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The Commonwealth and the Oath of Allegiance Crisis: A Study in Inter-War Commonwealth Relations

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ABSTRACT

Recent historical treatment of Anglo-Irish relations in the 1930s has overlooked the complex nature of the legal disagreements between the two countries during that period. This article provides an account of some of the fundamental points of legal disagreement between the countries. It explains how differences of opinion as to the structure of intra-commonwealth constitutional relations led to conflict between the British government and that of the Irish Free State, with particular reference to the oath of allegiance crisis. It considers how other commonwealth countries saw these points of conflict. It concludes with a re-appraisal of the roles of Lord Hailsham and de Valera in Anglo-Irish relations, as examples of differing attitudes towards the commonwealth relationship.

KEYWORDS

British policy; dominion;
United Kingdom; Ireland;
commonwealth

Introduction

In 1932, the newly elected Fianna Fáil Government indicated its intention to abolish the oath of allegiance contained in the 1922 Constitution of the Irish Free State. This oath contained a guarantee of faithfulness to King George V and was the result of an agreement between Irish and British negotiators at the end of the Irish War of Independence.¹ As a result of the international nature of the agreement, controversy erupted between the Irish Free State and British governments. Both countries were members of the British Commonwealth of Nations, and the same agreement had provided that Ireland would have the ‘same constitutional status’ as the other dominions of the commonwealth. Therefore, any limitation on the freedom of action of the Free State could be construed as a limitation on the other members of the commonwealth. It was, in the words of a commentator to the *South African Law Journal*, who wrote under the *nom de plume* of ‘The Justice of the Peace’, a ‘constitutional matter of first-class importance’.² Yet, the constitutional elements of the controversy have often been overlooked in deference to the consideration of the

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protagonists in the dispute. This is unfortunate, as without a clear understanding of the development of the commonwealth constitution it is difficult, if not impossible, to clearly evaluate the actions of these protagonists.

This article therefore describes the fundamental points of legal disagreement which underpinned the 1932 controversy. It then examines the political considerations influencing each of the major actors in 1932. It considers the manner in which the commonwealth constrained action in the Anglo-Irish dispute. It concludes with an assessment of two key individuals in the controversy: Éamon de Valera and Lord Hailsham.

I

The dispute between the Irish and British governments concerned the same subject matter, but there were three legal dimensions to the dispute: municipal, commonwealth and international. In each of these dimensions, the Irish and British sides relied on different legal theories. In order to understand the motives of the different actors in the dispute, therefore, we first have to detail these elements. We can then assess the historical actions of the protagonists in the conflict accurately.

Municipal Dimension

In order to understand the municipal dimension of the conflict in 1932, one must understand that the Irish and British governments had different views about the internal law of the Irish Free State. This difference may be traced back to a disagreement between the sides as to what was agreed between the Irish and British negotiators in 1921 to bring an end to the Irish War of Independence: was it a treaty or an agreement? The Irish side took the view that what was agreed was a treaty between Ireland as a sovereign nation and the United Kingdom to regulate their future affairs. In Ireland, therefore, the 1921 document was described as the ‘Anglo-Irish Treaty’. However, this interpretation was never agreed by the British negotiating team.

In the exchange of letters that led to the talks, Lloyd George made clear that any claim that the Irish side negotiated on behalf of an independent entity was unacceptable as it might seem to suggest a break in the authority of the UK over Ireland.³ Thus, the British negotiating team took the view that what was agreed was not a treaty; it was an inter-governmental agreement. Jones notes that the British government took the view that such agreements between dominions and Great Britain were not the subject of international law.⁴ Thus, the appellation which was attached to the document signed by the negotiators was merely ‘Articles of Agreement for a Treaty’. This was not of merely academic interest, it had concrete legal repercussions in the aftermath of the agreement.

Two questions arose in the aftermath of the negotiations: (1) what was to be the content of the constitution of the Irish Free State, and (2) how was the constitution

to be enacted? The answers to both questions were to have important constitutional ramifications in the Anglo-Irish disputes in the 1920s and 1930s. The first question is the easier one to answer: the constitution was drafted in Dublin, then sent to London for British approval and finally subject to amendment in Dáil Éireann. In Ireland, however, the clauses that were negotiated with the British side were protected from amendment by the government party.⁵

The second element is more complex, and has been the subject of some confusion on both the Irish and British sides.⁶ From the point of view of the Irish State, the constitution was passed by the 3rd Dáil sitting as a constituent assembly, which was given the royal assent on 12 December 1922. This legal basis is enshrined in the Irish Act entitled 'Constitution of the Irish Free State (Saorstát Éireann) Act, 1922' (hereinafter called the 'Irish Constituent Act').

From the point of view of the British state, however, the legislation which gave the force of law to the 1922 Constitution was a Westminster Act. This act was entitled the Irish Free State Constitution Act 1922.⁷ (This act will be referred to as the 'British Constituent Act'.) Thomas Mohr has recently published an article that comprehensively details the different constitutional laws that existed in relation to the establishment of the Irish Free State.⁸ For present purposes, it suffices to note that there were significant differences between the Irish and British Constituent Acts. The British Constituent Act, for example, provided in section 4 a saving clause for the Westminster Parliament to legislate with respect to the Irish Free State.⁹ However, both acts include the text of the 1922 Constitution in a schedule which was made subject, by the parent constituent Act, to the 1921 agreement.

Commonwealth Dimension

The position of the Irish Free State within the commonwealth was guaranteed by Article 1 of the Articles of Agreement, which provided that 'Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa'.¹⁰ Moreover, Article 2 of the Articles of Agreement stipulated that the relationship between the Free State and Westminster would be that of 'the law, practice and constitutional usage governing the relationship of the Crown ... to the Dominion of Canada'. Again, there were two ways of interpreting this provision. From the Irish point of view, any developments in commonwealth relations would *ipso facto* apply to the relationship between the Free State and Westminster. However, an alternative view held by some, but not all, British officials was that the treaty set the relationship as it stood in 1921 and no further. As we shall see, Douglas Hailsham held this view.

This was obviously of immense importance, not least because in a succession of imperial conferences in the 1920s, the *de facto* independence of the dominions

was recognised. The most obvious point of departure is the Balfour declaration in 1926, which recognised the equality of status of the members of the commonwealth such that they were 'in no way subordinate one to another in any aspect of their domestic or external affairs'.¹¹ Subsequent developments in imperial conferences were intended to ensure that no interference with the domestic affairs of the state was possible, e.g. the role of the governor-generals was clarified to note that they could act only on the advice of the ministers in the dominion concerned, rather than on the advice of ministers in Westminster.¹² The 1929 Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, however, noted that any projected legislation by one part of the commonwealth which would affect other parts should be based on 'previous consultation between His Majesty's Ministers in the several parts concerned'.¹³

The differing constitutional views further diverged with the passage of the Statute of Westminster in London in 1931. This act provided, *inter alia*, that dominions could repeal an act of the imperial parliament insofar as it operated in that dominion.¹⁴ According to Irish civil servants, this act was merely a recognition of the constitutional position that the Irish Free State had already achieved. It granted no further power.¹⁵ However, according to British legal understanding, it did grant further power to the dominion parliaments. Moreover, it contained a very wide power under the British view of the foundation of the Irish Free State. If the 1922 Constitution relied on a British statute for its validity, then the 1931 Statute of Westminster provided the Irish Free State legislature with the power to repeal any or all of that British statute under section 2.

The International Law Dimension

In 1923, the Irish Free State first began to consider the possibility of registering the Anglo-Irish Treaty with the League of Nations, although it was ultimately not registered until 1924.¹⁶ The importance of this point was as follows: the registration of the treaty meant that any breach of the treaty by either side was justiciable under international law. However, the British government was not prepared to allow the treaty to be registered in such a matter and entered a protest that 'relations of the British Members of the League of Nations *inter se* are essentially different in character from those subsisting between other states Members of the League of Nations'.¹⁷ The *inter se* doctrine refers to the fact that, under British theory, the king was head of each commonwealth member as the same person, and could therefore not conclude a treaty with himself. Therefore, the Articles of Agreement could not be registered as a treaty.¹⁸ The implications of the British view were profound. On their view, no international law obligations could arise between the Irish Free State and British governments. British officials came to rue this misstep, the attorney general, Sir William Jowitt, confessed his 'amazement' to the Irish minister for external affairs in 1930: '[Jowitt] himself would have welcomed the registration,

which would have made it necessary to register every successive advance in Dominion freedom.’¹⁹

The international law dimension was further complicated by the acceptance of the Optional Clause of the Covenant of the League of Nations in 1929.²⁰ This clause provided for the determination of disputes ‘as to the interpretation of a treaty’ by the Permanent Court of International Justice. Interestingly, both the Free State and the United Kingdom signed up to the optional clause, but they did so in very different ways. The Free State accepted the jurisdiction of the court ‘ipso facto and without special convention’. In contrast, the British accession specifically exempted ‘[d]isputes with the Government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree’.²¹ The British government was concerned to protect the efficacy of the *inter se* doctrine and preferred to put its faith in a commonwealth tribunal as discussed at the 1930 Imperial Conference.²²

Summary of the Legal Considerations

The result of these disagreements was that there were essentially two parallel sets of answers to any of the key constitutional questions which were to arise in 1932. The British believed that that what was agreed between Irish and British representatives in 1921 was an agreement between the different governments and not a treaty, that the Free State constitution existed by virtue of the British Constituent Act, and that the relationship between the Free State and British governments was governed by commonwealth constitutional, and not international, law.

In contrast, the Irish side believed that a treaty had been agreed in 1921 which had been registered with the League of Nations, that international law therefore governed the relationship between the parties, that the Free State constitution existed by virtue of the Irish Constituent Act, and that commonwealth law now recognised the internal sovereignty of the individual members of the commonwealth.

It is against this complex backdrop that we must assess the events of 1932.

II

The 1932 conflict was precipitated by the ascension of the Fianna Fáil party to office in the Irish Free State. They were bitterly opposed to the Articles of Agreement and had fought a civil war in an attempt to prevent its acceptance in the Free State. Fianna Fáil proposed, however, not to overturn the Articles of Agreement themselves, but to delete the oath of allegiance contained therein from the constitution. Their argument on this point was multi-faceted, but may be analysed through the lens of the three tiers outlined in the first section. At a municipal level, the Free State argued that they possessed the power under Article 50 of

the 1922 Constitution to amend that constitution unreservedly and proposed to do so. At a commonwealth level, they argued that the guarantees of the 1926, 1929 and 1930 conferences in relation to equal status meant that every dominion was free to regulate its internal affairs. At an international level, the Free State argued that the Articles of Agreement merely stipulated the form that the oath was to take, and did not stipulate that an oath was, in fact, to be taken. They were prepared to submit the interpretative case to the Permanent Court of International Justice for determination of this claim.

On the British side, the argument also proceeded on three levels. On the municipal level, the point was sometimes made that the 1922 Constitution was based on the condition precedent of the articles of agreement; an abrogation of the articles therefore called into question the legislative competence of the Free State. At a commonwealth level, the argument was that the matter was an *inter se* one which fell to the determination of a commonwealth tribunal. At an international law level, there was occasionally some reference made to the maxims of international law, but this was never completely explicated (nor could it be, given Britain's insistence that international law did not apply to *inter se* disputes).

These points will be considered in more depth in section three, but it should be noted at the outset the extent to which both sides were prepared to engage in sophistry of the highest kind in relation to the oath controversy. Both Irish and British governments were prepared to resile from positions that they had consistently held throughout the 1920s and did so in a manner which did no great credit to either side. The Irish side insisted on their complete freedom to amend the constitution on the basis that it was an internal matter for the state. This was in accord with commonwealth constitutional doctrine which emphasised that the members of the commonwealth were 'in no way subordinate one to another in any aspect of their domestic ... affairs'.²³ These tenets of commonwealth law were embodied in the Statute of Westminster in 1931. However, the Irish side in 1932 refused to recognise that it had international law obligations to the United Kingdom. Ireland had registered the 1921 agreement with the League of Nations on the basis that it was a treaty. Therefore, the Irish government should abide by the treaty, negotiate with the UK, or repudiate it. The Free State refused to do any of these things, which was a breach of its international law obligations under Irish legal theory. Moreover, a memorandum prepared by John Hearne, legal advisor to the Free State Department of External Affairs, in March 1932 specifically noted that the Free State would be in breach of its international law obligations if it proceeded unilaterally; this memorandum did not deter the Free State government from its course of action.²⁴

In contrast, the British government had spent the 1920s and early 1930s arguing that no treaty was in fact concluded. Moreover, the British government sought to rely in the 1932 dispute on the sanctity of agreements concluded

between two states. However, the failure to consider the 1926 Imperial Conference and its progeny as themselves agreements and capable of obviating previous constitutional practice undermines this point considerably. De Valera was to make consistent references to the 'equal status' of the members of the commonwealth. Was this not also based on agreement? Moreover, did this agreement not lead to the Statute of Westminster? Why, then, were the Articles of Agreement more sacrosanct than subsequent agreements?

In order to fully appreciate the dimensions of the oath controversy, however, we must also gauge the political considerations in play. The 1932 dispute was influenced by a number of different domestic political considerations and actors: the Irish and British governments and the civil service.

The Irish Government

Fianna Fáil campaigned in the general election on the manifesto that the oath of allegiance should be removed from the constitution. Fianna Fáil was a republican party that had determined to adopt the constitutional machinery of the state in order to achieve republican ends; it was, in the words of Sean Lemass, 'a slightly constitutional party'.²⁵ However, the position of the party in 1932 was precarious. It was a minority government which governed with the assent of the Labour party. The Free State was therefore in the hands of a government viscerally opposed to the imposition of the oath of allegiance, but it was not clear whether they had the political will to see through a conflict with the United Kingdom on the matter.

The British Government

The 1931 general election had returned the National Government to power, with a strong turnout for the Conservative party. However, Ramsay MacDonald remained prime minister in the government which followed. This meant that there were different ideological currents in the government of the United Kingdom in 1932. Notwithstanding, MacDonald and J. H. Thomas, secretary of state for dominion affairs, were advocates of a stronger empire so, in this area at least, no compromise between National Labour and Conservatives proved necessary. However, Paul Canning convincingly demonstrates that the position of the British government was susceptible to pressure from outside figures such as Winston Churchill; a weak negotiating stance risked a ferocious onslaught from a formidable polemicist.²⁶

From the point of view of the British government, it preferred to deal with the more reliable Cumann na nGaedheal party in the Free State than with Fianna Fáil. Viscount Sankey indicated that, while an immediate general election would be unlikely to result in a Cumann na nGaedheal majority, an election in November 1933 might.²⁷ It was therefore in the best interests of the British

government not to concede until the mettle of the Irish people in the face of economic tariffs on Irish agricultural produce could be ascertained.

The Civil Service

Relations between the civil services of the Free State and Great Britain had become strained as a result of the competing interpretations of the Articles of Agreement in the 1920s and 1930s. The locus of these disputes often centred on the issue of the abolition of the appeal to the Judicial Committee of the Privy Council. The Cumann na nGaedhael government was opposed to the retention of the appeal and sought to negotiate an agreement with the British government about abolition. It was ultimately frustrated in its aims due to a constrictive interpretation that British officials placed on the Articles of Agreement which sought to limit the status of the Free State to the position of Canada as it stood in 1921, and which did not take account of the development of dominion status in the interim. This led to a growing disenchantment of Irish civil servants with the prospect of negotiation and threats that, in the absence of consensus, the Free State was prepared to act unilaterally to abolish the appeal.²⁸

The end result of this was a deepening distrust of the British view of the agreement by the Irish side, and a growing conviction that there was no possibility of advancement on the basis of a mutually agreed approach to the Articles of Agreement. After all, if Britain failed to agree a common approach on the Privy Council, a matter which exercised a number of other dominions, with a relatively friendly government in Dublin, what chance did a republican government have of negotiating a settlement on the much more fundamental oath of allegiance? This distrust continued within the Department of External Affairs after the Cumann na nGaedhael government was removed from office and was to have repercussions in the 1932 conflict.

A meeting between John Hearne and Sir Harry Batterbee in London in July 1932 is illustrative. Hearne argued:

If those whose duty it was to carry out the directions of successive Governments had been able to say to President de Valera when he took office that the Privy Council had been regarded by the British Government as a Treaty issue just as the Oath was now so regarded by the British Government, but that the Privy Council issue had been settled by agreement without any difficulty whatever because of the wishes of the Irish people in the matter, what a difference might have been made. But what had been the position? The President had to be told ... that negotiations lasting over years had been a failure, and that an absurd interpretation of the Treaty was solemnly advanced over and over by successive British law officers to defeat the Privy Council policy of the Government and people of the Irish Free State.²⁹

In the course of those negotiations, Henry Bushe, legal advisor to the Dominions Office, had proposed a draft which would have nullified Jowitt's arguments, but only in terms which would have drawn the greatest protest from the Free State.

The exchange between Batterbee and Hearne ended with the concession of the legal power of the Free State to amend the agreement unilaterally:

Sir Harry Batterbee smiled and said: 'Anyway, in 1931 we had thought that you could have abolished the appeal on the basis of the Bushe draft.'

Mr. Hearne said that the hopes of Sir Harry would be realized soon even without the Bushe draft.

Sir Harry: 'Oh yes, of course, you now have the Statute of Westminster.'³⁰

The strong line which British governments had taken in relation to the appeal to the Judicial Committee of the Privy Council therefore obviated the realistic possibility of a negotiation in relation to the oath of allegiance; the Irish civil service had become convinced that no negotiation would be possible in relation to the Articles of Agreement.

In 1932, therefore, both Irish and British sides had equally practical reasons to pursue the course of action that ultimately ensued: the Irish to attempt to act unilaterally on the conviction that no compromise would be forthcoming on the issue through negotiation and the British because of the precariousness of de Valera's position in the parliament of the Free State. In order to fully appreciate the oath of allegiance controversy and subsequent Anglo-Irish affairs, however, we must also pay attention to the commonwealth dimension to the dispute.

III

The Free State's position within the commonwealth imposed a limit on the actions which the British government could pursue in its response to Irish provocation. Unfortunately, this element of the controversy has been overlooked in recent scholarship. Chris Cooper's reappraisal of the role of Lord Hailsham, secretary of state for war from 1931 to 1935 and lord chancellor from 1935 to 1938, does not consider the limitations that the commonwealth placed on the British government's ability to react. In fact, Cooper rarely adverts to any disagreements about the fundamental issues, and his analysis of the positions of the governments is limited to the British views in 1932. So, for example, Cooper consistently refers to the 'Treaty' or 'agreement' between the parties and does not clearly explain the difference between the two. The distinction between the two concepts, treaty and agreement, is important in understanding the oath controversy. Moreover, when Cooper refers to the agreements, his analysis is decidedly one-sided: '[t]he British were determined to uphold existing agreements; the Irish to smash them.'³¹ However, he does not examine why, if the 1921 agreement was an agreement, it was not superseded by the advances in dominion status in 1926, 1930 and 1931. Why were those 'agreements' not relevant to the determination of the dispute? If these had guaranteed complete internal sovereignty to the dominions, why did those agreements not bind the British government? His failure to consider the commonwealth dimension entails a

restrictive view of the conflict; ironically, this view sometimes fails to do justice to the complexity of Hailsham's thinking. In considering the role that the commonwealth was to play in the Anglo-Irish dispute, we will concentrate on three fundamental areas: the reaction of Canada to the oath of allegiance controversy, de Valera's missive in relation to secession in 1933 and the interpretation that the British government was to place on the Anglo-Irish Agreement.

Canada

The conflict between the Free State and Great Britain threatened to disrupt the equanimity of commonwealth relations. J. H. Thomas argued that 'the matter is one on which it is most important that we should have the support of Dominion opinion generally' and asked that representations be made in the various commonwealth capitals.³² However, despite telegrams from members of the commonwealth to Dublin urging a re-consideration of the Free State's policy, it was not possible to secure a concerted approach by the commonwealth to the oath issue. The reason for this was the reluctance of Canada to commit itself to intervene on the British side of the issue. Britain perceived the issue to be linked to the then-imminent Commonwealth Economic Conference in Ottawa; Canada would not intervene in an argument between London and Dublin before such a prestigious event.³³ However, the archives in Canada tell a different story.

The diaries of Oscar Skelton, under-secretary of the Department of External Affairs in Ottawa, provide an invaluable resource as they detail the meeting between Skelton and R. B. Bennett, premier of Canada, on the oath crisis.³⁴ Bennett was a loyalist member of the British Empire and was, before his ascension to the premiership, the corresponding secretary for the Alberta branch of the Royal Empire Society which listed its first object as: 'To promote the preservation of a permanent union between the Mother Country and all other parts of the Empire, and to maintain the power and best traditions of the Empire.'³⁵ J. H. Thomas regarded him as 'devoted to the Empire and all its traditions'.³⁶ An appeal to Bennett on a matter of imperial unity would be assured of consideration.

In fact, the Skelton diaries indicate that the appeal was to be further encouraged by two particularly weighty sources: Sir George Perley, minister without portfolio who was present in London, and King George V who made his views known in a private meeting with Perley at Buckingham Palace.³⁷ Perley advocated that Canada should fall into line with the other dominions in condemning the Irish move, particularly as a result of Canada's loyalty and Bennett's strong sentiments towards imperial unity. Skelton records that he felt Bennett would be swayed 'by the combined artillery of King George and Sir George, but no'. Bennett indicated that the dominions had not been involved in negotiating or signing the treaty, and it was therefore not their 'business to

enforce it or pull [that] chestnut out of [the] fire'. More interestingly, Bennett believed that the British should have known that the obligation would not have been kept and should therefore have made provisions accordingly.

Bennett was concerned with the question as to whether the removal of the oath provision would place the Irish Free State outside the commonwealth, but was informed by London officials that this was not the case, and there the matter dropped.

This episode demonstrates the difficult constitutional position that the British government found itself in. The 1926 Balfour declaration meant that dominions should be free to regulate their internal affairs. Even a believer in imperial unity such as Bennett was not persuaded that it was the business of the commonwealth to get involved in disputes to which they were not a party. Moreover, Bennett's lack of sympathy with the British position was informed by an understanding of the underlying political reality of the Irish situation—a party which fought a civil war against their erstwhile comrades in order to oppose an oath of allegiance was unlikely to abide by that agreement when in government. The British government appears not to have prepared itself for this eventuality, and its recalcitrance on constitutional issues when dealing with the Cumann na nGaedheal government in the 1920s and early 1930s simply fortified de Valera in his view that, as no agreement was going to prove possible on constitutional issues, it was simply better to proceed without seeking agreement.

This first episode demonstrated the difficulties that the British government had in rallying commonwealth opinion against the Free State. It was a consequence of the consensual method of commonwealth diplomacy that a lack of unanimity in the commonwealth ranks meant that the scope of action against a recalcitrant member was limited. Thus, if one other member of the commonwealth was not minded to sanction the errant member, the wishes of the remaining members were effectively stymied. Nicholas Mansergh notes that, in relation to the Anglo-Irish conflict of the 1930s, 'undesirable as it might be to have the Dominions in, it was hardly possible on matters of status to keep them out'.³⁸ De Valera was aware of this implication and sought to exploit it in the correspondence in relation to secession in 1933.

Secession

In 1933, de Valera asked the British government for a guarantee that force would not be used in the case of secession from the British commonwealth. Cooper's analysis of the issue again overlooks the commonwealth dimension. Cooper includes two quotations from Hailsham: one describes the difficulties that such a guarantee would mean for the Indian negotiations which were then under way, the second is Hailsham's belief that 'the reason why the Irish had not already dared to repudiate the Treaty was that they did not know whether they would be up against force or not'.³⁹ Cooper concludes: 'With the diehard

campaign against Indian constitutional reform underway, his reasoning carried the cabinet. Britain refused to give de Valera the assurance he craved, but the Irish leader ploughed on.⁴⁰

In fact, the question was considerably more complex than Cooper alludes to and it is not clear that de Valera 'craved' such an assurance. The matter was complicated as a result of the commonwealth and international dimensions to the question. The first of these was that de Valera was aware of the importance that General Hertzog in South Africa placed on the right to secede from the British commonwealth. Hertzog had announced his intention to secure a declaration of such a right in advance of the Commonwealth Conference of 1930. The point had been conceded by even loyal dominions such as Australia; James Scullin conceded the right in theory before the conference.⁴¹ Hertzog was ultimately unsuccessful in his aim in 1930, but any suggestion that force would be used by the UK to prevent secession would have threatened a rift between the UK and South Africa. Furthermore, the threat of the use of force would have been a breach of the international obligations of the United Kingdom, which had signed and ratified the Kellogg-Briand pact of 1929 by which it renounced the threat of force in its dealings with other countries. The Irish Free State was also a signatory to the pact. Therefore, the use of force in such circumstances would have placed the United Kingdom in breach of international law. So, if the United Kingdom indicated that force would be used, this would create difficulties in commonwealth relations and under international law.

Conversely, a declaration that force would not be used would have been a considerable diplomatic triumph for de Valera. It would have amounted to a rejection of Lloyd George's insistence that secession was not possible in the case of Ireland in 1921. It would also have amounted to a *de facto* recognition of a doctrine that was of some relevance to nationalists.

Therefore, from de Valera's point of view, while a response that force would *not* be used would be of some advantage, so would a response that force *would* be used. Cooper's formulation of the issue, however, does not admit of this complexity. Cooper's contention that de Valera 'craved' a positive response is overly simplistic. However, Hailsham was aware of these dimensions of the issue, and his comments at Cabinet and in the Irish Situation Committee (ISC) make this clear. The quotation that Cooper includes from Hailsham is immediately preceded by the following passage: 'If we replied in the affirmative he would embroil us with the Dominions: if we replied in the negative he would have an election and win it with a majority for a republic.'⁴² When Malcolm MacDonald re-introduced the issue for discussion before the ISC, Hailsham noted 'it would not be possible for us to wage war upon the Irish Free State in pursuance of some political object without breaking the Kellogg Pact'.⁴³

Cooper's interpretation of the issue is therefore lacking—Hailsham was aware that any answer would be to de Valera's advantage. Moreover, the one issue on

which Cooper chooses to focus, namely that it was the threat of force that kept de Valera in check, is plainly wrong as a matter of historical fact. De Valera wanted to remain within the commonwealth until at least such time as partition was abandoned, and it was the coalition party in 1948 which declared a republic, not de Valera. Cooper thus does a double disservice to Hailsham—he includes the single demonstrably incorrect idea and elides the more sophisticated analysis that Hailsham proposed. This does not mean, however, that Hailsham's thought was always sophisticated.

Commonwealth Development

In particular, Lord Hailsham's view of the right of appeal to the Judicial Committee of the Privy Council was mired in an outdated view of the nature of the commonwealth. Cooper quotes at length from the following argument by Hailsham:

the Treaty itself laid down that the constitutional position of the Irish Free State was the same as that of Canada at that date, i.e. 1921; and that it had been expressly decided with regard to the Dominion of Canada, in a series of cases, that the right of the citizens of Canada to appeal to the Privy Council ... was a right which could not be taken away ... without the express sanction of the Imperial parliament.

However, Cooper does not address three relevant points in relation to this quotation. First, the idea that the position of the Free State was frozen in 1921 was itself contentious. At the Imperial Conference of 1930, this line of reasoning had been advanced by J. H. Thomas and drawn a rebuke from Hugh Guthrie, Canadian minister for justice:

Mr. Thomas, you say that the Irish Free State can do in this manner what Canada can do. You say that Canada can get rid of [the appeal to the Judicial Committee of the Privy Council] if it wants. And your amazing conclusion is that the Irish Free State CAN'T! Tell me Mr. Thomas, why?⁴⁴

Moreover, this argument was not convincing to British politicians. Leo Amery's diaries disclose that he disagreed with this argument as early as 1929.⁴⁵

Second, the argument that Canada did not possess the power to abolish the appeal to the Judicial Committee of the Privy Council was based on precedents including *Nadan v The King* which had been decided in 1926.⁴⁶ It did not, however, take note of the development in commonwealth status in 1926 and subsequently.⁴⁷ Third, the proposition advanced in *Nadan* was, in the case of Canada, overruled in the case of *British Coal Corporation v The King*.⁴⁸ Thus, again, Hailsham's view failed to take account of the development of constitutional law in the commonwealth. In fact, Hailsham's view of commonwealth constitutional law appears to have been firmly mired in a pre-1926 mindset.

In each of these three areas, the commonwealth dimension constrained the British government's ability to manoeuvre. The failure to construct a united

commonwealth front against the Free State weakened the ability of the British government to act in 1932. De Valera attempted to exploit Hertzog's secession demands in 1933. Although the British government sagely refused to spring that trap, it exposed the constraints under which Britain operated. Finally, the view of Hailsham in relation to the Free State's powers was an outmoded one towards which other commonwealth countries had already demonstrated a hostility.

IV

The greatest opponent of compromise in the British cabinet was undoubtedly Lord Hailsham, and it is instructive to consider whether his actions were justified or not. In this regard, Cooper's article provides a useful point of departure. Cooper's thesis states: 'Interpretations of Hailsham's attempts to uphold the 1921 treaty as "reactionary" or "diehard" do less than justice to his position. That treaty had been ratified by both parliaments, making de Valera's demands, in Hailsham's opinion, unlawful'.⁴⁹

Instead, Cooper argues for a more sympathetic view of Hailsham:

The combination of a fundamentally right-wing outlook, which gave him solid links with a section of the party which regarded itself unfairly as excluded from power, a firm loyalty to the government and party of which he was a member and a pragmatism and principled flexibility often lacking among other traditional imperialists made Hailsham a key figure in the calculations of the Tory leadership.⁵⁰

First, a note on nomenclature: to be a 'diehard' is not to behave without reasons; it is simply a refusal to modify course in light of changing circumstances which characterises this position. Can one therefore argue that Hailsham's position was that of a 'diehard'? Was Hailsham correct that the actions of the Free State were unlawful?

Hailsham's view of the affair was:

the main difference which seems to me to arise between Mr. de Valera and the British Government is his assumption that a Treaty which is entered into by two parties can be repudiated or modified at the will of one of them. I do not want to do him any injustice, but he seems to have a theory that, inasmuch as no one enters into a treaty completely freely, that is to say, that since every nation when it enters into a treaty does so under the pressure of surrounding circumstances, but for which it would probably not assent to the terms contained in the treaty, therefore it is involved that any nation can at its will repudiate the obligations which it has undertaken under a treaty, whilst at the same time retaining the advantages. I believe that doctrine is wholly untenable either in International or Municipal Law.⁵¹

This was a curious statement in both international and municipal law. As Jennings points out, the British government had already denied that a treaty existed as a matter of international law in 1925, so no international law obligation could arise.⁵² Indeed, Hailsham had drawn Lord Ponsonby of Shulbrede's attention to the registration controversy in the House of Lords.⁵³

Moreover, in the municipal law of the United Kingdom, Hailsham's opinion was rejected by the Judicial Committee of the Privy Council scarcely a year later in *Moore v The Attorney-General of the Irish Free State*.⁵⁴ This opinion, a resounding repudiation of Hailsham's view of the origins of the Free State, was read out by Viscount Sankey LC the day before Hailsham took the Woolsack as lord chancellor for the second time. Gerard Hogan has recently praised Sankey for his 'judicial impartiality' in delivering the judgment while simultaneously occupying a position in the British cabinet.⁵⁵ Hailsham's belief in the soundness of his own arguments, however, appears not to have wavered in the face of this legal defeat for his arguments, as it did not temper his approach to the Anglo-Irish crisis.

Moreover, Hailsham's view of the dispute between the Free State and Britain did, at times, lead to conflict with the commonwealth. Deirdre McMahon notes that a speech given by Hailsham which attempted to claim that the Free State could not abolish the right of appeal to the Judicial Committee of the Privy Council led to a rejoinder in the South African House of Assembly. As McMahon records, this particular sortie led to a rebuke from even the loyal New Zealand government which called it 'highly unsatisfactory and unfortunate'.⁵⁶

In 1932, Hailsham's position might have been justified given the considerations outlined in section two when the possibility of ultimate victory was alive. Furthermore, Hailsham did have formidable allies at the outset of the oath controversy. Both J. H. Thomas and Neville Chamberlain were in agreement with the tenor of Hailsham's views. Early fissures did exist: Hailsham argued against 'any substantial modification of the Oath' in the Irish Situation Committee where Thomas and Chamberlain were at least willing to bring it into accord with the Canadian and South African positions.⁵⁷ As 1932 progressed, the ISC became more convinced that 'things were not going too well with Mr. de Valera'. Thomas questioned whether the Irish offer to negotiate on the basis of commonwealth membership signalled an acceptance of that membership or 'a gambler's last throw in the hope of securing some concession to enable him to go to the country and say that he had done better than Mr. Cosgrave'.⁵⁸ Furthermore, domestic political opinion in the UK was opposed to a settlement on de Valera's lines. It particularly risked fracturing the Conservative party.⁵⁹ However, the progress of the economic war gradually peeled Hailsham's allies away.

When the president of the Board of Trade indicated to the ISC that British industry was suffering as a result of the trade war, both Chamberlain and Hailsham were at one in rejecting Irish proposals that this should lead to an acceptance of the removal of the oath.⁶⁰ However, Chamberlain became convinced of the inadvisability of Hailsham's position as the years progressed. It is possible to suggest a date on which Chamberlain's view changed: 13 May 1936.

Malcolm MacDonald recounts a meeting of the ISC at which his proposals were objected to in strong terms by Hailsham, at which point in time the ISC

adjourned for house business.⁶¹ This was most likely the ISC meeting on 13 May 1936. Chamberlain took MacDonald aside, asked him what arguments he would have marshalled against Hailsham, and assured MacDonald of his agreement and his support thereafter. MacDonald does not state what his arguments were, but it is instructive to consider Hailsham's point just before the adjournment. He essentially suggested that nothing good could come of negotiation given de Valera's ultimate aim and negotiations should therefore be avoided. In contrast, Chamberlain was prepared to countenance negotiation. Even in the absence of cabinet allies, however, Hailsham was prepared to soldier on. His reasoning was not affected by the ruling of the Privy Council in *Moore* which undermined the British government's case. Given Hailsham's reluctance to strike a deal, it is difficult to assent to Cooper's view that Hailsham was open to 'principled compromise' as it seems his guiding principle was not to compromise.

It is important to bear in mind what the position in Anglo-Irish relations was when Hailsham confronted de Valera. The latter would no more change his view than the former. Malcolm MacDonald noted in his memoirs that de Valera 'was so utterly convinced of the rightness of his opinions, and so dedicated—some people would say fanatically dedicated—to them as matters of principle that he would make very few substantial concessions'.⁶² The conflict between Hailsham and de Valera was between the obdurate and the obstinate. Indeed, it is tempting to speculate that the antipathy which Hailsham evinced was as a result of his recognition of de Valera's strength of character: one would have to give way and Hailsham was determined that it would not be him.⁶³

Yet, Hailsham's view of the oath of allegiance controversy was certainly the weaker. It misunderstood the nature of the dominion status in the aftermath of the Balfour declaration and Statute of Westminster. His position was of questionable British legality in the aftermath of the Privy Council decision in *Moore*. Moreover, it misidentified de Valera's position as one which was susceptible to being shifted by outward pressure. Diplomatic pressure was unlikely to bring de Valera to heel and the attempt to give some teeth to this displeasure through tariffs resulted in de Valera achieving an enhanced absolute majority. While there was a possibility of British success in 1932, the situation had changed immeasurably by 1936. The economic straits of the British economy, the change in prime minister from an imperialist in MacDonald to conciliators in Baldwin and ultimately Chamberlain, as well as the advancement of the constitutional position in Ireland, particularly after the abdication crisis, made compromise inevitable.⁶⁴ In light of these considerations, to insist on the sanctity of a particular agreement as all other political and legal considerations crumbled was certainly the actions of a 'diehard'. This does not mean Hailsham was wrong, but it does call into question his judgement on this issue.

De Valera was equally capable of logical contortions and outright abandonment of key Irish constitutional theories in pursuit of his aims, but ultimately

he had the stronger hand. His strength of position internally meant that any attempt to destabilise him from outside short of military force was unlikely to succeed. This was not an option which Britain could reasonably pursue against another member of the commonwealth. Moreover, his insistence on complete internal autonomy was one which garnered sympathy among the other members of the commonwealth. It was a logical endpoint from the imperial conferences of 1926 and 1930.

Conclusion

The oath controversy was one which tested the new constitutional settlement in the commonwealth in the aftermath of the Balfour declaration. However, it is important not to overstate the importance of the oath controversy. For example, Cooper states: '[t]o recoup the losses from the unpaid annuities and to compel Dublin to reconsider its violations of the 1921 treaty, the National Government imposed a 20 per cent tariff on Irish goods entering Britain.'⁶⁵ Paul Canning also emphasises the position of the oath in relation to the tariff war that followed: '[t]o the British Government, the question of the land annuities, serious as it was, was outweighed by the issue of allegiance to the Crown.'⁶⁶

This overstates the importance of the oath. It is true that the oath acted as a catalyst in the tariff dispute, but this was fundamentally an issue about payments due from the Free State to the United Kingdom as the result of the establishment of dominion status. Closer attention to the Irish Free State (Special Duties) Act 1932 indicates, moreover, that it was only ever intended to recover the shortfall in revenue caused by the withholding of land annuities. That is, the oath was not a precipitate cause of the tariff war; the withholding of funds was.⁶⁷ Cooper continues to overstate the importance of the oath in the ensuing trade war. J. H. Thomas indicated that the tariffs would be withdrawn once the financial difference had been recouped.⁶⁸ Cooper's and Canning's interpretation of the ISC meeting of 27 September 1932 commits the same error in relation to the importance of the oath. Cooper maintains that the ISC resolved '[u]ntil the question of the oath was settled, tariffs should be maintained, even if the land annuities issue was resolved'.⁶⁹ This is a misreading of the cabinet minutes. Hailsham indicated that the fact that the Free State had not been exempted from tariffs under the Import Duties Act was a sign that no compromise was possible on the issue of the oath. However, Hailsham's interjections in relation to the terms under which a financial settlement would prove possible related entirely to financial concerns. So Hailsham indicated that agreement on annuities would leave the parties 'no nearer a settlement in the matter of the R.I.C. pensions and the other disputed payments' and therefore tariffs could not be lifted. The minutes recording the general feeling of the committee in relation to circumstances under which a resolution of the tariff would be possible similarly make no reference to the oath controversy: 'it would be unthinkable, in Cosgrave's interests, as well as our own, for

the United Kingdom representatives to acquiesce in the repudiation of the *financial provisions* of the Treaty and later Agreements.⁷⁰ It is true that the constitutional and financial elements of the dispute were often run together, which can lead to a degree of uncertainty about their relative importance. Nonetheless, the oath issue became a dead letter from 1933 when members of the British cabinet and senior civil servants advocated settlement proposals without the reintroduction of the oath. In contrast, the trade war continued until 1938.⁷¹

The oath controversy was a matter of prime constitutional importance but, while it seems likely that the tariff war would have commenced if the Irish payments had stopped, it is unlikely that the issue of the oath alone would have been enough to provoke a trade war between the United Kingdom and the Free State. The constitutional battleground was primarily a matter of diplomacy and law, and the British insistence on a pre-1926 understanding of commonwealth relations was ultimately to undermine its own cause. It is unlikely, for example, that the Free State would have succeeded if the interpretation of the Articles of Agreement had been submitted to an international tribunal. The functionaries of the Free State were aware, however, of the limitations under which the British government operated—both domestically and within the constitution of the commonwealth—and exploited these difficulties when the opportunity arose. Nicholas Mansergh notes: '[i]n de Valera, the moment had its man.'⁷² It was this ability to master relations within the new commonwealth, where Britain was a co-equal partner, which allowed the Free State to behave with such contumaciousness and yet ultimately triumph.

Notes

1. The oath was contained in Article 17 of the 1922 Free State Constitution.
2. Justice of the Peace, 'The Oath of Allegiance', 362.
3. See Cmd. 1539 (UK Government Command Paper), 'Correspondence for an Irish Settlement.' See also generally Jennings, 'The Statute of Westminster', 183–86.
4. See Jones, 'International Agreements', 112; also Stewart, 'Treaty-Making Procedure', 467. In international law, no such distinction was made; see Oppenheim, *International Law*, vol. 1, 667–68.
5. See, e.g., 1 *Dáil Debates* 354–61, 18 Sept 1922.
6. On this point, see Coffey, 'Need for a New Constitution', 279–82.
7. 13 Geo V, c 1, 1922.
8. Mohr, 'British Imperial Statutes', 65–74, 76–80.
9. This was in direct conflict with Article 12 of the Free State Constitution which reserved the 'sole and exclusive power' with respect to the Free State to the Irish parliament.
10. Significantly, there was no reference to the dominion of Newfoundland.
11. Cmd. 2768, 'Imperial Conference, 1926. Summary of Proceedings' 14.
12. *Ibid.*, 16.
13. Cmd. 3479, 8.
14. 22 and 23 Geo V, c 4, s. 2, 1932.

15. See Department of an Taoiseach s. 5340/1, 15 July 1929, National Archives of Ireland (hereafter NAI); Mohr, 'The Statute of Westminster', 749.
16. See Kennedy, *Ireland and the League of Nations*, 61–71.
17. See generally Harkness, *The Restless Dominion*, 56–63.
18. See further Jennings, 'The Commonwealth and International Law', 332–33.
19. Harkness, *The Restless Dominion*, 63.
20. For background, see Kennedy, *Ireland and the League of Nations*, 118–21.
21. See Williams, 'The Optional Clause', 63–65, 75.
22. Cmd. 3717, 'Imperial Conference 1930. Summary of Proceedings', 22–24.
23. Cmd. 2768, 'Imperial Conference, 1926. Summary of Proceedings', 14.
24. Department of an Taoiseach s 2264, 21 March 1932, NAI.
25. 22 *Dáil Debates* 1615, 21 March 1928.
26. Canning, 'The Impact of de Valera', 181, 185, 199.
27. CAB 27/525, 15 July 1932, The National Archives, Kew (hereafter TNA).
28. See Harkness, *The Restless Dominion*, 205, 207.
29. DFA (unregistered papers), NAI; reprinted in Crowe *et al.*, eds, *Documents on Irish Foreign Policy*, 78–79, 8 July 1932.
30. *Ibid.*, 81.
31. *Ibid.*, 5.
32. CAB 27/525, 24 March 1932, TNA.
33. *Ibid.*, 4 Apr. 1932.
34. On the relationship between Skelton and Bennett, see Hilliker, *Canada's Department of External Affairs*, 137.
35. Lapointe Fonds, MG 27, III BIO, vol. 7, Library and Archives Canada.
36. Thomas, *My Story*, 210.
37. Skelton Fonds, MG 30, D 33, vol. 12, file 12-5, entry for 11 Apr. 1932, Library and Archives Canada.
38. Mansergh, *The Unresolved Question*, 285.
39. Cooper, 'The Politics of Empire', 432.
40. *Ibid.*
41. *The Times*, 26 Sept. 1930.
42. CAB/23/77, 4 Dec. 1933, TNA.
43. CAB/27/523, 25 May 1936. TNA.
44. Harkness, *The Restless Dominion*, 206.
45. For his argument with Lloyd George on this issue, see 26 Nov. 1929 in Barnes and Nicholson, ed., *The Empire at Bay*, 56.
46. [1926] AC 482.
47. However, see Darwin on British opinion of the Balfour Declaration. Darwin, 'Imperialism in Decline?', 662,
48. [1935] AC 500.
49. Cooper, 'The Politics of Empire', 433.
50. *Ibid.*, 427.
51. 93 *House of Lords Debates* 1076, 25 July 1934. An abbreviated version is quoted by Cooper. Cooper, 'The Politics of Empire', 432.
52. Jennings, 'The Commonwealth and International Law', 332 fn. 5.
53. 85 *House of Lords Debates* 752, 11 July 1932.
54. [1935] I.R. 472, 485–86.
55. Hogan, *Origins of the Irish Constitution*, 112 fn. 28.
56. McMahon, *Republicans and Imperialists*, 133–34.
57. CAB/27/523, 25 Oct. 1932, TNA.

58. Ibid.
59. See Canning, 'The Impact of de Valera', 199 and *passim*.
60. CAB/27/523, 23 Nov. 1932, TNA and CAB/27/523, 7 Mar. 1933, TNA.
61. MacDonald, *Titans and Others*, 60–62.
62. Ibid., 71–72.
63. His comments in light of the 1932 Dublin meeting are particularly telling in this regard.
64. On the abdication crisis and the commonwealth, see Coffey, 'British, Commonwealth, and Irish Responses'.
65. Cooper, 'The Politics of Empire', 430.
66. Canning, 'The Impact of de Valera', 186.
67. Indeed, this is clear from the speech of Lord Hailsham in introducing the bill in the Lords; see 85 *House of Lords Debates* 741–64, 11 July 1932.
68. See, e.g., CAB/27/523, 14 July 1932, TNA.
69. Cooper, 'The Politics of Empire', 430; also Canning, 'The Impact of de Valera', 201.
70. Emphasis added.
71. The British insistence on maintain the oath collapsed after its deletion in 1933. J. H. Thomas had abandoned his insistence on it in cabinet discussions in November 1932, while Edward Harding his insistence on it by August 1933. See McMahon, *Republicans and Imperialists*, 103, 119.
72. Mansergh, *The Unresolved Question*, 289.

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