

FINDING THE LAW

Judy G. Russell, JD, CG, CGL

The **Legal** Genealogist

www.legalgenealogist.com

legalgenealogist@gmail.com



Overview: Genealogists need to look at the law at the time and in the place where a record was created. Misunderstanding the legal context may make us miss records critical to our research or miss clues hidden in the records. But with 50 states and the federal government all passing laws, finding the law is easier said than done! These tips help us understand the legal system and then find the *right* law for the record we're working with.

A SYSTEM FOR UNDERSTANDING THE LAW

In general, legal systems are hierarchical: certain types of law outrank others. A chartering document will outrank all other forms of law, express or implied. An express statement of law in a statute will outrank a legal principle only implied from a statute. In particular, a statute that appears to change a longstanding common law principle will only be given effect if its language is very clear. Where there is no express law either in a chartering document or in a statute, common law principles will generally apply.

Chartering documents are colonial charters and the Constitutions of the United States and of each individual state. They control whenever there is a conflict between the chartering document and a statute or common law principle. See *Marbury v. Madison*, 5 U.S. 137 (1803).

Statutory Law is the express statement of the law by the duly elected or appointed members of the legislature and, within the limits allowed by the chartering document, controls over the former practice or principles of the common law.

Where there is no statutory language, or where the intent to change the common law is not clear, the rule of decision for a particular matter will be drawn from **the common law**. *Note that there is one exception:* Louisiana, a civil law jurisdiction, does not follow the common law at all, and statutory enactments will prevail.

Federalism plays a role. Federalism – the American form of government – divides authority between federal and state governments. Under Amendment X to the Constitution, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” However, Article VI, clause 2, provides that: “This Constitution, and the laws of the United States . . . , shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any

State to the contrary notwithstanding.” So where there is a direct conflict between federal and state law, federal law will generally prevail.

What this means for genealogy: Whenever you need to know what law applied at a particular time and place, look first to see if the topic was covered by federal law exclusively. If it was, look first to the United States Constitution, then to federal statutes, and last to the common law for an answer to the research question. If it’s not a topic within exclusive federal control, then look first to the Constitution of the state (or colonial chartering document), then to the statutes of the state (colony or territory) and then finally to the common law for the answer.

A SYSTEM FOR FINDING THE LAW

Often the question we struggle with isn’t so much finding the law as finding the *right* law: the one that applied at precisely the right time in precisely the right place. There are three strategies that can be: (a) start with today’s law and work backwards; (b) start as little before the date in question as possible and work forwards; and (c) “sandwich” the date for which a law cannot be found between two dates on which the laws can be found. Not all will make sense in every case—there are no modern laws of slavery, for example—but one of these methods should work in every case.

A. Start with today’s law and work backwards

Modern laws generally set out at least some of their historical antecedents, and it is possible to research backwards. Assume, for example, that the question is what the grounds involving desertion were available for the granting of a divorce in Alabama in 1852.

The current Alabama Code §30-2-1 sets out 12 specific grounds for a divorce, and gives as its earliest history the Code of 1852, §§1961-1963:

The Code of Alabama 1975	
Title 30 MARITAL AND DOMESTIC RELATIONS. ^	<ul style="list-style-type: none">• Article 1 Divorce from Bonds of Matrimony.<ul style="list-style-type: none">◦ Section 30-2-1 Grounds; jurisdiction for proceedings; divorce judgment awarded to both parties.
<i>(Code 1852, §§1961-1963; Code 1867, §§2351-2353; Code 1876, §§2685-2687; Code 1886, §§2322-2324; Code 1896, §§1485-1487; Code 1907, §§3793-3795; Acts 1919, No. 584, p. 839; Acts 1919, No. 631, p. 878; Code 1923, §§7407-7409; Acts 1932, Ex. Sess., No. 41, p. 52; Acts 1933, Ex. Sess., No. 153, p. 142; Acts 1936-37, Ex. Sess., No. 211, p. 247; Code 1940, T. 34, §§20-22; Acts 1943, No. 463, p. 425; Acts 1947, No. 487, p. 336; Acts 1971, No. 222, p. 517; Acts 1971, No. 2272, p. 3662, §§1, 2.)</i>	

The next step would be to locate the Code of 1852, a simple matter of a library visit or even an online search. The answer appears in Code of 1852, §1961(3):

3. For voluntary abandonment from bed and board, for three years next preceding the filing of the bill.

B. Start before the date in question and work forwards

Change the research question by one year: assume that the divorce case was filed in 1854 instead of 1852. The second method of researching the question is to begin with the most comprehensive statutory compilation before the date in question (in this case that 1852 Code) and work forwards to find the answer, checking the session laws for each year between the last code and the date of the record.

An online search for Alabama laws for 1853 and 1854 shows there was only a single session of the Legislature after the 1852 Code, with session laws published as *Acts ... of the General Assembly* for the 1853-54 session (digitized by Google Books). A search of that book shows only one statute that changed the grounds for divorce and it didn't change the abandonment section. So the Code provision adopted in 1852 was still the law that governed the divorce case in 1854.

C. "Sandwich" the record date

Change the research question again: now assume that the divorce case was filed in 1862, and alleged as a ground for divorce was that the wife was pregnant at the time of the marriage. Copies of individual session laws for the late 1850s and early 1860s are often unavailable online and a search of the online catalog of the University of Alabama law library fails to disclose copies.

This is a situation that calls for the "sandwich" technique. From the modern statutory reference, it is clear that there was a compiled code in 1852 and another in 1867. No interim compilations appear in the law library catalog. It is then possible to compare the 1852 provision to the 1867 provision, to see if the language of a particular ground for divorce had changed between the two codes. In this particular case, the two provisions – §2352 of the 1867 Code and §1962 of the 1852 Code – are word-for-word identical and the source cited in 1867 is the section of the 1852 Code:

§ 2352. (1962) *Also to the husband, when the wife is pregnant at the time of marriage.*—In favor of the husband, when the wife was pregnant at the time of marriage, without his knowledge or agency.

That is strong evidence that the law remained the same in the interim period. The event was "sandwiched" between the two dates.

Where a Code provision has changed since the last time the laws were codified, look for a marginal notation suggesting when the change occurred. That provides some help finding an interim session law. For example, between 1852 and 1867, the law changed as to how many years of desertion qualified as grounds for divorce, and the marginal note says the law was amended 20 February 1866:

a. 20 Feb'y, 66. 3. For voluntary abandonment from bed and board, for *two years next preceding the filing of the bill.

RESOURCE LIST

General Legal Research

1. *Avalon Project: Documents in Law, History and Diplomacy*. Yale University. <https://avalon.law.yale.edu>
2. Black, Henry Campbell. *A Dictionary of Law : Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*. 1st edition. St. Paul, Minnesota : West Publishing Co., 1891.
3. Blackstone, William. *Commentaries on the Laws of England*, 4 vols. (Oxford, England : Clarendon Press, 1765-1770).
4. Bouvier, John. *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union*. Rev. 6th ed., Philadelphia: Child & Peterson, 1856.
5. "Complete Collection of United States Statutes at Large." *Constitution Society*. Downloadable PDFs of volumes 1 (1789-1799) through 130 (2016), public laws only. <http://www.constitution.org/uslaw/sal/sal.htm>
6. Google Books. <https://books.google.com/>
7. HathiTrust Digital Library. <https://www.hathitrust.org/>
8. Internet Archive. <https://archive.org/>
9. Law Librarian's Society of Washington, D.C. "State Legislatures, State Laws, and State Regulations: Website Links and Telephone Numbers," *LLSDC Legislative Source Book*. <https://www.llsdc.org/state-legislation>
10. Legal Information Institute (LII). Cornell Law School. *Constitutions, Statutes, and Codes*. Digital index and guide to the current state and federal statutes. <https://www.law.cornell.edu/statutes.html>
11. Library of Congress, American Memory Project. *A Century of Lawmaking for a New Nation*. Collection of U.S. Congressional documents including the Statutes at Large. <http://memory.loc.gov/ammem/amlaw>
12. United States Code. Office of the Law Revision Counsel. United States House of Representatives. <http://uscode.house.gov/> Popular Name tool: <http://uscode.house.gov/popularnames/popularnames.htm>
13. United States Statutes at Large, volumes 65-126. U.S. Government Printing Office. <https://www.govinfo.gov/app/collection/STATUTE>

A Sampler of Online Sources for State Historical Laws

Alabama: <http://digital.archives.alabama.gov/cdm/landingpage/collection/legislature>
Arizona: session laws 1912-2015, <http://azmemory.azlibrary.gov/digital/collection/azsession>
California: http://clerk.assembly.ca.gov/archive-list?archive_type=statutes
Colorado: <http://lawcollections.colorado.edu/colorado-session-laws/>
Connecticut: <http://cslib.cdmhost.com/cdm/landingpage/collection/p128501coll3>
Florida: <http://ufdc.ufl.edu/law> Acts & Resolutions 1845-1861, 1989-1996, <http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/index.htm>;
Territorial Laws, 1822-1845, <http://edocs.dlis.state.fl.us/fldocs/leg/actterritory/>
Georgia: https://digitalcommons.law.uga.edu/ga_code/
Hawaii: <https://law-hawaii.libguides.com/hawaiiilawsonline>
Illinois: http://www.wiu.edu/libraries/govpubs/illinois_laws/ See also <http://bit.ly/legalgen0050>
Indiana (1817-1830): <http://bit.ly/legalgen0089> [links to Indiana Historical Laws]
Kansas: <http://advancinggenealogist.com/historic-kansas-statutes/>
Louisiana: http://digitalcommons.law.lsu.edu/la_civilcode/
Maine: <https://legislature.maine.gov/legis/lawlib/lldl/open.htm>
Maryland: Codes- <http://aomol.msa.maryland.gov/html/codes.html> ; Session laws: <http://aomol.msa.maryland.gov/html/laws.html>
Massachusetts: <http://bit.ly/legalgen0052>; for historical documents and laws, <http://bit.ly/legalgen0090>
Minnesota: <https://www.revisor.mn.gov/statutes/?view=archive>
Missouri: <http://cdm16795.contentdm.oclc.org/cdm/landingpage/collection/molaws>
Montana: <http://advancinggenealogist.com/historic-montana-statutory-law/>
New Hampshire: <http://bit.ly/legalgen0053> [links to UNH Library]
New Jersey: https://www.njstatelib.org/research_library/legal_resources/historical_laws/
New Mexico: <https://www.nmonesource.com/nmos/en/nav.do>
New York: <http://www.nysl.nysed.gov/scandocs/laws.htm>
North Carolina: <http://ncgovdocs.org/guides/sessionlawslist.htm>
North Dakota: <https://www.legis.nd.gov/session-laws>
Pennsylvania: <http://www.palrb.us/>
Texas: <http://guides.sll.texas.gov/historical-texas-statutes>
Utah: https://collections.lib.utah.edu/search?facet_setname_s=uu_law_uschs
Vermont: <https://libguides.vermontlaw.edu/vermontlawguide/vermonthistoriclegislation>
Virginia (and West Virginia): <http://vagenweb.org/hening/>
Wisconsin: <http://advancinggenealogist.com/historic-wisconsin-statutes/>
Wyoming: <https://wyominglegislation.wyo.gov/>

Web addresses verified as of 20 June 2020