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RECENT DEVELOPMENTS IN THE CONSTITUTIONAL
AND INTERNATIONAL STATUS OF THE
BRITISH DOMINIONS†

BY C. D. ALLIN*

The British Dominions were keenly disappointed at the failure of the United States Senate to consent to the ratification of the Covenant of the League. They had expected that the United States would take the lead in welcoming them into the new association of states, but instead of that they were greatly surprised to find that the special recognition of their international status by the League was subjected to special criticism in the Senate and undoubtedly constituted one of the principal reasons for the rejection of the Covenant. The effect of this defeat was not only to weaken the power and prestige of the League but also to repudiate the tentative recognition which had been accorded to them by President Wilson at the Peace Conference. The interesting situation was therefore presented that the Dominions had acquired an international status so far as the League and its members were concerned but that they still retained their old colonial status in the eyes of the United States. There was a strong suspicion in the Dominions that the attitude of the United States Senate was determined to a large degree by partisan considerations and racial prejudices and that somehow or other they had been made the innocent victims of American party politics.

The legal effect of the defeat of the League was evidenced not long afterwards at the Washington Naval Disarmament Conference. In sending out invitations to the Conference, Secretary of State Hughes sent a single invitation to the British Empire only. The failure to include the Dominions stirred up a hor-

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†This article is a continuation of a discussion of the same subject in 4 MINNESOTA LAW REVIEW 190.
‡Allin, International Status of the British Dominions with respect to the League of Nations, 4 MINNESOTA LAW REVIEW 217.
§Report of the Right Hon. Sir Robert Borden on the Conference on
General Smuts, prime minister of the Union of South Africa, and the ablest representative of the Nationalist cause in the British Commonwealth, at once sent a strong protest to the other colonial ministers.⁴

"I notice from press that you are sending representative to Washington Conference. I do not know whether you have received invitation from United States through British Government or otherwise. Would very strongly urge that you should press for such invitation before sending delegate. United States did not ratify peace treaty to which we are signatories as component independent states of British Empire. On the contrary, agitation in Congress against our independent voting power in League of Nations was direct challenge to new Dominion status. This is first great international Conference after Paris and if Dominions concerned are not invited and yet attend, bad precedent will be set and Dominion status will suffer. If a stand is made now and America acquiesces, battle for international recognition of our equal status is finally won."

Premier Hughes of Australia heartily concurred in the view that the Dominions should be granted separate representation. "The whole Imperial conference, he subsequently explained in the House of Representatives, "was of the opinion that Australia and New Zealand ought to be represented at Washington.⁵ It was not until the United States of America objected to the separate representation of the Dominions that they had relinquished the effort." Mr. Meighen, the Canadian premier, likewise declared that "it was essential that Dominion representatives should hold the same status as at Paris and that their status must not be allowed to be prejudiced by the proceedings at the Washington Conference."⁶ Mr. Crerar, the leader of the Progressive party went even farther and declared that "Canada should be represented at Washington in her own right or should not be represented at all," a view which found hearty support in the Manitoba Free Press, probably the most influential organ of Progressive thought in the country. On the other hand, that staunch old Imperialist paper, the Montreal Gazette, pointed out "that Canada was not a sovereign state but a member of the British Empire" and it was useless to expect that she would exercise any influence at Washington in her own right when she had but a

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⁴Lowell, Canada's Treaty-Making Power, 2 Foreign Affairs, 15.
⁵Lowell, Canada's Treaty-Making Power, 2 Foreign Affairs, 15.
⁶Journal of the Parliaments of the Empire, 107.
small army and a petty navy. It was enough that the parent state Great Britain should be invited "to bring with him as many of his children as he thought proper." The Nationalist views of the other Dominions met with a decidedly hostile reception from the New Zealand Government. That little colony had always prided itself on being the most loyal part of the British Empire and it was strongly inclined to look with disfavor upon any project which might lead to the disintegration of the Empire. Prime Minister Massey accordingly replied

"Our representative had sailed before your telegram came to hand; but while the point you raise is important from certain points of view, I consider it to be much more important that the Empire should speak with one voice with no uncertain sound."

Mr. Lloyd George, the British Prime Minister, expressed his complete accord with General Smuts' views as to the maintenance of the new status of the Dominions. But as the time for holding the Conference was drawing near, it did not seem best to insist upon separate invitations which would have necessitated a postponement of the conference and might even have jeopardized its success. To meet the criticism of the Dominion nationalists, the British Government therefore arranged for the appointment of four Dominion representatives to serve as members of the British delegation. According to the original plan, all the delegates were to have been appointed by the British government but the mode of nomination was now modified so as to bring it into conformity with the procedure at the Paris Conference, where the Dominion delegates appeared with independent credentials from their own governments. The Canadian Ministry, therefore, adopted a special order in council authorizing the issuance by His Majesty of the full power necessary to enable Sir Robert Borden, the Canadian representative, to sign "for, and in the name of, His Majesty, the King, in respect to the Dominion of Canada, such treaties as might be concluded at the Conference."

Much of the criticism of the United States' attitude on the part of some of the Dominion Nationalists was quite beside the mark. The action of the Department of State was in strict con-

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6The Round Table. Mar. 1922. No. 46, p. 394.
7Ibid. Dec. 1922. No. 49, p. 221.
8Canada Sessional Papers, 1922, vol 18, No. 47, p. 46.
9Ibid.
10Ibid, p. 43.
formity with the principles and practices of international law. The government merely proceeded on the basis of the status quo. It had not extended any international recognition to the British Dominions nor was it under the slightest legal or moral obligation to consult their wishes in the matter of representation or to send them separate invitations. The composition of the British delegation was a purely domestic matter which was no concern of the United States. In any case there was no good reason why the United States should run the risk of being snubbed by the British government for attempting to determine the form of the British representation. The fact that the British government in this case would have welcomed the separate representation of the Dominions did not affect the general international principle that the acknowledgment of the independence or the international status of colonies should come in the first place from the Mother Country rather than from outside nations. The premature recognition of the international status of the British Dominions by the United States or any foreign power might justly have been regarded by Great Britain as an unfriendly act and a distinct violation of the rules of international law.

With the appointment of special Dominion representatives, the questions at once arose, in what capacity were they to attend the conference—as national or imperial delegates with full powers, or merely in an advisory capacity, and to what government or governments would they be responsible for their conduct. The opinion of the Dominion governments was divided upon this question. In submitting the proposal to nominate delegates to the conference, Prime Minister Hughes of Australia strongly emphasized the Nationalist character of Dominion representation.

"He thought that the representative of Australia should be one who is responsible to the people; he should go from that parliament instructed—for that was the proper term—as to what the people of that country conceived to be that policy which would best concern their interests and at the conclusion of his mission he should come back and report to that parliament of which he was a responsible member, and then it would be for the parliament and the people of Australia to express approval or disapproval of what he had done."

13 Moore, Digest of International Law 73.
14 Journal of the Parliaments of the Empire 105.
According to this view, the Australian delegate was a national
delegate with a national responsibility to his own country and
not an imperial representative accountable to the English king
and parliament. This was the view, likewise, of the Canadian
government. The New Zealand Ministry, on the other hand,
assigned a much less pretentious role to the Dominion delegates.
In explaining the results of the Washington Conference in the
House of the Assembly, Premier Massey frankly declared that
he regarded the separate representation of the Dominions in the
League of Nations as an exceedingly dangerous innovation and
repudiated the idea that the Dominions should regard themselves
as independent nations or feel entitled to take an independent
stand upon questions of foreign policy at international confer-
nences or elsewhere. According to his conception, the Dominion
delegates participated in such conferences in a consultative capac-
ty to the British representatives rather than in virtue of any
independent right of their own even as members of the British
dlegation.

"In all cases of foreign policy," he declared, "the British
prime minister speaks for the Dominions. In fact today the Right
Hon. Lloyd George is not only prime minister of the United
Kingdom but he is also prime minister of the Empire."

A similar difference of opinion presented itself in regard to
the powers of the Dominion delegates. The status of the Dom-
nion representatives, according to Sir Robert Borden, was equal
in all respects to that of their British colleagues.16

"Throughout the conference each delegate was in touch with
his own government by means of telegrams or the posts. Thus
no Dominion could be committed without its consent and each
was enabled to state its view and assert its influence in advance
of the formulation of agreements with other powers."

In the opinion of Sir John Salmond, the New Zealand repre-
sentative, on the other hand, there was a maternal difference in
their status and powers inasmuch as the Dominion delegates were
authorized to act on behalf of their respective Dominions only,
whereas the authority of the three British delegates covered the
whole Empire including those portions which were separately
represented by the Dominions.

"The British delegation, therefore, did not consist of seven
plenipotentiaries possessed jointly of co-ordinate and general

15Tbid. 1922. Vol. III, p. 877
16Canadian Sess. Papers, op. cit. p. 45.
authority. It consisted of three such plenipotentiaries, with whom were associated the four Dominion representatives, each of whom had authority in respect of his own Dominion only. The legal significance of this distinction is, as I understand the matter, that the Dominion delegates were present at Washington for the purpose of being heard and consulted as to all matters there in issue concerning the Empire, and of approving and confirming on behalf of their own Dominions the decisions of the King's general plenipotentiaries, and of testifying such approval and confirmation by signing on behalf of their own Dominions the treaties there negotiated.”

The procedure of the Washington Conference lent further support to the theory that the Dominions were there "not in their own rights as quasi-independent states but merely as constituent portions of an undivided Empire." The representatives of the Dominions, it is true, participated in the discussion and negotiation on equal terms with the British delegates and the representatives of foreign states but when the time for voting came the separate representation of the Dominions disappeared and the vote of the entire British delegation was given by Mr. Balfour alone as head of the delegation and on behalf of the whole Empire. Whatever might be the internal differences of the various members of the British delegation the final decision showed the Empire acting as a diplomatic unit. Fortunately the internal relations of the Imperial delegation were exceedingly harmonious and no question arose upon which it was found impossible to secure final unanimity of opinion.

There was also an interesting difference of opinion among the colonial representatives as to the right of the Dominion delegates to withhold assent to any agreement which might be entered into by the imperial delegation.

According to the views of Sir Robert Borden:

"In order to commit the British Empire delegation as a whole, to any agreement reached at the Conference, the signature of each Dominion delegate was necessary in addition to that of the others, and any Dominion delegate could, if convinced or instructed that his duty lay that way, reserve assent on behalf of his government."

A more imperialistic point of view was expressed by Sir John Salmond.

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21The Round Table, Dec. 1922, No. 49, p. 226.
23Canada Sess. Papers, op. cit. p. 44.
24The Round Table, op. cit. p. 227
"If any Dominion delegate, either of his own motion or under the instructions of his government, had found himself unable to agree with some proposal which commended itself to the Delegation, it would then have been necessary for His Majesty's general plenipotentiaries from Great Britain to determine in their own discretion the action to be taken.

"If they were of the opinion that the matter in dispute was of such minor importance, or related so exclusively to the Dominion itself, that the views of that Dominion ought to be acceded to for the sake of unanimity, this result could have been attained either by a modification of the terms of the proposed treaty or by excluding the dissentient Dominion from its operation unless and until it chose through its government or Parliament to give its subsequent adherence. If, on the other hand, it was considered that the matter was of such general importance that dissent on the part of a Dominion should be disregarded in the interests of the whole Empire, it would have been within the authority of the plenipotentiaries of Great Britain to assent to the treaty on behalf of the Empire as a whole, without regard to such dissent.

"The fact that the delegate of one of the British Dominions had failed to sign the treaty on behalf of that Dominion would have had no effect on the international operation and obligation of the treaty. Any difficulty so unfortunately resulting would have been a matter for negotiation and settlement within the borders of the Empire itself, but would have in no way affected the external relations between the Empire and the other contracting Powers."

The procedure adopted in signing and ratifying the treaties was that of the treaty of Versailles and other treaties concluded at Paris, the representatives of the Dominions signed on behalf of their respective Dominions along with the representatives of the British Empire. By this process the amour propre of the Dominions was satisfied, since they were accorded an independent position along with the other delegates. In accordance with the constitutional usage of the Empire, the treaties were thereupon submitted to the parliaments of the respective dominions for approval. In the words of Sir Robert Borden

"The constitutional convention of the British Empire, under which the final act of ratification by the King of a treaty signed on behalf of a Dominion must be based on the assent of that Dominion, was fixed by the practice of recent years worked out between the members of the Empire themselves. As that practice is entirely within the control and determination of the nations of the Empire, the Washington treaties do not affect it. In like case is the question whether the treaties shall be submitted to Parlia-

21Canada Sess. Papers, op. cit. p. 43.
ment for approval before ratification is recommended, although in this respect the practice is determined by each part of the Empire for itself; for example, it appears from the speech of His Excellency at the opening of the present session that with respect to the Washington Treaties the government consider that the 'approval of Parliament ought to precede their ratification on behalf of Canada.'

This procedure partly justified the contention of some of the Dominion governments that their assent was necessary to the validity and operation of the treaties within their respective Dominions. From a strictly legal standpoint, however, it must be admitted that neither signature nor ratification on the part of the Dominions was necessary to give effect to the Washington conventions.

"The Washington treaties," as Sir John Salmond pointed out, "like all others which are negotiated by plenipotentiaries, come into force only by ratification. The ratification required by the constitutional law of the British Empire is that of His Majesty. No action on the part of New Zealand is legally required. In view, however, of the direct participation of New Zealand in the negotiation and execution of those treaties, it may well be thought expedient that the treaties should be submitted to both Houses of the New Zealand Legislature in order that resolutions may be passed approving of their ratification by His Majesty."

This elaborate procedure in connection with the signing and ratification of the treaties was an ingenious attempt to reconcile the principle of the diplomatic unity of the Empire in its international relations with the constitutional doctrine of the coördinate right of national self-government on the part of the several Dominions. But this formal procedure could not hide the fact that the international aspirations of General Smuts and his supporters had been frustrated on this occasion. In the face of the proceedings of the Washington Conference, it was no longer possible to declare from the standpoint of international law, that the Dominions had attained a status of equality with the Mother Country and the sovereign nations of the world. In all their formal aspects, the preamble, preliminary statement of purpose, the recital of the names of the plenipotentiaries, the signature and ratification, the treaties recognized the British Empire only as the contracting party. The Dominions secured recognition simply as

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22 Ibid.
23 The Round Table, op. cit. p. 227.
constituent parts of the Empire and not as separate and distinct states.

The signature of the Dominion delegates and the ratification by the Dominion parliaments are important therefore from the constitutional rather than from the international standpoint. The chief international significance lay in the fact that it intimated to outside nations that they must consider the interests of the Dominions in carrying on their diplomatic relations with the British Empire since the direction of the foreign policy of the Empire was no longer in actual practice vested exclusively in the hands of the British Foreign Office. There was always the possibility in case of the sacrifice of the national interests of a Dominion that constitutional difficulties might arise through a refusal of the aggrieved Dominion to sign or ratify the agreement in question.

"The true significance of the presence of representatives of the Dominions at the Conference," in the words of Sir John Salmond, "is not that those Dominions have acquired for either international or constitutional purposes any form of independent status but that they have now been given a voice in the management of the international relations of the British Empire as a single undivided unity, relations which were formerly within the exclusive control of the government of Great Britain."24

The views of Sir John Salmond, it will be observed, differed not only from those of General Smuts in respect to the international status of the Dominions, but likewise from those of Sir Robert Borden in respect to their constitutional status. Sir John, as a thorough-going imperialist, asserted most strongly, the constitutional as well as the international unity of the Empire, whereas Sir Robert Borden attempted to lay down an intermediate position between the extreme national school of thought of General Smuts and the imperialist views of the New Zealand statesman. The Canadian leader was willing to concede that the Empire should be a unit in its international policy but he put forward the theory of the constitutional equality of the Dominions with the Mother Country in the determination of their own foreign policies—a theory which was emphatically repudiated by the New Zealand jurist. This conflict of views was partly due to a difference in the political philosophy of the two colonial statesmen. Sir Robert Borden combined in his political creed strong nationalist sentiments with a deep attachment to the British connection.

"I have never wavered," he declared25 on another occasion, "in the firm and constant belief that within the British Commonwealth of nations Canada will find her most commanding influence, her widest usefulness and her highest destiny. With this opinion is coupled a fixed and absolute conviction that the unity of the Empire can alone find its expression in complete autonomy and in equality of nationhood. A strong Canadian national spirit is entirely consistent with a firm purpose to maintain our country in a high place within the British Commonwealth."

Sir John Salmond, on the other hand, was an out and out Imperialist, who placed his allegiance to the British Empire above his citizenship in the Dominion. But this difference in view was likewise due in part to a difference in the legal and constitutional modes of interpreting the Imperial constitution. Sir John Salmond, throughout his discussion, adopted a strictly legal point of view. He looked only to the letter of the law which recognized the supreme authority of the British king and government in foreign affairs. Sir Robert Borden, on the other hand, was chiefly concerned with the practical workings of the Imperial constitution. The great unwritten constitution of the empire in the eyes of Sir Robert Borden, was essentially a political and not a legal instrument of government. The powers of the king in respect to Dominion affairs should therefore be exercised in accordance with the same political understandings as were operative in matters of English domestic policy. He must follow the advice of his colonial ministers on Dominion affairs and afford them an opportunity to express an independent judgment on matters of general imperial concern.

With this phase of the controversy, however, foreign states had nothing to do. They were concerned only with the international status of the Empire and not with its internal economy. As the treaty-making power was still legally lodged in the hands of the King in his imperial capacity, they could deal only with the British government and its accredited agents. From the standpoint of international law, the treaties were made between the United States, Great Britain and the other sovereign states represented in the Conference; the Dominions were not independent parties to any of these conventions.

The next important development in the international status of the Dominions arose out of a demand for separate diplomatic

representation. The Canadian government had long been dissatisfied with the diplomatic method of dealing with the government at Washington through the British Foreign Office. Canada had developed distinctive interests of her own and it was felt that these interests could best be represented by a Canadian diplomat. On more than one occasion the Canadian public had been made to feel that their interests at Washington had been sacrificed by the ignorance or indifference of the British Ambassador and the lukewarm support of the English government. From time to time special missions had been sent from Ottawa to Washington to assist the British ambassador in carrying on negotiations with the American government on Canadian affairs. Propositions had likewise been advanced in the Canadian House of Commons for the establishment of a permanent embassy at Washington, but all of these proposals had been defeated. Several United States secretaries of state had likewise suggested the advisability of establishing more direct relations between the two countries. Secretary Bayard had been particularly impressed by the difficulty of dealing with the Canadian government through London during the course of the negotiations over the Northeastern fisheries. In a letter to Sir Charles Tupper in 1887 he declared:

"In the very short interview afforded by your visit I referred to the embarrassment arising out of the gradual practical emancipation of Canada from the control of the Mother Country and the consequent assumption by that Community of attributes of autonomous and separate sovereignty, not, however, distinct from the Empire of Great Britain. The awkwardness of this imperfectly developed sovereignty is felt most strongly by the United States, which can not have formal relations with Canada, except indirectly and as a colonial dependency of the British Crown, and nothing could better illustrate the embarrassment arising from this amorphous condition of things than the volumes of correspondence published severally this year relating to the fisheries by the United States, Great Britain and the Government of the Dominion. The time lost in this circumlocution, although often regrettable, was the least part of the difficulty, and the indirectness of appeal and reply was the most serious feature, ending as it did, very unsatisfactorily."

As a large proportion of the diplomatic difficulties between the British government and the United States arose over Canadian

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21Ibid, 2380.
questions, there were manifest advantages in entrusting the negotiation and settlement of such issues to a Canadian representative. But these various propositions all came to naught. The British Foreign Office and the ambassadors at Washington were not favorable to any division of diplomatic authority and the leaders of the Conservative government at Ottawa were likewise opposed to any measures which might bear the appearance of dismemberment of the Empire or the cultivation of too intimate relations with the United States.

The question was again forced to the front during the World War. The political and commercial relations of Canada and the United States became so intimate that the Canadian government found it necessary to maintain a permanent commercial mission at Washington to deal with the heads of the various departments which were directly concerned with the prosecution of the war. But this method of doing business proved so cumbersome that Sir Robert Borden, the Canadian Premier, took occasion during the conferences in London and Paris in 1918 and 1919 to urge upon the British government "the importance and desirability of direct diplomatic representation of Canada at Washington." There was considerable hesitation at first on the part of the British authorities, particularly of the Foreign Office, to accede to this request as it was felt that "it might be taken to import a lessening of the ties which connected Canada with Great Britain and her sister nations." Nor was it easy to determine in advance what should be the nature and functions of the office or the relations of the proposed colonial minister to the British ambassador. An arrangement, however, was finally agreed upon in 1920 to the following effect:

"As a result of recent discussions an arrangement has been concluded between the British and Canadian governments to provide more complete representation at Washington of Canadian interests than hitherto existed. Accordingly, it has been agreed that His Majesty, on advice of his Canadian Ministers, shall appoint a Minister Plenipotentiary who will have charge of Canadian affairs and will at all times be the ordinary channel of communication with the United States Government in matters of purely Canadian concern, acting upon instructions from, and reporting direct to, the Canadian Government. In the absence

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28 Ibid., 2388.
of the Ambassador, the Canadian Minister will take charge of the whole embassy and of the representation of Imperial as well as Canadian interests. He will be accredited by His Majesty to the president with the necessary powers for the purpose.

"This new arrangement will not denote any departure either on the part of the British Government or of the Canadian Government from the principle of the diplomatic unity of the British Empire.

"The need for this important step has been fully realized by both governments for some time. For a good many years there has been direct communication between Washington and Ottawa, but the constantly increasing importance of Canadian interests in the United States has made it apparent that Canada should be represented there in some distinctive manner, for this would doubtless tend to expedite negotiations, and naturally first hand acquaintance with Canadian conditions would promote good understanding. In view of the peculiarly close relations that have always existed between the people of Canada and those of the United States, it is confidently expected as well that this new step will have the very desirable result of maintaining and strengthening the friendly relations and cooperation between the British Empire and the United States."

The British Government, it would appear, was anxious to meet the wishes of the Canadian government in the matter but was very dubious as to the practicability of dual representation. Canada, on the other hand, would not accept a subordinate position in the British embassy, nor was it willing that the Canadian minister should assume Imperial responsibilities similar to those of the British ambassador. A compromise plan was accordingly devised which would assure to the Canadian representative full liberty of action in Canadian affairs and at the same time maintain the closest cooperation with the British ambassador.

In the debate in the House of Commons, June, 1920, on a motion by Hon. N. W Rowell to appropriate $90,000 for a Canadian embassy to the United States, unexpected opposition was encountered from the opposition benches. In the past, the Liberal party had been the special champion of the cause of special representation at Washington, but on this occasion Mr. Fielding, former minister of finance, proved himself to be the most hopeless of the "Little Colonials" in his national outlook. The existing diplomatic arrangements, he maintained, were working satisfactorily It would be much better to continue the

32Ibid, p. 4534
practice of sending special missions to Washington than to set up a desk for a Canadian representative in the British embassy, where he would be under the influence of the British Foreign Office. But this provincial viewpoint did not commend itself to a majority of the members of the House. Mr. McMaster, one of the prominent members of the Progressive party, warmly commended the principle of establishing a separate Canadian embassy, but at the same time objected most strongly to the proposition that the Canadian minister should take charge of the affairs of the whole embassy in the absence of the British ambassador. This proposal, he urged, would bring about a confused and divided responsibility since the Canadian representative could not be responsible to his own and to the British Government at one and the same time. In reply to the criticisms of the opposition, Sir Robert Borden pointed out that from two-thirds to three-fourths of the business of the British embassy related to Canadian matters: That these interests could best be promoted by a Canadian representative had been clearly demonstrated by the successful operation of the International Waterways Commission on which Canadian representatives sat side by side with those of the United States. So far as the constitutional question of responsibility was concerned, the Canadian minister when acting in the place of the British ambassador "would occupy exactly the same position as the British ambassador had occupied in the past. In matters of purely Imperial concern, he would act under the direction of the Imperial government; in matters of purely Canadian concern, he would consult with, and act according to, the views of this government." But this explanation did not satisfy Mr. King, the Liberal leader, who declared that the provision for the Canadian representative to take charge of Imperial interests would lead to difficulty not only between Canada and Great Britain but also between Canada and the United States. An amendment to reduce the item was, however, defeated by a straight party vote of thirty-two to fifty-seven.

The debate was renewed the following session with even greater zest. Several strong Imperialists in the House from both the Liberal and Conservative parties strongly opposed the appointment of a representative at Washington on the ground that

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33Ibid, p. 4538.
34Ibid p. 4539.
it was an attempt to assume a sovereign power which was beyond the legal competency of the Dominion and moreover, would prove incompatible with the maintenance of the British connection. Sir Robert Borden again took the lead in emphasizing the need for an early appointment of a Canadian representative. This innovation, he argued, was merely an extension of the principle of colonial autonomy which was already operative in the field of domestic legislation.

"The appointment of the proposed minister, he asserted, would be made by the King upon the advice of his Canadian government in Canada. It has been repeatedly pointed that the same King acts by the advice of his Parliament in Great Britain, by the advice of his Parliament in Canada and by the advice of his legislature in every province of Canada, that is, sovereignty is divisible so far as domestic relations are concerned. I should like to tell the Honorable member for Shelburne and Queens (Hon. W S. Fielding) that there is good ground in the opinion of some constitutional writers to hold that sovereignty in respect to foreign relations is also divisible in somewhat the same sense. Whether that be true or not, there is no question about it in this case because the minister who is to be charged especially with the interests of Canada in relation to the United States will be appointed by His Majesty the King of the whole Empire and therefore the king of Canada upon the nomination and recommendation of the King's Privy Council for Canada."

This view was vigorously supported by the Hon. N. W Rowell in an even stronger nationalistic speech. The sovereignty of the British government and parliament, he alleged, was now essentially a legal fiction. For all practical purposes, the several states of the Empire today stood upon an equal footing with the mother country in respect to foreign as well as domestic affairs, as was clearly evidenced by their status in the League of Nations. There was no danger, he argued, of a conflict between the British and Canadian ministers at Washington.

"The Canadian representative would have no authority to enter into a controversy with a British ambassador and I think that the converse was also true. If any question or difficulty did arise it would naturally, properly, inevitably come back to the government of Canada and the government of Great Britain and would be settled between them just as all questions are settled from time to time by conference and negotiation. The functions of the Canadian minister would be the same as those of any other foreign diplomat."

Prime Minister Meighen explained that he had not yet "decided on the best man to fill this very important position." The reason for authorizing the Canadian representative to act during the absence of the British ambassador was to give him "a rank such as he should have. He is in a position second in authority and would naturally take over the duties of the British ambassador in the absence of the first in authority." He did not anticipate that any difficulty would arise from this arrangement inasmuch as the British government was ready to repose all confidence in anyone recommended by the Canadian government for such an important post.

The opposition leaders on this occasion were more favorable to the proposal. Mr. T. A. Crerar, the Progressive leader, heartily supported the motion but was inclined to criticize the government for the delay in making the appointment. The Liberal leader, Mackenzie King, renewed his objections to the confusion of Imperial and Canadian interests at Washington, but at the same time warmly commended the appointment of a Canadian. He concurred in the view of Mr. Rowell that "a Canadian minister should have the same right or authority to make a treaty in the name of the king as any minister of the British government." This was the view, likewise, which the British Foreign Secretary expressed in 1908 in respect to negotiations between the Canadian and Chinese governments on the question of immigration. At that time Sir Edward Gray took the position "that a minister of the Crown in Canada had as much right to act in the name of the sovereign as any minister of the Crown in Great Britain and that a minister of the Crown in Canada might receive from the King of England the same authority to act in the negotiating and signing of a treaty as could be given to any British minister." On the other hand, several members of the House were inclined to fear that the association of the Canadian minister with the British ambassador might result in a loss of independence on the part of the Canadian representative. They took particular exception to the proposal that the Canadian representative should assume any of the duties of the Imperial ambassador. The two offices, in their judgment, should be kept entirely distinct and independent of one another. But

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38 Ibid, p. 2400.
neither the extreme Nationalist nor the Imperialist groups ventured to challenge the House to a division. The strong support which was given to the appointment by the leaders of all three parties was too much for the feeble opposition and the motion for the adoption of the item was carried without a division.

Shortly after the Conservative government was defeated at the general election and resigned without having filled the post at Washington. On the advent of the Liberal government to office it was expected that an early appointment would be made, but up to the present no action has been taken in the matter. The position, it is currently reported, has been offered to several prominent Canadian leaders, but none of them has yet seen fit to accept the nomination. These repeated postponements have aroused a suspicion among the Nationalists that the British Foreign Office was still offering objections to the appointment but no evidence has been presented to support this innuendo. In reply to a recent question. Premier King stated that he expected to announce an appointment in the near future.

Thanks to this delay, the Irish Free State has carried off the honor of appointing the first Dominion representative at Washington. The new Irish Government, as was to be expected, was exceedingly anxious both for political and sentimental reasons, to set up direct relations with the United States. To this end it requested the British Government in conformity with the Canadian precedent of 1920, "to ask the government of the United States to receive a minister plenipotentiary accredited by His Majesty to the president and furnished with credentials enabling him to take charge of all affairs relating only to the Irish Free State." Fortunately for the Irish Nationalists, a friendly Labor government was in office at Westminster which readily agreed to support the proposal.

This proposal at once raised a number of difficult questions in respect to the powers of the Irish minister, his relation to the British embassy at Washington, and his responsibility to the Irish or British governments. These questions were thrashed out in a characteristic informal manner by the English Colonial Secretary and the Irish Free State Minister for External Affairs. An agree-

40The Round Table, Dec. 1921, No. 45, p. 171, Dennis, British Foreign Policy and the Dominions. 16 Amer. Pol. Sci. Rev. 598.
41British Parliamentary Debates House of Commons, June 26, 1924. Vol. 175, p. 596.
ment was reached by which, in the words of Hon. G. H. Thomas in the House of Commons,

"while the Free State Minister would be the official channel of communication with the United States Government for dealing with matters exclusively affecting the Free State, the principle of the Resolution of the Imperial Conference of 1923 as to the Negotiation, Signature and Ratification of Treaties and, in particular, of that part of the Resolution which relates to the conduct of matters affecting more than one part of the Empire, would apply generally to all questions with which he dealt.

"If any doubt should arise whether any particular question exclusively concerned the Free State, the point would, if possible, be settled by consultation between the Free State Minister and the Ambassador. If the matter could not be settled by such consultation, it would be referred to the British Government and the Free State Government. In order to meet the possibility that any particular question might in its initial stages be exclusively of concern to the Free State, and might subsequently prove to be of concern to other parts of the Empire, the Free State Minister would keep in close contact with the Ambassador.

"While the Free State Minister would not purport to deal with matters affecting the Empire as a whole, the assistance of the Ambassador and his staff would be at his disposal, if desired. The Ambassador would not, however, be in any way responsible for action taken by the Free State Minister, nor would the latter be in any way subject to the Ambassador's control."

The Irish agreement, it will be observed, followed along the same general lines as the Canadian precedent, save in one respect, namely, that the Free State Minister was not empowered to take over the duties of the British Ambassador during the latter's absence.

In the debate in the House of Lords upon the question, the Earl of Selborne urged that

"His Majesty's government should use the whole of their influence not to allow this development or experiment to be launched haphazard. It should only be done deliberately and after a complete and mutual understanding between all the Dominions of the British Empire and His Majesty's government as to how the action of their ministers were to be harmonized with the action of His Majesty's government. Above all, there should be by mutual agreement an exact limitation of the action and responsibility of each representative."

In reply, Lord Arnold, under-secretary of state for the colonies,

42Ibid, p. 597.
pointed out that the government was simply following the Canadian precedent.\textsuperscript{44} Ireland had such direct and particular interests in the United States that His Majesty's government agreed with the Irish Free State in thinking that these interests could be most conveniently handled by an Irish diplomat. It was clearly understood that the functions of the Irish Minister would be limited exclusively to Irish affairs. Lord Parmoor, speaking on behalf of the Foreign Office,\textsuperscript{45} further explained that the Irish minister "would receive his credentials in the usual manner from His Majesty, his letter of appointment being issued by the Free State Government." The government had made it clear in its instruction to Sir Auckland Geddes that the new appointment did not involve any departure from the principle of the diplomatic unity of the Empire. The Free State minister would receive his instructions from his own government only and would not be concerned in any way with imperial questions.

The speech of Lord Curzon, former foreign secretary, clearly revealed\textsuperscript{46} the hostile attitude of the previous Unionist government and at the same time threw considerable light upon the difficulties which the Canadian government had encountered in putting through its proposal. This innovation, he declared, might have a most important effect upon the future of the Empire. The Foreign Office had viewed the Canadian proposal with serious apprehension and it was only with great reluctance that it had acquiesced in it. The Canadian Government had also begun to question the wisdom of carrying out the plan for it had found it difficult to secure a satisfactory person to accept the appointment, "and the attitude of the United States was itself doubtful." To complicate matters still further, two of the Dominion prime ministers at the recent imperial conference, namely Bruce of Australia and Massey of New Zealand, had strongly objected to the policy of separate representation. "No agreement, he concluded, "should have been made by private negotiation with the Irish government until the whole question had been laid before an imperial conference for general determination." Lord Chancellor Haldane\textsuperscript{47} in summing up the case on behalf of the government, emphatically repudiated the whole philosophy of the Tory Imperialism. "It was impossible," he declared, "to govern the

\textsuperscript{44} Ibid., p. 998.
\textsuperscript{45} Ibid., p. 1000.
\textsuperscript{46} Ibid., p. 1001.
\textsuperscript{47} Ibid., p. 1006.
Dominions otherwise than in accordance with their will and their own wishes.” The unity of the Empire could best be preserved on the basis of freedom. Australia and New Zealand, it was true, had not yet asked for separate representation at Washington but should they do so he could see no reason for demurring to their request. The right to diplomatic representation was involved in the possession of a Dominion status. The late Unionist government, of which Lord Curzon was a member, had recognized the validity of that proposition in the case of Canada and it could not now deny its applicability to other Dominions. The speech of the Lord Chancellor was decisive. There was no escape either from the facts or from the conclusion of his argument. A few of the Tory lords continued to criticize the action of the government but they did not dare to divide the House upon the question.

Shortly afterwards, upon receiving a favorable reply from the United States government, the King duly accredited Professor Smiddy of Cork University as the first minister plenipotentiary of the Free State at Washington.

The successful working of this arrangement, it is obvious, will depend upon the mutual forbearance of the British and Irish representatives and above all else, upon the maintenance of harmonious relations between the English and Irish governments. Both the Canadian and Irish agreements are based on the assumption of reciprocal good faith and credit on the part of all the states of the Empire in their relations to one another as well as towards the outside world. From a legal standpoint, there is nothing to prevent the Irish minister at Washington, or any future Dominion representative, from pursuing an independent policy which might be injurious to other parts of the Empire. These concessions represent, therefore, a supreme act of political faith on the part of the Mother Country in the democracies of the Dominions.

The United States Government, it is interesting to observe, has not reciprocated the diplomatic advances of the Free State. Ireland has appointed a representative at Washington but the United States has not returned the compliment by sending a diplomat to Dublin. The American ambassador at London still remains the only accredited representative of the United States to the British Empire. From the standpoint of the American government, the British Empire
is a unit at London even though it may be divided at Washington. As a general proposition, it is much more convenient to handle the particular concerns of Ireland through the Irish minister at Washington but the American ambassador in London is still legally competent to carry on negotiations with Ireland through the British Foreign Office and would doubtless be consulted if the interests of the British Empire were found to be materially affected by the course of the Irish-American negotiations. The United States Government, we may then conclude, has been pleased to accord to Ireland a limited international status in respect to Irish as distinguished from Imperial concerns, but it has been careful not to concede to it the position of a sovereign or independent state with which it must deal on terms of diplomatic equality, as is the case in its relations with the British Empire.

In truth, the appointment of an Irish minister at Washington partakes in some respects even more of the character of an administrative arrangement for the more convenient dispatch of business than of a diplomatic appointment by a sovereign state according to well-understood principles of international law. The British Empire is free to carry on its business with Washington through one or one-half dozen representatives if the United States is willing to receive that number. The mere fact that the American Government agrees to receive an Irish minister does not necessarily involve a recognition on the part of either the British or the United States governments of a full and complete international status for Ireland. In many of the older federal unions such as the Swiss Confederation, the Hanseatic League, and the Holy Roman Empire, the component members enjoyed a limited right of sending and receiving ambassadors. The German imperial constitution expressly recognized the right of Bavaria to separate representation, but the Bavarian ministers at the various European capitals were never admitted into the diplomatic corps on terms of equality with the representatives of sovereign states. The same principle was exemplified in the appointment by Great Britain of a special diplomatic representative to the Vatican since the appointment was made with the full approval and consent of the Italian government. The real question at issue is not one as to the form or dignity of the appoint-

48 Herbert Smith, op. cit. p. 239.
ment but as to the legal and political authority for making the same. By whom was the Irish minister appointed—by the British or the Irish government? And in what capacity did he proceed to the United States, as a British colonial or an independent Irish minister? The fact that he received his credentials from the king would raise a presumption in the first instance that he was considered a British representative unless it could be shown that he had been appointed by the king on the advice of the Irish ministry and not of the Imperial cabinet. The further fact that the arrangement for the appointment was worked out between the English colonial secretary and the Irish minister for external affairs, lend support to the theory of the colonial character of the Irish minister. If the agreement had been drawn up by the British Foreign Office and the Irish government, the presumption might have been contrariwise. The two governments would then have negotiated on terms of equality and it would be right to assume that the appointment of the new minister constituted a formal recognition on the part of the English Crown of the international status of Ireland. On the other hand, it must be admitted that the Irish Government did not fail to proclaim on the housetops that the Irish minister was nominated by the Irish cabinet, received his specific instructions only from the Irish government and was going to Washington as the exclusive representative of the Free State, and the British Government has not seen fit to challenge the correctness of any of these statements either officially or unofficially. The gentlemen's agreement between the two governments, moreover, expressly recognized that the Irish ministers should be subject solely and exclusively to the government at Dublin. There is a manifest incompatibility between the theory of an imperial appointment and the admitted constitutional fact of Irish responsibility for the acts of the Irish representative. Power and responsibility, according to the principles of the English constitution, should go hand in hand. The actual facts of the case, moreover, strongly support this construction whatever the legal theory of the law officers of the Crown may be. The Irish situation was so critical at the time that the British Government did not venture to discuss the constitutional and international significance of the appointment for fear of upsetting the

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50Smith, op. cit., p. 241.
whole Irish settlement. In short, the Irish were permitted to win their case by default. The facts determined the law for the time being. British statesmen were not concerned with legal theories and were only too glad to throw off on the jurists the responsibility of working out a constitutional theory which would satisfactorily explain the real political situation.

It is manifest, therefore, in these recent controversies, that the international status of the Dominions is still somewhat doubtful. They have some of the characteristics of both colonies and states. So far as imperial matters are concerned, they are still colonial dependencies in relation to the outside world. But at the same time they have gained a limited international status by reason of their membership in the League of Nations and their special diplomatic and treaty relations with certain outside states. But these relations, it must be understood, are expressly restricted to their own particular domestic interests. They are states but not sovereign states.