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THE RIGHT OF SECESSION

[*The question arose early in the proceedings of the Constituent Assembly whether, in the context of the passage of the Indian Independence Act by the British Parliament on* 18*th July* 1947, *there was any difference as to the right of secession between one Dominion and another. Two independent Dominions were created by the Act, India and Pakistan. Section* 6 *of the Act, relating to legislation for the new Dominions, was in the following terms:*

6. (1) The legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation.

(2) No law and no provision of any law made by the legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and the powers of the legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.

(3) The Governor-General of each of the new Dominions shall have full power to assent, in His Majesty's name, to any law of the legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon, shall not apply to laws of the legislature of either of the new Dominions.

(4) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that

Dominion unless it is extended thereto by a law of the legislature of the Dominion.

(5) No Order-in-Council made on or after the appointed day under any Act passed before the appointed day, and no order, rule or other instrument made on or after the appointed day under any such Act by any United Kingdom minister or other authority, shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion.

(6) The power referred to in sub-section (1) of this section extends to the making of laws limiting for the future the powers of the legislature of the Dominion.

Sri B. N. Rau examined the question in this note on 1st August 1947.]

I SHOULD LIKE to mention at the outset that the subject is one on which there is still room for controversy. Prof. Keith's view as to the right of a Dominion under the Statute of Westminster to secede from the Commonwealth will be clear from the following extracts from his book *The Dominions as Sovereign States*, 1938. The date of this book is important, because it was written not only after the enactment of the Statute of Westminster, but also after the enactment of the Irish Constitution of 1937 in which Ireland is described as a sovereign, independent, democratic State:

" The United Kingdom and the Dominions recognise the same sovereign, and the fact is solemnly recorded in the preamble to the Statute of Westminster in accordance with the decision of the Imperial Conference of 1930: ' It is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the royal style and titles shall hereafter require the assent of the Parliaments of all the Dominions as of the Parliament of the United Kingdom '. The declaration thus solemnly asserts that any change in the succession must be made by common action, and

it is inevitable that the conclusion should thence be derived that the union of the parts of the Commonwealth is one which cannot be dissolved by unilateral action.

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" What is obvious and is never denied is that, if any Dominion should really decide to sever itself from the Empire, it would not be held proper by the other parts of the Empire to seek to prevent it from doing so by the application of armed force. This is a doctrine which was recognised as early as 1920 by Mr. Bonar Law and has often been admitted since. More recently it was made clear in the discussions of the attitude of the Irish Free State in the matter of the oath and the withholding of the land annuities and other payments due to the British Government that, if the Free State should determine to declare itself a republic, the British Government would not make war to prevent such a result. But that view, of course, has nothing to do with the legal aspect of the case.

" From the legal point of view the matter is *prima facie* simple enough. The Dominions were created as organised governments under the British Crown, and there is no provision in their constitutions which contemplates that they have the right to eliminate the Crown or to sever their connection with it. The language of the British North America Act, 1867, is emphatic; the Act was passed to unite the provinces in a federal union under the Crown of the United Kingdom. The Commonwealth of Australia Constitution Act, 1900 is based, as the preamble states, on the agreement of the people of the colonies of Australia to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom. The South Africa Act, 1909 was passed in order to unite the colonies in a legislative union under the Crown of the United Kingdom. The Irish Free State was created by an agreement which assigns to it the same place in the Empire as is enjoyed by Canada.

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" It is not surprising that, in the face of these facts, General Smuts has consistently maintained in the past, and even now perhaps holds, that even the King himself could not with due regard to his duty assent to a measure of a Dominion Parliament purporting to destroy the connection with the Crown, and that still less could the Governor-General exercise the power. It is indeed now seriously open to argue that to effect separation,

there would in law be necessary an Imperial as well as a Dominion measure, and that under the principle enunciated by the Statute of Westminster the concurrence of the other Dominions would also be requisite."

It is clear from these extracts that, according to Keith, neither Canada nor Australia nor South Africa nor Ireland nor any of the other Dominions under the Statute of Westminster can legally secede from the Commonwealth by unilateral action, and that in order to effect a valid separation, there would be required in addition to a Dominion Act, an Act of Parliament of the United Kingdom passed with the concurrence of the other Dominions.

On the other side, we have another authority, K. C. Wheare who in his book, *The Statute of Westminster and Dominion Status* (also published in 1938), after discussing the judgment of the Privy Council in *Moore v. Attorney-General for the Irish Free State* [1935] A.C. *p.* 484, goes on to say: "It would follow, too, that any enactment of the Oireachtas (the Irish Parliament) to abolish the monarchy, or to provide for secession from the Commonwealth, or to declare neutrality, would in strict law be valid."

. The question was considered by the King's Bench Division in *Murray v. Parker* in 1942. The Chief Justice Lord Caldecote's view (in which the other judges concurred in effect) was:

"The removal by the Statute of Westminster in 1931 of any restriction upon the power of the legislature of the Irish Free State to pass legislation, whether repugnant or not to an Imperial Act, did not either expressly or by implication provide for any separation, described sometimes as the right to secede, from the British Commonwealth of Nations. Nor at any time, so far as I am aware after listening to the agreement of the appellant, has it ever been declared in terms by the Government of Eire that the so-called right to secede has in fact been exercised. . . . If I am wrong in the opinion I have thus expressed, it would still be a matter for consideration whether secession by Eire could be effective unless and until the other members of the British

Commonwealth of Nations had given recognition to Eire foreign State."

The balance of authority at present would thus seem to be in favour of Keith's view. On that view, there is no right of secession under the Statute of Westminster either for Canada, or Australia or South Africa or Ireland by any unilateral Act.

The terms of the Indian Independence Act are wider than those of the Statute of Westminster. In the first place, there is no restrictive preamble to the Act; secondly, section 6 (2) of the Act expressly permits repeal of the Act itself (so far as it is part of the law of the Dominion) by Dominion legislation; finally, the name of the Act is significant. For these reasons, the position of India in respect of the right of secession may be different from that of the Dominions under the Statute of Westminster.