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Kentucky Civil Rules: Practice and Procedure by Watson Clay

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Book Reviews

KENTUCKY CIVIL RULES: PRACTICE AND PROCEDURE. By Watson Clay. West Publishing Company, St. Paul, 1953. Pp. LIII, 895. $20.00.

This is really not so much a book review as an expression of appreciation for an outstanding public service performed by Judge Clay and those working with him toward an integration of existing Kentucky practice with the Federal Rules. This integration was the work of many men, synthesizing Carroll's Code, modern legal thought, and the work of the Federal Rules Committee. I think of Judge Clay as symbolic of the patience and knowledge and hard work of those who made the Kentucky Rules of Civil Procedure possible. His is the voice, but the work is no less theirs, and it is this fact more than any other which adds stature to Clay's KENTUCKY CIVIL RULES: PRACTICE AND PROCEDURE; for in the author's comments, which follow practically every rule, is reflected the knowledge gained by the painstaking searching for the ultimate which took place as the Civil Code Committee made a comparative study of the existing practice in Kentucky and other jurisdictions with regard to each Federal Rule as it came up for adoption. The learning distilled by this comparative analysis is refined by Clay into a nectar upon which both the neophyte practitioner and the most learned men of the bar may feed to advantage.

I say this advisedly, for the rules in themselves are sometimes ambiguous, and often proclaim a spirit rather than a practice. They must be read with a mind oriented to the purpose and enriched by previous learning. Their purpose is avowed to be the simplification of procedure and the expedition of a "fair determination of rights between litigants, a class of persons whose personal interests are sometimes overlooked in the game of the law." They are to be construed in the "interests of substantial justice," so that ideally the meritorious litigant will always win. That this purpose is worthy few would care to dispute. Scholars will recall that this has been the aim of procedural reform from the Statute of Westminster in 1285 and the Hilary Rules in 1834, through the inception of Code Pleading in 1848* and on to the present day.

Yet it will bear repeating that one cannot read the Rules alone and know the law, as Judge Clay has recognized in his *Foreword.* He says there, and truly, that he has examined every rule separately, "careful

* This is the date of the New York Field Code, adopted with modifications by Kentucky in 1851.

consideration being given to the source of the Rule, the objective sought, the changes effected in Kentucky practice, and the problems presented." He says further, "to what extent the Court of Appeals will follow Federal decisions where applicable cannot now be known, but the reasoning found in those decisions will certainly be of significance." In saying this he has touched upon the troublesome truth—that a rule means nothing until it is interpreted by the highest court in the jurisdiction and that even the well considered opinions of a parent judiciary are only persuasive.

It is a matter of record that the Federal Rules themselves after their adoption in 1938 were a marvelously fertile field of appellate litigation and are still fruitful. In this connection, I need only point a finger at the voluminous erudition of Moore's *Federal Practice,* well known to my readers and staggering with the weight of noted cases. The very volume of comment which exists in Moore's *Federal Practice* and lesser works of the same nature highlights the necessity for some guide to the true meaning of the rules. Just as Moore has been a guide for voyagers on the seas of Federal Practice, so I believe will Clay's Civil Rules be a navigational aid for practitioners in Kentucky, particularly with regard to those portions of the rules which differ from the Federal Rules, and either continue the old Kentucky practice as it was under Carroll's Code, or make some innovation previously unknown to either.

As an example of the latter, I will take the liberty of citing here Kentucky Rule of Civil Procedure 43.07, on Impeachment of Witnesses, together with Judge Clay's Comment, which I consider most enlightening, and certainly an excellent example of the method of exposition used throughout the book.

Rule 40.07 IMPEACHMENT OF WITNESSES

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.

Source: CC 596, 597.

Author's Comment

Analysis

1. In General.
2. Relationship to Rules 26.06 and 43.06.

1. In General

Rule 43.07, which has no counterpart in the Federal Rules, effects a significant change in Kentucky practice.

Under CC 596 a party *producing a witness* could contradict him by other evidence and different statements made by him but could not impeach him by evidence of bad character, unless it was indispensable that the party produce him. CC 597 permitted a party *against whom a witness was produced* not only to impeach him by contradictory evidence or different statements, but also by evidence of general reputation for untruthfulness or immorality which rendered him unworthy of belief. This Rule puts *all* witnesses in the same category.[1]

Rule 43.07 gives any party the right to impeach any witness,[2] *regardless of who produced him*, by: (1) contradictory evidence, (2) showing different statements made by the witness, (3) showing that his general reputation for untruthfulness renders him unworthy of belief, or (4) showing that he has been convicted of a felony. The Rule does not permit proof of general reputation for *immorality* as did CC 597.

Before proving different statements made by the witness, compliance with Rule 43.08 is required.

Proof of conviction of a felony may be shown by (1) the examination of the witness or (2) by the record of a judgment, as was permitted under former Kentucky practice.

2. Relationship to Rules 26.06 and 43.06

Some confusion may result when considering this Rule in relation to Rules 20.06 and 43.06. Rule 20.06 contains language to the effect that a party *makes a deponent his witness* by introducing his deposition in evidence (with two exceptions); and Rule 43.06 would seem to suggest that an adverse party or its representative is in a category *different from that of other witnesses with respect to impeachment.* Apparently Rule 43.07 is predominant and controlling, and the inconsistent or ambiguous provisions of the other two Rules are not significant.

Whatever inconsistencies or discrepancies exist probably resulted from the fact that Rules 26.06 and 43.06 were adopted from the Federal Rules, whereas this Rule develops a new principle not followed in the Federal Rules.[3] It would appear that in drafting the language of the earlier Rules the impact of this Rule was not taken into account.

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[1] The reasons justifying such a Rule are discussed in Wigmore on Evidence (3rd ed.) Vol. III, Sections 896 to 901.

[2] Apparently references in these Rules to impeaching the *witness* or impeaching his testimony [see Rule 26.04(1)] means the same thing.

[3] The United States Supreme Court refused to adopt certain amendments recommended by the Federal Advisory Committee in its Final Report of November, 1937 that would liberalize FRCP 43(b).

Kentucky Decisions

Analysis

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1. Right to contradict

Before witness can be contradicted by proof of his prior statements, testimony given by the witness must be prejudicial to the party calling him, and it is not sufficient that he disappoints the expectations of such party by failing to give beneficial testimony. Harvey v. Commonwealth, 287 Ky. 92, 152 S.W. 2d 282.

2. Reputation

On cross-examination of defendant's witness by plaintiff's counsel, trial court properly sustained defendant's objection to question if the witness knew his own reputation for truth from what people generally said in the community in which witness lived. Louisville & N. R. Co. v. Gregory, 284 Ky. 297, 144 S.W. 2d 519.

3. Particular wrongful acts

Where particular wrongful acts are inquired into by party offering witness, inquiry when begun on cross-examination may be pursued by party impeaching witness, though such facts cannot be inquired into on examination in chief. Caskey v. Nussbaum, 227 Ky. 479, 13 S.W. 2d 493.

Federal Decisions

Effect of false swearing

In action for injuries, plaintiff's admitted false swearing as to details of accident did not require that his testimony be rejected by jury under maxim of "falus in uno, falsus in omnibus", since credibility of plaintiff's testimony was for jury. Norfolk & W. R. Co. v. McKenzie, C.C.A.6, 1941, 116 F.2d 632.

Multiply this illustration by 635 pages. Add Appendices of (1) Official Forms, (2) the Federal Rules, (3) Tables of disposition of former Civil Code Section, Statutes, and comparable Federal Rules, and (4) an Index somewhat more satisfactory than that of the old Carroll's Code; and we have a general idea of Clay's Civil Rules, a handsome book durably bound in red plastic with gold leaf lettering.

As a law professor, I have found Clay's Civil Rules to be of immense value not only in introducing students of Pleading to the new practice in Kentucky but also in acquainting students in Evidence with various changes in that field brought about by the New Rules, sometimes, it seems, inadvertently, as can be seen from Rule 43.07, quoted above.

It is an understatement to say that the new rules are beset with pitfalls for the unwary, and I would be less than honest if I did

not say that I think Judge Clay's book is indispensable to an understanding of the New Practice. He had the experience, the learning, and the gift to be articulate. No Kentucky lawyer can examine this book without being the wiser for it.

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*Suggested mode of citation: Clay, CR. Foreword, p. VII.

ANNUAL SURVEY OF AMERICAN LAW, 1953. New York University School of Law. 1954, New York, pp. x, 1029. $10.00.

For the past twelve years the faculty of New York University School of Law has each year published a volume giving a survey of American law; designed, as the foreword of the first volume announced, "to aid both lawyers and laymen faced with the task of keeping abreast of the current developments in the law."

Perhaps the best way for one unfamiliar with this series to gain an idea as to just what is covered in the survey is to glance at the names of the subjects covered. The headings, in their order of treatment, are taken up as follows: International Law; The United States and the United Nations; Conflict of Laws; Constitutional Law and Civil Rights; Administrative Law; Federal Income Taxation; Federal Estate and Gift Taxation; State and Local Taxation; Trade Regulation; Labor Relations Law; Food, Drug and Cosmetic Law; Public Housing, Planning and Conservation; Local Government; Copyright Law; Patent Law; Contracts; Agency and Partnership; Corporations; Bankruptcy; Banking and Negotiable Instruments; Sales; Insurance; Transportation Law; Admiralty and Shipping; Arbitration; Torts; Family Law; Real and Personal Property; Mortgages; Future Interests; Trusts and Administration; Succession; Federal Jurisdiction and Practice; Civil Procedure in State Courts; Criminal Procedure; Evidence; Jurisprudence; Judicial Administration, and Legal Bibliography.

These surveys vary in helpfulness, from the practicing lawyer's viewpoint, from excellent to being of little or no value. Among those that are well done and of real value can be mentioned administrative law; labor relations law, which clearly sets out the problem involved in an interesting way; the survey of local government; sales; insurance; real and personal property law; future interests; trusts; evidence; and civil procedure in state courts, which, together with the one on judicial administration, brings the lawyer up to date on legislative changes,