

## Warning: Statutes Under Construction

### Finding Good Case Law in Old Kentucky Statutes

by Kurt X. Metzmeier

#### Dear Mr. Metzmeier,

*I am trying to find relevant case law to interpret a particular passage in a Kentucky statute, but there are few cases annotating the section I am researching. I've tried the usual things — checking both versions of the Kentucky Revised Statutes, and looking at the outline of the chapter where my section is located to find cases associated with other related KRS sections — but have come up short. Is there anything else I should be doing?*

J. M. Harlan, Louisville, Ky.

OK, no one has written the editor with this (or any other) question, but this is a question I regularly get from students, attorneys, and others seeking help at my library. It is a good question, because annotated codes do not pick up all of the relevant case law regarding many Kentucky statutes. Generally they are very good about picking up

cases regarding recently enacted statutes and often collect cases adjudicated under a prior version of a statute, especially when that statute has the same KRS chapter and section number as the new statute. They are less helpful when a current statute has the same language as an older statute, but the prior statute had a very different KRS citation. A good example is the Unified Juvenile Code, which brought together various civil and criminal statutes (some quite old) that had once been scattered through the KRS. Moreover, the annotated codes rarely track cases prior to the 1942 enactment of the KRS, even though the KRS re-codified statutes that had been law for decades. The law against dueling, which can be traced back to 1799, is a good example. Given the traditional reluctance of Kentucky courts to publish its decisions, a lawyer needs every bit of decisional authority he or she can muster.

One could ask whether cases based on earlier statutes are mandatory authority, even when they grapple with the same language. However, it is a settled point of Kentucky law that the legislature is presumed to have knowledge of existing laws and the construction placed on them by courts. *Manning v. Kentucky Board of Dentistry*, 657 S.W.2d 584 (1983). It follows that a statute that preserves the language of a prior law does not intend to disturb the judicially accepted meaning of those words. Moreover, it is impossible to deny the persuasive authority of such cases. Tracing the language of a statute back to the first time the legislature so spoke and collecting the case law accumulated throughout its history can greatly illuminate the legislative purpose of a statute and provide a skillful advocate with fodder for argument. With the traditional instruments of legislative history (reports of debates and committee reports) not published in Kentucky, attorneys should not overlook any means of placing a statute in a light favorable to their clients. In addition, tracing a statute back to its origins in the misty past is often helpful on its own merit for determining that statute's current application, or in the alternative, to discredit modern interpretations that would be absurd when placed in historical context.

#### Tools for Researching Old Statutes

The question is, how does one trace the statutory language in a particular section of the KRS back to its origin? The answer to the question must begin with a disclaimer that may offend the ears of members of the bar educated within the last two decades: this cannot be done solely, or even mostly, online. Also, the most comprehensive research will have to be done in a law library with a full set of Kentucky Acts and a fairly deep collection of superseded volumes of the KRS, Carroll's Kentucky Statutes, and other older codes (see sidebar). In Louisville, there are two accessible libraries with these necessary tools: The law library of the University of Louisville's Brandeis School of Law (502-852-6392) and the Jefferson County Public Law Library (502-574-5943; [jcp11@bluegrass.net](mailto:jcp11@bluegrass.net)). Of these two law libraries, U of L has the deepest collection, which contains not only the all the Kentucky codes, but also library bound editions of softbound supplements and part parts. Its substantial print collection is supplemented with microfiche sets of Kentucky Acts and superseded Kentucky codes from 1915, including all replaced volumes of the Michie's KRS since 1970. The JCPLL, located in the Old Jail Building, also has a suitable collection. It has a good run of Kentucky Acts, superseded codes dating back to 1811 (including all superseded volumes of Michie's KRS), and a copy of the Notes and Annotations (discussed later). Other appropriate libraries include the University of Kentucky Law Library and the State Law Library in Frankfort.

Unfortunately for researchers, only a scant portion of the material discussed in this article is available digitally. Westlaw packages its historical versions of the KRS in annual databases that go back to 1986 and can be searched by year or combined together. It also has a database of acts of the legislature from 1990 on, but the database is not based on the official Kentucky Acts, but instead uses unofficial advance sheet versions of acts. Lexis has a legislative archives database that collects old statutes back through 1991. It also simulates the Kentucky Acts with its advance service in a database that dates to 1991.

#### History of Kentucky Statutes

The first bound edition of Kentucky laws dates back to the press of pioneer publisher John Bradford. "Bradford's Laws," now exceedingly rare, was published in 1799, with supplements in 1807 and 1817. William Littell published a similar work in five volumes (1809-1819). However, Littell was dissatisfied with this effort and in 1822 he joined with Jacob Swigert to prepare the "Digest of Statute Laws," which, unlike previous efforts, grouped acts together alphabetically by subject matter. In 1834 the General Assembly commissioned Charles S. Morehead and Mason Brown to undertake a revision of the compiled acts, following the same arrangement. Preston S. Loughborough published a supplement in 1842.

The first true codification of Kentucky statute law took place over 1850 and 1851 by three legislatively appointed commissioners, Charles A. Wickliffe, S. Turner, and S. S. Nicholas. The commissioners were empowered to re-word statutes, eliminate obsolete and repealed acts, rearrange and re-order the subjects, and to generally shape sixty years of acts into a code of law. The Revised Statutes was published in 1852. Updates were published in 1860 by Richard Stanton and in 1866 by Harold Myers. Neither update was approved by the legislature, which in 1873 appointed Edward I. Bullock, William Johnson and George W. Craddock to revise and update work of the 1852 commission, resulting in the General Statutes. Between

1877 and 1888, J. F. Bullock and John Feland published six commercial editions of the General Statutes.

Following ratification of the 1891 Kentucky Constitution, the General Assembly named commissioners, W.C. McChord, James C. Sims and John D. Carroll to prepare bills to conform the Kentucky statutes to the new fundamental law of the commonwealth. The hundreds of laws they proposed did not improve the arrangement of the statute laws, something Carroll and J. Barbour attempted to do in their 1894 edition of the Kentucky Statutes. While retaining the traditional alphabetical subject arrangement, Carroll and Barbour attempted to make citation of the laws easier by numbering the sections consecutively throughout the edition. Therefore, under "Animals," the section on "Bulls Running Wild," could be cited as KS § 73. This citation method would endure almost five decades, as would Carroll's compilations, which were printed in several editions from 1899-1936 as Carroll's Kentucky Statutes.

In 1942, the Kentucky General Assembly radically revised the state's statutes and published its own edition of the Kentucky Revised Statutes in 1944. This did not preclude the Baldwin Co. from beginning publication of the popular Baldwin's Kentucky Revised Statutes Annotated. In 1971, the Bobbs-Merrill Co. started a competing annotated code, soon purchased by the Michie Co. ■

## Tracing a Current Statute Back

The first place to begin researching the history of a law is the history notes in the annotated code. The main note is found as a parenthetical note attached to the last sentence of the text of the statute. These notes cite first to the Kentucky Acts where this particular version of the law was enacted, and list all revisions. The text of the original Act should be consulted because there is sometimes a preface or similar language referring to prior laws on the subject. In addition to references to acts of the legislature, some notes have citations to prior codes like the Kentucky Statutes (sometimes abbreviated "KS"). Such a note can take you back to before the 1942 revision of the statutes. As useful as it is, a history note is not completely conclusive as to a law's actual origin. As mentioned earlier, often a law that appears to have been enacted recently may be a thoroughly reworked law that has language that dates back decades.

### Example (KRS 67.040):

#### Westlaw/Banks-Baldwin

(HISTORY: 1978 c 118, § 7, c 384, § 141, eff. 6-17-78; 1976 ex s, c 20, § 6; 1952 c 224, § 1; 1942 c 173, § 1, c 208, § 1; KS 1833, 1836, 1837)

#### LexisNexis/Michie's

(1833, 1836, 1837: amend. Acts 1942 ch. 173, §§ 1, 2; 1952 ch. 224, § 1; 1976 (Ex. Sess), ch. 20, § 6, effective January 2, 1978; 1978, ch. 118, § 7, effective June 17, 1978; 1978, ch. 384, § 141, effective June 17, 1978)

Despite the fact that one version is in chronological order, and the two codes handle abbreviations differently ('c' versus "ch." for chapter; "ex s" and "Ex. Sess. for extraordinary session), the information—conveyed in terse statements separated by semicolons—is the same. The history note tells you that KRS 67040 goes back to three sections of the old Kentucky Statutes (1833, 1836, and 1837) that were combined in the original 1942 edition of the KRS, that the statute was revised in 1952, and the text of that revision is found in section one of chapter 224 of the Kentucky Acts, and that it was revised again in 1976 and twice in 1978, with additional information about those revisions.

Now that you have this history, you can look up the Kentucky Acts citations and see how your law evolved, paying particular attention to whether the specific statutory language you are trying to interpret has changed. Next, assuming you have access to a collection of superseded KRS volumes, check for relevant cases decided under the prior versions of the law that have not been carried forward to the current version of the KRS. Using our example, you would want to look up KRS 67040 as it existed prior to 1978, 1976, and 1952.

### Beyond the KRS

Having looked at all prior versions of your statute in the KRS, you can examine how

your statute looked and was interpreted before the 1942 revision of the KRS (assuming it goes back that far). Almost every statute in Kentucky has some roots in the 1942 revision of the Kentucky statutory code, if only in the chapter number it bears. Many statutes with legislative history notes have entries to "1942 Ky. Acts, Chapter 208," (see the Westlaw/Banks-Baldwin example above) but when you look up that cite, instead of finding the language of the statute being researched, you find "An Act Revising the Statute Laws of the Commonwealth." Experienced researchers encountering this citation know that they need to find their library's copy of the Bill to Revise the Kentucky Statutes 1942, because this is the act by which the legislature adopted the KRS by reference. Generally when you see this kind of cite, you know your law dates back to the original KRS.

In my example above, three sections of the old Kentucky Statutes (1833, 1836, and 1837) were combined to make KRS 67040. To find cases decided under these statutes, consult the last bound addition of Carroll's Kentucky Statutes (1936) and, if available, its supplements (originally issued softbound, these supplements have been hardbound by some libraries).

The committee assembled to revise the Kentucky statutes left behind a volume of materials from its extensive research that is extremely useful to researchers. The Statute Revision Commission's Notes and Annotations to the Kentucky Revised Statutes, published in 1944, contains "the complete legislative history from the time of the last complete revision in 1873 (the General Statutes) to the time of the enactment of the Kentucky Revised Statutes in 1942, and full Reviser's Notes explaining all changes of language and omissions made in the process of revising the statutes." Sections are also annotated by references to relevant court decisions "from the earliest date" to 1943 and "all material of a historical character that is useful in connection with the interpretation, construction and application of the statutes." The material is organized by KRS chapter and section, each of which is prefaced with an asterisk.

Using the Notes and Annotations, tracing a statute beyond even the Kentucky Statutes is a snap. First, look it up by its KRS number. The entry will have citations to cases and statutes in effect in 1942, as well as statutory and legislative history notes and case citations on the language of the statute going back to the 1873 General Statutes. A typical section begins with references to all sections of the Kentucky Statutes related to that KRS section. Citations to the Kentucky Acts follow, cited by year, chapter and section if applicable. Usually these citations are followed by commentary on the revision history of the statute, then annotations to cases commenting on the KRS section or prior statutes upon which the KRS section was based.

A citation to 1873 General Statutes can be researched further. The General Statutes has references to session laws and to the 1852 Revised Statutes printed in the margins alongside each statute. From there, a citation to the Revised Statutes can be traced even further, because that compilation has side notes to Morehead and Brown's Digest of the Statute Laws of Kentucky (1834) and Loughborough's supplement. Each of those sources have marginal references to session laws and to Littell and Swiger's collections of statute laws, as well as notes to leading cases.

Although a lot of work, researching the language of a statute back through early versions can pay off with both a better understanding of the law and a greater number of cases to mine for arguments. Few things are completely new to the law, and with diligent research, one can find all the relevant law on a statute.

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