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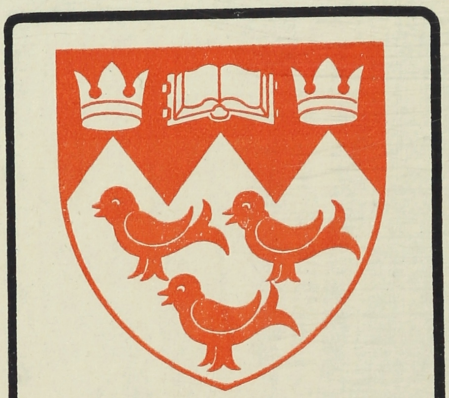

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The present world war has made further changes in the constitutional relations among the nations of the British Commonwealth. This was to be expected, for each great crisis has left its mark on that relationship in the past. The first world war ended the purely colonial period in the history of the Dominions. Their military contributions to the Allied war effort gave them a claim to equal recognition with other small states and to a voice in the formation of policy. This claim was recognized within the Empire by the creation of the Imperial War Cabinet in 1917, and within the community of nations by Dominion signatures to the Treaty of Versailles and by separate Dominion representation in the League of Nations. In this way the "self-governing Dominions," as they were called, emerged as junior members of the international community. Their status defied exact analysis by both international and constitutional lawyers, but it was clear that they were no longer to be regarded simply as colonies of Great Britain. Domestic self-government they had long possessed; international relations were to be their new prerogative.

To the changed position thus acquired the name "Dominion status" was given. It was a useful compromise term. Its main virtue was that it suggested a new and more independent rôle for the Dominions and an individual membership in the world community as well as in the British Empire. This was what the rising national sentiment in these countries demanded. Though no one knew exactly what the new status was, or what its limits were, Great Britain began to offer it to other less favoured portions of the Empire. Ireland was to have "Dominion status" by the Treaty of 1921;[1] India was started on the road to "Dominion status," making "rapid strides towards the control of her own affairs," as Mr. Lloyd George said at the Imperial Conference of that year. Clearly colonialism was being transformed into something new and strange. To acknowledge the abandonment of old style Empire, ruled from the centre, the very name of the association was gradually changed from British Empire to British Commonwealth.[2]

All this represented a great advance in the difficult process of making an

[1] Article I of the Treaty declared "Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada . . . etc." Mr. Lloyd George speaking on the Treaty said it was "difficult and dangerous to give a definition" of what Dominion status meant. See Wheare, The Statute of Westminster and Dominion Status, 2nd ed., London, 1942, p. 21.

[2] The phrase "autonomous nations of an Imperial Commonwealth" appears as early as 1917 in Resolution IX adopted by the Imperial War Conference. In the Irish Treaty cited above (note 1) the term "Empire" had not been abandoned. The famous declaration at the

Unlike the unilateral practice, the bilateral form of hostage-taking places neither of the parties in an inferior position. Moreover, it tends to safeguard the individual hostages against ill-treatment. The arbitrary basis for the selection of hostages, generally determined by nationality and geographic proximity, may be deplored, but it cannot be condemned as violating international law.

The bilateral exchange of hostages, however, can never replace the unilateral form. Only in limited instances will two governments or armies each have a sufficient number of hostages from the other to exercise a mutual control. Where the treatment of specific individuals or relatively small groups of individuals is involved, this might be managed. The approximate equality of the two parties that is implicit in the bilateral practice defines the uses to which it can be put. Certainly as a weapon of war it could have little value.

Though the unilateral practice of hostage-taking has assumed so illegal and inhumane a character through contemporary German abuse, this is insufficient to warrant its abandonment as a legal instrument of war. The fact that hostages may be taken, and, if need be, killed, strengthens the position of a law-abiding administrator of occupied territory.

empire democratic. By long historical association, if not by definition, an empire has been a single political unit in which one group of men rules over another; usually a unit in which one race rules over other races. For this reason all democratic sentiment is strongly opposed to imperialism. The British Empire began by being just such an empire. Down to the war of 1914 not only did the white 15 per cent rule over the coloured 85 per cent of the total population of the Empire, but those members of the white race inhabiting the British Isles ruled their fellow whites in the colonies and Dominions in all important matters of foreign policy. Though some external relations, such as commercial treaties, were beginning to be taken over by the Dominions prior to 1914, decisions as to peace and war, and the major choices in international affairs, were made in London only. The nineteenth century had witnessed the transformation from pure dependency to "self-governing colony," but a "self-governing" colony was still a colony in both domestic and international law despite the contradiction in terms. Even the word "Dominion," which had come into general use in the early part of this century (in 1907 the name "Imperial Conference" was first substituted for the former term "Colonial Conference") did not at first suggest anything like independence or full nationhood. Dominions were colonies in the stage of growing up—colonies in their 'teens, so to speak. They were, in law and in fact, integral parts of a unitary state whose centre of sovereignty was in London. Every Dominion "constitution" was merely a law of the Imperial power extending to a colony, permitting greater or lesser degrees of local self-government. All constitutional lawyers in the Empire emphasized the "indivisibility of the Crown," as proof that the group of countries called British were a unity and not a plurality. And any concept of unity implied an ultimate sovereignty wielded by an Imperial government.

Thus when "Dominion status" was recognized at Versailles in 1919 the word "Dominion" already had a special meaning which was carried forward into the new era and which retarded the development of the new idea. The term "Dominion" embodied two distinct and contradictory notions. On the one hand it suggested a mature type of colony or dependency, in which self-government was far advanced. On the other hand it was by implication and tradition a territory "belonging to" somebody else—a "possession," in short. Dominion means a territory ruled over as well as the process of ruling. It was still true to say that the Dominions were "British," and that Britain was not a Dominion. An element of colonial subordination was implicit in the term itself.

1926 Imperial Conference used both "British Empire" and "British Commonwealth" in the same definition, with typical obscurity. The Statute of Westminster speaks only of the "British Commonwealth of Nations." The term Empire is now used more technically to include Great Britain and the non-self-governing portion of the Commonwealth under her jurisdiction. But the old term "Imperial Conference" has not yet been changed to "Commonwealth Conference."

Adding "status" to a "Dominion" did not immediately clear away this confusion. The new concept grew slowly. At no time was there any agreement as to the end result, or any selected point at which decentralization of an old imperial sovereignty would cease. Did the changes mean that the former self-governing colonies were to attain full international freedom, like independent nations, though linked in some mystical way by a common crown? Or were they still to be on a lower international plane than the mother country, though somewhat freer than before? Or were they, perhaps, to become co-equal members with Great Britain of a group of states all of whom would be governed by a fundamental overriding law, so that some kind of confederation would emerge? No precise answer could be given and none was attempted. The weakness of the concept of "Dominion status" was that it contained at the outset a little of all these ideas but no definable quantity of any. The ultimate relationship was left to work itself out in course of time.

Certainly to many people in the Commonwealth the subordination of the Dominions to the sovereignty of Britain was not ended by the invention of an indefinable status. In 1917 General Smuts observed:

> "although in practice there is great freedom, yet in actual theory the status of the Dominions is of subject character. Whatever we may say, and whatever we may think, we are subject provinces of Great Britain." [3]

This was at the beginning of the new era. In 1921, even after the fanfare of Versailles and the founding of the League, Lloyd George could tell the British House of Commons that:

> "The instrument of the foreign policy of the Empire is the British Foreign Office. That had been accepted by all the Dominions as inevitable. But they claim a voice in determining the lines of our future policy." [4]

The instrument of policy, the Foreign Office, was something well organized and definite; it was also "inevitable." The voice was still an unrealized "claim" to influence "our" (*i.e.* British) policy. Never at any time during the inter-war armistice of 1919–1939 was any Imperial organization established by which the Dominion voices would actually share in making the major political decisions. In this respect the machinery of the League of Nations gave the Dominions more practice in international government and equality of status than did the British Empire. The Imperial Conferences did not meet the need, for they rarely met; [5] they had no executive power; they could merely make recommendations. Yet never at any time in that period was the full international personality of the Dominions, as nations

[3] Quoted by Wheare, *op. cit.*, p. 23.

[4] Quoted in R. MacGregor Dawson, The Development of Dominion Status, Toronto, 1937, p. 211.

[5] Imperial Conferences met in 1921, 1923, 1926, 1930, 1932 (Ottawa Economic Conference), and 1937.

distinct from Great Britain, established beyond equivocation. This did not come until the second world war, though South Africa and Ireland had clarified their position more than the other Dominions. Being without a power of control over British policy, and yet without a fully recognized independence from the consequences of that policy, the Dominions were left during the inter-war armistice with many marks of subordination not found in the other states members of the world community. Great Britain, of course, suffered none of these limitations on her sovereignty.

This subordination was more noticeable prior to the adoption of the Statute of Westminster in 1931. Colonial status lingered on into the era of Dominion status. For example, in 1924, the year after Canada had for the first time negotiated a treaty wholly by herself,[6] the Treaty of Lausanne was made by Great Britain with Turkey on behalf of the whole Empire. Thus peace between Turkey and all the Dominions was arranged without any of the latter's representatives playing any part in the proceedings. So, too, appeals from Dominion courts continued, with few exceptions, to go to a supreme tribunal in England—the Judicial Committee of the Privy Council. All legislation for the Dominions emanating from the Imperial Legislature was legally valid regardless of their consent. Thus there was an executive, judicial, and legislative sovereignty over the whole Empire vested in British organs of government containing no representation from the Dominions. None of this sovereignty was in fact exercised against the will of the Dominions, but this natural restraint, based on common understanding, did not alter the legal relationship. The idea of the Dominions as nation states was fast crystallizing, and found formulation in the Imperial Conference Declaration of 1926, but had not yet modified the formal law.

Other indications of the semi-autonomous position of the Dominions were very evident. The diplomatic unity of the Empire had only just begun to break down before 1931, and the few Dominion representatives abroad stood out as exceptions to the general rule that foreign affairs were conducted for the whole Empire through the British Foreign Office. The refusal of members of the Commonwealth (except Ireland) to register their inter-se treaties with the League or to submit their own disputes to international arbitration, like their refusal to bring imperial preferences within the scope of most-favoured-nations clauses in commercial treaties, was based on the notion that they were not separate states but members of a single political entity. None of the Dominions was considered to have any separate right to neutrality once Great Britain declared war.[7] It was therefore impossible to rank the Dominions on the same plane as fully self-governing countries like Mexico or Sweden. Writing in 1929, Mr. Noel Baker declared that "it is impossible to admit that the Dominions are persons of International Law of identically the

[6] The Halibut Fishery Treaty with the United States.

[7] See speech of Premier King in Canadian House of Commons, June 9, 1924: cited in A. B. Keith, Speeches and Documents of the British Dominions, 1901–1934, p. 337.

same kind as those which are called fully "independent sovereign states." [8] Not being sovereign states, they were not equal to Great Britain and the term "Dominion status" well expressed this difference.

This situation was, of course, greatly changed by the Statute of Westminster in 1931. But there was at first no certainty as to just what had been accomplished. By Section 1 of the Statute the legal title of Canada, Australia, South Africa, the Irish Free State, New Zealand, and Newfoundland was belatedly advanced from that of "colony" to "Dominion" but, as we have seen, this latter term had long been in use already and had co-existed with dependency. The remainder of the Statute did not apply immediately to Australia, New Zealand and Newfoundland, since their Parliaments had to adopt it before it became operative in their territories. Hence their former subordinate position remained after 1931, no less real because it was henceforth removable. Further definite constitutional steps had to be taken by them before the alteration in their status could be measured, and none of the three took these steps in the inter-war period. Canada, South Africa, and the Irish Free State were immediately affected by the statute. The extent of the effect was a matter of debate.

The most important parts of the Statute of Westminster were those which (1) gave permission to the Dominions to amend or repeal in the future any Imperial laws extending to them, and (2) declared that henceforth no Imperial law would be deemed to extend to a Dominion unless it was expressly declared in the law that the Dominion had consented to its enactment. The first provision, on a strict and traditional interpretation, was a mere extension of existing authority rather than an irrevocable transfer of sovereignty, and the second was a self-denying ordinance establishing a rule of construction rather than a binding restriction on the future powers of the Imperial legislature. Hence the Statute of Westminster could be, and was, interpreted by many authorities as not affecting the previous indivisibility of the Crown or diminishing the legal sovereignty of the Parliament which enacted it. And the very fact that it emanated from the Imperial Parliament only, and was not, as it might have been, simultaneously enacted by all the Parliaments in the Commonwealth, prevented it from symbolizing clearly the equality it purported to establish.[9] For the Imperial Parliament, representing the citizens of the British Isles alone, cannot be a true constituent assembly for the entire Commonwealth. It is legally capable of legislating for colonies and Dominions, because of its continuing possession of an ancient sovereign

[8] The British Dominions in International Law, p. 356. In the Commonwealth independence of action should be distinguished from independence of association. The members can be completely free to act as they wish and still be associated, like the members of the Pan-American Union. See John P. Humphrey, The Inter-American System, Toronto, 1942, pp. 269–270.

[9] The Dominion Parliaments all approved the Statute in advance by resolution, thus indicating consent to the enactment. But the Statute itself came from the Imperial legislature only.

authority, but politically it is without representation from the other members of the group and hence lacks that democratic base which would be expected in any body possessing sovereignty over a Commonwealth composed of equals.

The Statute of Westminster was a necessary preliminary step if what remained of the legal dependency of the Dominions was to be ended. The Statute undoubtedly was an advance in the direction of legal equality, but of such a nature as to emphasize again, through its use of the Imperial Legislature only, the colonial element in Dominion status. Moreover the Statute of Westminster, as has been pointed out, did not at once apply to Australia, New Zealand, or Newfoundland, for the reason that under its provisions the Parliaments of these Dominions had to adopt it before it affected them, and down to the end of 1943 Australia alone had done this. These Dominions, therefore, remained under the old arrangements until they voted themselves into the new. Hence in August, 1939, the Imperial Parliament can be found legislating for Australia and New Zealand in an ordinary statute just as in the old days of Empire. The Emergency Powers (Defence) Act of that year [10] contained a clause designed to give Australian and New Zealand laws extraterritorial operation for certain purposes, and it was not felt necessary to declare that this had been done at the request of those Dominions. Moreover, the fact that Newfoundland is ranked as a Dominion under the Statute of Westminster shows that the title "Dominion" by itself gives no special international status, for Newfoundland was never a member of the League of Nations, had no ministers abroad, and could scarcely be considered a separate person in the international world. She soon lost what little autonomy she had, for in 1933 an Imperial Statute, passed with the consent of her legislature, put an end to her self-government and reduced her once again to the position of a Crown Colony. She is still a "Dominion" in name, however, so that she provides a clear example of the uselessness of this title as descriptive of a self-governing community.

It is what has been done by most of the Dominions since the Statute of Westminster, particularly under the stress of the present war, that has freed them so fully from former shackles as to make the term "Dominion status" now inappropriate for general use. South Africa and Ireland led the others in ridding themselves of the subordination implicit in the rank of Dominion, and established for themselves the doctrine of complete national independence. South Africa in 1934 took the imaginative step of re-enacting the Statute of Westminster in the Union Parliament so as to make it a South African statute as well as an Imperial one. In addition she changed the law relating to the functions of the Governor-General so as to make it possible for the Royal assent to be given in South Africa to every kind of state act.[11] No further reference to Westminster need be made under these laws

[10] *1939 Statutes (Imperial), cap.* 62, sec. 5.

[11] See the *Status of the Union Act* and the *Royal Executive Functions and Seals Act, Statutes of South Africa, 1934,* Nos. 69–70.

for anything the South Africans wish to do as regards their internal or external affairs and the status of South Africa as a "sovereign independent state" (not Dominion) was openly proclaimed.[12] Ireland went even further to eliminate the symbols of a colonial past from her constitution. The Statute of Westminster had freed her from any restrictions imposed by the Treaty with Britain of 1921. In 1931 she acquired a Great Seal for her own use on international documents, and in the new constitution of 1937 not only did she proclaim herself a sovereign and independent state but changes were made by which the Crown was entirely removed from the internal government and constitution of the country. Only in external affairs does she still use the Crown for certain purposes such as diplomatic appointments and international agreements. Both South Africa and Ireland also adopted their own flag. Yet neither, it must be pointed out, seceded from the British Commonwealth and both continued quite properly to be classed as nations that were in some degree "freely associated" with the other states in the Commonwealth group. What they did was to take steps *in their own Parliaments* to convert equality of status into equality of sovereignty and to establish the principle that constitutional authority in their countries no longer derived in any way from the former Imperial source but from their own people (or—in Ireland—from God). They decided to "sever their law from the Imperial root." [13]

Canada, Australia, and New Zealand, on the other hand, did not develop the theory of equality so dramatically or so extensively after 1931. None of them adopted a new national flag. In each the constitution remained as before, an Imperial statute, and no attempt was made to base it on the national law. Since Australia and New Zealand did not adopt the Statute of Westminster it was highly doubtful whether they even had the power possessed by all self-governing states to make laws with extra-territorial effect; hence the need for supplementary Imperial legislation in 1939. Canada suffered an actual loss of capacity to fulfil international obligations in 1937 when the British Privy Council, Canada's final court of Appeal, ruled that purely Canadian treaties made by the Canadian executive did not come as completely within the jurisdiction of the Canadian Parliament as treaties made by the Imperial executive on behalf of the whole Empire [14] —thus making it much more difficult for her to utilize some of the "status" acquired since 1919.

During the visit of the King and Queen to Canada in 1939 much emphasis was placed on the fact that the King sat in the Canadian Parliament and gave his assent to nine bills personally instead of through his representative,

[12] In the preamble to the *Status of the Union Act.*

[13] The phrase is borrowed from R. T. E. Latham's chapter on "The Law and the Commonwealth," in Hancock, Survey of British Commonwealth Affairs, Vol. I, at p. 526.

[14] See *A. G. for Canada* v. *A. G. for Ontario*, 1937 Appeal Cases, 326, and comments thereon in the Canadian Bar Review, June 1937.

the Governor-General. This symbolism, from one point of view, suggested the Canadianization of the Crown, if the term may be used. It exemplified the declaration already made, in the Imperial Conference of 1926, that the representative of the Crown in a Dominion holds "in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain." On the other hand, the presence of a British King in Canada symbolized that Canada was "British" and part of a single political entity. Earlier in the same session of Parliament which enjoyed the Royal presence Mr. MacKenzie King had refused to accept a Bill introduced by Mr. Thorson designed to clear up the great confusion regarding Canada's right to neutrality,[15] and Mr. Lapointe, the Minister of Justice, had outlined the various reasons why Canada did not have the legal power to be neutral in a war involving Great Britain. These two events were as much evidence of dependency as the royal presence was of sovereignty. Of more practical use in establishing full freedom of action by Canada was the adoption of a new Seals Act, giving Ottawa increased control over the various seals to be used on royal instruments. But, unlike the South African Act which it resembles in many respects, the Canadian Seals Act has no provision for using the Governor General's signature in an emergency in lieu of the Royal signature, and is thus incomplete.[16]

A crucial test of the theory of equality of status in the British Commonwealth was bound to turn on the right of the Dominions to separate action in time of war. Only if they had the same power as Great Britain to decide whether or not they would enter a war could it be said they were in any real sense her equals in international status. Ever since their territories had become part of the British Empire they had followed the parent state automatically in and out of wars. While the right of colonies to decide the extent of contribution in men and materials was well accepted before 1931, there was no colonial control whatever over (1) Imperial policy which led to war or (2) the declaration of war which resulted in the legal commitment to the status of belligerent. The obligations and the law of Empire included unity in face of Britain's enemies, and the colonies did not select the enemies.

The question was academically debated in the 1930's whether "Dominion status" in this regard was changed by the Statute of Westminster. Responsible leaders in Ireland and South Africa could produce good reasons for saying that their countries possessed the sovereign power of neutrality. The Irish constitution, like that of the United States, requires the consent of the legislature to a declaration of war and the South African legislation of 1934 stood as proof of nationhood, though the issue was complicated by the agree-

[15] Text of the Bill is in F. H. Soward and others, Canada in World Affairs: The Pre-War Years, p. 286.

[16] *Statutes of Canada, 1939, cap.* 22. Text and comment is in F. H. Soward, *op. cit.*, pp. 257, 329.

ment to allow the British fleet the use of Simonstown. Hence when Ireland decided to remain neutral in September 1939 the position—though not the policy—was accepted on all sides, and no one felt that secession from the Commonwealth had occurred. So, too, it is probable that South Africa's neutrality would have been equally respected if Premier Hertzog's policy to that effect had not been defeated in the Union Parliament. South Africa issued her own separate declaration of war on September 6, and thus became the first British Dominion to exercise this new right.

Equally strong reasons pointed to the absence of the right to neutrality in Australia and New Zealand. They had not adopted the Statute of Westminster, and had never made an attempt either by domestic or international action to assert the right. Both these Dominions were so sure of their determination to stand beside Britain under any circumstances that they were indifferent to the element of subordination implicit in their position. Hence it is not surprising that on September 3, 1939, when Britain declared war on Germany, Mr. Menzies said to the people of Australia "it is my melancholy duty to announce officially that in consequence of Germany's persistence in her invasion of Poland, Britain has declared war and as a result Australia is at war also." [17] Australia was at war "as a result" of Britain's and not her own declaration. The same was true of New Zealand.[18] Neither country had a representative in Berlin. Unable to notify her enemy directly of the fact that she intended to make war, New Zealand requested the British Government to "take any steps that may be necessary to indicate to the German Government that His Majesty's Government in New Zealand associate themselves in this matter with the action taken by His Majesty's Government in the United Kingdom." South Africa and Ireland were the only Dominions which had direct representation in Berlin in 1939.

In Canada, too, the prevailing opinion at the outbreak of the war was that no neutrality was possible.[19] This was the expressed opinion of Mr. Ernest Lapointe, then Minister of Justice,[20] and a number of steps taken by the Canadian Cabinet between September 3 and September 10 (the respective dates of Great Britain's and Canada's declarations of war), such as the arrest of German nationals [21] and the prohibition of trade with

[17] "Constitutional authorities in Australia have on the whole considered that when the King is at war all his dominions are at war. There was, therefore, no declaration of war by Australia on Germany." Round Table, December 1939, p. 191.

[18] See Robert B. Stewart, "The British Commonwealth Goes to War," in The American Foreign Service Journal, Vol. 16, No. 12, December 1939, p. 645 ff. A New Zealand writer has however taken the view that his country declared war herself (F. L. W. Wood, New Zealand in Crisis, 1939, p. 30) but this seems untenable.

[19] See authorities listed in the present writer's Canada Today, 2nd ed., 1939, p. 131, n. 1.

[20] Speech of March 31, 1939, in *House of Commons Debates* for that date; the relevant portions are cited in F. H. Soward, *op. cit.*, pp. 300 ff.

[21] This action was protested in the local press by the German consul in Montreal, thus

the "enemy," clearly implied an automatic belligerency. Indeed the decision to issue a separate declaration of war was an afterthought in Canada; it was reached by Mr. King and his Cabinet some time after Parliament met on September 7, which was a week after the government had begun to take steps to put Canada on an active war footing. Pressure outside the Cabinet (particularly from the Imperialist group);[22] President Roosevelt's exception of Canada from the application of the Neutrality Act and the element of confusion regarding the exact legal position of Canada made it necessary to take seriously the constitutional issues which for so long had been treated by certain Canadians as "academic." A formal declaration of war alone could clarify the situation. This was issued separately for Canada by the Governor-General, after telegraphic approval had been given by the King in London, and a state of war with Germany was proclaimed as from 10 September, —not as from 3 September, the date of Britain's declaration. By this time Sir Neville Henderson, the British Ambassador to Germany, had of course left Berlin.

Thus September, 1939, revealed two things about the constitution of the Commonwealth. It showed that Dominion status was a term still applied to some Dominions which could be made belligerents by the mere action of the British government, in which they had no representation. This was the surviving colonialism. But it showed also that Dominion action could end and in some cases had ended, that situation. Ireland emerged with full recognition as an independent state. An Irish chargé d'affaires, with credentials standing in the name of George VI, continues in Berlin, and the German minister to Ireland has remained at his post throughout the war. South Africa also, it can scarcely be doubted, was making her own decision when she chose to declare her belligerency on September 6, and was not merely deciding the degree of her participation. In Canada, belligerency on September 3 was automatically accepted by most people, and apparently at first by the government (notwithstanding Mr. King's later speeches to the effect that Canada entered the war without prior commitment); but the separate declaration of war one week later was a new constitutional claim which announced to the world that the right of sovereign choice on this point was henceforth being assumed by the Canadian Government. In Australia and New Zealand there was obviously an acceptance of the fact of automatic belligerent status resulting from the British declaration. India clearly had no independent choice in the matter.

Hence Mr. Roosevelt's careful distinction between various parts of the

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indicating his assumption that Canada was not automatically at war. A similar attitude appears to have been taken by the Consul-General in Ottawa: see F. H. Soward, *op. cit.*, p. 256.

[22] See E. P. Dean, "Canada at War", in Foreign Affairs, January 1940, at p. 297; Round Table, December 1939, at p. 177. The Imperialists wanted the Declaration so as to commit Canada irrevocably: its effect was to show the disappearance of the old legal commitment.

Commonwealth in his application of the Neutrality Act on September 5, 1939, was based on a sound knowledge of intra-imperial relations. The proclamation invoking the Act, as originally drafted for signature, treated the Commonwealth as a unit, for it referred generally to "The United Kingdom, the British Dominions beyond the seas, and India." All the Dominions were grouped together irrespective of their stand on the war or their constitutional position. This first draft assumed the legal unity of the Commonwealth and the indivisibility of status during war. The President with his own hand changed the proclamation to read "The United Kingdom, India, Australia, and New Zealand." He took care to name individually the countries to which the Act was to apply, and to leave out Ireland, South Africa, and Canada pending their separate decisions. The Neutrality Act was not in fact applied to South Africa till September 8th and to Canada till September 10th. Thus was international recognition given to the exercise of full independence in foreign policy by the Dominions who had asserted the claim to freedom of choice. In respect of Canada the President's attitude was more nationalist than that of the majority of Canadians, but it greatly assisted the taking of a positive stand on the issue.

Since September 1939 the practice of separate Dominion declarations of war has become more general. In most cases these have been timed to coincide very closely if not exactly with a British declaration of war, but this would be expected as part of a joint war strategy. Canada's declaration of war with Japan, however, dates from December 7, 1941, one day before either Britain or the United States declared war. Australia and New Zealand declared war on Japan on December 9, the Australian declaration being made retroactive to 5 p.m. on December 8 and the New Zealand declaration retroactive to 11 a.m. on December 8th. In this instance Australia made the "striking constitutional innovation" of declaring war herself after specific authorization from His Majesty,[23] thus bringing herself into line with Canadian and South African practice for the first time. Ireland has persevered in her neutrality throughout the new conflicts. These and other instances would seem clearly to establish that the power to make war and peace is now vested in the Dominions as fully as in any independent nations. For Canada the original purpose of the Thorson bill, which Mr. King would not accept when introduced into the Canadian Parliament in 1939, appears to have been achieved. Since Canada, South Africa, Australia, and Ireland have all exercised the right of defining their enemies, and since other nations have taken cognizance of the practice the legal power can no longer be denied to any Dominion. The common citizenship has not interfered with this freedom of choice. It is noteworthy, also, that Australia, New Zealand, and Canada have increased their diplomatic services since the war began. Canada has not only sent five new High Commissioners and six new Ministers abroad but has begun the establishment of Consulates, as in Greenland,

[23] Round Table, March, 1942, pp. 337–338.

St. Pierre-Miquelon, and New York; she has also raised her Legation in Washington to the status of an Embassy.

With regard to several of the Dominions there undoubtedly still remain relics of Imperial sovereignty. New Zealand is still bound by Imperial legislation extending to herself since, until she adopts the Statute of Westminster, the Colonial Laws Validity Act of 1865 remains part of her law; and her power of extra-territorial legislation is dubious. Canada is freer, being able to legislate extra-territorially and to repeal or amend all Imperial laws affecting her except the British North America Act, which is her Constitution. Nevertheless Canada still must use the Imperial Parliament for the process of Constitutional amendment, and she still allows appeals in non-criminal matters to go to the Privy Council in London for final settlement.[24] Such remaining traces of colonialism, however, are now of minor importance in comparison with the international status evidenced by the declarations of war and by the whole range of independent action in international as well as domestic affairs. Except for New Zealand's failure to adopt the Statute of Westminster, they are negligible reminders of a past status, and are fully governed by the understanding that they will be removed whenever the Dominions desire to do away with them. It will also be conceded that New Zealand in practice is on an equal footing with the other independent nations of the Commonwealth. In so far as Canada resorts to the Imperial Parliament for amendments to her Constitution she is merely using an external authority as a rubber stamp to validate the changes which Ottawa has previously adopted by resolution of both Houses of Parliament.[25] For various political, sentimental and historical reasons, Canada, Australia, and New Zealand prefer for the time being to leave a small part of their machinery of government in Great Britain, just as they leave their King overseas. With the right to independent action in war and peace made clear, this symbolic remnant has ceased to indicate a diminution of statehood.

It thus appears correct to say that this war has brought to completion the evolution, well under way before September, 1939, of independent national status for the Dominions. The terms "Dominion," and "Dominion status," are obsolete as descriptions of inter-Commonwealth relationships, however much they may linger in the language of the law. New Zealand alone has the word "Dominion" as part of her official name; Australia is a Commonwealth, South Africa a Union, and Canada and Ireland are without supplementary title. If Dominion status ends, as it has, in national independence, the special terminology becomes merely confusing. South Africa's re-

[24] Canada's right to abolish the appeal has been upheld by the Supreme Court of Canada (*1940 Canada Supreme Court Reports, 49*) but the case was not carried to the Privy Council itself and hence the issue is undecided.

[25] Wheare, *op. cit.*, p. 303 says: "The legal inequalities (remaining since the Statute of Westminster) were in the nature of voluntary restrictions imposed by the Dominions themselves upon the legislative competence of their Parliaments in much the same way as any community may choose to limit the powers of its legislature in its Constitution."

assertion of her international status as "an independent State," a phrase used by her in the Conciliation Treaty made with the United States and signed at Washington on April 2, 1940,[26] is further evidence of the change that has occurred, but ceases to mark her as being on a different footing from any of the other nations associated in the Commonwealth. All the Dominions (except Newfoundland) are independent states. The common kingship within the British group today establishes a form of personal union, the members of which are legally capable of following different international policies even in time of war. The relationship of England to Hanover after the accession of George I was very similar, though the analogy is not perfect since some of the Dominions, as already pointed out, have traces left of a closer relationship with Great Britain. The Commonwealth is thus no longer a group of subordinate minor powers under the sovereignty of one independent nation, but a group of six independent nations, of varying size, associated together for certain purposes and policies which any one may abandon at will but which most of them have chosen to keep parallel rather than divergent in major crises. The "sister kingdom" theory first suggested by the Canadian delegates to the London Conference in 1866,[27] has prevailed. Empire, in the true sense, exists in Great Britain only as regards India, Newfoundland, and the Colonies under her jurisdiction; it is already dissolved for the rest. The relationship between the independent states associated through the Commonwealth is not Imperial in form but international. Even the common citizenship does not compel uniformity of international action since most of the member states make a distinction in law between their own nationals and those from other parts of the Commonwealth. Irish law does not recognize the common nationality within its territory. The quality of British subject now confers no right of free movement within the Commonwealth; no exemption from deportation proceedings; no inalienable right of appeal; no right to vote; no obligation to bear arms unless his own state is at war. It does, however, provide a basis on which the member states can erect their own system of rights, and it entitles the bearer to the protection of the diplomatic representatives of the Crown wherever he may be.

CONCLUSIONS

This analysis of the present relations between the members of the British Commonwealth leads therefore to the following conclusions:

1. Dominion status, in all save minor detail, has evolved into complete national independence. As a term descriptive of the states members of the Commonwealth, the word "Dominion" is therefore obsolete and confusing.

[26] The text is in S. S. Jones and D. P. Myers, Documents on American Foreign Relations, Vol. III, 1940–1941, Boston, 1941, p. 387.

[27] See F. R. Scott, "Political Nationalism and Confederation," in Canadian Journal of Economics and Political Science, August 1942, p. 386, at 390–396.

It has never been applicable to Great Britain. It should be abandoned and Section 1 of the Statute of Westminster ought to be amended accordingly.

2. The "British Commonwealth of Nations" is not a state. It has no single personality either in international or municipal law and no single government capable of acting for the whole.[28] The name is merely a convenient way of referring to a particular association of nations—Great Britain, Canada, Ireland, South Africa, Australia, and New Zealand, and their respective dependencies. It belongs rather to the category of collective names as "the Pan-American Union" or the "The United Nations." The term "British Empire" should be restricted to Great Britain and her empire (India, the Colonies and Protectorates) in which case it refers to a specific entity in international law.

3. The independent nations in the Commonwealth are still "associated" together by reason of their use of the common Crown for certain purposes, by their retention of an underlying common nationality, and by a number of generally accepted modes of behaviour *vis-à-vis* one another. A nation outside the Commonwealth is no more independent than one inside, though it is free from the results of this association.

4. Since Dominion status has been transformed into national status any offer of "Dominion status" to a non-self-governing part of the Commonwealth (such as India) is impliedly an offer of complete independence of action. There is nothing now withheld in such a grant. The acceptance of the status would, however, imply a continued association with the other members of the Commonwealth, but only on terms defined by the member itself and terminable at its sole discretion.

5. The use of the common Crown is not an essential condition of membership in the Commonwealth. Ireland has abolished it as a part of her internal constitution. A republic could be associated with other monarchies if such were the agreement. The use of the Crown as a symbol of association does not restrict the freedom of action of the nation states within the Commonwealth, though it does sometimes confuse the citizens with regard to their primary allegiance.

6. The oath of allegiance of public officers in each of the member nations is an oath to the Crown in relation to and as part of the constitution of that nation. It is not an oath to the Crown generally and in every aspect. Hence it is not a violation of the oath of allegiance to urge the Crown to adopt any particular policy (*e.g.* belligerency or neutrality) *vis-à-vis* the nation of which the proponent is a citizen, even if the Crown adopts the opposite policy elsewhere. Treason can only be committed against the national crown.[29]

[28] See P. E. Corbett, "The Status of the British Commonwealth in International Law," in University of Toronto Law Journal, Vol.III, 1940, 348, 359.

[29] This point arose in Quebec in September 1939. A member of the Quebec Bar opposed Canada's participation in the war, and was accused by a Chief Justice of having violated

7. The practice of excluding members of the Commonwealth from the application of the most-favoured-nation clause in commercial treaties, originally justified on the ground that the members were not separate states, can no longer be so justified.

8. Any member of the Commonwealth may make whatever treaties, alliances, or unions it desires with any other non-British state. The offer by Great Britain of complete union with France in 1940 is an example of the freedom possessed by the individual members. There was no previous Commonwealth agreement on this action, no assent from the other members of the group. The union would not on this account have been illegal in any respect. Similarly, Canada's Joint Defence agreement with the United States of August, 1940, required no Commonwealth approval. Members of the Commonwealth, however, are by agreements of Imperial Conferences expected to inform one another of negotiations likely to be of mutual interest.

9. The High Commissioners representing the various members of the Commonwealth *vis-à-vis* each other should belong to the category of the diplomatic corps, and it would be logical to accord them this status. At present their rank is inferior to that of the ambassadors of the smallest states.[30]

10. Full independence of action, in war as in peace, is possessed by all members of the Commonwealth. The common underlying citizenship is no legal obstacle to partial belligerency in the Commonwealth group.

11. If all or some of the nations of the Commonwealth join any future world association of states it would be improper for them to refuse to apply the rules of that association to themselves in their relations with one another. Any claims to special right for the group or any reservations of Inter-Commonwealth disputes from the purview of the World Court would violate the general principle that all states should be equally subject to international law.

12. The British Commonwealth, being an association of states *sui generis*, offers to the world no model of international organisation. It is not a type on which a League of Nations can be built. It has been steadily applying to itself over the past century the principle of national sovereignty, which, if a new league or union of nations is to be established, must be reduced rather than extended. Its surviving unity is a remnant of a much greater unity and not the result of an effort toward a new and closer association. It has none of the common organs of government which a world society would

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his oath of allegiance by so doing—an accusation clearly unfounded unless Canada was still a dependent colony.

[30] This conclusion supports the opinion vainly urged by the Canadian Government at the time of the appointment of the first Canadian High Commissioner to London in 1880. See the correspondence in W. P. M. Kennedy, Status, Treaties and Documents of the Canadian Constitution, 2nd ed., Boston, 1930, at p. 676.

need, though it offers many examples of purely voluntary coöperation based on sympathy, tradition, and consent.

13. It would seem improper, at the peace conference which will follow this war, for the British nations to claim the same dual representation they possessed at Versailles in 1919, when, in addition to their representation as separate states, they also were granted representation on the British Empire panel. Each should be represented by its own plenipotentiaries on the same basis as all other states.

THE STATUS OF THE UNITED STATES FORCES IN ENGLISH LAW

By Egon Schwelb

It is proposed to deal in this article with the English law concerning the legal status of the United States forces present in the territory of the United Kingdom of Great Britain and Northern Ireland during the present war. The history of, and the controversies regarding, the legal position of friendly armed forces on foreign territory in international law remain outside of the scope of the present survey, which is devoted to the municipal aspect of the matter.[1] In order, however, to give a picture of the whole body of English law applicable to the American forces we shall include a few remarks on the development of the question in English municipal and British imperial law, and it will also be necessary to compare the provisions concerning the United States forces with those regulating the status of the other allied and associated forces at present stationed in the British Isles, as well as with the provisions regarding visiting Dominion troops. As will be seen later there has been a certain amount of interdependence between international and inter-imperial relations with regard to the legal problem with which we are concerned.

I. The Sources of English Law on the Subject

During the World War of 1914–1918 the legal position of allied troops present in the United Kingdom was regulated by Orders in Council made under the Defence of the Realm Acts. By Order in Council of March 22, 1918, Regulation 45F of the Defence of the Realm Regulations was issued and by Order in Council of June 25, 1918, it was amended.[2] In the first paragraph of this Regulation it was declared that, subject to any general or special agreement, the naval and military authorities and courts of an Ally may exercise in relation to the members of any force of that Ally who may for the time being be in the United Kingdom all such powers as are conferred on them by the law of that Ally. The Regulation contained detailed provisions

[1] See Colonel Archibald King, "Jurisdiction over Friendly Foreign Armed Forces," this Journal, Vol. 36 (1942), p. 539, *et seq.;* Professor Arthur L. Goodhart, "The Legal Aspect of the American Forces in Great Britain," American Bar Association Journal, November 1942, pp. 762–765; Dr. Roman Kuratowski, "International Law and the Naval, Military, and Air Force Courts of Foreign Governments in the United Kingdom," Transactions of the Grotius Society, Vol. XXVIII (1942), p. 1, *et seq.;* the present writer's, "The Jurisdiction over the Members of the Allied Forces in Great Britain," Czechoslovak Yearbook of International Law, London, 1942, p. 147, *et seq.*, and, for the War of 1914–1918, Aline Chalufour, *Le Statut Juridique des Troupes Alliés pendant la Guerre, 1914–1918.*

[2] S. R. & O., Nos. 367, 765; see "The Defence of the Realm Regulations Consolidated," being Part II of the Defence of the Realm Manual, 7th Edition, Revised to March 31, 1919.