

LAW IS IN THE LAWYERS' KEEPING.

A Problem of Professional Duty.

*Based on part of the Valedictory Address on "War and Law" delivered by
E. N. BERGERE, President of the Law Students' Society in 1942.*

During the early years of the present war the Law Students' Society curtailed its activities very drastically and made marked modifications in its organization. Had it not done so it would not have been able to continue in existence. But its members determined that they should carry on the Society in whatever way was possible and did so even in our darkest year. Those who are its members when peace is restored will have the opportunity and the duty of restoring the Society to full and complete activity. They will be guided by a knowledge of what it did and how it was conducted in the past but their principal guide should be the needs of law students of their own times. If their Society functions somewhat differently or is differently constituted that need not be a matter for regret if it is as useful a society. But it will be their responsibility to be sure that if they innovate they also improve and do not abandon or neglect former practices unless they replace them with others, as useful, but more suited to the needs of their own times.

What happened in the Law Students' Society was but a slight reflection of what happened in society as a whole as a result of the same major cause—the urgent need to simplify and direct our national life to the end of preserving its essential framework until peace could be won. The problem of reconstruction that will confront future members of the Law Student's Society will be but a slight reflection of the problem that will, and already does, confront every member of the national community—how to reconstruct within the remaining framework of our social structure a full national life and a way of existence which will assure the greatest benefit to the community and all its members.

This is a problem of statecraft for which different social and political philosophies offer different solutions. But, whatever solution the community may ultimately adopt, it is a problem which should be the particular responsibility of those who make the Law their vocation because it is on their skill and integrity that the community must rely for the means to make its solution effective. It must so rely, not because lawyers have any monopoly of political wisdom, though they should have a wide political understanding, but because they have a monopoly of legal knowledge. Decisions on political principles or policies do not of themselves achieve any practical result. They require to be crystalized as rules of law and fitted into the structure of the legal system of the community before they can achieve their purpose. It is in this part of the process of government that the duty of studying, understanding and making effective the real will of the community rests on those of its members who profess knowledge of its laws and are accorded special status and privilege in consequence.

To appreciate this duty it is necessary to comprehend the nature of law and its function in a community.

The law which a community recognizes has several aspects. Primarily it is an indefinable concept resting on and reflecting the moral and ethical

beliefs currently accepted by the majority of its members. The will of a community to remain united postulates a recognition of the necessity for controlling the actions of individuals in the interests of the majority and the extent of the control which is demanded at any time depends on the nature and variety of their interests which the current moral and ethical standards of the members of the community lead them to accept as vital. If an individual action does not comply with these standards or threatens to disregard these interests it will be regarded as unlawful.

When a community regards an action as unlawful it seeks a means to control it and the means, when ultimately found, will appear as a formulated and expressed rule of conduct compliance with which will be compelled by such force as the community can command—i.e. a law. But that rule of law will attain its final meaning and effect only when it has been adjusted to and reconciled and harmonized with the rest of the legal system—the mass of existing laws both substantive and procedural, which have previously been formulated and expressed and whose effect has become known, certain and accepted.

A rule of law becomes effective when it is applied to particular facts and, if it is new, it must then be considered in relation to existing laws which also apply to those facts before its actual effect can be determined. The legal system of an advanced community is inevitably inter-related and interdependent because it is the product of a long and slow growth and deals with every phase and detail of complex and inter-related activities of individuals in a complex social organization where they are inevitably dependent on the conduct of each other. For purposes of study or reference laws dealing with particular subject matters can be grouped together but in their application they cannot be so isolated. The act of buying a loaf of bread might appear to effect contractual rights only but that simple act can also involve criminal and delictual responsibility if the bread were unwholesome or if the consideration for the sale were unlawful; it could constitute a breach of a covenant of a lease or of a condition of a licence granted by an administrative authority or even of an international obligation. Just as this act might be considered, not as being governed by one law only, but by the legal system as a whole, so any new law affecting even so small an act as the buying of a loaf of bread may be affected by and may affect the legal system as a whole and, therefore, must be adjusted to and reconciled with it.

This process of adjustment and reconciliation of new laws to the legal system takes place in the courts, in administrative offices and in the offices of lawyers when acts of individuals which the new laws do or may affect come to be considered and final rights must be determined. The result of such adjustment and reconciliation may be that the existing rules are modified by the new rules or that by the force of the existing rules the new rules are found to have a less or greater or a widely different effect from that which they would appear to have if considered by themselves. Unless they have been formulated with a careful regard to existing law their final effect in determining rights and duties will frequently disappoint or even frustrate the intentions of their framers.

Laws which do not disappoint or frustrate their purpose but carry it into effect and at the same time harmonise with the existing legal system,

modifying such parts of it only as it is their purpose to modify, are good laws. To the extent that they fail to achieve their object or produce unintended changes in the legal system they are bad. It should be the aim as it is the duty of all who serve the law to see that they are good.

But it is not enough that a law should fulfil its immediate and intended purpose and to that extent reflect the will of the community if that purpose is misconceived and based on a lack of understanding of its ultimate consequences. These may not be foreseen by the community if it does not understand the indirect results which will flow from achieving its immediate purpose. They should, however, be foreseen by those who have knowledge and understanding of the legal system and who should make clear to those without their special knowledge the full implications of suggested policies before they are adopted so that the will of the community may be exercised to attain ends which are clearly understood and desired with a knowledge of the consequences which will follow their attainment.

Every section of the community which possesses any special knowledge by reason of that fact owes a similar duty to the community as a whole. If, for example, a reorganization of the army is necessary it is the duty of its professional soldiers to advise the community so that it may decide upon the best form of reorganization and the best measures for carrying it out. It is also their duty to carry out those measures faithfully when they are decided according to their skill and knowledge. But professional soldiers, as a rule, need not concern themselves particularly with reforms outside their own sphere. Lawyers, because any reforms affect the law as a whole, must concern themselves with every social reorganization.

Whenever, therefore, conditions in the community are such that its members require new laws to be made which will reflect a changed outlook and carry out a desired reorganization of society, members of the legal profession have imposed on them a particular responsibility beyond that of serving their individual clients. It is not enough then that they should understand merely the existing law and the social structure it supports. They should seek to understand the defects of the social structure and to comprehend the remedies which the community desires and they should be active in informing the community according to their special skill of the means necessary to make those remedies effective. It is not for them merely to urge that "the government" make a law to solve a particular problem; if a law is needed they should be ready to say what that law should set out to do, what limits should be set upon it, and what it should not do. They should be active to see that every new law is good in form, whatever their opinion of the merits of its substance, and that it is applied properly.

These responsibilities are very heavy at the present time. Just as in the Law Students' Society the problem of reorganization will require a number of readjustments to be made in a brief period so in the community at large the problem of reorganizing our life after the war will require great and sudden readjustments of the social structure and the legal system. There must be great changes because there have been great changes in the outlook and social conscience of the community. The extent and nature of these changes is a problem for solution in the

political field but whenever that solution is reached and whatever it may be the community will expect and should expect that any defects it may possess will not result from a failure by the legal profession to fulfil its obligations. Those obligations are heavy. Their discharge calls for learning, skill and professional integrity as seldom before. There will be many temptations for lawyers to use their special knowledge to advance sectional interests or to justify their own political theories or even to ignore their public obligations in the conduct of their private business. There is no force to compel them to discharge these obligations beyond the knowledge that they have sought and acquired a position of privilege and respect in the community as members of a profession whose primary duty is service. The honour and standing of the profession depend on its members and they must justify them by their service not only as advocates but as servants and guardians of the law.