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CHASE HARDING*

David A. Simmons, then president of the American Bar Association, delivered at the Cincinnati meeting in 1945 a notable address, under the title "The Supremacy of Law". Simmons is a thinker. He also is a doer. In efficient administration and high service he has rarely, if ever, been equalled in the history of the Association.

He points out that in the search for scientific truths man only *discovers* laws. He does not create them. When discovered, they are found to be perfect, to be certain, to be without exception and universal in application.

Not so man-made law, he says. Man has not been content to discover, but has assumed the function of creating. And at best his work had been far from perfect. Man, born in a world of order, lives in confusion. We have failed to apply even the first lesson of natural law: To be supreme, the law must be certain; much less the second: To be usable, the law must be understood.

Our laws, then, to avail these requirements must be simple; and to be simple they must be brief.

By the old adage "Brevity is the soul of wit". And the word "wit" at that time meant "wisdom".

Does our aggregate statutory law, federal and state, meet these requirements? Far from it.

In my remarks here, I am not taking to task any political party. Each of the major parties, and predecessor parties throughout our history, have sinned exceedingly in

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swapping principle for expediency. And, no doubt, always will. And we concede that a democracy must always freely have the right to make honest and wholesome laws to effect liberty under law for all—for all alike. But I am not happy with costly present day experimentation with ideologies, whether imported or hallucinated domestically; especially those luring us to the false paradise of Easy Street. I am terribly in earnest in urging that our Ship of State be steered always by the pole star of Natural law, Simple law, Brief law, *Understandable* law—one law for all!

And therein the role of the lawmaker is that of the discoverer, . . . the man of research in the history of man. And I am prone always to cite the motto of Kettering, the great engineer of industry, "When you find it, it will be simple".

Certain it is that our statutory law—including that produced by farming out law-making to the executive, bureaus, boards and administrative agencies—is no longer brief; no longer simple; no longer clear; no longer understandable.

Within the last few years our mass of legislation, both federal and state, has mushroomed into the tangle of an unending jungle of language.

In something more than a decade our federal statutory factory has mass-produced some 5,000 new laws (more, it is said, than had been enacted in the hundred and fifty years of our prior history); 10,000 Presidential Directives; and untold thousands of administrative bureau rules, regulations, and interpretations—all having the force of law.

Out state enactments follow pretty much the same pattern. The revised statutes of 1881 required some 1600 pages. The present compilation of 1933, and the supplementary additions require some 17,000. Language, more language, and language upon language. Federally, they are even raping the alphabet! Our biennial statutory volume has increased from a normal of some seven to nine hundred pages back of 1933, to approximately 2,000 pages in the last two-volume edition of 1945. Our enactments in a little over a decade add 12,000 pages to our combined statutes.

The process of amendment, almost without exception, instead of reducing and simplifying a statute, adds greatly to its length; and by amplification of language piles confusion upon confusion.

We can all remember when federal enactments, parti-

cularly, were models of brevity, simplicity, and clarity. They were undoubtedly prepared by experts in grammar and phraseology. The draftsmen were aware of the principles of the great common law, and the architecture of the statutes followed classic lines. That has been sorely departed from.

Sir Norman Angell, a Nobel prize winner, gives us the rule "BE SIMPLE". He says,

"Our most threatening enemy is not the evil intention of the ordinary man. . . A worse danger is the increasing confusion of our time. And we who teach and write books create perhaps as much confusion as we dispel."

He instances an occurrence in a German university where a student said,

"My professor is a very learned man. Very learned. So learned that in ten minutes he can make the simplest matter incomprehensible. With him, therefore, the more I learn the less I understand. I think that in Germany, learning is becoming the enemy of wisdom."

This was some years prior to World War II, and the words proved prophetic. He then comments,

"At Gettysburg two men spoke. One was a great scholar, who talked with great learning at length. His words are forgotten. The other was a man whose reading had gone little beyond Blackstone and the Bible. He spoke only a very few words. They have become immortal."

Continuing, he says,

"There is a secret here, greater than that of the atom, which mankind has not yet discovered; How, out of complexity, to distill simplicity; out of knowledge, essential understanding; out of confusion, clarity. Upon its discovery will depend the survival of all humane and free society."

Lo! The wisdom of the wise old owl who lived in the oak. The more he knew, the less he spoke. The owl was not obfuscated with the minutiae of scholarship.

As an example of the confusion, present and increasing, in our state statutory law, take the field of municipal projects, improvements, etc., and the issue of bonds involved. We find upwards of a hundred separate enactments for such purposes—state, county, city, township—and their agencies. The fundamentals of the proceedings and bond issues are standard.

The present statutes duplicate and overlap no end. Unnecessarily, they are as varied in the details of their processes as the framers can invent, whether by ingenuity or ignorance. There can be no sane reason, for instance, why in a proceeding in say five different cities of 10,000, 25,000, 50,000, 75,000, and 100,000, there should be five or several times five duplicating statutes for the same thing. Especially, as cities have the habit of growing beyond these limits. One plain, simple, clear statute covering the essentials of proceedings and consequent municipal issues could be enacted, wiping out several hundred superfluous pages.

It is so in many other divisions of our state government. School laws and those covering the field of education, some extending back a hundred years and extensively archaic, cover over 650 pages. This is in addition to provisions in other acts affecting the educational program. Many of these laws are chaotic; many are duplicating, confusing, and even contradictory. Laws under the code heads of Municipal Corporations now require 1400 pages; Railroad and Public Utilities, 500; Elections, 250; County Government, 450. Our Corporation and Financial Institutions Acts, taking up several hundred pages, have been codified in recent years. They are unnecessarily extended and duplicating, and amendments since 1933 already aggregate several hundred pages.

Much of this spawns from the yen of humankind to regulate, to boss the job. The land is full of zealous Absaloms, yearning to dispense *personal* justice to every man. It is the extreme and extensive over-regulation in the present time that threatens to break down the entire legal system. Your human rebels. Solon was asked if he thought the laws he had prepared for the Greeks were in all things the best for them. His answer was, "Yes, indeed, the very best—that they could endure." The American will not endure beyond a certain stage; and his reaction is likely to wipe out much that is good. Already it is a common remark on the streets that we ought to repeal two-thirds of our laws. If we credit the newspapers, there are now upwards of 3,000,000 federal employees engaged in regulating us. The number is constantly growing—this in spite of the closing of the war, which brought on its hundreds of thousands of presumably necessary regulators. The grief of regulation is that one regulation begets innumerable more to implement

and enforce the regulation. The newspapers recently instance one statute or ukase anent which there have been issued so far over 8,000 rules, interpretations and directives. But to query how many twists and constructions there are or can be to a given law or promulgation, is as idle as the ancient clerical controversy as to how many angels could stand on the point of a pin.

The prevailing threat to our laws—and the prevailing butchery (I am quoting here in substance a recent editorial)—is that boards and bureaus and administrators assume the right to interpret the laws made by Congress in a manner suited to their own ideological zeal, thus changing the intent and substance of the law itself. They are making new laws, regardless of their utter lack of authority to do so. The result is a new and confusing law, which is not the law intended by Congress. Not only this, but every possible bar to judicial review is attempted. We are without benefit of clergy. The careless or devious use of double language invites the crime.

This is well expressed in a recent protest by Mr. Lowell B. Mason, new member of the Federal Trade Commission. He says,

“The commission has cut off the facts of the case that do not fit in with the order, and it has stretched out the statute until it is no longer the law Congress passed, but becomes the law that the commission would like to enforce. It requires private policing of one man’s business by another. It freezes the avenues of trade to set patterns. It eliminates the profit for one type of distributor and guarantees the profit to another. It subjects branded goods to restrictions not applied to in-between enterprisers by opening a Pandora’s box of governmental directives on a minutiae of accounting and distributing practices that bear scant relation to what Congress sought to inhibit. I am against it.”

No one would contend that the umpire should have the right to change the rules in the middle of the game. This practice obtains more in the federal field than in our state. However, there is a growing tendency in Indiana to attempt authorization of rule-making—having the force of law—in the executive and in the various agencies and departments.

If our civilization is to continue, our legislators must realize that lawmaking is a science, the most important of all sciences in its effect on our daily welfare—on our very existence.

Man came up from the jungle. Might, and not law or right, was his reliance. He may in the dim antiquity have had a herd comity, common to all species. But he undoubtedly tired of the constant battle; and being an animal who could smile, a natural instinct to declare a truce started him on the road to law. Even as in the mythical story of how the wolf became a dog—swapping his struggle for a hard existence with the settler, and becoming the settler's protector and faithful attendant in return for the comforts of food and lodging. In its essence, this must have been the swap the primeval man made with him who had been his enemy—now to be his neighbor. The dog, typifying fidelity and devotion, has always kept his bargain. The human has not always been so dependable.

Regardless of this humble beginning of law, from the earliest records, back at least four thousand years before Christ, we find an organized society, and a developed system of law. First administered by the king, and then often wisely entrusted, especially law-making, to those subordinates learned, in the light of their times, in the mazes of the weary ways of men. Astonishingly, their laws approached in principle those prevailing today. Which demonstrates that natural law, becoming the common law, is the product of ages and ages—built up on the experiences of men living together. The great English common law has engrafted into it that which proved best in the legal systems of Egypt and Greece and Rome, and India and China, the Asiatic and European hinterlands, the church, and even the tribal rules of the savages and semi-civilized peoples of all time. The concentrated distillate of the rules of social conduct from the day of Adam. No doubt all the "isms" which plague us today have been attempted. Those which were tried and found wanting were cast out. And yet we now appear ever ready to fly to evils we know not of.

I am ready to concur in Jefferson's precept, that the land which is least governed, is best governed. A remarkable address by Lord Moulton, a distinguished English barrister, delivered during World War I in a national program to keep up the morale of his countrymen, entitled "Law and Manners", develops logically the principle that beyond the limited domain of necessary positive law much can best be left to manners.

Digressing, perhaps, from my theme, I heartily concur with Mr. Simmons in refuting the proposition that the Constitution is what the court says it is. If that be conceded, then we have no Constitution. A packed court, and there have been such more than once in our course of history, can wipe it out. There may be temporary periods of eclipse, but the Constitution of this country, being the powers delegated by the states and none other, is not to be wiped out by a faithless and subservient court. I cannot concede that truth will not ultimately prevail. The cry is for a Lord Coke, a Dr. Bonham, a village Hampden with his dauntless breast, a Hercules to clean the Augean stables.

Nor have I ever been able to take stock in the Decatur battle cry, "My country . . . right or wrong." My country cannot be wrong. There may be usurpers in the saddle pursuing a wrong course. But it is my business and yours to get it right. An honest nation is an aggregate of honest men. It cannot be otherwise.

No honest man, no honest nation, can assert the right to be wrong. This may be the stumbling block to the current efforts to achieve world-wide federation, world-wide peace.

Notre Dame in recent years has established enviable leadership in scientific research. It is gratifying to note its eminent Dr. Burton, outstanding in his accomplishments in chemistry and physics now in his public addresses evinces his grasp of concept and ability to translate these into the science of human relations in world wide betterment of law.

As a refreshing contrast to all this confusion, our Indiana law of descent, standing almost unchanged for nearly a hundred years, and our probate code, likewise modified only in minor procedural details, standing for three-fourths of a century, are the models of the world. Cited often for their excellence in many foreign countries, followed in various of the newer states, and, as we are informed, adopted almost without change in the Philippines when America took over. These statutes are a pattern pointing the way. It can be done.

What a Utopia it would be if our states could all have uniform, simple, clear, brief, and understandable statutory law; and procedurally what a legal heaven if we and all other states would adopt the simple federal rules of practice, both *nisi prius* and *appellate*.

What can we do about it? As far back as 1925 statutory provision was made for a legislative bureau. It was a one man establishment, the powers and duties meagerly prescribed as a small part of a statute creating the Indiana Library and Historical Department. The Bureau was to furnish assistance to the General Assembly in the preparation and drafting of bills, resolutions, and amendments; to gather statistical information. The director was to be ex-officio the revisor of the statutes; prepare between sessions codifications, revisions, and consolidations; all, however, only on the express direction of the Governor or General Assembly. The director was to be a graduate of a college or university of recognized standing, and to have had special training in constitutional and public law, statutory bill drafting, the principles of government, political science, and economics, and to be familiar with legislative reference work and the collection, compilation, and interpretation of statistics. What a man!

Presumably this bureau gave valuable assistance, but it did not allay the flood. In 1939 the legislature adopted a new act creating and establishing the Indiana Legislative Bureau as an entirely separate department. Its purposes as stated were much the same as the first act, with some elaboration; particularly enjoining the improvement in form and wording of statutes, classifying, reconciling and codifying their provisions, reducing their bulk and number and making them consistent and intelligible. This bureau was still not implemented with a commission, or substantial authority.

In 1945 a new act, chapter 88, was passed again establishing the bureau, stating the purposes substantially as in the 1939 act. This act created a commission to support the bureau. The enactment appears to fully implement the bureau to go places. Here is the opportunity, the invitation to the forgotten man crying in the wilderness for relief. This bureau, we are assured, will welcome every assistance.

Law improvement, like charity, should begin at home. Betterment of federal legislation and practice may presently be beyond our reach, but we may safely assume all interests in our home state are eager to enlist in a campaign to eliminate that which is useless and vicious in our legal system, and build a structure worthy of our state. Our example might well inoculate the federal regime.

The Bar certainly owes it to itself and the entire community to lend its full and vigorous aid, not in the attitude of telling the director or commission or the legislature what to do, but by furnishing to and through the bureau assistance and support, and even carefully prepared proposed enactments framed to bring about the desired betterment.

Naturally the legal profession, with its training and experience, would be calculated to take the lead, though not in the spirit of arrogating its precedence. There could well be, in effect, a congress of all interests. The medical association, the bankers' association, agriculture, labor, health, education, the press, industry, in fact all groups organized in wholesome public purposes should be induced to take part in a combined and sustained effort for the betterment of all our laws. Not with the idea of individual advantage to any group, but for the wholesome purpose of betterment to all. The goal should be one law for all, and all for one law. The lawyer does not need legislation for himself, nor does the doctor, nor the banker. So it is or should be with all other groups.

Let's turn again to Dave Simmons. He closes thus:

"If judicial law is uncertain, if administrative procedure is in confusion, if industrial relations have degenerated into warfare and international affairs into the anarchy of recurrent war, what is to be done about it?

What was done about the confusion, the frustration, and the incipient warfare between the Colonies which followed their successful War for Independence? They agreed upon a successful formula that guaranteed the supremacy of law. They raised standards to which the wise, the good and the honest might repair.

In the fields of law it is our responsibility to raise those standards, to see that they are just, to see that they are certain, to see that they are understood.

Let us be about the task."

Again, what can we do about it? Dean Wigmore in his splendid work "The Panorama of the World's Legal Systems" concludes with this observation:

"The rise and perpetuation of a legal system is dependent on the development and survival of a highly trained professional class."

The challenge is to the lawyer. Throughout our history in the final crisis he has met it. The faith of our fathers beckons.

Today we stand in the wreckage of war. War that is the result of the miscarriage of law. Benumbed in the dawning comprehension of the implications of staggering debt, world wide starvation, world wide hate, world wide destruction of the accumulations over centuries of resources and culture and progress and morale; with the howling wolves of chaos at our very doors! What next? Only again the stern command of the dauntless Genoese to his frightened crew near five hundred years ago, the rallying cry to America for all time: "Sail on, and on, and on, and on!"

We are all research men in the greatest of the sciences, the discovery of the law of men living together in harmony and happiness in the wholesome work of a peaceful world.

I want to close by quoting the remarks of a great scientist—possibly the greatest of all in his contribution to human welfare—Louis Pasteur. The occasion was a testimonial dinner given him at the Sorbonne on his seventieth birthday.

"Gentlemen. . . You bring me the greatest happiness that can be experienced by a man whose invincible belief is that science and peace will triumph over ignorance and war. . . Never permit the sadness of certain hours which pass over nations to discourage you. . . Have faith that in the long run the nations will learn to unite not for destruction but for cooperation, and that the future will belong not to the conquerors but to the saviors of mankind."

The lawyer's place is in the front rank of the saviors.