent is recognized as a defense, the discussion here is limited to the offense of rape.

⁵⁶ *Rooney v. Commonwealth*, 194 S.W.2d 71 (Ky. 1946); *Lake v. Commonwealth*, 104 S.W. 1003 (Ky. 1907).

⁵⁷ *Holland v. Commonwealth*, 272 S.W.2d 458 (Ky. 1954).

⁵⁸ 187 S.W.2d 259, 263 (Ky. 1945). It should be noted that the defendant's evidence in this case was held too remote to have a bearing on the issue of consent.

⁵⁹ *Bowman v. Commonwealth*, 143 S.W. 47 (Ky. 1912).

⁶⁰ *Holland v. Commonwealth*, 272 S.W.2d 458 (Ky. 1954).

⁶¹ In *Lake v. Commonwealth*, 104 S.W. 1003 (Ky. 1907), the prosecution initially introduced evidence of the prosecutrix's good reputation for virtue. The Court recognized the general rule that in rape cases the reputation of the prosecutrix is always competent evidence where consent is an issue; however, the case does not directly hold that the prosecution may initially introduce evidence of the prosecutrix's reputation.

produced by evidence of the witness's reputation for untruthfulness and immorality or by proof that he had been convicted of a felony. Particular wrongful acts, other than a felony conviction, were not admissible to impeach under the Civil Code. Rule 43.07 of the Kentucky Rules of Civil Procedure [The Civil Rules are hereinafter cited as KRCP], which superseded section 597 of the Civil Code of Practice, omits impeachment by proof of reputation for immorality and permits any party to impeach a witness without regard to who called him, but in all other respects section 597 of the Code and KRCP 43.07 are the same.⁶² Under Rule 13.04 of the Kentucky Rules of Criminal Procedure, KRCP 43.07 is applicable to criminal proceedings.⁶³

Although both the Civil Code and the Civil Rules provide that evidence of particular acts, other than felony convictions, is inadmissible for impeachment purposes, questions concerning impeachment by particular wrongful acts often arise and are the subject of comment in appellate decisions. In a recent case,⁶⁴ the prosecution sought to impeach a defendant by showing on cross-examination that he had previously been charged with intoxication and other misdemeanors. On appeal this evidence was held inadmissible. Similarly, it has been held improper to ask a witness whether he has been indicted for perjury⁶⁵ or whether she has given birth to an illegitimate child.⁶⁶

It is not always clear whether questions concerning particular wrongful acts are intended to impeach the witness or to smear his character. However, where the witness makes a statement on direct examination, counsel is allowed to cross-examine him about what he said, even though in so doing particular wrongful acts of the witness are shown. In *Birchman v. Commonwealth*,⁶⁷ the defendant testified on direct that his gun battle with the police was the first time he had engaged in such activity. Over defendant's objection the prosecution was permitted to ask whether he had been involved in a similar inci-

⁶² Ky. R. Civ. P. 43.07 [hereinafter cited as KRCP] provides: A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence, by showing that he had made statements different from his present testimony, or by evidence that his general reputation for untruthfulness renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of a felony.

⁶³ Ky. R. Crim. P. 13.04 provides that "[r]ules of Civil Procedure heretofore applicable to criminal procedure by virtue of KRS 447.155 shall continue to be applicable to the extent not superseded by these rules."

⁶⁴ *Terry v. Commonwealth*, 471 S.W.2d 730 (Ky. 1971).

⁶⁵ *Johnson v. Commonwealth*, 61 S.W. 1005 (Ky. 1901).

⁶⁶ *Hutsell v. Commonwealth*, 243 S.W.2d 898 (Ky. 1951).

⁶⁷ 238 S.W.2d 1008 (Ky. 1951).

dent with police officers in Toledo, Ohio. The Court of Appeals held that the question was proper to contradict the statement made by the witness on direct examination. However, the cross examiner is prohibited from introducing evidence to contradict a statement made on direct examination if the statement relates to a collateral matter.⁶⁸

A. *Impeachment By Evidence Of A Felony Conviction*

Impeaching a witness by introducing evidence of a prior felony conviction is an exception to the rule forbidding impeachment on the basis of particular wrongful acts. This exception is based on the rationale that a felon has been proven guilty of conduct indicating a deterioration of character of such magnitude as to render him unworthy of belief in a court of law.⁶⁹

In Kentucky, a felony conviction can be used for impeachment only after the judgment becomes final. An appeal suspends the judgment, and therefore prohibits introduction of the conviction until it is affirmed.⁷⁰ A motion for a new trial also suspends the judgment and prohibits the use of a conviction for impeachment until the motion is denied.⁷¹ Since a juvenile delinquency proceeding results in adjudication of a status rather than conviction for a crime, it does not come within the rule allowing impeachment by felony convictions.⁷²

Assuming a felony conviction justifies the inference that a person is untruthful,⁷³ to have probative value it must not be too re-

⁶⁸ *Keene v. Commonwealth*, 210 S.W.2d 926 (Ky. 1948). The defendant-witness testified that he had never assaulted or raped the prosecutrix or any other person. The prosecution was thereafter permitted to offer rebuttal testimony by one who had allegedly been assaulted. The Court of Appeals held this type of impeachment to be improper. As to what is considered a collateral issue, see *Commonwealth v. Jackson*, 281 S.W.2d 891, 894 (Ky. 1955), where the Court analyzed this problem and cited Wigmore's test of collateralness: "Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self contradiction."

⁶⁹ 3 WIGMORE, *supra* note 3, §§ 519, 986, 987. It should be noted that Ky. REV. STAT. § 421.090 (1972) [hereinafter cited as KRS] disqualifies any person convicted of the offenses specified in KRS §§ 432.160-180 (perjury and related offenses) from testifying in any judicial proceeding except where a person so convicted wishes to testify in his own behalf in a criminal trial. However a conviction of perjury in another state was held not sufficient to disqualify a witness. *Wood v. Wood*, 264 S.W.2d 260 (Ky. 1954). It could nevertheless be used to impeach the witness.

⁷⁰ *Foure v. Commonwealth*, 283 S.W. 958 (Ky. 1926). PROPOSED FEDERAL RULES OF EVIDENCE rule 609(e) takes the opposite position and permits the use of a conviction despite a pending appeal; however, evidence that the conviction has been appealed is admissible in rebuttal.

⁷¹ *Adkins v. Commonwealth*, 309 S.W.2d 165 (Ky. 1958).

⁷² *Coleman v. Staples*, 446 S.W.2d 557 (Ky. 1967). *Accord*, PROPOSED FEDERAL RULES OF EVIDENCE rule 609(d).

⁷³ See *Commonwealth v. Reynolds*, 365 S.W.2d 853, 855 (Ky. 1963), where Justice Moremen, speaking for the court, said: "The writer has never been convinced that a felon is a perjurer—but we have accepted that premise and the conception is embodied in our law."

mote⁷⁴ and must be directed to the time when the witness testifies.⁷⁵ However, a fifteen year old conviction has been held not too remote to be introduced for impeachment.⁷⁶

Although some jurisdictions hold that a conviction cannot be introduced for impeachment if the sentence is never served, Kentucky follows the view that conviction alone is sufficient. Since the purpose of KRCP 43.07 is to apprise the court and jury that a witness may be unworthy of belief, the rule is not concerned with the penalty imposed.⁷⁷

KRCP 43.07 permits a party to impeach any witness;⁷⁸ therefore, a defendant in a criminal trial is subject to impeachment if he testifies. Ordinarily, the rules of evidence prohibit the prosecution from introducing evidence of the defendant's character; however, when the defendant testifies, he places his character for truthfulness and veracity in issue. This situation creates some of the most confusing and troublesome problems concerning the use of character evidence, and has been the source of much comment and criticism.

When the defendant-witness is impeached, problems arise concerning the jury's application of the impeachment evidence. Where a felony conviction is used to impeach, will the jury regard it as tending to prove the offense charged, or will they consider it only as it affects the defendant's credibility as a witness? The court instructs them to do the latter, but whether this is actually accomplished is subject to question.⁷⁹

The rules governing impeachment of the defendant have until recently been identical to those involving the ordinary witness. For example, it was previously permissible to impeach a defendant charged with detaining a female against her will with intent to have carnal knowledge by introducing a prior conviction for rape.⁸⁰ Two questions

⁷⁴ Cotton v. Commonwealth, 454 S.W.2d 698 (Ky. 1970).

⁷⁵ Goehring v. Commonwealth, 370 S.W.2d 822 (Ky. 1965). The latter rule should be distinguished from the rule governing the admissibility of character evidence to prove an act, which is required to be directed to the time the act allegedly occurred.

⁷⁶ Bogie v. Commonwealth, 467 S.W.2d 767 (Ky. 1971).

⁷⁷ Commonwealth v. Reynolds, 365 S.W.2d 853 (Ky. 1963).

⁷⁸ In Spencer v. Commonwealth, 203 S.W.2d 30 (Ky. 1947), the Court indicated that an absent witness whose probable testimony was read to the jury could be impeached the same as any other witness.

⁷⁹ Ideally, it is hoped that jurors will perform the mental gymnastics required by such instructions. However, many doubt whether this is realistic. The following assertion of Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949), is indicative of the criticism leveled at the effectiveness of limiting instructions: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

⁸⁰ White v. Commonwealth, 228 S.W.2d 426 (Ky. 1950). The use of rape

are raised by this situation. Is a conviction for rape relevant to the issue of truth and veracity? Will knowledge that the defendant has previously been convicted of an offense similar to the one for which he is being tried create jury prejudice towards the defendant? Impeachment of a witness by proof of felony convictions is now controlled by the decisions of the Court of Appeals in *Cowan v. Commonwealth*⁸¹ and *Cotton v. Commonwealth*,⁸² which eliminated some of the glaring flaws in the impeachment process by confining impeachment evidence to the purpose for which it is offered.

In *Cowan*, Justice Palmore pointed out the dangers inherent in impeachment by felony convictions. The prosecution cross-examined the defendant about his felony convictions in sufficient detail to cover four pages of the trial transcript, even though the convictions had already been introduced into evidence. The jury was then admonished to consider this evidence only as it affected the defendant's credibility as a witness. The Court of Appeals conceded that it is unlikely that an admonition could eliminate the prejudicial effect created by the disclosure of felony convictions considering the great latitude granted the prosecution in the conduct of the cross examination. The Court felt that the extensive questioning concerning the prior convictions was a factor in the jury's verdict of involuntary manslaughter. Thereafter, the Court held that if a witness is asked whether he has been convicted of a felony and he answers affirmatively further inquiry is impermissible. On the other hand, if the witness denies having been convicted of a felony, refutation by proof of his record should be limited to one conviction. Thus, *Cowan* was intended to remove the opportunity to dwell on the details of prior crimes.

In *Cotton*, the Court modified *Cowan* by holding that impeachment by proof of felony convictions must be confined to felonies involving dishonesty, stealing, or false swearing. The Court explained that such felonies included, but were not limited to: perjury, subornation of perjury, obtaining money under false pretenses, forgery, embezzlement, counterfeiting, fraudulent alterations, misappropriation of funds, false impersonation, passing checks without sufficient funds or on non-existing banks, fraudulent concealment, making false entries, and all felonies involving theft or stealing. *Cotton* focused particular attention on impeachment of a defendant-witness. The Court held that a hearing

(Footnote continued from preceding page)
convictions to impeach was upheld on appeal. However, under *Cotton v. Commonwealth*, 454 S.W.2d 698 (Ky. 1970), a conviction of that kind was subsequently declared inadmissible for impeachment purposes.

⁸¹ 407 S.W.2d 697 (Ky. 1966).

⁸² 454 S.W.2d 698 (Ky. 1970).

outside the presence of the jury is required where the trial judge will determine the admissibility of a felony conviction offered for impeachment. If, in the opinion of the trial judge, the conviction is not relevant to the issue of credibility, is too remote, or is likely to create prejudice outweighing its probative value, it shall be excluded.

The holding in *Cotton* retreated somewhat from the dictates of *Cowan* regarding the number of convictions which are admissible. Under *Cotton*, the number of convictions which may be introduced is left to the discretion of the trial judge. Further, the specific nature of the offense can be shown.⁸³ The rule in *Cotton* represents an enlightened position on this aspect of the law of evidence, far superior to that adopted by the drafters of the Proposed Federal Rules of Evidence.⁸⁴

*Harris v. Commonwealth*⁸⁵ applies the rule announced in *Cotton*. In *Harris*, wherein the defendant was charged with a sex related offense, the prosecution was permitted to impeach the defendant-witness by introducing a prior conviction for rape. Reversing the conviction, the Court of Appeals stated: "We do not consider the offense of rape to be relevant to the issue of credibility"⁸⁶

B. *Impeachment by Evidence of Reputation for Truth and Veracity*

Character evidence may also be used to impeach a witness's reputation for truth and veracity. The rules discussed relative to the use of character evidence to prove an act are applicable here; however, the testimony must be confined to the witness's reputation for truth and veracity. Evidence of a witness's reputation for general moral character is no longer admissible to impeach or support his credibility.⁸⁷ Further, the defendant-witness's reputation for honesty and integrity is admissible only as it affects his credibility.⁸⁸

Testimony of a witness's reputation for truth and veracity must be directed to the time when the witness testifies; otherwise it is irrelevant. The testimony may be based on the community's general estimate of

⁸³ Since *Cotton* held that only convictions relevant to truth and veracity could be used to impeach, it is logical that the specific nature of the conviction should be shown.

⁸⁴ PROPOSED FEDERAL RULES OF EVIDENCE rule 609(e) permits impeachment by proof of any conviction punishable by death or imprisonment in excess of one year, or by a conviction of a crime involving dishonesty or false statement regardless of punishment. However, if the court determines that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, the evidence may be excluded.

⁸⁵ 469 S.W.2d 68 (Ky. 1971).

⁸⁶ *Id.* at 70.

⁸⁷ As stated previously, KRCP 43.07 omitted the provision of Civil Code § 597 allowing impeachment on the basis of reputation for immorality.

⁸⁸ *Buchanan v. Commonwealth*, 200 S.W.2d 459 (Ky. 1947).

the witness or it may be based on "negative character" evidence.⁸⁹ As in other instances, opinion evidence is inadmissible.⁹⁰

C. *Admonitions to Limit the Effect of the Evidence*

Since it is recognized that impeachment evidence, particularly proof of felony convictions, can be prejudicial and misunderstood, courts seek to minimize these dangers by admonishing the jury of its proper purpose. The admonition commonly takes the following form:

The jury will consider the evidence of the defendant that he has been convicted of a felony only insofar as it may affect his credibility as a witness, if it does so, and for no other purpose. It neither disproves his guilt or innocence on this charge.⁹¹

The trial court is under no duty to admonish the jury regarding the purpose of impeachment evidence.⁹² Although it has not always been so in this jurisdiction, it is now crucial that the defendant request an admonition. If he fails to do so, he is deemed to have waived his right to have it considered on appeal.⁹³ This rule is based on the distinction between an admonition and an instruction. Under both the Civil Code and the Civil Rules, the court instructs on the whole law of the case.⁹⁴ In *Taylor v. Commonwealth*,⁹⁵ the defendant-witness was impeached by evidence of a felony conviction; however, he failed to request an admonition. On appeal, the Court stated:

It seems plain that the accused may not play fast and loose with the court by failing to request an admonition and then assigning the failure to give such an admonition as reversible error.⁹⁶

The defendant is entitled to an admonition, if requested, only when he has been impeached. If a witness other than the defendant has been impeached, the rationale for requiring an admonition does not exist.⁹⁷ However, where the defendant's character witness has been cross-examined as to whether he has heard of particular acts of misconduct by the defendant, it is proper for the defendant to request an admonition that the evidence is admissible only as it affects the witness's credibility and not to show the probability of the defendant's guilt on the present charge.⁹⁸

⁸⁹ *Davenport v. Commonwealth*, 148 S.W.2d 1054 (Ky. 1941).

⁹⁰ *Borders v. Commonwealth*, 67 S.W.2d 960 (Ky. 1934).

⁹¹ *Meek v. Commonwealth*, 11 S.W.2d 996 (Ky. 1928).

⁹² *Clair v. Commonwealth*, 102 S.W.2d 367 (Ky. 1937).

⁹³ *Id.*

⁹⁴ *Ochsner v. Commonwealth*, 109 S.W. 326 (Ky. 1908).

⁹⁵ 432 S.W.2d 805 (Ky. 1968).

⁹⁶ *Id.* at 808.

⁹⁷ *Clark v. Commonwealth*, 257 S.W. 1035 (Ky. 1924).

⁹⁸ *Wright v. Commonwealth*, 102 S.W.2d 376 (Ky. 1937).

D. *Overview of the Impeachment Process*

What has previously been said concerning the admissibility of opinion evidence to prove one's character in other situations may also be applied to proof of a witness's character for truth and veracity. Unfortunately, such evidence may well be a more reliable basis for ascertaining credibility than either reputation evidence or proof of felony convictions.

Impeachment by proof of felony convictions is responsible for a substantial part of the criticism aimed at the impeachment process. Since truthfulness is a complex psychological phenomenon, it is questionable whether a single act which results in a felony conviction is indicative of a witness's disposition to be truthful when testifying. As one commentator has pointed out, the present use of felony convictions to impeach is contrary to scientific method.⁹⁹ Yet, here as in other areas of the law, once a rule is established it is difficult to dislodge.

*Cotton v. Commonwealth*¹⁰⁰ was decided in 1970. Before then, Kentucky law governing impeachment was irrational and subject to abuse. Since *Cotton* only those convictions relevant to credibility can be employed in the impeachment process. The Court further prohibited impeachment by any conviction which the trial judge deems unduly prejudicial. *Cotton* was long overdue and a welcomed change. If one accepts the premise on which impeachment by felony convictions is based, *Cotton* represents the best answer to a difficult problem.

VII. CROSS-EXAMINATION OF CHARACTER WITNESSES

Whether a character witness has testified for the purpose of impeachment or to show one's disposition to commit an act, he can be cross-examined as to whether he has *heard* of particular acts of misconduct committed by the person about whom he has testified.¹⁰¹ However, the witness cannot be asked if he *knows* of particular wrongful acts.¹⁰² The particular acts inquired of must be relevant to the trait of character in issue. For instance, it has been held improper to cross-examine a character witness who testified to the accused's good moral character as to whether he had heard of the accused's being publicly drunk or whether he had a reputation as a common drunkard.¹⁰³

⁹⁹ Ladd, *Credibility Tests—Current Trends*, *supra* note 45.

¹⁰⁰ 454 S.W.2d 698 (Ky. 1970).

¹⁰¹ *Wright v. Commonwealth*, 102 S.W. 376 (Ky. 1902).

¹⁰² *Fox v. Commonwealth*, 1 S.W. 396 (Ky. 1886).

¹⁰³ *Daws v. Commonwealth*, 234 S.W.2d 953 (Ky. 1950).

Although the cross-examiner is bound by the witness's answer,¹⁰⁴ there is considerable criticism of the rule allowing particular acts to be mentioned on cross-examination. The fact that the question is asked often causes unfavorable inferences regardless of the answer given by the witness. However, if it can be shown that the question was asked in bad faith, it may be ground for reversal.¹⁰⁵

CONCLUSION

The major objection to the use of character evidence is its propensity to be misused. This is not to say that it is purposely misused, but to suggest that a lay jury often finds it difficult to separate evidence which is admissible for one purpose but not another. Although no one can analyze precisely the mental process of a juror considering evidence, the use of character evidence involves inherent dangers of unfair prejudice in some instances.

A fundamental rule of evidence, often disregarded, dictates that evidence should be excluded if its probative value is outweighed by the possibility of prejudice. The mechanical application of arbitrary rules, rationalized by often unjustified reliance on precedent, can result in ignoring the reasoning process essential to the sound application of the law of evidence. Although the law has chosen to draw its conclusions in the area of character evidence without regard to the scientific validity of the premises on which the conclusions are based, a proper consideration of the policies underlying the law of evidence will remedy many of the problems in this area.

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¹⁰⁴ Keene v. Commonwealth, 210 S.W.2d 926 (Ky. 1948).

¹⁰⁵ Steele v. Commonwealth, 232 S.W. 646 (Ky. 1921).