Experts and Imperial Conferences and Reports, 1929 & 1930

Introduction

This set comprises of four draft pieces of various lengths and states of editing. The first is the longest (75% of total) and has been heavily annotated with handwritten revisions and required some editing, primarily grammatical, for full clarity. In a few cases I have included crossed-out sentences; (?) is illegible text, and (blank) twice for omitted quotations. The other three have few annotations and required minimal editing. In all pieces I have split overlong paragraphs to suit current reading styles and preferences.

They are presented in the following non-chronological order on microfilm:

1. Constitutional Developments, part II. It covers the Experts and Imperial Conferences and Reports of 1929 & 1930. It details the constitutional issues, progress made and reactions by the government and opposition of the Saorstat. (15 pp)
2. Untitled. It covers the House of Commons debate on the Statute of Westminster Bill, 1931, with a note on the de Valera government's different conception of the respective roles of the Treaty and Constitution in 1932 with regard to the Removal of the Oath Bill. (3pp)
3. Untitled. It covers Patrick McGilligan's (Minister of External Affairs) presentation of the Imperial Conference Report, 1930, to the Dail with notes on the position of the Crown and nationality. (2pp)
4. 'New Position' and 'Established Constitutional Position'. It covers the definitions and usages of these two terms in the 1929 and 1930 Reports. (1p)

(Ian Cantwell, 2016)

Section 1 Constitutional Development, part II[1]

Besides the right of Appeal from the Dominion Courts to the Judicial Committee of the Privy Council, the Statute Book of the British Parliament, as well as the constitutions of the Dominions, still contained a number of restrictions in a manner affecting to a greater or less degree the informal sovereignty of the members of the Commonwealth, other than the United Kingdom, and still stressed the supremacy and control of the Westminster Parliament and of the British Ministers over the Dominions' domestic affairs. These restrictions could be classified under these following heads

1) The prerogative of the Crown known as Disallowance and Reservation

2) The domain of extra-territorial operation of Dominion Legislation

3) The Colonial Laws Validity Act, 1865, the Merchant Shipping legislation of 1864, 1894 and 1906 and the Colonial Courts of Admiralty Act, 1890.

By the use of the power of Disallowance the Crown, acting solely on the advice of the Ministers in the United Kingdom, could annul any act of Dominion Legislation. In other words any such act could be nullified by a simple order from Great Britain. Reservation, to keep to the terminology of the report of the 1929 Experts' Conference, means the withholding of assent by the representatives of the King (Governor-General or Governor) to a Bill duly passed by a competent legislature in order that his Majesty's pleasure may be taken thereon. In this case again the Crown acted on the advice of the Ministers in the United Kingdom, exclusively.

With regard to the power of disallowance the case had rather an academic significance for the Free State, since its constitution contained no provision for the exercise of this prerogative. Professor Berriedale Keith's opinion that this omission may not be legally valid, in view of the similarity of the Status of the Irish Free State to that of Canada[2] seems to be weakened by the consideration that, as regards the power of reservation, Article 41 of the Free State Constitution explicitly enacts it with reference to the usage governing this prerogative in the Dominion of Canada.

[1] Part I has yet to be discovered. *ed.*
[2] *The Sovereignty of the British Dominions,* p. 213

Constitutions of some of the Dominions contain provisions for reservations of Bills relating to particular subjects (the so-called Compulsory Reservation), whilst the Irish Free State Constitution confers of the Governor General a discretionary power of reservation only. The Report of the Imperial Conference, 1926, left the issue of reservation in a somewhat chaotic state. Professor B Keith thinks[3] that the only conclusion that could reasonably be drawn from the somewhat nebulous phraseology of the report would be this that nothing but the gravest reasons would justify the Imperial Government in hindering the enactment of dominion legislation by using its power of reservation.

It might be observed, it seems to be by virtue of a quite different conclusion of this report that one would be entitled to recognise the power of reservation as *de facto* dead since 1926, the conclusion which precisely defined the position of Governor-Generals in the Dominions as of the representatives of the Crown, holding in all essential respects the same position in relation to the administration of political affairs in the Dominions as is held by His Majesty the King in Great Britain.

Again in so far as the Dominions are concerned, constitutional practice has long since dropped the power of reservation, for it has been taken for granted that it would not be in accordance with this practice for advice to be tendered to the King by his Majesty's Government in Great Britain on any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.

They are, therefore, not representatives or agents of his Majesty's Government in Great Britain or any department of Government and consequently they have to follow the fulfilment of their duties the usage as established in Great Britain where the power of reservation became practically inoperative. This power is now about to disappear from the Free State Constitution by an Act of Oireachtas intended to repeal the provisions of Article 41 exclusively.

The Colonial Laws Validity Act was passed in 1865, anterior to the formation of the Dominions, and as shows this title, was originally intended to apply only to the colonies. With the passage of time the sanctions of this Act have been extended to the Dominions as well, thus limiting the internal sovereignty of the latter in the sense that each act of their legislature could be rendered void if it appeared to be repugnant to the provisions of any Act

[3] Ibid p. 217

of Parliament at Westminster, or to any order or regulation made under authority of such Act of Parliament.

When it first came into existence this Act was considered as something like a (?) charter of colonial controversy (one writer called it "a charter of colonial legislative independence") and the reason for giving it such exclusive interpretation was based on the consideration that, whilst the common rule existing before 1865 was that a colonial law which was contrary in tenor to a British Statute applying to a colony was null and void *in toto*, but only to the extent of the repugnancy with the British Statute. By the year 1929, however, the Act stood in opposition to the stage of the evolution as achieved by the Dominions.

The Merchant Shipping Acts and the Colonial Courts Admiralty Act also contained some restrictions on Dominion Legislation as imposed by those Acts in operational matters. As the Imperial Conference of 1926 was carrying out its work in full cognisance of the existence of the above restrictions and limitations of the Internal Sovereignty of the Dominions, it recommended that a special Committee of Lawyers should proceed to a detailed examination of the relations between Imperial Law and Dominion Legislation. This decision occurs in the Balfour Report[4] and defines very wide limits within which the experts were to investigate and make appropriate recommendations to the upcoming Imperial Conference.

Every discussion and decision of this Committee was intended to be kept in close contact with this report, to be its logical development, and to shape further links in the chain of facts, enacting and asserting the principle of the constitutional co-equality of Great Britain and the Dominions.

In authorative circles in Saorstat the conviction prevailed as regards the above mentioned prerogatives of the British Legislature that, although any undue use of them by Great Britain would lie without the sphere of practical considerations, nevertheless, even in the condition of a dead letter to which these prerogatives had been reduced, they were absolutely incompatible with the enormous growth of the Dominions as of a 'Multiple Monarchy' towards the realisation of the British Empire was, in the opinion of these circles, hastening ever more rapidly.

In his speech in the Dail on the 5th June 1929, the Minister for Foreign Affairs Mr. McGilligan said, forecasting the coming Expert's Conference, that this conference would

[4] Part IV section C subsections i-iii

meet to discuss the formal amendment, or modification, or repeal of enactments still on the Statute Book of the United Kingdom, which were inconsistent with the existing legislative powers of the member-state Parliaments. The Free State's purpose was that, whatever the remnants there might be of the old order of Imperial control, they would be removed and the last legal vestiges of that organisation swept away. "A new legal structure will take its place", said the Minister, "in which the free cooperation, which is the basis of the Commonwealth idea, will be clothed in forms which reveal rather than conceal reality."[5]

The Experts Conference met in London on the 8th October 1929 and lasted about ten weeks. The Irish Free State was represented by the Minister for Foreign Affairs, Mr. McGilligan, Attorney General, Mr. Costello, Secretary to the Executive Council, Mr. Hegarty, Secretary to the Department of External Affairs, Mr. Walshe, and legal adviser to the Department of External Affairs, Mr. Hearne. The results of the work of the Conference were embodied in the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping, 1929, and were presented by the delegations to their governments by the end of January 1930. The Report contains the following recommendations towards the solution of the still outstanding constitutional problems.

With regard to the power of disallowance, as has already been stated, the Irish Free State Constitution does not contain any provision of this kind, so in this case the Free State would not need to resort to its right (under Art. 50 of the Constitution) to alter its constitution, which course has been left open by the Report to those Dominions whose constitution provide for the said prerogative and who would desire to abolish it. With reference to only one Act, the Conference took the view that the power of disallowance should be maintained, that is to say the Colonial Stock Act, 1900.

This Act provides that the Dominions wishing to issue loans in London are bound to comply with certain conditions, the violation of which would be of nature to provoke the veto of the Crown. It is supposed that at the Conference the view seemed to prevail that the Dominions did not attach any great importance to this Act. If the Saorstat could successfully raise its National Loan in New York so wealthy Dominions, such as Canada or South Africa, would have no need to seek special financial favours from London, since credit is available for them everywhere. Any Dominion not wishing to submit to the restrictions of the Colonial Stock Act can easily avoid them by rising loans on any other money market. On the other hand the

[5] Parl. Deb. Official, 1929, vol. 30 no. 3 col. 79

Act is mainly intended to promote the interests of the British Government, which is rather anxious to keep the London money market for its own financial operations, while English and private capital would be rather interested in the non-existence of this Act.

Again with reference to the power of disallowance, are the recommendations of the Report in respect of the power of reservation and it was consequently left open to the Dominions to take the prescribed steps to repeal this prerogative if they so desired.

A special part of the Report is devoted to the extra-territorial operation of Dominion Legislation and it recommends that recognition be given to the unlimited power of the Dominions in the domain of such legislation and to the ability of each of them to regulate within the limits of its own competence a wide range of questions, which hitherto, if even dealt with by the Dominions, had not been regulated by them by direct methods. Under this head all such questions as fisheries, taxation, shipping, air navigation, marriage, criminal law, deportation, laws against smuggling and unlawful immigration are to be understood.

It is interesting, perhaps, to note that the limitation of the right of the Dominions to pass laws having extra-territorial operation was never enacted by any Act of Parliament and was based entirely upon judicial practice which, in its turn, appeared to be reduced to one particular case, known in the annals of Imperial Jurisprudence as the case of McLeod v the Attorney General of New South Wales. The appellant was accused of committing bigamy, but not within the territorial limits of the state under whose legislation he was tried. In the final stage of the case the Court of Appeal of New Zealand ruled that it did not fall within the power of the New Zealand Courts to punish crime committed abroad. This decision served as a basis for the whole theory of denying the Dominions the right of extra-territorial legislation.

This right, however, has never been explicitly denied to the Parliament of the Free State although, as Mr. McGilligan stated[6] the matter has never come on a direct issue before the Free State's own Courts, except in one case considered by Judge Fitzgibbon who opposed the view that the secondary opinion in MacLeod's case could be of such nature as to prevent the Irish Courts from dealing with criminal offences which are recognised as such by Free State Legislation.

The Report sets for the opinion that the recognition of the powers of a Dominion to legislate with extra-territorial effect should not be limited either by reference to any particular class of

[6] Parl. Deb. Off. 1931, vol. 39, no. 6, p. 2299

persons or by any reference to laws “ancillary to provisions for the peace, order and good government of the Dominion”. The conclusion is that the Dominion Parliaments must have full powers to make laws having extra-territorial operation.

As to the Colonial Laws Validity Act, the Conference took the view that the method of securing uniformity of laws throughout the Empire by the application of this Act – the method based on the supremacy of the Parliament of the United Kingdom – was no longer constitutionally appropriate in the case of the Dominions, and that the next step to take would be to bring the legal position into accord with the constitutional. To this end the Report recommended that an Act be passed in the English Parliament, by which the Colonial Laws Validity Act shall cease to apply to any law made by the Parliament of a Dominion and that no law hereafter made by the Parliament of the United Kingdom shall extend to any Dominion otherwise than at the request and with the consent of that Dominion. Section 58 of the Report says “(blank)”.

By doing so the Conference cut short a controversy which had long raged on the subject of the conditional or unconditional nature of the internal sovereignty of the Dominions. At the same time any doubts within the Free State itself as to whether this Act ever had any relevance to the Constitution of the Free State at all ceased.

The Conference, however, was fully aware of the existence of certain conventions of a general character, affecting the entire Commonwealth, the denunciation of which by one member would be equivalent to the destruction of the Commonwealth itself. What state of affairs would, for example arise, if any of the Dominions chose to enact a change in the succession to the throne and decided, let us say, that its monarch could not be of the female sex. This is why the Conference thought it necessary to exclude from the general principle of the unlimited power of Dominion legislation the laws relating to dynastic matters as defined in article 60 of the report. This Article states that “(blank)”.

One may, therefore, be entitled to draw the conclusion that, as was suggested in the Dail, a Dominion would be to empowered to do constitutionally whatever it pleases except one thing, that is to change its form of government, as for instance by proclaiming itself a Republic. In other words no Dominion could separate itself from the Commonwealth except in a non-constitutional, i.e. a revolutionary way.

The principle itself that all alterations in dynastic matter should require the assent of the parliaments of the Dominions as well as of the Parliament of the United Kingdom is entirely conformable with the principle of the co-equality of all the Parliaments of the Commonwealth. Taking into account the very remote probability of such initiative being ever taken in Westminster, one is entitled to assume that this clause was adopted rather with the idea of limiting the possibility of such initiative emanating from the Dominion Parliaments.

It is to be observed that the issue of succession is sometimes connected in the Dominions with that of secession, i.e. the right to secede from the Commonwealth. This right could not be legally upheld. It exists however in the form of a certain moral right adhering to any member of the Commonwealth and based upon the principle as set forth by the Balfour Report to the effect that they are freely associated as members of the British Commonwealth of Nations. A statement made by Bonar Law anterior to the 1926 Report that Great Britain would not retain by force any member of the Commonwealth that wished to leave it could be quoted as other evidence of this principle. Besides this, the Dominions seem to base the right to secede on the constitutional powers of their Parliaments.

When Mr. McGilligan was asked in the Dail has the Free State got a constitutional right to secede, his answer was in the affirmative. Not long before the Imperial Conference of 1930, the Premier of the Australian Commonwealth, Mr. Scullin, declared that in the opinion of Australian statesmen the right of secession exists, but he hastened to assert that this declaration should not be taken as a challenge, since Australia wishes to maintain its connection with the Commonwealth. Assuming that as a result of one of the future Imperial Conferences, a declaration purporting to assert the right of secession, the subsequent position could be constitutionally defined as a clear acquisition by the members of the Commonwealth of a certain moral right, the application of which in the region of facts would nevertheless amount to an act of revolution.

Since secession of any of the Dominions would, in accordance with the conclusions of the 1929 Report, inevitably lead to an alteration in the Royal Titles, it is, therefore, to be inferred that constitutional succession is virtually dependent upon the assent of all the Dominions.

At the time when the 1929 Report was being compiled the problems of succession and secession had a rather academic importance for the Irish Free State. There would have been no question of any such attempt at secession as long as President Cosgrave's Ministry was in office~~, standing firm as it did on the ground of the maintenance of the Treaty and on the~~

~~assumption that the Saorstat's membership of the Commonwealth was the best form of political existence~~.

The situation became less clear within the country when Fianna Fail took office. Starting with the attitude take up by President de Valera's Government over the Oath issue, we may only reiterate what has been said previously, namely, that although this Government based its power to abolish the Oath on the constitutional premises such as the non-mandatory character of the Oath in the Treaty and the unlimited legislative powers of the Oireachtas, practical considerations, such as the necessity of maintaining national peace and of making the Dail accessible to all sections of the community, was necessarily referred to by the authors and supporters of the Removal of the Oath Bill.

The establishment of a Republic was officially proclaimed to be the ultimate aim of the Fianna Fail Administration. A statutory reform could obviously be based on constitutional principles as having binding force at the time being. It remains, however, to be seen whether such act in respect to the secession of the Free State from the Commonwealth comes under the Free State Government's conjectures as a fait accompli, pure and simple, or would they be obliged to make an attempt of smoothing the inevitable crisis by preparatory negotiations with Great Britain in respect of the Saorstat's Treaty obligations and with other Dominions by the common obligations to the same monarch.

What should be added to complete this superficial survey of the Report is that it recommends putting an end to the restrictions over Dominion legislation consequential upon several sections of the Merchant Shipping Act, 1894, and of the Colonial Courts of Admiralty Act, 1918.

The Report of the Conference was received in Government circles and in the pro-Government press of the Saorstat with marked satisfaction and was appreciated as a notable success for the Irish delegates and as an enormous advance towards the abolition of the last vestiges of the supremacy of Great Britain in the Commonwealth by leading to the removal of the potential causes of friction and distrust among the State-members of the Commonwealth. It enhanced the feeling of mutual security and brought about further stabilisation in the relations between these States

The suggestion, as made by the Conference, to bring into existence a special tribunal for settling differences and disputes between members of the Commonwealth was recognised in

Dublin as satisfactory, although undoubtedly the Irish statesmen would prefer that the British Government should finally admit that differences of this nature, like all other international differences, should be within the competence of the International Tribunal at the Hague.

Considering further that the retention of the Colonial Stock Act, 1900 involves the survival of certain vestiges of previous constitutional anomalies, Dublin was of the opinion that as long as these anomalies persist, the Free State should simply refrain from raising loans on the English market.

It is beyond doubt that the part played by the Free State delegation to the Conference was one of great importance and weight. Notwithstanding the small size of the Saorstat, its geographical position, as that of the only European Dominion, gives it a special position among the rest. Racial ties, between Ireland and other Dominions are strong and far-reaching as well. The Australian Government at the time of the Conference was in the majority of Irish origin, in Canada the Irish again play a very considerable part, political sympathies between the Irish Free State and South Africa are beyond doubt; and yet another factor distinguishes the Irish at all these Imperial gatherings: having the best knowledge of England and the English, they are able to negotiate with these partners of theirs in the most effective way.

On the 19th of March, 1930, Mr. McGilligan moved that Dail Eireann approve the Report of the 1929 Conference and recommends the Executive Council to take such steps as they may think fit to give effect thereto. The following contributions to the debate that ensued call for great attention[7]. In supporting the motion, Mr. McGilligan stressed, first of all, that the Report was the most important constitutional document which the Dail had been asked to consider since the Treaty, and the clearest constitutional record that had ever proceeded from any Conference of the States associated together in the Commonwealth of Nations. Furthermore, he laid special emphasis on the international character of the method which had come to be adopted with regard to the document. He went on to say that the State-members of the Commonwealth developed under different historical conditions and, therefore, there were considerable differences in their respective constitutions.

In consequence the task of the Conference was to compile a report, which in its final recommendation would be of a nature to cover all the wide range of the not always identical wishes and tendencies of the six peoples gathered at the Conference, in other words, to

[7] Parl. Deb. Off. Dep. 1930, vol. 33, no. 6, col. 20(?)0- 2167 and 2195-2327

achieve the greatest possible measure of agreement among them. At the same time it was necessary to frame the document in such a way as to leave to each State-member at the Conference the power to adopt only those portions of the Report which its particular case called for, neglecting other portions that had no relation to it.

It is essential to mention this part of Mr. McGilligan's speech as it follows; he segregated a certain number of recommendations of the Report as having no direct effect upon the Free State's status. If, notwithstanding, this State's delegation took an exceedingly active part in the discussions of all the problems involved, it was primarily done to elevate the authority of the Dominions, to put their constitutional rights at the same level with Great Britain, and to see that nothing should remain on the British Statute Book which "would seem to cast doubt upon full Dominion status".

Not only was the power of disallowance, in the eyes of the Minister, of purely academic significance for the Free State but the power of reservation was, as well, a thing of the past. Even with regard to the Colonial Laws Validity Act he thought there would have been a very sound case for the assertion that this Act had never any legal effect upon the Free State. Treat Britain and the Irish Free State only. If, however, the document took the form under which it was presented to the Dail, it was because it had to reconcile the historical and constitutional differences throughout the Commonwealth and to put the existing position into such terms that all possible doubts as to the constitutional co-equality of these states should be swept away once and for all.

The Minister dealt with all component parts of the Report separately, subjected them to careful analysis and, at the conclusion of his speech, pointed out as quite an obvious fact that, in the light of the Report, all the legal restrictions of the old system are doomed to vanish and be taken asunder, never to be reconstituted. Instead of this obsolete structure of supremacy and control, a new order of things was on the point of arising out of the recommendations of the Report – the free co-operation of six peoples united in free association.

The objections against the Report, as made by the Fianna Fail spokesmen, could be looked upon as either of principle or interpretation. The first were reflected, maybe, in the most comprehensive way in Deputy O'Kelly's speech, the second – in Deputies Lemass's and McEntee's criticisms.

Mr. O'Kelly did not deny that, taken in the light of the Government's ideas, the whole matter afforded reasons for great satisfaction. But looked at from the point of view of the opposition all the achievements of the Report appear under quite a different aspect. The opposition's first concern, declared Mr O'Kelly, is the problem of winning Ireland's independence, the problem of breaking out of the Commonwealth and of getting Ireland, not the Free State, her proper status in the world. He took strong exception to any assertion that the Free State was in the British Commonwealth of Nations by the free will of the Irish people. The governing factor which brought the Free State into existence and consequently into the Commonwealth was, he said, Lloyd George's threat of immediate and terrible war if the Irish delegates would not have signed the Treaty.

The attitude taken by Fianna Fail towards the Report was, therefore, dominated by the view that the Irish people is not of its own free choice a Dominion and is not associated with the British Commonwealth of its own free will. Dominion status has never been recognised by the opposition as satisfactory, on the contrary – it is a thing they wish to get rid of as soon as they can. They hope to make the fullest use of every opportunity to break it down step by step, if they cannot do it any other way, the connection that does exist "until such time as the people here are given an opportunity to declare with absolute freedom what their choice is in this matter of association with the other Dominions of the British Commonwealth of Nations".

Taken under this aspect all the achievements of the Report, no matter how far-reaching in their substance, could, obviously, not meet with the approval of the opposition as the very principle of association with Great Britain and the Commonwealth being desired by the Irish people was called, by them, into question.

The leading idea of Mr. Lemass's criticism was different. He took the position that, even looked upon from the Government's standpoint, the Report could not be considered as by any means a step forward, but as a visible sign of retrogression. He made a point of showing that, in the light of the 1929 Report, the dual interpretation inherent in the conclusions of the 1926 Report was now tending to an aspect least advantageous to the Free State.

In the Deputy's opinion, the declaration made by the Minister for External Affairs in 1929 to the effect that the Free State was a completely independent state, freely associated with other members of the Commonwealth and co-equal in status with them; appeared in the light of the document under discussion, to misrepresent the real state of affairs. If there still existed on

the British Statute Book certain obsolete acts incompatible with the legislative power of the Dominions, the question whether the British Government cared to keep them on the Statute book or not, should not interest the Irish if the Minister's declaration and the 1926 Report were to be seen as reflecting the true position.

If all the talk about co-equal were not mere verbiage, then it would have been difficult to explain why the declaratory enactments, as suggested by the Report, were only to be passed by the British Parliament, and why, instead of this, the Report did not contain a general declaration stating that no Parliament of any part of the Empire had the right to legislate in any way for any other part. In Mr. Lemass's mind the Free State's delegates in 1929 only secured certain positive concessions from the British Government by surrendering the principles which its predecessor in 1926 succeeded in establishing.

As, however, Deputy Lemass's view that "the process of definition is a process of contortion" was developed with still more clarity in his speech delivered on the Imperial Conference Report, 1930, we take the liberty of sending students of the question to the corresponding volume of the Parliamentary debate. Here it might be interesting to note that he shared the Labour deputy, Mr. O'Connell's apprehension lest the Imperial Conference should develop into a sort of Empire super-parliament, with full and vigorous support on the part of the Free State Government. This point might remind students of the foundation and early history of the League of Nations that apprehensions similar to these were felt in certain countries to the effect that the League's institutions might get a sort of control over the sovereignty of the State-members of the League, apprehensions which, with the passage of time, were gradually dissipated.

The point was raised by Deputy O'Connell in connection with the fact, of which he reminded the Deputies, that the Dail was never asked to give formal sanction to the 1926 Report. He therefore thought it out of place that such a sanction should be asked for a document which was only the outcome of the previous report.

As to Deputy MacEntee's criticism; he made the case for the inconsistency of the Report with the Treaty and for the impossibility of having them both at the base of the Free State's constitutional status. To demonstrate this he took as his starting point the Oath of Allegiance, reserved by Article 17 of the Constitution, and put the question whether the Oireachtas had the power to abolish this article? If so, then the statement that the Saorstat is not subordinate in any way to Great Britain and the text of the 1929 Report are valid, but the Treaty falls.

This conclusion must be taken as abrogating from the argument as adopted by the Fianna Fail Government that the removal of the Oath leaves the Treaty inviolate. If not, then the Treaty stands but the Report is, to use the Deputy's words, "a mere sham and make-believe".

To the Deputy's mind, as long as Section 2 of the Constitution Act remained operative, Great Britain could always veto any Act of the Oireachtas, no matter what statement on its power of legislation might be included in the Report. He dwelt in a particularly circumstantial manner upon paragraph 60 of the Report, referring to the succession to the throne and the Royal Style and Titles, and came to the conclusion that the paragraph was intended to impose a limitation upon the sovereignty of the Dominions in one particular matter, which, he said, was of primary and vital concern to the Irish.

The new convention was aiming at limiting and taking away the right of the Dominions to secede from the Commonwealth, a right that had been hitherto admitted. He thought the real reason why the Minister brought the Report into the House was to get approval for paragraph 60 which contained nothing else but a recommendation to the Dominions to cede a portion of their sovereignty. He warned the House that, if they approved of the Report, it could be asserted in the future that in view of this approval the Irish people had surrendered their natural right to secede.

The proposed exception that any alteration in the succession to the Throne or the Royal Style and Titles shall hereafter require the assent of the parliaments of all the Dominions and the Parliament of the United Kingdom, created quite a new situation by introducing in this particular question a new factor, a group control of all the members of the Commonwealth of Nations over the affairs of the individual Dominions. "It s clear, therefore," said Mr. MacEntee, "that in this connection the sovereignty of the King of Great Britain is only being exchanged for the sovereignty of the King of the British Commonwealth." The declaration (par. 60 of the Report), concluded the deputy, is intended to prevent the future peaceful evolution of this State towards complete and sovereign independence.

Answering the above criticism, the Minister for Foreign Affairs said that people who were anxious to obtain, instead of the Report, a general Act of Renunciation passed by the Parliament of Great Britain in regard to the Dominions have virtually got such Act in the Report. The various sections, scattered throughout the Report, should simply be put together and looked upon as an entity, and then a most complete Act of Renunciation would emerge from the document. He took strong exception to the assertions made against the Report on the

ground that it might imply certain derogations from the principles established in the 1926 Report. The latter document found that there was on the Statute Book of the British House of Commons certain out of date legislation and the task of the Report under consideration was to bring this Book into conformity with the facts and to disencumber it from obsolete acts. This had been done in a clear and positive way.

The Government brought this exceptionally important document before the House and was asking for its approval not only because of the assumption expressed in article 82 of the Report that the necessary legislation and the constitutional conventions, to which the document refers, will in due course receive the approval of the parliaments of the Dominions concerned. They did it also because they felt it necessary to know before the next Imperial Conference how this Report stood with representatives of the Irish people, and what points of objection could be raised to the above document, as well as the Treaty and the 1926 Report.

Taken as a whole, this is an issue of the Free State's foreign relations in so far as the British Commonwealth of Nations is concerned, and this is why the Government thought it fit to make it an issue of confidence. Point by point the Minister went through the Report again arguing that none of these points detract from the previously achieved status or diminishes it. Although a considerable portion of the legislation being removed under the Report never applied to the Free State there was still a danger of an obsolete act being evoked against this country's legislative freedom, and this is why, by means of the Report, the Minister preferred to have all such danger exorcised for ever.

The Report was approved by the majority of 68 votes against 55.

In the Senate, paragraph 60 of the report, relating to the law of succession and the Royal Style and Titles, was the subject of a short but weighty discussion which ranged around some questions raised by Senator Johnson ~~to the Minister on the 3rd of July~~. It is to be noted that in the Parliament of South Africa there was the same atmosphere of uncertainty and feelings ran high whether paragraph 60 could not be used as an instrument affecting the right o secession for South Africa. Speaking in the House of Assembly on the 22nd May, General Smuts expressed strong doubts if, in view of the paragraph, it would be possible for South Africa to secede from the British Commonwealth without the full and unanimous consent of all the parliaments of the Commonwealth. Although General Hertzog, the then Prime Minister, opposed this view, the Report was finally adopted by the House with an exception to the

effect that paragraph 60 should not be taken as derogating from the right of any member of the British Commonwealth of Nations to withdraw therefrom.

Referring to this, Senator Johnson was anxious to have a statement of policy of the Saorstat as regards the matter involved in paragraph 60 as well as regards the right of secession of any of the Dominions from the British Commonwealth of Nations. To the Senator's mind, freedom of association with the Commonwealth inevitably implied freedom to dissociate, if and when the Dominions so decide, and when they are prepared to consider all the consequences.

Mr. McGilligan's answer was based on the presumption that succession and secession were two entirely different questions, two subjects to be taken separately. As of the right of any member of the Commonwealth to secede the Minister expressed the opinion that the only thing that is blocked by paragraph 60 is secession by way of alteration in the succession. "If a Dominion does not want to bother about succession but simply wants to leave the Commonwealth, paragraph 60 presents no difficulty... If a Dominion wanted to become a Republic and to remain inside the Commonwealth, and asked to do so by changing the order of the succession to the Throne, then, undoubtedly, paragraph 60 would be a definite bar, but if some one member of the Commonwealth tried to get outside the Commonwealth, paragraph 60 would have no operative effect whatever in relation to that Dominion".

Asked by Senator Connolly, does the Treaty position vitiate the right of the Free State to secede, Mr. McGilligan replied "We have a position inside the Commonwealth of Nations by the Treaty. If the people want to have that position disappear and do not seek to secure that by agreement, then it can only be secured by breach of the Treaty. The Treaty must be broken".

Having secured the approval of the Oireachtas for the Expert's Report, the Government embarked on preparations for the forthcoming Imperial Conference. The chief point of the latter was to be the just mentioned Report and opinion prevailed in the Department of Foreign Affairs that its acceptance *en bloc* by the Imperial Conference would not meet with any serious objection. The possibility was anticipated of some of the delegations putting forward amendments, however the fact that some of the Dominion parliaments had by this time already approved of the Report; led them to expect no alteration of principle in the recommendations as agreed upon in 1929.

Besides the problem of the complete emancipation of Dominion Legislation, the Free State hoped that the Conference could settle certain other points which were considered to encroach on the principle of co-equality. First came the question of the right of direct access to the Crown, according to the practice hitherto in force, a certain class of acts, such as the ratifications of treaties, consular exequaturs, etc., which were by their nature acts of Dominion legislation or administration, were formally loosing this character owing to the fact that the affixing of the King's seal on these documents continued to be performed through the channel of the British ministers and that the seal itself was an instrument of the King of the United Kingdom.

The course which the Free State proposed to follow at the Imperial Conference was to aim at a position in which all the above documents, from the first to the last, in fact, as well as in form, would have preserved clear and exclusive marks of Dominion legislation or administration. The contemplated change consisted in the adoption of such procedure in which the only person entitled to obtain the King's signature on such an act would have been the High Commissioner in London of the Dominion concerned; the apportion of the seal, distinctly separate for each Dominion, had to be performed by the same person exclusively. ~~With the adoption of such procedure all inference of British ministers in acts which were symbols of the Free State's authority would be wiped out at all stages of the procedure without question.~~

According to the view held by the Free State, the King's powers in the United Kingdom are limited by the Minister and by Parliament to such an extent that the only means by which the Dominions could free themselves from the supremacy, if only formal, of these factors and to concede the King the full use of the position to which it is entitled by the constitution and constitutional usage of the Dominion concerned, would have been by securing direct access to the Crown.

The issue of appeals to the Judicial Committee of the Privy Council, to which the Government of the Free State devoted so much attention and so much energy, remained still outstanding. Moreover, the passage of the 1926 Report[8] which stated that "the (wording?) of the Treaty in the name of the King or the symbol of the operational relationship between different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various

[8] Section V, subsection A, line 4

territories on behalf of the King" was still in force, whilst in the eyes of the Free State Government the provision of this passage grew more and more out of harmony with the stage which has been achieved in the relations between members of the Commonwealth and called, therefore, for an adequate settlement of the matter involved.

Finally they lay open before the Conference the enormous question of the so-called Empire Free Trade. The attitude, as adopted towards the problem by the three most important groups in the Free State, was the following. The Republican Opposition was openly opposed to any such scheme. One of the fundamental points in its programme has always been the raising of a complete tariff wall around Ireland with a view to the building up of national industry and an attempt to supersede Great Britain as the export market for Irish products by other markets. The Pro-British element held the opposite view; they maintained that protective tariffs, no matter whether modified by the so-called Imperial preference, or not, would have been equally detrimental to Great Britain as would have been to the Free State.

The products of Irish agriculture would have been, in these circumstances, be treated on the English market as foreign goods, without any preference whatsoever over all other undoubtedly foreign goods. If in response to the abolition by the Saorstat of its tariffs on agricultural goods Great Britain were to introduce tariffs on agricultural goods, such as Danish, Dutch, Argentine, Swiss, then the demand for Irish products would have increased enormously, universal prosperity would have grown, the tariff barrier between the Saorstat and Northern Ireland would have disappeared, and, last but not least, the influence of Republican ideas would have been doomed to diminish.

The pro-Government elements maintained an attitude of reserve and waited for the turn of events. They did not unconditionally reject the very ideas of inter-imperial Free Trade, but showed readiness to co-operate in such a scheme only in the event of the benefits to the Saorstat from joining such an economic bloc absolutely clear and beyond doubt. Up to the time under consideration no definite policy had been adopted by the Department for External Affairs with regard to the problem. The complete application of the idea throughout the whole Commonwealth always seemed to this Department to be inconceivable. The only practical possibility which came under consideration would have been a partial realisation of this scheme under the aspect of separate treaties and agreements to be concluded between the members of the Commonwealth.

The proceedings of the Imperial Conference opened in London on the 1st of October and lasted till the 14th November. The Free State was represented by the Minister for External Affairs, Mr. McGilligan, Minister for Defence, Mr. D. Fitzgerald, Minister for Agriculture, Mr. P. Hogan and Attorney-General, Mr. J. Costello. The ordinary body comprised nine members representing different Departments of the Free State administration.

Within the Free State the results of the Conference did not arouse any exceptional amount of public interest or general comment. There was a strong feeling that they comprised a rather colourless reflection of an evolutionary process already consummated. In the light of the epoch-making Imperial Conference of 1926 the summary of the proceedings of the 1930 Conference was looked upon as representing a considerable lowering of the high level which was so characteristic of the previous inter-imperial gathering. It is true that in respect of the majority of constitutional problems the Conference had to deal with a carefully prepared legacy from the Expert's Conference. By approving of this report and fixing December 1st 1931 as the date on which the so-called Statute of Westminster should become operative, the Imperial Conference completed, *ipso facto* the process of freeing all legislative ties as heretofore affecting Dominion parliaments.

But as the status of the Free State was at that time, and still is, a dynamic one and subject to further evolution, it should be born in mind that a characteristic feature of Irish politics is the extraordinary rapidity with things once done, pass into history. The dominating factor in these politics could perhaps be defined as an unquenchable passion for further achievements and developments.

The Report contains a number of suggestions for the bringing into existence of the so-called Commonwealth Tribunal, which would be called a upon to settle disputes and differences between members of the British Council, but evidently not to supersede the Privy Council in its rights to hear appeals from the Dominion Courts.

This part of the document which deals with the appointment of the Governor-General again provides for nothing which would have not been a practice already in force in the Free State. The first Governor-General of the Saorstat, no less than the second, had been appointed in accordance with the wishes of the Free State Government.

The same part includes, in addition, a very important conclusion in response to the wishes of the Free State regarding direct access to the Crown. The recognition of this principle seems to

flow naturally from paragraph 5 of the part of the Report which states that the channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government.

In the eyes of the Irish statesmen the weakness of the ~~Mc Donald~~ then British Government was the chief reason for the featureless results of the Conference. The Dominion policy of the Labour Party, although keeping within the general lines of the Conservative ideology, revealed a lack of bold solutions which were so characteristic of the Bonar Law and Baldwin governments. Consequently, upon the tendency as shown by the British delegates to avoid taking decisive steps, the centre of gravity in the Dominion policy of Great Britain shifted during the Conference to the Dominions Office, which, through the force of circumstances, was leaning towards an attitude of resistance to the further realisation of the principles as established by the 1926 Conference.

Accordingly centrifugal tendencies made themselves felt not only among the South African delegates but among the Australian and, for the first time, even among the New Zealand representatives. Another characteristic feature of the Conference was the wide-spread tendency to avoid political problems and to dwell upon purely economic questions. Although these questions were of great importance to the Free State, the Irish delegation did not gather the impression that the economic sphere was one in which new links were likely to be forged between members of the Commonwealth. The difficulty of finding a common economic language throughout the Commonwealth created an atmosphere rather of disunion than of consolidation.

Under such circumstances the Free State Government's line of action might be outlined as follows: The time for the finding of constitutional formulas must, in their opinion, be considered as ended. Instead a new epoch had arrived, that of their gradual and complete realisation. As the last Imperial Conference appeared to be an inappropriate instrument for this purpose the centre of gravity in these matters should from then on be located with the Governments of the Dominions concerned.

As we have already made clear the ultimate aim of this policy, as contemplated by the then Government of the Saorstat, would have been the achievement of an association of six *de* jure and *de* facto sovereign Kingdoms would have emerged, united only by a common Crown and not a state of affairs in which the United Kingdom was on one side and the Dominions on the other. The King in England would have at the same time been King in Ireland, etc., and have

performed the functions and enjoy his privileges in these countries in full conformity with the laws and constitutional usages of each of them.

President Cosgrave's Government stood immovably by this conception because, not only was it embodied in their general political ideology, but they believed that it was the only option to hasten the process of reunion between Free State and Northern Ireland.

Section 2 (Untitled)

When Mr. Thomas, the Secretary of State for Dominion Affairs, moved on the 20th November, 1931, in the British House of Commons that the Statute of Westminster be read a second time[9], a lively discussion ensued on the subject showing its different aspects from the British point of view. Mr Thomas himself qualified the Bill as the most important and far-reaching that had been presented to the House of Commons for several generations, but at the same time he thought it necessary to draw the attention of the House to the fact that to all intents and purposes the principles laid down in this Bill as a matter of law had been for many years observed as a matter of practice. By this he meant it to be understood that in the actual state of inter-imperial relations no British Parliament would think "of legislating for the self-governing Dominions except by their request and with their consent." He thus made it clear that the Bill presented was to be looked upon rather as a ratification of the past than as a starting point for the future.

As regards the Irish Free State however, that was not the opinion of some members of the British Parliament, and it should be perhaps interesting to outline the objections raised against the Bill in its contemplated application to the Free State at the very outset of the debate by Mr Winston Churchill, one of the survivors of the signatories to the Anglo-Irish Treaty. He made this Treaty a pivot for his arguments and declared that, if the Bill was passed in its proposed form, the special obligations entered into between Great Britain and the Irish Free State, by virtue of the Treaty, would be deprived of all safeguards.

[9] Parl. Deb. House of Commons, 1931, vol. 259 no. 12, col. 1173-1253 & vol. 260 no. 1(?), col. 245-368

It must be born in mind that the two title deeds which brought the Free State into being – the Treaty and the Constitution – were tightly bound together by the Irish Free State Constitution Act 1922, and the source of Mr Churchill's apprehensions was the possibility of the Bill, once it became law, conferring on the Free State full legal power to repudiate the above Act and thus destroy the Treaty. He was quite positive in asserting that the effect of the passing of the Bill in the proposed form would be to make it "perfectly legal and perfectly simple" for the Dail to repeal the Oath of Allegiance and the right of Appeal to the Privy Council, to repudiate the right of the Imperial Government to utilise the harbour facilities at Berehaven and Queens town, the facilities for aviation and oil fuel storage, the limitation upon the size of the Free State Army, in a word – all those restrictions, imposed upon the Irish Free State by the Treaty, which were intended as a special safeguard for British interests. This is why he strongly seconded an amendment to the Bill which aimed at inserting the principle that nothing in the Bill shall be deemed to apply to the repeal, amendment, or alteration of the Irish Free State Constitution Act 1922.

In his reply to Mr Churchill the Solicitor General, Sir Thomas Inskip, approached the question from an entirely different aspect. He quite agreed with Mr Churchill that the Treaty was at the very basis of the existence of the Free State, but he opposed the view as if the proposed Bill could involve any suggestion of a possible repeal of the Treaty. He did not think that one who was anxious to break the Treaty would be deterred by paper safeguards, included in the proposed Bill, and, answering Mr Churchill's remarks that these safeguards would make repudiation illegal, struck at the very root of the question by saying that the Treaty was as deeply imbedded in the Constitution of the Free State that "there must at least be considerable doubt as to whether the illegality is as plain" as Mr Churchill was assuming.

He set for the principle of the Treaty and the Constitution being irrecoverably woven together and emphatically declared that, even assuming that the Treaty might be legally repudiated after the Statute of Westminster had been passed (and such was not his opinion), one would be obliged to face a situation in which the only binding force in the maintenance of the Treaty would be the moral obligations involved in it. He suggested in conclusion that the Treaty itself at the time it was negotiated was a greater leap in the dark than the proposed Bill.

On opposing the same amendment on the 24th November Mr Thomas abandoned the legal ground of the question and faced it from the point of view of the practical consequences which the amendment would be likely to bring about. In the first instance he took exception

to any differentiation being made in the treatment of one of the Dominions to its detriment and drew attention to the long and uninterrupted term of office of the then-existing Free State Government, which was absolutely pledged to the preservation of the Treaty. "If you want to insure the return of Mr De Valera," he said, "then carry this amendment... Just imagine an Irish election taking place... and imagine every Irishman being able to say – 'they not only do not trust De Valera but they do not trust Cosgrave'. That would insure not only the return of Mr De Valera but it would ensure that every Irishman who had sacrificed so much in defence of the Treaty would have lost hope and would never meet us again."

Here ensued the most dramatic moment of the whole debate when Mr Thomas in support of his remarks read a passage from the now historic letter sent by President Cosgrave to the British Prime Minister the day before. This is the warning that the Free State Chief Executive thought necessary to give to the British Government:

Dear Prime Minister,

I have read the report of last Friday's debate in the House of Commons on the Statute of Westminster Bill, and am gravely concerned at Mr Thomas's concluding statement that the government will be asked to consider the whole situation in light of the Debate. I sincerely hope that this does not indicate any possibility that your government would take the course of accepting an Amendment relating to the Irish Free State. I need scarcely impress upon you that the maintenance of happy relations which now exist between the two countries is absolutely dependent upon the continued acceptance by each of us of the good faith of the other. This situation has been constantly present to our minds, and we have reiterated time and again that the Treaty is an agreement which can only be altered by consent. I mention this particularly, because there seems to be a mistaken view in some quarters that the solemnity of this instrument that the solemnity of this instrument in our eyes could derive any additional strength from a Parliamentary law. So far from this being the case any attempt to create a Stature of the British Parliament into a safeguard of the Treaty would have quite an opposite effect here, and would rather tend to give rise in the minds of our people to a doubt as to the sanctity of this instrument."

To dwell any longer on the most interesting debate which took place on this Bill in the British House of Commons on the 20th, 24th November, and 8th December and ranged almost entirely, as one of the members justly pointed out, round the question of the Free State, would

carry us far beyond the limits of this chapter. But just to show the spirit in which the proposed amendment was defeated by 350 against 50 and the Bill was passed in its integrity.

It would not, perhaps, be out of place to quote the words of Lord Hailsham which were cited by one of the members in the debate: "We English", said the late British Attorney General one occasion, "are sufficiently flexible and sufficiently sensible to allow Statutes which have become obsolete to remain inoperative. I do not see why this Statute of Westminster, even if it contains some the dangers which some people see in it, should not share the fate of its earlier predecessors. I believe that the Stature of Westminster, whether it is strictly a correct legal document or not, is regarded, by many of the Dominions at any rate, as a legal expression of the Balfour Declaration.[10]

It might at the same time be interesting to note a rather paradoxical situation: Mr, Churchill's assertion that the Statute would confer on the Free State the legal power to repudiate the Oath of Allegiance went even further than what the Fianna ail spokesman was able to draw from the Statute in support of the removal of the Oath Bill as introduced by President de Valera's government in April 1932.

Then speaking on the subject in the Dail, Mr. Conor Maguire, the Attorney General of the new Government, expressed the opinion that the matter of the legality of the Bill was certainly controversial but that it was only natural that in this controversy the Irish Government would uphold the Irish view. The absolute legality of such a step as foreshadowed by Mr. Churchill was thus superseded in the Irish mentality by a relative legality which seemly was based not even so much on the Statute of Westminster itself, as upon the right of a sovereign nation to dispose of its domestic affairs.

In connection with this it is of great importance to make clear that, in spite of what the British Solicitor General said about the Treaty and the Constitution being irrevocably woven together, President de Valera's Government endeavoured from the very moment of their coming into office to make out of these two documents two water-tight and impervious compartments, by removing the Treaty into the position of a purely international instrument and by treating the Constitution as a subject of purely domestic concern. This part of the Removal of the Oath Bill which dealt with Article 2 of the Constitution Act, 1922, must be

[10] Ibid vol. 260, no. 24, col. 1813

regarded as nothing else but a severing of the channel of communication between the two documents.

Section 3 (Untitled)

In the Dail Eireann the motion that this body "approves of the Commonwealth Conference, 1930, and recommends the Executive Council to such steps as they think fit to give effect thereto" was moved by the Minister for External Affairs on the 16th July 1931. The debate developed on very much the same lines as the debate previously referred to in connection with the Expert's Conference Report.

Again Mr. McGilligan rose and displayed all the convincing force of his eloquence and logic to elucidate the meaning of the document and to show its epoch-making character. Taking for a starting point the 1926 Imperial Conference, at which the late Kevin O'Higgins played such a prominent part as a champion in the task of remoulding the old imperial order into a free association of the State members of the Commonwealth, Mr. McGilligan said that "the system which it took centuries to build up has been brought to an end by four years of assiduous concentrated collaboration between the lawyers and the statesmen of the States of the Commonwealth".

Several courses could have been taken in order to destroy as a matter of law all that obsolete imperial supremacy which had already been destroyed in practice. It could have been done through the means of a simple record in a report. This course, however, as wanting the backing of legal authority, could not have satisfied those State-members of the Commonwealth, where, as in Canada and South Africa, the long tradition of the legislative limitation operating to their full extent was still fresh in the memory. The course of reaching the goal by an agreement was recognised as undesirable so far as the Irish Free State was concerned, for the reason that the Saorstat happened to join the Commonwealth at the latter definite stage of evolution.

Thus, as Mr. McGilligan pointed out, they were unwilling to suggest in any way that the territorial limitation applied to the Irish Free State, or that the Colonial Laws Validity Act applied to the Irish Free State and so on, and they felt that a certain type of agreement would

imply the previous application to the Free State of those doctrines and those laws, and that it was by virtue of the agreement that they ceased to apply. "But we take the view, that those doctrines and those laws did not survive to us as a result of the Treaty of 1921 and we were, therefore, unwilling to have then dealt with so far as we were concerned, in that way."

There was still another and more satisfactory method of covering the whole scope of the problem, and it was means of a declaratory enactment, a Statute to be passed by the British Parliament which, by doing so, would solemnly resign its right to legislate for the Dominions and thus the last vestiges of the British supremacy in the Commonwealth would vanish. To reinforce his argument the Minister quoted the British Parliament Act of 1779 as a *sui generis* precursor of the forthcoming Statute, and came to the conclusion that there is as much of renunciation in the latter as in the Statute of 1779 by which it was "declared and enacted" that the British Parliament had no right to govern the North American Colonies.

Mr. McGilligan's speech[11] covered the whole vast subject with perfect lucidity and both its synthetic and analytical parts were equally clear and happily balanced. As, however, its more detailed examination would be to a certain extent a paraphrase of what has been already said on the subject, it might be better to confine ourselves in this case to the elucidation of two points only which need additional explanation – What was the actual position of the Crown as it appeared to the Irish statesmen to emerge from the Report, and how stood the question of nationality as outlined by the same document?

Referring to the first Mr. McGilligan warned the House against any erroneous conclusion to be drawn from the fact that the Crown remained unitary, to the effect that the States of the Commonwealth could be regarded as a political and diplomatic unit. In the light of his conception the recital relating to the Crown had a perfectly clear meaning and its purpose was to establish the principle of uniformity in the domain of the succession. As the Crown was recognised to be the symbol of the free association of the members of the Commonwealth (and was now apparently the last bond between these members), it appeared to be necessary to establish this principle in order that any legal confusion should be avoided in regard to the succession.[12]

Thus the ideal at which President Cosgrave's administration was aiming from the very beginning of its period of Office seemed to have been achieved almost to its full extent and

[11] Parl. Deb. 1931, vol. 39, no. 6, Col. 2290 and following
[12] Idem col. 2303

instead of the vanishing British Empire, which represented a specimen of a unitary State legally as well as politically and diplomatically, an entirely new organism was on the cusp to representing a free association of six *de jure* and *de facto* sovereign kingdoms united only by a common Crown.

Adverting now to the problem of nationality it would be useful to bear in mind that the 1929 Report set forth for the purpose two principles: 1. That the members of the Commonwealth are united by a common allegiance to the Crown, and 2. That this allegiance is the basis of the common status possessed by all subjects of the King. At the same time it called to mind the fact that the common status recognised throughout the British Commonwealth has been given a statutory basis through the operation of the British Nationality and Status of Aliens Act, 1914. But in one of the subsequent paragraphs the Report came to the conclusion that "this common status is in no way inconsistent with the recognition within and without the Commonwealth of the distinct nationality possessed by the nationals of the individual States of the British Commonwealth".

The Imperial Conference Report of 1930 contains a complete adaption of the above principles and makes a further step towards a better elucidation of the problem by stating that "it is for each member of the Commonwealth to define for itself its own nationals, but that, so far as possible, those nationals should be persons possessing the common status, though it is recognised that local conditions or other special circumstances may from time o time necessitate divergences from this general principle." And later the same Report proclaims the principle "that the possession of the common status in virtue of the law for the time being in force in any part of the Commonwealth should carry with it the recognition of that status by the law of every other part of the Commonwealth."

The new position relating to nationality, as established by this Report, was defined by Mr McGilligan as follows: The who arrangement, as he said, "is based upon two things: the separate and distinct nationhood of this country from Great Britain, of Canada from New Zealand, etc., and the desirability for mutual recognition of the status of the nationals of the various countries of the Commonwealth. The essential point is that you do not have a single Commonwealth nationality based upon a single law. There is not a single Commonwealth nationality. The Irish Free Sate national will be that and nothing else, so far as his nationality is concerned. His own nationality law will rule him and his own State, through its

representatives abroad, will protect him ... And the recognition of his Irish Nationality will be Commonwealth-wide and world-wide".[13]

All the old ground was covered again by speakers of both sides of the House, with the result that the Report was approved on the 17th July by a majority of 63 against 46.

Section 4 'Position' and 'Established Constitutional Position'

There is one more thing which should be not lost sight of in this superficial survey of two documents, the Reports of 1929 and 1930, and that is the relative frequency with which they make such grave issues depend upon the 'new position' and 'the established constitutional position'. In the constitutional language of the European Continent, where a clear definition is usually put as the very basis of legislation, such words would have a confining vague or, in any case, a very vague meaning, but within the British Commonwealth, which itself a rather indefinable organisation, such is not the position, however difficult it might be to give those words the form of a clear definition.

There seem only to be one source of such nature as to indicate their scope and to shed light upon their exact meaning and that is from the famous Balfour declaration defining Great Britain and the Dominions as "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Common wealth of Nations".

Now, this sentence has undoubtedly two faces, one of which is turned towards the past, in other words – towards "the established constitutional position" and contains a *sui generis* ratification of what has been already accomplished in the constitutional development of the Commonwealth. Its other face turns towards the future, "the new position", and outlines what has yet to be done yet in the sphere of practical achievements if the declaration itself is not to remain in suspense as an empty formula. The general trend, therefore, of the two Reports, as well as of the Statute of Westminster, was nothing else than an effort to attain a state of

[13] Idem col. 2305

affairs in which the new position would be definitely shaped as an established constitutional one and the latter thus would become a corollary of the first.

It is noteworthy that the 1929 Report has been adopted by the Imperial Conference 1930 in its integrity with one only characteristic alteration, relating to par 4 of the future Statute of Westminster. The corresponding draft clause, as it was proposed by the 1929 Report, was conceived as follows: “No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.”

Now, it has occurred to the British members of the 1930 Conference that such an expression of the above principle could be so construed as simply to place English law in the Dominions in a position inferior to that which by virtue of the generally recognised principle of international comity the law of any other country would be allowed to have in the territory of the Dominions. The clause as it stood could be regarded as tantamount to a presumption that an English law which normally would be operative on the territory of an entirely foreign country might be denied any juridical effect within the territory of the members of the Commonwealth other than Great Britain herself.

This done apprehension arose on the side of some of the Dominions “lest,” as says the Report, “the acceptance of the above amendment might imply the recognition of a right of the Parliament of the United Kingdom to legislate in relation to a Dominion... in a manner which, if the legislation had been enacted in a relation to a foreign state, would be inconsistent with the principles of international comity”.

In order to appease these apprehensions it was decided to put on record that such interpretation of the amended clause would be inconstant with its real meaning and intention.