

SLIP SHOD LEGISLATION.

Sir Robert Peel expressed a general feeling when he remarked that he contemplated no task with so much distaste as the reading through an ordinary act of Parliament. A British statute it is necessary to admit is not, even at its best, exactly light literature. But American statutes at their worst conceal many an entertaining, and withal edifying, "quip and crank and wanton wile." Take, for instance, one of two of the statutes recently conspicuous before the public. The intent of one of them was to compel the spending of a million dollars to damage the most beautiful park in the United States, by carving from it an inferior trotting track. According to the enacting clause, this statute, like all others, set out in customary phrase that "the people of the State of New York, represented in Senate and Assembly, do enact as follows: * * *." Could greater sarcasm be compressed into words! When the people discovered the deed so treacherously done in their names by their "representatives," they assembled in mass meeting and denounced the law so roundly that the lawmakers—very different creatures from "representatives"—precipitately introduced repealing bills to save their political lives. Then take a most important statute passed by the New Jersey Legislature, namely, the law to validate the presumptively illegal contract by which competing railways contrived to stifle competition and increase the price of coal, to the railways' profit and to the people's oppression. If the thing were lawful, the proposed law was unnecessary; if it were unlawful, that is a dull wit which, when helped by a robustly growing coal bill, cannot see the humor of having the unlawful thing made lawful in the name of the people and by their agents. The field of national legislation is equally full of these merry jests. In the case of the McKinley bill, the President did not sign the bill the Congress passed. The sections relating to the tobacco rebate tax were omitted, although ordered in by repeated votes. This omission is not humorous simply because it concerned the tobacco trade, but because it cast doubt over the entire bill. We will not undertake to defend the humor of it to tobacconists, nor yet to the scores of thousands of manufacturers who brought suit to have the courts

say whether the law was law.* Doubtless they laughed long and heartily while paying the customs gatherers and their lawyers. For other people to see the joke, a certain elevation of view is necessary. It is necessary to consider that a statute is, or should be, the most formal and solemn assemblage of words and ideas which man can frame. There is no comma even, which may not involve the liberty or fortunes of any man, and each for himself is bound by assumed knowledge of every phrase and letter. And yet, an entire passage dropped out of the most important statute passed by the nation's Solons, and nobody was—for the moment—aware of it. Some solemn people may not think this is funny at all. To them it may seem like juggling with dynamite. If such things not only may happen but do happen, where shall the limit of impossible freaks of legislation be placed?

It must not be imagined that this exhausts the catalogue of curiosities of legislation. These are specified in detail only because they happen to be conspicuous. The inconspicuous errors, both of substance and form, are in number like the sands of the sea. In the Statutes of New York for 1891 are printed 49 asterisks denoting errors not chargeable to the printer. We cannot say how many errors there were without asterisks. In the preceding year there were 206 asterisks. In the charter of Gloversville alone were 14 errors; in Plattsburgh's, 19. A score of sections were wrongly numbered, one House was dropped from the enacting clause of one chapter, and such words as "alary," "pept," "docters" and "temini" (salary, peptic, doctors, termini) were too numerous to be recapitulated. These are just plain, ordinary blunders, but some others disclose Handy Andy qualities resembling genius. Acts to amend acts are well nigh a majority of all, but only in a few cases are the latter acts amendatory of laws which have been repealed. One case is known where the act amends an act to amend an act which last act was repealed. It is by no means an infrequent diversion to renumber a statute and then proceed to amend by the original numbers. What shall be made of such hodge-podge? And there are forty-three State Legislatures besides New York's and Congress. Surely the abundance and badness of our laws amply offset the foreigner's jibe that the Americans had forty religions but only a single soup.

* Adjudicated in *Field v. Clark*, 143 U. S. 649. The Supreme Court here held that that act was law which was attested by the signatures of the President of the Senate and the Speaker of the House, approved by the President, and deposited in the Department of State; that the journal of neither house could be introduced to vary an act so authenticated (see editorial).—Eds.

The indictment is not yet complete. Such blunders are merely facetiæ. The crimes are naturally less notorious, though it may be doubted whether they are less frequent. An example of two must suffice. The citizens of Jersey City were recently summoned by a legal advertisement to vote upon a charter, which provided—among other things—for a non-partisan tax board. But in the engrossed act, which alone is the law, there is no such provision. Is it to be doubted that it once was there, and is it creditable that it was omitted by accident? Again, the New Jersey railroads proposed for passage a law giving them omnipotent powers of condemnation; they could even take a street longitudinally according to this law. One honest man was watching to defeat it, when, to his amazement, he learned that it had passed unanimously—42 ayes; noes, none. Such was the printed record, but in the manuscript record of the clerk there was no such entry. The inquiry being pressed, it was learned that the bill was not moved by its introducer, but by the Speaker from the floor. He was so skillful that some members supposed they were voting for an amendment of no significance, while others were not aware that the bill was before the House. To speak of such traitorous legislation as “representative” is an abuse of language.

These are merely samples of a great and growing evil. *Ex pede Herculem*. If any one doubts that the case is serious and calls for strong and quick remedies, he should pursue the topic in the papers of Francis Wayland, before the Social Science Association, of David Dudley Field before the New York Bar Association, and of Simon Sterne before the the American Bar Association. There can be found convincing precision and ample detail suited for the legal profession, but which must be taken for granted here. Each has a remedy which deserves approval, even though all together leave something to be said. Mr. Field, for instance, casually makes the unique suggestion that bills should not be engrossed, at least compulsorily. He does not support by argument an idea which will seem heretical and impracticable to many; but there is reason in support of it. The truth is, engrossing, like sealing, is a legal fetich, an anachronous survival of an unlettered age. Because men were chosen to enact laws who could not write them, it was necessary to copy them out in a fair hand. There was no other way. And because, being written, not one-quarter of the legislators could read them, they were read thrice by the clerk before passage. In our times the readings are retained in form (though not in fact) and serve to mark increasing stages of maturity toward final passage. Thus the reading custom still has its

uses. But what use is served by engrossing which is not better served by printing, "engrossing by machinery," as has been held by one Lieutenant Governor? Even good engrossers are subject to human frailties, and it is violating no confidence to say that good engrossers are not always found. Not to put too fine a point on it, the engrossed laws of New York, as filed for perpetual evidence in the State archives, are disgraceful proof that in scholarship and handwriting, some, at least, of the engrossers were not the equals of schoolboys. But, waiving this, engrossed writings are liable to vary from the original in any letter, and can only be verified by much greater precaution than is necessary in the case of print. Thus, old laws were written like telegrams, without paragraphing or punctuation or numerals, so that it was artificially difficult to drop or insert anything, and correspondingly difficult for the reader. This was such a nuisance that nowadays laws are engrossed like well-edited "copy." But it is idle any longer to speak of the security of engrossing against falsification. There are sundry cases of "accidental" variations bearing the appearance of profitable design, but there is one flagrant case worth, for the present purpose, all the others put together. In Alabama, three words were left out of a statute, the omission being so important and under such circumstances that an extra session seemed necessary. Whereupon, the honorable chairmen of several committees, with the assent of the governor, erased three lines and rewrote them with the insertion, all being nicely spaced. If that could be done, what could not be? The point is, skillful alteration of manuscript leaves no trace. Print cannot be altered so easily and secretly; and, if altered, unnumbered "proofs" exist by which to trace and detect the alteration. To be sure, it takes a little time to "set" print; but so does it take time to engross; and as yet nobody has suggested the abandonment of engrossing in favor of enacting by stenography. The delay of printing need be no more than is wholesome; and certainly the enactment of a printed law, amended in an authorized hand, and properly certified by presiding officers, ought to meet every reasonable demand, for facility and security of legislation. That it would do much to amend errors of form, and increase the authenticity of enactment, is beyond question.*

The suggestions of Messrs. Sterne and Wayland are more sweeping. The substance of their criticism is that legislation

*Since this was written, action in the direction suggested, at Albany and Washington, emphasizes an example for other capitols.

now is like an *ex parte* legal proceeding, the opposition not being represented. No responsibility now attaches to the presentation of a law. Even the formality of an honorable member rising in his place in open session was burdensome in New York, and now, in that State, it is as easy to introduce a bill as to post a letter, the methods being the same. The result is, bills are introduced by scores, hundreds, thousands. Suppose they were all enacted! But how shall the flood be dammed without abridging that freedom of petition which is dear as Magna Charta, that thoroughly forgotten screed which protects the liberties even of those ignorant of its existence. In Knickerbocker's veracious history of New York, there is a hint: "* * * Harondas, the Locrian legislator, anxious to preserve the judicial code of the State from the additions and amendments of country members and seekers of popularity, ordained, that whoever proposed a new law should do so with a halter about his neck—whereby, in case his proposition were rejected, they just hung him up, and there the matter ended. The effect was, that for more than two hundred years there was but one trifling addition to the judicial code, and legal matters were so simple that the whole race of lawyers starved to death for want of employment. The Locrians, too, being freed from all incitement to litigation, lived very lovingly together, and were so happy a people that they make scarce any figure in history." But this is a counsel to perfection, and rather a taunt to our unhappy state than practicable advice. There is every reason to believe that the gentlemen at the capitols could not be led to enact anything resembling that. And, after all, the introduction of floods of foolish bills (one before the New York legislature forbade the employment of redhaired female base-ball players) signifies little beyond the cost of printing them. But what fair objection can be urged to assimilating the enactment of law to the administration of law, according to prescribed procedure regarding notice to all parties, with an interval for preparation, and public argument at stated times; and finally with penalty of costs (instead of a halter) for the loser? It is not forgotten that there is theoretically something resembling this in the present practice. But in the theory much is left to be desired, and in practice everything. In theory, the committees to which bills are referred, act semi-judicially, after hearings something like arguments in court. But, in fact, the committees are packed courts, being customarily made up to do certain things in rough proportion as such things are either important or bad, and committee hearings are almost farcical as measures to expose jobs and protect public interest. Persons

concerned, learn of hearings at their own risk and peril, there being no special or public citation; and in proportion as the proposed law is objectionable, it is likely that the bill will be reported without any fuss being made about it. Perhaps the chairman will simply take it on himself to make an unauthorized report, or a report authorized verbally by his personal or party friends, who know better than to oppose him, or make outcry, if they want anything done for them. When bills are passed one day and "amended" the next; or passed and amended the same day; or passed twice in the same session; or repealed twice; or enacted in such hasty phraseology that sense cannot be read into it, and the nonsense reënacted as a "revision"—when such things, which are not feats of fancy, happen in the ordinary course, what is it not possible for bad and able lobbyists to legislate, without anybody being the wiser until all is over but suffering the effects? A suitor in the courts is lucky to get final judgment in a year or two. That is too long, but it is better than to get, or risk getting, injustice in five minutes. Bentham, in his mechanics of legislation, suggests that the disturbance of the settled state of affairs should wait three months, and that the burden of making out the case for the change should be thrown on the proposer. Just as a man is taken to be innocent until proven guilty, so ought whatever is to continue—all being adjusted to it—until every objection is answered.

This proposal to assimilate the forms of legislation to the forms which safeguard justice carries with it another idea—that there should be a public officer charged with seeing that legislation is effective in the direction and to the extent intended, and not otherwise in direction or degree. The jury does not frame the indictment, nor the sentence under the indictment. The substance is left to the jury's verdict, but the forms are intrusted to skillful, disinterested officers. It is a saying that a man who is his own lawyer has a fool for a client. But although it is equally difficult—probably more difficult—to make good laws than to practice law, the legislative grist is ground out merrily on the theory that the art of legislation is intuitional. There never was a greater mistake. A new statute is not like a pebble dropped into water; it is like a salt or a stain, and becomes an undivided part of the mass of existing law into which it is thrust. Not to deal in abstractions—take the specific case of recently attempted legislation to forbid aliens to own land in the United States. The draftsman of the bill in Texas gave it this title: "An act to amend title 3, articles 9 and 10, and to add articles 10 *a*, 10 *b*, 10 *c*, 10 *d*, 10 *e*, 10 *f*, 10 *h*, 10 *j*, and to repeal all laws in conflict therewith." It is

apparent instantly, upon inspection, that no one can tell the object of the bill from its title, which would be equally applicable even to a similarly numbered statute of any other State than Texas. If the gentleman who drew that bill had had legal training, he would have recalled the famous, or rather infamous, Yazoo act of Georgia, which, under a title relating to payment of troops, corruptly granted immense areas of public land. Since then, it is a common provision of State constitutions that a law shall only do what it purports to do according to its title; and so it is in Texas. That a man should assume to draft a bill disturbing the title to principalities of real estate, and unsettling loans which it would have embarrassed Monte Cristo to pay, is,—well, it is unnecessary to characterize it; the courts promptly set the law aside. And the people, in whose name the law was enacted, built bonfires to celebrate the return of banished prosperity. In Illinois, another defender of the people tried to do exactly the same thing; and the courts invalidated the law because it violated a foreign treaty. Could the man who drew the Illinois law have known anything about the treaty, or even about the United States constitution? If not, what wicked folly to put into his hands as a plaything, or as a weapon, such a deadly tool as the power to legislate. Of course, there are objections to having a skilled and official draftsman. For instance, when Boss McKane wanted power to expend the large part of a million dollars, being surplus money in the treasury of Gravesend, he extorted the law from a hostile governor and a duped legislature, by leading them to believe that the measure was a "little local bill" applying to the case of Rondout. Imagine the Boss laying his soul bare to an official draftsman and explaining the job he wanted done, and how to do it.

These suggestions are excellent so far as they go. They would do much to lessen selfish and corrupt law-making, and would diminish blunders of accident or carelessness. But they do not touch the canker at the heart of representative government. In theory, representative government is "of the people, by the people, and for the people." In fact, the people do the voting and the bosses do the rest. They would not be human if they were—as a class—more altruistic than is necessary. Who ever heard of a professional politician, from alderman to senator, who, in these later days, preferred public benefit to his personal advantage. It is unnecessary to argue the point, because the signs that the people distrust their governmental agents are too abundant to be contested or overlooked. The mandate to legislate is being withdrawn and restricted in every direction. Delaware, alone, now permits

amendment of its constitution without a popular vote. In every other State the organic law can be altered only by appeal to the highest and ultimate source of the power, the suffrage of the governed. And nothing is more striking in these modern renewals of the social contract than the extent to which they take power from the legislatures, by forbidding them to act upon certain topics, or by declaring that certain laws shall become effective only after submission to election. The most conspicuous instance is that of the liquor traffic. But there are scores of instances where legislatures are forbidden to do things once peculiarly within their province, viz. : incurring debts, or levying taxes, or locating State capitols, or county seats. So far as these cases go, they mark the recrudescence of democracy, and a growth away from representative government. And it is most wholesome that a voter should feel that when he votes he governs. When a resident of a city votes for an alderman, it is commonly the case that the casting of the vote bears faint relation to the government of the city—the city's charter is made and amended in the legislature—of which the city legislators are a minority. And when the vote is cast for a legislator, there is greater remoteness between cause and effect.

No elections are so earnestly or intelligently conducted as those which tend directly to the establishment of a school, or the granting or withholding of liquor licenses, or ordering a public improvement, such as rapid transit in New York City. It is a return to the methods of the New England town meeting, where the voters command themselves and forbid themselves. Thus in truth the people govern, and do not surrender their sovereignty to agents, who, experience has shown, are not to be trusted when they cannot be watched. Steam, electricity and printing, have begun a peaceful revolution whose extent is not generally appreciated and whose possibilities are Utopian. Cities, States, or even the nation, can now vote as intelligently on any proposal, as the townsmen who gather within reach of a speaker's voice, or as the citizens who enact laws by voting them in the cantons of Switzerland. It is possible to cheaply bribe votes for legislators, because the worth of the vote is not perceived; and it is possible to bribe or corrupt those in the "business" of alderman or law-maker, because they are few, and "it is their nature to." But bribery of voters regarding paving streets, or increasing taxes, or issuing bonds, is another matter. Some citizens may be bought, or coaxed, or threatened—but only very rarely would the balance of power be such that an election upon such questions could be decided corruptly.

It will at once be objected that sad would be the fate of communities rendered over to Tammany rings. But is not the fate of such communities sad now? sad enough in fact to support the argument that legislation by voters can hardly be worse than legislation by agents of voters. Indirect legislation has proven as burdensome and deceptive as indirect taxation. More direct legislation, legislation more directly by the voters, is the interpretation of the growing cry for Home Rule. That the people do not rule in fact, is the true reason why so large a proportion go fishing on election day, and why so many meritorious reform movements fail. To exalt the citizen at the expense of the legislator, by restoring to the voter powers and functions rightly his and liable to abuse when exercised at arm's length and by the hand of another; to abolish the lobby and to dethrone the caucus, which taint and usurp delegated powers; to import into politics new meaning, a meaning material and selfish perhaps, but certainly preferable to partisan triumphs—these are the intents and virtues of democracy as distinguished from representative government.

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