

SIGNIFICANCE OF THE IRISH FREE STATE

BY W. P. M. KENNEDY

THE creation of the Irish Free State is one of the most significant facts in modern history—significant for the British Empire, for political science and for the world at large. Its political organization is also of remarkable interest. Not only is the first great constitution of the modern world—that of the United States of America—laid under obligations, but constitutional developments elsewhere have been incorporated in newer and more democratic forms, and the thorny domestic problems of a second chamber and of associations within the State have been faced with such boldness and courage that other international groups will watch with interest the issues raised by the unequivocal political faith of the Irish people. My object in this article is to view with objective realism the creation and constitution of the Irish Free State and to attempt to study them as political phenomena apart from the immediate and remote history out of which they arose.

The Irish Free State was created—or recognized—by treaty signed, December 6, 1921, by plenipotentiaries representing it and Great Britain. This Anglo-Irish treaty admitted the Irish Free State into the “Community of Nations” forming “the British Commonwealth of Nations” and gave it the status of the Dominion of Canada. Canadian development further colours the document. The regulations governing the office of Governor-General, the future relationships with the Imperial Parliament, the powers to legislate for “the peace, order and good government of the Irish Free State”, are all related to Canadian conditions today and are to move forward *pari passu* with Canadian evolution. The oath provided for members of the Free State Legislature is of momentous importance. They are to swear “true faith and allegiance to the Constitution of the Irish Free State”, and that they “will be faithful to H. M. King George V,

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his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations". Such are the most important and fundamental elements in the treaty and they need careful examination.

First of all is the fact of the treaty. The Irish plenipotentiaries received their full powers from the Irish people, not from Great Britain either directly or indirectly. Without constitutional antinomies, without conditions laid down by the British Foreign or Colonial Offices, without antecedent preliminaries necessary for the recognition of an abnormal international situation, without meticulous straining of current theory,—all of which are present when Canada negotiates a treaty,—the Free State plenipotentiaries met, as entirely equal, those of Great Britain, and brought with them an authority to act derived from the citizens of the future Free State. The causes lying behind can be explained in a thousand and one ways and can be examined from many different angles. The fact, however, remains that the treaty is not another concession to organized group life at the end of a colonial development,—for the Irish Free State was never a British colony,—but is a recognition at the very least of an age-long Irish aspiration and ideal, or, if the historian prefers it, the belated harvest of the Irish nation recognized in 1416 at the Council of Constance. The Irish Free State in its own inherent right entered the British Commonwealth by treaty, agreed to with an equal, signed by its own plenipotentiaries and later confirmed by its legislature.

Secondly, the Irish Free State takes over the entire Canadian status. It has not to go through Canadian experience—the debates over sovereignty, over fiscal policy, over treaties, all the growing pains of progress from colony to nation—but the Free State brings its own sovereignty, recognized fully by the fact of the treaty, and limits it, if you will, by entering the "Community of British Nations", as each of the Thirteen Colonies did at the formation of the American Union. This adherence on the part of the Irish Free State has lifted that Community to another plane. In no other case has a Dominion entered by an inter-

national treaty, and the protestation of equality among the British Nations so frequently emphasized for Canada by Sir Robert Borden has at last received formal recognition for one and all by the Anglo-Irish pact. The Free State is the political equal of Great Britain. Its legislature, its executive, its judiciary are in no sense inferior, and they derive not from the gift of a sovereign foreign parliament, but from the organized political will of the citizens of the Free State. Those citizens have surrendered certain spheres of authority—or rather pooled them in the Commonwealth. The fact is that they were a surrender. Canada achieved them. The Irish Free State gave them: otherwise the treaty is in form and manner meaningless and absurd, “a scrap of paper”.

Thirdly, the oath is the most remarkable recognition of a new state of affairs. “Allegiance” is still sworn, but not that allegiance redolent of autocracy or clothed in the trappings of hereditary monarchy, formal and powerless though it may be. Great Britain is not the “mother country” of the Irish Free State and allegiance is sworn to the Constitution of the Irish Free State, itself as we shall see the creation of the Irish people as much as that of the United States is the creation of its citizens. To the King and his lawful heirs “fidelity” (not allegiance) is sworn, and that fidelity is in the treaty itself solemnly pronounced to be a consequence, not of indefeasible right or of parliamentary power in the Crown to claim or demand it, but of Great Britain’s common citizenship with the Irish Free State in the British Commonwealth of Nations and of Great Britain’s membership of and adherence to that Commonwealth. The Crown thus takes its place in an international document as a formal link between nations, and Free State fidelity to the Crown depends not on allegiance but on the permanence of the Community of Nations and on Great Britain’s continued common citizenship in it. That oath is one of the crowning triumphs of political science. It is magnificently realistic. It gives domestic and international recognition, in solemm form and in sealed and plighted faith, to the *obiter dicta* of the Imperial Conference of 1921. When Mr. Lloyd George then said that the Dominions had been “accepted fully into the comity of nations” and that they were “equal

partners in the dignities and the responsibilities of the British Commonwealth," and when the Conference closed by expressing its "unanimous conviction that the most essential of the links that bind our widely spread peoples is the Crown", the words lacked political power and force. The oath in the Anglo-Irish treaty has supplied the defects. The citizens of each Dominion owe allegiance to their organized group life expressed in their political institutions, and they owe formal faith to the Crown as long as the Commonwealth lasts, with Great Britain as an equal member. The oath is the statement in different words of what I conceive to be the strict interpretation of the Covenant of the League of Nations—the Dominions guarantee the territorial integrity of each other and of the Commonwealth, and the Irish Free State is bound to the Commonwealth—as each constituent nation is also bound—on the mutual coherence of all the British nations, symbolized as an entity by the Crown, in whose name the Dominions signed the peace treaties. I need hardly add that foreign relationships are of course still governed by the conditions which I recently outlined in *THE NORTH AMERICAN REVIEW*.

Lastly, the Irish Free State is recognized as sovereign over the drawing up of its own Constitution. Of all the British nations, Great Britain alone possessed such power. All the other Dominions depend for their constitutions on Acts of the Imperial Parliament. The Irish Free State has made its own. Its Constitution has been given to it by the formal act of its own Constituent Assembly, confirmed by its own legislature and not by a suzerain Government. This Constitution is within the ambit of the Anglo-Irish treaty and is limited within its clauses—the limitations bind Great Britain as well as the Irish Free State. Both high contracting parties have given the Constitution the form and force of law—the Irish legislature passed it and the legislature of Great Britain passed it. The latter fact, however, does not give the Constitution any constitutional strength. It is a schedule of an Imperial Act, not an imperial enactment, and the Act which incorporates it as a schedule distinctly states that it was passed to give legal status to the treaty and Constitution for purposes of legal interpretation in case supposed treaty rights are

violated and the courts are called on to decide. As far as the Irish Free State is concerned this has not a constitutional but a judicial significance. The Halibut Treaty will be implemented by legislation both in Canada and in the United States, but the constitutional position in the treaty of each contracting party is not thereby hurt. The binding force of the Constitution depends on the fact that the Constituent Assembly of the Irish Free State drew it up. It is a free act, as much as the Constitution of any State in the American Republic is a free act—both work with limitations, one the Anglo-Irish treaty, the other the Constitution of the United States. This creation is most remarkable. It is the act of a sovereign people to draw up and impose a constitution—a high act of state, and it has lifted the sister nations to the plane of sovereign action. The fact of real sovereignty in each is solemnly recognized. The Irish Free State receives the status of Canada. We may now reverse it and say that Canada receives the status of the Irish Free State.

It would be interesting to examine in detail the Constitution of the Irish Free State, but in an article of this nature there are necessary limitations, and it is only possible to run through its clauses quickly and to point out some of their most outstanding and important provisions. Before doing so, we must once more recall that the Anglo-Irish treaty is, by the Constitution, made with it the “supreme law of the land”, and that both must be construed together. With this in mind, we at once miss in the Constitution any preamble usual in the Constitutional Acts of the other British Nations. The Irish Free State is not “hereby” constituted a Dominion or Commonwealth or Union “under the Crown of Great Britain”, and its fundamental law and organized life, legislative, executive, judicial, do not flow from that fact, but directly and explicitly from the people. Depending on the popular will as in the United States, and following the United States—but differing from all other constitutions in the British Commonwealth—the Constitution contains clauses in which its creators lay down their fundamental rights which are indefeasible. The people are guaranteed their language, their democratic status, liberty of person, *habeas corpus*, inviolate homes, freedom of conscience and religion, freedom of speech and of assem-

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bly, freedom from martial law where civil courts are operating, and to these are added three other fundamental rights which bear witness to the modern age:—the people reserve to themselves from the processes of ordinary legislation the inalienable possession of their natural resources; the right to free elementary education; and, most important of all, the fundamental right “to form associations”. This latter right is the formal recognition in a modern constitution that the political aspect is only one of many aspects in the life of a citizen. Indeed this fact receives further recognition. The Constitution provides that the National Assembly may create “Functional or Vocational Councils representing branches of the social and economic life of the Nation”, and thus furnishes us with an interesting illustration of the fact that the functional aspect of citizenship is gaining ground at the expense of the old all-embracing political theories of party politics. The underlying idea is clear: so to protect and organize the social and industrial life of the nation in its various groupings that the higher life of citizenship may not be warped. The daily happiness of the people is linked with basic fundamental political rights. The people, thus guaranteed and protected, are the democratic foundation on which the whole Constitution is reared. They next proceed to create in persons and institutions the necessary administrative machinery, guarding carefully their initial fundamental rights and fencing as they proceed each field of organization.

From the fundamentals, it is interesting to note, the next step is legislation—the creating by the people of a law-making body for the people. There is no process downward from “the executive authority shall be invested in the Crown”, as in the constitutions of the other Dominions. The process is upward from the rock from which the whole Constitution is hewn. A National Assembly is created of two houses—a House of Deputies and a Senate. The former need not detain us, as it follows all modern democratic lower houses—but it is to be elected by proportional representation and the universities are to be represented in it. The Senate is much more interesting. Why did the Irish Free State create a second chamber? Obviously it could not fulfill the function of the Senate in the United States. Obviously no sane man wanted to erect another hereditary house. We may

assume too that no one wanted a nominated Senate after the manner of the Canadian Senate, which is based on no conceivable political principle and fulfils no conceivable political function. Nor did the Irish people wish a revising chamber popularly elected from among popular candidates to re-do or undo what elected popular Deputies had already done. They aimed only to include in the Senate "citizens who have done honour to the nation by reason of useful public service or who, because of special qualifications or attainments, represent important aspects of the nation's life". To attain their end they have constituted the Irish Free State as one constituency, and there is a panel of candidates chosen every third year (when a fourth of the Senators retire) by the Chamber of Deputies and the Senate, and consisting of three times as many names as there are vacancies. The names are placed on this panel after written proposals in which qualifications—intellectual, economic, social, institutional—are set out, and the final list is made up by the Chamber and the Senate, each voting its defined number according to the principles of proportional representation. This final list is then issued to the Free State as a whole, in alphabetical order with the full qualifications set out which would commend the candidates to the suffrages of the people, who make their choice by proportional representation. No second chamber in the world is chosen in such a way, and if anything like success attends it, democracy will have learned how to use in the service of the state the highest gifts of citizens.

Such are the two chambers. Their relationship is clearly defined. The Senate cannot interfere with money bills, and it can in other respects only delay action. It cannot tie up a bill for longer than nine months. But it is an elected house as much as that of the Deputies and it is not meant to be futile. It is a vehicle to give the people a final say. Thus, any bill passed or deemed to have passed can be held up for ninety days on a vote of two-fifths of the Deputies or of a majority of the Senate, and the bill thus suspended must be submitted to the people by referendum if before the expiration of the ninety days three-fifths of the Senate demand it, or one-twentieth of voters on the lists. The decision of the referendum is conclusive. This power of the Senate

is noteworthy. Not only is the Senate so organized as to be representative of the best brains available, but it is the means of compelling, if necessary, direct reference to the people. A second chamber so organized and with such power is of far more value than if it could obstruct legislation or render it ineffective.

Provisions are made for constitutional changes, for legislation by the initiative and referendum, for the creation of subordinate legislatures, discussion of which space forbids. An important provision looks innocent enough, as on the surface it is just the statement of what is a fact in Canada: the Irish Free State shall take no active part in war without the consent of the legislature. That is true of Canada, but the Free State has this further protection that with the system of appeal to the people just outlined the legislature cannot be overawed by the executive and hurry the nation into war without direct *ad hoc* popular approval.

The executive follows more or less the traditional British lines, but here too we might note important developments. The President is not the choice of a political caucus like the President of the United States or the Prime Minister of Great Britain, nor has he the power as the former undoubtedly has and the latter in fact has to choose his colleagues. He and his colleagues are the direct choice of the Chamber of Deputies. The executive must retire when it loses the support of the Chamber, as in British custom, but its retirement need not mean the dissolution of the Chamber; an executive which has lost support among the Deputies cannot advise a dissolution. This is a distinct advance. Many times has the House of Commons in England been whipped into obedience by a Premier with a threat of dissolution. The Free State Legislature cannot be dissolved as in Canada merely on the advice of the Executive. The Governor-General must make certain that the legislature wishes to be dissolved before its constitutional term has expired. Here we see an executive chosen by the Deputies, responsible to them, their servant not their master. Perhaps it may be the destiny of the Irish Free State to rescue cabinet government from some of the contempt which has gathered round it in the British Commonwealth.

In one important point the Constitution is very weak. Appeals are retained to the Judicial Committee of the Privy Council, not

merely in civil and criminal cases but in constitutional cases as well. I cannot conceive that this will last and I feel certain that the Irish people will include this for change in the earliest possible constitutional amendments. Even in the palmy days of "the ascendancy" the Irish judiciary crowned itself with independence of judgment in Wolfe Tone's case, and it has always been among the most brilliant and honoured in the world. Irish Free Staters will not long allow their lawsuits to receive final decision in London. Doubtless the clause was included in a hurry and with the fact in view that the Constitution might need from time to time interpretation in relation to the Anglo-Irish treaty. This might account for a temporary provision in constitutional cases of a certain nature; but nothing disclosed will cover the more or less comprehensive right of the Privy Council to grant leave of appeal. It seems to me that the civil and criminal suits of the Irish Free State must be decided finally there, and also constitutional cases where the treaty is not in question. Where the treaty is in question, a panel of British and Irish judges must be set up.

I need not emphasize that as it stands the Constitution is only a machine and nothing but ceaseless vigilance and increased education can make it of value to the people. They have made it. They can unmake it. They can mar it. They can galvanize it into a life of richness and achievement. A fundamental document may soon become an interesting heirloom, and may have no market value in the marts of human progress. It is only useful as a frame for development, to be cast away, redrafted, as each generation of men brings the harvest of its achievement to the granary of human endeavour. As it stands, it is a noble document, based on the people, reflecting their hopes and aspirations, and giving us, in these latter days when at times the lamp of faith burns dim, a hope and an inspiration that in the iron bands of liberty the Commonwealth of British Nations may achieve high and glorious purpose, that sovereignty may take on its real and true meaning, and that in interdependence and union the political groups of the world may find the guarantee of realizing the highest and noblest in their peculiar community organizations.

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SELECTING CITIZENS

BY CORNELIA JAMES CANNON

IN most countries of the world citizens are produced by the mothers of the country and are perforce accepted. We have many citizens so produced and so accepted, and we take them with a good grace. But we have other citizens produced by mothers in other countries whom we are asked to absorb enthusiastically, and we have begun to gag a bit over the size and quality of the dose. Is it simply that the food is strange and alien, or does it possibly contain poisons against which we have no antidote?

For a generation we have had a production mania. New coal mines, new oil wells, new irrigation systems, buzzing factories in every hamlet, cities passing the million population mark, the upper air darkened with flying machines, have all been regarded as signs of healthy Americanism and a proper contribution to the carrying out of divine purposes. We have shown our sympathy with this national ideal by denuding the forests, recklessly bestowing the public lands upon the first comer, and giving away mining rights and water power for less than a song. To speed the process even more we have opened the doors of the country to a flood of immigrants designed to perform the actual physical labour of developing our resources under our own superior leadership.

Every year for decades hundreds of thousands of men and women, reared under other flags than ours and imbued with the ideals of other countries, have come to our shores. They have been content with a bare subsistence wage; their standards of living were low, and they were impressed into the rough and heavy work of the land. Their children, however, were brought up in the atmosphere of America; they went to the public schools and had glimpses of how other people lived. Indeed it has been our boast that in this land of opportunity the son goes up one