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Editorials

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EDITORIAL NOTES.

MR. SPEAKER:

Face to face with the beginning of another biennial cycle we see the legislature of Kentucky assembling at the capitol of the State. It may be safely assumed that no State in the Union can boast of a higher order of men in its lawmaking body than those
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who will sit at Frankfort during the next two months. We are asking ourselves the question: What will they accomplish for Kentucky?

In the past we have had too much personal politics, too much factionalism and too much narrow partisanship. We have had too little thinking, too little work and too little constructive service. In a nutshell, politics to the exclusion of business has become the bane of Kentucky. We do not mean politics in the sense in which John Adams termed it a "divine science," but rather that brand which prompted the late Jim Mulligan to pen the last line of his famous poem. We have seen legislatures composed in the main of capable and honorable citizens assemble under propitious stars, only to degenerate into a carnival of legislative miscellany resembling a two-ring circus. Past history has forced a large majority of our thinking people who have no axes to grind, and are not lured by the aroma of the pie counter, to distrust their legislators, and to look with favor upon no legislative act except a motion to adjourn. This attitude on the part of business men generally caused a distinguished Kentuckian to say of a session of our General Assembly that when final adjournment took place the galleries arose and sang: "Praise God From Whom All Blessings Flow."

An insuperable obstacle to constructive work by our legislature has been what Jefferson deprecated as the "mania for over-governing." Men arrive at Frankfort nursing the vagary that they are destined to save the country, and, returning to their admiring constituents, garner fresh laurels in the arena of partisan politics. Pursuing that fantasy they proceed to cover the clerk's desk with "pet measures" of their own. In statutes they seek a cure for every ill, a panacea for every evil.

George Sutherland, of Utah, late President of the American Bar Association, recently said:

"Under our form of government the will of the people is supreme. We seem to have become intoxicated with the plenitude of our power, or fearful that it will disappear if we do not constantly use it, and, inasmuch as our will can be exercised authori-
tatively only through some form of law, whenever we become dissatisfied with anything, we enact a statute on the subject.

"If, therefore, I were asked to name the characteristic which more than any other distinguishes our present-day political institutions, I am not sure that I should not answer, "The passion for making laws." There are 48 small or moderate-sized legislative bodies in the United States engaged a good deal of the time and one very large National legislature working overtime at this amiable occupation, their combined output being not far from 15,000 statutes each year. The prevailing obsession seems to be that statutes, like the crops, enrich the country in proportion to their volume. Unfortunately for this notion, however, the average legislator does not always know what he is sowing and the harvest which frequently results is made up of strange and unexpected plants whose appearance is as astonishing to the legislator, as it is disconcerting to his constituents."

Closely akin to—and rendering more dangerous—this legislative cure-all craze is the tyranny of an unrestrained majority grown intolerant of a helpless minority. With a propensity for crystallizing every popular whim into law and at the same time intolerant of the opinions of other men the legislative majority, become a capricious monster, is the worst menace to a free State.

De Tocqueville said:

"If ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majority."

In the Federalist, No. 51, Hamilton voiced the same fear. And so did Madison, the Father of the Constitution, as recorded in Annals of Congress, vol. 1, pages 454-5. The last word on this point was expressed by Jefferson in a letter to Madison, as follows:

"The executive power in our government is not the only, perhaps not even the principal object of my solicitude. The tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come."

Louis XIV said: "I am the State." Under our constitutional system the people are the State; and a legislative majority consti-
tutes a *de facto* sovereign for two years at least. When this hydra-head of sovereignty arrogates to itself the power claimed by Louis XIV; applies to itself the old maxim of English law, "The king can do no wrong;" then, manifests its power in a profusion of statutes, it is high time for the individual citizen to shake himself and remember that "Eternal vigilance is the price of liberty."

Not only does our legislative practice make our statute books a crazy-quilt of nondescript laws, and too often establish the absolutism of a majority, but many sorely needed laws are lost or destroyed in the legislative mill. With so many bills introduced, the orders of the day soon become hopelessly congested. This is followed by logrolling, jockeying for position, and every scheme of parliamentary chicanery and political leger-de-main that men or devils can contrive. The result is that little progress can be made until the last few days of the session, and then meritorious measures are slaughtered in the hurly-burly of the closing hours. For example, in 1916 that was the sad fate of the bill to raise the standard for admission to the bar, although it had passed the Senate with only four votes recorded against it, and would have had no serious opposition in the House. We could cite countless similar examples.

We are not cynical like Thomas Carlyle, who, it is claimed, said that the only acts of Parliament entitled to commendation were those by which previous acts were repealed. We are not a blind disciple of Humboldt, Mill or Herbert Spencer, or an adherent to the extreme doctrines of *laissez-faire*, but we have long believed that there is a lot of common sense in the homely philosophy of the darkey who said to his white neighbor, a candidate for the legislature, "We've got enough laws now, if you'll jes' put 'em in circulation." Indeed, we may not inappropriately paraphrase a hoary maxim of law, and say: Sound public policy abhors an inordinate multiplicity of statutes.

The Kentucky Law Journal, as a publication, has no politics, and is not concerned with the rise or fall of the political fortunes of any man or set of men. Its editor has no irons in the political fire, and bends to the yoke of no faction. These columns have been
dedicated to the bench and bar of this Commonwealth. In her century and a quarter of statehood, Kentucky has had no class of citizens more devoted to the public service and more consecrated to the preservation of liberty and democracy unsullied and unimpaired than the men who have dignified her judiciary and adorned her forum. The muse of Kentucky history will ever guard the names of such lawyers as John Breckinridge, Ben Hardin, John Rowan, Charles Wickliffe, Henry Clay, Thomas F. Marshall, Richard Menifee, Madison C. Johnson, John Boyle, James Harlan, John J. Crittenden, John B. Huston, Joseph Underwood, Elijah Hise, George Robertson, John M. Harlan and a legion of others. In names like these old Kentucky's grandeur lies. And it is in behalf of the successors of these men—the lawyers of today who have at heart the general welfare and would elevate the ideals of public service—that we appeal for the present legislature to lay aside petty personal politics and to devote their session to constructive service for our State.

A session of the Kentucky legislature—judging by the past—may be aptly likened to a voyage on a tempestuous sea. Those legislative mariners who would keep the Ship of State in safe waters can find no better chart than the political philosophy of Thomas Jefferson. De Tocqueville pronounced him "the most powerful advocate democracy has ever sent forth." Jefferson said: "I am not a friend to a very energetic government. It is always oppressive." His sage philosophy found terse, cogent expression in the familiar aphorism, "That government is best which governs least."—V. C.

RAILROAD PRESIDENT MUST ANSWER QUESTIONS OF I. C. C.

The power to regulate interstate commerce was granted to Congress by Article 1, Section 8, sub-section 3, of the Federal Constitution, but was virtually a dead letter until the Act of Congress to Regulate Commerce was approved February 4, 1887. This act and its subsequent amendments have given to the Interstate Commerce
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Commission almost unlimited authority in the regulation of common carriers doing an interstate business. By legislative enactment and judicial decisions the power of the Commission has been established to supervise and investigate all the activities of carriers, even their accounts, vouchers and expenditures being subject to the minutest scrutiny and their occult activities the legitimate object of governmental inquisition.

The railroads, incorporated under State laws, are quasi-public corporations. Their calling is said to be affected with a public interest. They are public servants and all the people have a more or less direct interest in the conduct of their affairs. The Supreme Court recently approved the following statement of the Interstate Commerce Commission: "There can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce." Therefore, public policy demanded the extension which has been made of the power of the Commission to regulate and investigate the affairs of carriers as public agents.

In response to a subpoena the president of the Louisville and Nashville Railroad Company testified at a hearing of the Interstate Commerce Commission May 4, 1916. Various questions were addressed to him concerning the matter of campaign contributions and political activities on the part of his road. He was asked if the L. & N. Railroad Co. had given money for campaign purposes and for the suppression of competition and charged the amounts on the company's books to operating, construction or legal expenses. These questions the president, on advice of counsel, refused to answer. In the case of *M. H. Smith v. Interstate Commerce Commission*, U. S. Adv. Ops. 1917, page 47, Mr. Justice McKenna delivered the opinion of the court, affirming the decision of the Supreme Court of the District of Columbia requiring Mr. Smith to answer the questions at issue. The public interest demanding consideration at all times, "the Commission must have power to prevent evasion of its orders, and detect in any formal compliance or in the assignment of expenses a 'possible concealment of forbidden practices.'"

The decision above mentioned does not purport to forbid a railroad company's attempting by legitimate advertising "to mold or
enlighten public opinion." But in order to guard against possible abuses it seems to be incontrovertibly sound public policy that the railroads' "conduct and the expenditures of their funds are open to inquiry." The learned justice ably said: "If it may not rest inactive and suffer injustice, it may not, on the other hand, use its funds and its power in opposition to the policies of government . . . . The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any way affect their relation to the public."—V. C.

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THE LAW OF TREASON.*

Prosecutions for treason have been few for many years and the very name has lain dormant for half a century or more until resurrected by recent events. As the crime is the highest known to the law and always tends powerfully to excite and agitate the popular mind, the framers of the Constitution deemed it safest to define and limit the offense in the fundamental document itself (Art. III, Sec. 3):

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

The terms here used were borrowed mainly from the famous statute passed in the reign of Edward III (1352) on account of the multitude of treasons that had arisen by arbitrary judicial construction at the instigation of the crown under the ancient common law. The language of the statute was weighed, interpreted and glossed by successive generations of English judges and commentators and the meaning well settled at the time the Constitution was adopted.

The question of what constitutes "levying war" against the United States came up in the Supreme Court for the first time on a mo-

*Herbert A. Howell in Law Notes.
tion for writs of certiorari to review the proceedings of the Circuit
Court in Ex parte Bollman and Swartwout (1807, 2 Curtis [U. S.] 23),
emissaries of Aaron Burr in his alleged treasonable plans. Speak-
ing through Chief Justice Marshall the court held that to complete
the crime of levying war there must be an actual assemblage of men
for the purpose of effecting by force a treasonable design, but that all
those who perform any part, however minute, or however remote from
the scene of action, and who are actually leagued in the general con-
spiracy, are to be considered as traitors. In the case before the court,
a design to overturn the federal government in New Orleans by force
would unquestionably have been a design which, if carried into ex-
ecution, would have amounted to treason, but no mere consultation or
conspiracy for this object, no enlisting of men uncombined with an
attempt to effect it, would be an act of levying war. Some actual force
or violence must be used in pursuance of the design, though the
quantum of force is immaterial. There need not be military array or
weapons; numbers alone may supply the requisite force. These prin-
ciples were shortly afterwards discussed at large and reaffirmed
by the Chief Justice sitting on circuit in the trial of Aaron Burr (25 Fed. Cas.
No. 14,693), and his language has become crystallized in the general
law on this branch of the subject.

But levying war is not only war for the purpose of entirely over-
throwing the government. It includes as well an assembling of men act-
ing in forcible opposition to any law of the United States pursuant to
a common design to prevent the execution of that law in all cases or any
case within their reach, under any pretense of its being unequal,
burdensome, oppressive, or unconstitutional (Case of Fries, 9 Fed.
Cas. No. 5,127). It is not enough if the intention be merely to defeat
the operation of the law in a particular instance, or through the agency
of a particular officer, for some private or personal motive; the
object of the resistance must be of a public and general character (U.
S. v. Hoxie, 26 Fed. Cas. No. 15,407). On the other hand, if the object
be to prevent the execution of one or more of the laws of a particular
state, but without any intention to intermeddle with the relations of
that state with national government or to displace the national laws or
sovereignty therein, that is treason against the state only (Story, J.,
What constitutes an "over act" under the second branch of the
definition, namely, giving aid and comfort (adhering) to the enemy, is
more difficult. The question will necessarily depend very much upon
the facts and circumstances of each particular case, but obviously the
act must always be of a character susceptible of clear proof and not
resting in mere inference, conjecture or suspicion. In general, it has
been held that when war exists any act clearly indicating a want of loy-
alty to the government, and sympathy with its enemies, and which by
fair construction is directly in furtherance of their hostile designs, ren-
ders them aid and comfort; or if this be the natural consequence of the
act, if successful, it is treasonable in its character (Leavitt, J., Charge,
30 Fed. Cas. No. 18,272). Every act which in regard to a domestic
rebellion would make the party guilty of levying war would in re-
gard to a foreign power with which the United States is at war consti-
tute "adhering to their enemies" (U. S. v. Greathouse, 26 Fed. Cas.
No. 15,254.)

Some acts leave little or no room for doubt, such as the com-
munication of intelligence to the enemy by letter, telegraph or other-
wise, relating to the strength, movements or position of the army;
furnishing arms, troops, munitions, etc., and sending money and pro-
visions, or obtaining credits, all with intent to aid the enemy in his
acts of hostility (Nelson, J., Charge, 30 Fed. Cas. No. 18,271). The
destruction of munitions and supplies designed for the army in the
field would seem unquestionably to belong to the same category, for
the aid is none the less effectual that it is indirect. War is necessarily
a trial of strength between the belligerents, and whatever weakens one
gives corresponding advantage to the other. It makes no difference
whether or not the enterprise commenced shall be successful and
actually render assistance. The bare sending of intelligence, for ex-
ample, which is usually the most valuable aid that can be given, will
make a man a traitor even though the intelligence should happen to
be intercepted; for the party in sending it did all he could; the treason
was complete on his part though it had not the effect he intended
(U. S. v. Greathouse, supra).

Mere expressions of opinion, however, indicative of sympathy with
the public, enemy will not in themselves constitute an overt act,
although when uttered in relation to an act which, if committed with
a treasonable design, might amount to such overt act, they are admissible as evidence tending to characterize it and to show the intent with which the act was committed; and they may also furnish some evidence of the act itself against the accused. But this is the extent to which such publications or utterances may be used either in finding a bill of indictment or on the trial of it (Nelson, J., supra). So also felonious attempts being essential, it is competent to show that some time before the event facts had occurred and rumors were prevalent in the neighborhood which would explain certain particulars relied on to show a treasonable intent and make the accused show a different one (U. S. v. Hanway, 26 Fed. Cas. No. 15,299).

In treason there are no accessories. All persons who counsel and incite others to subvert the government or resist the law by force, or to give aid and comfort to the enemy, are in contemplation of law principals, although they may not themselves directly participate or be actually present at the immediate scene of violence; for successfully to instigate treason is to commit it (Ex parte Bollman and Case of Fries, supra). No plea of compulsion will excuse a treasonable act unless it were done under an immediate and well-founded fear of death or grievous bodily harm. Mere apprehension of any loss of property, or of slight or remote injury to the person, is not enough (U. S. v. Vigol, 28 Fed. Cas. No. 16,621).

In legislating on the subject Congress has provided that “Whoever, owing allegiance to the United States, levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason,” punishable by death or, at the discretion of the court, by imprisonment for not less than five years coupled with a fine of not less than ten thousand dollars and incapacity to hold any office under the United States (Fed. Crim. Code, secs. 1 and 2). The words “owing allegiance to the United States” are here entirely surplusage and do not in the slightest degree affect the sense of the section (U. S. v. Wiltberger, 4 Curtis [U. S.] 574). for treason is a breach of allegiance and it is well settled that every resident or sojourner within the United States, as well as every citizen, owes to the government a local allegiance, permanent or temporary, sufficient to subject him to the penalties of treason.

In conclusion, it should be noted that Congress has also defined and penalized misprision of treason, or the bare knowledge and concealment of treason in others, without any degree of assent thereto (Code, sec. 3), thus accentuating the plain duty of everyone to expose treason and bring traitors to justice.

DUTY OF THE BAR

Every member of the Bar who would uphold the standard of justice, advance the science of jurisprudence and temper the juridical sword in Kentucky, is urged to lay his personal affairs aside for a little while and communicate with his Representative and Senator, asking their support of the bill that will be advocated before the legislature by the Bar Association’s Committee on Legal Education and Admission to the Bar. (It is Senate Bill No. 43, introduced by Senator M. C. Swinford, of Cynthiana). The lawyers of Kentucky should awake from their lethargy in this matter and emulate the laudable and victorious efforts of the medical profession in recent years. We should not permit private business or personal politics to interfere with the performance of this, our imperative duty. If this needed legislation is not agitated and supported by the reputable members of the Bar we certainly can not hope for its successful championship by members of other professions. The call, therefore, is to the members of the Bar, that we gird our armor on, and (paraphrasing Grant’s famous statement) win this fight if it takes all winter.—V. C.