LEGAL REFORM AND THE PROFESSION

The importance of the Report of the English Law Revision Committee, published in this issue of the REVIEW, recommending radical and revolutionary changes in what have come to be considered as two pillars of the law of contracts, cannot fail to attract attention. Now that the persistent, and hitherto unheeded, criticisms of academic writers have received at least a semi-official blessing, they will undoubtedly be treated with considerable respect. It is even possible that if they are adopted by legislation in England, we may, in this country — but only after the lapse of some time — do something about it. The pity of it is that in Canada we have not only failed to reach the stage where reforms of private law are dealt with by committees of bench, bar and teachers of law, but we are, on the whole, not particularly interested in reform. Further, we have not (save in one or two instances), made any effort to build up any group of professional men whose chief concern in law is not so much with the interests of clients or the adjudication of disputes, but solely the advancement and improvement of departments of the law which either have no popular appeal or are not backed by interests powerful enough to secure their improvement. (In the latter case, however, such improvement is usually for the benefit of these interests themselves.)

Law reform becomes a practical reality only with the existence of a group of this nature, and it is no mere coincidence that the work of the Law Revision Committee began at a time when the professional teacher of law and legal research had in England attained a stature and an influence unknown there until a few years ago. In this country, the groundwork, while laid, is still uncertain of its continued existence, and often stands in peril of complete demolition. To many lawyers our "theoretical law schools" and our "academic teachers" are viewed as things which certainly do little good and possibly do a lot of harm. What we want, some say, is a sound "practical" training, little realizing that by such a demand they may in reality, though quite unconsciously, be exposing themselves to the jibe of Disraeli that "the practical man is the man who practises the errors of his ancestors". Such persons forget that if law—and the livelihood of the "practical" lawyer dependent thereon—is to serve its purpose in assisting rather than deterring the forward march of society, it will not do for lawyers to say they are concerned only with administering the law : that it is no function of theirs to shape and mould the future of the law or to train

students in reform. To the public, lawyers are the guardians of the law. As such, the public surely have a right to ask for an accounting of that trusteeship. In such accounting what can the profession show they have done other than train the coming generation in the same sets of rules and principles—the "black letter" training—that they were taught? What can the profession, as such, point to in the way of assisted legal research or scholarship?

No one in his right senses can deny the absolute necessity of learning "how things are done". The profession in Canada, on the whole, does look after technical instruction of that kind exceedingly well. On the other hand it is doubtful whether the profession feels it is *their* business to do more than that. Not so long ago the governing body of the profession in one of the leading provinces of Canada reported that "the tendency has been to emphasize unduly the academic training at the expense of efficient office training". Let us, by all means, discard the impractical man who attempts to remove law from life and confine it within the four corners of a text-book. But the demand for "practical" training often leads, perversely, to precisely that type. Law must be treated as law—remote and unchanging—not merely as one of the social sciences : there must be no breath of suspicion that all is not well with the legal system. The idea that the profession should be responsible only for technical training is not confined to this country. For an illustration of a groping towards a broader conception of what a faculty of law should be, the reader may be referred to the remarks published earlier this year in the REVIEW [1] criticising many Scots faculties of law for being that very thing which in many quarters is the ideal in Canada—a technical training school. This, of course, it should be. But it should be much more. As that writer points out, it is the function of a law faculty, not to be "merely a depositary of a historical knowledge of the law in ancient times and a school for propounding the law as it stands today", but in addition, to be worthy of the name, it should be

> part of its function to emphasize the value of comparative law, to be a fountain of criticism of the many and glaring injustices, inconsistencies, and obscurities contained in the present law, an agency for helping to reduce the time lag between public opinion and the reflection of that opinion in statutory law and an instiller of the high duty which the legal profession owes to the community.

[1] 15 Can. Bar Rev. 361.

A Canadian writer has admirably summed up the requirements of this broader conception in an article in the *Scots Law Times* :[2]

> For "the man of science in the law is not merely a bookworm". (Mr. Justice Holmes, Collected Papers, at p. 224.) He sees the past of law, and, in so far as he has insight, he sees growth in response to social demand. The common law owes its life to experience. On the other hand, he learns to see the present—its problems, its difficulties, its castings off—and he is always asking how far it is responsible for social conditions, how far it can be beneficial. He has his inner eye on the inner life of which law should be the outward and visible sign. Thus he is at once a scholar and a reformer, at once a student and a practical man. . . . . He knows, too, the fundamental mistakes which flow from the idea that law, *per se*, can bring beneficial change. He dreads ignorant reform through ill-digested legislation as much as he dreads the judicial obscurantism which looks on *stare decisis* as a "universal inexorable command". (Mr. Justice Brandeis in *Washington* v. *Dawson & Co.* (1924), 264 U.S. 219 at p. 238.) He has no belief in any necessary consequences flowing from legal reform such as makes us dread so many social "platforms". . . . . He knows the function of law from its *real* study.

Is this conception of a faculty of law encouraged or assisted by the legal profession in this country, or does it, in the main, leave to others—non-lawyers—the task of creating such bodies?

Who in Canada is interested in clearing up the inconsistencies and absurdities of the doctrine of consideration in contracts? Or who is interested in doing something about the anachronisms and downright dishonesty involved in litigation concerning the Statute of Frauds? One cannot seriously blame the Legislatures for failing to espouse a cause so devoid of human interest or popular appeal. The man in the street cannot be induced to cheer a pungent sally at the doctrine of *Tweddle* v. *Atkinson*, and an election slogan based on the Statute of Frauds, 1667, could not be counted on to win many votes. But what of the legal profession? More than one unkind writer has suggested that the legal profession is the greatest obstacle to legal reform. This, like most generalizations, is untrue. Outside a reluctance to innovate or change—a reluctance natural to a training based on precedent—the legal profession is undoubtedly just as much or just as little interested in legal reform as any other group in the community. That the public believe the profession should take the lead in improving the legal order is, however, undoubted. The profession probably believes this too, judging from the speeches one hears on many public

[2] W. P. M. Kennedy, *A Project of Legal Education* (1937), Scots Law Times, at p. 2.

occasions. The lawyer's training, however, is prone to lead to a belief in the rightness of things merely because they are well-established law. Further, the chief task of the practising members of the profession is to protect their clients. They have neither the time, nor should they, unaided, be expected to take the time necessary for a study of the operation of the laws they administer. A busy medical practitioner cannot be expected to be a Banting. But the medical profession feel it their duty to encourage future Bantings and to act on their findings when made. Whose business *is* it to promote legal reform?

As we have suggested, the whole training of the lawyer naturally leads, not so much to a disinterest in legal reform, but to a disinclination to question doctrines that have been accepted and acted on as law for hundreds of years. The Statute of Frauds and the doctrine of consideration are excellent illustrations. Undoubtedly such an attitude makes for security and acts as a bulwark against the unstabilizing effect of ill-considered innovations. It is possible, however, to pay too great a price for stability. "Law must be stable and yet it cannot stand still. . . . . . If we seek principles, we must seek principles of change no less than principles of stability". Thus Roscoe Pound describes the eternal problem of legal thinking. [3] The reverence of the common law lawyer for precedent undoubtedly leads to an attitude of fatalism and a "belief in the immutability of the law".[4] It is not without significance that one of the strongest opponents of the "New Deal" Administration in the United States is the legal profession which feels called on to condemn "experimentation" in government. For an illustration of legal conservatism in our own public law one has only to recall the decisions of the Privy Council on the so-called "social" legislation of the Dominion Parliament.[5] Our whole system of *stare decisis* makes for that attitude of mind which Lord Macmillan neatly characterizes as follows: "What has been done before should be done again. The question came to be 'What did we do last time?' Not, 'What would it be right to do this time?' "[6] It is this attitude which glorifies the "practical" lawyer (who, presumably, knows how *to do* things) at the expense of the "theoretical" (who, presumably, knows, or at least tries to understand, *why* things are done and is often foolish enough to question whether they should be done at all):

[3] INTERPRETATIONS OF LEGAL HISTORY, p. 1.

[4] McNair, *Law Teaching and Law Reform*, Journal of the Society of Public Teachers of Law, 1934, at p. 3.

[5] See Can. Bar Rev. for June 1937.

[6] LAW AND OTHER THINGS (Cambridge, 1937) p. 81.

which insists that students of the law be taught *what is* the law and that consideration of *what ought to be* the law should be excluded from a legal curriculum. It is the same attitude which frowns on acquainting students with developments of law in the United States and would confine attention to what *we* do, be it good, bad or indifferent. Added to this attitude is a not unnatural reluctance of those who practise before the courts to criticize the actions of the men whose good-will may be a material factor in winning the next case brought before the court.

It is, moreover, true that the practising lawyer does his greatest work in protecting the interests of his client with the existing means at his disposal. Unless, however, our system of legal education is broadened to include searching analyses of existing doctrine, and unless it avoids expounding as Holy Writ the existing rules of the legal game, we shall not only continue to turn out a profession unresponsive to legal reform, but we will have made no provision for the building of groups of professional men whose business it is to work for the improvement of the law itself. To teach merely what can be done today with no thought of what might be done tomorrow is to merit well the reproaches of the public for whose benefit—and not the profession's—all law exists. And yet that is what one so often hears demanded of the law teacher. It explains why lectures by practising lawyers are so common: why full time law schools and full time faculties as yet have to fight for their existence, and why their existence is denied in many provinces in this country. It also explains why Canada has made, to date, so small a contribution to the development of the law.

To take but one illustration. We hear a great deal these days on the subject of growing "bureaucracy", and of a "new despotism". Lawyers, and some judges, point out in glowing and imaginative phrases the evils of transferring jurisdiction to boards and commissions, and of depriving the people of access to the courts. They tell us of the virtues of the legal process and the evils of the administrative process. In other words they are informing the world of the "rule of law". But on what information or investigation are such oracular pronouncements made? Has the profession actually made a study of the values of appeals in Workmen's Compensation cases? Are scientific studies being made as to the value of administrative as compared with judicial process? That some hardy souls, even in Canada, are doing so, is undoubted, if one examines the periodical literature. Are such studies fostered by the

legal profession itself? Are our law schools investigating the problem? Or do we want the students to be told without investigation that the "new despotism" must be stamped out, because the law books have said it was a bad thing. Surely fundamentals of this nature are the business of the legal profession. Surely we should not rest content with the impassioned articulation of legal clichés based on nothing more exact than an implicit faith in courts as a panacea for all ills—a faith that developed under circumstances that may or may not be quite different from those existing today. Slogans may serve their purpose in an advertising campaign or an election. There are still too many slogans in the law which either need "debunking" or else a strengthening by scientific fact. Is not the public entitled to ask the profession to find out how true it is that "the King can do no wrong", or how far the new despotism of administrative tribunals is inferior or superior to the old despotism of the courts? So far as the writer knows there is nowhere in Canada any chair of criminology. And yet, what do we *know* of crime—its causes, its cure, the effect of punishment, whether it really be a deterrent or not? If these be not matters which the public are entitled to have elucidated by the profession, what are? In other words, law must prove itself and not rest satisfied that the public will believe in the superiority of law because lawyers tell them so, any more than they will be satisfied to believe that a lawyer is as good for certain financial ills as a banker or a chartered accountant. What is the profession doing to encourage a study of these problems?

It is significant that in England during the last twenty-five years there has been a renewed interest in the "academic" or "theoretical" teaching of law. No longer are the writers and teachers on law content merely to expound. Critical and scientific law teaching has already produced tangible results in many of the newer text-books and has influenced not a few recent decisions of the English courts.[7] That the new teaching profession has played a large role in the actual work of, in addition to creating in part the demand for, the Law Revision Committee, is apparent if one examines the names of the Committee members. The happy combination of bench, bar and the law teacher has achieved much in overcoming the "dead weight of conservatism".[8]

[7] The most notable example of the latter is *Haynes* v. *Harwood*, [1935] 1 K.B. 146. Dr. Stallybrass in SALMOND, TORTS, 9th ed., p. 39, comments that "the case is an interesting illustration of the occasional influence even in England of academic work and of American case law".

[8] Lord Wright, *Ought the Doctrine of Consideration to be Abolished.* (1936), 49 Harv. L. Rev. 1225, 1253.

It will probably take considerably longer before a member of the teaching profession is appointed to the bench of an appellate court in England, due to the tradition that the Bench should be drawn from the practising Bar. This tradition, however, developed throughout a period of time when the law teacher was little known, and even when he was later grudgingly recognized he was treated as having less to offer than the "practical" lawyer. No one will gainsay the advantage of appointing practising lawyers to the trial court. In an appellate court, which is at least as much concerned in settling the law for the future as deciding the immediate case, the reasons for his appointment are much less obvious, and those of the man of legal research more clear. That this position may ultimately be reached in England seems probable. Having contributed so much indirectly in teaching, and more directly in such work as that of the Revision Committee, it would seem only an unreasoning prejudice that would prevent direct participation in the law-making function of the appellate bench.

Canada, as yet, is far behind England, so far as recognition as a distinct branch of the profession legal research and the professional law teacher. Likewise, Canada lags behind in legal reform. Even admitting a professional teaching class, it is doubtful whether full advantage is taken of their services by the profession or by legislative bodies. The word "theoretical" is deemed sufficient to condemn them. Were this to mean, as it frequently does, "divorced from reality", there might be considerable justification in the condemnation. It is at least arguable, however, that the practising lawyer, engrossed in applying the "black-letter" rule, is further removed from the necessities for action, and perceives less clearly the underlying reason for so much dissatisfaction with law than his "theoretical" colleague who has no private axe to grind, and whose sole interest lies in exposing whatever deficiencies there may be in the law and suggesting correctives. It was one of the greatest jurists of the common law, the late Mr. Justice Holmes, who spoke of legal theory in the following words :

> Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. . . . . Theory is not to be feared as impractical, for, to the competent, it simply means going to the bottom of the subject. [9]

What the legal profession in Canada needs is legal architects. There are plenty of able and brilliant workmen—men whose

[9] HOLMES, COLLECTED PAPERS, at p. 200.

success in the handling of the existing materials is the equal of that anywhere. The public, however, is entitled to more than that. It is entitled to have the best material and the most scientifically arranged scheme of building. Surely it is entitled to look to those to whom it entrusts the administration of the legal order to supply them?

To avoid misunderstanding, let it be clearly understood that the writer makes no claim that a professional teaching class has or ever will have an exclusive monopoly of interest in reform or improvement of the law. Far from it. On the contrary he believes that the entire legal profession is desirous of doing all in their power to correct any and all abuses that may exist in the legal system. At the same time, there are few, if any, *permanent parts of the profession, organized by the profession,* whose chief interest lies in scientific research into the ills of that system. That large and permanent faculties of law, given a free hand and every facility for legal research, could be of assistance in that aim is all that is contended for. Nor again, does the writer aim at turning every student of law into a legal reformer. God forbid! He does maintain that any lawyer is the better equipped for the practice of his profession if he has been taught, not merely how to lay legal bricks, but has been given some notion of the object to be served in laying them, and some appreciation of the problem whether the edifice he assists in building will survive, or is worthy of surviving, the storm of changing social, moral and economic conditions.

It is, perhaps, too much to hope that the opinions here set forth will not be considered as coloured by the writer's connection with that part of the legal profession whose virtues he may appear to have unduly extolled. Let it be said at once, therefore, that the writer disavows any intention whatsoever of glorifying one branch of the profession at the expense of another. The limitations and shortcomings of the academic lawyer in Canada are too well known to him for that. On the contrary, that is why this article was written—not in praise of what we have but of what we might have. We have law schools and faculties, but are they, to any extent, encouraged, staffed or endowed with a view to doing more than teaching the mechanics of the profession? It was the belief — perhaps a mistaken belief — that the legal profession have not fully appreciated that law faculties should exist and should be established by the profession not only for the legal neophyte, but for the assistance of the profession itself, and as a public service rendered by the

profession, that prompted the present writing. Another reason was the fact that the writer felt that every editor is entitled —but only at very long intervals—to commit that most serious of all editorial crimes—stating his personal views.

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