

## The Treaty with Great Britain

The first fact which obtrudes itself upon one's notice when approaching the problem of the nature of the Anglo-Irish Treaty (otherwise *Articles of Agreement for a Treaty between Great Britain and Ireland*) is that among all the documents which established or confirmed the organisation of the association of States known as the British Commonwealth of Nations; it stands alone, there is no counterpart to it in inter-Commonwealth relations.

No other document, which could be regarded as responsible – substantially or formally – for the calling into being of any other Dominion, can be paralleled with the Anglo-Irish Treaty. Be it the British North America Act, 1847, relating to the creation of the Dominion of Canada, the Commonwealth of Australia Constitution Act, 1900, the New Zealand Constitution Act, 1862, and the Royal Proclamation of 1907 by which the Colony of New Zealand was granted the title of Dominion, or the South Africa Act, 1909, and, additionally, all the documents relating to Newfoundland which was invested with the style of Dominion no earlier than by the Statute of Westminster – all of them bear the visible signs of something granted or bestowed by a paramount power.

The Anglo-Irish Treaty alone is marked with the character of a consensual compact, of an agreement arrived at, pursuant to the reconciliation of the two hitherto opposed parties. The Irish Free State was, therefore, called into being not by the unilateral will of the predominant member of the British Commonwealth of Nations, but by bilateral consensus of this member and Ireland herself in consequence of a document which, as we shall endeavour to show, can be classified among international documents.

The immediate causes which led to the conclusion of the Treaty may be roughly defined as the exhaustion of the Irish revolutionary forces, which faithful to the lead of the Easter Rising, were carrying on the struggle to the utmost of their power, and as an urgent necessity for Great Britain to have the dispute with Ireland settled as soon as possible even at the price of what could be, from her point of view, considered as far-reaching concessions.

The preliminaries to the negotiations which opened in London on October 11<sup>th</sup>, 1921, and resulted in the conclusion of the Treaty might be divided into three parts. The first embraces the correspondence exchanged between the British Prime Minister and President de Valera from the 24<sup>th</sup> June to the 9<sup>th</sup> July, 1921, and initiated by Mr. Lloyd George's letter in which he stated that the British Government, moved by a fervent desire to end the ruinous conflict,

“felt it incumbent upon them to make a final appeal... for a conference between themselves and the representatives of Southern and Northern Ireland”.

The same period comprises the efforts made by President de Valera to find whether a unity of action could be achieved with representatives of the Irish political minority. For that purpose he summoned a conference in Dublin, which was attended by the Earl of Midleton, Sir Maurice Dockrill, Sir Robert Woods and Mr. Andrew Jameson; Sir James Craig having declined the invitation. Conferences were held on the 4<sup>th</sup> and 5<sup>th</sup> July and, although they did not bring about any visible understanding, they certainly had most gratifying effects, leading to the cessation of bloodshed and acceleration of the Truce which was subsequently declared from noon on July 11<sup>th</sup>.

The invitation of the British Prime Minister for a ceasefire having been accepted by President de Valera, four meetings between the two statesmen took place subsequently in London on the 14<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup> and 21<sup>st</sup> July covering a period which might be regarded as the second part of the preliminaries, and on which depended their third and final phase. This last comprises all the communications between the British Prime Minister and President de Valera covering the period from the 20<sup>th</sup> July to the 30<sup>th</sup> September, a correspondence, which without exaggeration, may be looked upon as the most dramatic exchange of views that ever passed between two nations.

One of the most striking features of the communications exchanged is the highly reconciliatory spirit permeating all the offers and proposals from the British side. They were made by a Government, according to Mr Lloyd George's communication, dated 20<sup>th</sup> July, “actuated by an earnest desire to end the unhappy divisions between Great Britain and Ireland, and desirous of seeing the consummation of Irish political and spiritual ideals within the Empire, not only for the welfare of Great Britain, Ireland and the Empire as a whole, but also for the cause of peace and harmony throughout the world.” It was emphatically pointed out that “throughout the Empire there is a deep desire that the day of violence should pass and that a situation be found, consonant with the highest ideals and interests of all parts of Ireland, which will enable her to co-operate as a willing partner in the British Commonwealth”.

The word ‘Treaty’, meaning the proposed form of the document embodying the conditions of settlement between Great Britain and Ireland, was first set forth by the above communication from the British Government. The same document contained several conditions, subject to

which Great Britain was prepared to open immediate negotiations with Ireland having as their purpose the entering of the latter into the Commonwealth upon the basis of full Dominion status. Some of these conditions, appropriately modified, were finally embodied in the Treaty under its Articles 5, 6, 7, and 8, and the Annex to it.

On two points, however, the British Government proved to be unyielding and implacable; they would not acknowledge the right of Ireland to secede from its allegiance to the King, upon which, as was stated in their communication of the 17<sup>th</sup> September, the whole fabric of the Empire and on which every Constitution within it were based; and they would not admit the recognition of the Irish delegates as representatives of an independent and sovereign state as a basis of the proposed conference, since, as was stated in Lloyd George's letter of the 17<sup>th</sup> September, "to receive them as such would constitute a *formal* and *official* (italics by WTD) recognition of Ireland's severance from the King's dominions".

If the communications issued by the Irish Revolutionary Government were equally imbued with the spirit of reconciliation and the desire of entering into peaceful and amicable relations with Great Britain, a note of peremptoriness prevailed in them wherever Ireland's right to dispose of herself as a free and independent nation seemed to be involved. Unconditional Dominion status was not acknowledged in these communications to be the result which would respond to Irish national aspirations. "The freedom which the British Dominions enjoy is not so much the result of legal enactments or of treaties," says President de Valera's letter of the 10<sup>th</sup> August, "as of the immense distance which separates them from Britain and have made interference by her impractical. The most explicit guarantee, including the Dominion's acknowledged right to secede, would be necessary to secure for Ireland an equal degree of freedom".

Subject to these conditions a certain treaty of free association with the British Commonwealth group, "as with a partial league of nations", was the form of compact which the Irish Revolutionary Government would be ready to recommend to the Irish people. The *de facto* situation in which Ireland was placed by the force of events was defined in President de Valera's communication as follows: "The people of Ireland, acknowledging no voluntary union with Great Britain, and claiming as a fundamental right to choose freely for themselves the path they shall take to realise their national destiny, have by an overwhelming majority declared for independence, set up a Republic, and more than once confirmed their choice." From the statement of these facts naturally followed the conclusion exposed in President de

Valera's communication of the 12<sup>th</sup> September, that the Irish Government have authority and power to act on behalf of their people only as representative of a sovereign state.

Notwithstanding, the pressure from the British side to stop "a theoretical discussion" in order that an attempt to settle the dispute should be transferred on to a practical ground was still increasing and, by the middle of September, all the issues seemed to hang by a thread.

On the 19<sup>th</sup> September, President de Valera laid emphasis upon the point that, if no expectation could be reasonably upheld on the Irish side as to the probability of the British Government recognising as a preliminary to the conference, the Irish Republic, formally or informally, this Government should not expect the Irish Republican Government to surrender, formally or informally, their national position. If by imposing preliminary conditions the British Government were seeking to achieve this aim then the representatives of the two nations could not meet.

Immediately in reply to this letter a striking communication was dispatched by Mr Lloyd George on the 29<sup>th</sup> September doing real credit to this politician's versatility: Its first part contained an unequivocal refusal to enter a conference upon the basis of the correspondence passed, and then, pursuant to an amazing tactical *tour de force*, a "fresh invitation" to a conference to be held in London on October 11<sup>th</sup> appeared as a highly unexpected conclusion of the second part of the communication.

At this stage of the correspondence the two fundamental points – the subject of the forthcoming conference and the character which the Irish delegates will be invested with – stood as follows: As regards the first a compromise had been reached on the basis of that formula used in Mr Lloyd George's communication of the 7<sup>th</sup> September and repeated by him September 29<sup>th</sup>, that the Conference will meet "with a view to ascertaining how the association of Ireland with the community of nations known as the British Empire may be best reconciled with Irish national aspirations".

As to the second point no understanding was virtually reached and both parties seemed to have preserved their initial positions. The British Government expressed their willingness to meet the Irish delegates no otherwise than as "chosen spokesmen" for the Irish people, whilst the Irish Revolutionary Government stood by the principle that they could only recognise themselves "for what they were" and that therefore "the negotiators must meet without

prejudice and untrammelled by any conditions whatsoever except those imposed by the facts.”<sup>1</sup>

The last communication was dispatched from the Irish Revolutionary Government of the 30<sup>th</sup> September accepted the invitation for the delegates to meet in London on October 11<sup>th</sup>. The proceedings of the Conference lasted till the 6<sup>th</sup> December and resulted in the conclusion of *Articles of Agreement for a Treaty between Great Britain and Ireland* signed on behalf of the British delegation by Messrs Lloyd George, Austen Chamberlain, Lord Birkenhead, Winston Churchill, Worthington-Evans Hamar Greenwood and Gordon Hewart and by Messrs Griffith, Collins, Barton, Duggan and Gavan Duffy on behalf of the Irish delegation.

The eighteen articles of this document could, roughly speaking, be classified under the following heads:

1. Articles (1, 2, 3) constituting the Irish Free State as a member of the British Empire, enjoying the same status as the Dominion of Canada
2. Articles (6, 7, 8) explicitly limiting the extent of sovereignty of the new Dominion
3. Articles (5, 9, 10) disposing of some special matters having origin in the past union between the two countries
4. Articles (11-16) relating to Northern Ireland and the future co-existence of the two parts of Ireland
5. Articles (17, 18) setting up the administrative machinery for the period of transition and stipulating for the ratification of the Treaty.

Article 4 relating to the oath to be taken by Members of the Parliament of the Irish Free State stands apart and we intend to deal with the subject under a separate head.

Adverting to the problem whether the above document possesses the necessary distinctive features to endow it with the character of an international instrument it would, perhaps, be advisable not to let the opinion of any student of the problem be marred by a seeming contradiction to the thesis which might be found to be involved in the articles in our classification under heads 1, 2 and partly 4.

It is obvious that the very acceptance of Dominion status by a nation, claiming to be sovereign, contains already a certain limitation of its sovereignty, a limitation of far-reaching

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<sup>1</sup> President de Valera's letters of the 14<sup>th</sup> and 17<sup>th</sup> September

extent from the conclusion of the Treaty. This implicit limitation under the first head is found to be enhanced by some explicit stipulations embodied in the articles under the second and partly the fourth. But we do not think that the establishment of this fact could put in jeopardy the thesis of the document being of an international character for the very simple reason that any independent nation is at liberty to cede a portion, or even a whole, of its sovereignty and the very fact of such cession could not be regarded as implying a denial of the international character of the document under which it was effected.

History knows of many such international instruments where the line of demarcation between a treaty and a dictation, equivalent to interference in the internal affairs of the weaker party to the arrangement, tends to disappear. Such were, for instance, the treaties concluded between Russia and Poland in 1768 and 1775 which, although bearing the form of international documents, virtually implied a series of encroachments, pure and simple, upon the domestic affairs of the latter. The Polish Constitution, religious questions, the strength of the army Poland would be allowed to keep, and other similar matters of purely domestic concern were disposed of by these bygone treaties to the best advantage of Russia.

*Mutatis Mutandis* even the titles, under which these documents have been couched containing perplexing features, having some resemblance to the peculiar name under which the Anglo-Irish Treaty passed into history - *Articles of Agreement for a Treaty between Great Britain and Ireland*;<sup>2</sup> they bear such names as 'Treaty of Guarantee' or 'Separate Act'. By their substance they made the Polish Constitution entirely dependent upon the implied provisions and placed the whole internal structure of Poland under the control of the Russian Government.

But whatever the resemblance, formal or substantial, between the Polish-Russian treaties and the Treaty under consideration, taken from a historical standpoint, they certainly will appear on two opposite sides of an immense gulf. For the old Royal Republic of Poland, which attained at this epoch the climax of its internal dissensions and weaknesses, these treaties sounded like a death-knell of her political existence, and shortly afterwards she sank into the darkness of century-long annihilation. For Ireland, on the contrary, the Treaty with Great Britain marked the dawn of its revival and announced the immanence of an independence towards which the Irish Free State began to fight its way with ever increasing rapidity.

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<sup>2</sup> We are informed on good authority as of the two original instruments signed, only one had the title of "*Articles... etc.*", the other one being entitled "*Treaty between... etc.*"

For this reason owing to the historical conditions which gave rise to the two events, all the restrictions which were imposed by the above treaties upon Polish sovereignty were of such nature as to tighten their grip and to develop in the least favourable direction until finally they degenerated into a massacre launched by a Russian general in 1794. Whilst in the case of Ireland certain limitations, imposed by the Treaty on her sovereignty, tended in the course of time to smooth themselves out and to lose gradually their restrictive character; and the smiling faces of British Ministers, coming to discuss with their Irish colleagues on the footing of equality the difficulties between the two countries, were not an uncommon sight in the streets of Dublin in 1932.

After the Treaty came into force on the 11<sup>th</sup> July, 1921, the publication of exchange of communications, referred to above, that ensued between the British Government and the Irish Republican Government, threw much light upon the latter's political standing according to ideas of each of the parties.<sup>3</sup>

Dealing with this correspondence, Mr B. O'Brien<sup>4</sup> rightly points out that it "left each side in a position to state with truth that it had not abandoned its basic standpoint. The British Government had not involved themselves in a formal recognition of the Irish Republic, although many of their actions, starting with the conclusion of the Truce between the British and Irish armies, were hardly consistent with their claims to be a Government dealing with citizens of their own state. The Dail Ministry, on their side, at no stage of these discussions abandoned their claim to be the lawful Government of an Irish State dealing with a Government whose invading troops were in *de facto* occupation of much of the territory."

Although the lack of a *de jure* recognition on the British side of the Irish Republican Government is beyond doubt, is this a fact which could deprive the subsequently concluded treaty of its international character? The German delegates who signed, November 11<sup>th</sup> 1918, the terms of the Armistice were representing a revolutionary government having no *de jure* recognition from the Allies and yet the international character of the document they signed was never called into doubt.

The Irish, it is true, were at this time in a state of rebellion against their sovereign, but were not the Norwegians in the same state against their sovereign when, in 1905, they proclaimed the personal union with Sweden to be dissolved? And was the agreement subsequently

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<sup>3</sup> *Official Correspondence relating to the Peace Negotiations*, Dublin, 1921

<sup>4</sup> *The Irish Constitution*, p. 37

concluded between the two countries to suffer any deficiency as an international instrument on the ground of a revolutionary act having given rise to it?

Not only by historical references could we ascertain the real nature of the Anglo-Irish Treaty, as of an international instrument, but the *de facto* situation in which the two countries found themselves on the eve of the negotiations also presents many features eloquent enough to corroborate the arguments in favour of the thesis.

It is quite true that the material resources of the two countries could not bear any examination. As the time of the Truce approached the exhaustion of Ireland reached an almost critical stage. Although the military operations did not bring about any decisive solution, the Irish territory was still under occupation of the British forces that were provided with unlimited supplies of equipment and war materials. Michael Collins T. D., when speaking on the Treaty in the Dail, 19<sup>th</sup> December 1921, emphatically stated that they (the Irish negotiators) were not in the position of conquerors dictating terms of peace to a vanquished foe, as the Irish had not beaten the enemy out of their country by force of arms.

But to say at the same time that Great Britain was able to wage another war upon Ireland having as an end a complete destruction of Irish national aspirations and an absolute submission of the Irish people to her will – and do so without exposing herself to grave dangers – would be as dangerous to maintain that Ireland was in a position to win whatever she might have expected by carrying on hostilities.

England herself was at the time sufficiently exhausted to do her best to avoid further turmoil and armed conflagrations. Social unrest, that in the aftermath of the Great War was shrouding all European nations, did not leave England unaffected. Additionally the principle of the self-determination of nations and the great idea that the war had been carried on in order that the small nations should find their rightful place in the sun, were still in the full flush of their all-embracing force and it was hardly conceivable that any civilised nation in the world would trespass with impunity upon their sanctity.

The League of Nations, about to be born, proclaimed to the world the equality of states and nations and a hatred of war and peoples were listening to this new political gospel with all the ardour of faith and enthusiasm. The tremendous influence which was exercised at that time in world affairs by the United States, with their nine million citizens of Irish origin, equally could not be disregarded or treated as a negligible factor.

The Treaty was certainly concluded under duress but to say that its odium burdened the Irish side exclusively would be tantamount to a deliberate ignoring of the position of the other party of the Treaty. It could only be said that in this case, like in so many other cases of international disputes, the element of duress was inflicted upon the weaker party to the agreement with less consideration, perhaps, than upon the stronger.

Now a question arises whether Lloyd George's famous threat "of an immediate and terrible war" if the Irish delegates would not adhere to the Articles of the Treaty was a bluff invented to intimidate the Irish negotiators and to wring from them full submission, or if something more serious was really looming behind this threat? It fell to the lot of two of the negotiators to throw light upon the question.

This is how R. C. Barton T. D. related to Dail Eireann this most dramatic episode not only in the negotiations but perhaps in the whole of Irish history. "On Sunday, December 4<sup>th</sup>," he said when addressing the Dail a fortnight later, "the Conference had precipitately and definitely broken down. An intermediary affected contact the next day, and on Monday at 3 pm Arthur Griffith, Michael Collins and myself met the English representatives. In the struggle that ensued Arthur Griffith sought repeatedly to have a decision between war and peace on the terms of the Treaty referred back to this Assembly.

This proposal Mr Lloyd negated. He claimed that we were plenipotentiaries and that we must either accept or reject. Speaking for himself and his colleagues, the English Prime Minister with all the solemnity and this power of conviction that he alone of all men I met can impart by word and gesture... declared that the signature and recommendation of every member of our delegation was necessary or war would follow immediately. He gave us until 10 o'clock to make up our mind, and it was then about 8.30, etc."<sup>5</sup>

Speaking a few days later (on the 21<sup>st</sup> December) Gavan Duffy said "On the 4<sup>th</sup> of December a sub-conference was held between the two sides at which Lloyd George broke with us on the Empire and broke definitely, subject to confirmation by his cabinet the next morning. It might have been, or it might not have been, bluff. At all events contact was renewed and the next day a further sub-conference was held attended by Messrs Arthur Griffith, Michael Collins and Robert Barton, and after four and a half hours of discussion our delegates

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<sup>5</sup> Treaty Debate co. 49

returned to us to inform us that four times they had all but broken and that the fate of Ireland must be decided that night.

Lloyd Georag had issued to them an ultimatum to this effect: 'It must now be peace or war. My messenger goes tonight to Belfast. I have here two answers, one enclosing the Treaty, the other declaring a rupture, and if it is to be a rupture, you shall have immediate war, and the only way to avert that immediate war is to bring me an undertaking to sign from every one of the plenipotentiaries, with a further undertaking to recommend the Treaty to Dail Eireann and to bring it to me by 10 o'clock. Take your choice.'"

I shall not forget," went on Gavan Duffy, "the anguish of that night, torn as one was between conflicting duties. Again the ultimatum might have been a bluff but every one of those who heard the British Prime Minister believed beyond all reasonable doubt that this time he was not play-acting, and that he meant what he said, etc"<sup>6</sup>

Now, after this point has been sufficiently elucidated, another question insinuates itself obliquely into the historical account of this stage of Anglo-Irish relations, and it is this: Why did England insist with such implacable energy upon the Treaty being accepted by the Irish delegates in its integrity? Why did she not think it possible to allow the slightest alteration of those points which, as she knew perfectly well, were of exceptionally repulsive character to them? Why did she not let the document be accepted by an overwhelming majority of the Irish people and thus have a seven century long dispute settled not only as a truce, but as an arrangement acceptable for generation to come?

It seems that the answer lies, not so much in consideration of political prestige, as in strategic calculations. England had just emerged from a war which saw her national waters infested with enemy submarines and London bombarded by air-ships. She was haunted by visions of a possible invasion of her territory by enemy forces and concern of her leading circles for England's future security could not be estimated too highly. Now, at first glance, the geographical propinquity of Ireland related to the problem of England's security, suggests almost unlimited possibilities of the first of those two islands being used against the latter as a strategic base.

To give Ireland more concessions than those implied in the Treaty would be equivalent, from the British point of view, to letting her go adrift and possibly become involved in some

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<sup>6</sup> Ibid col. 86 & seq.

combination hostile to England. It, therefore, seemed to be for the English statesmen a matter of vital importance to keep Ireland within the limits of the Empire and to make out the strategic problems concerning her own security a question exclusively of inter-Imperial concern. A vague formula of an external association would not appeal to them since it would not contain all the necessary guarantees. The only way out would be the inclusion of Ireland in the Commonwealth and the binding of her by such allegiance as could leave no possible room for speculations as to Ireland being permitted to legally a hostile attitude towards England.

Hence emerged the Oath of Allegiance included in the Treaty under paragraph 4 and repeated by the Free State Constitution in its paragraph 17. Yet even this did not give the English negotiators the certainty of security they were seeking and consequently paragraph 7 was included in the Treaty imposing on the Free State the obligation of affording His Majesty's Imperial forces such "harbour and other facilities as are indicated in the Annex hereto" in time of peace and the same facilities "as the British Government may require for the purpose of such defence as aforesaid" in time of war or of strained relations with a Foreign Power.

To finish with the question whether the British Government recognised the Irish Republican Government, or not, it should still be kept in mind that the final disposition of the Treaty imposes upon the Irish signatories the obligation to submit the instrument for the approval "to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland" and that the same conditions transpired even more positively in the above quoted ultimatum of Lloyd George where he made the validity of the Treaty dependent upon it being recommended to Dail Eireann.

It is quite true that what was meant by the Treaty, by the British to it anyhow, to be "a meeting of the members elected to sit in the House of Commons of Southern Ireland" was an assembly which was held to have its legal roots in the Government of Ireland Act, 1920 (A British Parliament Act). This body had, however, merged *de facto* with the second Dail Eireann, summoned by the first in order to neutralise the consequence of a possible duplication of powers in the country which might have ensued to an order given by the Lord Lieutenant of Ireland for the elections under the above Act.

Now, Dail Eireann meant at the time nothing more or less than the elected Republican Assembly from which emanated the Irish Republican Government and the Irish delegation trusted with the carrying on of negotiations with Great Britain, and "President of Dail

Eireann”, i.e. the person who issued the credentials and instructions for the delegates, meant: President of the Government of the Republic of Ireland (explanation given to this title by President de Valera in the Dail, 10<sup>th</sup> January 1922<sup>7</sup>). It is obvious that the significance accorded by the Treaty and by Lloyd George’s ultimatum to “to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland” or to “Dail Eireann” implied something even more than a purely *de facto* recognition of the Irish Government and that only a solemn notification from the British side was wanting to give this recognition a perfectly *de jure* character.

Now, after this short examination of the origin of the document being of international character, or not, it would, perhaps, be not inappropriate to advert for a moment to the question whether the proceedings that led to its conclusion were by any means deficient from the Irish point of view.

The original credentials and the instructions issued by President de Valera to the Irish delegates at a Cabinet meeting ran as follows: “In virtue of the authority vested in me by Dail Eireann, I hereby appoint Arthur Griffith, T. D., Minister of Foreign Affairs, Chairman; Michael Collins. T. D. Minister for Finance; Robert C. Barton T. D. Minister for Economic Affairs; Edmund J Duggan T. D. and George Gavan Duffy T. D. as envoys from the elected Government of Ireland to negotiate and conclude on behalf of Ireland, with the representatives of His Britannic Majesty George V a treaty or treaties of settlement, association and accommodation between Ireland and the community of Nations known as the British Commonwealth, in witness whereof I hereunder subscribe my name as President” (signed Eamon de Valera)

#### Instructions

1. The Plenipotentiaries have full powers as defined by their credentials
2. It is understood before decisions are finally reached on the main question, that a dispatch notifying the intention to make these decisions will be sent to members of the Cabinet in Dublin and that a reply will be awaited by the Plenipotentiaries before a final decision is made
3. It is also understood that the complete text of the draft treaty about to be signed will be similarly submitted to Dublin, and reply awaited

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<sup>7</sup> Treaty Debate, col. 399

4. In case of a break, the text of the final proposals from our side will be similarly submitted
5. It is understood the Cabinet in Dublin will be kept regularly informed of the progress of the negotiations

As the Plenipotentiaries happened to be subsequently impugned with having signed the Treaty in excess of their powers; it will be observed that no formal mandate was ever issued to them to obtain a recognition by the British Government of an Irish Republic and it is highly improbable that Arthur Griffith would have gone to London at all if such were the will of the people who deputed him.

He never considered himself as a Republican doctrinaire whose task would be to fight out a Republican form of Government for Ireland in spite of all hindrances, but what he thought and knew he was sent to London for – was to strive for the freedom and independence of his country. He made this quite clear in his speech to the Dail on the 7<sup>th</sup> January, 1922, just before the division on the Treaty motion: going back to a Cabinet meeting, he recalled his exact words on this occasion “If I go to London I can’t get a Republic, I will try for a Republic but I can’t bring it back... if we get that mandate (for a Republic) we would have finished up in five minutes in Downing Street”.<sup>8</sup>

As regards the way in which the instructions were carried out this is the attitude taken in the controversy by President de Valera, speaking on the subject in Dail Eireann on the 14<sup>th</sup> December, 1921, he said<sup>9</sup>

“That was all (i.e. the instructions) done with the exemption of paragraph three. My idea was when the Plenipotentiaries had arrived at an agreement on the Treaty, and had a rough copy of a document which they were prepared to sign, that document in its final text, would be submitted... I have only to say with respect to paragraph three that the final text was not submitted. When the previous draft, which differed considerably from the final text, was submitted, that I said I could not sign, and I do not think the other members of the Cabinet... would sign. With the knowledge that we could not accept that, the Plenipotentiaries, acting in accordance with their right, signed the Treaty, and as far as relations between the Cabinet and the Plenipotentiaries are concerned, the only point is that the paragraph three, although not exceeded, was not carried out to the letter”

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<sup>8</sup> Ibid col. 336 & 337

<sup>9</sup> Ibid col. 8 & 9

At the same time he expressed anxiety that it could not in any way interfere with the discussions of the Treaty which the Plenipotentiaries brought with them, as the document was to be treated on its merits only. After Arthur Griffith, in his capacity of Chairman of the delegation, took immediate exception to any suggestion that the Plenipotentiaries exceeded their instructions, President de Valera pointed out that an impartial examination would make evident that paragraph three was not exceeded but not carried out.

It seems in the light of the above comment that any indictment against the document, construed on the ground of the negotiators having acted in excess of their instructions, could scarcely be upheld. It is quite another matter that this document did not respond to the hopes, eagerly nourished by the majority of the Irish people, and that the gap between what was expected and what it was humanly possible to obtain was responsible for that pathetic atmosphere in which it is possible to hurl accusations, than the presumable exceeding of instructions, against the negotiators.

It was an atmosphere in which Deputy MacEntee's conclusion that the Treaty was "the most dangerous and diabolical onslaught that has ever been made upon the unity of the Irish Nation"<sup>10</sup>, would not pass for the most heated among all those bitter, sometimes cruel sayings, which were thrown about during the momentous debate, charged with all the despair of thwarted hopes.

For the delegation itself unanimity, a reluctant and refractory unanimity, became an eleventh hour matter, as, till the last moment, two of the delegates had the gravest scruples as to whether they should sign the document or not, as the issue before them, as Mr R. Barton has said, was whether they should stand behind their original proposals for external association, face war and maintain the Republic, or whether they should accept inclusion in the British Empire and have peace.<sup>11</sup> Mr. Gavan Duffy said on the same subject "We found ourselves faced with these alternatives, either to save the national dignity by unyielding principle or to save the lives of the people by yielding to *force majeure*."

Whatever be the dramatic vicissitudes through which the document passed till it finally emerged from the overflowing sea of passions and arguments, nothing happened on its way to ratification which could be of a nature to impair its validity as of a document duly passed. The delegates did not exceed their powers, all their signatures appeared to be apposed on the

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<sup>10</sup> Ibid col. 156

<sup>11</sup> Ibid col. 49

document, and Dail Eireann approved the Treaty on the 7<sup>th</sup> January, 1922, by a majority of seven votes out of 121 votes cast.

To grasp fully what was really lost and what was won by the acceptance of the Treaty one has, perhaps, to advert again for a moment, to the ‘Great Talk’ which took place in the second Dail in December 1921 and January 1922. Apart from all the words dictated rather by heated feeling than by cool-blooded weighing of the circumstances, the following maybe one of the clearest pronouncements made against the Treaty. In it Deputy Sean O’Kelly succeeded in summarising the position in very few words indeed:

“Whatever material advantages we might gain from accepting this (Treaty), the price paid is too high. If this is not true, can the supporters of the Treaty tell us why offers of Dominion status were so scoffed at by all of us on former occasions. A Dominion status is honourable in the cases of Canada and Australia. Canada is free because she wills to be united to England and Canada and Australia and New Zealand are in the great majority peopled by Britons. Ireland as a Dominion is not free because she does not will to be united to England or to the British Commonwealth, if you like, except, of course, for those who are marching into the British Empire with their heads up. And, moreover, Ireland is not peopled by Britons. Ireland is the old historic Celtic nation that for many centuries had struggled for her existence and for national ideals.”<sup>12</sup>

But who really wanted the Treaty? “None of us want the Treaty”, was the answer given to it by Deputy Richard Mulcahy, “None of us want the Crown. None of us want the representative of the Crown. None of us want our harbours occupied by enemy forces and none of us want what is said to be partition; and we want no arguments against any of these things. But we want an alternative... the road open to us to show how we can avoid the Treaty”<sup>13</sup>

Here really lay the kernel of the situation and it could be taken for granted that all members of the Dail who ultimately cast their votes for the Treaty were asking themselves with anguish what would be the alternative in the case the Treaty was rejected?

The so-called Document No. 2? But, apart from it being completely unacceptable for Great Britain as containing, in her opinion, no definite foundations for the proposed association;

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<sup>12</sup> Ibid col. 64

<sup>13</sup> Ibid col. 141 & seq.

this document represented, in reality, a draft proposal which was handed over to the Deputies at the private session of the Dail, held between sessions at the very beginning of the Treaty Debate, and then withdrawn. This document was intended to be set forth as an amendment to the Treaty Document and on the 4<sup>th</sup> January President de Valera gave formal motion that he would move the next day and put it to a vote in the Dail “that this document be brought forward as an amendment to the Treaty”<sup>14</sup>, strictly speaking as an amendment to the motion for the approval of the Treaty.

But on the next day three things happened: Document No. 2 appeared in the Irish newspapers (to which it was handed over by Griffith in order that Irish public opinion could get cognisance of it); another different copy of it, containing seventeen clauses instead of twenty three, was circulated among members of the Dail; President de Valera lodged a protest against the publication of the document, as in his intentions it was a confidential draft only, issued for the purpose of finding whether a common ground could be got.

In the further course of events this document was never resuscitated to official life, so to speak, and no matter how deeply it penetrated into the undergrounds of Irish politics during the developments to come, its part in the constitutional aspect of the issue was very superficial, and any longer dwelling upon its merits or faults would be of a nature rather to embroil than to elucidate the problem. After the promise made by President de Valera on the 5<sup>th</sup> January to put the document before the House in the case he was re-elected head of Government<sup>15</sup> – a promise which could not be carried out as two days later Arthur Griffith became President – the document virtually sank into constitutional nothingness and further reference to it would be rather out of place in this chapter.

It might be only appropriate to call to mind that such kind of association which was, perfectly or imperfectly, suggested by the so-called Document No. 2 is not quite unknown to the recent history of the British Empire. Something very much within the lines of such association has been proposed by the British Government to Egypt which in the sphere of the strategic security of the Empire and its arteries of communication forms a most sensitive point. The draft Treaty of 1927 having as its basis Lord Allenby’s declaration of 1921 presents a fairly exhaustive example of an agreement by virtue of which one of the parties to it had to suffer

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<sup>14</sup> Ibid col. 217

<sup>15</sup> Ibid col. 275

some limitations of its sovereignty in order that military security of the other one should be provided with adequate safeguards.

In this draft, however, no Dominion status was ever offered to Egypt and no Oath of Allegiance was likely to be entailed upon its citizens since the principle of Egypt being an independent and sovereign State had been established by the above Declaration and all the matters in connection with the constitutional structure were disposed of by the Egyptian Constitution of 1923 which, as a matter of fact, contained only one stipulation of restrictive character (Article 154) having its origin in the capitulations.

By this we do not mean drawing any parallel between the Anglo-Egyptian and the Anglo-Irish relations, neither do we intend to discuss any such problems as to what kind of compact with Great Britain would best correspond, in its form and substance, to the Irish national aspirations, but we confine ourselves exclusively to the establishment of the fact that a scheme of an external association with a State, formerly a British Protectorate, was conceived by the British Government by 1927 on the basis of the interference in the domestic affairs of this State being reduced to strategic considerations and to some matters of quite specific concern.

It is obvious that when the Dail approved of the Treaty it dropped *ipso facto* the Republic, or let us put it in a somewhat different way, the idea of a sovereignty distinctly separate from Great Britain. By setting for the last definition we intend, at the same time, to take advantage of the opportunity for giving suggestion of what a Republic really meant in some prominent Irish minds.

Deputy Ernest Blythe, when speaking on the subject on the 3<sup>rd</sup> January, 1922, expressed the belief that the Irish people, when they voted for a Republican majority and declared themselves for an Irish Republic, were not thinking much of constitutional privileges, but were thinking of the complete freedom of Ireland.

“As far as I am concerned,” went on the future Vice-President of the Executive Council, “I wanted the Irish Republic, as I believed the people of Ireland did, in order that Ireland might be free. With me the Republic was a means to an end and not an end in itself... I believe in one sense the Republican form of Government which has been set up was a machine for the securing of Irish freedom. And I believe there is no more harm, if the interest of the motion demands it, in scrapping that machine than there is in scrapping any other machine which

may be devised for securing the freedom of the country... I stand for a Gaelic State... People who are willing to agree to external association and refuse to accept the Treaty, seem to me people who have swallowed the camel and straining at the gnat".<sup>16</sup>

Another Deputy, Mr Desmond Fitzgerald, who subsequently held two Cabinet posts under President Cosgrave's administration, when speaking on the next day, pointed out that the constant repetition of the words 'Irish Republic' gave the impression that the declaration of the Irish Republic was a declaration in favour of a form of government as distinct from what he (the deputy) understood it to be.

"I remember," he said, in 1917, a meeting at which the President spoke in the Mansion House where he said that he accepted the words 'Irish Republic' as the best means of making it perfectly clear to the world that we stood for absolute independence, whereas it seems to me during the course of the discussion in the Dail that a great many people are fighting for a Republican principle rather than a national principle."

He then quoted the following extracts from the Declaration of the Independence (adopted by the Dail on the 21<sup>st</sup> January 1919) which had just been read by Deputy Liam Mellows:

"Whereas the Irish people is resolved to secure and maintain in its complete independence... in order to promote the common weal, to re-establish justice, to provide for future defence, to insure peace at home and good will with all nations, and to constitute a national polity based upon the people's will with equal rights and opportunity for every citizen" and so on, he inferred from these words that the unbiased object of the founders of the Irish Republic was an Independent Ireland and that the Irish Republic was looked upon as a means to an end, "as one of the weapons used in fighting for freedom of our country". His final presumption was that the Treaty was considered in such terms that it could respond to all these national aspirations which were laid down by the Declaration.

If the acceptance of the Treaty made inaccessible the aim of a Republic, taken as a symbol of a sovereignty formally separate from Great Britain and as a form of Government as well, it would be perhaps no exaggeration to say at the same time that Great Britain's intentions as to the spirit in which she would be prepared to treat the Articles of Agreement remained for a certain time a disquieting question mark even in the minds of the supporters of the document. Seven centuries of political hardship certainly did not contribute to do away with this kind of

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<sup>16</sup> Ibid. Col. 192

apprehension even among those Irishmen who looked upon the Treaty as upon “freedom to obtain freedom”. Could they expect in full frankness that the other party to the Treaty will carry out its obligations with perfect loyalty to this new spirit which seemed to emanate from the document?

Ten years of experience now impart an impressive meaning to the following words of Kevin O’Higgins containing an exact prophesy of the future co-existence on the two countries: “I hardly hope,” he said when speaking in the Dail on the 19<sup>th</sup> December, 1921, “that within the terms of this Treaty lies the fulfilment of Ireland’s destiny, but I do hope and believe that with the disappearance of old passions and distrust festered by centuries of persecutions and desperate resistance, what remains may be won by agreement and by peaceful political evolution.”<sup>17</sup>

But the disquieting questions were still there. The Office of Governor-General, would it be equivalent to a continuation of old vice-royal traditions with a display of splendour and court ceremonies of nature to overshadow the true national life of the country? Would not the national judicature be put in a position of inferiority considering the wide-open possibility of appeals from the decisions of the national courts to the British Privy Council? How would all the obsolete Imperial legislation react upon the constitutional development of the Free State? And what would become of this Imperial political and diplomatic unity which at the time being was still held to be alive and effective? Would the undistorted face of a comparatively small nation be let pierce through all that massive strata of impediments accumulated during centuries of subservient existence?

Now, with the perspective of the last eleven years, we can conclude that most of those apprehensions dissipated and that all the bugbears, which rightly haunted the Irish imagination at the birth of the Free State, gradually vanished to give way to political realities which rose as a consequence of a decade’s strenuous and unyielding efforts of Irish statesmen.

The duties of Governor-General were discharged both by the late Mr Healy and Mr James McNeill with great ability and discretion and, above all, in a way which contributed to the enhancement of a purely national character in Irish administration. Now, with the

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<sup>17</sup> Ibid. Col. 47

appointment of Mr Donal Buckley, it is permissible to expect that the Governor-General's residence will acquire all the aspects of another nucleus of Gaelic language and culture.

Apart from the cases of appeals to the Privy Council being numerically almost negligible, the decisions of this body were practically rendered inoperative within the Free State territory owing to an ingenious legislative device superimposing the national law upon those decisions. All the vast structure of the old Imperial supremacy over the Dominion's affairs were destroyed by the Statute of Westminster, and finally the Irish Free State having been elected member of the Council of the League of Nations, on its own merits, without any correlation with the fact of it being at the same time member of the British Commonwealth of Nations, marked *pro fer externo* its unequivocal character of an independent political and diplomatic unit.

The next stage through which the Treaty passed had to pass was its approval by "to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland". Since this body never existed in the shape given to it by articles 17 and 18 of the Treaty and, as was mentioned above, became practically amalgamated with the second Dail, invitations issued for the purpose by President Griffith embraced all the members of this Dail, plus four representatives of Trinity College, minus one member who sat for the counties of Tyrone and Fermanagh which henceforth passed under the control of the Belfast administration.

The lifetime of this ephemeral assembly lasted a few hours only on the 14<sup>th</sup> January, 1922. When the convened members gathered at the Mansion House it became apparent that all the anti-treatyites abstained from attendance. The order paper contained only two items:

1. The constituting of a Provisional Government
2. The motion: That the instrument entitled *Treaty between Great Britain and Ireland – Articles of Agreement* signed in London on the 4<sup>th</sup> day of December 1921, by the members of an Irish and British Delegation respectively be and is thereby approved

When Mr Liam de Roiste, Chairman of the Assembly, put the motion there was no amendment and he therefore declared it carried unanimously. The roll was then called and signed by sixty five members.

At this stage in its history the Treaty assumed all the aspects of an international agreement concluded between two sovereign nations and having been duly passed and approved by the

appropriate legislative body of one of the signatories to it. It was the first document, as Arthur Griffith declared in the Dail<sup>18</sup>, concluded between the representatives of the Irish Government and the representatives of the English Government since 1172 on an equal footing.

Since then, further developments in Great Britain and Ireland ran for some time in two different channels by the use of which each of the parties to the Treaty was seeking to abide by a partly fictitious situation. On the British side the sequence of events seemed to rest on a presumption that nothing unconstitutional had happened in the relations between the two countries. There was first the Government of Ireland Act, 1920, then came the Treaty with its provision the constituting of a Provisional Government entrusted with executive power until the coming into being of the Free State, and finally – the approval of the Treaty by the assembly just mentioned.

The next step the British Government thought appropriate to take was the passing on the 31<sup>st</sup> March, 1922, of an Act to “give the force of law to certain Articles of Agreement for a Treaty between Great Britain and Ireland”. By enacting that “the Articles of Agreement for a Treaty between Great Britain and Ireland... shall have the force of law as from the date of the passing of this Act, the British Parliament virtually gave its ratification, an exception having been made in relation to Article 11, or strictly speaking to its provision fixing the term which Northern Ireland was to have the right to opt for the maintenance of the Government of Ireland Act, 1920, as one month from the passing of the Act of ratification of the Treaty.

But paragraph 1 (2) of this Act not only gives sanction to the transference to the Irish Provisional Government of the powers and machinery referred to in Article 17 of the Treaty, but it also contains a very important provision for an election to be held in Ireland implied in the following clause: “... the Parliament of Southern Ireland shall be dissolved and such steps shall be taken as may be necessary for holding in accordance with the laws now in force... an election of members for the constituencies which would have been entitled to elect members to that Parliament, and the members so elected shall constitute the House of Parliament to which the Provisional Government shall be responsible, and that Parliament shall, as respects matters within the jurisdiction of the Provisional Government, have power to make laws in like manner as the Parliament of the Irish Free State when constituted.”

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<sup>18</sup> Ibid. Col. 2

At the same time this Act definitely severs the connection between the new Irish State and the British Parliament by enacting that no writ shall be issued after the passing of this Act for the election of a member to serve in the Commons House of Parliament for a constituency in Ireland other than a constituency in Northern Ireland<sup>19</sup>.

On the Irish side a fiction was sustained to the effect that the Republic should be held as still alive and active until the coming into being of the Free State. “The Republic of Ireland remains in being until the Free State comes into operation” said Arthur Griffith in the Dail on the 10<sup>th</sup> of January, 1922, and later on “... I will keep the Republic in being until such time as the establishment of the Free State is put to the people, to decide for or against”<sup>20</sup>. After having been elected on the same day as President of Dail Eireann he made the following pronouncement: “As Premier I suppose I may say that Dail and Republic exist until such time as the Free State is set up. When that Free State Government is set up I intend that the Irish people shall have the fullest power of expression of that election”.<sup>21</sup>

This line of policy, however necessary its adoption might have appeared to the then dominant elements, proved with the course of time to have thrown the Irish community into a great deal of confusion as regards the mutual correlation of such conceptions as Republic and Free State, Treaty and Document No. 2, Provisional Government and Dail Government. But, what seems to be of exceptional interest from our point of view, is the fact that the fiction of an independent Republic could hardly be harmonised with paragraph 1 (2) of the above mentioned Irish Free State (Agreement) Act, passed by the Parliament of Westminster.

The second clause of this paragraph providing for the dissolution of the existing, or supposedly existing, Parliament of Southern Ireland, for new elections, for the constituting of a new House of Parliament and for the limits of its jurisdiction must be read to mean a piece of legislation passed by the British Parliament in relation to a purely domestic Irish affair. A case may be made out that these dispositions were passed in agreement with the Irish representatives, a presumption which, at any rate, would not impair the incompatibility of the principle of an independent Republic with the fact of its domestic affairs being regulated by a foreign legislative body.

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<sup>19</sup> Ch. 4. 12 Geo. V

<sup>20</sup> Treaty Debate col. 399 & 400

<sup>21</sup> Ibid. Col. 411

The Irish Government subsequently endorsed this piece of legislation when, pursuant to a resolution, taken by the second Dail on the 20<sup>th</sup> May, 1922, for elections to the third Dail, it issued a week later a Proclamation which said *inter alia*: “Whereas we... have been duly constituted a Provisional Government pursuant to Article 17 of the Articles of Agreement for a Treaty between Great Britain and Ireland signed in London on the 6<sup>th</sup> day of December, 1921, and set forth in the Schedule to an Act entitled the Irish Free State (Agreement) Act 1922... And whereas the said Act contains provisions with respect to the holding of an election and the Constitution of a House of Parliament to which we, the said Provisional Government shall be responsible... Now we, the said Provisional Government, pursuant to the provisions of the said Act... declare that we have given order that... summons shall be issued forthwith in due form calling the said Parliament to meet in the City of Dublin...”

Whatever objection could be set forth against the thesis we think that the only way through this imbroglio of contradictory standpoints and facts would be to acknowledge that the Irish Free State came into being *de facto* with the approving of the Treaty by both parliaments, by the Dail in January and by the British House of Parliament in March, 1922, although *de jure* its birthday must be related to the 6<sup>th</sup> of December of the same year when all the fictions just mentioned, sustained by the two parties during the transition period, converged finally in two Acts passed simultaneously by the two respective parliaments.

On the Irish side it was an Act “to enact a Constitution for the Irish Free State (Saorstát Eireann) and for implementing the Treaty between Great Britain and Ireland”. Its fundamental part consisted of a Preamble and three articles, the first of which enacted that the Constitution annexed to the Act as its first Schedule shall be the Constitution of Saorstát Eireann.

The second, although only comprising one sentence, could be divided into two parts, the first of them stating that the Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland (annexed to the Act as its second Schedule), gave these articles, i.e. the Treaty, force of law. The second part set forth the consequence in the case “any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty” and decreed that any such provision, amendment or law “shall, to the extent only of each repugnancy be absolutely void and inoperative.”

The third Article defines the title of the Act as “the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922.

On the British side it was an Act to provide for the Constitution of the Irish Free State as well and it was construed on the following lines: “Whereas”, says the recital to it, “the House of Parliament constituted pursuant the Irish Free State (Agreement) Act, 1922, sitting as a Constituent Assembly, has passed the measure (hereinafter referred to as ‘the Constituent Act’) set forth in the Schedule to this Act, whereby the Constitution appearing in the First Schedule to the Constituent Act is declared to be the Constitution of the Irish Free State, and whereas by the Constituent Act the said Constitution is made subject to the following provisions, namely (here comes a literal quotation of paragraph 2 of the Irish Constitution Act)...

Be it enacted: Paragraph 1. The Constitution set forth in the first Schedule to the Constituent Act shall, subject to the provision to which the same is by the Constituent Act so made subject as aforesaid, be the Constitution of the Irish Free State... Paragraph 2 provides for the power of the Free State to adopt Acts applicable to other Dominions. Paragraph 3 provides for the power of the Parliament of Westminster to make laws affecting the Free State “in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions”. Paragraph 5 defined the title of the Act as “the Irish Free State Constitution Act, 1922, and approved of the Treaty for the purposes of its Articles II<sup>22</sup>

How did these latter Acts of Irish and British legislation affect the position of the Treaty as an international instrument? By virtue of Section 2 of the Irish Free State Constituent Act the constitutional structure of this State was made subordinate to the provisions of the Treaty which was explicit term given the force of law. This last is to be read not only as a ratification of the Treaty but, taken together with the second part of this section, but its adoption as well, by the Free State as part of domestic or municipal law subject to interpretation by the Irish national courts in the case of controversy arising in respect to its application.

The said second part of the section provided at the same time for sanctions to be applied to any such provision, amendment or law which might prove to be repugnant in any respect to the Treaty, and made them absolutely invalid to the extent of such repugnancy. Through the operation of this section the two fundamental documents became tightly woven together in

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<sup>22</sup> Ch. 1. 13 Geo. V

this sense that, if the Treaty could stand without being corroborated by the Constitution, the latter, or strictly speaking its different separate clauses, was permitted to remain in force inasmuch only as it would not run counter to the letter and spirit of the Treaty.

In consequence of such arrangement did the Treaty suffer any infringement upon its international character? We do not think so, but what we do think is that this document, without having lost a jot of its importance as of an international instrument, assumed at the same time a different and a rather unusual capacity for international treaties, the capacity of a domestic law adopted as such by one of the signatories to it. Hence comes its amphibious character which we referred to above and which make some of the Saorstát's constitutional problems almost inexplicable unless we constantly keep in mind the two-fold structure of the Treaty; one of which bears all the features of an international instrument whilst the other shows – until the passing of the Constitution (Removal of Oath) Act, 1933<sup>23</sup> – the marks of a part of the Free State's constitutional law.

Great stress was evidently laid by the British side upon the insertion of Section 2 in the Irish Constituent Act, as is shown by the Irish Free State Constitution Act passed by the Westminster Parliament where the above section is not only quoted literally in the recital but is referred to again in paragraph 1 of the Act. The more one examines the correlation of these two fundamental Acts passed by the British and Irish legislatures the more one feels inclined to come to a conclusion that Section 2 of the Irish Constituent Act was deemed to form a *sui generis* substitute for the Colonial Laws Validity Act, 1865, by which the same principle of repugnancy to British Law was made an overriding factor in relation to the validity of the Dominions' legislation.

It is true that in 1922 the 1865 Act was still in force but some provision of its imminent disappearance cannot be deemed to have been absolutely unexpected to the then rulers of the British people and, also, a claim could be reasonably made that this Act was not considered as applicable to the Free State. Now, if by the Act of the British Parliament approving of the Treaty (The Irish Free State Agreement Act), the obligations of that Treaty were imposed upon the British people, by the Act passed by the same Parliament to enact the Free State Constitution, the last became, together with the Treaty, British Law and consequently everything which might prove to be repugnant to this law was, under Section 2, doomed to turn void and inoperative. The radical difference between the two Acts consists however in

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<sup>23</sup> This is a handwritten addition *Ed.*

the obvious fact that, whilst the first was imposed on the Colonies and Dominions by the British Parliament unilaterally the latter implied an obligation undertaken by the Free State itself.

When speaking in the Dail on the Removal of the Oath Bill<sup>24</sup> President de Valera said that there were three ways of regarding the Treaty: “There is the way of regarding it as an international instrument. There is the way of regarding it as *sui generis* a sort of document of a peculiar character and could not be classified as a full international instrument. Then there is the third way the British have been trying to get the world to believe, and that is to regard it as purely British domestic legislation”.

Professor Noel Baker seems to incline towards the second of the views when he writes that “whatever the character of the Irish ‘treaty’ in International Law it was not a normal example of an inter-Commonwealth agreement. In its origin, in its nature, and inasmuch as for its political execution it required legislation by the British Parliament, it differed essentially from an ordinary contractual agreement between Members of the Commonwealth... It is possible according to the point of view adopted to hold that the ‘Irish Treaty’ was either less or more definitely international than an ordinary inter-Commonwealth Agreement.”<sup>25</sup>

Mr. Winston Churchill, one of the surviving signatories to the Treaty, a politician, to whom could by no means be imputed a tendency to enlarge the Irish Free State’s international status, expressed the conviction that the Irish Treaty finds no counterpart in the relations between Great Britain and any of her Dominions. “It is at once more recent, more tragical and more solemn than any other instrument that exists going even as far back as the Articles of the Treaty of Vereeniging”.<sup>26</sup>

President Cosgrave, when addressing the nations assembled in Geneva in September 1923, emphatically pointed out that “an international treaty has brought Ireland peace” and, as such, the Anglo-Irish Treaty received in 1924 formal registration at Geneva initiated by the Free State Government under Article 18 of the Covenant. At this stage, however, the latent controversy between the British and Irish standpoints which, as may be surmised, existed since the very beginnings of the Treaty, rose to the surface and elicited a formal protest from

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<sup>24</sup> Parl. Deb. 1932 vol. 41 no. 7 p. 203

<sup>25</sup> Baker, Noel, *The Juridical Status of the British Dominions in International Law*, p. 320

<sup>26</sup> Off. Rep. Parl. Deb. House of Commons, 1931 vol. 260 no. 14 col. 330

the British Government (which it) placed with the Secretariat of the League of Nations against registration.

Following<sup>27</sup> is the essential portion of the letter despatched by the Foreign Office, November 27, 1924, to the Secretary-General of the League of Nations: “Since the Covenant of the League of Nations came into force, His Majesty’s Government have consistently taken the view that neither it, nor any convention concluded under the auspices of the League, are intended to govern the relations *inter se* of the various parts of the British Commonwealth. His Majesty’s Government considers, therefore, that the terms of Article 18 of the Covenant are not applicable to the Articles of Agreement of 6<sup>th</sup> December, 1921”.

“The Government of the Irish Free State,” ran the answer given to the forgoing by the Saorstat Department of External Affairs, 18<sup>th</sup> December, and also addressed to Eric Drummond, “cannot see any that useful purpose would be served by the initiation of a controversy as to the intentions of any individual signatory to the Covenant. The obligations contained in Article 18 are, in their opinion, imposed in the most specific terms on every member of the League and they are unable to accept the contention that the clear and unequivocal language of that Article is susceptible of any interpretation compatible with the limitation which the British Government now seek to read into it. They accordingly dissent from the view expressed by the British Government that the terms of Article 18 are not applicable to the Treaty of 6<sup>th</sup> December, 1921”.

Another exchange of notes through the intermediary of the Geneva Office ensued in 1926 when the Agreement, dated 3<sup>rd</sup> December, 1925, amending and supplementing the Treaty, was, at the request of the Free State Government, registered in its turn with the Secretariat of the League of Nations. On this occasion the Foreign Office reminded the Secretary-General, 30<sup>th</sup> March, 1926, that, whereas His Majesty’s Government considered the terms of Article 18 of the Covenant non-applicable to the Articles of Agreement of December 6<sup>th</sup>, 1921, the same view was held as regards the Supplementary Agreement. The reply of the Department of External Affairs, 30<sup>th</sup> April, 1926, referred to the statement as per their communication of December 18<sup>th</sup>, 1924, and confirmed that the same view was held by this Department as regards the Supplementary Agreement.

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<sup>27</sup> The next three paragraphs to ‘Supplementary Agreement,’ is a separate page to be inserted here *Ed.*

In connection with these notes a good many different opinions have been put forward on the question, whether the terms used in Article 18 of the Covenant for the purpose of definition of those international agreements which are subject to compulsory registration can, or cannot, be applied to inter-Commonwealth agreements. The question as such is certainly controversial, but if there is one thing which does not admit doubt it is the origins of the Anglo-Irish Treaty were not of inter-Commonwealth character and that the document became an inter-Commonwealth agreement only in pursuance to the recognition by the British party to it and to the adoption by the Irish of Dominion status to be the title deed of the Irish self-governing existence. At the conclusion of the Treaty, Ireland was neither British Colony, nor Dominion; she was an integral part of the United Kingdom in a state of breaking the links between her and the latter through revolutionary action.

A minor alteration which occurred in the Treaty in 1924 is again of nature to underline its international character. Under Article 12 of the Treaty, a commission consisting of three persons, one each appointed from the governments of the Irish Free State and Northern Ireland and a chairman to be appointed by the British Government, was called upon to determine the boundaries between North Ireland and the rest of Ireland. Since the Government of Northern Ireland declined to appoint a commissioner, the two parties to the Treaty entered into negotiations which resulted in an agreement, signed 4<sup>th</sup> August, 1924, by Mr Ramsay MacDonald and Mr Cosgrave and expressed as follows:

“... it is hereby agreed, subject to the confirmation of this Agreement by the British Parliament and the Oireachtas of the Irish Free State, that if the Government of Northern Ireland does not meet before the date of the passing of the Act of the British Parliament or of the Oireachtas of the Irish Free State confirming this Agreement, whichever is the later date, appoint the Commissioner to be appointed by that Government the power of the Government of Northern Ireland to appoint such a Commissioner shall thereupon be transferred to and exercised by the British Government, and that for the purpose of the said Article any Commissioner so appointed by the British Government shall be deemed to be a Commissioner appointed by the Government of Northern Ireland, and that the said Articles of Agreement for a Treaty shall have effect accordingly.”

The Agreement was subsequently given force of law by the British Parliament on the 9<sup>th</sup> October<sup>28</sup> and by the Oireachtas on the 25<sup>th</sup> October, 1924<sup>29</sup>. The proceedings in this case are

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<sup>28</sup> Ch. 41. 14 & 15 Geo. V

perfectly clear and characteristic of international instruments: as one of the stipulations of the Treaty proved to be incongruous with the possibility of it being carried out, pursuant to a certain contingency which in this case could be qualified as *force majeure*, the parties involved obtained a settlement by means of negotiations and secured subsequently the ratification of the Agreement arrived at by the respective legislative bodies.

Exactly the same thing occurred in connection with another amendment to the Treaty passed by the Parliament of Westminster on the 10<sup>th</sup> December 1925<sup>30</sup> and by the Oireachtas on the 17<sup>th</sup> December, same year<sup>31</sup>. They were Acts to confirm and give effect to a certain Agreement, amending and supplementing the Treaty, which was signed as a tripartite document on the 3<sup>rd</sup> December, 1925, by Mr Stanley Baldwin (and others) on behalf of the British Government, by President Cosgrave (and others) on behalf of the Free State Government and by Sir James Craig (and others) on behalf of the Government of Northern Ireland.

By virtue of this Agreement the proviso to Article 12 of the Treaty was revoked and the Irish Free State was released from the obligations under Article 5 of the same Treaty to assume the liability therein mentioned. It is very interesting to observe the phraseology used in the Preamble to the Agreement as it may pass for typical in so many international documents, such as “the progress of events”, “the improved relations now subsisting between the Governments... and their respective peoples”, the desirability “to amend and supplement the Articles of Agreement, so as to avoid any cause of friction which might mar or retard the further growth of friendly nations”, and so on.

All the above outlined avatars through which the Treaty passed since its conclusion, as well as the examination of its origin and substance lead us to the conclusions:

1. That the *Articles of Agreement for a Treaty between Great Britain and Ireland* is an international instrument
2. That since the passing of the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922, they have been endowed with an additional capacity to exercise the powers of a sort of paramount law to which the Irish Free State constitutional law has become

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<sup>29</sup> Public Gen. Act 1924 no. 51

<sup>30</sup> Ch. 7. 15 & 16 Geo. V

<sup>31</sup> Public Gen. Act 1925 no. 40

submitted, a circumstance which nevertheless, did not affect their character as of an international instrument

3. That their presumable character of an inter-Commonwealth agreement derives not from their origin but from their effects and appears to be absorbed by their far wider scope as of an international document

We think that in the light of the above conclusions the most intricate and, let us say irritating, question whether the Treaty is, or not, doomed to suffer a violation in consequence of the Constitution (Removal of Oath) Act, 1933, might appear under a somewhat more intelligible aspect. As the Oath issue is being dealt with below<sup>32</sup> we intend to keep here exclusively within the bounds of the purely constitutional problem without referencing other arguments, assertions and contentions which have raised round it an almost impervious ring of contradictory meanings.

The Bill was introduced by President de Valera's Government on the 20<sup>th</sup> April, carried on the 19<sup>th</sup> May, then underwent a substantial mutilation in the Senate in June and was formally passed by the Free State legislature in May, 1933. The Act consists of three capital sections. The first provides for the deletion of Article 17 of the Constitution which determines that "The Oath to be taken by members of the Oireachtas shall be in the following form" (here follows the text of the Oath). The second provides for the removal of Section 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922. The third had no direct relevance to the question under consideration.

No article of the Treaty is mentioned in the Bill and consequently the question of a formal breach of the Treaty does not arise. But an evident, although oblique, encroachment upon its substance insinuates itself automatically when the Act is compared with two clauses of the Treaty, one of which (Article 4) contains a provision for the Oath similar to that of Article 17 of the Constitution, and the other (Article 2), providing that the position of the Free State shall be that of the Dominion of Canada, determines "that the law, practice and constitutional usage governing the relationship of the Crown, or representative of the Crown and the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State".

The question presents two alternatives:

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<sup>32</sup> This, perhaps, should read "In dealing with the Oath issue we intend etc." *Ed.*

1. If it is assumed that the Oath is not mandatory in the Treaty then no argument for it being violated by the Removal of the Oath Act could be reasonably upheld
2. If it is assumed that the Oath is mandatory in the Treaty, the following conclusions seem to flow naturally from what has been suggested above:

The Treaty as an international instrument is deemed to suffer a breach for the obvious reason that no such instrument is permitted to undergo any change in its entity, as well as its separate clauses, in its letter, as well as its spirit, by the unilateral action of one of the parties to it. Any such alteration could be arrived at no otherwise than by bilateral consent which pre-supposes the carrying on of negotiations until the issue becomes sufficiently agreed upon to be submitted to the respective legislative bodies for ratification.

Had the Free State been called into existence as a Dominion solely by an Act of the British Legislature, the matter would probably not have arisen at all or would have, at all events, taken a different course. But in the issue under consideration the Treaty exhibited this peculiar feature of its own which, in this particular case, may be named a *privilegium odiosum*, a feature which proved to be somewhat contrary to the supposed best interests of one of the beneficiaries of this international instrument.

On the other hand, the Treaty, as part of the Saorstad domestic law under section 2 of the Irish Constitution Act, 1922, and as part of British law under the British 'Irish Free State Constitution Act, 1922, does not seem to undergo any violation pursuant to the Removal of the Oath Act, and this for the following reasons: Not only the advanced stage of the Free State's constitutional development could be referred to as pre-supposing its right to legislate to the full extent, inherent in any other sovereign parties, but in<sup>33</sup>

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<sup>33</sup> Rest of text is missing on microfilm. Assuming that the article was completed, possibly no more than three pages as his consideration of the Removal of the Oath issue was his last sustained constitutional analysis. His overall conclusion can be found in 'Twenty Years of Irish Politics'. *Ed.*