## THE IRISH FREE STATE AND APPEALS TO THE PRIVY COUNCIL.

Article 2 of the Treaty between Great Britain and the Irish Free State reads as follows:—

2. Subject to the provisions hereinafter set out, the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

Article 51 of the Irish Free State Constitution, which in case of conflict is overridden by the Treaty provides:

The Executive Authority of the Irish Free State (Saorstat Eireann) is hereby declared to be vested in the King, and shall be exerciseable in accordance with the law, practice and constitutional usage governing the exercises of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown. . . .

These two articles show the importance that Canadian constitutional practice has in the Irish Free State, and also the importance of Irish practice for Canada. Two interpretations may be given to these provisions. *First* that as Canadian practice changes from time to time so will Irish practice; it is a growing and changing set of conventions which is provided for. Where Irish practice exceeds in independence that of Canada, it is unlikely that, excepting great irregularities, anyone would question the validity of such practice on constitutional grounds. Moreover with the keen emulation among the Dominions it is highly probable that any additional powers asserted by the Irish Free State, would immediately be asserted by and granted to Canada thereby making constitutional the claims of the Free State. Thus we see clearly the reciprocal influence of constitutional practice in the Dominion of Canada and the Irish Free State. *Secondly,* that the Treaty and the Constitution seek to set up a new parliament, and that it is only intended to give this new parliament a background of constitutional practice, which Irish practice will in time change and develop by the creation of a new indigenous foreground. Moreover this interpretation is more easily reconciled with the extravagant claims of sovereignty put for-

ward by Nationalists of the temper of the late Darrel Figgis, and with the preamble (curious in the legal theory of the Empire) to the Act of the Free State Constitution, viz:

> Dail Eireann sitting as a constituent assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people, and in the confidence that the national life and unity of Ireland shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstat Eireann) and in the exercise of undoubted right, decrees and enacts as follows:—.

Extreme Nationalists claim that the Treaty and the Constitution were wrung from the Irish nation by Great Britain through superior force of arms and that they are a mere political expediency until the Irish Nation is strong enough to shake off the shackles, and to start afresh with a genuine constitution.

> Before the Union Act of 1800 Ireland had, unlike the other Dominions of the Crown, a House of Lords, and after the Union the House of Lords of the United Kingdom succeeded the Irish House of Lords as a Court of Appellate Jurisdiction, whereas the Privy Council as an appeal tribunal advised the King on appeals from courts of the Dominion and Colonies. Irish Appeals came within the jurisdiction of the House of Lords.

Now they are to come within the jurisdiction of the Judicial Committee of the Privy Council.

There is a prejudice among many lawyers that the Judicial Committee on the whole employs a lower grade of judicial talent than is to be found in the House of Lords. Unfortunately this condition was very true in the latter half of the nineteenth century, but more recently the standards of the two courts have been about the same, with a leavening of Dominion and Colonial judges in the Judicial Committee in cases where a knowledge of local laws or conditions is essential to a proper understanding of the appeal. One can see therefore than even among those people in the Free State who have a respect for the ability and impartiality of British judicial tribunals, this change of appellate jurisdiction from the House of Lords to the Privy Council, provided for by the Constitution, will be received with disfavour. More strongly still does the Nationalist resent appeals to a *foreign* tribunal, so the matter of appeal to the Privy Council meets with but little support in the Free State.

With this political and historical setting in mind, the provisions of the Constitution regulating appeals can be more easily followed. Article 66 of the Constitution of the Irish Free State provides that

The Supreme Court of the Irish Free State (Saorstat Eireann) shall with such exceptions (*not including cases which involve questions as to the validity of any law*) and subject to such regulations, as may be prescribed by law, have appellate jurisdiction from all decisions of the Hight Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever; Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to Appeal from the Supreme Court to His Majesty in Council or to the right of His Majesty in Council to grant such leave.

(Note that the High Court alone has original jurisdiction in questions as to the validity of any law. Art. 65.)

The Constitution and the Irish Treaty have been made law by legislation in both Great Britain and the Irish Free State; in cases of conflict the provisions of the Treaty prevail over the Constitution. Under Article 2 of the Treaty quoted (*supra*), the Irish Free State in relation to the Imperial Parliament and Government is like the Dominion of Canada and is governed by the same law, practice, and constitutional usage. The point has been raised that the provisions of Article 66 allowing appeals from the Supreme Court *only* to His Majesty in Council are ultra vires. The Canadian practice is governed by the Imperial Act of 1844 (7 & 8 Vict. c. 69) which preserves the right of appeal to His Majesty in Council from "any court of justice within any British Colony or Possession". And the Treaty prevails over the Constitution. It is highly improbable that such a legalistic interpretation of the terms of the Treaty would be given by the Judicial Committee, which according to A. B. Keith "mingles political wisdom with legal interpretation."

A very strong case against that political wisdom of article 66 is found in Mr. Darrel Figgis' book on the Irish Constitution, in which he describes appeal to His Majesty in Council as bondage to a *foreign* state. Moreover the history of Article 66 and the language ultimately adopted are indicative of strong resentment in the Free State against such appeals. To date but little advantage has been taken of the authorized powers to restrict appeals, i.e., other than those "affecting the validity of any law."

In an appeal involving the interpretation of the Irish Land Act. in advance of the opinion given by the Judicial Committee overruling the Supreme Court, the parliament of the Irish Free State passed an act declaring that the judgment of the Supreme Court was the law of the Free State. Keith points out this case as a means

of destroying the effect of appeal to the Judicial Committee, and at the same time preserving the right of appeal from the High Court to the Supreme Court. A court with no power to execute its judgments is effective only so long as the litigants approve of its jurisdiction. Despite the Judicial Committee Act of 1844, it is probable that a strong Dominion Government could effect a partial change of its constitution by this device of legislative reversal. Although it would be a de facto rather than a de jure change and would depend upon the complaisance of local courts. In all other matters of Dominion legislative competence this procedure has the virtuous sanction of a complete legality, although in constitutional matters such course of action is clearly illegal.

In Quebec[1], the legislature taking advantage of a minor mistake in fact made by the Privy Council (Cotton v. the King, 1914 I, A.C.) passed an Act declaring that the taxation provisions declared ultra vires by the Privy Council as indirect taxation, had been and were in future to be considered direct taxation and so valid under section 92. At the same time be it noted the taxation statutes in question were amended to come within the Privy Council's definition of direct taxation, and the advice of the impugned decision was actually followed in drafting the new acts. Nevertheless a legislative intent to rebuke the Judicial Committee and to reverse its opinion is clearly manifested in the preamble to the amending statute 4 & 5 Geo. V. c. 11., and in section 1 of the same act. The methods of legislative reversal adopted by the Free State in the Land Act case (never actually argued before the Judicial Committee) and in the more recent case dealing with civil service pensions (but involving chiefly a question of law under Dyson v. the Attorney-General) and actually decided by the Privy Council, are therefore not entirely new, though they have never been regularized by a general practice in the Free State or elsewhere. It should be mentioned that in the last case the reversal is made with the concurrence of the British government, which we believe from Mr. Amery's remarks in the House (Feb. 23rd of this year) will introduce a bill making legal the violation of Article X of the Treaty which would otherwise result. This practice is similar to the requests made by Nova Scotia to the Dominion that the latter disallow certain Nova Scotian statutes. That there is a growing sentiment throughout the Empire in restricting appeals to the Privy Council cannot be doubted. The case of the Free State is there-

[1] Keith, Imperial Unity and the Dominions, p. 375, for a discussion of this point.

fore but one more illustration of the vigorous condition of the locally autonomous nations constituting the British Commonwealth of Nations.

The legal principles governing appeals to the Judicial Committee are worthy of serious consideration, both because of an enunciation of them made by Lord Haldane, and because of the peculiar language of articles 65 and 66 the full significance of which appears hitherto to have been overlooked. The first appeals to come to the Judicial Committee for special leave to appeal were brought in 1923. Two were dismissed and the third was withdrawn by consent. The general principles governing the granting of leave in such appeals were discussed by Lord Haldane before considering one of the appeals ultimately dismissed. He said:

> The Sovereign was everywhere throughout the Empire in the contemplation of the law. In Ireland, under the Constitution Act by section 66, the prerogative of the Sovereign was saved, and the prerogative, therefore, existed in Ireland just as it did in Canada, South Africa, and India, and right through the Empire with the single exception of Australia, and in that case it only had reference to constitutional disputes. He need not observe that the growth of the Empire, and particularly of the Dominions, had led to a very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee. It was obviously proper that the Dominions should more and more dispose of their own cases, and in criminal cases it had been laid down so strictly, that it was only in most exceptional cases that the Sovereign was advised to intervene. In other cases the practice which had grown up, or the unwritten usage which had grown up, was that the Judicial Committee of the Privy Council was to look closely into the nature of the case, and if in their Lordships' opinion the question was one that could be best determined on the spot, then the Sovereign was not, as a rule advised to intervene, normally unless the case was one involving some great principle or was of some very wide public interest. It was also necessary to keep a certain discretion, because the Dominions differed very much, With regard to Ireland it was not expedient that they should lay down too rigidly, to begin with, what the principles were. They would grow with the unwritten constitution. They had a constitution which was partly written in Ireland, but their experience was that all unwritten constitutions developed flesh and blood within the unwritten bones, and they had to see the sort of flesh and blood they put on, as regarded the question of how much they disposed completely of their own judicial questions.
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> (MacNeil pp. 86-7 of his *Irish Constitution.*)

In pursuance of the above principles presumably the Judicial Committee proceeded and, inter alia already noted, dismissed an appeal dealing with the right of a Bishop of the Roman Catholic

church to remove a priest from his office giving him no notice of the removal proceedings. It granted leave to appeal in the case mentioned above of the tenant under the Irish Land Act of 1923, and also an appeal as to the compensation due to officers of the former government vacating office under the new regime. (Wigg et al. v. A. G. For Irish Free State, 1926, A.C.).

A nice problem arises in the interpretation of articles 65 and 66 of the Constitution. The former gives the High Court alone, original jurisdiction in questions "of the validity of any law having regard to the provisions of the Constitution." The latter allows appeal to the Supreme Court to be barred in all cases but "not including cases which involve questions as to the validity of any law." Since appeal from the Supreme Court to His Majesty in Council is preserved also by article 66 the combined effect is to save the Royal Prerogative of appeal only in cases coming within the quoted descriptions.

The great constitutional authority, A. B. Keith has it that

> In the case of the Irish Free State it is *clear* from the Constitution that appeals from the High Court to the Supreme Court may be barred by Parliament save as regards *constitutional cases, involving the interpretation of the Constitution.*

One notes the language of articles 65 and 66 already cited, and if there is any difference, which seems next to impossible, it is that the phrase in article 66 is wider than the phrase in article 65. But as extensive as article 66 appears to be, it does not include many important *constitutional* questions involving the interpretation of the Constitution. Most notable of the omitted constitutional provisions are those providing for the exercise of the prerogative granted by article 51 of the Constitution quoted above. Nor does the phrase include the questions of the exercise of powers, or the preservation of guarantees granted by the Constitution. From the point of view of the individual entitled to these powers or guarantees and so soon after the necessary irregularities of the revolution and before the Irish courts are thoroughly established and have received the backing of the community, the right to appeal to an impartial *foreign* tribunal would appear to be a most valuable one.[2]

Note particularly; article 5 which provides for the conferring of titles of honour upon approval and advice of the Executive Council of State; articles 6-9 dealing with the liberty of the person, inviolability of the dwelling of each citizen, freedom of conscience

[2] Note erroneous Editorial contra: *Toronto Daily Star*, April 2, 1928.

and of free profession and practice of religion, and right of free expression of opinion respectively; article 18 which deals with the protection of members of Dail Eireann coming to, during and going from sessions of Dail Eireann, and other privileges of the Dail and its members in subsequent articles.

The constitutional problems likely to arise under the articles last referred to which are not covered by the saving clauses of articles 65 and 66 are problems in which the law is clear, but the application to the facts at hand will be difficult during even a minor political crisis and the importance of an impartial authority, though removed in space from the scene of conflict, is very great indeed.

Among the most important provisions not covered by articles 65 and 66 are those to be found in articles 60 and 63, the first of which deals with the appointment of the representative of the Crown, the Governor-General; viz.: in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointment; and his salary which is to be a charge *on the public funds of the Irish Free State.*

The second, article 63, has an even more important provision which does not appear to be covered by "questions as to the validity of any law," viz.:

> The Comptroller and Auditor-General shall not be removed except for stated misbehaviour or incapacity on resolutions passed by Dail Eireann and Seanad Eireann.

Note finally the Civil service pension case supra, (Wigg et al v. A. G. Irish Free State 1926 A.C.)

In conclusion assuming that articles 65 and 66 are intra vires notwithstanding articles 2 of the Treaty, what interpretation is to be given to article 50 of the Constitution which provides that

Amendments of this Constitution *within the terms of the scheduled Treaty* may be made by the Oireachtas (parliament) in a certain manner. One submits that it is still not clear from the Constitution or decided cases that appeals from the High Court to the Supreme Court may be barred save as regards *"constitutional cases, involving the interpretation of the Constitution."* There is a danger that political wisdom will have to bow to legal interpretation. The alternative is to recognize that constitutional legal theory must yield to the will of the people manifested in their constitutent assemblies, and amendments of the constitution by

Oireachtas in violation of article 2 of the treaty will have to be upheld by legislative reversal in the British Parliament or else connived at. The former alternative legislation is surely the more dignified and satisfying procedure.

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NOTE.—Further press reports of House of Lords debates indicate that concurrent legislation is being introduced in the British Parliament and in Oireachtas, to overrule the case of *Wiggs* v. *The Attorney-General.* The basis of this action is the discovery of mistakes in fact, if not in law, which influenced the decision given in that case. The late Lord Chancellor Viscount Cave, was sponsor to this legislation shortly before he died.

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PURITAN LONDON.—We reprint the following from the London *Spectator*:

The Home Secretary stated in the House of Commons on Monday that he had ordered an inquiry into the recent arrest of Sir Leo Chiozza Money in Hyde Park. This is satisfactory as the public are undoubtedly perturbed by the series of prosecutions for offences in the streets or the parks which have broken down through faulty evidence. Counsel for Sir Leo Money used an argument which was a humiliating one for London when he assumed as a matter of course that it was unwise for Sir Leo Money to sit in Hyde Park at night with a respectable woman. Misgivings were aroused, too, by the discovery that though Sir Leo Money asked at the time of his arrest that a casual onlooker should be called in as a witness this request was refused. It is often said, and, of course, there is point in the objection, that if independent evidence is to be regarded as indispensable to a police prosecution there will be hardly any convictions. Passers-by are always reluctant to be "mixed up" in such cases. When Sir Leo Money was arrested, however, an independent witness was standing by and spoke to Sir Leo Money, and yet was not even asked whether he was willing to come forward. There is evidently material for inquiry, and it will be something gained if the inquiry ends merely in that better lighting of Hyde Park which the Home Secretary himself has proposed.