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“The Statute of Westminster, 1931 – An Irish Perspective”

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Abstract

The Statute of Westminster Act, 1931 enjoys a prominent place in general histories of Canada, Australia, New Zealand and South Africa as former Dominions of the British Empire. This famous legal instrument is seen as an important milestone in the evolution of the Dominions from colonial status to fully sovereign states. By contrast this famous legal instrument receives far less attention in general works dedicated to Irish history even though the Anglo Irish Treaty of 1921 granted the self-governing Irish Free State the same status as the afore-mentioned Dominions. This tendency to minimise the importance of the Statute of Westminster also extends to the sphere of Irish law. Since the 1930s the Irish courts have maintained that the provisions of the Statute of Westminster had no impact on Irish constitutional law. This article argues that the marginalisation of the Statute of Westminster in Irish historiography and Irish law is particularly unfortunate when the proper context of this historic piece of legislation is fully appreciated. This article examines perceptions of the Statute of Westminster at the time of its enactment when parliamentary debates focussed on its significance to Anglo Irish relations at the expense of consideration of its impact on the evolution of the British Empire. This article will also examine the significance of the Statute of Westminster in advancing Irish sovereignty and in facilitating the creation of the current Irish Constitution that was brought into force in 1937.

1. The Statute of Westminster in British Imperial History

The significance of the Statute of Westminster of 1931 to the history of the British Empire cannot be over-emphasised. Its very name, with its medieval antecedents, epitomises a sense of enduring grandeur and dignity.¹ The Statute of Westminster recognised significant advances in the march of the self-governing Dominions in their evolution into fully sovereign states. The term “Dominion” was initially adopted in relation to Canada but was extended in 1907 to refer to all self-governing colonies of white settlement that had been evolving in the direction of greater autonomy since the middle of the nineteenth century.² By the early 1930s the Dominions included Canada, Australia, New Zealand, South Africa, Newfoundland and the Irish Free State.

The significance of the Statute of Westminster has seen it ranked alongside the American War of Independence as a key turning point in British Imperial history.³ It has even been suggested that if the former had existed in 1776 the latter might never have occurred.⁴ The contribution of the Statute of Westminster to the advance of the Dominion autonomy has long been emphasised by historians. For example, one commentator concludes “The general effect of the Statute was to close the chapter of Commonwealth history which recorded the attainment of self-government and self-determination [of the Dominions], and to still any questionings that might yet arise as to the validity of that attainment.”⁵

The significance of the Statute of Westminster Act, 1931 in the evolution the Dominions is reflected in textbooks on public international law. In the 1920s these textbooks had been unsure how to classify the British Dominions as self-governing entities. Could they be considered as constituting fully sovereign states? A lengthy examination of

this specific question, carried out as late as 1929, concluded that although significant advances had been made by the Dominions in the early twentieth century “it is impossible to admit that the Dominions are persons of International Law of identically the same kind as those which are called ‘independent sovereign States’”.⁶ This uncertainty evaporated after the enactment of the Statute of Westminster. Henceforth, the Dominions were firmly classified as sovereign states.⁷

No history of the former Dominions in the twentieth century would be complete without some reflection on the significance of the Statute of Westminster. One Canadian work concludes: “The Statute of Westminster ... essentially established the complete lawful autonomy of Canada”.⁸ An Australian text adds “This enactment removed the last formal restrictions on the sovereignty of the Commonwealth of Australia”.⁹ South African historians recognise that “the Statute of Westminster opened a new period in the constitutional history of South Africa”.¹⁰ A New Zealand text passes judgment on Wellington’s decision not to immediately adopt the Statute of Westminster by concluding that “New Zealand was content to remain a ‘Dominion’” while “Canada, South Africa and the Irish Free State became sovereign, independent states in 1931”.¹¹

The only exception to the necessity of providing some historical commentary on the significance of the Statute of Westminster concerns works written in what was once the sixth Dominion of the British Empire. This was the Irish Free State which formally joined the ranks of the Dominions in 1922.¹² It is not uncommon for general histories of Ireland in the twentieth history to offer the Statute of Westminster little more than a passing reference or to ignore it completely.¹³

The marginalisation of the Statute of Westminster in many general works of Irish political and constitutional history, something unthinkable in Canadian or Australian equivalents, is particularly unfortunate when the proper context of this historic piece of legislation is fully appreciated. The Irish Free State played an important role in the creation of the final text of the Statute of Westminster at successive Imperial conferences in the 1920s and 1930s. In addition, parliamentary debates at Westminster reveal that this historic legislation was largely perceived at the time of its enactment as an incident in Anglo Irish relations rather than a key moment in the development of the British Empire or Commonwealth.¹⁴ The other Dominions were certainly mentioned in these parliamentary debates. Supporters and opponents of the Statute of Westminster tended to refer to the wishes of like-minded authorities in the Dominions to support their arguments.¹⁵ Canada and Australia were often used as examples in the context of hypothetical arguments.¹⁶ Yet, the discussions on the actual impact of the statute on Australia, Canada, New Zealand and even South Africa never received anything like the level of attention given to the Irish Free State. The lengthy discussions on the internal politics of the Irish Free State have no parallel with respect to any of the other Dominions.¹⁷ Stanley Baldwin, leader of the Conservative party and former prime minister, expressed a sense of frustration in the House of Commons when he complained “There is a tendency, in concentrating on Ireland, to lose sight of the fundamental question here, which is the question of Imperial relationship”.¹⁸ These considerations ensure that the debates on the enactment of the Statute of Westminster can be seen as the last in a series of great parliamentary debates on the future of Ireland that was a major feature of British politics in the late nineteenth and early twentieth centuries.

This article will examine the impact of the Irish Free State on the enactment of the Statute of Westminster and the impact of the Statute of Westminster on the Irish Free State. The examination of these related issues will permit analysis of the Statute of Westminster as it was seen at the time of its enactment in 1931. This will illustrate why British politicians of the 1930s were more concerned with the effect of this far-reaching legislation on the Irish Free State rather than its significance to the development of the Empire as a whole. It will also examine why the enactment of the Statute of Westminster promoted the development of Irish sovereignty in the 1930s that permitted the development of the current Irish Constitution. This article will argue that the impact of the Statute of Westminster on the Irish Free State was significant even if this reality is not always recognised in works on Irish history. However, it is important to note that this ambivalent and often dismissive attitude towards the Statute of Westminster is not limited to historical accounts. The Irish courts have acknowledged the importance of the Statute of Westminster for the other former Dominions but insist that its provisions had no direct effect on Irish law. The Irish Supreme Court in Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975 held “the Statute of Westminster, 1931, should be regarded as declaratory of the law [in Ireland] and not as making any change in it”.¹⁹

A similar sense of ambivalence towards the Statute of Westminster was shown by Irish governments in the 1920s and 1930s. In 1931 the Irish government gave formal consent for the enactment of the Statute of Westminster while simultaneously denying that this measure had any legal impact on the Irish Free State. This article will attempt to explain the reasons behind this ambivalent attitude towards the Statute of Westminster. It

will also attempt to show why this stance towards the Statute of Westminster remains relevant in the spheres of Irish law, history and politics.

2. Key Provisions of the Statute of Westminster

The great distinction of the elevated title of “Statute of Westminster” was its association with the imposing majesty of English legal history. This allowed the statute to weather a tide of accusations of being inconsistent with British constitutional tradition, in that it regulated Imperial relations by statutory means instead of unwritten convention, by anchoring it to ancient legal antecedents.²⁰ The name also had the great merit of making no reference to the contents of the statute. This was highly advantageous since the provisions of the statute were often condemned as sounding the death-knell of Imperial unity.²¹ Maurice Gwyer, British procurator general and treasury solicitor, is often credited with having first suggested the name “Statute of Westminster” for the 1931 Act.²² This claim seems elusive of definite proof. Nevertheless, Gwyer can certainly be credited with having played an important role in the creation of this important piece of legislation. He chaired a key committee at the special Imperial conference of 1929 that had recommended the removal of legal constraints imposed upon the legislative powers of the Dominion parliaments.²³

The name “Statute of Westminster” did provoke a number of supercilious comments as to the accuracy of its historical provenance. The Statutes of Westminster of 1275, 1285, and 1290 had dealt with such matters as the fixing of “legal memory”, trial by jury at *nisi prius* and the prevention of sub-infeudation after the alienation of the fee

simple.²⁴ The establishment of self-governing Dominions across vast oceans was beyond the wildest fantasies of medieval Englishmen. A clumsy attempt was made to delay the passage of the Bill on the basis that its title was inappropriate. It was argued that its contents had little in common with previous Statutes of Westminster.²⁵ Such quibbles were brushed aside by the solicitor general Thomas Inskip who concluded that the “splendid title” of “Statute of Westminster” was eminently suitable for “a landmark in the constitutional history of the British Empire”.²⁶

The most important provisions of the Statute of Westminster that concerned all of the Dominions were found in Sections 2, 3 and 4 of the Act. Section 2 of the Statute of Westminster ensured that laws created in the Dominions would no longer occupy a subservient position to statutes passed by the Imperial parliament. Previously any Dominion law that was repugnant to a statute passed by the Imperial parliament that extended to that Dominion could be declared null and void. This position was recognised at common law and regulated by statute in the form of the Colonial Laws Validity Act, 1865. The provisions of the Colonial Laws Validity Act had actually been put into practice as recently as 1926 when Section 1025 of the Canadian Criminal Code, 1888 was struck down as being incompatible with certain statutes passed by the Imperial parliament in London.²⁷ Section 2 of the Statute of Westminster repealed the effect of the Colonial Laws Validity Act, 1865 with respect to the Dominions and ensured that no Dominion law could ever again be struck down on this basis.

Section 3 of the Statute of Westminster confirmed that the Dominions had the power to make laws that extended beyond the bounds of their own frontiers. There was a body of opinion that argued that the Dominions had always had the power to legislate with

extra-territorial effect but this was contradicted by a number of important judgments.²⁸

The Statute of Westminster provided clarity on this important issue.²⁹

The Statute of Westminster confirmed the power of the Imperial parliament to legislate for the Dominions. However, Section 4 provided that this power could only be used if the Dominion or Dominions in question had requested and consented to the legislation. In fact, this was nothing more than the formal enactment of a convention that had been recognised at the 1926 Imperial conference and had been followed in practice for several preceding decades.³⁰

The Preamble to the Statute of Westminster reflected decisions made at the special Imperial conference held in 1929 which, amongst other issues, discussed succession to the Crown.³¹ The wording that was finally agreed recognised that “any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom”. These provisions would prove to be of some significance when King Edward VIII abdicated in 1936. Before 1931 a single Imperial statute passed at Westminster would have sufficed to recognise the abdication of Edward VIII and the accession of his brother George VI. Now legislation had to be passed by each of the Dominion parliaments to recognise the succession.

The Statute of Westminster also contained a number of minor provisions that were of general interest. Section 5 of the Statute of Westminster removed certain limitations on the power of the Dominion parliaments to legislate in relation to merchant shipping. These limitations were reflected in Sections 735 and 736 of the Merchant Shipping Act, 1894. The restrictive provisions were replaced with a common position based on

voluntary agreement. This would later be enshrined in the Commonwealth Merchant Shipping Agreement of 1931.

Section 6 of the Statute of Westminster removed the restrictions imposed by Sections 4 and 7 of the Colonial Courts of Admiralty Act, 1890 on the Dominions. Although it is not indicated in the text, this section of the Statute of Westminster did not actually apply to the Irish Free State. The report of the special Imperial conference of 1929 recognised that the 1890 Act had never applied to the Irish Free State where admiralty matters were governed by the Courts of Admiralty (Ireland) Act, 1867.³²

3. The Irish Free State

The focus of this paper is on the relationship between the Statute of Westminster and the Irish Free State. The particular emphasis on the impact of the Statute of Westminster on Irish affairs in contemporary parliamentary debates is hardly surprising when it is considered that, in contrast to most of the other Dominions, the full provisions of this historic measure applied without any restriction or qualification to the Irish Free State in 1931. The Statute of Westminster did not apply at all to Australia until 1942³³ and New Zealand until 1947.³⁴ It never applied to Newfoundland, which was a separate Dominion until 1933.³⁵ Canada agreed that its Constitution, at that time composed of Imperial legislation, would remain unaffected by the provisions of the Statute of Westminster.³⁶ Even South Africa passed a parliamentary resolution protecting certain entrenched provisions within its constitution, the South Africa Act, 1909, from the impact of the Statute of Westminster.³⁷ No equivalent action to exempt the Irish Constitution, or key

aspects of it, from the impact of the Statute of Westminster was ever undertaken by the Irish parliament.

The special position of the Irish Free State with respect to the provisions of the Statute of Westminster was an important consideration in ensuring that British parliamentary debates focussed on this particular Dominion more than any other. The Irish also played a leading role in creating some of the most important provisions of this historic piece of legislation. These and other considerations require substantial consideration of the influence of the Irish Free State in any history of the Statute of Westminster. Yet, there were other special features of the Irish Free State that set it apart from the likes of Australia, Canada and even South Africa. The Irish Free State did not consider herself as constituting a self-governing Dominion. This, in turn, led her to deny that the Statute of Westminster had any impact on Irish law.

The self-governing Irish state consisted of 26 counties in the south and west of the island of Ireland that had formerly been part of the United Kingdom. The Irish Free State was born out of an armed struggle against Crown forces that began with the Easter rising of 1916. The conflict recommenced in 1919 and only concluded in 1921 with the signature of the “Articles of Agreement for a Treaty between Great Britain and Ireland”.³⁸ Article 1 of the 1921 Treaty provided that the Irish Free State would remain within the British Empire where she would enjoy the same constitutional status as the existing Dominions. Article 2 specifically linked certain key aspects of the constitutional status of the Irish Free State to that of Canada, the “eldest Dominion”. While it was clear that the Irish Free State was intended to be the latest addition to the existing Dominions, her origins in armed conflict and her former position as a part of the United Kingdom could

never be entirely forgotten. It was difficult to reconcile this history with British perceptions as to the identity and history of the colonies of white settlement. These ensured that she was placed in a unique position among the Dominions of the British Empire. Indeed, there was an influential body of opinion throughout the Empire and within successive British governments that was reluctant to treat the Irish Free State in the same way as the other Dominions.³⁹ There was a corresponding body of opinion within the Irish Free State in the 1920s and 1930s that, coming from a different perspective, also rejected the very idea of an “Irish Dominion”. The contention that the Irish Free State had come into existence as a Dominion was seen as incompatible with Irish identity and history.⁴⁰

4. Irish Influence on Origins of the Statute of Westminster

Any analysis of the relationship between the Irish Free State and the Statute of Westminster must include a brief outline of the origins and provisions of this famous piece of legislation. The momentum behind the creation of the statute was created in a number of Imperial conferences that took place between 1926 and 1930. The Imperial conferences were occasions in which the self-governing entities of the British Empire met to discuss matters of common interest in the late 19th and early 20th centuries. The Irish had played a significant role in shaping each of the formal reports of the Imperial conferences that preceded the enactment of the Statute of Westminster. They had objected to the restrictions on the legislative sovereignty of the Dominions in a preparatory memorandum that was circulated at the Imperial conference of 1926.⁴¹

Detailed consideration of these matters was postponed until a special “conference on the operation of Dominion legislation” was convened in 1929. The British government made a determined effort to limit Irish demands for reform at the 1929 conference. It proposed a number of legal mechanisms for continuing the supremacy of Imperial legislation considered fundamental to the unity of the British Empire. Although these proposals received staunch support from New Zealand, they were unacceptable to Canada, South Africa and the Irish Free State.⁴² The position advocated by the Irish government was finally accepted. The 1929 conference accepted that the overriding effect of Imperial statutes over Dominion laws, as reflected in the Colonial Laws Validity Act, 1865, should come to an end.⁴³

The Irish Free State was also a driving force behind the provisions of the Statute of Westminster that recognised the power of the Dominion parliaments to pass extra-territorial legislation. In the early 1920s the Canadians attempted to persuade the British government to recognise that the Dominions could legislate with extra-territorial effect.⁴⁴ These efforts did not bear fruit. The Irish Free State revived this issue at the the Imperial conference of 1926 and at the special conference of 1929 using very different tactics than their Canadian predecessors. Instead of requesting concessions from the British government, the Irish presented this restriction on Dominion sovereignty as a deviant theory that required to be put to rest by clarifying the true position.⁴⁵ The British government saw the demand for identical legislative powers to those enjoyed by the Imperial parliament at Westminster as an extravagant claim. It assumed that the other Dominions would accept limited powers to pass extra-territorial legislation.⁴⁶ This assumption proved to be incorrect when the Canadians and South Africans refused to

accept the limitations that were proposed.⁴⁷ Although the British were particularly reluctant to recognise that the Irish Free State enjoyed full powers to pass extra-territorial legislation, the strong support provided to the Irish by Canada and South Africa made it impossible to refuse this concession. Section 3 of the Statute of Westminster provided: “It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation”.⁴⁸

Those who were hostile to the general scheme of the Statute of Westminster often blamed the Irish Free State and South Africa for its introduction.⁴⁹ In Australia, former prime minister William Hughes deplored the fact that the British government “had listened to men who, in some instances, were newcomers to the table of the Empire, and had acceded to their demand that there should be such a modification of the existing relations between Great Britain and the countries they represented as would permit those countries to pose before the world as independent nations”.⁵⁰ J.H. Morgan, a leading authority on British constitutional law with strong unionist sympathies, noted with complete approval that the Statute of Westminster was often called the “Statute of Dublin” in loyal New Zealand.⁵¹

5. Irish Difficulties with the Statute of Westminster

Although the Irish played a central role in securing the most important reforms contained in the Statute of Westminster, it is important not to exaggerate Irish influence over the statute as a whole. There were aspects of the Statute of Westminster that caused some misgivings in Dublin. These included the provisions on the succession to the Crown.

Westminster had previously enjoyed a monopoly on passing statutes relating to the succession to the Crown. The British wished to retain this exclusive power and advocated that an exception be made on this matter in the proposed Statute of Westminster. This exception proved to be unacceptable and the British put forward a compromise proposal that would cover matters connected to the Crown together with the law of prize and the discipline of armed forces outside their own country. It was proposed that a formal agreement be concluded between all the governments whereby each would covenant to take no action for the purpose of altering the relevant areas of law without the consent of all. The agreement would be ratified by each Dominion parliament and given the force of law by an Imperial statute. The Canadians objected to this solution on the grounds that it savoured of federalism and gave Westminster an overriding position.⁵² Although the Irish had little enthusiasm for legal provisions that recognised the legislative dominance of the parliament at Westminster they seemed prepared to make a special exception in relation to succession to the Crown.⁵³ This was a subject that the Irish government did not want to raise in the Irish parliament. The Canadians voiced fears during the 1929 conference that parliamentary debates on matters relating to the Crown would raise difficult political and religious questions, especially given the exclusion of Catholics under legislation relating to the succession.⁵⁴ These difficulties were far more acute in the Irish Free State than in Canada.⁵⁵ As events transpired the Irish parliament would be obliged to pass such legislation in 1936 when Edward VIII abdicated from the throne.⁵⁶

There were other aspects of the Statute of Westminster that caused some disquiet in Dublin. The Irish Free State, with some support from South Africa, made an unsuccessful attempt in 1929 to secure complete abolition of Westminster's powers to legislate for the

Dominions irrespective of considerations of consent.⁵⁷ The retention by Westminster of a technical power to legislate for the Irish Free State was emphasised by domestic opponents of the Irish government even though Irish consent was unlikely to be forthcoming.⁵⁸ The retention of this power by Westminster was clearly inconsistent with the principle of the equality of the Dominions and the United Kingdom that had been accepted at the Imperial conference of 1926.⁵⁹ However, the formal abolition of Westminster's power to legislate for the Dominions in all circumstances was almost inconceivable for most British and Dominion statesmen. The Canadian prime minister, R.B. Bennett told his parliament that no Imperial conference "has for a single moment thought of renouncing the supremacy of the Imperial Parliament, lest it be taken as a termination of the ties that bind together under the Crown all the overseas Dominions".⁶⁰ It is unlikely that the Statute of Westminster could have been enacted without some provision guaranteeing the possibility of new Imperial legislation for the Dominions in some shape or form. As events transpired this provision permitted the passage of a number of important legislative acts in subsequent decades. These include such measures as the Australia Act, 1986 and the "patriation" of the Canadian Constitution in the Canada Act, 1982.

The foremost difficulty that the Irish government had with the Statute of Westminster was that it was enacted as a British Imperial statute that purported to extend to the Irish Free State along with other Dominions. Although British recognition of enhanced autonomy in the Dominions was undoubtedly a positive development, the Irish government would have preferred that this be achieved without resort to Imperial legislation. The alternatives of drawing up a formal agreement, something akin to an

international treaty, or merely recognising the changes in a report of an Imperial conference were not acceptable to the other Dominions.⁶¹

The Irish had not had everything their own way in the negotiations that hammered out the final form of the Statute of Westminster. The inclusion of the Irish Free State in the provision that defined the term “Dominion” for the purposes of the Act caused some disquiet among Irish commentators who refused to accept that their state was a Dominion.⁶² However, as far as the Irish government was concerned, these drawbacks were easily outweighed by the beneficial provisions of the Statute of Westminster. If sacrifices were required to win the support of other Dominions for these reforms this was a price that the Irish government was prepared to pay.

6. The Statute of Westminster and the Anglo Irish Treaty of 1921

The Irish had particular reason to welcome the provisions concerning the removal of limitations on legislative sovereignty contained within the Statute of Westminster. Many aspects of the settlement imposed by the Anglo Irish Treaty of 1921 were unpalatable to Irish nationalists. The Treaty made it clear that the Irish Free State would remain part of the British Empire. In addition, the Irish Free State was to be a constitutional monarchy and not a republic. The King and his representative, the Governor General, were recognised as significant institutions in Irish internal affairs by the 1922 Constitution.⁶³ The Constitution of the Irish Free State also included an oath to be taken by all members of the Irish parliament and government. The reference to the King in this oath provided one of the most divisive issues in Irish politics in the 1920s and 1930s.⁶⁴ These aspects

of the Treaty settlement were exacerbated by British claims concerning limits on extra-territorial jurisdiction and insistence that the Irish Free State was still subject to Imperial legislation enjoying superior status to Irish law under the Colonial Laws Validity Act, 1865.⁶⁵ In 1922 the Irish were forced to accept that the decisions of the Irish Supreme Court were subject to an appeal to the Judicial Committee of the Privy Council, the final appellate court for much of the British Empire.⁶⁶

Soon after the signature of the Anglo Irish Treaty of 1921 the British demanded that the Irish give a legal guarantee that they would continue to adhere to its provisions. This guarantee was to be enacted alongside the substantive articles of the Irish Constitution of the Irish Free State. The Irish Constitution of 1922 was enacted by parallel statutes, one passed by an Irish constituent assembly in Dublin and the other by the Imperial parliament at Westminster. It was agreed that both statutes would provide that that any provision of the Constitution, any constitutional amendment and any law made under the Constitution that was inconsistent with the provisions of the 1921 Treaty would be rendered void and inoperative.⁶⁷ This provision, sometimes called the “repugnancy clause”, was a serious impediment to the expansion of Irish sovereignty in the 1920s and early 1930s.⁶⁸

The dual origins of the Irish Free State and its Constitution also proved to be problematic in the inter-war years. The British and Irish both considered the statute enacted by their own parliament as enjoying primacy. The Irish were convinced that they had created their own self-governing state and their own Constitution by means of a statute passed by their constituent assembly. However, they were well aware that the British were equally convinced that the Irish Free State and its Constitution had been created by an

Imperial statute passed at Westminster in the same manner as the other Dominions of the British Empire. The Irish knew that the only way to remove the limitations of the Treaty settlement while avoiding a serious clash with the British was to find a means of doing so that was compatible with the British theory as to the legal origins of the Irish Free State. This was not easily done as a result of the barrier imposed by the “repugnancy clause”. The obvious answer for the Irish was to pass an amending statute that removed this “repugnancy clause”. However, this was not possible because British Imperial statutes outranked Dominion laws in terms of legal hierarchy. It may be recalled that this position was maintained by means of a rule of common law and also by means of the Colonial Laws Validity Act, 1865. This ensured that the limits on Irish sovereignty imposed by the 1921 Treaty were protected by a double padlock of repugnancy clause and supremacy of British Imperial statutes. This padlock remained unbreakable throughout the 1920s.

The great significance of the Statute of Westminster to the Irish Free State lay in its potential to remove this padlock. Section 2 of the statute proposed the removal of the supremacy of British Imperial statutes over Dominion laws. If this were done the British would not be able to challenge the removal of the “repugnancy clause” and subsequent amendment of constitutional provisions that reflected the settlement imposed by the 1921 Treaty. Although many Irish nationalists favoured a radical revision of the Treaty settlement, the Irish government in power in 1931 only targeted key aspects that were particularly repugnant to Irish sovereignty. The most important of these was the policy of seeking the abolition of the appeal to the Judicial Committee of the Privy Council from the Irish courts.

7. The Irish Appeal to the Privy Council

In the early 20th century the “Judicial Committee of the Privy Council” heard appeals from most of the scattered territories that made up the British Empire. The awkwardness of its name ensured that it was often called by its short, although not entirely accurate, name of the “Privy Council”. The Privy Council was the final court of appeal for the self-governing Dominions which, by 1922, included the newly created Irish Free State. Irish governments were never reconciled to the existence of an appeal to a court in London that could overrule the decisions of the Irish Supreme Court. British ministers were forced to apply intense pressure before their unhappy Irish counterparts finally agreed to recognise the Privy Council appeal in Article 66 of the Constitution of the Irish Free State. The appeal was seen as an integral aspect of Dominion status and as a safeguard for unionists who remained in the Irish Free State.⁶⁹ A series of unfortunate decisions in the mid 1920s further alienated the Irish government from the Privy Council.⁷⁰ By 1926 the Irish government began to block appeals to the Privy Council by various means.⁷¹ Before long the government was openly advocating the formal abolition of the appeal. A determined effort to secure British agreement for the abolition of the appeal from the Irish courts was defeated at the Imperial conference of 1930.⁷² This reverse only reinforced the Irish desire to abolish the hated appeal to the Privy Council.

There were individuals in the United Kingdom who were equally convinced that the Irish Free State should not be permitted to abolish the appeal which, they predicted, would form the first step in a wholesale revision of the settlement imposed by the 1921 Treaty. These persons were determined that the application of the Statute of Westminster

had to be limited with respect to the Irish Free State in order to protect the Privy Council appeal and the entire settlement imposed by the 1921 Treaty. The British government anticipated that the House of Lords was almost certain to introduce an amendment of this nature.⁷³ Edward Harding, the under-secretary at the Dominions office, told the Irish high commissioner in London that he would be surprised if the House of Lords passed the Statute of Westminster without an amendment relating to the Irish Free State.⁷⁴ Matters were not helped by the fact that the government's own leader of the House of Lords, Lord Hailsham, was widely known to oppose granting legal concessions to the Irish Free State.⁷⁵ The British prime minister, Ramsay MacDonald, promised that the provisions of the Parliament Act, 1911 would be set in motion in the event of an amendment by the House of Lords. He added that the worst-case scenario would be delay of around eighteen months in enacting the Statute of Westminster.⁷⁶ This was hardly encouraging news for an Irish government facing an election within the next nine months. Yet, as events transpired, the main challenge took the more serious form of a proposal for amendment in the House of Commons. A successful amendment here would have had far more devastating consequences than mere delay. The Irish government could never accept a diluted version of the Statute of Westminster and the survival of the entire initiative would have been placed in jeopardy.

8. Attempts at Amendment in the House of Commons

On 20 November 1931 Colonel John Gretton MP proposed an amendment to the Statute of Westminster Bill that was specifically aimed at the Irish Free State. Gretton was a wealthy Staffordshire brewer and one of the leading “die-hards” in the British Conservative party. The “die hards” were a group of Conservatives associated with staunch opposition to reform of the House of Lords and equally uncompromising opposition to concessions to Irish, and later Indian, nationalists.⁷⁷ Gretton had resigned the Conservative whip in 1922 in protest at the policies of the coalition government led by Lloyd George. He was outraged by the political settlement in Ireland that had culminated in the signing of the Anglo Irish Treaty of 1921. Just under ten years later Gretton sought legal advice as to the effect of the Statute of Westminster on the Irish Free State. He also entered into correspondence with the Dominions secretary, James Thomas, on this matter.⁷⁸ Thomas explained that the Irish Free State would still be obliged to maintain the Treaty settlement on moral grounds after the enactment of the Statute of Westminster. He insisted that these moral considerations stood “on a higher plane than an obligation imposed by law”.⁷⁹ Gretton was unimpressed by these assurances and joined forces with such figures as Lord Carson, Lord Danesfort, A.A. Somerville and J.H. Morgan to circulate letters and hold public meetings that urged the amendment of the Statute of Westminster with respect to the Irish Free State.⁸⁰ Gretton’s proposed amendment was given addition force when it was endorsed by one of the British signatories of the 1921 Treaty. This person was Winston Churchill.

The original intention of the die-hard members of the House of Commons was to place the amending provisions in Section 7 of the Bill. This provided that “Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930”. The proposed amendment would insert the additional words “or to the Irish Free State Constitution Act, 1922”.⁸¹ By the time the amendment was finally introduced, it had been decided to place it in a section of its own and to expand the scope of protection: “Nothing in this Act shall be deemed to authorise the Legislature of the Irish Free State to repeal, amend, or alter the Irish Free State Agreement Act, 1922, or the Irish Free State Constitution Act, 1922, or so much of the Government of Ireland Act, 1920, as continues to be in force in Northern Ireland.”⁸²

This amendment had been drafted following the provision of legal advice from J.H. Morgan. Morgan, like the great majority of British lawyers, considered the Irish Free State to have been created by Imperial statute. As far as he was concerned the Treaty settlement had been given force of law by the Irish Free State (Agreement) Act, 1922 and the Irish Free State Constitution Act, 1922. Morgan believed that the removal of the limiting provisions of the Colonial Laws Validity Act, 1865 would allow the Irish Free State to alter or repeal these Imperial statutes. This would give the Irish parliament the power to legislate contrary to the 1921 Treaty and so allow the Irish Free State to repeal or amend the provisions of the Irish Constitution relating to such matters as the Privy Council appeal and the position of the King. It was hoped that removing the Irish Free State (Agreement) Act, 1922 and the Irish Free State Constitution Act, 1922 from the effect of the Statute of Westminster would ensure the preservation of the legal settlement with the Irish Free State.⁸³

Colonel Gretton introduced his amendment by distinguishing the Irish Free State from the other Dominions. He argued that its position as the youngest and “least firmly established” Dominion set it apart from the others. Gretton also argued that the geographical position of the Irish Free State differentiated it from the more distant Dominions and made it a “special case”.⁸⁴ Having made these points, Gretton and his supporters argued that their amendment was actually designed to remove an unfortunate distinction between the Irish Free State and the other Dominions that was inherent in the existing provisions of the Statute of Westminster. The other Dominions had moved by various means to ensure that the Statute of Westminster would not interfere with the provisions of their own Constitutions.⁸⁵ Colonel Gretton and his supporters argued that their proposed amendment would ensure that the Irish Free State Constitution, which had incorporated the text of the 1921 Treaty, would be similarly unaffected by the passage of the Statute of Westminster.

Those who opposed Gretton’s amendment insisted that its effect was not to place the Irish Free State in the same position as the other Dominions. The great difference was that Canada, Australia, New Zealand and South Africa had all consented to the measures that safeguarded their Constitutions. The amendment concerning the legal position of the Irish Free State was proposed without any request or initiative from Dublin. By contrast, the Irish government had made clear its fervent opposition to acceptance of Gretton’s proposal.

In the words of the Times there was an “unfriendly atmosphere” in the House of Commons on 20 November 1931 when Colonel Gretton’s proposed amendment to the Statute of Westminster was introduced. The House was sparsely attended and the

Dominions secretary, James Thomas, and the solicitor general, Thomas Inskip, were the only representatives of the government who were present. By contrast, the chamber was full of die-hards who loudly demanded that the Statute of Westminster be amended in relation to the Irish Free State. There seemed a real possibility of a government defeat that would have put the entire Statute of Westminster in jeopardy.⁸⁶ Thomas managed to calm the situation by announcing that “every consideration” would be given to the arguments behind the amendment and that “the Government will be asked to consider the whole situation in the light of the Debate that has taken place”.⁸⁷ These assurances proved sufficient to buy time and stave off the immediate threat to the British government and to the Statute of Westminster itself.⁸⁸

9. The Irish Response

Thomas’ promise to consider Gretton’s amendment caused much anxiety on the part of Irish government. The Irish took the threat of amending the Statute of Westminster very seriously. An Irish memorandum noted that British acceptance of this amendment would “destroy the whole basis of the Irish Free State as we have conceived it” and set nine years of government policy at naught.⁸⁹ The Irish prime minister in 1931 was W.T. Cosgrave.⁹⁰ Cosgrave’s government had largely adhered to the settlement enshrined in the 1921 Treaty and adopted a policy of constructive engagement with the Commonwealth. This was reflected in the importance placed by the Irish government in attending the Imperial conferences of the 1920s and early 1930s. Cosgrave and his Cumann na nGaedheal party had been in government since 1922 but by the early 1930s were facing a serious political

challenge from Eamon de Valera and his supporters.⁹¹ De Valera had been president of the underground government during the Anglo Irish conflict of 1919-1921 and had opposed acceptance of the 1921 Treaty from the outset. In 1926 he founded a new political party, Fianna Fáil, and committed it to a programme of extensive constitutional reforms that would radically alter the settlement enshrined in the 1921 Treaty and in the Constitution of the Irish Free State.⁹² By late 1931 it had become clear that de Valera had a good chance of winning an approaching general election.

It was not obvious to the members of the Irish government that Thomas' apparent willingness to consider the proposed amendment to the Statute of Westminster was based on a need to play for time. W.T. Cosgrave responded to the perceived threat by writing a letter to prime minister Ramsay MacDonald on 21 November that demanded resistance to Gretton's proposal.⁹³ Cosgrave insisted that the Statute of Westminster Bill reflected agreements that had been approved by all participants at the Imperial conference of 1930. However, the central theme of the letter concerned the position of the Anglo Irish Treaty. Cosgrave wrote that the Irish government had reiterated time and again "that the Treaty is an agreement which can be altered only by consent".⁹⁴ He asserted that the Irish people believed in the solemnity of the Treaty but added that any attempt by the British parliament to alter its terms would undermine Irish faith in the sanctity of this instrument.⁹⁵

Patrick McGilligan, the Irish minister for external affairs, echoed Cosgrave's initiative by writing his own letter to James Thomas. This letter followed the same approach as that sent by Cosgrave, although McGilligan placed greater emphasis on the danger of giving in to "reactionaries". McGilligan warned that there were "forces at work

in both islands whose hatred for this country is so bitter that no consideration of general interest would stop them in their endeavour to overthrow the institutions built up here with so much toil and difficulty”.⁹⁶ McGilligan also authorised John Dulanty, the Irish high commissioner in London, to impress upon James Thomas the “serious ill consequences” that would follow the acceptance of an amendment to the Statute of Westminster relating to the Irish Free State.⁹⁷ It was, however, Cosgrave’s intervention that made the real impact.

Cosgrave’s letter was deplored by members of the Fianna Fáil opposition. They were disturbed by Cosgrave’s commitment to securing bilateral consent before amending the Treaty settlement. Seán MacEntee, a leading figure in Fianna Fáil, called it “one of the most utterly foolish letters that ever passed from a spokesman of the Irish people into the hands of a British politician”.⁹⁸ Yet, Cosgrave’s emphasis on the solemnity of the Treaty and the need to maintain a position of good faith at the heart of Anglo Irish relations had a different impact on a British audience. The British government was sufficiently impressed with the contents of the letter as to actually read out the vital paragraphs to the House of Commons.⁹⁹ Ramsay MacDonald declared that he agreed with every word of the letter.¹⁰⁰ Austen Chamberlain, one of the British signatories of the 1921 Treaty, revealed that he had been disinclined to intervene in the debate until the effect of Cosgrave’s letter stirred him into open opposition to Gretton’s amendment.¹⁰¹ Even die-hard unionists seemed touched by Cosgrave’s integrity.¹⁰² The Morning Post, a unionist newspaper, described Cosgrave’s letter as a “trump card”.¹⁰³ One unionist MP, Arthur Shirley Benn, claimed that he had actually torn up his speech supporting Colonel Gretton’s amendment on hearing Cosgrave’s letter.¹⁰⁴

Cosgrave was not without his admirers at Westminster. His government had received considerable praise for restoring stability to the Irish Free State. The Cosgrave administration and, perhaps more importantly, Cosgrave himself enjoyed a certain amount of esteem even among die-hard unionists. Most of those who supported Gretton's amendment made sure to praise Cosgrave's record of adherence to the terms of the Treaty.¹⁰⁵ Yet, there were discordant voices that cast doubt on the apparent stability achieved by Cosgrave's government. Winston Churchill asserted that the Irish government had been forced to introduce public order legislation of such an extreme nature that it almost amounted to martial law.¹⁰⁶ It was well known that Cosgrave's majority in the Irish parliament amounted to a mere handful of seats and that this precarious position would be sorely tested in the approaching election. There was a real possibility that Cosgrave might be replaced by de Valera in a matter of months. The political situation in the Irish Free State exerted a powerful influence throughout the debate on the Statute of Westminster.

The prospect of a de Valera government strengthened the resolve of those who supported the amendment of the Statute of Westminster with respect to the Irish Free State. Supporters of Colonel Gretton's amendment refused to be convinced by the argument that the provisions of the Anglo Irish Treaty rested on a moral plane that transcended questions of law. They highlighted the importance of maintaining existing legal controls even if it became clear that a future Irish government would defy them. Supporters of the amendment often asked whether de Valera would recognise the moral sanctity of the Treaty on which so much emphasis was laid. They also questioned the

logical basis of handing the Irish the legal power to legislate contrary to the Treaty and then telling them that the exercise of such a power would be considered immoral.¹⁰⁷

Supporters of Gretton's amendment also argued that its acceptance would actually strengthen the position of the Cosgrave administration in relation to its domestic opponents. It was argued that the removal of the legal bonds of the 1921 Treaty would ensure that the status of the Irish Free State would become the focus of every subsequent Irish election. Supporters of the proposed amendment concluded that this development would only be of benefit to Cosgrave's opponents. It was also argued that the retention of certain legal limits would provide continued grounds for restricting calls for radical change by those who did not recognise any moral dimension to the Treaty. These arguments were clearly out of line with political realities in the Irish Free State. If Gretton's amendment had been enacted it would have been seen as a snub to the Cosgrave administration and its policy of constructive engagement with the Commonwealth. This is evident in the dismay with which the Cosgrave administration greeted the proposal. The proponents of Gretton's amendment were too intent on safeguarding the Treaty settlement to contemplate pragmatic means of extending the survival of the Cosgrave administration vis-à-vis their more extreme domestic opponents.¹⁰⁸

10. The Final Fate of Colonel Gretton's Amendment

The British government could never accept the proposed amendment to the Statute of Westminster notwithstanding the strength of unionist opinion that lay behind the efforts of Gretton and Churchill. This was made clear in internal memoranda drafted for the benefit

of the British government. These memoranda noted that the British government had accepted Irish arguments based on the moral sanctity of the Treaty that existed “on a higher plane than any legal sanction” at recent Imperial conferences.¹⁰⁹ The introduction of legal safeguards at this eleventh hour would be seen as a reversal of the agreements reached at these conferences.¹¹⁰ Acceptance of the amendment would have forced the British to violate established constitutional practice by enacting Imperial legislation for a Dominion that no longer consented to the measure.¹¹¹ British officials also argued that it was difficult to see how their government could justify placing legal safeguards in the Statute of Westminster relating to the Anglo Irish Treaty without making similar demands with respect to the “entrenched clauses” in the South African Constitution that were designed to protect the rights of the English speaking minority and the black majority. It was obvious to British officials that the latter course “would arouse the most violent opposition from General Hertzog, and cannot be contemplated for one moment”.¹¹²

The British government would have faced serious opposition from the Dominions even if attempts to amend the Statute of Westminster were limited to the Irish Free State. Their Irish counterparts had long feared that an attempt would be made to introduce an amendment to the Statute of Westminster that would deny the Irish Free State the full benefit of this historic measure. In early 1931 Irish ministers went to the trouble of trying to secure advance support from the other Dominions in resisting a possible amendment of this nature. These efforts met with some success. Some weeks later Patrick McGilligan was able to tell the Dominions secretary, James Thomas, that prime minister Bennett of Canada had assured him that “the Free State would have the support of all members of the Commonwealth if the House of Lords were to attempt to tack the Statute of Westminster a

provision saving the right of appeal in the Free State”.¹¹³ The British took this claim seriously and concluded that any attempt to limit the effect of the future Statute of Westminster with respect to the Irish Free State would meet opposition from Canada, Australia and South Africa in addition to the Irish Free State itself.¹¹⁴

The desire not to undermine the Cosgrave administration on the eve of a general election provided the British government with an additional incentive to defeat Gretton’s amendment. The positive record of the Irish government in adhering to the Treaty was often emphasised. The great exception to this otherwise positive record was, of course, the attitude towards the Privy Council appeal. One memorandum noted that the Irish had acted as “very wrong-headed people” and had only themselves to blame for the creation of suspicions on this issue.¹¹⁵ Yet, British memoranda were prepared to concede that the Irish position was “honestly held”.¹¹⁶ It was noted that the Statute of Westminster would do no more than place the Irish parliament in the same position as the Imperial parliament which had always enjoyed the legal right to legislate contrary to the terms of the 1921 Treaty.¹¹⁷ One memorandum summed up by asking whether the future relations of the members of the Commonwealth were to be based on trust and confidence or not. Using an American analogy it asked whether the British government intended to deal with this issue “in the spirit of Chatham or of Lord North”?¹¹⁸

The supporters of Gretton’s amendment were in no doubt that removal of the limiting effect of the Colonial Laws Validity Act, 1865 by the Statute of Westminster would give the Irish Free State the power to legislate contrary to Imperial statutes that protected of settlement imposed by the 1921 Treaty. Some of the opponents of the amendment, most notably Thomas Inskip as solicitor general, denied the accuracy of this legal argument.¹¹⁹

Stanley Baldwin, then lord president of the council, claimed that he had received legal advice that concluded that “the binding character of the Articles of Agreement will not be altered by one jot or tittle by the passing of the Statute.”¹²⁰ It is curious that none of the supporters of Gretton’s amendment asked for a detailed explanation of these conclusions. The advice in question was based on perceptions that the signing of the 1921 Treaty had created a contractual relationship between the United Kingdom and the Irish Free State that was unaffected by the enactment of the Statute of Westminster.¹²¹ This argument was not tested in public in 1931. Instead, Stanley Baldwin was content to provide the blithe, though vague, conclusion that “That Treaty will be just as binding, so I am advised after the passing of this Statute as before” and added that “this country has every security”.¹²² Although Baldwin’s prognostications had a calming effect in 1931 they would later return to haunt him.

Contemporary accounts indicate that an amendment to the Statute of Westminster Bill was seen as a real possibility when Gretton revealed his initiative on 20 November.¹²³ This possibility had evaporated when the debate resumed four days later. The determined efforts of the British government undermined die-hard efforts to win support outside their traditional constituency. Thomas had spent the previous weekend meeting with the editor of the *Times* and also with the media magnate Lord Beaverbrook. These meetings had yielded undertakings that leading articles would appear in the Times and the Daily Express supporting the enactment of the Statute of Westminster without amendment. The leadership of the Conservative party was mobilised to counter the influence of Winston Churchill.¹²⁴ The amendment was finally defeated by 360 votes to 50. It was often asserted in 1931 and in the years that followed that the amendment had been defeated by the argument that the

Statute of Westminster would not undermine the settlement imposed by the 1921 Anglo Irish Treaty and by the emotional impact of Cosgrave's letter of 21 November.¹²⁵ These arguments are not convincing. As illustrated earlier, constitutional practice and Dominion pressure ensured that the British government could never accept Gretton's amendment. Nevertheless, Cosgrave's intervention was useful in limiting support for Gretton's initiative. The Cosgrave administration has often been accused, from the 1920s to the present, of displaying a post-colonial psyche that craved the approval of former masters.¹²⁶ Yet, the positive reputation that had been cultivated by the Cosgrave government was vital to the process of advancing the status of the Irish Free State at the Imperial conferences of the 1920s and early 1930s. This positive image proved its worth in during the final enactment of the Statute of Westminster.

11. Attempts to Amendment in the House of Lords

The only serious blot on the record of the Cosgrave administration, as far as the British were concerned, was its position with respect to the appeal to the Privy Council. In addition to numerous instances of blocking the appeal, members of the Irish government had made repeated declarations advocating its abolition in the very near future.¹²⁷ This issue provoked the second attempt at amending the Statute of Westminster with respect to the Irish Free State.

The amendment introduced in the House of Lords by Lord Danesfort did not seek to replicate the attempt made by Colonel Gretton to exclude the entire settlement enshrined in the 1921 Treaty from the effect of the Statute of Westminster. Instead, Danesfort

confined his amendment to safeguarding the specific issue of the appeal to the Privy Council from the Irish courts. His proposed amendment would have inserted the following provisions into the Statute of Westminster:

“Without prejudice to maintenance of the other provisions of the Treaty of sixth December, nineteen hundred and twenty-one, and of the Irish Free State (Agreement) Act, 1922, and of the Irish Free State Constitution Act, 1922, it is hereby declared that nothing in this Act shall be deemed to authorise the Parliament of the Irish Free State to alter or repeal Section two of the said Treaty or the provisions contained in the Irish Free State Constitution Act, 1922, as to the right of any person to petition His Majesty for leave to appeal from the Supreme Court of Southern Ireland to His Majesty in Council or the right of His Majesty to grant such leave.”¹²⁸

Danesfort was one of the most obdurate of the “southern unionists”, persons of a unionist persuasion who hailed from the territory of the Irish Free State, in the House of Lords. He made it clear that his amendment was motivated by a desire to safeguard the position of the unionist minority in the Irish Free State. Danesfort was in no doubt that the appeal to the Privy Council was an effective safeguard for the southern unionists who continued to reside in the Irish Free State.¹²⁹ Danesfort seemed prepared to accept Cosgrave’s sincerity when he wrote in his letter of 21 November 1931 that “The Treaty is an agreement which can only be altered by consent”. However, Danesfort noted that this statement was not sufficient to safeguard the appeal to the Privy Council given that members of the Irish government had argued that the appeal to the Privy Council was not strictly required by

the 1921 Treaty.¹³⁰ Danesfort also pointed to statements made by Cosgrave himself that advocated abolition of the Privy Council appeal.¹³¹

Danesfort's amendment was, in many respects, a poorly drafted provision. The reference to the Articles of Agreement of 1921 as "the Treaty" was a particularly regrettable given the stance of many British legal authorities on the legal nature of this instrument. Even though British officials, for the sake of convenience often referred to the agreement reached in 1921 as a treaty it was often asserted that it was nothing of the sort in strict legal terms.¹³² The reference to the "Supreme Court of Southern Ireland" was also an unfortunate, if not untypical, error. There was no such legal entity as "Southern Ireland" in existence in the 1930s. In any case, the proposed amendment had little chance of acceptance. Lord Hailsham spoke for the government when he made clear that the amendment would be never be acceptable to the Dominions as a whole. The imposition of this provision against the will of the Irish Free State would be seen as incompatible with the insistence of the Dominions that they enjoyed a position of equality with the United Kingdom. Hailsham made it clear that acceptance of the amendment would damage Anglo Irish relations and would also have wider ramifications throughout the Empire.¹³³ Lord Midleton, a peer from the south of Ireland, added that even if the amendment were passed it would prove ineffective as "We all know that we are not going by force of arms to reaffirm the right of appeal to the Privy Council".¹³⁴

The British and Irish governments had long anticipated that the Irish appeal to the Privy Council would exert a powerful influence over the passage of the Statute of Westminster. The Irish had openly announced their intention to unilaterally abolish the appeal in the aftermath of their failure to secure multilateral agreement on this issue at the

Imperial conference of 1930.¹³⁵ Nevertheless, the Irish government had not introduced any legislation seeking to put this objective into action in the year preceding the enactment of the Statute of Westminster. Public attention on this controversial issue seems to have declined during this period of inertia. The failure of the Irish government to follow through on its promises ensured that the much-anticipated abolition of the appeal could only be mentioned in the conditional tense. The most Danesfort could do was to call upon Cosgrave to pause before deciding whether to carry out a measure that would be seen as a “gross breach of faith”.¹³⁶

In fact, the fears expressed by Churchill, Gretton and Danesfort were well-founded. The Cosgrave administration had already drafted its proposed legislation for abolishing the Irish appeal to the Privy Council.¹³⁷ The Irish government decided to postpone the publication of this draft legislation in the period preceding the parliamentary debates on the Statute of Westminster. As events transpired the Cosgrave government never had the opportunity to enact their proposed legislation. It lost power in a general election that occurred within weeks of the enactment of the Statute of Westminster.

12. The Impact of the Statute of Westminster on the Irish Free State

The Statute of Westminster was finally passed on 11 December 1931. The Cosgrave government had played a leading role in the creation of the Statute of Westminster and openly claimed credit for this achievement. A press statement issued by the Irish government boasted “it must be said that while very valuable help was received from Canada and South Africa the brunt of the task was admittedly borne by our

Government”.¹³⁸ More importantly, the Irish government had ensured that the final form of the statute applied without restriction or qualification to the Irish Free State. The Cosgrave administration trumpeted the final enactment as representing “the end of an epoch” and as marking a “mile-stone on the onward march of this nation”.¹³⁹ Yet, the Cosgrave administration did not get the credit that it must have expected for this achievement. There were a number of reasons for this development which had a long-term impact on Irish politics.

Although it is unlikely that Irish ministers expected much credit from the parliamentary opposition, they must have been chagrined at accusations that their efforts had actually retarded the advance of Irish sovereignty.¹⁴⁰ Seán T. O’Kelly, a future Irish president, accused the Cosgrave administration of having “worked with all their might to bind us more closely to the British Empire, politically, economically and financially”.¹⁴¹ Much Irish criticism of the Statute of Westminster focussed on its status as a British Imperial statute that purported to apply to the Irish Free State. The government was accused of having recognised British hegemony and of having “used its power to fasten for ever upon us, in so far as they can do so, this Dominion status”.¹⁴² Seán Lemass, a future Irish prime minister, insisted “What one British Parliament has enacted another British Parliament can repeal ... without the consent of the Parliament of this State or of this Dominion”.¹⁴³ Fossilised fears of “Imperial federation”, a movement that sought to convert the British Empire into a global state, still lingered in some nooks and crannies of Irish political life. Although this movement was in obvious decline in the 1930s, the Statute of Westminster was sometimes portrayed in Ireland as a possible cornerstone for a future Imperial Constitution.¹⁴⁴ Patrick McGilligan was forced to deny such accusations

on numerous occasions notwithstanding the obvious reality that the Statute of Westminster had placed the final nail in the coffin of grandiose dreams of Imperial federation.¹⁴⁵

The stance taken by the Cosgrave administration with respect to the Statute of Westminster also did little to win credit with the electorate. Patrick McGilligan emphasised that “The passing of this Statute writes no new Constitution for this State”. He added that “Everything that is there I claim, and have claimed, we possess already”.¹⁴⁶ McGilligan and his governmental colleagues argued that the reforming provisions of the statute were simply declaratory of powers that the Irish Free State had enjoyed since its foundation.¹⁴⁷ The legislative limits imposed by the common law and reflected in the Colonial Laws Validity Act, 1865 that applied to the other Dominions but had never applied to the Irish Free State. The limits on extra-territorial jurisdiction that applied to the other Dominions had never applied to the Irish Free State. The Imperial parliament could never pass Imperial legislation for the Irish Free State after 1922 in contrast to the other Dominions. The Privy Council appeal should never have applied to the Irish Free State even though it was a key institution in the other Dominions. The stance maintained by the Irish government in 1931, like that of their parliamentary opponents, denied that the Irish Free State had ever really constituted a Dominion.¹⁴⁸ This is reflected in Patrick McGilligan’s statement to the Seanad in 1931 that “We have a peculiar position, quite different from the position of the Dominions”.¹⁴⁹ McGilligan went further in presenting the Irish Free State as enjoying greater autonomy than the other Dominions when he declared that his country was “the first of the Commonwealth States to have attained a position of equality with Great Britain.”¹⁵⁰

There are a number of difficulties with position that the provisions of the Statute of Westminster were merely declaratory of a position of autonomy that had been enjoyed by the Irish Free State since the time of its foundation. If the Irish Free State already enjoyed the autonomy granted by the Statute of Westminster, why did it devote so much time and effort in bringing key aspects of this measure into being at successive Imperial conferences? Any contention that these efforts were motivated by an unselfish desire to advance the position of the other Dominions must be rejected as unreal and inconsistent with the history of the Imperial conferences. The alternative explanation, that the Irish merely wished to gain British recognition of their pre-existing position is also problematic.¹⁵¹ First, it should be emphasised that the provisions of the Statute of Westminster did not apply retrospectively. In addition, the actions of the Cosgrave administration in shelving the publication of key constitutional reforms in order facilitate the enactment of the Statute of Westminster in 1931 is difficult to reconcile with the confident declarations of pre-existing autonomy that followed once the statute was safely in force.¹⁵² Finally, the Irish government had not always claimed all aspects of the enhanced autonomy offered by the Statute of Westminster. For example, it should be remembered that Section 3 of the Statute of Westminster provided that the Dominion parliaments could enact legislation that had extra-territorial effect. This was not a power that was claimed by Irish Free State at the time of its foundation. In 1922 the Irish government's actually rejected a proposed amendment to the draft Irish Constitution that would have confirmed that the Irish parliament enjoyed the power to legislate with extra-territorial effect.¹⁵³ Kevin O'Higgins, the minister for home affairs, pointed out that a

provision of this nature would be meaningless unless it was recognised by other countries.¹⁵⁴

These difficulties have not prevented the Irish courts from maintaining the position that the Statute of Westminster was merely declaratory of a legal position enjoyed by the Irish Free State since the time of its creation.¹⁵⁵ However, the adoption of this stance in 1931 was not conducive to winning popular acclaim for the achievements of the Cosgrave administration. Where was the merit in achieving new autonomy if the State had always enjoyed such autonomy from the time of its foundation? The argument that the achievement lay in securing British recognition for the pre-existing situation as an “Act of Renunciation” was less likely to capture the attention of the public.¹⁵⁶ What little credit was derived from this argument was easily outweighed by the government’s inability to answer awkward questions on the right to secede from the Empire and by the public nature of the failure to remove the appeal to the Privy Council.

The third reason for the failure of the Cosgrave administration to win popular acclaim for securing the advantageous provisions of the Statute of Westminster was its loss of power a few weeks after the enactment of the Statute of Westminster. The new government led by Eamon de Valera soon moved to remove the key features of the 1921 Treaty settlement. Over the next five years the de Valera administration dismantled the settlement imposed by the 1921 Treaty piece by piece. A deeply controversial parliamentary oath that mentioned King George V was removed. The powers of the Governor General, the King’s representative in the Irish Free State, were diluted. The appeal to the Judicial Committee of the Privy Council, a vital policy objective for the Cosgrave administration, was finally abolished. The Irish had never had any enthusiasm

for the provisions of the Statute of Westminster that required legislation from each Dominion with respect to succession to the Crown. Nevertheless, this aspect of the Statute of Westminster actually proved to be beneficial to the Irish. In 1936 Eamon de Valera made use of the need for legislation to recognise the abdication of King Edward VIII to remove all references to the King from the text of the Constitution of the Irish Free State.¹⁵⁷ De Valera took the final step in 1937 when he abolished the Irish Constitution of 1922, regarded by many Irish nationalists as too closely associated with the 1921 Treaty, and replaced it with the Constitution that remains in force in Ireland today. These reforms did much to solidify Fianna Fáil dominance of Irish politics for the next seven decades.

Although the Statute of Westminster was of inestimable importance in facilitating this program of constitutional change de Valera was careful not to justify his reforms by reference to its provisions. De Valera did examine the possibility of doing so soon after coming to power in 1932.¹⁵⁸ Open reliance on the provisions of the Statute of Westminster would have allowed de Valera to circumvent a number of obstacles presented by domestic Irish law. Many legal commentators argued that the Irish constituent assembly of 1922 was a very different entity from subsequent Irish parliaments.¹⁵⁹ This argument suggested that subsequent Irish parliaments could not amend the statutory provisions enacted by the constituent assembly. These included the infamous “repugnancy clause” that rendered Irish laws void and inoperative if found to be incompatible with the provisions of the 1921 Treaty.¹⁶⁰ The provisions of the Statute of Westminster ensured that no such obstacles existed with respect to the amendment of the restrictive provisions of the British Imperial statute that also purported to enact the Irish Constitution of 1922. By a strange twist of fate, the Statute of Westminster offered greater autonomy to the Irish Free State than was

provided by Irish domestic law. However de Valera was informed by his legal advisors that the use of the provisions of the Statute of Westminster to justify his programme of constitutional reforms would sacrifice key principles that were held dear by many Irish nationalists.¹⁶¹ This approach would have conceded that the Irish Free State itself had been created by means of Imperial statute, that it was not autochthonous and that the Irish Free State had come into existence as a Dominion of the British Empire. All of these claims were and remain anathema to many Irish people.

De Valera finally decided to follow the counsel of his legal advisers and did not rely directly on the legal provisions of the Statute of Westminster in initiating his constitutional reforms. Instead, he tended to base his arguments, at least when speaking before a domestic audience, on the principle of co-equality and the general enhancement in the status of the Dominions.¹⁶² From the Irish perspective, the Statute of Westminster was useful in that it reflected British recognition of the changed situation within the Commonwealth.¹⁶³ Yet, even in this limited context, the Irish were reluctant to place too much emphasis on the Statute of Westminster. For example, de Valera had considered making extensive use of the Statute of Westminster in the early drafts of his speech on the introduction of legislation for the abolition of the Privy Council appeal. De Valera seems to have thought better of this and all references to the Statute of Westminster were removed from the speech that was finally delivered.¹⁶⁴

The ambiguous stance adopted by de Valera did not limit the utility of the Statute of Westminster in inhibiting the British government from successfully challenging the legality of these measures. This became apparent in 1935 when the Judicial Committee of the Privy Council rejected a legal challenge to key aspects of de Valera's programme of constitutional

reform. In Moore v. Attorney General the Privy Council held that it had to be assumed that the Irish Free State was acting under the authority of the Statute of Westminster in initiating these constitutional reforms notwithstanding its refusal to justify its actions by reference to the provisions of that historic piece of legislation.¹⁶⁵ The court summarised the significance of the Statute of Westminster to the advance of Irish sovereignty in a single sentence: “The simplest way of stating the situation is to say that the Statute of Westminster gave to the Irish Free State a power under which they could abrogate the Treaty, and that, as a matter of law, they have availed themselves of that power”.¹⁶⁶

The supporters of Colonel Gretton’s attempt to amend the provisions of the Statute of Westminster in relation to the Irish Free State made no attempt to hide their dismay and fury in the aftermath of this decision. They focused their ire on Thomas Inskip, who now held the office of attorney general. Inskip had been among those who had insisted that the enactment of the Statute of Westminster would not confer unfettered powers upon the Irish Free State to abrogate the settlement embodied in the 1921 Treaty. He raised the argument that the 1921 Treaty had created a contractual relationship between the United Kingdom and the Irish Free State that was unaffected by the enactment of the Statute of Westminster in his submissions to the Privy Council in Moore v. Attorney General.¹⁶⁷ This argument had failed to persuade the Privy Council to rule against de Valera’s programme of constitutional reform.¹⁶⁸ Winston Churchill subjected Inskip to a deluge of criticism, blaming him, among others, for giving the government “wrong advice both legal and political”.¹⁶⁹ Stanley Baldwin, who had only returned to the post of prime minister a month earlier, was not allowed to forget the assurance that he had given in 1931 that the provisions of the 1921 Treaty would remain “just as binding” after the enactment of the Statute of

Westminster.¹⁷⁰ Churchill was convinced that the blatant incompetence displayed by the British government in 1931 had nullified his own efforts, along with those of his former colleagues in the Lloyd George administration, during the negotiations that had preceded the signing of the 1921 Treaty.¹⁷¹

13. Conclusion

This article has attempted to analyse the relationship between the Statute of the Westminster and the Irish Free State. It should be recalled that the Irish Free State played a major role in the creation of the Statute of Westminster. It should also be emphasised that the Irish Free State was the only Dominion to enjoy the full benefit of the provisions of the Statute of Westminster without any form of limitation at the time of its enactment in 1931. The enactment of the Statute of Westminster Act, 1931 also represents the last occasion in which the British parliament purported to legislate for the Irish Free State. The parliamentary debates that preceded this enactment were dominated by Anglo Irish affairs. Indeed, the consideration of the Statute of Westminster in 1931 could be seen as the last in a series of great debates on the future of Ireland. These had been initiated by the Home Rule debates of 1886, 1893 and 1912 and continued in the debates on the Anglo Irish Treaty of 1921 and the Constitution of the Irish Free State of 1922. In 1931 most British parliamentarians saw the Statute of Westminster as a critical juncture in Anglo Irish relations. This emphasis pushed consideration of the impact of this statute on the other Dominions and on the British Empire as a whole to the margins of political debate. This

reality is not always appreciated by scholars of Imperial and Commonwealth history or, indeed, by scholars of Irish history.

Finally, the Statute of Westminster had an immediate impact on the law and politics in the Irish Free State that had no parallel in any of the existing Dominions. It facilitated the dismantling of the limits on Irish sovereignty reflected in the 1921 Treaty settlement and paved the way towards the creation of the Irish Constitution of 1937 that remains in force to this day. The insistence that the Irish Free State was autochthonous and difficulties with the Dominion origins of the Irish Free State prevented the Cosgrave administration from receiving the credit that might have been expected from this significant achievement. Instead, their parliamentary opponents reaped the benefits of the Statute of Westminster to raise their own political stature. The enactment of the Statute of Westminster was and remains one of the most important events in the constitutional history of Ireland even if the Irish courts refuse to recognise this reality.

¹ Previous “Statutes of Westminster” had been enacted in 1275, 1285, and 1290.

² The use of a capital ‘D’ when referring to the ‘British Dominions’ was required by the British government in order to avoid confusion with the wider term ‘His Majesty’s dominions’ which referred to the British Empire as a whole. See the National Archives of the United Kingdom (henceforth TNA), HO 45/20030. This article will follow this convention.

³ David L. Lewis, “John Latham and the Statute of Westminster” [Electronic Journal of Australian and New Zealand History](#)

<http://www.jcu.edu.au/aff/history/conferences/newcastle/lewis.htm> (accessed 2 August 2012). See also National Archives of Ireland (henceforth NAI), department of foreign

affairs, 5/3, press statement by Patrick McGilligan on the Statute of Westminster, 11 December 1931.

⁴ For example, Hansard, House of Commons, vol. 259, col. 1222, 20 November 1931.

⁵ James A. Williamson, A Notebook on Commonwealth History (London, Macmillan, 1960), p. 262

⁶ P.J. Noel Baker, The Present Juridical Status of the British Dominions in International Law (London, Longmans, 1929) p. 356. This conclusion was echoed by general texts on public international law. The 1924 edition of Hall's International Law concludes "For the general purposes of international law, except for League of Nations proceedings, it is not believed that any one of the self-governing Dominions possesses international personality apart from the whole of the Empire". Pearce Higgins, Hall's International Law (Oxford, Clarendon Press, 1924) p. 34.

⁷ For example, see H. Lauterpacht (ed), Oppenheim's International Law (London, Longmans, 1963) pp. 203-5.

⁸ R.I. Cheffins and R.N. Tucker, The Constitutional Process in Canada (Toronto, McGraw-Hill Ryerson, 1976), p. 12.

⁹ W.G. McMinn, A Constitutional History of Australia (Melbourne, Oxford University Press, 1979), p. 160.

¹⁰ J. Liebenberg "Hertzog in Power" in Five Hundred Years – A History of South Africa, ed. C.F.J. Muller (Pretoria, Academica, 1981), p. 422.

¹¹ W. David McIntyre, "Imperialism and Nationalism" in The Oxford History of New Zealand ed. Geoffrey W. Rice (Auckland, Oxford University Press), p. 346. For an

opposing view see Hansard, House of Lords, vol. 83, col. 187-8, 26 November 1931. It is not uncommon for historians to interpret the Statute of Westminster as giving legal force to the Balfour declaration of 1926. This recognised that the Dominions were ‘autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations’. Cmd. 2768, p. 14. For example, see Russell Ward, A Nation for a Continent – the History of Australia 1901-1975 (Richmond, Victoria, Heinemann Educational, 1981), p. 199; P.J. Gibbons, “The Climate of Opinion” in The Oxford History of New Zealand ed. Geoffrey W. Rice (Auckland, Oxford University Press), p. 335; David Day, Claiming a Continent – A New History of Australia (Sydney, Angus and Robertson, 1997), pp. 251-2 and Marjorie Barnard, A History of Australia (Sydney, Angus and Robertson, 1980) p. 543.

¹² Under British law the Irish Free State came into existence on 6 December 1922. For example, an Order in Council of 17 March 1932 on the provision for the reciprocal enforcement of judgments in the United Kingdom and in other parts of His Majesty’s Dominions under Part 11 of the Administration Act, 1920 provided as follows: “And whereas on the 6th day of December, 1922, the Irish Free State was established under the provisions of an Act of Parliament shortly entitled the Irish Free State Constitution Act, 1922 (Session 2)”. The date on which the Irish Free State came into existence cannot be so easily fixed under Irish law. See Thomas Mohr, “British Imperial Statutes and Irish Law” The Journal of Legal History 31:3 (2010) 299-321.

¹³ Nicholas Mansergh explains the relative paucity of attention to the Statute of Westminster in Irish historiography by reference to the reaction of the de Valera government which took advantage of the concessions granted by this historic piece of legislation while repudiating the authority of British Imperial statutes within the Irish Free State. Mansergh argues that historians have understood that Irish nationalism was in a revolutionary phase in the 1930s and that “[r]evolutionaries who respect constitutions, conventions and legal precedents are not revolutionaries at all”. Nicholas Mansergh, Survey of British Commonwealth Affairs: Problems of External Policy, 1931-1939, (London, Oxford University Press, 1952), p. 26. This conclusion should be treated with caution given the volume and length of the legal analyses on the constitutional position of the Irish Free State produced and given public expression by the Cosgrave and de Valera administrations. Some works on Commonwealth history do devote significant attention to the relationship between the Irish Free State and the Statute of Westminster. Examples include K.C. Wheare, The Statute of Westminster and Dominion Status, (Oxford University Press, 1938, 1942, 1949 and 1953) and D.W. Harkness The Restless Dominion (New York, New York University Press, 1970).

¹⁴ The terms “Empire” and “Commonwealth” were used interchangeably in the years between the wars. This reality was even reflected in legal documents. The Anglo Irish Treaty uses both terms without any differentiation between them. The term “British Empire” is used in Article 1 of the Treaty, while “British Commonwealth of Nations” is used in the wording of the Oath detailed in Article 4. The two terms were also used interchangeably in the “address to their Majesties” passed by the Imperial conference of 1926. Cmd. 2768, pp. 54-60. There were academics in this period who attempted to

promote a technical differentiation between these two terms. This involved the use of the term “Commonwealth” to refer to the group of self-governing entities and “Empire” to refer to the group of “non-self-governing” entities. This differentiation did not receive universal acceptance in the inter-war years. The solicitor general, Thomas Inskip, attracted considerable criticism when he tried to draw such a technical distinction during the enactment of the Statute of Westminster in 1931. Hansard, House of Commons, vol. 260, col. 362-4, 24 November 1931 and A.B. Keith, Letters on Imperial Relations, Indian Reform, Constitutional and International Law (London, Oxford University Press, 1935), pp. 111-2.

¹⁵ For example, see Hansard, House of Commons, vol. 260, col. 258 and 295-303, 24 November 1931 and Hansard, House of Lords, vol. 83, col. 199-201, 26 November 1931.

¹⁶ For example, see Hansard, House of Commons, vol. 259, col. 1177, 20 November 1931; vol. 260, col. 253, 264 and 359-60, 24 November 1931 and Hansard, House of Lords, vol. 83, col. 210-1, 26 November 1931. The Irish Free State was also used in the context of hypothetical examples. For example, see Hansard, House of Commons, vol. 260, col. 267-8, and 275, 24 November 1931.

¹⁷ For example, see Hansard, House of Commons, vol. 260, col. 303-55, 24 November 1931, Hansard, House of Lords, vol. 83, col. 202-8, 26 November 1931 and House of Lords, vol. 83, col. 231-45, 1 December 1931.

¹⁸ Hansard, House of Commons, vol. 260, col. 342, 24 November 1931.

¹⁹ [1977] I.R. 129 at 148.

²⁰ For example, see Hansard, House of Lords, vol. 83, col. 185-7 and 195-6 and 202, 26 November 1931.

²¹ For example, see J.H. Morgan, “Secession by Innuendo” National Review (1936) 313.

²² H. Duncan Hall, Commonwealth- A History of the British Commonwealth of Nations (London, Van Nostrand Reinhold, 1971), p. 683.

²³ The special conference that met in London in 1929 was not a full Imperial conference. Although this conference was a pivotal event in the history of the British Empire it defies easy classification. Its official name was the “conference on the operation of Dominion legislation and merchant shipping legislation”.

²⁴ The Statute of Westminster of 1931 is also known as Quia Emptores.

²⁵ Hansard, House of Commons, vol. 259, col. 1242-3, 20 November 1931.

²⁶ Ibid. at 1243.

²⁷ Nadan v. R. [1926] A.C. 482 and [1926] 2 D.L.R. 177.

²⁸ For example, see Macleod v. Attorney-General for New South Wales [1891] A.C. 455.

²⁹ See Thomas Mohr, “The Foundations of Irish Extra-Territorial Legislation”, Irish Jurist 40 (2005) 86-110.

³⁰ See Cmd. 2768, p. 18. British authorities have often questioned the efficacy of the legal impediment imposed by Section 4 of the Statute of Westminster on passing “Imperial statutes” without the request or consent of a Dominion government. For example, see Wheare, The Statute of Westminster and Dominion Status, pp. 153-4 and W. Ivor Jennings, The Law and the Constitution (London, University of London Press, 1933), pp. 125-9. Such speculations were rejected by Viscount Sankey in British Coal Corporation v. R who noted that while the Imperial parliament could “as a matter of abstract law”, alter or repeal the provisions of the Statute of Westminster, “that is theory and has no relation to realities”. [1935] A.C. 500 at 520.

³¹ Cmd. 3479, para. 58-61.

³² Cmd. 3479, para. 110. K.C. Wheare is, therefore, mistaken, when he identifies the Colonial Courts of Admiralty Act, 1890 as a source of obligatory reservation which applied to the Irish Free State on the Canadian model. Wheare, The Statute of Westminster and Dominion Status, p. 118.

³³ Statute of Westminster Adoption Act, 1942.

³⁴ Statute of Westminster Adoption Act, 1947.

³⁵ Newfoundland did not send delegates to the operation of Dominion legislation conference in 1929 that created the first draft of the Statute of Westminster. It should be noted that Newfoundland was included in Section 1 of Statute of Westminster, which provided the definition of a Dominion for the purposes of the Act. However, Section 10 named Newfoundland, along with Australia and New Zealand, as Dominions that would not be affected by key provisions of the Statute of Westminster until a statute passed by the parliament of the relevant Dominion adopted any or all of the key provisions. Newfoundland, unlike Australia and New Zealand, never adopted any of the key provisions of the Statute of Westminster. The impact of the Great Depression forced Newfoundland to surrender responsible government in 1933. In 1949 Newfoundland became the tenth province of the Dominion of Canada.

³⁶ Section 7(1) of the Statute of Westminster Act, 1931 provided “Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.”

³⁷ K.C. Wheare commented that “This resolution had no legal force, but it may well become a constitutional convention”. Wheare, The Statute of Westminster and Dominion Status, p. 242.

³⁸ It is important to give this agreement its full, and deliberately ambiguous, title even though it is often referred to as the “Anglo Irish Treaty” or often as just “the Treaty”. Irish governments in the 1920s and 1930s insisted that this agreement did constitute an international treaty while their British counterparts refused to recognise that the agreement enjoyed this status. British commentators often referred to the agreement as the “Articles of Agreement for a Treaty”, or simply the “Articles of Agreement”, in order to avoid any implication that it enjoyed the status of a treaty. See Henry Harrison, *Ireland and the British Empire, 1937* (London, Robert Hale and Co, 1937), pp. 131-170.

³⁹ For example, see Hansard, House of Commons, vol. 260, col. 303-4, 24 November 1931. Lord Curzon ranked Ireland in the same category as India at the Imperial conference of 1923. Ronald Hyam and Ged Martin, *Reappraisals in British Imperial History* (London, Macmillan, 1975) p. 211. In same year the British Law Officers concluded that the Irish Free State could not advance beyond the status enjoyed by Canada in 1921. TNA, CO 532/257, Law Officers to Colonial Secretary, 31 December 1923.

⁴⁰ For example, see Saorstát Éireann Official Handbook (Dublin, Talbot, 1932), p. 72.

⁴¹ UCDA, Costello Papers, P190/106 and McGilligan Papers, P35/184, untitled memorandum, 2 November 1926. See also UCDA, Blythe Papers, P24/217, memorandum on appeals to the Judicial Committee of the Privy Council.

⁴² TNA, CAB 32/69 D.L. 5th Meeting.

⁴³ TNA, CAB 32/69 D.L. 11.

⁴⁴ TNA, CO 532/257, Colonial Office memorandum of 4 April 1924 and LAC, Oscar Skelton Fonds, MG30 D33, Vol. 2, 2-14 Imperial Conference – Notes and Drafts.

⁴⁵ Costello Papers, P190/106 and McGilligan Papers, P35/184, untitled memorandum, 2 November 1926.

⁴⁶ TNA, DO 117/183.

⁴⁷ TNA, CAB 32/69 D.L. 2nd Meeting.

⁴⁸ See also the official report of the operation of Dominion legislation conference, 1929, Cmd. 3479, para. 43.

⁴⁹ For example see Hansard, House of Commons, vol. 260, col. 297, 24 November 1931.

⁵⁰ Quoted at Hansard, House of Lords, vol. 83, col. 201, 26 November 1931.

⁵¹ J.H. Morgan, “Secession by Innuendo”, 313. John Hartman Morgan (1876-1955) was a British general, politician, lawyer and professor of constitutional law at the University of London. His political sympathies did not prevent him from appearing for the defence at the trial of Roger Casement in 1916. Morgan is said to have created the phrase “Irish history is a thing for Irishmen to forget and for Englishmen to remember”. J. H. Morgan, John, Viscount Morley. An Appreciation and Some Reminiscences (London: John Murray, 1925), p. 90.

⁵² TNA, DO 117/182, DO 117/184 and Library and Archives Canada (henceforth LAC), Oscar Skelton Fonds, MG30 D33, Vol. 4, 4-1.

⁵³ TNA, DO 117/184 and NAI, department of the Taoiseach S5340/13, memorandum by McGilligan, October 1929 and Michael McDunphy to Diarmuid O’Hegarty, 19 October 1929. O.D. Skelton suggested the solution of simply listing possible alternative methods

of dealing such matters as the Crown. This was rejected by the Irish who wanted the conference report to be a final document. TNA, DO 117/184.

⁵⁴ LAC, Oscar Skelton Fonds, MG30 D33, Vol. 4, 4-1.

⁵⁵ See the comments of John A. Costello to the Gwyer Committee, 14 November 1929. University College Dublin Archives (henceforth UCDA), Costello Papers, P190/116.

⁵⁶ Constitution (Amendment No. 27) Act, 1936 and Executive Authority (External Relations) Act, 1936.

⁵⁷ TNA, 32/69 D.L. 1st and 5th Meetings.

⁵⁸ Dáil Debates, vol. 39, col. 2335-6, 17 July 1931.

⁵⁹ Cmd. 2768, p. 14.

⁶⁰ A.B. Keith, Speeches and Documents on the British Dominions, 1918-1931 (Oxford, Oxford University Press, 1961), p. 256.

⁶¹ Dáil Debates, vol. 39, col. 2297, 16 July 1931 and Seanad Debates, vol. 14, col. 1652-3, 23 July 1931.

⁶² Section 1, Statute of Westminster Act, 1931. NAI, department of the Taoiseach, S12046, George Gavan Duffy, “The Treaty and the Statute of Westminster”, 25 March 1932.

⁶³ Articles, 12, 17, 24, 37, 41, 42, 51, 60, 66, 68 and 83, Constitution of the Irish Free State.

⁶⁴ Article 17, Constitution of the Irish Free State. The oath was generally known as the “Oath of Allegiance” by Irish opponents of the 1921 Treaty. The accuracy of this term has been questioned by supporters of the Treaty in the 1920s and 1930s and by historians writing in the decades that followed. They argue that the wording of the oath makes clear

that it was an oath of allegiance to the Irish Constitution and merely offered fidelity to the King. Tom Garvin has argued that the use of the term “Oath of Allegiance” represents “a marvellous lie of silence that has become institutionalized in Irish popular culture”. Tom Garvin, 1922: The Birth of Irish Democracy (Dublin, Gill and Macmillan, 1996), p. 17. It should, however, be noted that opponents of the Treaty held that references to the monarch permeated the text of the Constitution and that, therefore, it could indeed be argued that the oath was indeed one of allegiance to the King. See Poblacht na hÉireann, 22 June 1922.

⁶⁵ See Thomas Mohr, “The Colonial Laws Validity Act and the Irish Free State” (Irish Jurist 43 (2008) 21-44 and Mohr, “Irish Extra-Territorial Legislation” 86-110.

⁶⁶ See Article 66, Constitution of the Irish Free State.

⁶⁷ Preamble, Irish Free State Constitution Act, 1922. An identical provision appeared in Section 2 of the Constitution of the Irish Free State (Constitution) Act, 1922.

⁶⁸ The term “repugnancy clause” was introduced by Leo Kohn. Leo Kohn, The Constitution of the Irish Free State (Dublin, Allen and Unwin, 1932), p. 98.

⁶⁹ Thomas Mohr, “The Privy Council Appeal as a Minority Safeguard for the Protestant Community of the Irish Free State, 1922-1935” Social Science Research Network UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 50/2011

⁷⁰ See Thomas Mohr, “Law without Loyalty - The Abolition of the Irish Appeal to the Privy Council” Irish Jurist 37 (2002) 187-226.

⁷¹ Ibid.

⁷² See Thomas Mohr, The Irish Free State and the Legal Implications of Dominion Status, 1922-1937 (2007, unpublished thesis, University College Dublin), chapter 7.

⁷³ TNA, LCO 2/910, memorandum attached to letter from Batterbee to Schuster, 16 April 1931.

⁷⁴ NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 23 November 1931.

Harding had received a warning on this point from Claude Schuster. TNA, LCO 2/1190, Schuster to Harding, 13 November 1931.

⁷⁵ TNA, LCO 2/1190, Schuster to Thomas, 18 November 1931.

⁷⁶ NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 23 November 1931.

⁷⁷ (1895-1947) First Baron Gretton.

⁷⁸ TNA, LCO 2/1190, Gretton to Thomas, 13 November 1931.

⁷⁹ TNA, LCO 2/1190, Thomas to Gretton, 16 November 1931.

⁸⁰ See the Times, 16 and 17 November 1931. Edward Carson, Baron Carson, (1854-1935) was a barrister, a judge who rose to the position of Lord of Appeal and the leader of the Irish Unionist Alliance and Ulster Unionist Party from 1910 to 1921. Carson was born in Dublin, educated at Trinity College Dublin and called to the Irish bar at King's Inns. John Butcher, Baron Danesfort, (1853-1935) was a barrister and Conservative politician. He was baronet and later baron of Danesfort, Co. Kerry. Danesfort was the son of Samuel Butcher (1811-1876), bishop of Meath and professor of divinity at Trinity College Dublin. Annesley Ashworh Somerville (1858-1942) was a Conservative politician born in Co. Cork and educated at Queen's College Cork. John Hartman Morgan (1876-1955), see fn. 51.

⁸¹ Hansard, House of Commons, vol. 259, col. 1196, 20 November 1931.

⁸² Hansard, House of Commons, vol. 260, col. 303, 24 November 1931. The intention behind the reference to the Government of Ireland Act, 1920 in the proposed amendment is unclear. This statute had created the parliament of the 6 counties of Northern Ireland. The repeal by the Irish parliament, known as the “Oireachtas”, of the relevant provisions would have had little practical effect on the existence and functioning of the Northern state. This reference may have been added to ensure that the parliament of the Irish Free State could not withdraw legal recognition of the existence of Northern Ireland.

⁸³ Morgan admitted his role as legal adviser to the supporters of Gretton’s amendment in J.H. Morgan, “Secession by Innuendo” 313.

⁸⁴ Hansard, House of Commons, vol. 260, col. 303-4, 24 November 1931.

⁸⁵ Sections 7 and 8 of the Bill protected the integrity of the Constitutions of Canada, Australia and New Zealand.

⁸⁶ James Thomas was convinced that there was a real risk of the government suffering an embarrassing defeat on 20 November. NAI, department of foreign affairs, 19/6, John Dulanty to Joseph Walshe, 23 November 1931. This assessment is supported by other sources. For example, see department of foreign affairs, 19/6, John Dulanty to Joseph Walshe, 23 November 1931 and *The Times*, 21 November 1931.

⁸⁷ Hansard, House of Commons, vol. 259, col. 1253, 20 November 1931.

⁸⁸ Thomas later explained to the Irish high commissioner in London that he had only agreed to consider the amendments as part of a strategy of “playing for time”. NAI, department of foreign affairs, 19/6, John Dulanty to Joseph Walshe, 23 November 1931.

⁸⁹ UCDA, P35/174 McGilligan Papers, P35/174, Statute of Westminster Bill 1931, the Churchill Amendment and the Irish Free State, undated.

⁹⁰ His official title was the “President of the Executive Council of the Irish Free State”.

For the origins of this title see Thomas Mohr, “British Involvement in the Creation of the Constitution of the Irish Free State” Dublin University Law Journal 30 (2008) 166-86.

⁹¹ Cumann na nGaedheal was founded as a political party that supported the Anglo Irish Treaty in 1923. The name is usually translated as “Society of the Gaels”.

⁹² Fianna Fáil was founded as a political party in 1926. The name is usually translated as “Soldiers of Destiny”.

⁹³ NAI, department of the Taoiseach, S5340/19, Cosgrave to MacDonald, 21 November 1931.

⁹⁴ Ibid.

⁹⁵ TNA, LCO 2/1190, extract from a speech by President Cosgrave on Sunday, November 22nd at Charleville Co. Cork and NAI, department of the Taoiseach, S5340/19, Cosgrave to MacDonald, 21 November 1931.

⁹⁶ NAI, department of the Taoiseach, S5340/19, McGilligan to Thomas, 21 November 1931.

⁹⁷ NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 23 November 1931.

⁹⁸ Dáil Debates, vol. 41, col. 595, 27 April 1932.

⁹⁹ Hansard, House of Commons, vol. 260, col. 311, 24 November 1931.

¹⁰⁰ NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 23 November 1931.

¹⁰¹ NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 25 November 1931.

¹⁰² NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 27 November 1931 and 5 December 1931 and *The Times*, 26 November 1931.

¹⁰³ NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 25 November 1931.

¹⁰⁴ NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 26 November 1931.

¹⁰⁵ For example, see Hansard, House of Commons, vol. 260, col. 320 and 328-9, 24 November 1931.

¹⁰⁶ Hansard, House of Commons, vol. 260, col. 329, 24 November 1931.

¹⁰⁷ For example see Hansard, House of Commons, vol. 259, col. 1209-10 and 1227-8, 20 November 1931.

¹⁰⁸ It would be rash to assume that the arguments put forward by supporters of the amendment on extending the survival of the Cosgrave administration were not sincere. John Dulanty, the Irish high commissioner in London, reported a conversation with Winston Churchill that showed that Churchill was entirely convinced that the proposed amendment represented one of the last opportunities to prevent de Valera and Fianna Fáil from taking power. NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 26 November 1931.

¹⁰⁹ TNA, LCO 2/1190, “Reasons why it is impossible to accept the amendment standing in the name of Colonel Gretton and others”, undated.

¹¹⁰ According to K.C. Wheare the fact that these amendments were moved at all showed that some members of the British parliament “had failed to grasp or were unwilling to accept the plain implications of the declaration of equality of status” declared at the Imperial conference 1926 and its elaboration at the conferences of 1929 and 1930. Wheare, The Statute of Westminster and Dominion Status, p. 255-6.

¹¹¹ K.C. Wheare argues that if the proposed amendments with respect to the Irish Free State had taken a different form they would have had a better chance of satisfying constitutional convention. Wheare contends that although the parliament at Westminster

could only enact clauses with respect to the Irish Free State that the Irish had requested and consented to, it was not constitutionally bound to enact any and every clause that the Irish had requested and consented to. This approach would have allowed the British parliament to refuse to enact such clauses unless and until the Irish agreed to key amendments in the Statute of Westminster. Wheare, The Statute of Westminster and Dominion Status, pp. 256-7. This approach was not feasible in 1931 when the provisions of the Statute of Westminster had already been agreed at the operation of Dominion legislation conference of 1929 and the Imperial conference of 1930. British efforts to limit the impact of the proposed Statute of Westminster on the provisions of the 1921 at these conferences were not successful. See Thomas Mohr, The Irish Free State and the Legal Implications of Dominion Status, 1922-1937 (2007, unpublished thesis, University College Dublin), chapters 6 and 7.

¹¹² Ibid. See also Hansard, House of Commons, vol. 260, col. 311-2, 24 November 1931

¹¹³ TNA, LCO 2/910, CP 120(31), “The Irish Free State and Appeals to the Judicial Committee of the Privy Council”.

¹¹⁴ TNA, LCO 2/910, memorandum attached to letter from Batterbee to Schuster, 16 April 1931 and LCO 2/1190 Schuster to Thomas, 19 November 1931.

¹¹⁵ TNA, LCO 2/1190, “Statute of Westminster”, 16 November 1931.

¹¹⁶ TNA, LCO 2/1190, “Reasons why it is impossible to accept the amendment standing in the name of Colonel Gretton and others”, undated.

¹¹⁷ TNA, LCO 2/1190, “Statute of Westminster”, 16 November 1931.

¹¹⁸ TNA, LCO 2/1190, “Reasons why it is impossible to accept the amendment standing in the name of Colonel Gretton and others”, undated.

¹¹⁹ Hansard records Inskip refer to “Article 50 of the Treaty”. However, it is clear from the context that he intended to refer to Article 50 of the Irish Constitution. Hansard, House of Commons, vol. 260, col. 328, 24 November 1931.

¹²⁰ Hansard, House of Commons, vol. 260, col. 344, 24 November 1931.

¹²¹ This contractual argument was raised at the Imperial conference of 1930. TNA, CAB 32/79 PM(30)5. It was later raised by Thomas Inskip during the pleadings in Moore v. Attorney General [1935] A.C. 484 at 488-9.

¹²² Ibid. at 345.

¹²³ See fn. 86.

¹²⁴ Stanley Baldwin and Philip Snowden also seem to have been involved in lobbying the newspapers on this point. NAI, department of foreign affairs, 19/6, Dulanty to Walshe, 5 December 1931.

¹²⁵ For example see Hansard, House of Lords, vol. 83, col. 232, 1 December 1931, NAI, department of foreign affairs, 5/3, Dulanty to Walshe, undated and Irish Independent, 23 December 1953.

¹²⁶ For example, see J.J. Lee, Ireland 1912-1985 (Cambridge, Cambridge University Press, 1989), p. 173.

¹²⁷ For example, see The Star, May 1931 and UCDA, McGilligan Papers, P35B/108 and NAI, Department of the Taoiseach, S4285B, transcript of radio broadcast of 9 November 1930.

¹²⁸ Hansard, House of Lords, vol. 83, col. 231, 1 December 1931.

¹²⁹ Ibid. at 232-3.

¹³⁰ The Irish government openly questioned whether the Privy Council appeal was really required by the Anglo Irish Treaty at the Imperial Conference of 1930. TNA, CAB 32/79 PM(30)5 and TNA, CAB 32/79 PM(30)27.

¹³¹ *Ibid.* at 232-5.

¹³² For example, see Hansard, House of Commons, vol. 151, col. 599-625, 2 March 1922.

¹³³ Hansard, House of Lords, vol. 83, col. 237-41, 1 December 1931.

¹³⁴ *Ibid.* at 244.

¹³⁵ For example, see NAI, department of the Taoiseach, S4285B, transcript of radio broadcast of 9 November 1930 and Dáil Debates, vol. 39, col. 2360, 17 July 1931.

¹³⁶ Hansard, House of Lords, vol. 83, col. 243, 1 December 1931.

¹³⁷ NAI, department of the Taoiseach S6164, Arthur V. Matheson to Michael McDunphy with drafts Bills, 12 November 1930.

¹³⁸ NAI, department of foreign affairs, 5/3, press statement by Patrick McGilligan on the Statute of Westminster, 11 December 1931.

¹³⁹ Dáil Debates, vol. 39, col. 2290 16 July 1931 and Seanad Debates, vol. 14, col. 1620, 23 July 1931.

¹⁴⁰ Thomas Johnson did, however, propose a resolution in the Seanad that would have commended the minister for external affairs for his efforts in “procuring the full establishment and international recognition of the independence and sovereign status of Saorstát Éireann”. Seanad Debates, vol. 14, col. 1607, 23 July 1931.

¹⁴¹ Dáil Debates, vol. 39, col. 2309-10, 16 July 1931.

¹⁴² *Ibid.* at 2309.

¹⁴³ Dáil Debates, vol. 39, col. 2335, 17 July 1931. This remark was later echoed in legal advice against justifying constitutional reform on the basis of the Statute of Westminster given to de Valera by J.J. Hearne in 1932. NAI, department of the Taoiseach, S12046, memo by John J. Hearne on “The legal basis of the establishment of the Irish Free State” 31 March 1932.

¹⁴⁴ Dáil Debates, vol. 39, col. 2296 16 July 1931 and Seanad Debates, vol. 14, col. 1621-2 and 1627, 23 July 1931.

¹⁴⁵ Seanad Debates, vol. 14, col. 1627, 23 July 1931.

¹⁴⁶ Seanad Debates, vol. 14, col. 1653, 23 July 1931. George Gavan Duffy, a signatory of the 1921 Treaty, future judge of the Irish High Court (1936) and later President of the High Court (1946), advised the de Valera government in 1932 that “The Statute of Westminster adds little or nothing to the powers of the Irish Free State or the Oireachtas [the Irish parliament]. NAI, department of the Taoiseach, S12046, George Gavan Duffy, “The Treaty and the Statute of Westminster”, 25 March 1932.

¹⁴⁷ NAI, department of foreign affairs, 5/3, press statement by Patrick McGilligan on the Statute of Westminster, 11 December 1931.

¹⁴⁸ For example, see Seanad Debates, vol. 14, col. 1606, 23 July 1931. See also NAI, department of the Taoiseach, S12046, John J. Hearne, “The legal basis of the establishment of the Irish Free State” 31 March 1932 and George Gavan Duffy, “The Treaty and the Statute of Westminster”, 25 March 1932.

¹⁴⁹ Seanad Debates, vol. 14, col. 1652, 23 July 1931.

¹⁵⁰ NAI, department of foreign affairs, 5/3, Press release by Patrick McGilligan, 11 December 1931.

¹⁵¹ Ibid.

¹⁵² NAI, department of the Taoiseach, S6164, extract from Cabinet minutes, Cab 5/87, 20 October 1931 with postscripts from 29 December 1931. The Irish government did raise legal arguments that maintained that the appeal could be abolished without the benefit of the Statute of Westminster. Their British counterparts concluded that these were “so fantastic as to appear hardly tenable by responsible lawyers”. TNA, LCO 2/1190, “Statute of Westminster”, 16 November 1931.

¹⁵³ Dáil Debates, vol. 1, col. 1742-3, 19 October 1922. The proposed amendment provided: “The laws of the Parliament/Oireachtas shall, save where otherwise provided in any Act, be in force throughout the territory and the territorial waters of the Free State/Saorstát Éireann, and all ships registered in the Free State/Saorstát Éireann; and, save where expressly so provided in any Act, they shall be binding on Irish citizens, when beyond the limits of the Free State/Saorstát Éireann, or on ships not registered in the Free State/Saorstát Éireann.”

¹⁵⁴ Dáil Debates, vol. 1, col. 1743, 19 October 1922. See also Mohr, “Irish Extra-Territorial Legislation” Irish Jurist 40 (2005) 86-110.

¹⁵⁵ Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975 [1977] I.R. 129 at 148.

¹⁵⁶ NAI, department of foreign affairs, 5/3, press statement by Patrick McGilligan on the Statute of Westminster, 11 December 1931.

¹⁵⁷ Constitution (Amendment No. 27) Act, 1936 and Executive Authority (External Relations) Act, 1936.

¹⁵⁸ NAI, department of the Taoiseach, S12046, John J. Hearne, “The legal basis of the establishment of the Irish Free State” 31 March 1932.

¹⁵⁹ This argument would receive judicial recognition in the judgments of Kennedy CJ and FitzGibbon J in State (Ryan) v. Lennon [1935] I.R. 170, 202-4 and 224-30. See also Nicholas Mansergh, The Irish Free State – Its Government and Politics (London, Allen and Unwin, 1934), p. 49 and Mohr, “Law without Loyalty” Irish Jurist 37 (2002) 187-226.

¹⁶⁰ Preamble, Irish Free State Constitution Act 1922. An identical provision appeared in Section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922. See fn. 67.

¹⁶¹ NAI, department of the Taoiseach, S12046, John J. Hearne, “The legal basis of the establishment of the Irish Free State” 31 March 1932.

¹⁶² For example, see Dáil Debates, vol. 41, col. 570, 27 April 1932.

¹⁶³ For example, see Dáil Debates, vol. 41, col. 1090-1, 29 April 1932 and NAI, department of the Taoiseach, S12046, George Gavan Duffy, “The Treaty and the Statute of Westminster”, 25 March 1932.

¹⁶⁴ NAI, department of foreign affairs, 3/1, draft speech for Constitution (Amendment No. 22) Act, 1933 and Dáil Debates, vol. 49, col. 2115-6, 4 October 1933.

¹⁶⁵ [1935] I.R. 472 at 487 and [1935] A.C. 484 at 499.

¹⁶⁶ [1935] I.R. 472 at 486-7 and [1935] A.C. 484 at 499. It is interesting to note that Viscount Sankey, who delivered this judgment on behalf of the entire Judicial Committee of the Privy Council was also responsible for moving the Statute of Westminster through the House of Lords in 1931. See Hansard, House of Lords, vol. 83, col. 176-228, 26 November 1931. K.C. Wheare criticises the approach taken by the Privy Council in

determining the impact of the Statute of Westminster on the Irish Free State. Wheare, The Statute of Westminster and Dominion Status, pp. 265-71.

¹⁶⁷ [1935] A.C. 484 at 488-9.

¹⁶⁸ The judgment of the Privy Council stated “It would be out of place to criticise the legislation enacted by the Irish Free State Legislature. But the Board desire to add that they are expressing no opinion upon any contractual obligation under which, regard being had to the terms of the Treaty, the Irish Free State lay.” [1935] I.R. 472 at 486. It may be recalled that British lawyers argued that the “Articles of Agreement for a Treaty” signed by British and Irish delegations in London in 1921 did not constitute an international treaty. See fn. 38. This ensured that the actual legal status of the document commonly referred to as “the Treaty” or sometimes as “the Articles of Agreement for a Treaty” remained unclear under British law. This must have created considerable challenges for the Privy Council in evaluating this contractual theory. Nevertheless, these lines were interpreted as indicating that the judges on the Privy Council had some personal sympathy with this contractual theory and considerable distaste for the actions of the Irish Free State. For example, see Henry Harrison, Ireland and the British Empire, 1937 (London, Hale and Co., 1937), pp. 196-201. In 1931, Viscount Sankey, who later delivered the judgment in Moore, stated “I have no reason to doubt the honour of the Irish Free State any more than I have reason to doubt the honour of England, and I refuse to believe that the Irish Free State will break or repudiate a Treaty into which they have so solemnly entered”. Hansard, House of Lords, vol. 83, col. 185, 26 November 1931.

¹⁶⁹ Hansard, House of Commons, vol. 304, col. 441, 10 July 1935.

¹⁷⁰ Ibid. at 443.

¹⁷¹ Ibid. at 439-47.