Lord Cave, the British Empire and Irish Independence – A Test of Judicial Integrity

Thomas Mohr*

ABSTRACT

This article examines the career of Lord Cave and his influence on the history of the Irish Free State within the British Empire. Cave was a controversial figure in Anglo Irish politics in the early twentieth century. Nevertheless, he held the office of lord chancellor for much of the 1920s and presided over a number of important appeals to the Judicial Committee of the Privy Council emanating from the Irish Free State. Cave also played an influential role during the Imperial conference of 1926. This article argues that Cave's pre-occupation with maintaining the integrity of the British Empire influenced decisions in a number of key appeals to the Privy Council that directly or indirectly affected the Irish Free State. It also examines the conclusions of other scholars who maintain that the history of the Irish appeal shows that the Judicial Committee of the Privy Council was occasionally influenced by political policies pursued by the British government. This article challenges these conclusions. It argues that the decisions used to support these contentions were actually influenced by the personal views of Lord Cave and not by policies embraced by the British government. This supports the conclusion that the Judicial Committee of the Privy Council of the early twentieth century was, after all, an independent court of law.

* Dr Thomas Mohr BA LLB MA PhD, Lecturer in Law, University College Dublin.

INTRODUCTION

In 1926 Kevin O'Higgins, the Irish minister for justice, asked his parliamentary colleagues to consider the utility of the Irish appeal to the Judicial Committee of the Privy Council. In particular he asked them to consider 'whether it is a good court, whether it is a useful court, whether it is a necessary court'.[1] O'Higgins' uncompromising conclusion was that it was 'a bad court, a useless court, an unnecessary court.'[2] These remarks are indicative of the unhappy history of the appeal to the Privy Council from the Irish courts in the 1920s and 1930s. Irish nationalists regarded the Privy Council appeal as a serious affront to Irish sovereignty. In addition, many Irish people perceived the Privy Council as being biased against the new self-governing Irish state.[3] In 1922 Michael Collins, the leader of the Irish provisional government, stressed that there was a strong feeling prevailing in Ireland against the Privy Council on the grounds that several of its judges had publicly displayed hostile attitudes to the embryonic Irish state.[4] There is evidence that a substantial portion of the protestant minority of the Irish Free State did value the appeal to the Privy Council from the Irish courts. However, claims that the Privy Council appeal was necessary as a safeguard for the rights of the minority community tended to offend members of the majority catholic community and increased suspicions of bias. Irish governments insisted that safeguards of this nature were unnecessary in the new Irish Free State.[5] Perceptions of the Judicial Committee of the Privy Council as court that was inherently biased against the Irish Free State fuelled the opposition of Irish governments to the appeal throughout the 1920s and 1930s.

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[1] *Dáil Debates*, vol. 14, col. 331-4, 3 February 1926.
[2] *Ibid.* at 334. O'Higgins later attempted to mollify any offence that might have been taken at these remarks. He explained to the other delegations at the Imperial conference of 1926 that when he had referred to the Privy Council as a 'bad court' he had not meant that it was inherently bad, but that in was bad from the point of view of the Irish Free State. The National Archives of the United Kingdom (henceforth TNA), CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926.
[3] For example, see Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (P.S. King, 1931), p. 98.
[4] TNA, CAB 43/7 22/N/163, interview between the prime minister and Mr. Griffith and Mr Collins, 1 June 1922.
[5] See Thomas Mohr, 'The Privy Council appeal as a minority safeguard for the Protestant community of the Irish Free State, 1922-1935'. (2012) 63(3) *Northern Ireland Legal Quarterly* 365-395.

This article does not propose to chronicle the entire history of the Irish appeal to the Judicial Committee which has been analysed in some detail elsewhere.[6] The purpose of this paper is to examine the influence of one man in moulding this history. The man in question was a judge called George Cave (1856-1928). Cave was lord chancellor and also chancellor of Oxford University in the mid-1920s and was made an earl shortly before his death. Cave sat on the Judicial Committee of the Privy Council and was also the focus of many accusations of bias against the Irish Free State.

The significance of this analysis goes beyond the history of the Irish appeal to the Privy Council and examination of the career of Lord Cave. The unfortunate history of the Irish appeal has led some scholars to draw wider conclusions with respect to the integrity of the Judicial Committee of the Privy Council as a court of law. The experience of the Irish appeal has been used to suggest that, at least in the early twentieth century, the decisions of the Judicial Committee were influenced by the policy interests of the British government.[7] This article concludes that the history of the Irish appeal cannot be used to support conclusions of this nature. It does so by arguing that the decisions made in a number of important Irish appeals appear to have been influenced by the personal views of Lord Cave and not by policies embraced by the British government.

THE ORIGINS OF THE IRISH APPEAL TO THE PRIVY COUNCIL

The Privy Council appeal has its origins in the medieval concept of the King as the fount of all justice throughout his dominions. This Crown prerogative was much reduced in the 1640s as a result of the struggle between King Charles I and his parliaments. The right to appeal to the King in Council was circumscribed in the three Kingdoms of England, Scotland and Ireland. However, the right of subjects in overseas territories to take appeals remained largely intact. This right of appeal to the King in Council grew in

[6] See Thomas Mohr, 'Law without Loyalty: The Abolition of the Irish Appeal to the Privy Council' (2002) 37 *Irish Jurist* 187-226.
[7] For example, Darrell Figgis, *The Irish Constitution- Explained by Darrell Figgis* (Mellifont Press, 1922), pp. 53-5; Donal McEgan, 'John Bull's Privy Council' (1933) 23 *The Catholic Bulletin* 739 and Jacqueline D. Krikorian, 'British Imperial Politics and Judicial Independence: The Judicial Committee's Decision in the Canadian Case *Nadan v. The King*' (June 2000) 33:2 *Canadian Journal of Political Science* 291 at 331.

significance with the expansion of the British Empire in the centuries that followed. In 1833 the appeal was reformed with the creation of a permanent court known as the 'Judicial Committee of the Privy Council'.[8] Appeals came from the colonies but also from the self-governing Dominions that had come to prominence in the late nineteenth and early twentieth centuries.[9] Although judges from the colonies did occasionally sit on the Judicial Committee, it was from the outset a court dominated by British judges.

The origins of the Irish appeal to the Judicial Committee of the Privy Council lie in Articles 1 and 2 of the 'Articles of Agreement for a Treaty between Great Britain and Ireland' signed by British and Irish representatives on 6 December 1921. The signing of the document popularly known as 'the Treaty' concluded a period of Anglo Irish conflict that had begun with the 1916 uprising and had been revived in 1919. Articles 1 and 2 of the Treaty ensured that the Irish Free State came into existence as a Dominion of the British Empire.[10] The British government considered the institution of the appeal to the Privy Council to be an integral feature of Dominion status. It also saw it as a means of safeguarding the rights of the southern protestant community and as a means of maintaining the integrity of the settlement imposed by the 1921 Treaty.[11] The British government insisted that, although the appeal to the Privy Council was not mentioned in the text of the 1921 Treaty, recognition of the appeal was implicit in the overall acceptance of Dominion status.[12] The Irish provisional government was far from happy with this position. Its representatives made a determined, but ultimately unsuccessful,

[8] Judicial Committee Act, 1833. This was later amended by the Judicial Committee Act, 1844. John A. Costello argued that this amending legislation did not apply to the Irish Free State. University College Dublin (henceforth UCD), Archives, Costello Papers, P190/94, memorandum on *Lynham v. Butler,* undated.

[9] One source provides the following figures for appeals between the years 1911 and 1917: India: 514, Canada: 180, Australia: 45, New Zealand: 18, Newfoundland: 6, South Africa: 3. See *Irish Independent* 31 December 1929.

[10] 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 TNA, HO 45/20030. This article will follow this convention.

[11] For example, see TNA, CAB 43/1 SFB 21, meeting between representatives of the southern unionists and the British representatives on the conference on Ireland, 7 December 1921 and TNA, CO 739/7/47027, Curtis to Churchill, 20 September 1922. For a detailed analysis see Thomas Mohr, *The Irish Free State and the Legal Implications of Dominion Status* (unpublished thesis, University College Dublin, 2007) Chapter 5.

[12] TNA, CAB 43/7, 22/N/162, draft Irish Constitution, 27 May 1922.

effort to exclude any reference to the Judicial Committee of the Privy in the draft Irish Constitution that was being prepared in 1922.[13]

Irish delegates raised a number of objections to the Privy Council appeal during negotiations with the British government on the draft Constitution.[14] The most important of these were the afore-mentioned concerns of a diminution of Irish sovereignty which were heightened by allegations of bias against the Irish Free State on the part of a number of judges who sat on the Judicial Committee. After a series of lengthy negotiations an unhappy Irish delegation agreed to recognise the Privy Council appeal in the Irish Constitution of 1922.[15] Irish ministers would later assert that they had only accepted the appeal based on some additional assurances given by their British counterparts during the course of these negotiations.[16] These undertakings never seem to have been recorded in any written text. This ensured that British governments in the late 1920s and early 1930s doubted whether any such assurances had ever been made.[17] Nevertheless, the Irish government remained convinced that the Lloyd George government had indeed given assurances in 1922 that Privy Council appeals from the Irish Free State would be restricted to disputes concerning other members of the Commonwealth or 'international issues of the first importance'.[18]

THE IRISH APPEAL IN THE EARLY 1920s

The unfortunate origins of the appeal to the Privy Council from the Irish courts did not augur well for its future. Despite this unfortunate beginning, the appeal actually had a

[13] See Thomas Mohr, 'Law without Loyalty: The Abolition of the Irish Appeal to the Privy Council' (2002) 37 *Irish Jurist* 187-226.
[14] See Thomas Mohr, 'A British Empire Court - An Appraisal of the History of the Judicial Committee of the Privy Council' In: Anthony McElligott et al (eds). *Power in History - Historical Studies XXVII*. (Irish Academic Press, 2011) pp. 125-144.
[15] TNA, CAB 43/7 22/N/163, report on draft Irish Constitution. See Article 66 of the Constitution of the Irish Free State.
[16] For example, see *Dáil Debates* vol. 1, col. 1404, 10 October 1922 and *Seanad Debates*, vol. 6, col. 408, 24 February 1926.
[17] *Hansard,* House of Lords, vol. 63, col. 403-4, 3 March 1926 and TNA, LCO 2/910, Dominions secretary to lord chancellor, 17 February 1926.
[18] *Dáil Debates* vol. 1, col. 1404, 10 October 1922.

good start in the early 1920s. In 1923 the Privy Council heard three Irish petitions for leave to appeal.[19] Lord Haldane felt it necessary to set out some general principles followed by the Privy Council before hearing the petitions. He claimed that the Privy Council was reluctant to interfere if the question involved was one that could be 'best determined on the spot' and that 'it is obviously proper that the Dominions should more and more dispose of their own cases'.[20] Haldane went on to note that, as a general principle, the Privy Council would only intervene if the case were one 'involving some great principle or is of some very wide public interest'.[21] Haldane also tried to mollify the fears of Irish nationalists with respect to the objectivity of the Judicial Committee of the Privy Council by stressing that 'we have nothing to do with politics, or policies, or party considerations'.[22] Matters ended on an amicable note when the Judicial Committee dismissed all three Irish petitions for leave to appeal. Haldane noted that the Irish Free State 'must in a large measure dispose of her own justice'.[23] These conclusions were welcomed with obvious relief by Irish observers. Hugh Kennedy, the Irish attorney general and future chief justice of the Irish Supreme Court, declared that critics of the Privy Council had been proved wrong. He welcomed the restrictive stance adopted by Haldane and added that 'if they had been so dishonestly minded, the British side could have eaten into our rights very substantially'.[24]

LIMITED TOLERATION OF THE PRIVY COUNCIL APPEAL

By the mid-1920s there were definite signs that Irish suspicions with respect to the Privy Council appeal were beginning to soften. The harmonious conclusion to the first petitions for leave to appeal to the Privy Council ensured that a textbook on Irish constitutional law published in 1925 confidently predicted that the appeal would 'raise no

[19] These three petitions were *Alexander E. Hull and Co. v. Mary A. E. M'Kenna, The 'Freeman's Journal' Limited v. Erik Fernstrom* and *The 'Freeman's Journal' Limited v. Follum Traesliberi.* All are reported at [1926] I.R. 402.
[20] *Ibid.* at 404.
[21] *Ibid.* at 404-5.
[22] *Ibid.* at 403.
[23] *Ibid.* at 407-408. Lord Buckmaster added that the Irish Constitution made it plain that 'as far as possible, finality and supremacy are to be given to the Irish Courts'. *Ibid.* at 409.
[24] UCD Archives, Kennedy Papers, P4/516, Hugh Kennedy to W.T. Cosgrave, 30 July 1923.

difficulties in the development of the Irish Constitution under conditions of good-will between Ireland and Great Britain'.[25]

It would be fair to say that the Privy Council appeal enjoyed a brief 'honeymoon' period in the Irish Free State in the early 1920s. However, it is important not to exaggerate the nature or extent of this period of toleration. Irish nationalists remained suspicious of the appeal and their tolerance had definite limits. This tolerance was based on the perception that Irish appeals to the Privy Council would only be heard in very exceptional circumstances. In 1923 the Irish senate was informed by its chairman that the Privy Council would decline to grant leave to appeal to litigants from the Irish Free State unless there was 'some question of national importance involved or except the case raises grave constitutional issues'.[26] Irish officials always favoured the cessation of appeals to London but did not necessarily advocate formal abolition in the early 1920s. Instead, Irish ministers expressed the hope that the appeal would gradually be rendered obsolete through non-usage.[27]

Irish toleration of the Privy Council appeal was always confined to extremely narrow parameters. Nevertheless, it is important to emphasise the existence of this period of limited toleration. There were even some signs of positive engagement with appeals to the Privy Council that fell within the restrictive parameters deemed acceptable by the Irish. The Irish government did not object when the Privy Council granted leave to appeal in the case of *Wigg and Cochrane v. Attorney General* in 1926.[28] The government even appointed counsel to represent the Irish attorney general before the Judicial Committee. Kevin O'Higgins, the Irish minister for justice, explained to members of the Irish parliament that the subject matter of this case was connected to the provisions of the 1921 Anglo Irish Treaty. This was a case that concerned relations between members of the British Commonwealth and, as such, was considered to be 'one of the kind of cases that

[25] John G. Swift MacNeill, *Studies on the Constitution of the Irish Free State* (Talbot, 1925) pp. xxiii and 83-9.
[26] *Seanad Debates*, vol. 1, col. 1570, 30 July 1923.
[27] *Dáil Debates*, vol. 1, col. 1402-3, 10 October 1922, vol. 14, col. 124-5 and 132, 27 January 1926, vol. 14, col. 384-5, 3 February 1926 and *Seanad Debates*, vol. 6, col. 401, 24 February 1926.
[28] [1925] 1 I.R. 149; [1927] I.R. 285 and [1927] I.R. 293.

could be admitted'.[29] Yet, just a few weeks later Kevin O'Higgins condemned the Judicial Committee of the Privy Council as 'a bad court, a useless court, an unnecessary court.' By the end of 1926 the Irish government made clear its objective to secure the formal abolition of the appeal.[30] In 1933 the Irish Free State became the first part of the Empire to formally abolish the appeal to the Privy Council from its domestic courts.[31] What had caused this dramatic reversal of fortune? How had the goodwill that had built up in the early 1920s been squandered in such a short period of time? In order to answer these questions it necessary to turn our attention to one of the most prominent judges who heard appeals to Privy Council from the Irish Free State. We must now examine the life and career of Lord Cave.

GEORGE CAVE

George Cave was born in 1856, the son of Thomas and Elizabeth Cave. Thomas was a London merchant and a Liberal MP for Barnstaple between 1865 and 1880. The young George was a gifted student and gained a scholarship to St John's College, Oxford. In 1880 he was called to the bar and took silk in 1904. He was elected to parliament as a Conservative MP for Kingston upon Thames in 1906, became solicitor-general in 1915, and served as home secretary between 1916 and 1918. Cave was appointed a lord of appeal and was made a viscount immediately after the conclusion of the first world war. In 1925 he stood against former prime minister H.H. Asquith, then Lord Oxford, in the election for the chancellorship of the University of Oxford. The opposition to Asquith was largely based on party political considerations and Cave initially refused to stand against him. Cave soon came under pressure from other Oxford scholars, ten heads of

[29] *Dáil Debates*, vol. 14, col. 134, 27 January 1926. See also *Dáil Debates*, vol. 14, col. 342 and 386, 3 February 1926 and *Seanad Debates*, vol. 6, col. 439 and 386, 24 February 1926. A.B. Keith also distinguished *Lynham v. Butler* and *Wigg and Cochrane v. Attorney-General* by noting that the former concerned a 'technical issue' whereas in the latter case 'it would hardly have been possible to decline intervention'. A.B. Keith, 'Notes on Imperial Constitutional Law' (1926) 8 *Journal of Comparative Legislation and International Law* 133.
[30] UCD Archives, Blythe Papers, P24/217, memorandum on the Judicial Committee of the Privy Council and TNA, CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926.
[31] Constitution (Amendment No. 22) Act 1933.

colleges and even his own ministerial colleagues to reconsider.[32] He was finally persuaded to stand. Cave won the election despite the high profile of his opponent and the unflattering soubriquet of 'cavemen' that was attached to his followers.[33]

The life of Lord Cave was one of considerable achievement in the political and legal fields. Nevertheless, this mix of law and politics also contained the seeds of disappointment and failure with respect to one of the issues on which Cave was most passionate. Cave was anxious to maintain the unity of Britain's sprawling Commonwealth and Empire in the face of the many challenges that threatened it in the early twentieth century. One of the greatest of these challenges was the perennial issue of the political status of Ireland. Cave came from a Liberal background but broke with that party after Gladstone embraced the cause of Irish home rule in 1885. He was at the forefront of resistance to the third Home Rule Bill and was a firm supporter of Ulster's right to secede during his time as a Conservative MP.[34] Cave's hostility to the idea of an autonomous parliament in Dublin led him to propose that the King should dissolve parliament, notwithstanding the absence of advice to that effect from the prime minister, before the 'third Home Rule Bill' could be enacted in 1914.[35] The constitutional crisis that would inevitably have followed an act of this nature guaranteed condemnation of Cave's drastic proposal.[36]

Cave was horrified at the consequences of the Irish uprising of Easter 1916 and witnessed the destruction it had wrought on the city of Dublin on a visit to the city. As a barrister he had participated in the prosecution of Roger Casement, one of the leading figures of the uprising. As home secretary, Cave was responsible for the decision to circulate Casement's notorious 'black diaries', which contained references to homosexual inclinations, to journalists and other influential figures.[37] This decision was motivated by a desire to undermine Casement's reputation and may also have been intended to forestall

[32] Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) pp. 277-8.
[33] Oxford Dictionary of National Biography http://www.oxforddnb.com.eproxy.ucd.ie/view/article/32329 (Accessed 10 July 2010).
[34] Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) pp. 154-5 and 163-5.
[35] Government of Ireland Act 1914.
[36] Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) p. 163.
[37] *Ibid.* at p. 183.

calls for clemency. Michael Laffan has concluded that, notwithstanding the existence of a long-standing dispute as to the authenticity of these diaries, 'the unscrupulous use that was made of them in 1916 – to smear the reputation of a condemned man and thereby help ensure the failure of his appeal against his death sentence – has met with nothing but embarrassment and distaste'.[38] Cave's position as home secretary also ensured that he was involved in drafting a Bill intended to extend conscription to Ireland in 1918. This duty also placed him in the unhappy position of being obliged to draft an accompanying Bill on Irish home rule, which was intended as a sweetener for Irish nationalists. Cave accepted this unwelcome duty on the basis of a number of understandings that focused on safeguarding the position of Ulster.[39] He always had grave doubts as to the wisdom of this policy and once complained that 'I have the feeling that we are ploughing the sands'.[40] The scheme fell apart in the face of mass demonstrations against conscription in Ireland. The prospect of conscription increased the popularity of radical nationalism in Ireland. Cave's association with the measure can hardly have augmented his own standing within that country.

Cave's reputation in Ireland was also affected by his actions after he resigned ministerial office. As a judge Cave became notorious for refusing a writ of prohibition against a military court that had sentenced two Irishmen to death in 1921.[41] As a member of the House of Lords, Cave revealed himself as a firm opponent of the Anglo Irish Treaty of 1921 and did not support the creation of the new state in the twenty-six counties of the south and west of the island.[42] L.S. Amery, colonial and Dominions secretary in

[38] The assertion that the diaries were forgeries perpetrated by the British government was accepted by a significant number of Irish nationalists in the years that followed Casement's execution. This controversy continues despite scientific tests carried out in 2002 that confirmed the authenticity of these diaries. The evidence put forward by both sides in this dispute is considered in Michael Laffan's entry on Casement in the Dictionary of Irish Biography: http://dib.cambridge.org (accessed 31 August 2010).
[39] Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) pp. 200-201.
[40] *Ibid.* at p. 201.
[41] *Re Clifford and O'Sullivan* [1921] 2 A.C. 570. Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) p. 229.
[42] Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) p. 253.

the late 1920s, wrote in private that Cave was widely perceived to be 'no friend of the [Irish] Free State'.[43]

Cave had remained silent during the parliamentary debates concerning the Anglo Irish Treaty of 1921. He maintained this stance despite his sympathy for those, such as Lords Carson and Sumner, who condemned the agreement with bitter scorn.[44] Although Cave spoke more than once during the debates on the Government of Ireland Act 1920 there was a need for greater caution now that an embryonic Irish government had been recognised by the United Kingdom.[45] Cave was hardly the only member of the British establishment to greet the birth of the Irish Free State with a mixture of suspicion and hostility. Nevertheless, Cave's views on Ireland had come to special prominence in 1922. Cave had refrained from following the examples set by Carson and Sumner during the debates on the 1921 Treaty on the basis of a sincere belief that interventions of this nature were 'wrong'.[46] His scruples on this matter, together with advice given by Lord Birkenhead not to get involved, were overcome by a vigorous campaign waged by his well-meaning wife and mother.[47] Their determination that Cave express his opinions on the state of affairs in Ireland eventually bore fruit on 16 March 1922. Cave made a speech to the House of Lords in which he made clear that he did not support the Anglo Irish Treaty and identified the embryonic Irish Free State as an entity that was 'far from friendly' to the United Kingdom.[48] Most of the speech concerned Northern Ireland, in particular the fairness of the provisions concerning the commission that was to fix the final border between the Irish Free State and Northern Ireland. He also made clear his belief that the proposed Council of Ireland, intended to administer services held in common by both jurisdictions, represented an arrangement that was unfair to Northern Ireland.[49] There was much here to offend the new Irish provisional government that was assuming power in Dublin. Lord Birkenhead later criticised partisan interventions of this

[43] John Barnes and David Nicholson (eds) *The Leo Amery Diaries, Vol. 1, 1896-1929*, (Hutchinson, 1980), p. 530.
[44] Charles Mallet, *Lord Cave – A Memoir* (John Murray, 1931), p. 253.
[45] *Ibid.*
[46] *Ibid* at p. 27.
[47] *Ibid* at pp. 27-8.
[48] *Hansard*, House of Lords, vol, 49, col. 606-7.
[49] *Ibid.* at col. 608-9.

nature by persons holding judicial office and claimed that they were in breach of constitutional convention.[50] Lord Cave's adoring wife and mother were unperturbed at the negative reaction to Cave's speech in the press.[51] Nevertheless, the open expression of Lord Cave's views on Irish politics did not go unnoticed by Irish nationalists.

In June 1922 a series of Anglo Irish negotiations gave Michael Collins, chairman of the Irish provisional government, the opportunity to name Lord Cave along with Lords Carson and Sumner as judges who were perceived as hostile to the Irish Free State and therefore unsuited to hear Irish appeals to the Privy Council.[52] In private some members of the British government expressed their discomfiture with the public nature of Cave's opposition to the creation of the Irish Free State. Lloyd George told his cabinet that Cave was among those judges whose conduct had placed the British government in an 'awkward and indefensible position'.[53] Winston Churchill raised the possibility of making a public declaration that these judges had disqualified themselves by their political actions from hearing Irish cases.[54] A declaration of this nature would certainly have included Cave. Churchill even raised the possibility of purging the offending judges from the Judicial Committee.[55] Lloyd George never seems to have seriously considered these radical courses of action. Instead, he assured the Irish delegates that members of the Judicial Committee would be excluded from hearing Irish appeals if they were in some way compromised by their public stance on Ireland in the context of political debates.[56] These assurances were fatally undermined just a few months later. In October 1922 a new Conservative government under Andrew Bonar Law came to power. The new government selected Lord Cave as its new lord chancellor. This office provided its occupant with considerable powers in determining the composition of judicial panels hearing Privy Council appeals. This meant that the exclusion of Lord Cave against his

[50] *Ibid.* at col. 943.
[51] Charles Mallet, *Lord Cave – A Memoir* (John Murray, 1931), pp. 27-8.
[52] TNA, CAB 23/30 32(22), conclusions of cabinet meeting, 2 June 1922.
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] TNA, CAB 23/30, CAB 32(22) conclusions of cabinet meeting, 2 June 1922, TNA CAB 43/1 SFB 33rd conference, the Irish situation, 10 October 1922 and National Archives of Ireland (henceforth NAI), department of the Taoiseach S4285A, Winston Churchill to W.T. Cosgrave, 11 October 1922.

will from hearing Irish appeals was a virtual impossibility. The promises given by Lloyd George on the exclusion of politically tainted judges had proved to be worthless.

Lionel Curtis wrote in 1922, when serving as under-secretary at the colonial office, that it was nothing less than a constitutional calamity 'that at this juncture the Court, which we have always stipulated must be the supreme arbiter in interpreting the Treaty, should have been exposed to the profound distrust of a most suspicious people by the fact that three of its members plunged into party politics'.[57] Lord Cave's unwise parliamentary speech in March 1922 had done much to ensure that he was numbered among these three judges. His subsequent appointment as lord chancellor compounded this calamity. He would hold this office until 1928, save for a short interval in 1924 when the first Labour government was in power. This ensured that Lord Cave was inextricably linked with the Judicial Committee of the Privy Council throughout the formative years of the Irish appeal. The effect of this position on the image of the Judicial Committee in the Irish Free State was devastating. A book written on the Judicial Committee of the Privy Council by an Irish author affirmed a strong belief that this court was politically biased against the Irish Free State 'where it is not fully believed that the Treaty of 1921 has dissipated the former antagonism towards that country of some who became members of the Judicial Committee'.[58] Suspicions of this nature remained strong throughout the 1920s and 1930s. Ernest Blythe, the Irish minister for finance, spoke for many in the Irish Free State when he spoke of the Privy Council in the following terms:

> There are I think, no anti-Canadian and no anti-South African lawyers on the bench in Great Britain, but there are undoubtedly anti-Irish lawyers on the bench in Great Britain, and I do not think that from a court such as that the Irish Free State could have confidence in getting justice that perhaps other countries might have.[59]

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[57] TNA, CO 739/7/47027, Curtis to Churchill, 20 September 1922.
[58] Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (P.S. King, 1931), p. 98.
[59] *Seanad Debates,* vol. 13, col. 46, 20 November 1929. See also the remarks made by Kevin O'Higgins with respect to the decision to grant leave to appeal in the case of *Lynham v. Butler. Dáil Debates*, vol. 14, col. 134, 27 January 1926 and vol. 14, col. 386, 3 February 1926.

Cave was, of course, only one of three judges that had been named as unacceptable to the Irish provisional government in 1922. However, Lords Carson and Sumner refrained from sitting on any Irish appeal to the Privy Council.[60] Lord Cave showed no such restraint.

As seen earlier, the first Irish applications for leave to appeal had concluded on an amicable note. These were followed by a period of time in which the Irish government seemed prepared to adopt a policy of limited toleration of Privy Council appeals. The goodwill that underpinned this policy was dissipated three years later when Lord Cave and his colleagues granted leave to appeal in the case of *Lynham v. Butler*.[61]

LYNHAM v. BUTLER

This case concerned the interpretation of certain provisions of the Irish Land Act 1923.[62] This was a purely domestic issue and, as far as the Irish government was concerned, was not a matter that should have been the subject of an appeal to the Privy Council. Fears that the appeal might serve as a device for British interference in the internal affairs of the Irish Free State were now revived. These concerns led the Irish government to send a 'constitutional protest' to London.[63] A new statute known as the Land Act 1926 was rushed through the Irish parliament or 'Oireachtas'. This confirmed the interpretation of the Land Act 1923 given by the Irish Supreme Court during its consideration of the issues

[60] In 1925 Lord Carson and Lord Cave did hear an appeal to the Judicial Committee of the House of Lords that directly concerned the Irish Free State. The case of *Attorney General v. Great Southern and Western Railway Company of Ireland* concerned the payment of compensation for the removal of rails and sleepers during the first world war. The House of Lords held that this liability was now vested in the government of the Irish Free State. Cave's judgment included consideration of the railway company's claim that it would have difficulty recovering the sum in question from the Irish government. Cave insisted that this was improbable and added that he did not doubt that the liability imposed on the Irish Free State would be fully honoured. [1925] A.C. 754 at 766-7. Lord Carson did no more than concur with the judgments of Lord Haldane and Lord Dunedin. *Ibid.* at 775.

[61] [1925] 2 I.R. 82 (High Court) [1925] 2 I.R. 82 (Supreme Court).

[62] The Land Act 1923 was the latest in a series of legislative acts concerning the compulsory sale and purchase of tenented land in Ireland. This continued a process that had been initiated in William E. Gladstone's Landlord and Tenant (Ireland) Act 1870. *Lynham v. Butler* concerned a dispute as to whether the purchase and sale provisions of the 1923 Act applied to particular holdings in Co. Dublin.

[63] *Dáil Debates*, vol. 14, col. 339, 3 February 1926.

involved in *Lynham v. Butler*.[64] The Irish government never made any secret of the position that this measure had been designed to undermine the proposed appeal to the Privy Council.

The Irish government was outraged at the decision of the Privy Council to grant leave to appeal in *Lynham v. Butler*. Kevin O'Higgins claimed that the decision violated undertakings given by the British government in 1922 that had placed definite limits on appeals from the Irish Free State. O'Higgins also insisted that the decision of the Privy Council to accept an appeal in the case of *Lynham v. Butler* was no less than the first attempt at external intervention in the domestic affairs of the Irish Free State since the time of its establishment.[65]

The debates in the Oireachtas concerning *Lynham v. Butler* make occasional reference to the influence of hostile individuals that had never come to terms with the 1921 Treaty.[66] Although the Irish government refrained from mentioning Cave by name, he was the only one of the three judges named by as unacceptable to the Irish in 1922 who was involved in the decision to grant leave to appeal in this case. Cave was, of course, only one member of the judicial panel that granted special leave to appeal in *Lynham v. Butler*.[67] Nevertheless, he admitted responsibility for the decision and told the House of Lords that he had granted leave to appeal in *Lynham v. Butler* on information that the case 'was of importance' and that it 'affected a considerable number of people in the Free State'.[68] The vagueness of this argument allowed Cave to contradict Irish claims

[64] A.B. Keith claimed that he had anticipated the use of such measures as the Land Act 1926 in advice given to Darrell Figgis during the drafting of the Irish Constitution. A.B. Keith 'Notes on Imperial Constitutional Law' (1926) 8 *Journal of Comparative Legislation and International Law* 286-7.
[65] *Dáil Debates*, vol. 14, col. 389-90, 3 February 1926.
[66] *Ibid.* at col. 386.
[67] The other two judges who heard the petition for leave to appeal in *Lynham v. Butler* were Lord Dunedin and Lord Shaw of Dunfermline.
[68] *Hansard,* House of Lords, vol. 63, col. 403, 3 March 1926. See also TNA, LCO 2/910, lord chancellor to Dominions secretary, 3 February 1926; CAB 24/174 SFC 54 (26), memorandum by the lord chancellor, 25 February 1926 and NAI, department of the Taoiseach, S11749, shorthand notes of petition for leave to appeal in *Lynham v. Butler*, 7 December 1925. Cave's insistence that leave to appeal had been granted on the basis that the case 'affected a considerable number of people in the Free State' is unlikely to have made a favourable impression in the Irish Free State. A theory circulated in the Irish Free State that maintained that the Judicial Committee had granted leave to appeal in *Lynham v. Butler* on the erroneous assumption that the

of discrimination and claim that he had not the least doubt that leave to appeal would have been granted if a similar case had come from any of the other Dominions.[69]

Cave was always unrepentant for the part he played in initiating the controversy in *Lynham v. Butler*. He had not been a party to the 'assurances' and 'undertakings' given in 1922 on which the Irish government placed so much emphasis. Cave was unimpressed when informed of the existence of these claims.[70] He argued that even if the Lloyd George government had given such assurances in 1922 it was clear that they were making promises that they simply could not keep. The jurisdiction of the Privy Council, which embodied a prerogative of the Crown, could not be limited by secret promises that had no basis in law.[71] The Irish provisional government and its legal advisors had not taken this basic consideration into account in 1922.

Cave was unable to prevent the enactment of the Land Act 1926. He and his colleagues seriously considered the possibility of reserving the Royal assent to this legislation on the basis of a belief that its provisions included a direct attempt to limit or abolish the Irish appeal.[72] Cave backed away from this radical course of action when it became clear that the legislation was only aimed at preventing the appeal in *Lynham v.*

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case would affect a considerable number of Anglo Irish landlords. Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (P.S. King, 1931) p. 99.

[69] *Hansard,* House of Lords, vol. 63, col. 405, 3 March 1926. A.B. Keith noted that 'The Lord Chancellor in discussing this matter curiously and rather amazingly asserted that it was this sort of case which it had been intended to secure as a matter for appeal in the Constitution whereas it is clear from that instrument that constitutional issues alone were really intended to be safeguarded, since they alone are of Imperial interest.' A.B. Keith, *Responsible Government in the Dominions, Vol. II*, (OUP, 1928) p. 1090. Keith was firmly of the opinion that the essential function of the Privy Council in relation to the Irish Free State was to decide constitutional issues. For example see A.B. Keith, *The Sovereignty of the British Dominions*, (Macmillan, 1929) p. 59, *The Constitutional Law of the British Dominions*, (Macmillan, 1933) p. 277 and *Letters on Imperial Relations, Indian Reform, Constitutional and International Law, 1916-1935*, (OUP, 1935) pp. 55-6 and 354. It is likely that such conclusions were even more unwelcome in the Irish Free State than the assertion originally made by Cave.

[70] Cave ordered an investigation of British government files to ascertain claims that the Irish Free State had been promised in 1922 that Irish appeals to the Privy Council would follow the restrictive practice employed with respect to appeals from South Africa. Cave found no evidence to support these claims. In any case he concluded 'I have no doubt that if a similar application [to that in *Lynham v. Butler*] had been made in a South African case, leave would have been granted'. CAB 24/174 SFC 54 (26), memorandum by the lord chancellor, 25 February 1926.

[71] TNA, LCO 2/910, lord chancellor to Dominions secretary, 3 February 1926.

[72] TNA, DO 117/3, lord chancellor to Dominions secretary, 29 January 1926.

Butler.[73] The lord chancellor was reluctant to make use of the power of reservation, which Irish legal authorities believed had been rendered obsolete with respect to the Dominions, until it became clear that the Irish were contemplating a wider assault on the Privy Council appeal.[74] He was convinced that the use of this blunt tool against the Land Act 1926 would radicalise Irish opinion and lead to a vigorous campaign to abolish the Irish appeal. Cave also feared that this agitation might spread to the other Dominions.[75] Nevertheless, it was clear that a dangerous precedent had been set. Cave concluded that the blocking measures used by the Irish Free State against appeals were both 'ingenious and effective'.[76] He told the British cabinet 'if a similar course were followed with regard to other appeals it might be necessary to take action; but that time has not yet arrived'.[77] However, Cave made little secret of his dissatisfaction with the means used by the Irish authorities to block Privy Council appeals and made this clear in parliament.[78] He was soon presented with a method of preventing the prospect of total abolition of the Irish appeal by means other than the controversial power of reservation. This opportunity presented itself in the context of another appeal to the Privy Council.

NADAN v. R

One of the most influential cases concerning the relationship between the Irish government and the Privy Council did not actually originate in the Irish Free State at all. On 25 February 1926 Lord Cave delivered judgment on behalf of the Privy Council in the

[73] TNA, DO 117/3, memorandum on the Irish Free State and the Privy Council, 29 January 1926.
[74] TNA, LCO 2/910, lord chancellor to Dominions secretary, 3 February 1926. For Irish attitudes towards the power of reservation see *Dáil Debates*, vol. 1, col. 1168-9, 4 October 1922.
[75] TNA, CAB 24/178 SFC 54 (26), memorandum by the lord chancellor, 25 February 1926.
[76] TNA, CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926. Cave is often misquoted in this capacity as having described the Irish measures as 'effective and ingenious'. For example see NAI, department of the Taoiseach, S4285B, undated memorandum for the Imperial conference, 1930.
[77] TNA, CAB 24/178 SFC 54 (26), memorandum by the lord chancellor, 25 February 1926.
[78] Cave was forced to admit to the House of Lords that neither the British government nor the courts could prevent the enactment by the Oireachtas of the blocking legislation. This was not strictly true. The power of reserving assent for the Irish Land Bill was available but its use was not deemed wise. Cave did tell the House of Lords that if the Irish government tried to expand on this measure a 'different condition of affairs would arise'. *Hansard*, House of Lords, vol. 63, col. 407, 3 March 1926.

Canadian case of *Nadan v. R*.[79] Canadian appeals to the Privy Council were of direct interest to the Irish Free State because the two countries shared a constitutional link. Article 2 of the 1921 Anglo Irish Treaty provided that the Irish Free State was to have the same constitutional status within the Empire in certain key areas as was enjoyed by the Dominion of Canada. *Nadan v. R* concerned a challenge to the legality of s.1025 of the Canadian Criminal Code 1888 which prohibited appeals to the Privy Council in criminal cases. The legality of this provision had always been dubious. It appeared to be inconsistent with the Judicial Committee Acts of 1833 and 1844 which had been passed by Westminster in order to facilitate the operation of the Privy Council appeal. In the 1920s any provision of a Dominion statute that was incompatible with 'Imperial legislation' passed by Westminster was technically void under s.2 of the Colonial Laws Validity Act 1865. Nevertheless, the British government had declined to take any real action with respect to s.1025 of the Canadian Criminal Code when it was enacted in 1888.[80] The Privy Council itself developed a policy of tacit toleration of s.1025 by refusing to grant leave to appeal in criminal cases emanating from Canada. Although there had long been doubts concerning s.1025 of the Canadian Code its validity remained untested for thirty-eight years.

Almost four decades of tacit toleration came to an abrupt close in 1926 in the case of *Nadan v. R.* In 1924 Lord Cave himself had declined to consider the legality of the Canadian measure in *Attorney-General for Ontario v. Daly.*[81] Yet just two years later Cave and his colleagues on the Judicial Committee suddenly decided to reverse the long-established policy of turning a blind eye to the Canadian provision. Cave declared that it was 'very desirable that a decision upon the question [of s.1025] should now be

[79] [1926] A.C. 482. The other judges who heard the appeal were Viscount Dunedin, Lord Shaw, Lord Phillimore and Lord Blanesburgh.
[80] The colonial office had considered the option of recommending the disallowance, or vetoing, of the Canadian Criminal Code, 1888 on the basis of the dubious legality of s.1025. This course of action was rejected although the doubts with respect to this provision remained. TNA–PRO TS 27/678, Colonial Secetary to Governor-General of Canada, 12 November 1888. The British government also turned a blind eye when the code of 1888 was amended in 1892 to further clarify the prohibition of appeals to the Privy Council in criminal matters. TNA, TS 27/678, Risley to Greenwood, 24 July 1925.
[81] [1924] A.C. 1011. This appeal was heard by Lord Cave, Lord Haldane, Lord Dunedin, Lord Shaw and Lord Phillimore. See also *Toronto Railway Company v. The King* [1917] A.C. 630.

reached'.[82] Why now? Neither Cave nor any of his colleagues ever gave any explanation as to why it was so desirable to reverse four decades of toleration at this particular point in time. Nevertheless, on 25 February 1926 the Privy Council found that s.1025 of the Canadian Criminal Code was null and void under the Colonial Laws Validity Act 1865.

The reaction in Canada to the decision in *Nadan v. R* ranged from serious concern to outrage. The decision was robustly criticised in the Canadian press.[83] A measured speech by Ernest Lapointe, the Canadian minister for justice, to the Imperial conference of 1926 saw him admit that the effect of the decision was such that 'the principle of equality of status [between the United Kingdom and the Dominions] had thereby received a decided set-back in Canada'.[84] It should be emphasised that the Privy Council had not actually struck down Canadian legislation on this basis for a very considerable period of time. The negative reaction to the decision of the Privy Council in *Nadan v. R* was heightened by the perception that this decision was not really aimed at Canada at all. It was widely believed that the decision was really directed at the Irish Free State. These rumours were reflected in a speech given by the veteran Canadian nationalist Henri Bourassa in the Canadian House of Commons:

> The Attorney-General of England in order to reserve the right of appeal to some people in Ireland against the expressed wish of the majority of the nation, against the will of the Parliament and Government of Ireland, declared null in the Canadian statute a clause against which in itself they had no objection, against which no appeal had ever been taken to the Privy Council, and the application of which the Privy Council pronounced inadvisable. This evidences once more the fact that the Judicial Committee of the Privy Council is not primarily a tribunal, but a semi-political, semi-judicial body; and they do not ignore that fact in England.[85]

Bourassa was not alone in expressing the opinion that the decision in *Nadan v. R* was really aimed at the Irish Free State. This opinion was also held by the Canadian department of external affairs which concluded that 'It is an open secret that one motive in the Privy Council's action [in *Nadan v. R*] was the desire to be free to hear Irish Free

[82] [1926] A.C. 482, 491.
[83] For example, see *Manitoba Free Press*, 18 March and 5 April 1926.
[84] TNA, CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926.
[85] W.P.M. Kennedy, 'The Imperial Conferences, 1926-1930' (1932) 48 *Law Quarterly Review* 191 at 207.

State appeals'.[86] This conclusion is also supported by detailed analysis of this case by Jacqueline D. Krikorian, who concludes that 'The Judicial Committee's opinion in *Nadan* was a British judicial solution to the Irish political "problem" regarding the imperial tribunal'.[87]

There are a number of considerations that suggest that the Privy Council may well have had one eye on the Irish Free State when making its decision in *Nadan v. R.* First, it should be recalled that under Article 2 of the 1921 Treaty the Irish Free State had come into existence with the same constitutional status within the Empire as enjoyed by the Dominion of Canada. If Canada could not limit or abolish the appeal to the Privy Council it appeared that the same position must also apply to the Irish Free State. Secondly, it should be noted that the constitutional link between the Irish Free State and Canada was actually raised during the pleadings in *Nadan*. The attorney general for England and Wales, Sir Douglas Hogg who later become Lord Hailsham, had become involved in the pleadings in this case as an intervener. Hogg reminded the Privy Council that the issues raised by the case extended beyond Canada and noted that any decision on constitutional matters would also extend to the Irish Free State.[88] The third consideration focuses on the argument that there was no practical necessity to reverse four decades of toleration and strike down the Canadian provision. The actual subject matter of *Nadan v. R* was hardly of exceptional significance. It concerned small-scale possession and transportation of intoxicating liquor in violation of certain statutes passed by the Province of Alberta. Once the Privy Council had taken the opportunity to declare s.1025 invalid it refused leave to appeal to the appellant. Consequently, there was no more necessity to strike down s.1025 of the Canadian Criminal Code in *Nadan v. R* than at any other time since 1888. The fourth factor that supported the belief that the decision in *Nadan* was really aimed at the Irish Free State was the identity of the person who delivered the judgment. This was Lord Cave who was widely perceived of being, in the words of L.S.

[86] National Archives of Canada, RG 25, vol. 3418, 1-1926/6, 'Notes on the Imperial conference, 1926'. The decision in *Nadan* is also linked to the Irish Free State in K.C. Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press, 1953), p. 120.
[87] Jacqueline D. Krikorian, 'British Imperial Politics and Judicial Independence: The Judicial Committee's Decision in the Canadian Case *Nadan v. The King*' (June 2000) 33:2 *Canadian Journal of Political Science* 291 at 306.
[88] TNA, TS27/678, pleadings in *Nadan v. R,* 10, 11, 14 December 1925

Amery, 'no friend of the [Irish] Free State'.[89] The final consideration that convinced many people that the judgment in *Nadan v. R* was really aimed at the Irish Free State was the timing of the decision. On 27 January 1926 the Land Bill, 1926 was introduced in the Irish parliament. This was the 'constitutional protest' introduced as a consequence of the decision to grant leave to appeal in *Lynham v. Butler*. The Oireachtas debates on this bill involved a wide-ranging discussion on the Privy Council appeal. During these debates the limitation and even the total abolition of the Irish appeal to the Privy Council was discussed in some detail. The Land Act was finally enacted on 11 March 1926. The Privy Council delivered its decision in *Nadan* on 25 February 1926. The decision in *Nadan v. R* had been delivered right in the middle of a major clash between the Irish government and the Privy Council. The decision also coincided with the debates in the Oireachtas that examined the entire future of the appeal to the Privy Council from the courts of the Irish Free State.

Lord Cave had already shown himself to be hostile to the 'constitutional protest' implicit in the Irish Land Act 1926. The decision delivered by Cave in *Nadan v. R* seemed to ensure that efforts to further limit Irish appeals to the Privy Council would not be successful. Although Irish legal advisers tried to assure their government that there could be no Irish version of *Nadan v. R* it was clear that this could not be taken for granted.[90] The combined effect of *Lynham v. Butler* and *Nadan v. R* provided the Irish government with a powerful incentive to limit or even abolish appeals to the Privy Council from their courts. Lord Cave's interventions ensured that the Privy Council appeal became a priority issue in Irish external policy.[91] The Imperial conference of 1926 provided the Irish government with the opportunity to pursue this new agenda.

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[89] John Barnes and David Nicholson (eds) *The Leo Amery Diaries, Vol. 1, 1896-1929*, (Hutchinson, 1980) p. 530.

[90] UCD Archives, Costello Papers, P190/94, memorandum on *Lynham v. Butler*, undated. These assurances were based on arguments that Imperial statutes, such as the Judicial Committee Act 1844 and the Colonial Laws Validity Act 1865 did not apply to the Irish Free State. See Thomas Mohr, 'The Colonial Laws Validity Act and the Irish Free State' (2008) 43 *Irish Jurist* 21-44.

[91] The priority given to this question is underscored by the fact that, while the other reforms sought by the Irish delegates at the Imperial conference of 1926 were contained in a single memorandum, a separate document was devoted to the sole question of the Privy Council appeal. UCD Archives, Blythe Papers, P24/217, memorandum on the Judicial Committee of the Privy Council. See also *Seanad Debates*, vol. 6, col. 413, 24 February 1926.

LORD CAVE AT THE IMPERIAL CONFERENCE OF 1926

The Imperial conference of 1926 is often seen as a milestone in expanding the status and autonomy of the Dominions.[92] This is presented as being incompatible with Lord Cave's position as a strong supporter of maintaining existing Imperial ties. Many analyses of the Imperial conference of 1926 make reference to an unflattering account provided by the Canadian journalist D.B. MacRae of the *Manitoba Free Press* in which Lord Cave 'finally stamped out of the conference, saying he was not going to be a party to the breaking up of the British Empire'. 'With him gone', concluded MacRae 'the conference made better progress.'[93] It should be borne in mind that MacRae did not have direct access to the closed sessions of the conference. His anecdote reflects a simplistic and incomplete analysis of Lord Cave's contribution to the Imperial conference of 1926. Cave took a personal interest in the discussions concerning the Irish appeal to the Privy Council and took a leading role in them. In fact, British delegates to the Imperial conference were instructed that Lord Cave was to be summoned on every occasion that the subject of the Irish appeal was raised in one of the sessions.[94]

The 1926 conference provided the Irish delegation with the opportunity to face the leading figure behind the decision to grant leave to appeal in *Lynham v. Butler*. Cave was unapologetic for his actions. He denied that the Irish Free State had been treated differently from the other Dominions and rejected the Irish contention that the Judicial Committee was attempting to broaden the appeal so as to occupy the position formerly enjoyed by the House of Lords with respect to Ireland. Cave emphasised that leave to appeal had only been given in two cases out of about ten arising from the Irish Free State, and in only one of those had any objection been taken. He made a spirited defence of the Judicial Committee before the

[92] For example, see D.W. Harkness, *The Restless Dominion* (Macmillan, 1969), chapter 6.
[93] Letter from D.B. MacRae, journalist with the *Manitoba Free Press* to his editor J.W. Dafoe, 21 November 1926. See Ramsay Cook (ed), 'A Canadian Account of the 1926 Imperial Conference' (1965) 3 *Journal of Commonwealth Political Studies* 60-1. MacRae's account is also repeated in D.W. Harkness, *The Restless Dominion* (Macmillan, 1969) p. 114n and Jacqueline D. Krikorian, 'British Imperial Politics and Judicial Independence: The Judicial Committee's Decision in the Canadian Case *Nadan v. The King*' (June 2000) 33:2 *Canadian Journal of Political Science* 291 at 326.
[94] TNA, LCO 2/3465, memorandum on Imperial conference, 1926, 13 October 1926.

delegations of the Imperial conference and concluded by making a favourable comparison between that court and the House of Lords.[95]

The negotiating position adopted by the Irish delegation with respect to the Privy Council appeal had two main strands. The Irish knew that they had little chance of achieving their objectives in this area if they acted in isolation. The first strand of the Irish negotiating strategy was to appeal to the self-interest of the other Dominions. The Irish delegation insisted that Canada would be permitted to abolish the appeal if she were inclined to do so. A challenge to the right of the Irish Free State to abolish the appeal was, therefore, a challenge to the rights of every other Dominion.[96]

Lord Cave responded to these arguments by pointing out that, from a strict legal perspective, none of the Dominions had the right to abolish the Privy Council appeal. This point lay at the heart of the judgment that he had delivered in *Nadan v. R.*[97] *He* also made it clear that Imperial legislation would be required in order to give a Dominion exclusive control of all judicial matters within its own jurisdiction. He emphasised the position of the Privy Council appeal as a prerogative of the Crown and as an important link that bound the Empire together. The consent of all the Dominions would be required before a change could be made to this Crown prerogative.[98]

Cave did not need to push his position too hard. The Irish negotiating strategy on the Privy Council appeal was defeated by the absence of any support from the other Dominions. The Irish delegates had hoped that the decision in *Nadan v. R.* would guarantee some support from the Canadian delegation led by prime minister William Lyon Mackenzie King.[99] The failure of the Canadian delegation to offer support in 1926 is usually ascribed to perceptions that the provincial parliaments and the French Canadian community valued

[95] TNA, CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926.
[96] *Ibid.*
[97] [1926] A.C. 482.
[98] TNA, CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926.
[99] NAI, department of foreign affairs EA1/26, memorandum by J.P. Walsh, 21 April 1926.

the appeal as a safeguard of their rights.[100] Australia and South Africa also declined to offer support while New Zealand and Newfoundland were openly hostile to the Irish position.[101]

The second strand of the Irish negotiating stance was to stress that they were only seeking the *right* to abolish the Privy Council appeal. The Irish delegates stated that if this right were admitted, the Irish Free State might be satisfied with limiting the appeal in place of outright abolition.[102] It is open to speculation how far this reflected the true position of the Irish government and how far it represented tactical considerations.

Lord Cave admitted that a Dominion request to modify the appeal would merit serious consideration but stressed that any such request would concern the Empire as a whole. He admitted that if, for example, the Commonwealth of Australia demanded the abolition of the appeal the British government would probably try to persuade Australia to retain it, but that if abolition was insisted upon they would probably meet the views of the Commonwealth. Lord Birkenhead went further when he stated that 'if Canada, or Australia, or New Zealand, or South Africa, desired such legislation, in the end and after discussion such legislation would be passed'. The Irish Free State was conspicuously absent from this list. Lord Cave admitted that, in the context of the appeal to the Privy Council, 'The position of the Irish Free State was singular'.[103] The Irish appeal was seen as having its basis in the settlement imposed by the Anglo Irish Treaty of 1921. Cave argued that it was too early for the Irish government to seek modification of this instrument. He suggested that the best course would be to postpone further consideration of this matter until the next Imperial conference.[104]

The absence of Dominion support doomed the Irish attempt to secure recognition of their right to abolish the Irish appeal to the Privy Council. On the other hand, some members of the British government and the British delegation to the Imperial conference were receptive to the idea of negotiating a limitation of the Irish appeal. Lord Balfour, then

[100] For example, see D.W. Harkness, *The Restless Dominion* (New York, 1969), p. 114.
[101] TNA, CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926.
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*

lord president of the council, concluded 'By all means limit the right of appeal in trivial cases, but keep it as a "bulwark of great principles"'.[105] Lord Birkenhead, a signatory of the Anglo Irish Treaty of 1921, agreed that the Irish appeal should be 'rigidly delimited' and proposed that a sub-committee could be set up for the discussion of a formula for such delimitation. The option of limiting the Irish appeal was attractive because it minimised the chances of any repetition of cases like *Lynham v. Butler* and so preserved the role of Judicial Committee of the Privy Council as arbiter of the Treaty settlement.

Lord Cave was horrified by these proposals. He placed significant emphasis on the argument that the Judicial Committee was an independent body and that, since the rules affected all the Dominions, it was not possible for the British government to negotiate with one Dominion as to the rules by which that body was governed.[106] Cave's position, in blocking attempts to formally limit the Irish appeal and in delaying further consideration of this matter until the next Imperial conference, prevailed in 1926. The conference report also recognised Cave's insistence that changes should not be made with respect to the appeal without prior consultation and discussion with other members of the Commonwealth.[107] A.B. Keith, a leading commentator on Imperial law and Imperial relations, wrote that this ensured that 'if Canada did not desire to change- and in the face of Quebec this must be Mr. King's attitude- nothing had better be done'.[108] The Irish delegation had come to the Imperial conference seeking Dominion support for their position with respect to the Irish

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[105] *Ibid.*

[106] TNA, LCO 2/3465 Imperial conference 1926, Appeals to the King in Council, 1 November 1926 and CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926.

[107] Cmd. 2768, pp. 19-20. Similar restrictions were placed on Dominion acceptance of the compulsory arbitration of the Permanent Court of International Justice, a court that was often seen as a potential competitor in terms of jurisdiction with the Judicial Committee of the Privy Council. Cmd. 2768, p. 28. The Irish government had to be satisfied with a statement in the conference report that 'it is no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the part of the Empire primarily affected'. Cmd. 2768, p. 19. In reality, this statement provided nothing that had not been said to the Irish by British politicians during the negotiations on the Irish Constitution in 1922 or by the Privy Council itself when dealing with Irish appeals. For example, see the comments made by Viscount Haldane when hearing the three petitions, *Alexander E. Hull and Co. v. Mary A.E M'Kenna; The 'Freeman's Journal' Limited v. Erik Fernstrom* and *The 'Freeman's Journal' Limited v. Follum Traesliberi* [1926] IR 402 at 404. A.B. Keith referred to it as 'the usual, it must be feared insincere, declaration'. Arthur Berriedale Keith, *Responsible Government in the Dominions- Vol. II* (OUP, 1928) p. 1230.

[108] Arthur Berriedale Keith, *Responsible Government in the Dominions- Vol. II* (OUP, 1928), p, 1230. William Lyon Mackenzie King was prime minister of Canada 1921-1926, 1926-1930 and 1935-1948.

appeal to the Privy Council. Lord Cave helped to ensure that the Irish left the Imperial conference with a Dominion veto over their attempts at reform.

WIGG AND COCHRANE v. THE ATTORNEY GENERAL OF THE IRISH FREE STATE

The hostility of the Irish government to the appeal to the Privy Council reached a new level in the aftermath of the decision in *Wigg and Cochrane v. The Attorney General of the Irish Free State*.[109] The case concerned the level of compensation payable to transferred civil servants in Ireland under Article 10 of the 1921 Treaty. Many of the transferred civil servants disputed the level of compensation determined by the Irish Supreme Court[110] and eventually took an appeal to the Judicial Committee of the Privy Council. The controversial decision that resulted from this appeal was delivered by Lord Cave in 1927. This judgment concluded that the civil servants were entitled to a higher level of compensation than had been calculated by the Irish Supreme Court. The Irish responded by sending a despatch to London complaining that a basic error had been made in the context of the Privy Council decision.[111] They insisted that the judgment had mixed up a number of key dates. The Privy Council had apparently calculated the compensation on the assumption that a minute of the British treasury, which came into effect on 20 March 1922, had not been applicable. Lord Cave and the rest of the Privy Council had been under the impression that the civil servants had already been transferred on 20 March whereas, in fact, they had not been transferred until 1 April.[112] The Irish government insisted that this error invalidated the entire basis on which the Privy Council had made its decision and refused to pay any extra compensation. Irish nationalists had always seen the Judicial Committee of the Privy Council as an alien institution that

[109] [1927] I R 285, 293. The judges who heard this appeal to the Judicial Committee included Lord Cave, Lord Haldane, Lord Finlay and Lord Dunedin.
[110] [1925] 1 I.R. 149.
[111] R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) p. 441.
[112] [1927] I.R. 285 at 291.

included a number of judges who were not friendly to the Irish Free State. Now incompetence could be added to their list of grievances against this tribunal.

Lord Cave's health was in sharp decline when this controversy erupted. This did not prevent him from playing a part in the strange spectacle that followed. This event must rank as one of the strangest events in British parliamentary and legal history. It certainly marked one of the lowest points in the entire history of the Judicial Committee of the Privy Council. On the 25 April 1928 Lord Haldane rose to inform the House of Lords that a serious error had been made by the Judicial Committee, of which he had been a member, in the course of reaching judgment in *Wigg and Cochrane*. This shocking declaration was exacerbated by the fact that Haldane was not alone in making this *mea culpa*. A shocked house looked on as law lord after law lord rose from their seats and admitted that a mistake had been made in relation to the Irish appeal. Lord Dunedin declared that it was no pleasant matter to 'stand in a white sheet and say that you were wrong' but that, on the other hand he considered it 'cowardly for a man to run away and not accept his share of responsibility'.[113] Lord Finlay, another former lord chancellor who had heard the appeal in *Wigg and Cochrane*, avoided this humiliating exhibition by pleading ill health. However, Lord Cave played a very prominent role in the collective admission of error despite the considerable handicap of having died some weeks earlier. It was revealed that the decision in *Wigg and Cochrane* had preyed on the mind of the lord chancellor at a time when his life was rapidly drawing to a close. Cave dictated a letter to be sent to the prime minister just three days before his death. Lord Birkenhead, then a member of the second Baldwin administration, told the House of Lords that the dying man had admitted that aspects of his decision in *Wigg and Cochrane* were 'probably wrong in law' and admitted full responsibility for the error.[114] Despite his rapidly deteriorating state of health, Cave was still capable of making constructive comments on the manner in which his error could be rectified. Lord Birkenhead told the House of Lords, with maximum dramatic effect, that Cave had been such a faithful servant of public duty that, notwithstanding the pleas of the prime minster not to allow

[113] *Hansard,* House of Lords, vol. 70, col. 832, 25 April 1928.
[114] R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) p. 442.

such concerns to add to his suffering, he could not rest until he had discharged this final act of public service.[115]

It was decided not to follow the suggestion of that had apparently been made by Cave *in extremsis* of passing special legislation to set the level of compensation for the transferred civil servants. Instead, it was decided to refer the matter back to the Privy Council. This proved to be extremely unfortunate decision in terms of the history of the Irish appeal. The second decision only exacerbated an already tense situation when it upheld the original decision in *Wigg and Cochrane*.[116] The Irish government had not expected this outcome and refused to accept it. Irish ministers were convinced that the Privy Council had compounded one embarrassing mistake by a second even more ignominious error.[117] A serious Anglo Irish political dispute followed. This was only resolved when an exasperated British government agreed to pass special legislation and pay the extra compensation itself.[118]

LORD CAVE AND THE ABOLITION OF THE IRISH APPEAL TO THE PRIVY COUNCIL

The debacle of the two decisions on the transferred civil servants placed the final nails in the coffin of the Irish appeal to the Privy Council. By 1930 the total abolition of the Privy Council became one of the main policy objectives of the Irish government. The Irish were prepared to achieve this objective by bilateral agreement with the United

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[115] *Hansard,* House of Lords, vol. 70, col. 834-41, 25 April 1928. Sir Claude Schuster claimed that Cave had been in a state of physical distress during the hearing of *Wigg and Cochrane* which, in all probability accounted for the mistake. TNA, LCO 2/910, memorandum by Sir Claude Schuster, 6 November 1930. It should also be noted that Lord Haldane was also unwell and approaching death during the decision in *Wigg and Cochrane*. He finally died on 19 August 1928. R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) p. 236-7.

[116] *In re Compensation to Civil Servants under Article X of the Treaty* [1929] I.R. 44. This case was heard by the Marquess of Reading, Lord Phillimore, Lord Hanworth, Lord Alness and Anglin CJ.

[117] *Dáil Debates*, vol. 32, col. 665, 31 October 1929; *Irish Independent*, 14 November 1928 and *Irish Times*, 15 November 1928.

[118] The association of this dispute with Article 10 of the Anglo Irish Treaty of 1921 ensured that parallel legislation passed in Dublin and at Westminster ultimately proved to be necessary. Civil Service (Transferred Officers) Compensation Act 1929 (Dublin) and the Irish Free State (Confirmation of Agreement) Act 1929 (Westminster).

Kingdom if possible and by unilateral means if necessary. The intervention of the Imperial conference of 1930, a series of fruitless Anglo Irish negotiations and a change of government provided a stay of execution for the appeal. However, by 1933 the Irish Free State became the first Dominion to abolish the Privy Council appeal.

There can be little doubt that the decisions delivered by Lord Cave had disastrous consequences for the Irish appeal to the Privy Council. To what extent did Cave bear personal responsibility for these decisions? It should be emphasised that the judgments of the Judicial Committee of the Privy Council in the 1920s were delivered by means of a single collective judgment that represented the views of the majority of the judges hearing the appeal. Dissenting judgments were not allowed in Privy Council appeals until 1966.[119] This consideration complicates the process of determining Cave's responsibility for the unfortunate decisions in *Lynham v. Butler*, *Nadan v. R* and *Wigg and Cochrane v. Attorney General of the Irish Free State.* How can there be any certainty that the decisions reached in each of these cases actually represented opinions held by Lord Cave?

It can be stated with total confidence that Lord Cave was responsible for the granting of leave to appeal in *Lynham v. Butler* and for the judgment in *Wigg and Cochrane*. This conclusion is based on admissions made by Lord Cave himself during the controversies that followed.[120] However, the evidence with respect to *Nadan v. R* presents certain challenges. It is true that Lord Cave delivered this decision on behalf of the Judicial Committee. Yet, can we be completely sure that this decision reflected his views given the collective judgment rule followed by the Judicial Committee in this period? First, it is highly unlikely that a person who fundamentally disagreed with a judicial decision would be chosen to deliver that decision in open court. Second, Cave would still bear a considerable amount of responsibility for the controversy surrounding

[119] Judicial Committee (Dissenting Opinions) Order, 1966 (S.I. 1966, No. 1100).
[120] With respect to *Lynham v. Butler*, see *Hansard,* House of Lords, vol. 63, col. 403, 3 March 1926. See also TNA, LCO 2/910, lord chancellor to Dominions secretary, 3 February 1926 and NAI, department of the Taoiseach, S11749, shorthand notes of petition for leave to appeal in *Lynham v. Butler*, 7 December 1925. With respect to *Wigg and Cochrane*, see *Hansard,* House of Lords, vol. 70, col. 834-41, 25 April 1928 and R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) p. 442.

Nadan v. R even if one could accept the highly unlikely scenario of a dissenting judge delivering the majority decision. Cave must have been aware that the act of delivering a decision would associate it with his name in the eyes of the general public.[121] Cave's attitude to the Irish Free State was common knowledge in the 1920s. The association of Cave with the decision helped to create the impression that the judgment was really aimed at the Irish Free State and not at Canada.

Lord Cave had very different ideas as to the nature of the Irish appeal to the Privy Council than those held by the Lloyd George government that had first insisted upon its recognition by the Irish Constitution of 1922. The Lloyd George government saw the appeal as a vital symbol of Dominion status but also, as seen earlier, as means of safeguarding the terms of the 1921 Treaty and the rights of the southern protestant community. These were clearly powers to be held in reserve and, as far as the Irish government was concerned, the Lloyd George government had given definite assurances that Irish appeals would be very exceptional events. This led Kevin O'Higgins to predict in 1922 that there would be two or three appeals at most in the forthcoming century.[122] By contrast, Lord Cave did not see the appeal to the Privy Council from the Irish courts as a power to be held in reserve for cases concerning the 1921 Treaty or the rights of southern protestants. It should be recalled that Cave insisted that that any assurances given by the Lloyd George government concerning the limitation of Irish appeals to the Privy Council were unenforceable.[123]

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[121] For example, see the remarks of Desmond FitzGerald, minister for external affairs, that 'the recent pronouncement of Lord Cave in the King versus Nadan brings out the danger of relying too entirely in advancement through constitutional usage.' UCD Archives, FitzGerald Papers, P80/450, Desmond FizGerald to Oscar Skelton, under-secretary in the Canadian department of external affairs, 9 June 1926. See also the reference to the 'remarkable declaration of Lord Cave' in a memorandum drafted by the department of external affairs. UCD Archives, Blythe Papers, P24/217, memorandum drafted by the department of external affairs in preparation for the Imperial conference of 1926, undated.

[122] *Dáil Debates*, vol. 1, col. 1404, 10 October 1922. See also letter of 22 September 1922 from Kevin O'Higgins to Thomas Johnson, *Irish Times*, 23 September 1922. George Gavan Duffy claimed in 1922 that the restrictions achieved by the Irish provisional government would ensure that no appeal would ever go to the Judicial Committee of the Privy Council from the Irish Free State. *Dáil Debates*, vol. 1, col. 1413-4, 10 October 1922.

[123] TNA, LCO 2/910, lord chancellor to Dominions secretary, 3 February 1926.

The Irish government was alarmed at the prospect of seeing regular appeals from the Irish Supreme Court to the Judicial Committee of the Privy Council in cases that concerned matters of purely internal significance. Instead of two or three appeals in a century, the Privy Council granted leave to appeal on four occasions in just over three years.[124] The Irish government was also taken aback by the sheer number of cases in which leave to appeal was sought, even though leave was refused in the great majority of cases. According to Kevin O'Higgins all sorts of 'trumpery cases' were being brought to London for consideration as to whether they were worthy of the attention of the Privy Council. O'Higgins saw this as part of 'a conscious and deliberate effort to widen the appeal and to make it a matter of course'.[125] It could be argued that this position constituted a greater threat to Irish sovereignty than having the Privy Council act as arbiter of the 1921 Treaty. The Irish government actually seemed prepared to accept the Privy Council as arbiter of the Treaty in the case of *Wigg and Cochrane*, although this position changed as relations began to sour.[126] The main consideration in souring these relations was the fear that the Judicial Committee of the Privy Council was asserting the same position over the self-governing Irish Free State as had been enjoyed by the House of Lords over the island of Ireland as a part of the United Kingdom.[127]

The effect of the judgments associated with Cave was exacerbated by the nature of the office that he held. This was the hallowed office of lord chancellor which, until recently, spanned the executive, legislative and judicial spheres.[128] The Irish government had unfortunate encounters with Cave in each of these areas. Cave, as lord chancellor,

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[124] *Lynham v. Butler* (1926) NAI, department of the Taoiseach, S11749, shorthand notes of petition for leave to appeal, 7 December 1925; *Wigg and Cochrane v The Attorney General of the Irish Free* State [1927] I.R. 285; *In the Matter of the Reference as to the Tribunal under Article 12 of the Schedule appended to the Irish Free State Agreement Act 1922* Cmd. 2214 and *Performing Right Society v. Bray U.D.C.* [1930] I.R. 509.

[125] TNA, CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926.

[126] *Dáil Debates*, vol. 14, col. 134, 27 January 1926. See also *Dáil Debates*, vol. 14, col. 342 and 386, 3 February 1926 and *Seanad Debates*, vol. 6, col. 439 and 386, 24 February 1926. By 1930 the Irish were raising the possibility of the Permanent Court of International Justice acting as arbiter of the 1921 Treaty in preference to the Judicial Committee of the Privy Council. *Dáil Debates*, vol. 33, col. 836, 893-4, 897-8 and 911-4, 26 February 1930.

[127] The fear that this scenario might become reality was raised by Kevin O'Higgins at the Imperial conference of 1926. TNA, CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926. See also *Dáil Debates*, vol. 14, col. 338, 3 February 1926 and *Seanad Debates*, vol. 6, col. 409, 24 February 1926.

[128] The office of lord chancellor was reformed by the Constitutional Reform Act 2005.

had substantial control over the selection of judges to hear the various appeals to the Privy Council. This ensured that it was impossible to enforce any promise of excluding him against his own will from hearing Irish appeals. The difficulties with Lord Cave's position in the judicial sphere were exacerbated by comments made by him in the legislative sphere. These included statements in House of Lords that stressed the utility of the Privy Council appeal in ensuring that the Irish Free State continued to adhere to the terms of the 1921 Treaty.[129] Cave also made use of his position in parliament to make thinly veiled threats that an Irish policy of blocking Privy Council appeals would not be tolerated.[130] Cave's role in the executive sphere also led to unfortunate consequences. When the Irish delegates attempted to express their concern as to what had happened in *Lynham v. Butler* at the Imperial conference of 1926 they ended up facing Lord Cave, the man who bore primary responsibility for the decision, across the negotiating table.

The absence of a clear separation of powers inherent in the office of lord chancellor, as it existed in the 1920s and 1930s, also facilitated accusations of the worst kind can be aimed at any judicial tribunal, that of not being independent of external interests. This paper has argued that Lord Cave's personal convictions with respect to the Irish Free State and the value of the Irish appeal to the Privy Council are likely to have influenced his decisions in a number of key court cases. Other scholars have gone much further in raising the possibility that the Judicial Committee was being used as a 'political vehicle' by the British government to implement Imperial policy.[131] Can claims of this nature be sustained?

[129] *Hansard*, House of Lords, vol. 52, col 166-7, 30 November 1922.
[130] *Hansard,* House of Lords, vol. 63, col. 394-422, 3 March 1926.
[131] Jacqueline D. Krikorian, 'British Imperial Politics and Judicial Independence: The Judicial Committee's Decision in the Canadian Case *Nadan v. The King*' (June 2000) 33:2 *Canadian Journal of Political Science* 291 at 329.

THE PRIVY COUNCIL AS AN INSTRUMENT OF GOVERNMENT POLICY

Irish commentators often suggested that the British government influenced or interfered with the decisions of the Judicial Committee of the Privy Council in the 1920s and 1930s.[132] Attempts to defend the integrity of the Privy Council occasionally produced knee-jerk reactions from British commentators who made similar accusations in relation to the Irish courts.[133] Irish nationalists may have had good cause to resent the imposition of a Privy Council appeal that they had never wanted. Yet, the contention that decisions in appeals that directly or indirectly concerned the Irish Free State, in particular those associated with Lord Cave, reflected wider policy aims pursued by the British government are difficult to sustain. It has already been noted that Lord Cave saw the Irish appeal in different terms to the Lloyd George government of the early 1920s, which had assumed that Irish appeals to the Privy Council would only be permitted in exceptional circumstances.[134] In addition, it should also be remembered that Cave himself was a staunch defender of the autonomy of the Irish appeal to the Judicial

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[132] John A. Costello, then attorney general of the Irish Free State, wrote that the Judicial Committee had a 'political tinge' and supported this by noting that it was 'formed of people who are at one and the same time Judges and Politicians'. UCD Archives, Costello Papers, P190/94, notes on the memorandum prepared for the Imperial conference of 1926 on appeals to the Privy Council, undated. Patrick McGilligan, the Irish minister of external affairs, made a radio broadcast in 1930 that stated 'Are not the British government and parliament still in a position to interfere in Irish affairs through this purely British Court, the majority of whose judges have most violently opposed the liberation of the Irish people'? UCD Archives, McGilligan Papers, P35/108, radio broadcast, 9 November 1930. Darrell Figgis, one of the most prominent figures on the committee that drafted the first Irish Constitution, wrote that the expectation of impartiality from a tribunal with such political links was 'a fool's dream'. Darrell Figgis, *The Irish Constitution- Explained by Darrell Figgis* (Talbot, 1922), p. 54. See also remarks of Professor Magennis at *Dáil Debates,* vol. 1, col. 1406, 10 October 1922. These suspicions filtered down to opinion pieces in Irish periodicals in which the Privy Council was described as the 'pocket tribunal of the English political party in power'. Donal McEgan, 'John Bull's Privy Council' (1933) 23 *The Catholic Bulletin* 739. Kevin O'Higgins, the first Irish minister for justice, told the Oireachtas that 'It is the Lord Chancellor who assigns the judges who are to try every and any case that is sought to be brought to the Judicial Committee of the Privy Council, and the Lord Chancellor while a very eminent lawyer is none the less a politician and a member of the Cabinet.' *Seanad Debates*, vol. 6, col. 409, 24 February 1926.

[133] For example, see A.B. Keith, *The Constitutional Law of the British Dominions* (Macmillan, 1933), p. 271-2. For a contrasting view of the independence of the Irish judiciary see TNA, LCO 2/3465, Imperial conference 1926: Appeals to the King in Council, 1 November 1926. Some commentators ridiculed the very idea of the judges of the Privy Council being directly influenced by the British government. For example, see TNA, LCO 2/910, memorandum by Sir Claude Schuster, 6 November 1930.

[134] The expectation that Irish appeals would be exceptional events was also shared by A.B. Keith, one of the leading authorities on British Imperial law. See fn. 69.

Committee of the Privy Council and firmly rejected interference by the British government. This is evident in his refusal to be bound by secret promises made by the Lloyd George government in 1922 with respect to the appeal from the Irish courts.[135] Similar considerations prompted him to veto proposals made at the Imperial conference of 1926 that the British government negotiate special limitations on the appeal that would only apply to the Irish Free State.[136]

Perhaps the strongest evidence of the independence of the Judicial Committee was the frequency with which its decisions were actually in direct opposition to the interests and wishes of the British government. Many of the decisions in relation to the Irish Free State caused the British government considerable embarrassment and inconvenience. Even members of the Irish government had to admit that the decisions of the Privy Council and the policy interests of the British government did not always coincide.[137] This reality is also reflected in private comments made by members of the British government in the aftermath of key decisions made by the Privy Council. L.S. Amery wrote that Lord Cave's decision in *Wigg and Cochrane* was 'absurd' and was convinced that it highlighted the necessity for the reform of the Judicial Committee in the very near future.[138] Amery also described the second decision on the transferred civil servants, delivered in the case of *In re Compensation to Civil Servants under Article X of the Treaty*[139] as 'alarming' and concluded that 'Only in connexion with Ireland could such a tangle ever have arisen'.[140]

The Irish case of the *Moore v. Attorney-General for the Irish Free State* provides one of the best examples of the independence of the Judicial Committee of the Privy

[135] TNA, LCO 2/910, lord chancellor to Dominions secretary, 3 February 1926.
[136] TNA, LCO 2/3465 Imperial conference 1926, Appeals to the King in Council, 1 November 1926.
[137] Desmond FitzGerald, minister for external affairs, was convinced that the Privy Council had actually 'double-crossed' the British government in the case of *In re Compensation to Civil Servants under Article X of the Treaty* [1929] I.R. 44. UCD Archives, FitzGerald Papers, P80/1411, Desmond FitzGerald to Mabel FitzGerald, 6 November 1930.
[138] John Barnes and David Nicholson (eds) *The Leo Amery Diaries, Vol. 1, 1896-1929*, (Hutchinson, 1980), p. 539.
[139] [1929] I.R. 44.
[140] John Barnes and David Nicholson (eds) *The Leo Amery Diaries, Vol. 1, 1896-1929*, (Hutchinson, 1980), 570-1.

Council from the British government.[141] This case saw the Judicial Committee of the Privy Council uphold the validity of Irish legislation passed in 1933 that sought to unilaterally abolish the Irish appeal to that tribunal. It was obvious that this decision went against the interests of the Judicial Committee of the Privy Council itself. It was also incompatible with the interests of the British government, which had publicly argued that the Irish attempt to unilaterally abolish of the appeal was illegal. On 14 November 1933 the Dominions secretary, James Thomas, told the House of Commons that this act was a clear breach of the 1921 Treaty.[142] The British government was forced to endure serious embarrassment and accusations of incompetence when the Privy Council finally upheld the legality of its own abolition with respect to the Irish Free State.[143]

THE BRITISH JUDICIARY AND THE IRISH APPEAL TO THE PRIVY COUNCIL

Lord Cave admitted responsibility for the decisions in *Lynham v. Butler* and *Wigg and Cochrane* and publicly associated himself with the decision in *Nadan v. R*. Yet, Cave was not the only judge who sat on the Judicial Committee in the 1920s and the existence of the single judgment rule should not be used to suggest that this court was a monolith. Lord Cave's approach to the appeal to the Privy Council from the Irish courts can be contrasted with that taken other members of the Judicial Committee. Lord Haldane saw the Irish appeal as an instrument that should be held in reserve for matters of exceptional

[141] [1935] I.R. 472 and [1935] A.C. 484. The case of *Moore v. Attorney General* provides examples of the two indicators identified by Krikorian as suggesting the possibility that a decision of the Judicial Committee had been influenced by political considerations as well as legal ones. The first indicator is the presence of the attorney general of England acting as intervenant in the case. The attorney general of England, Sir Thomas Inskip, appeared before the Judicial Committee during the pleadings in *Moore v Attorney General*. The second indicator concerns instances in which the Privy Council denied the applicant leave to appeal but nevertheless passed comment on the validity of the legislation raised by the case. This also occurred in *Moore v Attorney General*. It should also be noted that the practice of the attorney general of England appearing as an intervenant in a Privy Council appeal was by no means unusual. This had also occurred in *Toronto Railway Company v. The King* [1917] A.C. 630 and *Attorney-General for Ontario v. Daly* [1924] A.C. 1011. The attorney general for Ontario was also an intervenant in *Attorney-General for Ontario v. Daly* as was the attorney general of Canada in *Nadan v. R.*

[142] *Hansard,* House of Commons, vol. 281, col. 726-7, 14 November 1933.

[143] For example, see *Hansard,* House of Commons, vol. 304, col. 441 and 443, 10 July 1935.

importance.[144] His public declaration of this policy, in response to three Irish applications for leave to appeal made in 1923, was echoed by Lord Buckmaster. Would the history of the Irish appeal to the Privy Council have been different if a judge other than Lord Cave had occupied the office of lord chancellor during the formative years of the Irish Free State?

Irish perceptions of the appeal to the Privy Council as a diminution of sovereignty ensured that it was never likely to be a permanent feature in the constitutional law of the Irish Free State. It is easy to argue that the abolition of the appeal, the dismantling of the terms of the 1921 Treaty and Irish secession from the Commonwealth, would have occurred without the interventions of Lord Cave. Although the circumstances that surrounded the origin of the Irish Free State ensured that the history of the Irish appeal was always likely to be brief this does not mean that all aspects of it were inevitable. This is illustrated by the brief period of limited toleration for the Privy Council appeal that existed between the delivery of Haldane's assurances in 1923 and *Lynham v. Butler* in 1926. The rapid deterioration in relations that followed were the direct result of a number of unfortunate decisions between 1926 and 1928 that can be attributed to Lord Cave. These judgments proved instrumental in converting a spirit of suspicious toleration to one of uncompromising opposition to the appeal. Although eventual abolition of the Irish appeal to the Privy Council was inevitable, the bitter and antagonistic history that preceded it was not. The decisions delivered by Lord Cave ensured that complete abolition of the Irish appeal to the Privy Council had become a prime objective of Irish governmental policy even though that appeal had been in existence for less than eight years. These decisions also guaranteed that a policy of seeking abolition of the appeal enjoyed cross-party support in the Oireachtas in the early 1930s.

Lords Cave and Haldane shared a common desire to maintain the position of the Judicial Committee of the Privy Council as the final appellate court for the colonies and Dominions of the British Empire. However, the manner in which they sought to achieve

[144] *Hull and Co. v. M'Kenna; 'Freeman's Journal' Limited v. Erik Fernstrom* and *'Freeman's Journal' Limited v. Follum Traesliberi.* [1926] I.R. 402. The judges who heard this peition for leave to appeal were Viscount Haldane, Lord Buckmaster and Lord Parmoor.

this objective could not have been more different. Haldane preferred to restrict the jurisdiction of the court to cases of fundamental importance to the Dominions and the Empire as a whole. This sense of restraint is evident in his statement with respect to the three Irish petitions for leave to appeal in 1923. The importance of this statement is underlined by its having been sent to Windsor with the important passages marked for the King's attention.[145] Haldane also proved to be a lone voice in the House of Lords when he asserted that the Irish Free State was acting *intra vires* in passing such legislation as the Land Act 1926 which effectively blocked the appeal in *Lynham v. Butler*.[146] His policy of restraint was aimed at allowing the Judicial Committee of the Privy Council to give special attention to important cases emanating from the Dominions. This is reflected in Haldane's personal commitment to sit on every Dominion appeal that raised a point of constitutional law.[147] By contrast, Lord Cave seems to have championed a more wide-ranging Privy Council appeal in which the Judicial Committee would be free to intervene in legal disputes that did not raise significant constitutional questions. This policy risked irritating the Dominions, as was illustrated in the aftermath of his decision to grant leave to appeal in *Lynham v. Butler*. Haldane once told the House of Lords that the jurisdiction of the Privy Council could only survive by maintaining the good will of the Dominions rather than existing on an oppressive basis.[148] Lord Cave did not heed this warning.

CONCLUSION

There are a number of points that should be raised in Cave's defence before concluding this article. Cave was by no means 'anti-Irish' in his personal sentiments. He was personally opposed to the brutal tactics adopted by the temporary constables of the Royal Irish Constabulary, popularly known as the 'Black and Tans', during the Anglo Irish conflict of 1919 to 1921.[149] He was on friendly terms with the moderate Irish nationalist T.M. Healy, who would eventually become the first governor general of the Irish Free

[145] R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) p. 239.
[146] *Hansard,* House of Lords, vol. 63, col. 408-12, 3 March 1926.
[147] R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) pp. 216 and 236.
[148] *Hansard,* House of Lords, vol. 63, col. 408-12, 3 March 1926.
[149] Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) p. 251.

State in 1922.[150] As home secretary he allowed Countess Constance Markievicz, the most prominent female figure within Irish nationalism, to receive a visit from her sister when she was imprisoned under sentence of death for participation in the Irish uprising of 1916.[151] It is open to debate whether these considerations would have affected Cave's reputation in Ireland if they had been common knowledge within his lifetime.

It is also necessary to raise a number of points in relation to some of the decisions of the Privy Council that were associated with Cave. The correctness or otherwise of the decision in *Wigg and Cochrane* was hotly disputed in 1920s and 1930s. The Privy Council itself upheld this decision when it re-examined the issues at the heart of the case just one year later in *In re Compensation to Civil Servants under Article X of the Treaty*.[152] It has been argued that although Cave admitted the mistake concerning the date of the relevant treasury minute this did not amount to acknowledgement that the entire decision was made in error.[153] In any case, Cave's correspondence does make it clear that the mistakes made in *Wigg and Cochrane,* irrespective of their nature and extent, were genuine ones.[154] Cave appears to have been in a state of physical distress during the hearing of *Wigg and Cochrane* and that this may have accounted for any error that might have been made.[155] Cave must be given credit for having the courage and honesty to acknowledge the possibility of error at a time when his life was rapidly drawing to a close.[156]

While some of the reasoning in *Nadan v. R* appears to be flawed, few would challenge the correctness of the final decision in strictly legal terms. There can little doubt that s.1025 of the Canadian Criminal Code, 1888 was inconsistent with key Imperial statutes and was therefore null and void under the Colonial Laws Validity Act

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[150] *Ibid.* at pp. 201 and 222.
[151] *Ibid.* at p. 201.
[152] [1929] I.R. 44.
[153] For example, see Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) pp. 319-21. Cave's deathbed note of 26 March 1928 states that 'my opinion in the decision of *Wigg v. Pattison* [sic] (on the bonus point) was probably wrong in law'. R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) p. 442.
[154] See R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) p. 442.
[155] TNA, LCO 2/910, memorandum by Sir Claude Schuster, 6 November 1930.
[156] Charles Mallet, *Lord Cave – A Memoir*, (John Murray, 1931) p. 320.

1865.[157] It is the timing of the decision in *Nadan*, coming right in the middle of a major Irish controversy, that renders the decision suspect when examined from a political perspective.

It is difficult to employ legal analysis to pronounce on the correctness or otherwise of the decision to grant leave to appeal in *Lynham v. Butler*. This is because the criteria used by the Privy Council in granting leave to appeal in this period were vague and ill-defined. Lord Buckmaster noted in 1923 that there had to be 'really serious considerations' while Lord Haldane noted the restriction of the appeal to cases involving 'some exceptional question' determined by the 'magnitude of the question of law involved' or the existence of a 'matter of public interest in the Dominion'.[158] The malleability of criteria of this nature is readily apparent. They were sufficiently flexible to allow Lord Cave to grant leave to appeal in *Lynham v. Butler* with full conviction that this action was perfectly consistent with settled practice.[159] It is far easier to reach firm conclusions when examining the political wisdom of this decision. There can be little doubt that, in this context, the decision was a terrible blunder.

In fact, the fundamental error made by Cave pre-dates all three of the afore-mentioned appeals to the Privy Council. His most serious mistake was that of getting mixed up in the quagmire of Irish politics while holding high judicial office. Cave was not the only person who found himself in this embarrassing situation. Nevertheless, his interventions were of sufficient force to attract condemnation in Ireland, at Westminster and even within the British cabinet itself.[160] On one occasion, Cave attracted significant criticism for his remarks in the House of Lords concerning the border of Northern

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[157] The Privy Council also held that the powers of the Canadian Parliament were confined to matters falling within the frontiers of that Dominion. [1926] A.C. 482 at 492. This decision suggested that Canadian legislation could not circumscribe the jurisdiction of a tribunal that sat in London and was, therefore, outside the frontiers of the Dominion of Canada. This aspect of the judgment in *Nadan* is open to challenge. See Thomas Mohr, 'The Foundations of Irish Extra-Territorial Legislation' (2005) 40 *Irish Jurist* 86-110.

[158] [1926] I.R. 402 at 405.

[159] *Hansard,* House of Lords, vol. 63, col. 405, 3 March 1926. See also David B. Swinfen, *Imperial Appeal* (Manchester University Press, 1987), p. 96.

[160] For example see TNA, CAB 23/30, CAB 32(22), conclusions of Cabinet meeting, 2 June 1922 and Thomas Jones, *Whitehall Diary: Vol. III* (Hutchinson, 1971), p. 206.

Ireland. Cave responded by making a public pledge that he would refrain from sitting on any deliberations by the Privy Council on this matter.[161] He was true to his word. In 1924 Cave was absent from the Judicial Committee when it heard a special reference concerning the Irish Boundary Commission.[162] R.F.V. Heuston has questioned the wisdom of giving this pledge.[163] Yet, it could be argued that Cave's real error was in failing to expand on this pledge given that his interventions in Irish politics went far beyond the question of the border.

The real error made by Lord Cave in *Lynham v. Butler*, *Wigg and Cochrane v. Attorney General* and perhaps even in *Nadan v. R* was the decision to actually appear on the judicial panels that heard these cases. Cave was clearly unwilling to exclude himself from key appeals that directly or indirectly concerned the interests of the Irish Free State. The decisions made in these cases support the conclusion that Cave was not above using his judicial position to safeguard and expand the jurisdiction of the Privy Council with respect to the Irish Free State. Yet, these decisions had precisely the opposite effect that Cave seems to have intended. They neither safeguarded nor expanded the jurisdiction of the Privy Council. Indeed, these decisions damaged the appeal to the Privy Council from the Canadian courts and doomed the appeal from the Irish courts. In the decades that followed the controversies initiated by Lord Cave would be used to support conclusions that questioned the very integrity of the Judicial Committee of the early twentieth century as an independent court of law.

Lord Cave was a man of his time and his career must be evaluated in that context. He was convinced that the Privy Council was a vital pillar in ensuring the unity and stability of the British Empire. He cherished a deep belief that the British Empire was a force for good in the world. For many people the preservation of Empire and the continuance of the Privy Council appeal were heavily interlinked. One commentator declared that 'the King, the Navy and the Judicial Committee are three solid and apparent

[161] *Hansard*, House of Lords, vol. 49, col. 689, 21 March 1922 and col. 942-3, 29 March 1922.
[162] *In the Matter of the Reference as to the Tribunal under Article 12 of the Schedule appended to the Irish Free State Agreement Act 1922.* Cmd. 2214.
[163] R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940*, (Clarendon, 1964) p. 423.

bonds of the Empire; for the rest, the union depends on sentiment'.[164] Lord Cave was determined to preserve the Privy Council appeal and the integrity of the British Empire in the face of perceived threats from the infant Irish Free State. Yet, his interventions with respect to the Irish Free State undermined these cherished ideals. In 1933 the Irish Free State became the first of the British Dominions to abolish the appeal to the Judicial Committee of the Privy Council. Cave's great tragedy was that he inadvertently ripped a small but significant tear in the fabric of the Commonwealth and Empire that he loved and was determined to protect.

[164] Herbert Bentwich, quoted in *The Times* 14 August 1933 and in Donal McEgan, 'John Bull's Privy Council', (September 1933), vol. 23, no. 9, *The Catholic Bulletin*, p. 738.