Kentucky Law Journal

Volume 42 | Issue 3 Article 13

1954

Kentucky Practice Forms by W. Lewis Roberts

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Book Reviews

KENTUCKY PRACTICE FORMS. By W. Lewis Roberts. St. Paul, Minn., West Publishing Co., 1953. xxv, 761 pp.

During the past year it has been my privilege to witness the creation by W. Lewis Roberts, Professor Emeritus of the University of Kentucky College of Law, of a work which I believe destined to fulfill an important need for substantial numbers of the Kentucky bar. With the acceptance of the New Kentucky Rules of Civil Procedure, a major change has occurred in our practice, the extent and nature of which are bound to be questions troublesome to bar and judiciary alike.

It is an oversimplification to say that demurrers are abolished, that one need no longer state a cause of action, and pleadings now need only give notice of the nature of the cause and need not reach an issue. It helps to know that the pleadings are now construed for the pleader rather than against him and are to be viewed liberally so that all meritorious causes may prevail. It cheers the slipshod lawyer to know that his errors need no longer result in the loss of his client's cause. He may even perceive that the dead demurrer has risen in three new guises as a motion for judgment on the pleadings, a motion to strike for failure to state a claim, and a motion for summary judgment. He may be comforted by the assurance that what was good pleading under the Code will in practically all cases be good pleading under the New Rules.

However, the good lawyer will want to know when he can object to an opponent's pleading, and the extent to which he may escape objection in turn. He will want to know, for example, that a written contract can now be sued on in three ways: it may be set forth verbatim, pleaded by exhibit, or pleaded according to its legal effect. Formerly, of course, the substance of the contract had to be set forth and the copy of the writing attached.

It will thus be seen that substantial changes have been effected by the New Rules without the New Rules' being explicit as to what the changes are. Dr. Roberts has sought to answer the questions which will arise in every lawyer's mind in a very practical manner. He has synthesized his examination of the Federal decisions and all available form books of the Federal system into a single volume of 761 pages which includes accepted forms covering the most common situations with which the practicing lawyer is confronted. There are roughly

two thousand sections in the book, the majority of which are the forms, the others being comment upon the changes from the old to the new practice.

I can think of no clearer way to illustrate the design and format of the book than to pick at random one or two of the author's sections for visual representation:

> § 181. *Requisites for Complaint in an Action on a Written Contract.*
>
> In a suit on a written contract, the Kentucky decisions have required that the contract be set out verbatim;[1] or, if the writing sued on is not copied in the petition, the substance of the writing was required to be set forth.[2] To use the words of Judge Willis in the case of Crawford v. Crawford: "It is a rule of long practice in this state that a promise or agreement to pay must be averred to make a petition thereon good, and the mere exhibition of the writing will not supply an omission to allege a promise or agreement to pay. . . . A pleading is sufficient if it sets out the contracts in its words, or in other words constituting the substance of the contract."[3]
>
> Under the new rules a plaintiff may set forth the contract verbatim in the complaint or plead it by exhibit or plead according to its legal effect. This is pointed out in the note to Official Form 12 of the Federal Rules of Procedure and it is further stated that the plaintiff may ask for legal or equitable relief or both although this was not allowed under the earlier rules of pleading.
>
> Since the new rules of procedure in this state follow the Federal rules and official forms for the most part, this statement in the note mentioned above is applicable to our new rules of civil procedure as it has been in other states that have adopted the Federal rules. Rule 10.01 requires that every pleading shall have a caption. This caption consists (1) of the name of the court, (2) the style of the action, (3) a file number, and (4) a designation as provided in Rule 7.01. In the case of the complaint, where there are two or more parties plaintiff or defendant, the names of all the

[1] Aetna Ins. Co. v. Hensley, 1926, 215 Ky. 45, 284 S.W. 425.
[2] Davidson v. Falls, 1926, 215 Ky. 368, 285 S.W. 209.
[3] 1928, 222 Ky. 708, 2 S.W. 2d 401.
[4] 28 U. S. C. A. (1946 ed.) p. 3342.

parties must be set forth. This is practically the same as Section 110 of the Civil Code, now repealed.

The requirement of Rule 11 must also be borne in mind in drawing complaints. Every pleading of a party represented by an attorney must be signed by at least one attorney and the address of the attorney given.

The caption given in Official Form 1 is as follows:

Franklin Circuit Court

Civil Action, File Number .....

John Doe, Plaintiff
v.
Richard Roe, Defendant

Summons

§ 182. *Complaint in a Suit for Breach of Agreement to Compromise a Pending Action*

[*Caption*]

1. On the ..... day of ....., 19....., an action was pending between the parties to this action, brought by the plaintiff to recover from defendant the sum of ..... dollars, which defendant owed plaintiff, but which the defendant disputed.

2. In consideration of the plaintiff's discontinuing such action at law and accepting ..... dollars in satisfaction of the disputed claim, defendant promised to pay plaintiff the sum of ..... dollars [on the ..... day of ....., 19.....].

3. Plaintiff thereupon discontinued the action. [*Or,* Plaintiff has duly performed all the conditions of said agreement on his part.]

4. No part of said sum has been paid [except the sum of, *etc.*] Wherefore, plaintiff demands judgment against defendant for ..... dollars, with interest and costs of suit.

Signed: .....
Attorney for Plaintiff.

Address: .....

AUTHOR'S COMMENT

> Recent Kentucky decisions on compromising suits are McCreary County v. Bybee, 1946, 301 Ky. 794, 193 S.W. 2d 423; Wilson v. Hillman, 1948, 306 Ky. 508, 208 S.W. 2d 493; Sutton v. Moore, 1949, 309 Ky. 229, 217 S.W. 2d 321; Moore v. Sutton, 1950, 311 Ky. 174, 223 S.W. 2d 737; and Murphy v. Henry, 1950, 311 Ky. 799, 225 S.W. 2d 662. In Sutton v. Moore, the court quoted with approval the case of Nuckols v. Nuckols, 1942, 293 Ky. 603, 169 S.W. 2d 828 (1942) the following passage: "It is well settled in this jurisdiction that an agreement of compromise is supported by sufficient consideration where it is in settlement of a claim which is unliquidated, or in the settlement of a claim in dispute, or one which is in doubt."

The text and comment which accompany many of the forms will undoubtedly be invaluable to owners of the book. While I would not suggest for the moment that the diligent lawyer may dispense with perusal of Moore's Federal Practice, or more voluminous compendiums of forms (such as West's Federal Forms 8 vol. 1953; Barron and Holtzoff's Federal Practice and Procedure, 7 vol. 1950; and Ohlinger's Federal Practice, 8 vol. 1941; etc.), where available, certainly this work will serve as a valuable aid in the small office, or large one as well, as a book of ready refeernce which will in most instances suffice.

It should be observed that the author has here created a pioneer work under the handicap of having no state decisions under the New Rules for guidance. Careful attention has been paid to differences between the Federal rules and the Kentucky Rules of Civil Procedure wherever they have appeared. Many attorneys have offered suggestions which have been diligently appraised, and in some instances incorporated into the text. For errata and changes in the law which will undoubtedly appear, provision is made for correction by inserts in the rear flap of the book. The first of the annual supplements which are contemplated is now being readied for publication. Included in the supplements will be new forms, as they seem desirable, and commentaries on recent Federal decisions. Section 1025 of the present supplement, for example, deals with Recent Federal Decisions Bearing on Defenses.

In this brief review I have tried to convey my belief that Dr. Roberts, within the limitation of a one-volume form book created in

the absence of state decision, has created a notable achievement in a work which will be of service of the bar of this state for years to come.

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THE SOCIAL IMPACT OF THE WARSAW CONVENTION. By Harold J. Sherman. New York: Exposition Press, 1952. Pp. 156.

The main title of this book is misleading; the actual subject matter of the book is covered accurately by the subtitle, "A Critique of the Lee Decisions on the Warsaw Convention and a Plea for Early Rectification." The author is much disturbed by the decision of the New York Courts in the Lee case[1] and the denial by the United States Supreme Court of an appeal by the Lees for a judicial review on the merits of the final judgments.[2] Since Pan American Airways invoked in its defense the provisions of the Warsaw Convention of 1929, Mr. Sherman argues that the courts permitted the provisions of a treaty to nullify a right guaranteed in the Seventh Amendment of the Federal Constitution, namely, the right of trial by jury "in suits at common law, where the value in controversy shall exceed twenty dollars. . . ."

In view of the proposed amendment to the Constitution sponsored by Senator Bricker, this ought to be a very timely, significant and provocative book. If the author had succeeded in proving his thesis his book would indeed be an effective support of the contention of the Bricker amendment supporters, but in the opinion of the reviewer Mr. Sherman fails to establish the necessary connecting links to make his case valid. It is true that the Convention by limiting the liability of the carrier for each passenger did restrict the legislative power of the state of New York, but it did not thereby violate the provision of the Seventh Amendment, because the first nine amendments are restrictions on the Federal government and not on the states. While the courts in recent years have held that the basic provisions of the Bill of Rights are included under the Fourteenth Amendment there is no decision holding that a specific provision like that at issue in this case is covered by the broad restrictions on the states imposed by this amendment. If the New York courts properly had jurisdiction in this case the Seventh Amendment could not be invoked by the Lees. The Lees had no right to a jury trial in the courts of the state of New York

[1] Lee *et al* v. Pan American Airways, Inc., 118 N. Y. L. J. 1548 (1947); 275 App. Div. 855, 89 N. Y. S. 2d 888 (1949).
[2] 339 U. S. 920 (1950).