FORGOTTEN AMENDMENTS TO THE CANADIAN CONSTITUTION

It may come as a surprise to some students of the Canadian constitution to learn that one paragraph of the preamble and no less than eight sections of the original B. N. A. Act (1867) have been totally repealed, while three other sections have been partially repealed. These changes are quite apart from those made by the later B. N. A. Acts of 1871, 1875, 1886, 1907, 1915, 1916, 1930 and 1940, which are usually considered to be the formal amendments to the constitution, and quite apart from any of the other statutes relating to Canadian affairs which Mr. H. McD. Clokie in his recent article on "Basic Problems of the Canadian Constitution"[1] has so well described as being part of our constitutional law.

There has also been a repeal of one provision in the B. N. A. Act of 1915 referring to the change in composition of the Senate.

All these changes in our constitution have occurred without any notice by Canadian constitutionalists of the fact of their existence. Even the King's Printer at Ottawa pays no attention to them, and his published copies of the B. N. A. Acts contain no trace of them. This is not perhaps surprising, considering the manner in which they were made. Nor is the subject of any practical interest, since the changes do not touch any continuing portion of the constitutional law. Nevertheless the very fact that the Canadian constitution could be amended in England without the Canadian Parliament being anyway informed, still less the provinces, is another reminder of our colonial relationship toward the Imperial Parliament. The latest of these forgotten amendments occurred as recently at 1927, one year after our equality of status with the

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1. Canadian Journal of Economics and Political Science, Vol. VIII, p. 1.

other members of the Commonwealth was declared.

The story of the amendments is simple. Periodically the British Parliament passes a Statute Law Revision Act, the object of which is to clear the English statute law of enactments which have either ceased to be in force or have become unnecessary, but which have not been expressly repealed. The revision Act is prepared by the Statute Law Committee, set up in 1868 by Lord Cairns to superintend the publication of the revised edition of the statutes. In preparing its list of statutes for repeal the Committee works on the principle that six categories of enactments are considered as having ceased to be in force, otherwise than by express specific repeal[2]. These categories relate to statutes which are

1. Expired: that is enactments which, having been originally limited to endure only for a specified period, by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had for their object the continuance of previous temporary enactments for periods now gone by effluxion of time;

2. Spent: that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect, or on the happening of some event, or on the doing of some act authorized or required;

3. Repealed in general terms: that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts on which it is to operate;

4. Virtually repealed: where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one;

5. Superseded: where a later enactment effects the same purposes as an earlier one, by repetion of its terms or otherwise;

6. Obsolete: where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longe capable of being put in force, regard being had to the alteration of political or social circumstances."

In the year 1892 a substantial number of sections of old acts of Parliament[3] were cleared away by the Statute Law Revision Act on the principles ~~just enumerated. The schedule to this Act listed all the laws repealed. In~~

2. Vol. 18 Halsbury's Complete Statutes of England, p.1183.
3. 55-56 Victoria cap. 3.

the schedule we find this entry:-

"30 & 31 Vict. c. 3. The British North America Act, 1867.
In part; namely,-
From "Be it therefore" to "same as follows."
Section two
Section four to "provisions" where it last occurs.
Section twenty-five
Sections forty-two and forty-three.
Section fifty-one, from "of the census" to "seventy-one and" and the word "subsequent."
Section eight-one.
Section eighty-eight, from "and the House" to the end of the section.
Sections eighty-nine and one hundred and twenty-seven.
Section one hundred and forty-five.
Repealed as to all Her Majesty's Dominions."

The careful law clerks had taken the B. N. A. Act as just one more of the English statutes to be revised, had gone through it punctiliously, and lopped off the dead wood just as with any other statutes. The statute next after the B. N. A. Act in the Schedule of revisions is the Dog Licenses Act, 1867, the statute to which the Imperial Parliament turned its attention after it had disposed of the B. N. A. Act.

So it is that the B. N. A. Act no longer contains the enacting words of the preamble or sections 2, 25, 42, 43, 81, 8 9, 127 and 145, or parts of sections 4, 51 and 88. If the B. N. A. Act is referred to in Halsbury's Statutes[4] it will be seen printed in its correct form - a form discoverable in no Canadian text known to the writer. Similarly, by the Statute Law Revision Act of 1927[5], Section one, subsection (2) of the B. N. A. Act of 1915 was repealed. No doubt if the Statute Law Committee is still at work, somewhere in a distant office a meticulous clerk is paring away any loose portions of the B. N. A. Act of 1930, the Statute of Westminister of 1931, the B. N. A. Act of 1940 and any other such statutes that may pass before his eyes.

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4. Vol. 5, p. 351
5. 17 & 18 Geo. 5 C. 42.

It is unnecessary to describe in detail the portions of the Canadian constitution which are repealed. Most of them are of no consequence and relate to provisions which are spent, expired or obsolete. Still, they did no harm where they were, and helped to make the Act more historically complete. Their removal leaves unsightly gaps - or rather would leave unsightly gaps if Canadians were to pay any attention to them. The repeal of section 145 dealing with the Intercolonial Railway, for example, takes out a provision that illustrates very clearly one of the aims of the Fathers of Confederation - that of linking the former colonies by steel from coast to coast. And it might be argued that the obligation to construct a railway includes an obligation to maintain, which is a continuing obligation. Will the Maritime provinces welcome the elimination of section 145? Also the removal of section 2 is difficult to understand. It provides

> "2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland."

No doubt this rule remains in our law without the necessity of its statement in the B. N. A. Act, but cela va bien mieux en le disant.[6]

This odd group of amendments to our constitutional law provides another argument for those who believe that Canada should acquire a new constitution of her own - a single, complete, independent document superseding all previous statutes and deriving its authority solely from the assent of the Canadian people. Until that occurs we shall not have a Canadian constitution, nor a full sense of national status.

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6. For instance, Dr. W. P. M. Kennedy recently cited section 2, though repealed, in support of his argument that Canada is not a "Kingdom" but a "Dominion under the Crown of the United Kingdom". See his article "The Kingdom of Canada", 17 Canadian Bar Review, 1, at p. 4.