A PROPOSAL FOR STATUTORY RELIEF FROM THE PRIVY COUNCIL CONTROVERSY.

The fault is in an Act respecting the Supreme Court of Canada. There has been a deal of controversy about the Appeal to the Privy Council. But the fault is in the Supreme Court Act.

Courts do more than one thing. They not merely decide the particular merits of the case brought by A. against B. They sort out the principles applicable to similar and dissimilar cases, partly like and partly unlike that brought by A. against B. They settle the law. Sometimes.

What gives its imposing respectability, its ponderous finality to a decision of the Privy Council is its unity. There may be considerable diversity of opinion, doubts, hesitations and dissents behind the curtain. But when the curtain goes up one judge delivers the opinion of the Court and it is law. It does not sprinkle like a garden hose; it hits like the hammer of Thor.

True it is a peculiarity of the Privy Council that it is meticulously stingy in the way of enunciating general principles and gives off as little law as will decide the point at issue. Thus as to the rights of Provinces with respect to Dominion Corporations it has taken a series of Privy Council cases to enable our lawyers to arrive at any general formulae and the process of formularising is not as yet very satisfactory. It has been like the old process of getting the meat out of a hickory nut with a hair-pin.

On the other hand, in this matter of enunciating general principles, there has been a gorgeous generosity about the Supreme Court of Canada. For a while it appeared that we had less a bench of judges than a college of indefatigable jurists each of whom collected all the law into an encyclopaedic essay. These separate and divergent essays have been admirable if meant to promote discussion. But as a device to settle law something has been lacking.

Of late the tendency of the Supreme Court has been for the majority to follow the Privy Council habit and use one judge as the mouth-piece. Occasionally there is a burst of the old individualistic practise and the judges go through the subject like a group of bombers searching dugouts.

We have a good instance of this in *Corporation Agencies Ltd.* v. *Home Bank of Canada,* 1925, 4 D. L. R. 585, the effect of which on the lawyers will be a clear definition of what is meant by "kiting cheques" (which some of them unfortunately knew before) and a

very unclear perplexity as to who in future is going to be held liable to pay for the "kiting."

But on the whole the tendency of the Supreme Court has of late years been towards solidarity in opinion. Unfortunately there is no discipline that can at present be applied to restrain the pride of authorship in any member of the Court. By neglecting to attend the meeting of the majority he entitles himself to the privilege of ploughing lone furrows as a dissenting judge and publishing his dissent.

This is an evil. It is becoming an occasional practise for judges in the inferior Courts to look for law in these dissenting judgments of the Supreme Court; not to mention the six thousand and fifty practising lawyers throughout Canada not one of whom will be content to have his client's interest unfavourably concluded by a statement of the law which is interwoven with threads of dissenting opinion. It is an evil; the Supreme Court of Canada fails in its duty of settling law.

Two sections in the Supreme Court Act are the seat of trouble. They are:—

"28. It shall not be necessary for all the judges who have heard the argument in any case to be present in order to constitute the Court for delivery of judgment in such case, but in the absence of any judge, from illness or any other cause, judgment may be delivered by a majority of the judges who were present at the hearing. 51 V., c. 37, s. 1."

"29. Any judge who has heard the case and is absent at the delivery of judgment, may hand his opinion in writing to any judge present at the delivery of judgment, to be read or announced in open court, and then to be left with the Registrar or reporter of the Court. 51 V., c. 37, s. 1."

The evil could be cured by repealing section 29 and inserting in lieu thereof the following:—

"29. Judgment as in the next preceding section shall be delivered by one of the said majority and no dissenting judgments or alternative reasons for judgment shall be published."

Shortly after the coming into force of this amendment we might look for the gradual abolition by disuse of the appeal to the Privy Council. It would be difficult to obtain a constitutional amendment in the British Parliament abolishing this appeal when in the past it has been the only relief against something our own Parliament can remedy. Before we ask John Bull to cut it off let us first take measures that will make it drop off—and seek as a cure not surgery but atrophy.

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