LAW REFORM

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This article falls into two distinct parts. First, there is the paper on "The Lawyer's Part in Law Reform" which, at the suggestion of the General Council of the Bar, I contributed to the Commonwealth and Empire Law Conference in London last July. This is reproduced substantially in the form in which it appeared, with only minor revisions. Secondly, at the invitation of the editor of this Review, I have ventured some comments on law reform in Canada, with special reference (inadequate though it is) to the other papers on law reform contributed to the conference, and to recent contributions to this Review. I need hardly add that these comments are made with the greatest diffidence, for I am lamentably ignorant of Canadian conditions, and must rely on what I have seen in print and on what I have been told by Canadian practitioners. But by segregating what I hope is a coherent picture of the English position in part I and what are at most intelligent guesses in part II, I hope that the material will be deployed before readers in a way that will help them to form their own opinions and, above all, to quicken their interest. For, quite simply, the main contention in the paper in part I is that the profession as a whole takes too little interest in law reform: and if the profession fails itself and the public, who shall reform the law?

I. *The Lawyer's Part in Law Reform*

Law reform is a tender plant. In this modern world, it can usually be achieved only by legislation: and, in the legislatures of the world, law reform tends to be crowded out by the great affairs of state, and by what most (but by no means all) lawyers would regard as the lesser affairs of political strife. And so, quite natural-

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ly, it is to the legal profession that law reform must look for protection. What is the lawyer's part in law reform? Perhaps the best starting point is a brief examination of the present position in England. Almost inevitably pride of place must be given to the Law Revision Committee and the Law Reform Committee. The first of these flourished from 1934 to 1939, and the second was established in 1952 and is still in being.

The Law Revision Committee was appointed by Lord Sankey L.C. in January 1934. It consisted initially of fourteen members under the chairmanship of Lord Hanworth M.R.: five were judges,[1] three K.C.'s,[2] two professors,[3] two solicitors,[4] one a civil servant[5] and one a junior barrister.[6] Although from time to time minor changes in the composition of the committee occurred, basically it remained constant. In its five and a half years of life, it produced eight reports, and with the exception of part of one report, dealing with consideration in the law of contract, substantially all its recommendations reached the statute book. The record is set out in the appendix to this paper.[7] With the outbreak of war in 1939, it ceased to function, but in June 1952, when the post-war pressure on parliamentary time had begun to ease a little, Lord Simonds L.C. set up the Law Reform Committee, under the chairmanship of Jenkins L.J., very much on the lines of the Law Revision Committee. This committee, too, initially had fourteen members: five were judges,[8] three Q.C.'s,[9] three professors,[10] two solicitors[11] and one junior barrister.[12] Since then,

[1] Lord Hanworth M.R., Lord Wright, Romer L.J. and Swift and Goddard JJ.

[2] T. J. O'Connor, S. L. Porter and A. F. Topham. There were two other K.C.'s (see footnotes (3) and (5) *post*) but they were not in active practice at the bar.

[3] H. C. Gutteridge K.C. and A. D. McNair.

[4] W. E. Mortimer and Sir Reginald Poole.

[5] Sir Claud Schuster K.C. [6] Hon. Cyril Asquith.

[7] The cost of publishing the last four reports was estimated at a little under £75. The cost of the first four was not stated, but they were considerably shorter, so that the total cost of the eight reports was probably of the order of £120. Ignoring all receipts from the sale of reports, an average of £15 a report is no reckless extravagance.

[8] Lord Goddard C.J., Lord Asquith of Bishopstone, Jenkins L.J. and Devlin and Parker JJ. (now Parker L.J.)

[9] J. N. Gray, Gerald Gardiner and W. J. K. Diplock (now Diplock J.). There was one other Q.C. (see the next footnote), but he was not in active practice at the bar.

[10] A. L. Goodhart Q.C., Sir David Hughes Parry (now Q.C.) and E. C. S. Wade.

[11] R. J. F. Burrows and R. T. Outen.

[12] R. E. Megarry. I need hardly say that in this paper I speak for myself alone, and not in any way as representing the rest of the committee or for the Lord Chancellor's office, though Mr. D. W. Dobson (Assistant Permanent Secretary to the Lord Chancellor and Deputy Clerk of the Crown) has kindly supplied some of the information.

Lord Asquith of Bishopstone has died and Lord Goddard C.J. has resigned owing to pressure of work, so that the committee is now a dozen strong. So far, only one out of the three reports by the committee has passed into law; another was the subject of a bill which, with many others, perished when Parliament was dissolved; and the third, the most recent and the longest, has hardly had time even to be translated into a bill. Again, the record will be found in the appendix to this article.

Those are the formal facts: what of the substance? Both committees have as their unwritten primary object the reform of that indefinable subject, lawyer's law. If all law with any substantial political or moral content is excluded, much of what remains will be lawyer's law. Legislation founded on a broad social policy, such as that governing town and country planning, is also tacitly excluded; and, to judge by the topics so far considered, there is a marked bias towards case-law rather than statute law, and old acts as against new. Perhaps it would be somewhere near the truth to say that the subjects chosen are those likely to be non-controversial save among lawyers.[13]

These limitations are in no way formal: the minute of appointment merely appoints the committee "to consider, having regard especially to judicial decision, what changes are desirable in such legal doctrines as the Lord Chancellor may from time to time refer to the Committee". In practice, what happens is that the committee (like the pre-war committee) collects suggestions of possible subjects for consideration, decides on the most suitable, and, through its secretary, seeks the authority of the Lord Chancellor to consider the chosen topics. In other words, although formally the initiative lies with the Lord Chancellor, informally it tends to lie with the committee, subject to the veto of the Lord Chancellor.

In three respects the Law Reform Committee differs from the pre-war Law Revision Committee. First, it is expressly empowered to work through sub-committees, and in practice this power is freely used. For each subject referred to the committee for consideration, the chairman selects a sub-committee, usually of five members, presided over by a judge. This sub-committee considers the matter in the first place and prepares a draft report for consideration of the committee as a whole. This has many advantages. It enables the committee to be working on more subjects than one

[13] Yet consider the Law Reform Committee's report on innkeepers' liability.

at a time, for normally there are two sub-committees in being. It also has the even greater advantage of facilitating the full discussion of a subject: for lawyers are not unvocal, and the larger the committee the greater the difficulty of ensuring that each shall have his say. Again, it allows for a moderate degree of specialization, so that the common lawyer does not have to endure a succession of meetings on the rule against perpetuities, and the chancery lawyer can hope to escape an excess of innkeepers' liability. Yet again, it has what for once is the advantage of two bites at the cherry. When the sub-committee puts its draft report before the other members of the committee, they can look at it with a fresh eye, unclouded and unaided by any knowledge of the process by which it evolved.

Secondly, unlike the Law Revision Committee, the Law Reform Committee has power to co-opt to the sub-committees, subject to the Lord Chancellor's approval. The practice has been to co-opt at an early stage to each sub-committee one lawyer, whether academic or a practitioner, who has special knowledge of the branch of the law involved. The advantages in practice have proved as substantial as might be expected in theory. Although there is no power to co-opt to the full committee, in practice co-opted members of sub-committees have been invited to attend meetings of the full committee at which the reports of their sub-committees are being considered.

Thirdly, whereas the secretary of the Law Revision Committee was a practising barrister, the secretary and assistant secretary of the Law Reform Committee are both civil-service members of the staff of the Lord Chancellor's Office. This has the advantages that liaison with the Lord Chancellor's department might be expected to bring. In suggesting subjects for consideration, in the process of discussion, in drafting the final report and in the consideration, preparation and enactment of any remedial legislation, it is plainly advantageous that there should be some permanent official who can help to keep the machinery running smoothly.

Apart from the Law Reform Committee, there are a large number of bodies brought into being from time to time to deal *ad hoc* with some legal problem. Some are royal commissions, some are committees appointed by the Lord Chancellor or another minister of the Crown, and some are departmental committees. They vary widely in numbers and composition. The larger committees may

have a membership of two dozen or more,[14] while the smaller committees may consist of nine or so,[15] or even less, for example, four.[16] Sometimes lawyers are in a minority, sometimes they predominate: much depends on the nature of the problem referred to the committee. Such committees have considered matters ranging from lawyer's law to matters of acute public, moral and political controversy. The common element is that there is some problem of sufficient magnitude to warrant setting up a committee; and, once it has reported, the committee is *functus officio*.

In addition to providing some of the members of these *ad hoc* bodies, the legal profession contributes in varying degree to its deliberations. Occasionally, quite a large number of lawyers will submit written or oral evidence, or both. More often, only one or two will do this, though the Bar Council and The Law Society often give evidence. Where the individual contribution of lawyers is greatest, the cause may well be that the spirit of controversy has been aroused, perhaps by some moral issue. By becoming lawyers, men do not cease to be men; and what has impelled many a lawyer to give evidence in such cases is the strong feelings on the subject which he holds as a citizen, rather than any professional instincts. Certainly the process of browsing through a number of reports of the committees and noting the number of lawyers who had given evidence before them does not suggest that the legal profession has fallen short of any other section of the community. But that does not answer the question whether it has discharged its special duty to the law.

Next, how much in the way of law reform can be achieved by professional or unofficial committees? For example, both the Bar Council and The Law Society now have Law Reform Committees. The Bar Council's committee was constituted in 1946 and, although The Law Society's Committee was not set up until the beginning of 1955, much of its work had previously been distributed among other committees, standing or *ad hoc*. Both committees from time to time make recommendations for reform to the various departments or committees concerned. From time to time, too, groups of lawyers, some political, some not, make proposals for reform.

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[14] *E.g.*, the Committee on Supreme Court Practice and Procedure ("the Evershed Committee"): Cmd. 7754, 8176, 8617, 8878.

[15] *E.g.*, the Committee on the Law of Intestate Succession (Cmd. 8310).

[16] *E.g.*, the Committee on Limitation of Actions and Bills of Exchange (Cmd. 6591).

All these activities are valuable: the greater the awareness of the need for reform, the greater the pressure upon the bodies concerned, the greater the chance of achieving reform. And there is nothing like discussion from a multitude of angles to bring out the advantages and disadvantages of each proposal. But these unofficial committees are naturally less well placed than bodies like the Law Reform Committee when it comes to securing the passage of the necessary legislation. The spearhead of law reform to-day is the official committee, and, great though the assistance of the unofficial committee undoubtedly is, it is no substitute. Unofficial committees are especially important in helping to achieve reforms in matters which are the responsibility of specific government departments; their success to some extent varies with their influence with the department. But on most lawyer's law the main result of an increased activity of these committees would be to build up an even longer queue of subjects awaiting consideration by the Law Reform Committee.

Turning from the work of committees, it is, of course, true to say that many an individual lawyer has done much to reform the law. I do not propose to discuss these efforts, whether of the stature of Bentham's, or of the modern type of the lawyer member of Parliament who manages to secure the passage of some reforming measure of his own: for these are the achievements of giants, and I am concerned with the workaday world. Moreover, they are spasmodic and unsystematic, though nonetheless valuable for that. Nor will I discuss those lawyers in the civil service who play so large a part in the reforms which the various departments make in the branches of law for which they are responsible: for it is primarily as civil servants, rather than as lawyers, that they perform their duties.

Instead, I must turn from the existing machinery of law reform in England to ask whether it is adequate, and whether lawyers are playing their part. In some degree I believe the answer to both questions to be no. But, first, what is the part which lawyers ought to play?

Many lawyers like the law; many do not; but all, I think, have a pride of profession. Without resorting to semi-romantic personifications, such as "Our Lady the Common Law", my belief is that nearly all lawyers recognize something of the greatness of the law and its administration, and, indeed, of the nobility of the profession. Even the most cynical, asserting boldly that their interest in the law is only in the money to be made out of it, can

sometimes be detected in a little flow of professional pride when they explain to a layman some esoteric legal distinction, far beyond the grasp of the lay mind. With that pride of profession necessarily goes a sense of responsibility, and a sense of shame when the law is not as it should be. This may be more acute in the lawyer who likes the law than it is in the advocate pure and simple (if such there be), or in the lawyer who is really a man of business and not a lawyer: but it is wholly absent from none. And so I start with the proposition that law reform is the concern—and the duty—of all lawyers.

It is here, I suggest, that lawyers are not playing their part. By and large, it is true to say that there is very little response from the legal profession as a whole to the invitations for assistance which, for example, go out each time a subject is referred to the Law Reform Committee. Perhaps two or three lawyers write in with suggestions; and that is all. In one sense, this can be dismissed as a mark of confidence in the committee: the practitioner thinks, "There's no point in my making any suggestions; with all those distinguished members of the committee, any point I could suggest is bound to be considered". Other reasons are not hard to find: inertia, pressure of work, and the national failing—and virtue—of a disinclination to thrust oneself forward. Solicitors, too, can shelter behind the plea that The Law Society often makes official—and most valuable—representations: and does not the society speak for the whole profession? The bar has the same kind of excuse. But, whatever the reasons, the hard fact remains: the requests for assistance are made, and answer comes there never—well, hardly ever.

The loss, I think, is great. Even if all the proposals to be sent in by lawyers were trite, they would still be most valuable as showing trends of opinion, and personal and local variations of approach. They would help to show which difficulties are real and recurrent, and which merely theoretical or temporary; and they would supply a background of knowledge which no committee, however distinguished, can hope to command if the number of its members is to be kept within bounds.

One point which may be emphasized is the diversity of approach of the different branches of the legal profession; each branch can make its distinctive contribution to law reform. On the whole, in England these branches remain in fairly watertight compartments. Relatively few solicitors become barristers, or barristers solicitors; nor do many whole-time teachers of law be-

come full-time practitioners, or *vice versa*. The few exceptions, and the tendency of the young practitioner to do a little part-time teaching, serve only to emphasize the comparative rigidity of the division.

Let me take the different branches in turn. A judge has, of course, had many years experience at the bar, and retains many (but fading) recollections of his practice there. Apart from that, his experience of the law will (if I may borrow a term from another profession) be almost entirely pathological: matters which never were litigious, or which were settled out of court, are outside his ken. He has a wide range of experience, in other words, of the cases that went wrong—so wrong that litigation took place. Barristers, on the other hand, have to deal with a wide range of cases, many of which never get into court. They will be able to speak with feeling of a problem, perhaps unknown to the judges, which is constantly recurring in practice, but which has yet to get into court. Much of their work, too, is pathological, but much (especially on the chancery side) is clinical.

Solicitors carry this process even further. Points of law come their way less frequently, but they have a wider general field of experience. On the whole, the greater degree of specialization at the bar means that a point which occurs once in a solicitor's practice may arise a dozen or more times in the practice of a barrister specializing in that type of work. Yet it is the solicitor who sees the case as a whole: the barrister's aid may be invoked many times in the course of a transaction, but it is the solicitor who sees it through from beginning to end, with the final consequences to the client.

Lastly, there are teachers of law. They make the highly important contribution of a synoptic view of a whole branch of law; they alone are daily concerned in seeing a subject as a whole, as opposed to examining certain small parts of it in detail. They see the landscape, while counsel applies his magnifying glass to some plant in the foreground. Teachers, too, are concerned with theory, with qualities of clarity, elegance and consistency, while at times the practitioner is content with a healthy pragmatism. Yet teachers live on an unbalanced diet. Of necessity, they must draw for their knowledge on reported cases; usually they are limited to those instances of pathology in the law which call for report. And so it may be that among practitioners new trends and new ideas may grow up—sometimes jealously guarded professional secrets—which may be almost wholly unknown to the teachers of law.

Perhaps the most important contribution made by teachers of law is that in their capacity as authors of books, and especially of articles in the learned periodicals, they frequently call attention to defects in the law and so help to create the necessary professional climate for reform.

These different approaches are all of value and importance to any proposals for reform. All are represented on the Law Reform Committee; yet mere representation is not enough. What is needed is more direct assistance, a wider spread, a warmer interest, and, indeed, a refusal to take for granted that the committee will consider every possible point.

I turn from the work of the committee and the help it should get from lawyers to my other main point. Any lawyer who has pretensions to knowledge on any branch of the law could, given quarter of an hour and a sheet of paper, write down half-a-dozen respects in which that law is unsatisfactory: yet how many lawyers do anything about it? I confess freely that I do very little. I even lack what I feel every barrister should have on his table in chambers, namely, a pad on which to scribble notes about points of law which need some revision. Again and again one is forced to write an opinion, or give advice in conference, pointing out what unfair results a given rule is capable of producing. It may be that on balance the rule is just far more often than it is unjust, and no effective alteration can be made without opening up fresh (and greater) difficulties; or it may be that by quite a simple revision the law could be considerably improved.

One common characteristic of points of this kind is their haphazard nature. They vary from lawyer's law to issues of the most controversial political or ethical nature. Many are very small —perhaps a single word in a sub-section of a recent act would make all the difference. And that creates much of the difficulty. One can understand a large and important subject such as the survival of a cause of action on death being referred to the Law Reform Committee. But who, for example, would advocate referring to that committee, as a separate question, whether the word "such" ought to be inserted in front of "widow" in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, section 12(1)(g)? Yet this is a very proper reform[17] which has now, happily, been effected,[18] and, although the point may be small, it may be of the greatest importance to the member of the

[17] See Law Reform and Law Making (1953) pp. 36, 37.
[18] Housing Repairs and Rents Act, 1954, s. 42.

public who finds himself caught by some such trap or imperfection in the law which the profession, though well aware of it, has done nothing about.

Supposing, then, I had my pad in chambers, and in a few weeks I had accumulated a dozen points of law on which reform was or might be needed: what would I do with it? Of the various possible answers to that question, on the whole I favour "I don't know". One or two of the points might involve major issues of legal doctrine, fit for reference to the Law Reform Committee, and they could join the queue. But the rest would be minor points, some turning on case law, others on statutory provisions governing town planning or agriculture, others on the administration of charities, and so on; and each of these subjects is the responsibility of a different government department. I could, I suppose, write to the solicitor to the correct department, and hope that in due course my suggestion would be considered when amending legislation was afoot: but I know of no regular machinery for dealing with such matters, and I might not always succeed in addressing my letter to the right person in the right department.

And so my point can be reduced to this: there ought to be some person or body to whom all lawyers could be encouraged to send any suggestions for reform of the law, however minor; and all lawyers should regard it as part of their professional duty to note such points when they occur, and in due course send them in. No doubt a good deal of preliminary sifting would be needed; no doubt some of the cures proposed would be worse than the existing ills; and it might even be that some of the proposals would be found to rest on a misapprehension of what the existing law really is. But, after making all due allowances, I believe that one of the major avenues of law reform, as yet almost entirely unexplored and paved with stones almost wholly left unturned, is the removal of the hundreds of minor anomalies revealed by experience. And the most important single step in doing this is to have one central, well-known, point to which all suggestions should be sent, even though ultimately they are sent on to the responsible departments. It should be made easy for the lawyer to send in his suggestion, and each suggestion should receive a welcome. If there were some general recognition by lawyers of their professional opportunity—and obligation—to get rid of some of the tiresome little traps of the law, I believe that valuable results might be achieved within a relatively short time.

As for the central point, everything points to the Lord Chan-

cellor's Department; for the Lord Chancellor has long accepted a general responsibility for law reform. I have not dared to suggest to the secretary of the Law Reform Committee the awful possibility of this burden being added to those which he already bears: but plainly it would be convenient to the profession if it were. Many of the suggestions would involve correspondence, perhaps to clear up ambiguities in the suggestion, perhaps to discover examples of alleged injustices, perhaps to ascertain whether some possible escape from the difficulty had been considered. But, given the encouragement of an intelligent welcome to each suggestion, and visible signs of action within a reasonable time, I believe there would be a reasonable response to some arrangement such as this: and certainly it would be a black mark against the profession if there were not.

Next, let me say a word about the *tempo* of law reform. For intelligent law reform, nobody seems to have evolved a better method than the cut and thrust of discussion in committee. Even though the Law Reform Committee habitually works through two sub-committees sitting simultaneously, progress is slow: for members of the calibre required are almost by definition busy men. The eight reports in five and half years of the pre-war Law Revision Committee gives some idea of the rate of progress. Is that fast enough? I doubt it. The remedy, I think, is not to attempt to hurry the existing committee, but to provide more committees, or more sub-committees, for in law reform my belief is in making haste slowly. So often the facile remedy which first suggests itself has hidden depths which make it more treacherous than the evil to be cured. Let one or two reforms be enacted which produce as much harm as they cure—or more—and the whole process of law reform is brought into disrepute. Each proposed reform, then, must be tested and retested, until each member of the committee is brought to the inescapable conclusion that the reform is indeed a reform. But this process should be carried out more in parallel and less in series: and the profession ought to respond willingly to any additional calls on its time. Every lawyer, at least, should admire the law: yet the gaze should be critical and not adulatory.

Lastly, I must touch on what is commonly regarded as one of the major obstacles to law reform in England, namely, lack of parliamentary time. The great advantage of bills founded on reports by the Law Revision Committee or the Law Reform Committee is that from a political point of view they are likely to be almost entirely noncontroversial, so that they consume the mini-

mum of parliamentary time. Even so, in the post-war years it was found difficult to find a place in the government legislative programme for a number of measures of this type. One curious consequence has been that a number of reforms of lawyer's law have originated in bills introduced as private members' bills by ordinary members of Parliament. The Law Reform (Enforcement of Contracts) Act, 1954,[19] is one example, and the Law Reform (Limitation of Actions, etc.) Act, 1954,[20] another. In such cases, the government provides support for the bill, and makes available the invaluable assistance of parliamentary counsel in drafting it. The private member's contribution is his willingness to use in this way the small measure of parliamentary time allotted to him, instead of promoting some other legislative proposal which may lie nearer his heart. Although he thus puts forward an adopted child instead of his own, its prospects of surviving to receive the royal assent are considerably brighter.

As will be seen from the appendix, one way and another Parliament has found time to enact nearly all the proposals of the Law Revision Committee and Law Reform Committee, though sometimes there has been a significant delay. If the output of proposals for reform is substantially increased, is there not a danger that many of the reforms will be crowded out of the parliamentary programme? My answer is threefold. First, many of the minor reforms will be made by means of adding a few substantially non-controversial amending clauses to substantive legislation which the department concerned will in any event be promoting. Secondly, if a queue of desirable reforms awaiting enactment does begin to form, it will not only exert a certain amount of pressure of its own on parliamentary arrangements, but also do much to keep clear the collective conscience of the legal profession: for the lawyers will with justice be able to assert that delays in reform are due not to their own inertia but to congestion in Parliament.

That leads me to my third point. Both collectively and individually lawyers could do more to make the public feel that law reform matters. If there were a constant pressure for reforms from the profession (as with a long queue of unenacted bills), the profession could indeed urge upon members of Parliament and others the importance of righting, at the earliest possible moment, the known injustices dealt with by the bills. The House of Com-

[19] Based on reports of the Law Revision Committee (Cmd. 5449) and Law Reform Committee (Cmd. 8809).

[20] Based on the report of the Committee on Limitation of Actions (Cmd. 7740).

mons, of course, contains a useful number of practising lawyers and many others who, though legally qualified, do not practise. If the pressure were there, some way surely could be found of husbanding precious parliamentary time on the reform of what, for convenience, we call lawyer's law, but which in fact may every day play so important a part in the lives of laymen. Perhaps a standing Committee of the House of Commons on Law Reform is not too much to hope for and, in time, to ask for. But before one can hope for success in this, the tempo of the drive for law reform must be quickened, and lawyers, both individually and as a body, must do more.

One final word: let me apologize for the uncompromising insularity of this paper, which has been confined to the position in England. My own excuse is a lack of accurate and up-to-date knowledge of the position in other parts of the Commonwealth. I know, for example, that other jurisdictions have law reform committees; but what their experience has been, how far there are difficulties of parliamentary time, what progress there has been towards uniformity of laws in the provinces of Canada and the states of Australia—these and a dozen other questions will spring to the lips of most English lawyers; and I hope that at this conference we shall be able to learn from the experience of our brethren in other parts of the Commonwealth.

II. *Law Reform in Canada*

One of the most popular subjects for discussion at the Commonwealth and Empire Law Conference was "The Lawyer's Part in Law Reform". This attracted eight papers. Canada led the field by contributing three—one by Dean G. F. Curtis, of the University of British Columbia, the second by E. B. Fairbanks of Montreal, and the third by E. C. Leslie, Q.C., of Regina.[21] Australia followed, with two papers, one by E. H. St. John, of Sydney, New South Wales, and the other by R. N. Vroland, of Victoria.[22] The other contributions were all singletons: P. M. A. Sim, of Auckland University, New Zealand, Professor T. B. Smith, of the University of Aberdeen, Scotland,[23] and the English paper just reproduced.

It is not easy to summarize the papers. In general, there was a remarkable degree of unanimity, with less regional variation and

[21] Cited as "Curtis", "Fairbanks" and "Leslie", respectively.
[22] Cited as "St. John" and "Vroland", respectively.
[23] Cited as "Sim" and "Smith", respectively.

differences of emphasis than might have been expected. There was, of course, a general recognition that, with Equity less fertile than she was two centuries ago, the work of law reform that could be carried out by the courts is strictly limited, and that of necessity the effective means of reform must be the legislatures, both for removing old blemishes in the law and for meeting new situations brought about by changed social and economic conditions.[24] There was also a general recognition of the need for some body or bodies which would impel the legislatures to the requisite activity. One important group of bodies consists of the various bar associations and law societies[25] (or committees thereof).[26] In addition, in a number of jurisdictions the government had set up law reform committees, somewhat on the lines of the English Law Reform Committee. Thus New Zealand had had a Law Reform Committee since 1937,[27] and so had Scotland since 1954;[28] and in Victoria, Australia, there is a Chief Justice's Law Reform Committee.[29] The composition of these committees varies: thus the New Zealand committee in effect excludes the judiciary; one judge is technically a member but does not attend meetings.[30] In Victoria, Australia, on the other hand, the Chief Justice's committee includes a number of judges,[31] and the Scottish committee is presided over by a judge.[32] The degrees of activity varied too. Thus the New Zealand Law Reform Committee met only "two or three times a year",[33] while the Canadian Conference of Commissioners on Uniformity of Legislation meets in conference "for about one week in the year".[34]

An Englishman can see only too clearly that the English Law Reform Committee, composed of lawyers who work and live in London or within some fifty miles of it, has the great geographical advantage of bodily propinquity that Canada and Australia, for example, with their vast distances, must find a grievous obstacle to the convenient working of any national committee. In

[24] See, *e.g.*, Curtis, pp. 1, 2; Leslie, p. 1; St. John, pp. 1-3; and see Smith, p. 5.

[25] See, *e.g.*, Curtis, p. 3; Fairbanks, pp. 2, 3; Sim, pp. 4-6; St. John, p. 5; Vroland, pp. 4, 5.

[26] *E.g.*, the Legislation Committee of the Council of the Law Institute of Victoria, Australia: Vroland, pp. 2-4, 7-11.

[27] Sim, p. 4.

[28] Smith, p. 6. This replaces in permanent form a previous informal committee: see 1954 S.L.T. News 221.

[29] Vroland, p. 5.

[30] Sim, p. 4.

[31] Vroland, p. 5.

[32] 1954 S.L.T. News 221. There are nine other members: two are Q.C.'s, one an advocate, three solicitors and three academic lawyers (*ibid.*).

[33] Sim, p. 4.

[34] Leslie, p. 3.

practice, the Law Reform Committee and its sub-committees always meet at the Law Courts in London. The full committee usually sits in the Queen's Bench Masters' Library, the sub-committee often in the room of the judge who presides; and even the members who have to come from Oxford or Cambridge can set out in the afternoon, attend a meeting from 4.30 p.m. until 6.00 or 6.30 p.m., and return home that night.

The papers at the conference also showed a due recognition of the importance of research in any programme of law reform. Dean Curtis's paper was especially valuable in this respect, for he surveyed the various types of research, including that of a Bar Center (on the lines of the center established by the American Bar Association at Chicago), the comparative method, and post-graduate studies.[35]

Let me turn from the papers presented to the conference to a consideration of law reform in Canada. It would, of course, be an impertinence for someone with so little knowledge of Canadian conditions as I regrettably have to make suggestions. Yet it is just that impertinence that the editor of this Review has instigated. Let me, then, with the greatest possible deference embark upon a tentative discussion which, if it does no more, may at least serve as the skeleton of an agenda for discussion. It is possible to consider the matter under six main heads.

1. Is the present situation satisfactory? So far as I can judge (and I must draw in large degree on discussions and conversations at the conference last July), there seems to be a considerable measure of agreement that the answer is "No": and the point need not be laboured.

2. Does the answer lie in constituting a committee or committees for law reform? Broadly, I should have thought the answer was "Yes", subject to a number of qualifications. The status of an officially constituted committee is of great value in bridging the most serious gulf between recommendation and reform, namely legislation. A permanent, non-party, and yet official committee seems, so far, to be the most effective spearhead of law reform that has been yet devised. Bar associations have a most valuable and important part to play in law reform, and they can do a very great deal to stimulate and aid a law-reform committee: yet by themselves they lack the power and weight of the official committee.

3. Should there be a law-reform committee in each province of Canada, with, perhaps, another at Ottawa? This, in effect, is

[35] Curtis, pp. 4-6.

what Mr. W. Kent Power, Q.C., proposed recently,[36] and Mr. L. R. MacTavish, Q.C., espoused, subject to questions of possible conflict with the Conference of Commissioners on Uniformity of Legislation in Canada.[37] The Minister of Justice, the Hon. Stuart S. Garson, Q.C., suggested, however, that it should be considered whether there were enough "men in Canada"[38] who had "the necessary ability, scholarship and time" to staff eleven councils, and whether enough common-law anomalies remained to justify their existence. But if—as seems likely—the answer to the first question just asked must be "No", would it not be possible to constitute two committees, one for Quebec and one for the other provinces? Or perhaps there could be one committee with one representative of each province, and a sub-committee for Quebec. Is it not possible to devise some process of integration or inter-relation or inter-representation with the Uniformity Commissioners that will remove more of the problems of overlapping or, on the other hand, of questions falling between two stools? The device of a common secretariat with some degree of membership in common has achieved much in the past. Would not such a body, of perhaps some fifteen members, with power to sit in sub-committees and to co-opt to those committees, offer some promise of achievement, without becoming cumbersome, or stretching too far the available resources of man-power and time? And would not the honour of belonging to such an important and wide-ranging committee be sufficient to attract men of the required calibre?

4. What should be the composition of such a committee? Should membership be a salaried appointment? The English Law Reform Committee employs the method, traditional in the country, of voluntary work. It is considered an honour to serve on such a committee, and each of the members works without remuneration. In contrast, the New York Law Revision Commission, constituted in 1934, is a salaried body;[39] and no doubt the payment of a salary encourages less diffidence in making claims on the time of the members. One possible answer, which seeks to get the best of all worlds, is that the members of the committee itself should be volunteers, but that there should be one or more salaried research workers attached to the secretariat of the com-

[36] (1954), 32 Can. Bar Rev. 929. [37] (1954), 32 Can. Bar Rev. 1060.

[38] (1955), 33 Can. Bar Rev. 129. For this purpose, no doubt, in the words of the traditional statutory definition clause which never reached Parliament, "man embraces woman".

[39] See Professor J. W. MacDonald (1955), 40 Cornell L. Rev. 641, at p. 642 (in a foreword to a symposium on the work of the commission since it was founded).

mittee who could save the members of the committee much time both in investigating the existing state of the law and in drafting the reports.

A further problem of composition is that of representation. The committee must not become too large and unwieldy, and yet there must be a fair representation of all interests. Would it suffice if, as I have suggested, there were one member for each province, with an additional four or five places for academic lawyers and other interests, and some arrangement of a sub-committee for Quebec, with power to co-opt? And how would the members be appointed? Would it be constitutionally possible and desirable for the Dominion government to invite each provincial government to nominate one member, and itself to appoint the remaining members? Or would it be better for all appointments to be made by the Dominion government, with, of course, an eye to the due representation of each province? In either case, what could be done to secure a great measure of interest in each of the provincial legislatures? Possibly some solution lies in the creation in each province of liaison committees, consisting of those lawyers of the province who are on the main committee, with, say, three or four members of the provincial legislature. One of the functions of each member of the main committee would be to implicate the members of the liaison committees as much as possible in the work of the main committee, so that each would champion the main committee's recommendations in his provincial legislature. If this is impracticable, is there no other way in which such a result could be achieved?

5. What of the problems of time and space? In a country the size of Canada, obviously frequent meetings would be difficult and burdensome. A possible programme designed to mitigate these difficulties would be as follows:

(a) On a topic being referred to the committee for consideration, one member (or two or more who live near each other) should, in conjunction with the secretariat and with the help of any research workers in the secretariat, prepare a memorandum summarizing the existing law, the principal defects in it and the various possible methods of reform, with their recommendations.

(b) This memorandum would be circulated to the committee, and each member would be asked to provide a note of his views for circulation among other members of the committee.

(c) After these notes had been circulated, the committee would have to meet in order to discuss them.

(d) This meeting would probably produce a further crop of notes, and subsequently another meeting would be necessary: but experience suggests that after two or perhaps three meetings most of the major issues and most of the divergences of opinion will have at least begun to be resolved. Experience also suggests that there is much advantage in beginning the drafting early: a tentative draft report circulated after the first meeting does much to crystallize views.

(e) Obviously every case depends on its own facts: but by sufficient preparatory and secretarial work the number of meetings required can be very substantially reduced. Even a complex problem may be substantially resolved after three or four meetings. Further, each meeting of the committee, which might last one day or even two, could consider more than one subject. Thus topic *A* might be nearing the final report stage; topic *B* might be at the first draft, and topic *C* may be receiving its first discussion. A surprising amount of ground might be covered in four meetings spread over six months or more. Could—and would—Canadians of the calibre required spare the time required for this? The debates are, of course, vital; but it is sometimes overlooked that it is almost as important—possibly even more important—that between meetings each member should address himself with zeal to his share of the preparatory work for the next meeting. Professor Goodhart, it is true, has pointed out that "Law Reform, if it is to be properly done, is not the work of a few spare afternoons".[40] The cogency and weight of this comment should not, however, be allowed to overshadow a due realization of how much can be accomplished in a few, relatively short, meetings if those attending have previously applied themselves in due measure to the issues involved. The heavy claims on the time of those concerned with law reform may in large degree be satisfied, not in the committee room, but in their chambers or offices or studies.

6. What of legal research? Dean Horace E. Read, Q.C., has

[40] Presidential Address to the Holdsworth Club on Law Reform, 1952, p. 17.

recently emphasized the part that could and should be played by the universities,[41] and so did a number of the papers given at the Commonwealth and Empire Conference. The Canadian Bar Association's important Committee on Legal Research, under Professor F. R. Scott, has also recently issued a valuable interim report that foreshadows an even more valuable final report. One trouble lies in the wide ambit of the word "research". Often it is employed for work done by a university graduate in order to obtain a research degree such as Ph.D. I may be doing such work an injustice, but, however valuable it may be for other purposes, I doubt whether many theses prepared for degrees have contributed significantly to law reform. Another type of research which has perhaps less value for law reform than some would ascribe to it is the work of writing legal textbooks to fill gaps in the nation's book-shelves. One must, of course, have some knowledge of the law as it is before one can say with assurance what it should be: but I find it hard to think of many instances of law reform in which the textbook has played a dominant part. The need for providing a comprehensive yet reasonably concise statement of the law as it is has a stifling effect on assertions of the law as it should be. If there are gaps in the national law library, then it is a great and worthy project to fill those gaps: but it is a project that must stand in its own right, without claiming more than incidental support from the field of law reform.

Two forms of legal research are, however, of great importance to law reform. First, there are articles in legal periodicals: and to those I would give pride of place. In England, many a contribution to the Law Quarterly Review has played an important part in law reform. The author of an article is freed from the shackles that fetter the author of a textbook. He need not be comprehensive or exhaustive; he is free in large degree from any compulsion to be concise; and he can select and arrange his material in such a manner as to present the case for reform in the most effective way possible. More than anything else, the researches of those who feel moved to write articles for the learned periodicals have helped to create, among lawyers, the necessary climate for law reform. England has in this respect long been in a fortunate condition. With an adequate supply of legal textbooks as the foundation, and a generous outpouring of articles in legal periodicals, no worthy idea for law reform should lack a background, a champion and an audience. Canada, as I understand it, is less fortunate in

[41] (1955), 33 Can. Bar Rev. 248.

each respect. Yet if the law reform is to be nurtured, I should have thought that the paramount step towards creating the necessary climate would be for all possible steps to be taken to encourage the writing of articles in the nation's law journals.

The other form of legal research that is of especial importance to law reform is what may be called *ad hoc* research. Thus, suppose there to be some specific proposal to reform the law, with the inevitable question "How will it work?" One way of testing the proposal is to apply the suggested solution to the reported cases on the subject, in order to see whether the result would be an improvement.[42] Another way is to apply the proposed rule to a wide range of hypothetical examples. Again, the rules applied in other jurisdictions may suggest methods of reform that otherwise would not occur to the committee. Work such as this is preeminently within the sphere of the research worker, and the secretariat of any law-reform committee might well be grateful for the presence of one or more research workers on its staff, or to whose services it could lay claim.

Ad hoc research plainly raises issues of finance and organization. In England, the Law Reform Committee has no financial resources, or any formal arrangements for such research; it is not known what the result would be if any such assistance were sought. However, three members of the committee are also members of the Committee of Management of the Institute of Advanced Legal Studies;[43] and the institute has informally provided the secretariat of the Law Reform Committee with some helpful research assistance. The English tendency for informality to ripen into necessity and so ultimately into formal recognition has certain advantages, but those who prefer something less nebulous should not find it impossible to devise a scheme for such salaries or grants as are necessary to provide any desirable research work.

Ad hoc research work may plainly be valuable and helpful; yet it may be something of a luxury rather than a necessity. So much depends on the ability and industry of the members of the committee, their familiarity with the problem before them, and its degree of complexity and obscurity. In other words, if for any reason it proved impracticable to provide for *ad hoc* legal research

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[42] This method was, in fact, employed by the English Law Reform Committee in preparing its Third Report on Occupiers' Liability to Invittees, Licensees and Trespassers.

[43] Professor Sir David Hughes Parry, Q.C. (the Director of the Institute), Professor A. L. Goodhart, K.B.E., Q.C., and R. E. Megarry.

as an adjunct to law reform, this would not *per se* render a law-reform committee impotent to reform the law.

Let me end by asserting what will, by this point, be sufficiently obvious, namely, that I have achieved no comprehensive survey, but have merely made some tentative suggestions that cover only part of the ground. Let me also re-assert my diffidence at putting my name to what must seem (if I may adopt an old saying) a bare-faced attempt of an Englishman to teach his Canadian grandmother to suck eggs. (The expression is homely, but eggs have long been respectable in the law: in 1305, Howard J. said to counsel, who in his argument was trying to have it both ways, "volez vos dont aver le eof e la mayle?"[44]) If I have done no more than set up Aunt Sallies for others to knock down, I shall be content. Not every legal author could say as much.

APPENDIX

1. Law Revision Committee

(Constituted January 1934)

No.	*Subject of Report*	*Date, Reference and Size*	*Consequent Legislation* (Date of Royal Assent in brackets)
1.	Survival of actions after death	March 1934 (Cmd. 4540: 9 pp.)	Law Reform (Miscellaneous Provisions) Act, 1934 (July 25th, 1934)
2.	Recovery of interest in civil proceedings	March 1934 (Cmd. 4546: 8 pp.)	Ditto
3.	Contribution between tortfeasors	July 1934 (Cmd. 4637: 9 pp.)	Law Reform (Married Women and Tortfeasors) Act, 1935 (August 2nd, 1935)
4.	Husband's liability for wife's torts: married woman's liability in contract and tort	December 1934 (Cmd. 4770: 13 pp.)	Ditto
5.	Limitation of actions	December 1936 (Cmd. 5334: 44 pp.)	Limitation Act, 1939 (May 25th, 1939)
6.	Statute of Frauds: Consideration	May 1937 (Cmd. 5449: 36 pp.)	Statute of Frauds: Law Reform (Enforcement of Contracts) Act, 1954 (June 4th, 1954) Consideration: no action.

[44] "Will you then have the egg and the halfpenny too?": Y. B. 32 & 33 Edw. 1 (R.S.) 400, 401 (1305).

7.	*Chandler* v. *Webster* (Coronation cases)	May 1939 (Cmd. 6009: 11 pp.)	Law Reform (Frustrated Contracts) Act, 1943 (August 5th, 1943)
8.	Contributory Negligence	June 1939 (Cmd. 6032: 19 pp.)	Law Reform (Contributory Negligence) Act, 1945 (June 15th, 1945)

2. LAW REFORM COMMITTEE
(Constituted June 1952)

No.	*Subject of Report*	*Date, Reference and Size*	*Consequent Legislation* (Date of Royal Assent in brackets)
1.	Statute of Frauds, etc.	April 1953 (Cmd. 8809: 4 pp.)	Law Reform (Enforcement of Contracts) Act, 1954 (June 4th, 1954)
2.	Innkeepers' Liability	May 1954 (Cmd. 9161: 8 pp.)	Hotel Proprietors (Liabilities and Rights) Bill, 1955 (introduced March 1955)
3.	Invitees, Licensees, Trespassers	November 1954 (Cmd. 9305: 44 pp.)	——

Perhaps a Dying Art?

I have the feeling that the lawyer's processes of thought, as I have presented them to you, are such as to make him rather a figure on the side-lines of the game as it is played today. But then Law itself, his native art, is coming to stand rather on the side-lines of modern civilization. His status is still a high one, but this eminence he owes in part to the very great value that was placed upon his calling in the earlier forms of our own society. He enjoys therefore an inherited prestige which is out of proportion to the current evaluation of the services which Law can render. The reason, I believe, lies in that change of attitude which is at once the cause and the consequence of the present age. There is not really much to be said for Law unless it is thought of as representing absolute standards of right and wrong, even at a far remove. But then that means that its fundamental rules, whatever they are, stand above and independent of social needs and aspirations of the day. The function of the lawyer, you might say, is to reconcile the demands of human nature to the acceptance of those rules. There are periods of historical development when men prize very highly such a service of reconciliation. I do not think that this is one of those periods. The vast possibilities of material change and advance have made men haughty to their institutions. So be it: but a lawyer remains, first and last, an institutionalist, and the lawyer, his equipment a little rusty, his habit a little worn, not quite the tremendous figure of the past, stands compactly on one side, content to wait his turn. (Rt. Hon. Lord Radcliffe, How a Lawyer Thinks, The Royal Society of Medicine's Lloyd Roberts Lecture for 1955 (1956), 270 The Lancet 1, at p. 5)