

THE SCOTTISH LAD AND THE BRITISH EMPIRE.

On the death of the Virgin Queen, Elizabeth, in 1603, came to the throne of England the "Scottish Solomon," King James VI., who thereby became King James I. of England; though he removed his residence from Scotland to his new kingdom, he continued to be King of Scotland. These two kingdoms continued to be separate and distinct political entities, however, until the time of Queen Anne, when, May 1st, 1707, the kingdom of Great Britain came into actual existence (1706, 5 Annæ, cap. 6).

It was the ardent desire of King James that the two separate kingdoms should be one; and in his proclamation of October 20th, 1604, he styled himself King of Great Britain; this proclamation contained a clause which stated that he had been advised by "those that be skilful in the lawes of the land that immediately upon our succession, diurse of our auncient lawes of this realme are *ipso facto* expired as namely, that of escuage and of the naturalization of the subjects." The last portion of this clause received great attention from the statesmen of England, looking as it did to the status of those born in either kingdom after the death of the Queen, the *Postnati*, as they were called.

Opinion, legal and otherwise, in England was very much divided as to whether a child born in Scotland after the accession of James VI to the throne of England was an alien in England and with reference to property, etc., in England. Some contended that he was an alien, while others as confidently contended that such a child, a *postnatus*, was a "natural born subject" of the King of England, with rights as such, including the right of inheriting and holding land in England.

By the Act of (1604) 1 Jac. I., cap 2., provision was made for the appointment of Commissioners to treat with Commissioners from Scotland for the weal of both kingdoms, in respect of any changes or alterations, etc., "to prevent and extinguish all and every future Questions, or unhappy Accidents, by which the perfect and constant Love and Friendship and Quietnesse between the Subjects of both the Realms may be completed and confirmed" In the Scottish Parliament was passed similar legislation, that is in "The Seventeenth Parliament of the Most Excellent and Michtie King and Monarch, James By the grace of God, King of GREAT BRITAIN, FRANCE and IRELAND" naming Commissioners for the same purpose. These Commissioners met and advised, *inter alia*, "that the common

law of both nations should be declared to be, that all born in either nation sithence his majesty was king of both, were mutually naturalised in both." the Houses of Parliament at Westminster held a conference over the recommendations; the Houses agreed as to certain of the recommendations but as to the right of the *Postnati*, they could not agree—the House of Lords was satisfied, but the House of Commons declined to accede to the suggestion. The opinion of the Judges of the three Superior Courts was taken, and ten out of the eleven who took part in the discussion agreed that the *Postnati* were natural born subjects according to the law of England, Mr. Justice Walmsley of the Court of Common Bench alone dissenting.

Still the House of Commons was obdurate, and the matter had to be decided in the Courts in a regular proceeding—and this was done, and in the following manner: At Edinburgh on November 5th, 1605, was born a male child who received the name Robert Calvin to whom were appointed guardians, John Parkinson and William Parkinson. Were the child legally entitled to hold or inherit real estate in England, he would be entitled to a freehold "in Haggard, otherwise Haggerston, otherwise Aggerston, in the Parish of St. Leonard in Shoreditch." But two persons, Richard Smith and Nicholas Smith, claimed that he was not a natural born subject, but an alien.

To understand the contention, it is to be borne in mind that by the Common Law of England, an alien could not inherit or hold land in England. True, an alien might legally buy land in England, but it forthwith became the property of the King. An illustration of this principle is to be had from the story of the Jews in England—not being natural born subjects, they were early taken into the care of the King, but any property they bought, the King could take at will. Not infrequently they were called upon to contribute to the royal exchequer, and had to obey. Everyone has heard the true story of Isaac of York, who declined to pay King John what he demanded, and the King put him into prison; proving recalcitrant, the King ordered a tooth to be pulled out of his jaw every day till he should comply; and after some extractions, Isaac paid up his assessment.

An action was brought by Writ of Assize in the Common Law Court by the infant's guardians in his name against the Smiths, for the recovery of the land. The Smiths pleaded that Calvin was an alien, and consequently not entitled to hold land in England, therefore they should not be called upon to answer. The guardians admitted the birth in Edinburgh after the acces-

sion of King James, but said that that was no answer—this is what is in law called a demurrer, that is admitting the facts alleged but disputing the legal result claimed to follow from them. The Court determined that it was proper to refer the matter to all the Judges in the Exchequer Chamber.

The guardians for the infant also claimed the deeds, etc., shewing the title to the land they were claiming for him, there being no Registry Office such as we have in this Province and the possession of the deeds, etc., being necessary to show the title to the land. This relief, however, could not be given by the Common Law Courts, they having no power to order the production of them; and so, the matter was brought before the Court of Chancery, in a suit properly framed in that sense. The case was argued before Lord Ellesmere, Lord Chancellor; and he thought that it should be brought before the Judges in the Exchequer Chamber along with the Common Law action, just mentioned.

When the cases came on to be argued, the Judges who sat to hear them were the Lord Chancellor, five Justices of the Court of King's Bench, five Justices of the Court of Common Bench and four Barons of the Court of Exchequer. They were argued for the Plaintiff by Hobart, the Attorney-General and Bacon, the Solicitor-General, and for the Defendants by Lawrence Hyde and Hutton; and, as was to be expected, the arguments are full of learning, historical and legal. In the result, the Lord Chancellor, the Chief Justices of the Courts of King's Bench and Common Bench, the Chief Baron of the Court of Exchequer with all the Puisnes except Foster and Walmesly of the Court of Common Bench, agreed that the demurrer should succeed, that the child was not an alien but a native born subject, and the Smiths must put in any defence upon which they should rely. To put it in technical terminology,—

“the plea of the said Richard Smith and Nicholas Smith is not sufficient in law to bar the said Robert Calvin from having an answer to his aforesaid Writ; therefore, it is considered that the aforesaid Richard Smith and Nicholas Smith to the Writ of the said Robert Calvin do further answer.”

During the argument when counsel suggested inconvenience resulting from a certain view, he was sharply reminded by the Court that it was not a matter *de bono* but *de vero*, that is not a matter of what the law should be, but as to what the law actually was—of this we have frequently to remind our own counsel.

The real point in the case was whether the allegiance was due to the King in his natural capacity or in his political capacity,—

“It is true that the King hath two capacities in him; one a natural body, being descended of the blood royal of the realm; and this body is of the creation of God Almighty, and is subject to death, infirmity and such like; the other is a political body or capacity so called because it is framed by the policy of man (and is called a mystical body) and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infancy, nonage, etc.”

And it was resolved that the allegiance,—

“Was due to the natural person of the King and it was not due to the political capacity only, that is to his crown or kingdom distinct from his natural capacity.”

This means that the allegiance we owe to our King is quite irrespective of his relation to the people of England, and it is a personal duty by one person to another person as a person and not as a King of others. That this is the true doctrine is beyond controversy—that it was often ignored is equally true and indisputable. Now, to make the practical application.

During practically the whole existence of the English colonies in North America, the practice indicated that the view held in the mother country and the Government there was that the allegiance of the colonists was due to the English people—I say “English colonies” because they were essentially English, rather than British; indeed, when some Scottish merchants in the reign of Charles II. claimed to be allowed to trade with these colonies, as they, too, were in the King’s allegiance, the Privy Council told them plainly and definitely that these colonies were English colonies and they not being English, had no right to trade there. The old British Empire was built on much the same theory as respects colonies as the old Roman Empire—the Roman conception of a colony was that it existed, not for the benefit of the colony or the colonists, but for the benefit of the mother State, Rome; so, the view taken by the statesmen of the old British Empire was that the English colonies existed, not for the advantage of the colonies or the colonists, but for that of England. Time and again, the legislation of the colony was disallowed by the Home Ministry acting through the Privy Council because of the evil effects feared to English commerce, etc. I am not blind to the enormous sacrifices made for the American colonies by the mother country; but it must be obvious that the advantage of the mother country was the primary object to be considered in almost every proceeding.

This view was based upon the hypothesis that the colonists were the property or the subjects of the people in the home land; or, in other words, the allegiance to the King was due to him in his political capacity not a personal relation of a person to a natural person, as had been held in the Calvin case.

This interference with the colonists, they at length felt no longer bearable, and the Declaration of Independence of July 4th, 1776, followed. Until nearly the very last, the loyalty of the colonists to the King was almost fulsomely expressed by them, the blame for the measures causing the discontent being placed upon his ministers. When the decisive step came to be taken, indeed, the King came in for blame; but it must always be remembered that the Declaration of Independence was a "Campaign Document," the most celebrated of all campaign documents, and no one but one of exceeding great innocence and inexperience looks for literal accuracy in such a document. I think it beyond any question that had the colonists been allowed to manage their own affairs, irrespective of the commercial and other interests of the mother country, they would have been perfectly content to retain their allegiance to the King. To put it in other language, the colonists were perfectly content to have the personal allegiance to the personal King—what they objected to, in fact if not in appearance, was the theory, carried into practice, that they were his subjects in his political capacity, and that capacity, the King of the English people, which involved the idea that the colonists were subject to, the property of the English people—the colonies, the property of the English people, not of the individual, the person, who was on the throne.

I once heard a former Lord Chancellor of Great Britain in Westminster Hall in addressing a body of lawyers of England, the United States and Canada, say that the American Revolution was the most important event in British history in the eighteenth century; in private conversation, I told him that I agreed with him, but went much further, that I thought it the most important event in the history of our people, our race. I even went so far as to say that it was the most important event in secular history at any time. He asked me why?; and I said, and now say again, that it was the American Revolution that destroying the old British Empire, made way for the new British Empire, the British Commonwealth of Nations, which, in my considered opinion, is the hope of the world, the most secure anchor for peace, liberty and democracy.

Curiously enough, I do not find historians in general saying anything of the part played by Canada in the story of the American Revolution; and yet, I think it plain.

Before the conquest of Canada, and while it was French, there was almost constant trouble, not uncommonly amounting to actual hostilities between the French and the English colonists; there might be peace in Europe, there never was real peace on this Continent—if the whites were apparently at peace, there was generally trouble among the Indians attached to one side or the other. The Boston preacher to alarm his hearers as to the future after death, compared, not the French to the Devil and his angels (Hell had not yet been abolished in that community) but the Devil and his angels to the French, while the French Canadian mother taught her children to be quiet—as she still is said to do occasionally—by threatening them with the Bastonnais, as the New Englanders were called, i.e., Bostonians. So long, then, as Canada was French, the American colonist had reason to treasure the protection of the mother country; and it must be said that this protection was cheerfully and abundantly given. But the colonist also knew that England would never allow those of her blood to be conquered by foreigners; and he was confident, after Canada was in British hands, that he need have no fear of his neighbours to the North. The colonies had been complaining for half a century or more of their treatment, but dared not separate from the mother land. When Canada became British, that took place which Vergennes, the French Minister had warned Britain of—the colonies took their courage in their hands and declared themselves independent, with the result that the old British Empire was rent in twain. Not immediately, indeed, but ultimately, this led to the true conception of the position of colonists in our world.

Not by any means all or the better class of colonists as a whole took the step of severing themselves from the mother land; a large number determined that that relation should be eternal, in which they had been born and bred, and their allegiance to the King should continue at any sacrifice. These were the United Empire Loyalists, whom I am accustomed to compare with the Cavaliers of the times of King Charles I. While, no doubt, some of the Cavaliers believing in the divine right of the King, believed that he was in fact as in name "King by the Grace of God," and that, consequently, they should follow him in everything, most of them were true lovers of liberty, (Falkland was as great a patriot as Hampden); they did not approve

of some of the acts of the King, but believed that the way to have errors corrected was not rebellion, not the way of the Roundheads. So the United Empire Loyalists in nearly all cases were believers in freedom, the right to direct their own destiny; they did not in most cases approve of the treatment awarded the colonies by the old land, but believed that the erroneous conduct could be rectified by constitutional means, and rebellion was as unnecessary as it was wrong. So they came to this Canada of ours, as our Poet Kirby says,—

“Not drooping like poor fugitives, they came
In exodus to our Canadian wilds;
But full of heart and hope, with heads erect
And fearless eyes, victorious in defeat.
With thousand toils they forced their devious way
Through the great wilderness of silent woods
That gloomed o’er lake and stream, till higher rose
The Northern Star above the broad domain
Of half a continent, still theirs to hold;
Defend and keep forever as their own;
Their own and England’s till the end of time.”

And except the last line, their descendants hold the same creed and determination,—no one, now, thinks of Canada being England’s any more than England being Canada’s.

I yield to no one in my admiration and regard for the United Empire Loyalists; my honorary membership of their Association I treasure as highly as any other honour with which I have been favoured, but just as admiration for the loyal Cavalier does not blind my eyes to the merits of the Roundhead, so admiration for the United Empire Loyalist does not blind me to the merits of the Revolutionist; he thought that the only way to obtain the freedom to which he was entitled was to sever the connection between the colonies and the mother land, and he was not content to wait the slower process of obtaining his rights by constitutional means. The descendants of the Cavaliers and the Roundheads have forgotten the differences of their ancestors and are living in harmony, and I know of no reason why the descendants of the original United Empire Loyalists and of the Revolutionists should not live in the like harmony and forgetfulness of the differences of their ancestors. Whatever else the result of the success of the American Revolution, the mother country determined that there should be no more Bunker Hills; and never since have the people of a colony desired a concession looking to self-government and have shewn themselves fit for it, has the concession been denied. Nay, sometimes, concessions have been offered to, almost urged upon, colonies which they

were unwilling to accept. Had the same spirit been shewn before 1776, there would have been no Revolution—had it been recognized that the colonists were subjects of the King of England, indeed, but, in no way subjects or the property of England or of Englishmen, there would have been no need of a separation from the old land—old land and the new lands would have remained united by a common allegiance to the one King, while each would have been allowed to manage its own affairs.

The British world had not learned the lesson of the Scottish Lad; if it had the world would have been different; but while the process was never referred to as a recognition of the rule in the case of the *Postnati*, the gradual evolution of the Empire is a gradual approach to a situation that puts that rule into practical effect.

The course of that evolution, it would be impossible to detail in a paper of the present character; but even a superficial examination of the history of the British colonies will show a gradual approach to full self-government in all English-speaking colonies; and that has gone on until the existence as a fact of the new British Empire, in which the common allegiance to the one King is the golden band that unites, while the recognition of equality of status gives every part of the Empire full self-government.

This is in fact; there are relics in our terminology of the old state of affairs—some peoples are radical and logical and insist on their documents meaning exactly what they say. We, on the contrary, are conservative, and so long as no harm is done, we stand upon the old paths, we follow the old terminology. We say that the King is King, by the Grace of God, whereas he is King by the grace of an Act of Parliament, passed in Queen Anne's time. He is Defender of the Faith, because when King Henry VIII. defended the faith of the Roman Catholic Church against the attacks of Martin Luther, the Pope gave him that title, which his successors have kept, though now the Sovereign must be a Protestant; so in Canada, we have a Governor-General, who does no governing, as we have in the Province, a Lieutenant-Governor, who is not the Lieutenant of a Governor and who does no governing. In the British North America Act, it is provided that the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, and I was appointed nominally by a Governor-General whom I had never seen and who had never seen, probably never heard of me. The Queen-in-Council at Westminster was given power to disallow

any legislation of the Dominion Parliament, and only one Act has been disallowed, and that at the request of the Government of Canada, etc., etc. Were I not warned by the experience of a Member of Parliament from Toronto trying to have me chastened by the House of Commons at Ottawa for saying that the British Constitution and ours are full of camouflage, I should make that assertion here—but I must be cautious, for that gentleman is again a Member of the House, and there is no saying what trouble I should get into. Now, at length, it is fully recognized that like the Scottish Lad we are subjects of the King of England, but not of him in his political capacity so as to be, in a sense, subjects of England or of Englishmen. England and Englishmen have no right to interfere with us any more than with Robert Calvin; and the case of the *Postnati* has come to full fruition.

The new British Empire, which is the strongest hope for democracy, liberty, the reign of law, justice to all, may rest secure on the principle established three and a quarter centuries ago.

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