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The Sources, Progress and Printed Evidences of the Written Law in Kentucky: Part I

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THE SOURCES, PROGRESS AND PRINTED EVIDENCES
OF THE WRITTEN LAW IN KENTUCKY.

I.

THE PERIOD OF TRANSITION FROM THE DISTRICT OF KENTUCKY TO
THE INDEPENDENT STATE AND THE FIRST REVISION 1796-1797

In 1806, the Court of Appeals of Kentucky in the case of
Hunt v. Warnicke’s Heirs, Hardin 66, had before it the question
whether the heirs of an alien could inherit the ancestor’s lands
in Kentucky. The court said: “By the common law of England
aliens are incapable of taking by descent, or inheriting lands.

“By the ordinance of the Virginia legislature, passed in
1776, it is declared that the common law of England, all statutes
or acts of parliament made in aid of the common law prior
to the fourth year of the reign of King James I, and which are
of a general nature, and not local to that kingdom, etc., shall be
the rule of decision, and shall be considered as in full force until
the same shall be altered by the legislature.1

“The eighth section of the sixth article of the Constitution2

1 The original provision reads as follows: “That the common law of
England, all statutes or acts of parliament made in aid of the common
law prior to the fourth year of the reign of King James the First, and
which are of a general nature, not local to that kingdom, together with
the several acts of the General Assembly of this colony now in force,
so far as the same may consist with the general ordinances, declara-
tions, and resolutions of the general convention, shall be the rule of
decision, and shall be considered as in full force until the same shall
be altered by the legislative power of this colony.” See Thorpe’s Amer-

2 This refers to the second Constitution, that of 1799. The first and
second Constitutions are printed in the volume “Carroll’s Statutes,”
1909. The first Constitution, that of 1792, contained the following pro-
visions: “Article VIII, Sec. 6. All laws now in force in the state of
Virginia, not inconsistent with this Constitution, which are of a gen-
eral nature, and not local to the eastern part of that state, shall be in
force in this State, until they shall be altered or repealed by the legis-
lateur.” The schedule of the same Constitution provides: “Sec. 1. That
of this state declares that the laws of Virginia of a general nature, and not local to that state, etc., shall be in force until altered or repealed by the general assembly. It must therefore be manifest that the common law of England respecting aliens is in force in this Commonwealth inasmuch as no law of Virginia or this state has changed, repealed, or altered this principle of the common law."

In 1839, the same court had before it an action of ejectment which had been brought by an Ohio banking corporation to recover lands in Kentucky which had been mortgaged to the bank by the owner in Kentucky. The point in issue was whether the Mortmain Acts were in force in this state. The court said: "We are satisfied therefore that the mortgage to the Bank of Scioto was sanctioned and should be upheld by the law of this state unless the 'Mortmain Acts' of England, or so much of them at least as applies to civil corporations, should be deemed to be in force in this state.

"Unless the British Mortmain Acts were in force in Virginia on the 1st of June, 1792, they have never been in operation in Kentucky. Virginia had never, prior to June, 1792, specially enacted any mortmain statute; and therefore, if the Mortmain Acts of England prior to the 4th Ja. I were local to that King-

all officers, civil and military, now in commission under the state of Virginia, shall continue to hold their offices until the tenth day of August next and no longer. Sec. 11. The government of the Commonwealth of Kentucky shall commence on the first day of June next."

The second Constitution, that of 1799, contains these provisions: "Article VI, Sec. 8. All laws which on the first day of June, one thousand seven hundred and ninety-two, were in force in the state of Virginia, and which are of a general nature, and not local to that state, and not repugnant to this Constitution, nor to the laws which have been enacted by the legislature of this Commonwealth, shall be in force within this State, until they shall be altered or repealed by the General Assembly." And Sec. 1 of the schedule of the same Constitution provides: "That all laws of this Commonwealth, in force at the time of making the said alterations and amendments, and not inconsistent therewith, and all rights, actions, prosecutions, claims and contracts, as well of individuals, as of bodies corporate, shall continue as if the said alterations and amendments had not been made."

"Done in convention at Frankfort, the seventeenth day of August, one thousand seven hundred and ninety-nine, and of the independence of the United States of America the twenty-fourth."

3 Lathrop v. C. Bank of Scioto, 8 Dana 114.
dom, no part of them was ever in force in either Virginia or Kentucky.

"Our researches have not enabled us to find any intimation, legislative or judicial, in the state of Virginia, at any time or in any way, that any of the Mortmain Acts of England have been considered in force in that state.

"The foregoing considerations are sufficient in our judgment to authorize the conclusion that the Mortmain Acts of England were altogether local, and that none of them were ever applicable or considered applicable to Virginia, where the peculiar evils felt in England never existed."

In 1878, in the case of Ray v. Sweeney, 14 Bush 1, the Court of Appeals reduced the controversy to this form: "It results that the appellee, having enjoyed an easement of light and air over the appellant's open lot for a period of more than fifteen years, has acquired a right to its continued enjoyment if his past enjoyment has been adverse within the meaning of the statute of limitations."

"The Revised Statutes," say the court, "repealed certain statutes of Virginia and of England, as do the General Statutes, but neither repeals the common law of England.

"Although we do not know of any other case (referring to Hunt v. Warnicke's Heirs, supra, in which the existence here of the English common law is so distinctly recognized as in that case, yet there are very many cases the decisions in which were based on its assumed existence, and of its existence in fact, we entertain no doubt whatever.

"But only such principles and rules as constituted a part of the common law prior to the fourth year of the reign of James I are or ever were in force in this state . . . and when it is sought to enforce in this state any rule of English common law as such, independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date."

In Aetna Insurance Company v. Commonwealth, 106 Kentucky 864 (1899), that company had been indicted under the statute forbidding unlawful trade combinations. The words of

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"Carroll's Ky. Statutes, Sec. 3915."
The indictment were: "Unlawfully conspiring by persuasion, intimidation, and force to counteract, avoid, stifle and kill the effect of free competition among fire insurance companies." The court said: "The underlying question . . . is whether, either by the common law or under the statute, there is in this Commonwealth such an offense as that attempted to be described in the indictment." The court decided that such offense was not covered by the statute, and continued: "This brings us to consider whether, by the common law as adopted into the jurisprudence of Kentucky the acts constitute an indictable offense. And we would inquire further whether the English common law, at the time of its importation into our system, contained a principle which, by natural growth and expansion to meet the needs of social progress in a civilized state, has so enlarged its original scope as to include those acts in the catalogue of public offenses."

"It is evident from this examination that at the time the English common law, and the English statutes of a general nature became a part of our system, the acts charged as an offense in this case were not indictable."

In Nider v. Commonwealth, 140 Ky. 684 (1910), the accused had been indicted for a criminal offense against a young girl. The punishment of the offense was prescribed by the statute, but there was no Kentucky statute of attempts. The evidence did not warrant the conviction of the defendant on the charge but might have sustained a conviction of the attempt. The court said (opinion by Judge Carroll): "If this was an offense at common law, then it would also be an offense in this state, even if we had no statute on that subject, as the common law of England and all statutes of parliament made in aid thereof have since the organization of this state been a part of the body not only of the criminal law but the civil law, except where it has been abrogated or superseded by the statute, or is repugnant to the spirit of our laws or the public policy of the state. And so it is that when there is a wrong to be punished, whether it be great or small, or a right to be redressed, whether it be big or little, and no statute law of this state can be found that will afford the punishment or offer the remedy, we turn to the common law for relief. And if we can find there a principle that is applicable to the
situation or condition, its aid may be invoked and under it the wrong punished or the injury redressed. How the common law came to us can be seen in section 233 of the Constitution:

"That the crime we are considering was an offense at common law is shown by an act of parliament passed in the reign of Queen Elizabeth. . . . That this parliamentary statute is a part of the common law in force in this state except to the extent that it has been modified by section 1155 of the Kentucky Statutes is apparent from a consideration of the section of the Constitution, and the cases before mentioned. It was passed in aid of the common law, that is, to supply a deficiency or an omission in that law and prior to the reign of King James the First, who succeeded Elizabeth on the throne of England, and it is not repugnant to the spirit of our laws or our public policy."

From the foregoing declarations of the Court of Appeals, it is apparent that the common law of England as of the year 1607, the date of the first permanent English settlement in America, was firmly established and recognized as the fundamental law of Kentucky. The same provision was asserted in each of the four Kentucky Constitutions, in 1792, in 1799, in 1850, and in 1892. The English statutes, however, since that date are not part of the law adopted by the people of Kentucky although they may have been in force in Virginia until the separation. The period between 1607 and 1776, approximately, was a period of dispute between the colony and the home government as to the jurisdiction for legislation in matters of local concern. By its ordinance, Virginia repudiated all legislation of the parliament in matters regarded in that colony as local, but recognized as

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5The reference here is to the Constitution of 1891. Section 233 is the descendant of the provision in the first Constitution, and reads as follows: "All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the state of Virginia, and which are of a general nature, and not local to that state, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth shall be in force within this State until they shall be altered or repealed by the General Assembly." See the Constitution printed in Carroll's Kentucky Statutes, 1909.

6That the ordinance of 1776 and the constitutional provision in Kentucky were expressions of a sentiment and the assertion of a dogma which were common in all the colonies at the time scarcely needs any support of authority since the Declaration of Independence. The matter had been discussed by Franklin. See 4 Sparks' Works of Franklin, p. 271. In the Declaration of Rights of the Continental Congress, 1774,
of binding force in the new state such enactments as had been made by the legislature of the colony. Thus, in 1789, when the legislature of Virginia declared its consent to the severance of the District of Kentucky from its jurisdiction, the situation was as follows: those acts of parliament made in aid of the common law prior to 1607 of a general nature and not local to England, and applicable to the situation of the colonists in Virginia, and not repugnant to the general ordinances, declarations, and resolutions of the Virginia general convention constituted a

occur the following declarations: "Whereupon, the deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindicating their rights and liberties, declare. . . .

"5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

"6. That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances."

Story in Commentaries on the Constitution of the United States, section 147, says: "If an uninhabited country is discovered and planted by British subjects, the English laws are said to be immediately in force there; for the law is the birthright of every subject. So that wherever they go, they carry their laws with them; and the new found country is governed by them." And in section 148: "This proposition however, though laid down in such general terms by very high authority, requires many limitations, and is to be understood with many restrictions. Such colonists do not carry with them the whole body of the English laws, as they then exist; for many of them must, from the nature of the case, be wholly inapplicable to their situation, and inconsistent with their comfort and prosperity. There is, therefore, this necessary limitation implied, that they carry with them all the laws applicable to their situation, and not repugnant to the local and political circumstances in which they are placed."

Judge Cooley, Constitutional Limitations, p. 51, Seventh Edition, says: "From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law as then existing in England was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them. They also claimed the benefit of such statutes as from time to time had been enacted in modification of this body of rules."

That the acts of parliament passed after the settlement of the American colonies were not in force therein unless made so by express words. See Commonwealth v. Lodge, 2 Gratt. 573; Pembie v. Clifford, 2 McCord 31.

The act is printed in Carroll's Kentucky Statutes, 1909. It has always been known in Kentucky as the "Compact with Virginia."
part of the body of the law adopted by express enactment by the sovereign state of Virginia. Those of the British statutes which should be constituents of this body of statutes were not enumerated, and the task of making the declaration in each case must be imposed upon the courts. It was then and has ever been a very responsible and burdensome duty. Justice Story, Commentaries on the Constitution of the United States, section 149, says: "The proposition is full of vagueness and perplexity; for it must still remain a question of intrinsic difficulty to say what laws are or are not applicable to their situation; and whether they are bound by a present state of things, or are at liberty to apply the laws in future by adoption, as the growth or interests of the colony may dictate. The English rules of inheritance, and of protection from personal injuries, the rights secured by Magna Charta, and the remedial course in the administration of justice, are examples as clear perhaps as any which can be stated as presumptively adopted, or applicable. And yet in the infancy of a colony some of these very rights and privileges and remedies and rules may be in fact inapplicable, or inconvenient and impolitic. It is not perhaps easy to settle what parts of the English laws are or are not in force in any such colony, until either by usage or judicial determination they have been recognized as of absolute force."

Between the years 1607 and 1792 the legislative authority of Virginia, in whatever form, had been busy making enactments and building up a body of written law suited to local conditions and circumstances. The right to legislate for itself in local concerns had been claimed under the colony, and the righteousness of that claim in its own case had been officially asserted among the first acts of the free people. It was natural that the same claim should be made by the people of the District of Kentucky and should be accorded to them. That is was the intention of the founders of the independent state of Kentucky (most of whom were emigrants from Virginia) to follow the same mode of procedure, and to continue the same body of statute law which was in force in Virginia at the time of the founding appears upon the face of their proceedings and pronouncements.
This is strengthened by the fact that in the "Compact" it had been left to the initiative and discretion of the founders to declare what should be the jurisprudence of the new state, and the response of the founders in the first Constitution was in the wording and of the same content as those of the ordinance of Virginia when she severed her political dependence upon England.

By the ordinance of the convention the date set for the first assembling of the legislature was the fourth of June, 1792. At this first session seventeen acts were passed, approved by the Governor, and promulgated, which were of general import, as follows:

AN ACT establishing an Auditor's Office of Public Accounts.
AN ACT concerning Surveyors.
AN ACT to arrange this State into divisions, brigades, regiments, battalions and companies, and for other purposes.
AN ACT regulating the annual elections.
AN ACT for the election of representatives pursuant to the Constitution of the government of the United States.
AN ACT for establishing a permanent revenue.
AN ACT for establishing a Land Office.
AN ACT to ratify certain articles in addition to and amendment of the Constitution of the United States of America, proposed by Congress to the legislatures of the several states.
AN ACT concerning the Treasurer.
AN ACT for the appointment of electors to choose a President, and Vice President of the United States.
AN ACT for regulating the militia of this Commonwealth.
AN ACT concerning sheriffs.
AN ACT concerning strays.
AN ACT to amend and revive an act entitled "an act for better regulating and collecting certain officers' fees."
AN ACT establishing county courts, courts of quarter sessions, and a Court of Oyer and Terminer.
AN ACT establishing the Court of Appeals.
AN ACT for regulating the fees of county court justices.
AN ACT concerning militia fines.
AN ACT granting a certain sum of money to the public printer.

The legislature met again in November, 1792, when twenty

*The Virginia act is to be found prefixed to the Revised Statutes of Kentucky, and contains the following provision: "16. It is to be understood that the said convention shall have authority to take the necessary provisional measures for the election and meeting of a convention . . . . with full power and authority to frame and establish a fundamental Constitution of government for the proposed State, and to declare what laws shall be in force therein until the same shall be abrogated or altered by the legislative authority acting under the Constitution so to be framed and established."*
acts were approved, some of them original and of striking import.

AN ACT prescribing certain duties for the Attorney General. "That it shall be the duty of the Attorney General of this State, and he is hereby required, to give his attendance during the present, and future sessions of the legislature to draft or assist in drafting bills, in conformity to the resolutions of either branch thereof." (This act was repealed by an act of Dec. 10, 1793.)

AN ACT to disable officers under the Continental Government from holding offices under the authority of this Commonwealth.

AN ACT more effectually to prevent persons from dealing with slaves.

AN ACT more effectually to prevent obstructions in water courses.

AN ACT to appoint commissioners for the division of lands. "Whereas many inconveniences may arise to the citizens of this State, and great injuries sustained not only to individuals, but likewise to the Commonwealth by lands lying undivided held in conjunction with non-residents, and such non-residents not having agents in this State to attend to such division."

AN ACT subjecting lands to the payment of debts. "Section 1. That lands, tenements and hereditaments, shall and may by virtue of writs of fieri facias, be taken and sold in satisfaction of judgments in a manner hereinafter prescribed."

AN ACT prescribing the mode of procedure in cases of impeachment.

AN ACT prescribing the mode of appointing inspectors of tobacco, hemp and flour.

AN ACT to provide a seal for the Commonwealth.

AN ACT to provide for the improvement of the breed of horses.

AN ACT concerning executions, and for the relief of insolvent debtors.

AN ACT prescribing the duties of constables, and regulating their fees.

AN ACT to appoint commissioners for the conveyance of certain lands. "Whereas many persons die intestate, having previous to their death made sales of lands without executing deeds of conveyance therefor; for which if suits in law or equity should be instituted, by the persons who in consequence of any contract or agreement possessed an equitable claim in such lands, it would tend greatly to the injury of such decedent."

AN ACT for the appointment of justices of the peace in the several counties of this State.

AN ACT concerning relinquishment of dower, and recording letters of attorney.

AN ACT concerning clerks.

AN ACT to procure an enumeration of the free male inhabitants above twenty-one years of age.

AN ACT concerning coroners.

AN ACT authorizing a lottery. (To purchase a house of worship for the Lexington Dutch Presbyterian Congregation.)

AN ACT appointing commissioners to examine the South and Stoner's Fork of Licking, as high as the mouth of Strode's Creek. (To report whether the streams were navigable.)

At the session of November, 1793, the following acts were approved:

AN ACT for the revision of the laws of this Commonwealth. (This act proved abortive.)

AN ACT concerning replevy bonds.

AN ACT concerning the poor.
AN ACT for opening the navigation in the South and Strode's Fork of Licking.

AN ACT to regulate taverns, and to restrain tippling houses.

AN ACT more effectually to secure the constitutional rights and privileges of the citizens of the Commonwealth. (Limiting the power of courts to punish for contempts, prescribing jury trial in some cases.)

At the November session, 1794, the following acts were approved:

AN ACT authorizing persons to relinquish their rights to lands.

AN ACT to revive and continue an act entitled "An act for the revision of the laws of this Commonwealth." (This act was also abortive.)

AN ACT for the purpose of erecting a linen manufactory in Georgetown.

AN ACT concerning grand juries. "That all laws and parts of laws heretofore in force in this State respecting grand juries shall be and the same is hereby repealed."

AN ACT concerning the importation and emancipation of slaves.

AN ACT to amend and reduce into one act the several acts concerning strays.

AN ACT to ascertain the boundaries of lands.

AN ACT concerning boatmen.

At the November session, 1795, the following acts were approved:

AN ACT for processioning lands.

AN ACT to amend and reduce into one act the several acts authorizing the county courts to appoint commissioners for the conveyance of lands.

AN ACT to amend and reduce into one act the several acts concerning bastardy.

AN ACT to prevent the increase of vagrant and other idle and disorderly persons within this State.

AN ACT concerning certain powers of the General Assembly, and the privileges of its members. "To remove any doubts concerning the powers or authority of the General Assembly, to compel the attendance of witnesses, or to send for persons, papers and records for their information, on any matter or subject under consideration."

AN ACT concerning the revision of the laws.\(^9\)

\(^9\) The repealing clause of this act would indicate the initiation of a policy to collect together and place upon the statute book of the new State the written laws then existing and in operation whether under British or Virginia enactment and authority, so as to make the content of the laws certain and to give them the sanction of the new sovereignty. The phrase "amend and reduce into one" is the first appearance of the phrasing of the acts of revision to follow in 1796-1797.

\(^{10}\) The act is found on page 293 of the first volume of Littell's Laws of Kentucky, and is as follows: "Whereas on the separation of this State from the state of Virginia, the convention declared all the laws then in force in that state and not of a local nature, in force also in this State; and it is necessary and proper that a revision should be made of all the British statutes and acts of assembly now in force in this
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AN ACT to establish district courts in this Commonwealth.

AN ACT concerning arbitrations.

AN ACT concerning the killing of wolves.

AN ACT for the relief of the settlers on the south side of Green river.

AN ACT to compel each tithable to kill a certain number of squirrels or crows.

The sixth session opened November, 1796. On the sixteenth of November an act entitled "An Act to amend 'an act concerning a revision of the laws'" was passed and approved which directed the revisors to report immediately to the general assembly what progress they had made. Apparently the revisors made their report, and some if not all the bills reported were adopted. The revisors followed the instructions of their commission for no single act embodying all the laws was passed, but each law was presented in the form of an independent enactment. Many of the acts passed at this session do not contain individual repealing and commencement clauses. The effect of the revision upon prior legislation is provided for in two several acts,\(^1\) in

State, and a selection of such as ought to continue in force; and that the different acts on the same subject should be brought into one point of view: Section 1. Be it enacted by the General Assembly: That two persons shall be appointed by joint ballot of both houses, whose duty it shall be, first, to prepare bills upon the subject of such British statutes, if any there be, which are suited to this Commonwealth, and have not been enacted in the forms of acts of assembly. Secondly, to report what laws or parts of laws which are of a general concern shall remain in force at the close of the next session of the General Assembly, after they shall have completed the work. Thirdly, to prepare bills upon the subject of such laws as from their multiplicity ought to be reduced into single acts. And, fourthly, to report what laws or parts of laws are either unfit to be continued in force or unnecessary to be published in any code of laws. And to prevent any delay which may happen in the proceedings of the revisors, if either should refuse or be disabled to proceed in the work, it shall be lawful for the governor to appoint another person in his room to fill up such vacancy; and so soon as the work shall be completed it shall be laid before the General Assembly at their next meeting thereafter. Provided that such bills so to be prepared and reported by the said revisors, shall be of no force until they shall have been passed in such manner and form as if the same had been originally introduced without the direction of this act."

Section 2. (Compensation of the revisors.)

Section 3. (Advancement to the revisors.)

\(^1\) These two acts are printed in 1 Littell's Laws of Kentucky, pp. 508, 672. The first was approved Dec. 19, 1796, and is entitled "An act declaring when certain acts passed at the present session of the General Assembly shall commence and be in force, and for other purposes." The provisions are as follows: Be it enacted by the General Assembly, That the following acts, to wit: "An act establishing the Court of Appeals." "An act to reduce into one the several acts establishing courts
each of which occurs the significant and pregnant phrase, "acts which come within the purview" are repealed. The difficulty and importance of these words were noted by the compiler, William Littell, in 1809, in the introduction to the first volume of Littell's Laws of Kentucky, in setting out his motives for publishing laws which had been expressly repealed. He says:

"As he is the first compiler who ever introduced laws expressly repealed, it may be expected that he should give a very of quarter sessions, and for directing the proceedings therein." "An act to reduce into one the several acts establishing county courts and regulating the proceedings therein, and concerning the appointment of justices of the peace and their jurisdiction." "An act to reduce into one the several acts directing the rules and proceedings in the courts of chancery." "An act to reduce into one the several acts for preventing vexatious suits, and regulating proceedings in civil cases." "An act directing the mode of proceedings in courts of equity against absent debtors and other absent defendants, and for settling proceedings on attachments against absconding debtors." "An act to reduce into one the several acts or parts of acts concerning limitations of actions." "An act to reduce into one the several acts or parts of acts concerning sheriffs." "An act to reduce into one the several acts or parts of acts concerning executions, and for the relief of insolvent debtors." "An act to reduce into one the several acts or parts of acts regulating conveyances." "An act directing the method of suing out and prosecuting writs of habeas corpus." "An act to prevent frauds and perjuries." "An act concerning partitions, joint rights and obligations." "An act concerning the dower and jointure of widows;" and "for the relief of creditors against fraudulent devises," shall commence and be in force from and after the first day of January, 1797. So much of every act or acts as comes within the purview of the said before recited acts, shall be and the same is hereby repealed from and after the said first day of January, 1797.

The second act was approved February 28, 1797, and is entitled, "An act declaring when certain acts shall be in force, and for other purposes." The provisions are: Be it enacted by the General Assembly, That the following acts, to-wit: "An act concerning public roads." "An act to reduce into one the several acts to ascertain the boundaries of and for processioning lands." "An act to reduce into one the several acts respecting wills, the distribution of intestates' estates, and the duty of executors and administrators." "An act to reduce into one the several acts for the establishment of ferries." "An act to reduce into one the several acts directing the course of descents." "An act containing so much of every act or acts as ascertains the boundaries of the State and of the several counties," shall commence and be in force from and after the first day of March next, and all acts or parts of acts which come within the purview of the same, shall be and the same are hereby repealed from and after the first day of March next. (The remainder of the act relates to the correction of an accidental omission in a former printed act.)
particular account of his motives for so doing. They are as follows:

First. When a law is enacted and comes into operation, it instantly attaches itself to matters then existing and in fieri, and according to the principles of our Constitution, will adhere to them until they are finally disposed of; hence an act of assembly may stand repealed in the statute book, and yet be in force in every court in the state; the Virginia land law furnishes an eminent example of this—the substance of it has been repealed to nearly every purpose, except adjudicating on the transactions which took place under it, ever since the existence of our government; yet there is no law more interesting or more litigated.

Secondly. It is a well established maxim of our law, that in construing any act of assembly all other acts on the same subject, whether repealed or not, are to be taken into consideration. Under the extensive operation of this principle, no law of Virginia or Kentucky has ever yet been repealed; for though not in force as directly obligatory, they are all in force for the purpose of giving direction and decision to those which are obligatory.

Thirdly. There are many acts which it would be rash and presumptuous to exclude, under the idea of their being repealed, until we have been taught by judicial decision, what effects are to result from a rule of construction introduced into our code by an act of 1789, and afterwards copied by the legislature of Kentucky. The rule is as follows: Whensoever one law which shall have repealed another shall be itself repealed, the former law shall not be revived without express words to that effect. Acts of 1789, chapter 9, section 2. We are yet to learn from judicial construction, whether under this rule, after an act of assembly, which has produced a radical change in the law has been repealed, the law will be the same as if such act had never been passed, or the same as if it had never been repealed.

For example—there is a maxim of common law, that an action of covenant shall not be maintained on a writing not under seal; in 1796, an act was passed which says, actions of covenant may be brought on writings not under seal; this necessarily repealed that common law maxim. In 1798 the legislature ex-
pressly repealed the act of 1796, but were silent as to what the law should thereafter be. Suppose a question is made whether an action of covenant may now be maintained on a writing not under seal? If it is said that it cannot—what is the effect of the act of 1789? If it is said that it can—what is the effect of the repealing act of 1798?

Perhaps it may be suggested that by the term law in the act of 1789, the legislature intended acts of assembly only; but they certainly use the generic term, and in the same section, in the same sentence they give us to understand that they knew the precise meaning both of the word law and act. It is not however intended to argue this point here, nor would the compiler be understood as giving any opinion on it; he has merely suggested it as an apology for this republication of repealed laws.

Fourthly. From a want of congruity between the title and subject matter of an act, a particular law may be repealed by name, and none, except the most indefatigable student, be apprized of the quantity or quality of the law repealed. This renders it necessary to have a view of the repealed act.

Fifthly. The habits, and manners, and modes of thinking and feeling acquired by the people under existing laws, will necessarily continue long after the laws themselves have been repealed; they become then the lex non scripta of the human heart, and are frequently above legislative control, and have themselves

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No doubt the compiler, William Littell, had himself somewhat in mind when he wrote "indefatigable student. The amounts of information, legal learning, critical ability, and industry he brought to bear in compiling the three volumes first published at Frankfort in 1809, of his "Littell's Laws of Kentucky" were prodigious, and the worth of his labors to the jurisprudence of Kentucky is beyond estimation. These volumes are unique, and rank among the most precious contributions of scholars and students of American institutions. By way of praelections and notes to the various acts prior to 1796, and to the acts of the "Revision" as well, he has collated and presented for the student of the laws of Kentucky the statutes of England and of Virginia which it is necessary to have in mind in interpreting the present statutes, and at the end of the second volume, through enormously laborious and intelligent effort, he collected and published the English and Virginia statutes from the earliest times which the Kentucky jurist and practitioner must have at hand for daily reference in order to determine the present status of the law in even the most commonplace matter. This work entitles him to the undying gratitude and veneration of all Kentucky students and scholars, and to an eminent place among American Jurists.
an incalculable influence on every system of jurisprudence. The compiler must content himself with barely hinting at this subject here—a subject perhaps of all the most interesting and amusing to the philosophical lawyer."

Although it might reasonably be inferred that the second of the acts of commencement and repeal, that of February 26, 1797, should be taken as the final act of the revision, and that the enumeration in the two acts were inclusive of all the acts presented by the revisors, yet there are several acts approved at the same time and of the utmost importance, which bear the earmarks of being parts of the revision.

AN ACT prescribing the mode of licensing counsel or attorneys at law.
A collection of the acts or parts of acts of the Virginia assembly, concerning the titles to lands in this Commonwealth. (It is to be noted that this statute contains no repealing clause.)
AN ACT to reduce into one the several acts concerning the examination and trial of criminals, grand and petit juries, venires, and for other purposes.
AN ACT concerning the assignment of bonds and other writings.
AN ACT concerning the establishing of towns.
AN ACT concerning occupying claimants of land.

On March first, the following additional acts were approved:

AN ACT concerning guardians infants, masters and apprentices.
AN ACT concerning tithables, and directing the mode of laying and collecting the county levy.
AN ACT to reduce into one the several acts for the conveyance and division of lands.

(To be continued.)

Lyman Chalkley.

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"It must have already presented itself to the mind of the curious student and experienced jurist that the argument of Dr. Littell turns upon the difference between a law "repealed" and a law "obsolete," a distinction whose validity and weight will be readily accorded, although he has nowhere stated it in explicit terms. But on account of the peculiar political traditions of Kentucky, and the very individual form of the fundamental law of the State, this is certainly to the Kentucky lawyer, as phrased by Dr. Littell, "the subject perhaps of all the most interesting and amusing."