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DICEY ON THE CONSTITUTION OF CANADA.

THE short extract from Mr. Dicey's book on Constitutional Law, which appears in the review of the work in THE WEEK of 17th December, is perhaps as misleading as it is possible for an author to make a period of that length.

The topics referred to in the extract are: (i.) a comparison of the Constitution of Canada with that of the United States, to which the learned writer declares it to be similar, rather than to that of the United Kingdom, as recited in the preamble of the British North America Act; (ii.) the alleged impossibility of changing the Constitution "either by the Dominion or by the Provincial Parliaments"; (iii.) the existence of the powers of disallowance, and the reason for it. In treating of each of these matters the learned writer conveys an entirely erroneous impression. Indeed, it is difficult to understand how one who has read the B. N. A. Act through could have fallen into the manifest errors under which Mr. Dicey labours with respect to the second and third topics. It is intended to point out, as shortly as possible, some of the inaccuracies.

(i.) *The Constitution of Canada as compared with those of the United Kingdom and the United States.* Upon this the learned writer remarks: "The preamble to the British North America Act, 1867, asserts with official mendacity that the Provinces of the present Dominion have expressed their desire to be united into one Dominion, with a Constitution similar to that of the United Kingdom. If preambles were intended to express the truth, for the word *Kingdom* ought to have been substituted *States*, since it is clear that the Constitution of the Dominion is modelled on that of the Union."

This is untrue of the inception or derivative force of our Constitution, of the principle upon which the legislative functions have been distributed, and of the inherent powers of the Canadian Legislatures when acting within the topical limits of their jurisdiction, or when legislating upon subject-matters over which they have jurisdiction. The chief, perhaps the sole points of similarity between the Constitution of the United States and that of Canada are the subordination of the legislatures to the judiciary, and the distribution of legislative powers amongst local and central bodies. The points of dissimilarity are many, and in fact our constitutional lawyers refer to the Constitution of the United States for the purpose of contrasting, rather than of comparing, it with our Constitution. The United States of America, as the name implies, is an aggregation of several sovereign States, which retain their sovereignty subject to the terms of the indissoluble compact (indissoluble, because the right of secession has been demonstrated by force of arms to be unfounded,) into which they entered for the purpose of forming a central or Federal Government.

Canada, on the contrary, is a physical entity, being composed, not of the old provinces of Canada, Nova Scotia and New Brunswick, but of the territory formerly comprised in them, together with that which has been admitted since the passing of the B. N. A. Act. The old Provinces, as constitutional entities, are extinct; physically, their territory is merged in the Dominion. Canada, the Dominion, is not *composed of*, but is *subdivided into*, provinces. Section 5 of the B. N. A. Act is as follows: "Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick."

It is this apparently unimportant distinction which forms the basis of the grand fundamental difference between the Constitutions of the United States and Canada. When the North American Provinces formed a Federal Union they had plenary powers of legislation vested in their own legislatures. Certain of these powers they abdicated in favour of the Federal Government, *i.e.*, they agreed that a Congress should thenceforth exercise for the United States certain legislative functions which had formerly been exercised by the individual States for their own benefit. Such powers as were not expressly or by implication granted to Congress were of necessity retained by the several States, and continued to be exercised by the State legislatures. This is, in fact, expressed in the tenth amendment as follows:—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus was formed a Federal Union, *i.e.*, a union founded upon treaty or compact.

The Constitution of Canada forms no analogy whatever to this. The term "Confederation" when applied to the union is a misnomer, as is the term "Federal" when used as descriptive of Dominion functions and powers. The B. N. A. Act is not in any sense a treaty or compact. It is in every sense an Act of Parliament. It is true that it was passed in response to the request of the Provinces affected, which voluntarily surrendered their constitutional powers in order to accept a new form of government. But the very necessity for the passing of the Act was caused by the want of power in the Provinces otherwise to attain the desired end. Again, it is impossible that a treaty, compact, or federation should exist between Provinces which are extinct. The grant of legislative power, then, came, not from the old Provinces, but from the Imperial Parliament; and as the B. N. A. Act was passed for the purpose of bringing into existence the Dominion of Canada, there was thereby granted to the Parliament of Canada power "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." Whatever, therefore, is not "assigned exclusively" to provincial jurisdiction is within the legislative jurisdiction of the Parliament of Canada. In the United States, as we have seen, whatever legislative power was not granted to Congress by the several States still remains with the State legislatures.

Another, and a more important, difference between the two constitutions is this, that the American legislatures are restricted in their power to legislate upon subjects within their jurisdiction, while the Canadian legislatures are not. For example, by the fifth amendment, "no person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a grand jury." This alone would have rendered Riel's trial and conviction illegal, had it occurred in the United States, though the trial took place under an Act of the Parliament which had full and undoubted jurisdiction over the criminal law, and which dispensed with the necessity for such a presentment and reduced the number of the jury to six. Take another example. The Constitution of the United States prohibits the passing of any *ex post facto* law, or law impairing the obligation of contracts by any State: Article I., section 10. Any legislative attempt to contravene the provisions of this article would be null and void. In Canada, however, instances may be readily pointed out of *ex post facto* laws. The Exemption Act of Manitoba is still fresh in the minds of lawyers and commercial men. So, with respect to contracts, our legislatures have not hesitated at times to outrage the solemnity of contracts. A familiar instance of this may be found in the legislation which has at various times "adjusted" the entangled affairs of public companies by enabling them to give a preference lien on their assets to those who advance their money last, thus rendering of little or no value their stock and earlier bonds.

It is true that British Constitutional usage forbids the taking of private property except for public purposes, and upon compensation being made that it forbids interference with the private obligations of subjects, except in such a general way as by a bankruptcy law; and that it forbids the passage of *ex post facto* laws, except when injury or injustice would accrue from the want of one. But British Constitutional usage is only a very strong moral obligation imposed upon the sovereign powers; and if the Parliament chooses to disregard it, the law passed in defiance thereof must