*(February 3rd, 1908.)*

# Law Reform as Applied to Ontario Legal Appeals.

By Mr. D. B. Maclennan, K.C.

ADDRESSING the Canadian Club on "Law Reform as Applied to Ontario Legal Appeals," Mr. D. B. Maclennan, K.C., said:

*Mr. Chairman and Gentlemen of the Canadian Club of Toronto,*—I confess to being as great a novice in law reform as anyone else. It is the first time I have ever attempted an address upon the subject. But law reform is coming to the front, and it is in the public interests and in the interests of the legal profession that some progressive action should be taken relative to the existing appeals in the law courts.

The subject of law reform centres largely around the appellate system now in existence and the question is whether any change should be made, and if so, to what extent.

The trial and the appeals that are open now form five stages in the progress of a law suit from the beginning to the end. The first and most important step is the trial of the action before the judge alone or before the judge and jury;

Second, the appeal to the Divisional Court;

Third, the appeal by leave to the Court of Appeal for Ontario;

Fourth, the appeal of certain cases to the Supreme Court of Canada;

Fifth, appeal by leave to the Judicial Committee of His Majesty's most Honorable Privy Council, to give this court of final resort its full legal and statutory title.

The anomaly presented in this procedure is that at all these five stages the subject matter is the same, and the litigant goes from stage to stage without any change of scenery.

If we go into other spheres for the sake of illustration, we find that in the process of Government in the Dominion we have also five stages, namely:

First, the Township Council;

Second, the County Council;

Third, the City Board of Control;

Fourth, the Provincial Government;

Fifth, the Government of the Dominion of Canada.

Contrasting, again, our legal system with all these different bodies, we find that they all deal with different matters, each governmental body from the lowest to the highest dealing exclusively and finally with matters under its control. There is a regular gradation in the subject matter to be dealt with by each. There is also a gradation on the ascending scale in the work, quality and ability of the governmental bodies from the appropriate work and appropriate ability of the members of the Township Council up to the equally appropriate work and appropriate ability of the Dominion Government.

Here we find no anomaly whatever, everything is just as we would expect to find it in a proper system of governmental administration.

We do not find any matter of business or any subject involving the consideration in any one of these bodies going from the lowest to the highest for the purpose of reconsideration or for the purpose of appealing, and here there is a singular contrast between our system of government at the various stages and our system of judicial procedure.

We take another illustration, which we find in our educational system. There are there also five stages:

First, the work of the primary teacher at the foot of the list, done by the teacher of the Public School in a rural district;

Second, we have the teacher of the central school in the town or city;

Third, the High School or Collegiate Institute;

Fourth, the Normal Training School;

Fifth, and highest of all, the University.

Here, also, we have different subjects dealt with at different stages. We have workmen of different qualifications and ability graded up from the rural teacher of the Public School to the President of the University, and at each of these stages there is a different work to be done, and there is a gradation in the quality of the work as well as in the standing, ability and qualifications of the workmen. In each of these two spheres we have a well understood and sensible procedure and one well calculated to meet the requirements of the country at large.

Reverting to our system of legal procedure, we find no gradation in the work done at the various stages, the work is the same all along the line. The quality and ability of the gentlemen who do the work is the same.

The trial judge who tries a case to-day at the City Hall is as well qualified to deal with the questions submitted for his decision as the Lords of the Privy Council are. That is, so far as legal qualification is concerned.

It is therefore quite obvious at the very outset that some very strong reason should be adduced for the perpetuation of a system of legal procedure so utterly out of harmony with what we find in every other system of administration.

There should, of course, be an appellate court to which appeals could be taken from the judge who tries the case for the purpose of securing uniformity, otherwise each judge who tries a case might follow the bent of his own inclination and we might thus have as many diversities of legal opinion as to what the law is on any particular subject as there are judges on the Bench.

But this requirement is filled by the existence of one Court of Appeal.

Instead of two Courts of Appeal in the Province we should have but one.

We have seventeen judges of the Supreme Court of Judicature in Ontario. They should form the Court of Appeal. Each sitting of the Court of Appeal should consist of six judges. The even number is better than an odd number and this is necessary in justice to the trial judge, who should not be reversed on an even division of opinion including his own as one.

The reasons for the change are the saving of time and expense and the avoidance of minority judgments. The two former go without saying. There is a minority judgment under the existing system of internal appeals when the judge and the Divisional Court of three agree, say, in a judgment for the plaintiff, but they are reversed by the Court of Appeal by the opinions of three of the judges of the Court of Appeal against two in favor of confirmation. Thus the winning party to the cause has the opinion of three judges in his favor, with six in favor of his opponent.

This is an extreme case, but it is an event which may occur under the present system.

The Divisional Court is a survival of a similar court under an older system.

Forty years ago the corresponding courts, known as the Courts of Chancery, Queen's Bench, and Common Pleas, fitted properly into the then existing appellate system where all the judges in these distinct courts formed the Court of Appeal,

and then the anomaly of a minority judgment could not and did not exist.

The next question is, why should there be an appeal from the Province to the Supreme Court of Canada.

If we secure the boon of one Court of Appeal in the Province, that is quite sufficient to pave the way for the abolition of appeals in ordinary litigation to the Supreme Court.

We have a strong judicial force in the Province. Any final decision in the Province is in a sense the decision of our seventeen judges. Why should we go to a tribunal at Ottawa consisting of six judges?

The reasons are entirely against it. Our own judges are much more familiar than others can be with all the surroundings, with the modes of thought, the business instincts and methods of our people and the various ways in which these are likely to influence the dealings between man and man.

It is conceded that the judges of the Supreme Court are men of great eminence and great judicial experience, but this can with equal fairness be said of our High Court judges.

There is this distinction between the two judicial bodies: Two of the judges of the Supreme Court come to their appellate duties at Ottawa with a training in the law of the Province of Quebec, different in many of its features from the law of this Province. At present Prince Edward Island and British Columbia is each represented by one judge in the Supreme Court and we have two Ontario Court judges.

Cases have occurred where the judgment of the Ontario Court of Appeal has been reversed by a majority of the Supreme Court judges with the only Ontario judge on that court dissenting.

If it is expedient and necessary, as it may be, that there should be an appeal to the Supreme Court at Ottawa from say Nova Scotia and the other smaller Provinces of the Dominion where the judiciary is not as strong as it is here, it is neither expedient nor necessary that appeals should go from Ontario.

It is quite a far call to go from the Court of Appeal in this Province to the Supreme Court. It is a still further call to go to the Judicial Committee of the Privy Council.

If the difference of environment is great between Ontario and the seat of the Dominion Appellate Court, it is much greater when we cross the sea.

In the later case we come in conflict with many differences between the instincts, habits of thought and sentiments of our people and our brethren in the United Kingdom.

The Englishman is brave, sincere and energetic, but he is full of incredulity. There is very little outside of the United Kingdom which strikes him as being of very much consequence to him.

Cases that have come before the Judicial Committee of the Privy Council show how this feeling exists among all classes and in all spheres.

A case from the colony of Victoria was cited to indicate how even our final Court of Appeal in England is apt to respond to this spell.

An illustration was taken from the old sod.

King James the Second got Varelst, the great picture painter, to do his portrait. When the work was done the sunflowers and tulips which surrounded the central figure were magnificent and drew away all attention from it and the picture, which was not a good portrait of the King, was taken to be a flower piece.

The special application is that the painter represented the Judicial Committee, the portrait of the King the subject of the litigation, and the flowers the environment, and the general application showed how the environment got the better of the main subject.

Reverting to Canada, the Province of Quebec is the only one similarly situated to Ontario, and the question of the reduction in the number of appeals has there become a live subject of discussion.

Why should there not be a multitude of appeals from those who make as well as from those who interpret the laws?

There is much more danger of error in the former than in the latter sphere.

But if any one should propose an appeal from the Provincial Legislature to the Dominion Parliament or from the latter to the Parliament of the United Kingdom, the proposal in either case would be spurned and its advocate would be held up to scorn.

Ontario has come of age long ago and is perfectly capable of managing its own affairs in the judicial sphere as well as in all others, and it is quite time we should cast off the swaddling bands and leading strings of an antiquated system the usefulness of which has long since passed away.