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**THE CONSTITUTIONAL ASPECT OF KENTUCKY'S
STRUGGLE FOR AUTONOMY—1784-92.**

THE CONSTITUTIONAL ASPECT OF KENTUCKY'S STRUGGLE FOR AUTONOMY—1784-92.

By ETHELBERT D. WARFIELD, President of Miami University.

The political history of a people is the story of its emotions: its laws are the records of its sober second thoughts. Consequently constitutional history affords less that is striking and picturesque, but more that is stable and true, than any other department of history. It is judicial in its attitudes. It considers only those thoughts which ripen into deeds—only those deeds which are big with import for the future. An interesting commentary upon the character of a people is afforded by the degree of resemblance to be observed between its constitutional and political histories. A phlegmatic and impulsive people both draw these departments together; the one doing all things gravely and within the limits of its laws, the other writing every hot thought upon the statute-book. Certain periods of the history of Holland and France well illustrate these conditions. On the other hand, a people at once progressive and conservative, such as the English people has ever been, generally offers an instructive contrast between these departments of its history. Indeed, the wise way in which the English people winnowed the wheat from the chaff after every threshing is the lesson the world has found best worth learning in its story. It is interesting to observe how the old story retells itself in history—how an historic heredity rules the destiny of a race. In the little drama of Kentucky's struggle for autonomy we have a pretty miniature, which shows the conflict between passion and patience, politics and law, in a very suggestive contrast.

Kentucky was thrust into the great trans-Appalachian region like an entering wedge of civilization. It contained few settled inhabitants at the coming of the white man. It was claimed in whole or in part by several tribes, but, in truth, it was a common hunting- and battle-ground. Its rich blue-grass valleys and frequent salt-licks attracted quantities of game. These the tribes east, west, north, and south, assiduously pursued. A great war trail lay right across its territory, uniting with a bloody cincture the dominant tribes of north and south, the representatives of different and bitterly hostile races. The hunting parties of one tribe so often met the war parties of others that he who hunted the deer and buffalo amid the waving cane-brakes took his life in his hand. The result was that the Indians who roamed the country between the Ohio and the Tennessee were always equipped alike for war and the chase. Hence the force of the remark of the old Indian to Boone at the close of one of the treaty-making meetings: "Brother, we have given you a fine land, but I believe you will find trouble in settling it."¹ It was too true. Yet every effort was made to secure the acquiescence of the Indians in the settlement of this territory. "By fair and repeated treaties, first, of 1768, with the Six Nations, by which the Indian title to Kentucky was extinguished as far south as the Tennessee River; secondly, by the treaty with the Shawnees with Lord Dunmore, 1774; thirdly, by the treaty with the Cherokees, in 1775, in consideration of £10,000 sterling, their title was extinguished to that portion of Kentucky between the river of that name and the Cumberland Mountains and Cumberland River; also by the treaty of Fort McIntosh, in 1785; confirmed and enlarged by the treaty of Greenville, in 1795; and, lastly, by the treaty with the Chickasaws, in 1818, all that part of Kentucky west of the Tennessee and south of the Ohio was acquired."²

The Indians sold, under inducement of fraud and duress in most cases it is too true, land which they did not possess, and to which they could not give possession. Their cessions

¹ Butler: "History of Kentucky," p. 15.

² *Ibid.*

were, however, in the nature of quit-claims. Whatever was the legal aspect of the case, the Indians knew nothing of legal distinctions, and had never heard of a policy of *laissez-faire*. They therefore took all that was given them, and when the opportunity offered took as much more as they could get, whether in the form of property or of scalps.

When once immigration commenced, it flowed over the mountains into the Western valleys. The Ohio River and the Wilderness road through Cumberland Gap were the main approaches. Thus they left in their rear a wide tract of unsettled, mountainous country. The seaboard had been settled under very different conditions. Its settlers had held on to their base of supplies, and only very slowly and as necessity demanded, pushed back their Western line. The old settlements never understood (perhaps, even to this day, the East has not learned fully to comprehend the West) the new settlements. They lost touch with each other. Time brought indifference to the one, doubt and, in some cases, suspicion to the other. A natural result was that, thrown ever more and more on their own resources, the Western people acted on their own ideas, first in self-defence, and then becoming more self-sufficient out of natural preference and self-confidence.

Under these circumstances the character of the settlers naturally determined the history of the country. The population of Kentucky may be divided into three classes during the period under consideration. First, the true frontiersmen, the men who actually opened up and established the early settlements; secondly, the post-revolutionary emigrants, embracing all classes and conditions of men set free by the termination of the war and urged on by the scarcity and hardship of the times to seek new homes, but in a large measure made up of young men, chiefly from Virginia, and of good family; thirdly, adventurers. This last class was not homogeneous, but embraced many outlaws and tories in the first period, down to the close of the war; many soldiers who had imbibed a taste for a life of excite-

ment, immediately after the war; and from that time forward men of broken and desperate fortunes. The first class was largely composed of the Scotch-Irish Presbyterians from Pennsylvania, Virginia, and North Carolina, and formed the back-bone of the people. These people were the ordinary product of a sturdy Calvinism. They were a God-fearing, law-abiding, liberty-loving race. They had no patience with shams, and scoffed at Henderson's Imitation Proprietary government of Transylvania; they were in deadly earnest, and bitterly complained of Virginia's neglect under the shadow of perfunctory government; they were clear-sighted, and calmly resisted, with the force of *inertia*, the demagoguery of Wilkinson and his coadjutors; at the same time they were full of enterprise, and, calmly disregarding foolish laws, they supplemented the feeble arm of the State whenever needful. Above all, they had the courage of their convictions, and by a monumental patience left their constitution and statute-book free from the least stain in the face of every kind of pressure towards treasonous devices. And yet their efforts to secure self-government have often been spoken of as "separatist movements," and treated as if inherently disloyal.

These so-called movements began in 1776; from that time till Kentucky became one of the United States, on the first day of June, 1792, was a period of fifteen years. During that time no less than eleven regular conventions were held for the specific purpose of considering the governmental affairs of the country. In conjunction with these a number of informal conventions were held, mainly in the interest of separation. It is interesting to observe how a people unused to restraint met and determined the questions presented to them on such occasions. Under similar circumstances, Tennessee, a region settled by a kindred people, for nearly identical considerations, twice plunged into open rebellion. What is the record of Kentucky?

Virginia claimed jurisdiction over Kentucky on the basis of the original grant, and this was practically never questioned. The country was governed as a part of the frontier

county, whatever that happened to be. In 1776 this was Fincastle. The connection between the county seat and the outlying district was by hundreds of miles of mountain road through a country inhabited by no settled people, and infested with roving bands of savages and wild beasts. The capital of the State was yet other hundreds of miles away, beyond another chain of lofty and difficult mountains. Such a government could only be a pretence. This the settlers felt, and the spirit of liberty being rife, they determined to apply for recognition to the Virginia Convention, which was to meet in Williamsburg on the 6th of May. George Rogers Clark, who had spent the winter in the East, advised against this plan. He recommended that instead, two delegates should be sent to the regularly constituted government to demand substantial recognition for Kentucky, coupled with a strong suggestion of a resort to a violent separation in case their application was refused. The first part of Clark's plan was adopted. The people met at Harrodstown (now Harrodsburg) early in June and held an election, extending over five days, for delegates. Clark and Gabriel John Jones were elected. Wisely thinking a prayer should not be accompanied with a threat, they rejected the second part of Clark's suggestion, and sent a decorous yet decided petition, under date of June 20th, praying that they, the people of "West Fincastle," be erected into a separate county. Their case met with due consideration, and the prayer was granted, and the western country was cut off from Fincastle and erected into Kentucky County. Thus the first step in the direction of independence, local self-government, was attained. The Continental Congress had not declared the colonies independent when the demand of the inhabitants of West Fincastle was penned, nor had these good people forgotten the fact that there was a war on hand. George III. probably meant little to them now, but they did not think it imprudent to remind the would-be commonwealth of Virginia, which, as far as they knew, was still debating its rights,¹ "how

¹ The Virginia Bill of Rights was agreed to on the 12th June.

impolitical it would be to suffer such a respectable body of prime riflemen to remain in a state of neutrality."

The concession was only a sop to Cerberus. The discontents of the Kentucky people were not due to factional, but to natural and persistent causes. Three grievances were especially great, and were destined to be permanent causes of complaint. They arose from the difficulties in communication, and were as follows :

First. The legal relation between the two parts of the State was very inconvenient, because laws were enacted without considering how they would affect Kentucky, thus having the effect of *ex-post-facto* laws in some cases; and appeals were rendered almost impossible, because the expenses of prosecuting them at the capital were ruinous, and the same reason made it easy for the rich to oppress the poor.

Secondly. The people in the East could not understand and did not sympathize with the condition of life in Kentucky, especially with respect to Indian affairs.

Thirdly. A common commercial policy between the sections was impossible, and Kentucky was forced to bend to the welfare of the seaboard.¹

A sudden thunder-clap came in May, 1780. Six hundred and forty of the inhabitants of "Illinois, Kaskaskias and Kentucky," or as they in another place call themselves "people of that part of contry now claimed by the State of Virginia in the counties of Kaintucky and Ilinois," sent a petition praying that "the Continental Congress will take proper methods to form us into a separate State or grant us such rules and regulations as they in their wisdoms shall think most proper." These good people to the number of six hundred and forty, were plainly much distressed, or, as they phrased it, "appressed," since they turned from Virginia to that shadow, the Congress of the Confederation. At any rate, they got nothing for their pains, and the coun-

¹ Quite a full statement of these grievances may be found in the address to the inhabitants of the District of Kentucky, published by the Convention of May, 1785, and printed in Marshall's "History of Kentucky," pp. 202 *et seq.*

try rested for a time under suppressed but chronic discontent.¹

Virginia was not a careless nor a hard mother. She was willing to do her best and from beginning to end her treatment of her western territory was liberal to a degree. A division of Kentucky County into the three Counties of Lincoln, Fayette, and Jefferson and the erection of the whole into a district (which retained the name of Kentucky) made local government more efficient. But the essential difficulties lay too deep for such simple remedies. The termination of the war brought this out in high relief.

Kentucky had been on a war footing. The militia officers had military powers and constantly made use of them against the British and their savage allies. Now they had no such powers. Yet for them the war was not at an end. The Indians still kept up a desultory warfare and the unsundered posts in the northwest were so many plague spots.

The following statement of the situation from the pen of a participant in the events of these years is at once accurate and graphic.²

"During the war the Indians were the enemies of the America at large, when peace was concluded, the situation of the Western people, instead of being ameliorated was rendered worse. The Indians, it is true, as the allies of Britain, had no pretensions to continue hostilities after their principal had acknowledged herself satisfied and had made peace. But they never had an adequate conception of the nature and consequences of the contest. They had never been conquered by the Americans, and could not understand how they could have been subdued in consequence of the Americans having obtained an advantage over the British in

¹ This interesting document may be read in full in Appendix D, Vol. II., of Roosevelt's "Winning of the West."

² This passage is taken from the valuable little treatise of William Littell: "Political transactions in and concerning Kentucky, from the first settlement thereof, until it became an independent state, in June, 1792. Frankfort (K.), 1806."

the eastern part of the continent, when they were daily making conquests in the West. They could not comprehend how they were subdued abroad by proxy, at the same time they were conquerors at home in fact. But not only was their military pride wounded by this doctrine ; their interest was vitally affected. They had never considered England as the proprietor of their country. Yet, under the treaty, America claimed it as ceded to them by the British, and required from the Indians an acknowledgment of their right ; which acknowledgment was once extorted from them, as may be seen in the treaty with the Shawanese, made at Miami in 1786, section 2nd, though with the extremest reluctance on their part, and even with tears. This claim produced in the minds of the Indians a spirit of indignant resentment and desperate hostility toward the Americans, which no exertions of Great Britain could probably have ever effected. Hence the termination of the general conflict was a new era in the war between the Indians and the exposed frontiers of America.

“But the government inattentive to these matters, and thoughtlessly and obstinately disregarding the consequences which must necessarily result, not only withstood all efficient military force from the district ; but left it destitute, of any legal authority to put its own inherent strength into action. The fact is in short, that the governments in Virginia and of the United States, seemed resolved to consider the Indians as friends ; to permit no offensive measures to be taken against them, and to make no provision for defensive ones. Hence by the treaty of peace, the Indians, instead of being the enemies of America at large, as they had hitherto been, became the enemies of the Western Country alone.”

In coupling Virginia in this attitude towards the Indians with Congress, the partizan spoke rather than the historian. While there was some ground for this view it was not the ordinary attitude of the State, especially at this time. The difficulty was mainly that Virginia could not be made to understand the situation, and did not provide proper remedies for the distress of her Western counties. Things drifted

on till the autumn of 1784 when it was rumored that the Cherokees in the South were meditating an inroad into Kentucky.

The situation is quaintly described by Marshall, who says: "Physically, Kentucky might be compared to Sampson, going down to the Philistines. Politically, to the same man, after his amour with Delilah": and adds, "No man, or collection of men in the district, were competent to call the militia into service for offensive measures. The district contained no public magazine of arms, powder, or lead, equal to the necessary supply. There were no provisions in store; nor funds to purchase them. The citizens individually had arms, amunition, and provisions. But there was no law to conscript the owners—none to place their effects into requisition."

In view of these circumstances Col. Benj. Logan summoned a number of citizens to meet in Danville to discuss the situation. They decided to call a convention to meet in Danville on December 27, 1784, to be composed of one member of each militia company in the district. This informal meeting fairly inaugurated the struggle. From that time on the thread was never broken. The history of the remaining years is one of persistent effort looking towards separation from Virginia. The first regular convention met in Danville, December 27, 1785. A decided majority of its members were in favor of applying to Virginia for a formal separation. "But as the idea had not been suggested before they were elected, and they could not say they were elected for the purpose, they declined making the application." Thus where we might have expected precipitation we find excessive caution. The only work of the convention was to call a second convention to meet on May 23d. The second convention passed five resolutions. The first and recond resolved *nemine contradicente*, "That a petition be presented to the assembly praying that (this) district may be established into a state, separate from Virginia"; and "that this district when established into a state ought to be taken into union with the United States of America." The third and

fifth resolutions called a new convention and referred the whole question to it, while the fourth made the notable declaration as to representation, "that the election of deputies for the proposed convention ought to be on the principle of equal representation," which put Kentucky alongside of Vermont as a pioneer of equal representation and manhood suffrage. The Virginia Law provided for representation by counties without regard to extent or population, a system always distasteful to her Western district.

The convention then proceeded to petition the General Assembly of Virginia for a separation in terms of the most admirable lucidity and calmness, referring to the "provisional clause in the Constitution," and even seemed to suggest such a division. This clause in the Virginia Constitution of 1776 provided that: "The Western and Northern extent of Virginia shall . . . stand as fixed by the charter of King James I, etc. . . . unless by act of this legislature, one or more governments be established Westward of the Alleghany Mountains." This petition was justified and enforced in an address to the "inhabitants of the district of Kentucky," naturally more specious and persuasive, but still maintaining a judicious attitude. The address enumerates seven grounds of grievance, which are practically comprehended in the three already enumerated as the permanent grievances of the people. These papers are very able and would have done credit to any deliberative body of the day. In the contrast between these documents and the rough, misspelled petitions of 1776 we read a great change in the character of the population.

The third convention was summoned to meet on August 8, 1785, the delegates being voted for on five successive days, beginning with the county-court day in July in each county. From the election of this convention the inauguration of a party in favor of immediate—even if violent—separation dates. At its head was General James Wilkinson, and he was the embodiment of the episode in the contest which had to do with the Mississippi trade. Wilkinson was essentially a demagogue. That he lugged the

Mississippi question into the discussion for personal interest and political capital cannot be doubted. We owe the finally successful policy of our Government on this question primarily to Jay, influenced and supported by Henry, Lee, Jefferson, and other Eastern statesmen. The Western cabal deserve little credit for the result.

I do not propose to trace through its tortuous length the proceedings of the next seven years. The Virginia Assembly met the request of her Western district cordially and promptly, but through a series of untoward accidents—principally Clark's unfortunate expedition against the Indians on the Wabash, the East and West played at cross-purposes. Convention after convention met, to the total number of ten, and four enabling acts were passed by the Virginia Assembly before any thing definite was secured. The experience was sufficient to try the patience of the most law-abiding people. What could be expected of a body of backwoods settlers? And yet they loyally observed the law to the letter; conformed to every requirement with precision; and, when baffled by circumstances, quickly renewed the contest. And all this in the face of a cabal led by a man of singularly fascinating manners, bold in his address, popular in his oratory, and supported by a very respectable and influential following. The revolutionary precedent was immediately before their eyes; the sense of grievance was great and loudly expressed; and yet not a single one of these many conventions, by a single important or significant act, gave countenance to any measure which departed in the least from the strictest constitutional limits. In the final shock, Judge George Muter's most explicit and admirable paper setting forth the constitutional consequences of unlicensed separation under the Virginia Constitution and Articles of Confederation, was conclusive. His argument left no room for doubt as to the results of the cabal's schemes, and only a small minority were ready to face them.

In the meantime, in June, 1788, the Virginia Convention to act on the Constitution of the United States had been

held, and the delegates from Kentucky, two from each of her seven counties, had cast an overwhelming vote against the Constitution. The delegates from Jefferson County, Bullock and Robert Breckinridge, and Humphrey Marshall, of Fayette, alone voted for ratification. This result was perhaps due to the excited state of their section, but probably quite as much to the personal influence of Patrick Henry, which was very great beyond the mountains. It is not to be doubted, however, that the hostility to the Northeast so sedulously cultivated in connection with the Mississippi trade had borne some evil fruits. The refusal of the Congress of the confederation, on July 3d following, to take any action on the petition for the admission of Kentucky as a State, properly referring the whole question to the new government about to be established, produced a small tempest. Once more the measures of the men who were in favor of rash and violent action proved abortive, and the inauguration of the new government produced a strong moral effect, which was greatly increased by the act of Congress providing for the admission of Kentucky to the Union on June 1, 1792, the day named by Virginia in her final enabling act.

The question was mainly fought out in Fayette County. Actually there was far less of a struggle than there appeared to be. The weight of the old-fashioned sturdy Scotch-Irish type told too heavily in the country districts, and they voted a solid phalanx in favor of law and order. In the flourishing town of Lexington the adventurers had their principal stronghold and their leader. Wilkinson made this the pivotal point, and here the sharp conflict which he stirred up gave the locality a somewhat undue importance, an importance which has been increased by Humphrey Marshall's efforts to make the Marshall share—really a large one—in thwarting the disunion schemes as large as possible. It is impossible now to regard the movement as a serious menace to the faithfulness of the State; for it was wanting in a homogeneous and reliable rank and file. At the same time, its leaders were at once able, ambitious, and rash, and

it is greatly to the credit of the people that they were not swept away from their moorings.

The final convention, which met at Danville, April 3, 1792, draughted the first constitution of the State. The personel of this convention was very different from that of the earlier ones. Marshall speaks with contempt of it. It seems that the reaction towards the entire approval of the Constitution of the United States was strong, that the new immigration was bringing vigorous young men whose minds were free from the prejudices of the past and wholly occupied with plans for a peaceful and progressive future, and that in the election they left out the leaders on both sides of the old contest and sent new men whose actions could not be construed in the light of an outworn partizanship. In the forefront was a new-comer, George Nicholas. Nicholas had an extreme view of the obligations of a representative to his constituents, and resigned his seat and offered himself for re-election on the ground that he had changed his mind on a point which he had discussed before election. In other respects he was in the utmost sympathy with the constitution, the adoption of which he had ably advocated, and the convention turned to him for guidance. It was doubtless due to this that the constitution somewhat blindly followed the national document in important provisions and in consequence fell into some serious difficulties.

The most important of all the provisions of the constitution in its ultimate influence was the final, formal adoption of "equal representation" and the full recognition of the principle of manhood suffrage. Its qualification shows how temperate were these men. The first article of the bill of rights declares "that all men, when they form a social compact, are equal." Their incapacity to rise to the noble phraseology which Mason had employed in the Virginia Bill of Rights, and which Jefferson had bettered in borrowing for the Declaration of Independence, and which in its last form declared "that all men are created equal, that they are endowed with certain unalienable rights, that among these are the rights of life, liberty, and the pur-

suit of happiness,"—was perhaps natural, but it was none the less deplorable. Their refusal to use a form of statement to which they could not give their consent was, at least, a proof of their honesty. It was only "free men" as the Constitutional Convention of 1799 more specifically declared whom they regarded as equal. Yet they were not wholly blind to the evils of slavery, and showed an active desire to put a stop to the slave trade. The article (IX.) which treats of slaves and slavery is, indeed, so progressive that it deserved to be quoted in full.

"Article IX. The legislature shall have no power to pass laws for the emancipation of slaves without the consent of their owners, previous to such emancipation, and a full equivalent in money for the slaves so emancipated. They shall have power to prevent emigrants to this State from bringing with them such persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by the laws of the State. They shall pass laws to permit the owners of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming chargeable to the county in which they reside. They shall have full power to prevent slaves being brought into the State as merchandize. They shall have full powers to prevent any slaves being brought into this State from a foreign country and to prevent those being brought into this State who have been since the 1st day of January, 1789, or hereafter may be, imported into any one of the United States from a foreign country. And they shall have full powers to pass such laws as may be necessary to oblige the owners of slaves to treat them with humanity, to provide for them necessary clothing and provisions, to abstain from all injuries to them extending to life or limb, and in case of their neglect or refusal to comply with the directions of such laws, to have such slave or slaves sold for the benefit of their owner or owners."

Perhaps the most important point in which the Constitution of the United States was imitated was in the provision

for the election of the Senate and Governor. For this purpose an electoral college was created. It was a clumsy device, foredoomed to failure. Singularly enough the clause treating of the matter failed to state whether a majority or a plurality should elect, though elaborate provision was made for the case of a tie. The first contested election in our history was caused by this neglect. In the second election for governor the college met with fifty-three present. The first ballot showed twenty-one votes for Benjamin Logan, seventeen for James Garrard, fourteen for Thomas Todd, and one for John Brown. The electors, assuming that there was no election and that a majority vote was necessary to a choice, summarily dropped Todd and Brown and proceeded to another ballot. Garrard, receiving a majority on the second ballot, was declared elected. The best legal opinion in the State held that the second ballot was not justified, and that Logan was elected. The law made the Senate the arbiter in cases of contested gubernatorial elections and Logan took his case thither, but with admirable constitutional acumen the Senate declared that any law which did not promote the peace and harmony of the commonwealth was contrary to the well-being of the State, and that all such laws were unconstitutional. That the law referring contested elections to the Senate had already provoked discord and was, therefore, unconstitutional.

The personal equation of Nicholas again appears in the provision introduced into Article V., providing that the Court of Appeals ("The Supreme Court") should have an original and final jurisdiction in suits respecting land titles. This was almost necessitated by the compact with Virginia which guaranteed all Virginian titles, and by the temper of the times which held out little hope of impartial administration of justice in land suits. The provision failed, for the very reason that seemed to justify it. Montesquieu had long before noted that virtue is the sole foundation of a stable republic. The Kentucky convention had not learned, any more than we have yet learned, that a people cannot be made virtuous by a constitutional provision.

The constitution as completed followed that of Virginia in the main, with the grafts which Nicholas had cut from the national instrument and the principle of universal suffrage inserted. It was a strange document—democratic, with a half-developed tendency towards ultra republicanism—it was at least conservative and served well for a few years.

The union sentiment prevailed with some strength at first. Robert Breckinridge was made speaker of the house of representatives, a post he retained for four successive terms, when he retired to private life. John Edwards became one of the first senators. But John Brown was chosen for the other—due perhaps to a spirit of compromise—an honor which his long experience of national affairs as delegate in Congress and his ability at least justified. In the main the old party of disunion was swamped. The leaders came to the front by virtue of real force. Sebastian became judge of the Supreme Court; Innis, a prominent State official; only Wilkinson had to wait. The party of the future was unformed as yet. It was to come out of Virginia immigration. Nicholas and Robert Breckinridge, the new governor, Isaac Shelby, and others were to belong to it. But a younger Breckinridge and his contemporaries were to formulate its principles and shape its organization.

One further point illustrates the complete triumph of the Scotch-Irish, law-loving element. The first code of criminal law was the fruit of these years of striving after an efficient government. It was worthy of a Draco. No less than one hundred and sixty offences were visited with punishment by death. It was no backwood code. It was a survival of the seventeenth century on the threshold of the nineteenth. It was impossible to effectuate such a code. One county by its grand jury entered its protest by indicting it. The pendulum was at its farthest swing.

Law and order had won the day. The disunion chimera faded away. Ordinary methods came again with the young blood from the East. John Breckinridge, serving for a

year as attorney-general saw that the severity of the criminal code defeated its purpose, resigned and entered the legislature with the design of preparing a new code. The result was a code in which wilful murder alone was punished capitally—the pendulum in five years had swung back—and again too far.