COLONIES AND CONSTITUTIONAL LAW

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THERE are public speakers and writers in Reviews who confuse the import of the word "Colony" and the constitutional development of a Colony.

Now and again one hears of those who fret and chafe under the term "colonial", when used with respect to British subjects resident in Canada. It should, I think, be remembered that there are no Subjects or Citizens of Canada. As has been said, "the mere federation of Colonies introduces no change in their relation to the Metropolis." [1]

In his last political campaign, Sir John A. Macdonald's text was: "A British Subject I was born. A British Subject I shall die."

In 1902, Sir Wilfred Laurier was Prime Minister of Canada, and the Prime Ministers of the Colonies at the Conference in London passed these resolutions:—

> That, with a view to promoting the increase of trade within the Empire, it is desirable that those Colonies which have not already adopted such a policy should, as far as their circumstances permit, give substantial preferential treatment to the products and manufactures of the United Kingdom.
>
> That the Prime Ministers of the Colonies respectfully urge on His Majesty's Government the expediency of granting in the United Kingdom preferential treatment to the producers and manufacturers of the Colonies.

While remaining a "Colony", a "self-governing Dominion" under the British Crown, we have gone "warily" in our constitutional development, and of this there is abundant evidence. The Motherland has yielded much. Space will not permit the record of all the concessions to our national aspirations; yet we remain a Colony. Suffice it to say that, outside of all legal questions of status, during the Peace negotiations Canadian statesmen sat at the council table as representatives of our own community and not as mere assessors to the British representatives. It is true that Canada was recognized (informally), for certain purposes, as a separate State. But at the signing of the Peace, King George, (be it observed) in each case acted on the advice of the Ministers representing our Dominion separately. Lastly, our Dominion became a full member of the League of Nations, undertaking, individually the many serious obligations involved by such membership.[2]

1. *Sovereign Colonies*, "Harvard Law Review", June, 1921.
2. *Encyclopaedia Britannica*, Vol. XXX, p. 508.

In discussing the King's signature to the Treaty of Versailles as "King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India", Mr. Baty observes that the word "Dominions" is here used in its proper sense as including all the possessions of the Crown, self-governing or not. He further points out that Canada is not a signatory to that Treaty. "Two gentlemen signed the Treaty for Canada, but *representing* the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India." [1]

Mr. Justice Martin, one of the Judges of the Court of Appeal for British Columbia, has been reported to have recently said that Canada should declare her independent national status. His words as reported are:—

> Canada must be placed on a basis where in future she cannot be drawn into wars and embroilments without giving her consent. We owe this to our children.
>
> Are you the mere colonials still, as their Lordships of the Privy Council insist on calling you, or are you citizens of an independent nation?

But Sir John Willison, one of Canada's journalists, in an interesting article in the *Nineteenth Century* recently wrote, and I agree with him:—

> We are demanding equal authority in the Empire, but we seldom utter a sentence which suggests that we are willing to accept any obligation or sanction of any definite organization of the Commonwealth.

The object of this article is mainly to point out that the word "colonial" is not a sign of inferiority, but is a correct description of a British subject living in the Dominion of Canada. As a matter of law, Canada is still a "Colony"—a self-governing Dominion it is true, but nevertheless a "Colony."

The extent of powers of self-government so far given to Canada does not affect the legal status of Canada as a "Colony". Statesmen may, of course, claim that Canada in effect constitutes a nation within a nation. Our development in all that this suggests is undoubtedly a matter of just pride and ambition. Nevertheless, so long as we remain under the ruling monarch of Great Britain, we are not only British subjects but "colonists" as well. It is, to my mind, worse than childish to claim the protection of Britain's flag, and at the same time shirk the responsibilities of that flag. It is childish to claim a right to control or affect the foreign policy of

1. Howard Law Review, June 1921.

Great Britain so long as we, as Canadians, refuse to bear our fair share of that responsibility.

"Dominions", "Provinces", and "Colonies" are old and well known words.

So long ago as 1674, Vaughan, Chief Justice, referred to Wales, the Western Islands, Barbadoes, St. Christophers, Nevis, New England, as "of the dominions of England." [1]

The word "Colony" has been defined in its popular sense as follows:—

> A term most commonly used to denote a settlement of the subjects of a sovereign state in lands beyond its boundaries, owning no allegiance to any foreign power, and retaining a greater or less degree of dependence on the mother country.

With respect to Dominions, Imperial statutes now refer to Canada as a "self-governing Dominion". (See Dominion Naval Forces Act 1911, and Seal Fisheries (North Pacific) Acts 1895 and 1912):—

> Dominions are those colonies which possess elective legislatures to which the executive is responsible as in the United Kingdom, the only officer appointed and controlled by the Crown being the Governor or Governor-General. These colonies are divisible into two categories: first, those in which the legislature consists of two chambers, the Upper Chamber (or Senate, or Legislative Council) being either elective or nominated by the Crown.
>
> As in the Dominion of Canada and the Canadian Provinces of Quebec and Nova Scotia, in Newfoundland, New South Wales, Queensland, New Zealand, Natal, the Transvaal and the Orange River Colony." [2]

Why should the term "colonial" suggest, as Mr. Justice Martin implies, any mark of inferiority?

At the Imperial Press Conference in 1909, Mr. Birrell historically, though jocularly, dealt with this:—

> After all, we who proudly welcomed the Colonists to what we called our home were only Colonists ourselves. He did not know that we could claim any prouder title than that of Colonists of an earlier growth. Where we came from, hardly anyone knew, but we came here prompted by those roaming instincts, predatory instincts, which we still cherished as part of our boasted intelligence. (Laughter and cheers). To those who came from Australia, Canada and other parts of the King's dominions beyond the seas, we only said we were glad to see them back in the oldest of all British Colonies.

1. Vaughan, p. 400.
2. (10 Hals. p. 859.)

Mr. Balfour (now Lord Balfour) said:—

> I have heard it said that many gentlemen who come from Canada, from Australia, from New Zealand, or from the Cape, are sometimes pained by the ignorance shown by dwellers in this part of the Empire with regard to even the largest of their domestic interests. That ignorance is, perhaps, greater at this moment in these islands of the colonies than it is in the colonies of these islands. (Cheers).

That the Canadian Dominion is in law and in fact a union of Colonies is shown by our Charter in 1867, which provides for the "admission of *other* Colonies" in the confederated Colonies.[1]

In 1877, Crease J., one of the members of the Supreme Court of British Columbia, in the case of S. v. S., says:—

> We are met on the threshold of this enquiry by the fact that by the "British North America Act 1867" legislative authority exclusive of England in matters of divorce has been given to the Parliament of the Dominion—a colony of England—over half a continent.

It is equally true that notwithstanding the Canadian Parliament and the legislatures are colonial, they have large powers and Canada is essentially a self-governing Colony.

With reference to the strictures of Mr. Justice Martin upon the Judicial Committee, attention may be directed to the observation of a great Canadian judge, the late Chancellor Boyd, in the case of *Regina v. Brierly*, in 1887 Ont. Reports, 525. In discussing the criminal law in reference to bigamy, where a British subject was resident in Canada and contracted a marriage abroad, he refers to the principle that no British Court has jurisdiction to declare that an Act is unconstitutional or void, and remarks:—

> Such a power, however, does exist, both in colonial and English Courts, with regard to colonial legislation.

And again he says:—

> So in earlier cases in which the constitution of Colonies was not nearly so close upon the verge of independence as that of the Dominion as now established, it was held that though the status of individuals resident in the Colony must be determined by the laws of England, yet the rights and liabilities incidental to such status, must be determined by the la ws of the Colony.

It had been contended in 1865 in the case of *Low v. Routledge* (1865, L. R. 1 Ch. 42) that the word "Colonies" in an English Act did not apply to a Colony which had an independent legislature, but this view was not upheld. It was held, however, that "the laws of a

1. See also the 48th section of the "Constitution Act 1871" of British Columbia.

Colony cannot extend beyond its territorial limits." This is surely the law to-day with respect to the Parliament and legislatures of Canada.

In 1915 an eminent text writer, E. R. Cameron, K. C., Registrar of the Supreme Court of Canada, in reviewing the decisions of the Judicial Committee which refer to the Canadian Constitution, discusses the subject under the heading of "Constitutional Status of Self-Governing Colonies". Among other things, he says:—

> The relationship of the Colonies to the mother country is only partially governed by statutory enactments. Our constitution, like that of England, is for the most part unwritten, and is constantly the subject of further development. Every decade in the past has shown some larger rights demanded, and conceded. There has never been a time of retrogression. Every outpost won has been retained.

And again:—

> It may now be said that the legislative jurisdiction of a self-governing Colony is limited to the ambit of its own territory, but within that sphere it is supreme.

If subjects of the King wish to abolish or limit the right of appeal to the greatest judicial tribunal in the world, the Imperial Legislature would, at the request of the Canadian Parliament, undoubtedly do so. Without such legislation, this "Colony" cannot so provide.

If Canadians desire to leave the Empire, it is clear they may do so. All these are political questions, and it is to the credit of the Motherland that we may now go as we please, i. e., remain in the Empire as a self-governing Colony, or go out of it.

As one desiring for Canada the largest powers of a self-governing Colony within the Empire, but having regard to the ever growing disputes between the Provinces and the Dominion, I would view with alarm any serious suggestions to cut our connection with the Judicial Committee.

That eminent jurist, Lord Shaw, after sitting in the Judicial Committee, says:—

> Over and over again there come before the Board questions, antagonisms, rivalries, jealousies, which in former times would have driven races, provinces, kingdoms to rancorous and bloody wars. These problems are settled by the arbitrament of equity and by a justice so manifestly achieved without fear or favour, that their solution is accepted with a loyalty at once respectful, real and complete. So that one can feel that peace is being won and kept by justice—a peace more enduring than any that could be imposed even by the rod of Imperial power.[1]

1. Pp. 306, 307, Shaw's *Letters to Isabel.*

If there had been no appeal to the Judicial Committee, my firm opinion is that Canada long ago would have been broken into its original fragments.

PERMANENCE

Set within a desert lone,
  Circled by an arid sea,
Stands a figure carved in stone,
  Where a fountain used to be.

Two abraded, pleading hands
  Held below a shapeless mouth,
Human-like the fragment stands,
  Tortured by perpetual drouth.

Once the form was drenched with spray,
  Deluged with the rainbow flushes;
Surplus water dashed away
  To the lotus and the rushes.

Time was clothed in rippling fashion,
  Opulence of light and air,
Beauty changing into passion
  Every hour and everywhere.

And the yearning of that race
  Was for something deep and tender,
Life replete with power, with grace,
  Touched with vision and with splendour.

Now no rain dissolves and cools,
  Dew is even as a dream,
The enticing far-off pools
  In a mirage only seem.

All the traces that remain
  Of the longings of that land,
Are two hands that plead in vain
  Filled with burning sand.

DUNCAN CAMPBELL SCOTT.