

Some Causes of Courts Legislation.
a paper read before the West Virginia Bar
association at Martinsburg, W. Va., on Jan. 4th, 1902
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Mr. President and members of the Bar Association of West Virginia:-

At the close of the last session of the legislature of this State a citizen ~~of the city~~ of Charleston, in seeking to express to a member of that body his opinion of the net results of the session, gave voice to the sentiment that the legislature "had not done much harm". Still another, less charitable than the first, remarked that never until he had seen the legislature in session did he appreciate the real need for the pious invocation that closes all our court proclamations; and that he could join at such times with the sheriffs and criers in saying "God Save the State."

Perhaps the approval of the first gentleman referred to may have been somewhat less hearty, and the condemnation of the second more caustic than the facts would justify; but there is little doubt that they voiced a widespread sentiment in regard to our legislative bodies, both State ~~legislatures~~ and Federal. ~~So strong~~ So strong has the tide of popular disapproval and distrust set against our legislative ~~bodies~~ that one is tempted to wonder whether the people really desire to continue them, or are simply urged to do so by way of appeasing the incessant clamor of the office seeker. One editorial writer has declared himself almost tempted to advocate a constitutional provision in the State of New York, requiring the legislature to adjourn immediately upon convening. Another in speaking of a bill that threatens to have itself introduced into the legislature of the same State making Dewey Day a legal holiday, remarks that "it will probably pass, as will anything else introduced into the New York legislature". Hardly a writer who has dealt with the problems of representative government, but has paused to berate the legislative branch of the machinery and dilate

upon its patent imperfections. Condemned by philosophers, jeered at by the press, and distrusted by the people, the legislative arm, were it other than it is, would have been long ago cowed into supine inaction. In the face of the confident assurance that "he will be damned if he does and damned if he don't," it is an exhibition of moral courage on the part of a legislator to vote for anything more than a motion to dispense with the reading of the journal or to adjourn. However the thickness of the epidermis of the collective legislative animal is to be measured by that of its most ^{individual} impervious members; and the storm of criticism has not yet served to dull the edge of the legislative energy.

Tested by numerical statistics alone this energy seems to be not only undiminished but increasing. In the New York Legislature during the past two years it is said that over three thousand bills have been introduced, of which some fourteen hundred became laws, while for the same period in the Parliament for the whole empire of Great Britain only four hundred bills were introduced, of which two hundred were placed on the statute books. With this latter figure may also be compared the four hundred and nine bills introduced at the last session of our own legislature of which (fortunately perhaps) only sixty five became laws. In 1860 there were introduced into the Congress of the United States some one thousand and twenty six bills; in the Congress of 1890, 14032 were brought in; while the present Congress has broken all previous records by introducing in the first week of its existence the enormous number of 3327 bills, resolutions and joint resolutions in the House, and 1017 in the Senate. *And while it is the intention of this paper, to deal primarily with problems concerning the state legislatures, these latter figures are pre-*

As might be expected, in this flood of bills, almost every department of life and every branch of human activity is sought to be affected. Into every part of the clock work of society

* - served as an example on a larger scale only of what is taking place in each State

the legislator dares to thrust his clumsy hand, with ~~XXX~~ results often as deplorable as unexpected. In such a multitude of measures no wonder that many of them are crude in thought and awkward in expression; but that we should be prepared to anticipate legislation on some of the topics that have been proposed could hardly be expected. In the address of Hon. Seymour D. Thompson made before this body two years ago quite a number of these "freak" bills were enumerated; since that date others have been brought to my attention.

The last session of the legislature of the State of Missouri passed an act establishing a board for the examination of barbers doing business in cities of 50,000 or more. In lesser towns the pernicious energies of the unlicensed barber are still permitted to prey upon the body politic. The act defines a barber as follows: "Any person who is engaged in the capacity so as to shave the beard or cut or dress the hair for the general public, shall be construed as practicing the occupation of barber;" and further provides that "each member of the examining board ^{shall} possess sufficient knowledge of contagious and inoculations diseases to enable such member to pass judiciously upon the qualification of others in the occupation of barber". It would be interesting to know whether a barber was elected to that particular legislature, or whether the barber vote of St. Louis needed recognition. If one may judge by the selection given, the act was framed by the same man who as foreman wrote the following verdict for a jury impanelled in the same State upon a commission of lunacy, viz:- "We, the jury, impanelled, sworn and charged to inquire into the insanguinity of Hezekiah Jones, do occur in the affirmative".

In the neighboring State of Kansas the liberties of the tonsorial artist, were sought to be further abridged by a bill passed by the Senate of that State limiting the price of a shave to ten cents; hair cutting twenty-five cents, and dyeing whiskers, fifty cents.

In Illinois a penalty has been affixed to the use of the national flag or emblem for any commercial purposes or as an advertising medium; a law, which while responsive to much popular clamor, can be best explained as a recurrence to fetichism, and similar to the great "Taboo" of the aboriginal Polynesian.

In South Dakota the Senate passed a bill appointing a commission to examine into the physical qualifications of all applicants for marriage. A law again which has a certain amount of public sentiment in its favor, but which is a curious reversal of the principle supposed to lie at the foundation of the science of government, namely that the State was made for the family, and not the family to be made to order for the State.

In New Jersey the last legislature had under consideration a law restricting the charges of attorneys in suits for damages against an employer for injuries sustained by an employee; in which the hand of the corporate employer of labor is but too poorly disguised.

A bill has been introduced in the present Legislature of Virginia, now sitting, making it unlawful for book and other agents to enter premises posted against them; a penalty of \$5.00 being imposed for each violation.

But we can come nearer home for examples. For instance, the legislature of a certain State having its capitol at Charleston has passed within the last three years:-An act providing a bicycle law for the State of West Virginia," making it unlawful

to ride at more than twelve miles an hour in an incorporated city containing five thousand inhabitants or more, and forbidding the throwing of tacks, glass and other noxious objects- from the wheelman's point of view- on the roads, streets and alleys in the State, and forbidding the council of any city or town to pass any ordinances on the subject; an act requiring the removal of hats and bonnets during theatrical or other performances where admission is charged, and prescribing penalties for the violation thereof; an Act forbidding the "carrying on of the business of horse trading" within one mile of a fair, religious camp-meeting or other religious association while the same is being held; a bill passed by the House of Delegates "to prevent the use of tobacco in churches or places of religious worship"; a bill passed by the Senate (1895) forbidding the entry of horses in races out of their class or under assumed names, and the sale of pools anywhere except on the grounds where the race is to be held, and after a suitable adjustment of financial matters with the management.

And so the list might be extended did time permit.- One might think after observing the number and topics of the bills that flood the calendars, that the legislators were trying to hasten the day of the poet's dream when,

"The kindly earth shall slumber, lapped in universal law."

It necessarily follows, too, that with the number of Acts ground out each year from legislative hoppers, many which are commendable enough in principle and purpose, are stripped of their strength by awkward phrasing or clumsy expression. The Courts are kept busy in construing them, and searching for the legislative intent-a quantity which seems at times as much of a legal fiction as ^{The famous} Mr. John Doe; all this at great waste of time and labor, and to the serious inconvenience and expense of the public.

It is not the desire or intention of this paper to exaggerate or magnify our troubles. We cannot for a moment admit that government without direct representation is better than the government of representative bodies, or that our present system is not better both in theory and results than anything that has preceded it. Perhaps after all, instead of dilating upon the imperfections of our legislation, we should congratulate ourselves that the work as a whole is so well done. But he would be needlessly blind who failed to see that there is by far too much legislation both attempted and accomplished by every representative assembly in the land; that matters are interfered with that are far outside of the province of the lawmaker; and that much of the legislation passed from time to time is wrong in principle and immature and crude in expression. When we see among the net results of our governmental plan a flood of useless and even pernicious legislation, coupled with statutes that violate every rule of legal draughtsmanship, we have a right to pause and look for the causes that produce this effect.

It becomes apparent at once that the inquiry is too broad in its scope to receive adequate treatment in a paper such as this. It goes to the very heart of our governmental and political life. The legislature is at once the distinguishing characteristic and chief organ of a representative government. The success or failure of the system must be judged by it, and there can be hardly a disease of the body politic that will not make this the point of its first attack and the place of its earliest manifestation. So we might appropriately discuss as among the causes of crude legislation the failure of the people at large ^{To comprehend} ~~to study~~ their government, its purposes and powers; the rise of the politician and the decline of the statesman; bribery at the polls and venality in office; the ever-growing spirit of paternalism, the sovereigns looking more and more

up to the State as the fountain of prosperity, instead of the State looking to the sovereigns - the people - as the fountain of all its power.*
 ^ But I shall pass over these and other themes equally interesting and important and call attention to some of the patent reasons why our legislative bodies fail to do the work that might be expected of them. It is the intention of this paper, moreover, as heretofore stated, to refer more especially to the State Legislature rather than to any of our other representative assemblies; and I desire at the outset to disclaim any intention to reflect upon our own legislature in particular or upon any of its members, many of whom measure up to the highest standard of personal worth and fitness and fill out the full measure of their duty to their constituents and the State at large.

In the first place then, many of our troubles can be traced to the fact that the importance of the legislative office is grossly underestimated by the people ~~xxxxxxxxxxxxxxxxxxxx~~, and too many unfit representatives chosen.

* and the gradual dwindling of ~~the~~ interest in the State as compared with the Federal government -

that bars all hope of future progress. Neither a nation nor an individual, unless urged on by the divine spirit of discontent, can hope for advancement; and the surest way to mend our faults, is to be kept in constant reminder of their existence.

In the first place, then, the way of our troubles can be traced to the selection of unfit representatives.

In his commentary on the American Commonwealth, Prof. Bryce in discussing this problem of the State Legislatures, calls attention to the fact that the American people as a whole are apt to underrate the difficulties of government and overrate the capacity of public men. Nothing could be more true. There seems to be a popular belief in the spontaneous generation of knowledge. Let the people but select a man for some particular office; and lo, by some mysterious fiat lux, he becomes invested with all the learning and capacity necessary to fill it, be he never so dull or his intellect never so dark before the miracle is wrought. For instance, no good American will contend that an election to the office of justice of the peace is not better than a three years course in any law school—sometimes indeed it teaches more than could be learned in years of practice at the bar. In the same way the nomination of Tom Jones for the legislature, transmutes him into a Henry Clay or Daniel Webster, and fills him with ample knowledge of the statutes and needs of his State. Indeed, as to this latter office, I have heard it seriously argued that no lawyer should be chosen to it; as if years spent in the study of the laws of the State, in ferreting out their weak places and noting their defects, unfitted a man for helping to frame or alter them. And while I do not mean to plead the lawyer's exclusive right to a seat in the legislature, because it is well in such a body that all shades of opinion should be represented, yet it is an anomaly found nowhere else that men who know least of the laws as they exist should be chosen to make new ones. Says John Stuart Mill in his

Considerations on Representative Government-" The bulk of the Assembly may keep their hands clean, but they cannot keep their minds vigilant or their judgment discerning in matters they know nothing about; and an indolent majority, like an indolent individual, belongs to the person who takes most pains with it. xxxxxxxxxxxxxx There is hardly any kind of intellectual work, which so needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws". Instead of the selection of such men, how often do we find- ~~and I desire to expressly disclaim any intention to reflect upon this State in particular or the members of her legislature~~ that men are selected for the dispatch of this most important business to whom the conduct of matters of private interest, and of vastly less importance would not be intrusted for a moment. The nominations for this office usually come far down on the convention programme, when- as is the case with nearly all conventions- attention has grown listless and interest dull; such and such a faction needs to be recognized, such and such an aspiring politician who desired some other office and was beaten, or foreseeing the end stepped out of the way of the victor must be conciliated, or so and so, who has designs on the future, must have the nomination by way of grooming him for coming races. The indolent convention--to paraphrase the words of Mill--belongs to him who takes most pains with it; and that person may be and often is- some senatorial candidate, or some person or corporation plotting for legislation in his or its own interest, who see to the nomination of Mr. so and so because they can use him; and it may be added that a candidate chosen under such circumstances, rarely disappoints his political creator.

The remedy for all this can come only from an awakening of the people to the true importance of this office, second as it is to none which they have an opportunity to fill.

They must cease to regard the selection ^{of} Federal officers ^{as} alone [^] of prime importance, and must realize that the members of their State Legislature have more to do with their everyday life than even their representatives in the Federal Congress. Surely no care on the part of the people is too great in choosing the members of a body which controls the State asylums, colleges, and schools; can pass laws regulating the conduct of private business, the collection of debts, and the conveyance of real estate; can fix a standard of morals and determine crimes and penalties; can regulate marriage and divorce and - as has been but recently done in this State- intervene between the parent and his child; can tax a man out of existence and pursue him, as it were, beyond the grave with its statute of distributions and descents and its tax on inheritances. Certainly no such power should be given to any person, simply to tickle the vanity of himself or his friends or because he can be safely counted on for Mr. A. B. in the senatorial caucus.

The second matter to which I wish to call attention is akin to the first. We read that in the early days of the English Parliament, when the principles of representative government were first beginning to find root in English soil, and when Edward I summoned two burgesses "from every city, borough and leading town" in the kingdom to sit in the Great Council, this most pregnant reform was all but defeated by the desperate efforts of the boroughs to escape the burden it entailed of maintaining their burgess at a cost of two shillings a day.¹¹ Nor were the representatives themselves more anxious to appear than their boroughs to send them. The busy country squire and the thrifty trader were equally reluctant to undergo the trouble and expense of a journey to Westminster. Legal measures were often necessary to secure their presence. Writs still exist in abundance such as that by which Walter le Rous is

" held to bail in eight oxen and four cart-horses to come before the King on the day specified" for attendance in Parliament" A return to that ~~measure~~ ^{method} of enforced service might not be unwise; for not only are the people at large- I make bold to think- too careless in their selection of legislators, but it too often happens that when they desire the services of competent men they are unable to secure them. The office of Legislator in the State of West Virginia, for instance, with its princely stipend of \$4.00 per day may be one of emolument but hardly one of profit. To the man of only average business, membership in that body means real sacrifice and actual financial loss. But what of that. In theory at least the life of every citizen in time of war belongs to his country, and ignominy attends the man who refuses to bear his part in the common defense. If it be ignominious to refuse to die pro patria when the call to battle comes, why is it not even more ignomintous to refuse to live for her in times of peace, when the sacrifice is infinitesimally smaller? What greater right is there to refuse the one rather than the other? Or if you will, put it on the lower ground of self-interest. What would be thought.

of the business man who instead of going in person to participate in the meeting which held in the hollow of its hand his financial future, should send some incompetent subaltern—because forsooth it would disturb his ease to attend? Government is no more automatic than trade or commerce; and in my solemn judgment, there is no greater traitor to the cause of popular government than the man who without great ^a reason refuses to take part in conducting it because he "cannot afford it", or "lacks the time". This may seem extreme ground; but if proper men refuse, the people cannot be blamed for selecting others less qualified, and then when things go wrong let the cause of it all hold his peace.

A third cause readily suggests itself to the observer of one of our legislative sessions, which will account for many things upon our statute books which were otherwise inexplicable. I refer to the existence and activities of that ancient and honorable body known as the "third house"; which body, I venture to say, has as much and perhaps more to do with legislation than either of the co-ordinate branches provided for by the Constitution. At the door of the lobby must be laid the introduction of most of the private jobs of the session, the passage of many a bill innocent in appearance but dishonest in design, and the defeat of many a meritorious and useful measure.

A Chicago police justice is said to have recently held that the term "lobster" applied to a human being is not a term of reproach, insult or abuse, for the reason that the lobster is an important and beneficent element of modern civilization. It is doubtful if his reasoning would apply where the term is used as a synonym for lobbyist.

I do not mean to condemn legitimate approach, advice, argument or ^e persuasion addressed to legislators by parties interested in the passage of bills proposed; that is a privilege that

can be denied to no one, and neither the legislator nor his constituents can complain of its exercise. In fact I think it must, in justice, be said that ^{not infrequently} ~~XXXX~~ the third house may be and is of great service-it supplies information often beyond the reach of the member of the assembly, sifts out defects in measures that might otherwise be overlooked, and marks many an injurious bill for ignominious death in committee or public execution on the floor.

But the man who is unreservedly to be condemned is the professional lobbyist who for a fee large or small lends himself to the promotion of any scheme no matter how vicious; who can be hired to promote any private job that may be concocted; or when that source of profit proves inadequate, descends to the level of blackmailer and secretly promotes bills expected to wring revenue from the pocket of the interests at which they are leveled by insuring his employment at their hands as an obstructionist. As an instance of this I may refer to what has been reported to me as the history of a bill now on the Statute books of this State. Having proved itself a revenue-producer at several previous sessions, it was caused to be introduced in the House of Delegates by three members of the lobby, went to committee and was returned to the House with an adverse report. It was taken up in opposition to the report and placed on the calendar, and the triumvirate at once offered their services to the interests affected to defeat the bill for a fixed sum. The offer was promptly rejected, and the bill, being of a popular and plausible character passed the House. Again the three patriots offered to insure its defeat in the Senate for the small sum of \$700.00; which the parties in interest- now really alarmed- grudgingly delivered to their would be defenders. But the bill like Frankenstein's monster, had become more powerful than its creators, and in spite of opposition passed the Senate by a

narrow margin, and now stands on the Statute books as a ~~monument~~ ^{specimen} of
inaccurate draughtsmanship, and a monument to the ac-
tivity of the third house.

Of the methods of the lobbyist it is useless here to speak- of his flattery, cajolery, threats of political disaster, promises of political advancement; of his sophistry, his plausibility, his pertinacity; it is enough to say that "for ways that are dark and tricks that are vain" he has a long lead on the Heathen Chinee. He rests not day nor night, and not even behind the bar of the House can the wavering member find refuge; for even there he is pursued and besieged in his seat, without ^{no} time for quiet reflection before his name is reached on the roll-call of the vote. The legislature of this State in 1897 (Acts Ch. 14) passed a most salutary statute forbidding any person to lobby for or against any measure on the floor of either house while the same is in session. But the Act is a dead letter so far as its enforcement is concerned, and no perceptible consternation could be perceived when it was read from the Clerk's desk during the last session. There has been no person arraigned for its violation, so far as I know, and there may never be- but there should be *beyond all question.*

Akin to the lobbyist is the framer of the "loaded bills" that are carefully prepared before the opening of the session- for a secret purpose apparent only to their designer- and rushed through with all parliamentary haste. Perhaps the offender may even be a lawyer who finds some statute an obstacle in the way of a prospective suit, and desires a slight- and of course immaterial- change in the Act to make it more readily understood (by his client). ^{In general} ~~More often~~ these bills are framed under the guise of statutes of general import and effect, yet if the whole truth were known they will affect few- if any persons- other than their promoter. For this evil as well as for the lobbyist I can think of but one remedy or safeguard that can be at all effective, namely,

that representatives shall be chosen possessed of the three cardinal virtues required for their office, viz:—good sense, honesty, and moral courage.

There is another reform much less abstract, which will go far towards improving our ^{own} legislation if put into effect. No observer of the work of the legislature can have failed to notice that the greatest danger period is the closing days of the session. Perhaps as was the case last winter, much of the session was lost in matters outside of legislation; new members not realizing the necessity for prompt action, have permitted their pet bills to slumber ^{over} long on the calendar; and so from one cause or another there ensues a wild scramble at the end of the session to put bills through at any cost. It is the millenium of the lobbyist and the seeker after special legislation. Every job, every "loaded bill" that dared not show its face in the light of calm and leisurely discussion, creeps forth now from its hiding place and seeks to get through by joining in the general rush. Too often it ^{is} succeeds. ^{Ob-}serve the process— the bill ^{is} by unanimous consent taken up out of its order, its reference to a committee dispensed with, ^{and} read a first time by its title; the next step is to dispense ^a by three-fourth vote with the constitutional rule requiring the bill to be fully read three times upon as many days; ^{then} the bill is read a second time by its title and ordered to its engrossment and third reading; thanks to the engrossing Clerk it has already been engrossed and under the previous suspension of the constitutional rule, the bill is read a third time and (of course) passed. Then follows a motion that the bill take effect from its passage, which carries, ^{of course} and behold the Act is un fait accompli, it may be in thirty minutes. All this too without the moving member having left the floor or permitted any other business to intervene between his successive

a state examining board of computers and printers

motions. What a travesty on the constitutional requirement that the rule providing for three distinct readings shall be dispensed with only in case of urgency. Under such circumstances it is not unfair to say that at least a large per cent of the members have no idea of the contents of the bill they are voting on and still less of its merits; voting for it in many cases solely to oblige its patron and in the hope of similar favors from him. To put an end to this method of railroading measures through, two brakes should be applied to the machine. First, it should be forbidden by constitutional amendment to suspend the constitutional rule for any bill save a general appropriation bill during the last week of the session; second, it should be likewise forbidden by constitutional amendment to introduce any bill, in either house, other than a general appropriation bill during the last twenty days of the session. The reason for requiring a constitutional amendment is clear, since what the legislature does, the legislature can- and probably would- undo when occasion prompted. This would in the majority of cases force at least a semblance of consideration to be given to each measure, and check to some extent the unseemly and dangerous scramble with which the session closes..

*Transp
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Should the session be prolonged by the necessary majority beyond the time limit fixed by the constitution for its expiration, let the rules suggested apply to the whole of the extension, so that the additional days may be confined strictly to their proper purpose, viz., the closing up of pressing business already on hand. When convened by special call in extra session there would be no need - save in the most extraordinary of cases, for any application of the rules proposed. In such event the purpose of the assembly is clearly stated in the call, and the body confined to the dispatch of that business and no other; and it is hardly conceivable that any call would ever be made broad enough to open the

door to any such rush of business ~~as~~ attends upon a regular sitting.

It may be objected that handicaps such as ~~those proposed~~ ^{These} would render it impossible to transact the business of the average session in forty-five days. Even if this should be its effect, the evil would not be an unmixed one. It is time that we wrote in flaming letters upon the walls of all our legislative halls the motto, "The world is governed too much, let the man alone". It would be small loss if one half of the statutes that are passed year by year, were ~~not~~ ^{buried} in the pigeon hole of some committee or perished on the calendar. But if legitimate business demands, why not extend the constitutional limit of our sessions to sixty days, assured that sixty days under the restrictions suggested would be safer than forty-five as we have it now.

I have used the word "safer". It calls to mind another quotation from Bryce's American Commonwealth, where he says "The Americans seem to reason thus : "Since a legislature is very far gone from righteousness, and of its own nature inclined to do evil, the less chance it has of doing evil the better. If it meets, it will pass bad laws. Let us therefore prevent it from meeting". They are no doubt right as practical men. They are consistent as sons of the Puritans, in their application of the doctrine of original sin. But this is a rather pitiful result for self-governing democracy to have arrived at".

If this acute foreign observer has correctly gauged our attitude upon this question, it is time we were at work to better our ~~con-~~ ^{situation} ~~dition~~. If our condition is what this paper has described it, there is work ahead for this association and its members as factors in the moulding of public thought. Let us see to it that the people are reminded of the dignity and importance of ~~the~~ ^{our} State governments,

to which they must first look for the defense of their personal rights and liberties; and that it is of paramount importance to them that in all its branches their State government should be well administered; Let them be taught that the source of prosperity is not the State, and that the passage of no law can prove a panacea for their ills; but that the surest guarantee of happiness and material comfort lies in hearty, earnest, independent effort. Let them understand that for the conduct of their ~~State~~ governments they have a right to the best of talent, ^{and} integrity, and that the best their State can produce is none too good for the work at hand.

I have but sketched the outlines of the subject, and leave much to be said. But when our legislatures are filled with men of earnest purpose ~~and~~ well fitted for their task; when they are left free from the wiles of the lobbyist and schemer; when they are given time to do the work before them, and are surrounded by proper constitutional safeguards; then let us hope that the work of the reformer will at least be lessened, if not complete.

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