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The Use of Extrinsic Aids in Statutory Interpretation in Kentucky

William H. Coldiron

NOTES

THE USE OF EXTRINSIC AIDS IN STATUTORY INTERPRETATION IN KENTUCKY

The purpose of all statutory interpretation is to discover the purpose or intent of the legislative body in exacting the statute.[1] To aid the courts in arriving at the intention of the legislature the various canons of statutory interpretation have been formulated to make such interpretation to some degree mechanical or at least predictable. The great increase in the amount of legislation necessary to govern complicated modern civilization has caused the federal courts, and to a lesser extent the state courts, to abandon their rigid adherence to the "plain meaning rule" and other canons of construction[2] which are often the subterfuges behind which they conceal much judicial legislation,[3] and to resort to many extrinsic aids in their attempt to arrive at the intention of the legislature.[4] The purpose of this note is to consider briefly the extent to which the Kentucky Court of Appeals has gone in the use of extrinsic aids in its interpretation of statutes, with particular emphasis on the legislative journals.

The "intention of the legislature" has been condemned as a mere fiction,[5] but has also been defended or accepted as a necessary and helpful aid in statutory construction by leading writers in the field in recent years.[6] It is not within the scope of this

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[1] Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes* (1939) 25 WASH. U. L. Q. 2; Landis, *A Note on "Statutory Interpretation"* (1930) 43 HARV. L. REV. 886.

[2] Jones, *Statutory Doubts and Legislative Intention* (1940) 40 COL. L. REV. 957, 959.

[3] Note (1937) 50 HARV. L. REV. 822.

[4] de Sloovere, *Extrinsic Aids in Interpretation of Statutes* (1940) 88 U. OF PA. L. R. 527.

[5] Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863; see also: Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence* (1940) 20 B. U. L. REV. 601.

[6] Landis, *A Note on "Statutory Interpretation"* (1930) 43 HARV. L. REV. 886; Horack, *In the Name of Legislative Intention* (1932) 38 W VA. L. Q. 119; Jones, *Extrinsic Aids in The Federal Courts* (1940) 25 IOWA L. REV. 737; Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes* (1939) 25 WASH. U. L. Q. 2.

note to attempt an analysis of "legislative intention," but merely to accept the term as it seems to be used by the Kentucky Court. Since neither the debates by the members of the legislature nor the reports of the proceedings before the committees of the legislature are preserved in this state,[7] the phrase "the intention of the legislature," as used by the Kentucky Court of Appeals, must of necessity refer to legislative "purpose" as distinguished from legislative "meaning."[8] That is, the court can not enter into speculation as to what an individual legislator, the statutory draftsman, or the legislature as a body actually meant by the words employed, because this would place statutory interpretation in a field with theology and literary criticism, as has been aptly pointed out,[9] but must confine itself to ascertaining the "purpose" for which the legislature enacted the statute.

The Kentucky Court of Appeals has stated on many occasions that it will refer to extrinsic aids in interpreting statutes when the intention of the legislature can not be readily ascertained from the words of the statute, when parts of the same statute are inconsistent, when the statute under consideration conflicts with other statutes, or when some other ambiguity or conflict exists.[10] The court has been very willing to find such an ambiguity or conflict as would allow it to invoke extrinsic aids.[11] Prominent among the aids invoked are the legislative history of the act under consideration as indicated by the journals of the houses of the General Assembly;[12] the contemporary history of

[7] The Kentucky Constitution of 1890 sec. 40 requires only that each house of the General Assembly keep a journal of its proceedings and the vote by yeas and nays on any measure may be recorded therein at the request of two members. See Sections 46, 55, 88, 112, 256, and 258 relative to other entries in the journals.

[8] Jones, *Extrinsic Aids in Federal Courts* (1940) 25 IOWA L. REV. 737, 761, Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes* (1939) 25 WASH. U. L. Q. 2, 3-4; Landis, *A Note on "Statutory Interpretation"* (1930) 43 HARV. L. REV. 886, 888.

[9] Radin, *op. cit. supra* note 5, at 866-868.

[10] Swift v. Southeastern Greyhound Lines, 294 Ky. 137, 171 S.W 2d 49 (1943) Williams v. City of Raceland, 245 Ky 212, 53 S.W 2d 370 (1932), City of Vanceburg v. Plummer, 275 Ky. 713, 122 S.W 2d 772 (1938).

[11] Fidelity & Columbia Trust Co. v. Meek, 294 Ky 112, 171 S.W 2d 41 (1943).

[12] May v. Clay-Gentry-Graves Warehouse Co., 284 Ky. 502, 145 S.W 2d 84 (1940).

the act as to the evil to be remedied by it;[13] the history of the statute through its various revisions through the years;[14] contemporary construction of the statute by the courts,[15] by administrative agencies,[16] by the executive,[17] and by the legislature;[18] the debates of the constitutional conventions;[19] and the title of the act being construed.[20] The use of the titles of acts and statutes as an aid in interpreting the statutes is an interesting and special field, especially in connection with section 51 of the Kentucky Constitution of 1890,[21] and should be treated in a separate note, therefore it will not be discussed here.

When the court has decided that there exists such an ambiguity or conflict as will require it to use extrinsic aid there seems to be an almost complete abandonment of any inhibitions against their use, and all phases of the contemporary history of the statute will be considered. As pointed out in *Morgan* v *The Fayette County Board of Education*:[22] "The *immediate* occasion or specific purpose of legislation is not always controlling in interpretation of a statute, " In that case the court traced the history of the Public Works Administration and indicated that it had been necessary for the legislature to pass the statute being construed and other legislation in order to allow educational institutions to take advantage of the opportunities offered under this federal act. On other occasions the court has similarly traced the history of the Federal Social Security Act;[23] considered a report to the Governor on the bankrupt condition of

[13] Martin v Louisville Motors, 276 Ky 696, 125 S.W 2d 241 (1939).

[14] Trustees of Baptist Female College of Liberty Assn. v. Barren County Board of Education, 190 Ky. 565, 228 S.W 19 (1921).

[15] Coleman v. Green, 239 Ky 580, 40 S.W 2d 283 (1931)

[16] Harned v. Atlas Powder Co., 301 Ky. 517, 192 S.W 2d 378 (1946)

[17] *See:* Louisville & Evansville Mail Co. v Barbour, 8 Ky. L. Rep. 436 (1866)

[18] Button v. Hikes, 296 Ky. 163, 176 S.W 2d 112 (1943).

[19] Commonwealth v International Harvester Company of America, 131 Ky. 551, 115 S.W 703 (1909).

[20] Neutzel v. Ryan, 184 Ky. 292, 211 S.W 852 (1919).

[21] Section 51 of the Constitution of Kentucky provides that no law enacted shall refer to more than one subject and that shall be expressed in the title.

[22] 294 Ky 597, 600, 172 S.W 2d 64, 66 (1943).

[23] Barnes v. Anderson National Bank, 293 Ky 592, 169 S.W 2d 833 (1943)

the State in construing a tax measure;[24] considered the economic state of the nation;[25] and considered slum clearance and public health[26] in its attempt to discover the evil which the legislature was attempting to remedy

The most interesting phase of the problem under consideration is the use of the legislative journals, debates of the constitutional conventions, and other legislative records in the construction of statutes. The failure of the state courts generally to resort more frequently to legislative journals in interpreting statutes is due primarily to the inadequacy of the records of legislative proceedings kept by the states.[27] The Federal Courts, with the full and complete Congressional Record, have gone much further than the state courts in the use of such records.[28] Kentucky does not publish committee reports nor the debates and remarks of the members of the legislature on the floor or in committee hearings. The House and Senate Journals in Kentucky, however, do have one advantage not found in most state legislative journals in that the text of each bill and amendment is set out in full.[29] But as is the case with the legislative journals in most states the journals of the Kentucky General Assembly are made up principally of the minutes of routine legislative action and memorials to former officials.

The extent of the reliance placed on such records by the court is not clear. When it seems necessary that the legislative history of an act be considered the court does not hesitate to refer to the journals to show that an amendment was considered and rejected or accepted as proof that the legislature considered a certain situation and intended the statute to apply or not to apply to it. An outstanding example of the court's drawing inferences from the acceptance and rejection of amendments as indicative of legislative intent is found in *City of Covington* v

[24] Martin v. Louisville Motors, 276 Ky. 696, 125 S.W 2d 241 (1939).

[25] Grieb v. National Bank of Kentucky's Receiver, 252 Ky 753, 68 S.W 2d 21 (1934).

[26] Spahn v. Stewart, 268 Ky 97, 103 S.W 2d 651 (1937).

[27] Jones, *Extrinsic Aids in the Federal Courts* (1940) 25 IOWA L. REV. 737.

[28] *Ibid.*

[29] Bradley, *Legislative Recording in the United States* (1935) 29 AM. POL. SCI. REV. 74, 77, n. 6.

State Tax Commission.[30] Here the plaintiff city, and the intervening charitable and educational institutions and retail merchants seek a declaration of their rights under the state sales tax act. Issues were raised as to whether eleemosynary institutions were exempt from the payment of the tax and whether the tax should be paid by the buyer or by the seller. After developing the legislative history of the act the court stated.

> "Applying it [the rule that the history of the statute and the proceedings attending its actual passage through the legislature as disclosed by the legislative journals may be considered in construing ambiguous statutes] in this case, we find it is admitted in the briefs, and shown by the journals of the two Houses of the General Assembly, that the Statute when first introduced was essentially one imposing the tax levied by it on the *merchant* or *seller,* the act was amended in several particulars, prominent among which was a shifting of the burden of paying the tax from the *merchant* or *seller* to the *consumer* or *buyer,* and which was accomplished by the amendatory provisions we have hereinbefore discussed."

In *May* v *Clay-Gentry-Graves Warehouse Co.*[31] the court considered the journals of the House and Senate at some length and ascertained the intention of the legislature from the inferences to be drawn from the adoption of amendments by the Senate and the subsequent approval of these amendments in the House. This case is an excellent illustration of the employment of extrinsic aids by the Kentucky Court of Appeals in their search for the intention of the legislature. The court in arriving at its interpretation considered the contemporary history of the business affected (here tobacco warehousing), the title of the act, the House Journal, the Senate Journal, and the remarks made by the Governor upon his approval of the bill. This clearly indicates that the court is not averse to the use of adequate extrinsic aids to assist in ascertaining the legislative intent on the proper occasions.

But in *Fiscal Court of Fayette County* v. *Nichols*[32] the court was considering an act relative to the rights of the fiscal court, the county judge, and the county road engineer to employ men to work on the county roads and reference was made to the House and Senate journals to show the bill as originally intro-

[30] 257 Ky 84, 91, 77 S.W 2d 386, 389-390 (1934).
[31] 284 Ky. 502, 145 S.W 2d 84 (1940).
[32] 287 Ky. 478, 153 S.W 2d 986 (1941).

duced. For some unexplained reason the bill as it was reported to the House after passing the Senate had been altered and the House had rejected an amendment which covered the situation under consideration. The court considered the journals in so far as it was justified considering the incompleteness of the records. The unexplained alteration of the bill after its passage by the Senate and before its presentation in the House as disclosed by the journals serves to accentuate the inadequacy of the legislative records of this state and the court in this case seems justified in stating, "We must construe the statute as enacted, enrolled and signed by the presiding officers of the Legislature and approved by the Governor, and seek the Legislature's intention there. We can not go behind it though the records of the journals be to the contrary" In *City of Vanceburg* v *Plummer*,[33] the Court was required to determine whether or not a municipal corporation was required to obtain a certificate of necessity and convenience from the Public Service Commission in order to operate an electric power plant under Chapter 145 of the 1934 Acts of the General Assembly The House Journal was introduced to show that an amendment was offered to the act which specifically provided that cities must obtain a certificate of necessity and convenience in order to operate an electric power plant and that this amendment was rejected. It was argued that this definitely indicated that it was the intention of the legislature that municipal corporations were not to be affected by the requirements of the act. But the Court found that the act did require cities to secure a certificate of necessity and convenience stating

> "The rejection of the amendment is entitled to little weight, since the court can have no means of knowing the reasons that influenced the legislature in such rejection Rejection by the legislature of a proposed amendment to an act is, at most, only a circumstance to be weighed along with others when choice is nicely balanced The journals of the legislature may not be resorted to for the purpose of supporting a construction which adds to or takes from the significance of the words employed."[34]

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[33] 275 Ky. 713, 122 S.W 2d 772 (1938).

[34] But the court also said: "Where the language of a statute is doubtful or ambiguous, resort may be had to the journals or to the legislative records showing the legislative history of the act in ques-

The cases above cited are definitely inconsistent and represent the two lines of thought by the Court, one accepting the journals as a valuable aid in determining the intention of the legislature, the other rejecting the journals as incomplete, inadequate, and of little, if any, value to the Court. The latter view may be attributed in part to a feeling by the Court that the records are not sufficiently complete to render assistance to the Court in ascertaining the legislative intent, rather than a rejection by the Court of this type of evidence.

The probative value which the Court gives to the legislative journals is well indicated by a series of cases not involving the interpretation of statutes, but involving the constitutionality of a statute when attacked for the failure to observe some formal step required by the Constitution in the process of enactment. The leading case in this series is *Lafferty* v *Huffman*,[35] where the validity of a local option act was attacked for the failure of the Senate on final passage of the act, after it had been amended by the House, to vote by yea and nay and to record the vote in the journal as required by the Constitution, section 46. The Senate Journal indicated that section 46 had not been complied with, but the act had been enrolled and signed by the presiding officer of each house of the legislature and by the Governor. In holding that the act was a valid law and could not be impeached by the Senate Journal the Court went at great length into the method in which the legislative journals are made up.[36]

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tion in order to ascertain the intention of the Legislature, but this rule does not apply where the language is plain and unambiguous." 275 Ky. 713, 721, 122 S.W 2d 772, 776 (1938).

[35] 99 Ky. 80, 35 S.W 123, 18 K.L.R. 17 (1896).

[36] The court commented on the records as follows: "The enrolled bill, so attested and signed, and approved by the Executive is easy of access and inspection; but what shall we say of the journals? At the session at which the law under consideration was adopted, those records consist of over 4,000 pages. They seem to have been hurriedly and imperfectly indexed, as in the nature of things they must be This is usually prepared by the subordinate officials, hurriedly amidst the excitement and confusion incident to legislative bodies, and with small concern for those details which are to become so important if the record is to be subjected to judicial scrutiny but the chances of mistake are very great in the make-up of the journals as they are ordinarily kept; and, if it be understood that the enrolled bill may be impeached by them, the chances of fraud are likewise great. They are usually read from loose sheets or hurriedly made memoranda, and are approved with slight attention,

The court reached the conclusion "that the consistent and safe rule is to assume that the legislature, in obedience to the constitution, has taken steps required by that instrument in the passage of every law attested by the signatures of its presiding officers, the journals to the contrary notwithstanding."

The rule laid down in *Lafferty* v *Huffman* has been followed in several cases including *Vogt* v. *Beauchamp*[37] where, it is interesting to note, the Court held that a bill never approved by the House of Representatives in any form, in fact rejected by a 48 to 27 vote, became a law of this State regardless of the action by the elected representatives of the people as shown by the undisputed record of the House Journal.[38]

There are cases which have varied somewhat the rule of *Lafferty* v *Huffman* and allowed the journals to be received as evidence of the validity of an act. In *Perkins* v *Lucas*[39] it was held that when the Constitution required that a bill vetoed by the Governor but passed over his veto is reconsidered by the legislature the vote by yeas and nays must be taken and the result recorded in the journals, such journals must of necessity be looked to and thereby become competent evidence. In *McIntyre* v *Commonwealth*[40] the court considered the requirement of the Kentucky Constitution of 1890 that the cause for any emergency clause in a bill be set out at length in the journals. It was held that failure to comply with this requirement would invalidate an emergency clause. This would seem to be contrary to the rule of *Lafferty* v *Huffman* in that the journals were allowed to impeach a portion of a properly

and are then passed to the journal clerk or some copyist to be transcribed formally in the journal. They receive, usually, no further consideration at the hands of the body." 99 Ky. 80, 88-90, 35 S.W 123, 125-126 (1896).

[37] 153 Ky 64, 154 S.W 393 (1913).

[38] In Hamlett v. McCreary 153 Ky. 755, 156 S.W 410 (1913), the court held that where the Senate Journal showed that the President of the Senate had signed the bill but the face of the bill showed he had not signed, the bill did not become a valid law *Accord:* State Board of Charities and Corrections v. Hays, 190 Ky. 147, 227 S.W 282 (1920), Duncan v. Combs, 131 Ky. 330, 115 S.W 222 (1909), Norman v. Kentucky Board of Managers of Worlds Columbian Exposition, 93 Ky 537, 20 S.W 901 (1892), Auditor v. Haycraft, 77 Ky. 284 (1878)

[39] 197 Ky. 1, 246 S.W 150 (1922).

[40] 221 Ky. 16, 297 S.W 931 (1927).

signed and enrolled bill. Judge Dietzman wrote a vigorous dissenting opinion to this effect, criticizing the majority's statement that their opinion was not contra to *Lafferty* v *Huffman*.

Further confusion as to just what probative value is given to legislative journals results from the decision in *Cammack* v *Harris*.[41] A question arose here as to what time the House of Representatives adjourned on a certain day The House Journal showed that the body adjourned at 2 p. m., but the uncontradicted testimony of witnesses showed that the House in fact adjourned at 12:30 p. m. The Court held, "however, the record of the journal must, under a universal rule, be accepted."[42]

While the cases just considered do not deal with the problem of extrinsic aids in statutory interpretation, they do indicate the general attitude of the Court of Appeals towards legislative journals. The vigorous criticism of such records in *Lafferty* v *Huffman* is justified, but the cases indicate that when the journals show facts which are of use to the court, the court is not adverse to the use of such records and seem to indicate that the court would give greater weight to and make more extensive use of legislative journals if they were more complete and more accurately kept. This fact is emphasized by *Kirkman* v *Williams*[43] where the court was asked to reconcile two inconsistent statutes passed at the same session of the legislature. In ascertaining the intention of the General Assembly in enacting the statutes the history of the two acts was traced in detail from the journals but no question as to their admissibility was raised.[44]

While it is a matter of pure conjecture as to what use in the interpretation of statutes the Court of Appeals would make of the debates in the General Assembly if such became available, some indication of their attitude towards such evi-

[41] 234 Ky. 846, 29 S.W 2d 567 (1930).

[42] 234 Ky. 846, 849, 29 S.W 2d 567, 569 (1930).

[43] 246 Ky. 481, 55 S.W 2d 365 (1932).

[44] *See:* City of Covington v. Ludlow, 58 Ky. 295 (1858) relative to the admissibility of the journals of a city council to impeach a city ordinance.

dence might be drawn from their use of the debates of the Constitutional Convention of 1890 in construing the Constitution and statutes. In a case[45] shortly after the Constitutional Convention of 1890 the court flatly rejected the record of the debates as an aid in construing a constitutional provision, stating

> "We have examined with some care the debates of the constitutional convention upon the subject of the constitutional provision against trusts, pools, and combinations the examination has shown the wisdom of the general rule, several times approved in Kentucky that the debates of a legislative body have little practical value in ascertaining the meaning to be given to the action of such bodies, and are of value chiefly insofar as they show that the attention of the body was called to the existence of facts which might influence its action Obviously, a court will not pay the slightest attention to any such declaration in debate, but will be guided in ascertaining the meaning of the instrument by the language which was actually adopted to express that meaning."[46]

But some twenty-five years later, in 1926, the court was again asked to interpret a section of the Constitution in *Shanks, Auditor* v. *Julian, Jr.*[47] The court quoted at some length from the debates showing that several members of the Convention had definite ideas about the section under consideration and had explained their vote on the measure to the Convention. The court then made this statement, "In the light of them [certain cited cases] and of the debate in the Convention on the adoption of this section as a part of our fundamental law, it is very clear that the purpose of section 249 was [etc.] Nothing that we could here say would serve to elucidate that purpose more clearly, tersely, or aptly than the debate in the Convention we have quoted. "[48] While it is not possible to say that this later case shows a definite trend towards the use of debates in interpretation of the constitution

[45] Commonwealth v. Grinstead, 57 S.W 471 (Ky. 1900).

[46] In *Lafferty* v. *Huffman*, 99 Ky. 80, 86, 35 S.W 123, 124, 18 K. L. R. 17 (1896) the court reflected its attitude in the statement: "That the act or successive acts of some agency, somewhere or somehow, must be held conclusive, is entirely evident, unless we open the doors to all competent proof, including that of the member on the floor, an absurdity not to be thought of."

[47] 213 Ky. 291, 280 S.W 1081 (1926).

[48] 213 Ky. 291, 300, 280 S.W 1081, 1084 (1926).

or that the court would use the legislative debates to aid in statutory interpretation if such were available, this case does show that the court is not now adverse to the use of such debates and could furnish a precedent upon which the court could base their use of legislative debates in ascertaining the intent of the legislature.

The Court of Appeals has from time to time invoked the assistance of various aids not usually considered as extrinsic aids to statutory interpretation. In *Fidelity & Columbia Trust Co.* v *Meek*[49] the court allowed Hon. Robert K. Cullen, Editor-in-Chief of the *Kentucky Revised Statutes* and now Reviser of Statutes to testify and to produce work sheets to show that the omission of certain words in a section of the statutes as revised was the result of a clerical error and that it was not the intention of the legislature that this section be changed. The message of the Governor upon the approval of a bill was cited to aid in the construction of an ambiguous statute in *May* v *Clay-Gentry-Graves Warehouse Co.*[50] These recent cases show that the Kentucky court, when it deems it necessary, will use the most unconventional extrinsic aids to support an interpretation of a statute which seems just.

It has been contended that all law is judge made.[51] It has also been contended that the popular idea that the legislature passes the laws and the courts interpret and apply them is fallacious.[52] While these propositions contain an element of truth, the cases in Kentucky indicate a willingness on the part of the Court to receive extrinsic evidence to aid in its determination of the purpose of a statute. Judicial legislation to some degree is inevitable because of the inherent inability of language to convey the intended meaning.

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[49] 294 Ky. 122, 171 S.W 2d 41 (1943).

[50] 284 Ky. 502, 145 S.W 2d 84 (1940).

[51] Radin, *op. cit. supra* 881. "But since a choice implies motives, it is obvious that, somewhere, somehow, a judge is impelled to make his selection—not quite freely, as we have seen, but within generous limits as a rule—by those psychical elements which make him the kind of person that he is. That this is pure subjectivism and therefore an unfortunate situation is beside the point."

See also: GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1927) 170.

[52] WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW (1931) 72.

The most logical means of reducing judicial legislation to a minimum and thus carrying into execution the will of the people, as manifested by the action of the General Assembly, would be to make available to the Court and to the public a complete and accurate record of all the proceedings of the state legislative bodies. If such records were available it is believed that the Court of Appeals would follow the lead of the United States Supreme Court and the other federal courts and make use of legislative records far more extensively than it has in the past. It would be a profitable investment by the State to provide more complete legislative records to aid the Court of Appeals in ascertaining the intention of the legislature in enacting the laws placed by it on the statute books.

WILLIAM H. COLDIRON