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The Kentucky Law Reports and Reporters

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Kentucky Court of Appeals

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THE KENTUCKY LAW REPORTS AND REPORTERS

Section 3 of Article V of the first Constitution of Kentucky vested in the Court of Appeals original and final jurisdiction in all cases respecting the titles to land under the existing land laws of Virginia, including all such cases then pending in the Supreme Court for the District of Kentucky. It was also given such jurisdiction in all cases concerning contracts of land prior to the establishing of those titles. This section after setting out the procedure in such cases provided:

“(The said Court) shall on the conclusion of every cause, state on the records the whole merits of the case, the questions arising therefrom, the opinions of the Court thereupon, and a summary of the reasons in support of those opinions.”

Section 4 of this Article required each dissenting Judge “to deliver his opinion in writing, to be entered as aforesaid.” It also provided that “each judge shall deliver his opinion in open court.”

As is well known, the English Judges, both Common Law and Chancellors, up to this time had never filed written opinions. Neither did the Judges of the United States Supreme Court until the time of John Marshall, who is said to have introduced in that Court the practice of filing written opinions. The first Constitution of our State, then, introduced in this State a notable innovation in the requirement that written opinions be filed although they were confined to a certain class of cases. The benefit expected from this practice in the securing of uniformity of decisions in cases involving land titles, did not, however, result as hoped for, largely because no provision was made for the publication of these decisions. Realizing this deficiency, Colonel Thomas Todd and James Hughes undertook the publication of these decisions. The risk of the adventure was entirely upon them and they had to reimburse themselves for the expense of the publication entirely from its sale. Colonel Todd withdrew from the enterprise, and Hughes alone published what is now the first volume of our Reports. Hughes was an eminent land lawyer, residing at Lexington, Kentucky, and served, at different times, in our legislature. The first part of his book is taken up with the decisions of the old Supreme Court of the District of

Kentucky, the first reported case being that of *Hoy v. Boggs*, decided at the June term of 1785.

The first reported case of the Court of Appeals was that of *Thomas Marshall and others, Superintendents of the Virginia State Line v. George Rogers Clark*, decided at the October term, 1793. The last reported case in this volume is that of *Ward v. Fox's Heirs and Simon Kenton*, decided at the March term, 1801. This volume, as originally published, was without a syllabus and with a very meager index. Its publication, however, served to bring forcibly to the attention of the public the need and advantages of a published report of the Court's decisions. It is difficult for us today, supplied as we are with a published report of the court's decision so promptly after its rendition, to realize that in the early years of our state and nation, the opinions of the courts of the states and nation were practically unknown to the bar and general public. The opinions of the United States Supreme Court from 1801 to 1804 lay unreported until William Cranch issued the first volume of his reports in the latter year. In the preface to that report he said :

"In a government which is emphatically styled a government of laws, the least possible range ought to be left to the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a similar case differently without strong reasons, which, for his own justification, he will wish to make public."

To this, Cranch might also have added the benefit the practicing lawyer obtains in the ability to advise his client in the light of the reported decisions of the court.

Since the publication of Hughes Reports had entailed a loss of several hundred dollars on that gentleman, it was not to be expected that an individual would at his own risk undertake another publication of like kind, and so the legislature, in 1804, passed the act of December 19th of that year, found on page 236 of Vol. III of Littell's Laws of Kentucky, and reading :

"Whereas it is desirable that there should be as uniform rules of decisions as possible in the courts of this Commonwealth, and whereas the promulgation of the opinions of the Court of Appeals would tend greatly to facilitate that object; therefore,

"Sec. 1. Be it enacted by the General Assembly that the clerk of the Court of Appeals be and he is hereby directed and required to make a fair transcript of all the decisions of the Court of Appeals since the first day of March, 1801, in which the case is stated and the reasons of

the court are given at large and before the first day of April next deliver the same to the public printer of this Commonwealth, whose duty it shall be to print the same with all convenient dispatch and deliver to the Secretary of State one copy for each of the judges of the circuit courts and each judge of the Court of Appeals and another copy to be deposited in the clerk's office of each court in this Commonwealth for the use of said courts, free for the inspection of all persons who may wish to inspect the same in the offices aforesaid.

"Sec. 2. Be it further enacted that the Governor be and he is hereby requested to purchase a copy of Hughes' Reports for each circuit court in this Commonwealth which shall be transmitted to the clerks of said courts with the acts of the present session and shall be kept by them for the use of their respective courts and all others who are desirous of examining them, provided that no person except the judges and they only in term time shall be permitted to take the said book out of the clerk's office. And the Auditor is hereby directed to issue his warrant on the Treasurer upon the order of the Governor for the sum the said books may cost.

"Sec. 3. And be it further enacted that the Clerk of the Court of Appeals shall be allowed two cents for every twenty words for the services hereby required of him; and the Auditor of Public Accounts shall issue his warrant on the Treasury for the same.

"This act shall commence and be in force from the passage thereof."

The clerk of the court at the time of the passage of this act was Achilles Sneed, the same who, as clerk of the court during the Old and New Court controversy, declined to turn over the records of the court to Francis P. Blair, the clerk of the New Court, and who, for his refusal, was fined by the New Court ten pounds for contempt. The volume of decisions prepared by Sneed under the statute quoted was the first published under the authority of the legislature. It began with the March term, 1801, and closed with the case of *Grant v. Boyd*, decided on January 18, 1805. It was but a bare copy of the order book of the court without syllabi, an index, or table of cases. As Hardin says in the preface to his report:

"In this situation, the law it contained was hid in obscurity and trash and by the omission of the facts on which the court adjudicated was too often calculated to mislead when found."

The failure of the project created by the Act of 1804 and the experience gained by that failure, brought about the Act approved February 20, 1808, and found on page 486 of Vol. III of Littrell's Laws of Kentucky. It reads:

"Be it enacted by the General Assembly, that it shall be lawful for the Court of Appeals to procure reports to be made of all such decisions of the court since its establishment as shall be deemed useful and to certify to the succeeding General Assembly what they shall deem a reasonable allowance to be made to any person engaged therein for the purpose of aiding the legislature in making due compensation.

"This act shall be in force from its passage."

Under this law, the court procured Martin D. Hardin to undertake the work and left to his discretion the selection of the cases to be reported. General Martin D. Hardin was a citizen of Washington County, the son of Col. John Hardin. He was an eminent lawyer, practicing his profession in Frankfort. He was secretary of state under Governor Shelby from 1812 to 1816 and was appointed to the Senate of the United States by Governor Slaughter, serving one session in that body in 1917. He served with distinction in the War of 1812 and died in Frankfort in 1823. Of the one volume of reports which he reported, the editor of the second edition said:

"Mr. Hardin was an admirable reporter. His volume was thoroughly prepared and indexed and is among the most valuable of the Kentucky Reports."

Hardin began his Report where Sneed left off. Beginning with the fall term of 1807, he took notes of the arguments of counsel and inserted them in the report where, as he said, "he deemed it serviceable." Although the report closes with the Spring term of 1808, the volume was not printed until 1810, due to the fact that the legislature did not until its passage of Chapter 142 of the Acts of 1809 make any provision for carrying into effect the Act of 1808.

Very limited encouragement was given in the state to the publication of the decisions of our courts. So Hardin, though he had begun the preparation of another volume of reports, never published a second volume. The decisions of the court went unreported until the legislature passed the Act of February 8, 1815, found on page 414 of the Acts of 1914. It reads:

"Sec. 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky that the Governor shall nominate and by and with the advice and consent of the Senate appoint a fit person a reporter of the decisions of the Court of Appeals.

"Sec. 2. Be it further enacted that it shall be the duty of said reporter to publish the decisions of the said court in volumes of about 600 octavo pages each, to be printed in a good type on good paper with a complete alphabetical table of cases and an index of principal matters, well bound in law binding and lettered, commencing with the fall term, one thousand eight hundred and eight, and progressing regularly with the decisions given since that time, omitting the arguments of counsel in all cases.

"Sec. 3. Be it further enacted that the said reporter shall, at least annually, finish and deliver 250 copies of one volume of the said decisions, for the use of this Commonwealth, into the Secretary's office; and shall receive as a compensation for the same, at the rate of five

dollars for every 600 pages of printing contained therein—tables and indexes being taken into the calculation. And when the said reporter shall deliver in the office of the Secretary of State the copies aforesaid, if the said Secretary upon examination shall find that the work is well done, he shall certify the receipt thereof and the amount due to the said reporter at the above mentioned rate to the Auditor of Public Accounts who shall, if approved by the Governor issue a warrant thereon in favor of the said reporter; which shall be paid out of the public treasury. And the said reporter shall moreover be entitled to the copyright of said reports."

"Sec. 4. And be it further enacted that the price in this act allowed for the 250 copies for the use of this Commonwealth, shall, upon motion made in the general court by the attorney general, be subject to such reduction as the said court may adjudge, if the work shall not be as well executed as is intended by this act, the said reporter having 10 days' previous notices of said motion."

Pursuant to the authority thus vested in him, the governor at once appointed George M. Bibb reporter of the Court. He was born in Prince Edward County, Virginia, on October 30, 1776, the son of Richard Bibb, an Episcopal clergyman. After graduating from William and Mary College, he, in 1798, emigrated to Kentucky where he studied law. He rapidly rose in his profession and soon stood among its leaders. He was a member of the Court of Appeals from 1808 to 1810, being commissioned Chief Justice on May 30, 1809. From 1811 to 1814 he was United States Senator. On the adjustment of the Old and New Court controversy, he was on January 5, 1827, again commissioned Chief Justice, and served until he resigned in 1828. After that he served a full term as United States Senator. From 1835 to 1844 he was chancellor of the Chancery Court in Louisville. In 1844 by invitation of President Tyler he took charge of the Treasury Department of the United States. From this he retired in 1845 and thereafter practiced law in Washington, acting at times as an assistant in the office of the Attorney General. He died at Georgetown, D. C., April 14, 1859. He was chosen by the legislature of Kentucky to defend with Henry Clay the occupying claimant laws before the Supreme Court and although Kentucky lost the case—See *Green v. Biddle*, 8 Wheat 1—Bibb discharged his duties with great ability and fidelity. I commend the reading of his dedication, appearing in the front of the first volume of his reports. It is as sound today as it was the day he wrote it. This is what he says of the lawyer:

"Do not cherish prejudices against lawyers as a class. They have been in all free governments the friends and supporters of liberty, exposing the corruption of ministers and the prostitution of judges. They

are necessary to bring the ministers of the law to an account for oppression in office, to warn judges of their duty, to apprise the people of their rights, to defend them against the encroachments of unconstitutional power, to detect the frauds of the knavish and artful upon the honest and simple; they are useful in the general administration of the laws."

Bibb began his reports with the decisions of the fall term of 1808. His fourth and final volume ends with the spring term of 1817. Pursuant to the act creating his office, he omitted from his reports the arguments of counsel.

The next reporter was A. K. Marshall, a brother of John Marshall, the chief justice of the United States. He served in the legislature from 1797-1800 as a representative from Mason County. He and Sneed are the only reporters prior to 78th Kentucky who took no copyrights on their reports. Although precluded by law from publishing arguments of counsel, he did print some petitions for rehearing where, as he said, they "made points of a leading or positive character" because such points made "are considered settled by the Court and will not be permitted to be further stirred." His three volumes of reports begin with the fall term of 1817 and end with the fall term of 1821.

Littell, the next reporter, is said to have been an Englishman and a man "of marked eccentricities." He came to Kentucky in 1804. In 1805 he entered into a contract with the State to publish its statute laws in three volumes which he did under the title "Littell's Laws of Kentucky." The first of the volumes appeared in 1809. Afterwards, together with Jacob Swigert, he issued a digest of the statutes. His five volumes of reports start with the spring term of 1822 and end with the like term of 1824. He also published a sixth volume of selected cases, containing decisions culled from those of the court extending from 1795 to 1821, and which had been theretofore unreported. He also wrote a book of poems called "Festoons of Finery" and a sketch of historical events in Kentucky's history prior to its becoming a state. In 1818, Transylvania conferred upon him the title of LL. D. He died in 1824.

In 1825, Governor Desha appointed Thomas B. Monroe reporter of the court. The second volume of his reports contains only opinions of the New Court which are not authority, as it was decided in *Hildreth's Heirs v. McIntire's Devise*, 1 J. J.

Mar. 206, that the New Court never had any valid existence and all its acts and decisions were null and void. T. B. Monroe was born October 7, 1791, in Albermarle County, Virginia. He was the son of Andrew Monroe, a close relative of President James Monroe. His parents settled in Scott County, Kentucky, in 1793. He graduated from the law department of Transylvania in 1821 and soon rose to prominence in his profession. In 1833 he was appointed United States district attorney for the District of Kentucky and the following year was appointed United States district judge for the same district. He served with distinction in this office until 1861 when he went to Nashville and there took the oath of allegiance to the Confederacy. He never returned to Kentucky but died in Mississippi in 1865. He was at one time professor in the University of Louisiana as well as in Transylvania University. Harvard conferred the degree of LL. D. upon him. His seven volumes of reports cover the period from the fall term of 1824 to that term of 1828, inclusive.

John J. Marshall was the next reporter of the court. He was the son of Humphrey Marshall, United States Senator and author of a history of Kentucky. He was the father of the famous General Humphrey Marshall of the Confederate Army. He was born August 4, 1785, in Woodford County. In 1806, he graduated with the highest honors from "New Jersey College" now Princeton. When George Bibb resigned the chief justiceship of the Court of Appeals in 1828 to become United States Senator, Governor Metcalfe first appointed George Robertson to the vacancy. He was rejected by the senate. The governor then nominated in turn Richard A. Buckner, John J. Marshall and Joseph R. Underwood—all of whom the senate refused to accept. Its action was due to the reverberations of the Old and New Court controversy. After the election of 1829, Robertson was again nominated and this time confirmed. In 1836, Marshall was appointed Judge of the Jefferson Circuit Court and so continued until his death in 1846. Although he had been a very rich man, financial reverses overtook him in the latter years of his life. His brother, Judge Thomas B. Marshall, later served as a member of the court of which he had been the reporter. His seven volumes of reports begin with January, 1829, and end with November, 1832.

By an act of January 4, 1833, being Chapter 52 of the Acts of 1832, the office of Reporter of the Court was abolished. That Act reads:

"An act to change the mode of publishing the decisions of the Court of Appeals.

"Sec. 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that so much of each and every act or acts of Assembly as created the office of Reporter of the decisions of the Court of Appeals and so much of each and every act or acts as prescribes the duty of the reporter and fixes his compensation shall be and the same is hereby repealed; provided, however, that this act shall not operate so as to preclude the present reporter from completing any volume or volumes of reports which he may have commenced printing or for which he may have drawn the advance from the public treasury but for such volume or volumes when reported in the manner required by the present law, he shall be entitled to receive the compensation now allowed.

"Sec. 2. Be it further enacted that whenever any person who may hereafter obtain the consent of the judges of the Court of Appeals or a majority of them for that purpose shall deliver well bound and lettered into the office of the Secretary of State for the time being, for the use of the Commonwealth and obtain his receipt therefor 250 copies of such decisions of the Court of Appeals as may not have been reported but which may in the opinions of the judges of said court establish some new or settle some doubtful point or be otherwise by them deemed important to be reported, such person shall receive as a compensation therefor at the rate of one dollar for every hundred pages contained in each volume of said reports, including tables and indexes; provided, however, that the letter and paper be of the same size and quality as that of Hardin's Reports of the decisions of the Court of Appeals; and provided, also, that the judges of said court or a majority of them, certify that the work meets their approbation and was published by their consent.

"Sec. 3. Be it further enacted that upon the delivery of the number of copies aforesaid, in conformity with all the conditions and requirements aforesaid, the Secretary shall give a receipt for the same and state therein the sum due to the publisher at the rate aforesaid and it shall be the duty of the Auditor of Public Accounts, whenever the receipt of the Secretary is delivered to him to issue a warrant for the amount which shall be paid out of any money which may have been received in the treasury in payment of taxes."

James G. Dana, a famous editor and publisher and a man of great ability, was the one who obtained the consent of the court to publish its opinions. The nine volumes of his reports running from the spring term of 1833 to that term of 1840, inclusive, are regarded among the best reports in mechanical execution and other respects in the country. Of the decisions contained in them, Judge Story of the Supreme Court said they were the best in the Union and Chancellor Kent remarked that he knew of no state decisions superior to them. The Act of 1833 authorized only those cases to be published which in the opinion of the judges established some new or settled some doubtful

point or which was otherwise deemed important by them to be published. By Section 6 of the Act of February 8, 1838, appearing on pages 159 and 160 of the Acts of 1837-8, it was provided:

"Sec. 6. That the Court of Appeals shall cause the reporter of the decisions to have the opinions delivered at one term printed by the commencement of the succeeding term; but they may authorize the opinions of two terms to be bound in one volume; and it shall be the duty of the reporter to print all the cases in which petitions for a rehearing shall be filed and print the petitions with the decisions."

Gossip has it that the insertion in the law that all petitions for rehearing should be reported was due to the insistence of a legislator, who was a member of the bar, and who, having lost his case, felt that his petition for rehearing had not been read or at least carefully considered. And so he insisted that these petitions be reported so that court would have to notice them in its opinions, thus insuring the fact that the petitions would be read and considered. We thus see that the bar in these early years was even then skeptical about the consideration given petitions for rehearing. The rule requiring the printing of petitions for rehearing continued until 1844 when it was repealed by Section 2 of an act approved March 2, 1844, appearing on page 84 of the Acts of 1843-44.

"Sec. 2. Be it further enacted that the second section of an act entitled 'An act concerning the Court of Appeals approved February 8, 1838,' and so much of the sixth section of said act as makes it the duty of the reporter to print all the cases in which petitions for rehearing shall be filed and so much as requires the petition to be published, be and the same is hereby repealed."

Although no statutes prior to the year 1852 has been found recreating the office of reporter of the Court of Appeals, Ben Monroe, in 1840, styled himself such. However, Chapter XXII of the Acts of 1851-52, entitled "Courts," which became effective July 1, 1852, by Article VI, provided:

"Sec. 1. The Court of Appeals shall biennially appoint a reporter of its decisions.

1. The appointment must be entered on its records.

2. The court shall direct what decisions delivered by it are to be published.

"Sec. 2. The reporter shall have the decisions of the court printed in letters and on papers of proper size and of superior quality.

"Sec. 3. The reporter shall be allowed by the state after the rates of one dollar for every one hundred pages of the decisions, tables, and indexes so printed, and well bound in calf skin with good indexes and marginal notes.

1. The court must certify that the work meets their approbation and was published by their consent.
2. Upon the deposit of 200 copies of a volume of reports so published with the Secretary of State, the Secretary shall draw an order on the Auditor of Public Accounts for the price which shall authorize the Auditor to issue a warrant on the public treasury for such price."

The Code of Practice of 1854 provided:

"Sec. 905. Court to deliver written opinions in certain cases. The court must deliver written opinions in all cases involving a principle of law not previously settled by the court and reported.

"Sec. 906. Regulations as to reporting decisions. In the publication of the reported decisions of the Court of Appeals, it shall be the duty of the reporter to make a short abstract of the facts of the case involved in the decision, followed by the legal proposition made by counsel in the argument on both sides, with the authorities relied on for their support."

Under this authority of the Code, the abstracts of the arguments were often of considerable length. By a statute enacted in 1860, the reporter was restricted to stating only the names of the counsel and the authorities upon which they relied. When the Code of 1854 was revised in 1877, Sections 905 and 906 of the Code of 1854 were re-enacted as Sections 765 and 766. These requirements continued down to 1910, since which time neither the abstracts of arguments of counsel nor the statement of authorities relied upon have been published. The 18 volumes of B. Monroe run from the fall term of 1840 through the winter term of 1857.

James P. Metcalfe, who served as secretary of state from 1851 until he resigned in 1854, published four volumes of reports covering the period from the summer term of 1858 through that term of 1863.

The next reporter, Alvin Duvall, was born in Scott County March 20, 1813. He was of French-Huguenot descent. He graduated from Georgetown College in 1833. He was elected a circuit judge from 1852 to 1865 and a judge of the Court of Appeals from 1856 to 1864. In this year, he was a candidate to succeed himself. He was a sympathizer with the Confederacy and so popular was he that General Brubridge, then in military charge of Kentucky for the Federals, feared to let his election go forward and ordered his name stricken from the poll books. Duvall, who was in Covington engaged in his canvass for re-election, on hearing of this, fled to Canada. In 1866, he was a candidate for clerk of the Court of Appeals and was elected by an

overwhelming vote—a testimonial to his great popularity. He and Judge Bullitt were the two commissioners who revised the codes of 1854, their revision with the comparatively few subsequent amendments being the codes under which we practice today. He became reporter of the court succeeding Metcalfe. He published but two volumes, incorporating the decisions of the winter term 1863 through the summer term, 1866.

Duvall's successor was W. P. D. Bush, whose fourteen volumes of reports run from the winter term of 1866 through the January term of 1879. He was born March 14, 1923, in Hardin County. His forebears came from Holland. He served as deputy county and circuit clerk of Hancock County. He was an officer in the Mexican War and later was a member of the legislature.

With his reports comes to an end the designation of the Kentucky Reports by the name of the reporter, for in 1880 our legislature enacted that henceforth the reports of the court should be numbered beginning with the 78th Kentucky. In directing that the numbered reports so begin, three volumes of the reports which had not theretofore been recognized as such were so recognized, these being Hughes, Sneed and 2 T. B. Monroe.

Until 1910, only those cases directed by the court to be published were incorporated in the official reports. However, since 1880, the Kentucky Law Reporter had published all the decisions of the court, those not officially reported as well as those officially reported. It continued this practice until it ceased publication in 1908. In 1886 the West Publishing Company began its publication of all decisions of the Court in the Southwestern Reporter and so continues to this day. Finally by statute enacted in 1910, being Chapter 12 of the Acts of that year, the legislature decreed that all opinions of the court should be officially reported and such is the practice at the present time. The records of the Court of Appeals were burned in 1865, but such of its opinions from that date to the establishment of the Southwestern Reporter as were unpublished have since been published in the series of reports known as the Kentucky Opinions.

Our early Kentucky reports contained no citations of English cases. This was due to the legislative mandate embodied in

the Act of February 12, 1808, Littell's Laws of Kentucky, Vol. III, page 457, reading:

"Be it enacted by the General Assembly that all reports and books containing adjudged cases in the Kingdom of Great Britian which decisions have taken place since the 4th day of July, 1776, shall not be read nor considered as authority in any of the courts of this Commonwealth—any usage or custom to the contrary notwithstanding.

"This act shall be in force from its passage."

This law continued in force until repealed by the Act of March 2, 1844. Acts of 1843-44, page 84.

The Reports beginning with 1st Bibb and running through 9th Dana are extremely interesting to the student of Kentucky history and Kentucky jurisprudence. They are a mine of historical and judicial information and their reading will well fill the use of an occasional leisure hour.

Modern day methods of reporting afford little scope for the employment of the individualistic talents of the reporter, but we of Kentucky can be justly proud that in the day when the reporter was allowed a freer rein, those who edited our reports ranked high on the list of those who reported the decisions of the courts of the states and nation.

RICHARD PRIEST DIETZMAN,
Justice of the Court of Appeals.

Louisville, Kentucky.