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Law Without Loyalty- The Abolition of the Irish Appeal to the Privy Council

'Law without loyalty cannot strengthen the bonds of Empire'- Lord Balfour[1]

On the morning of 3 June 1925 an excited crowd gathered on the banks of the River Erne at a point of the river's tidal estuary known as Robert's Hole. They watched expectantly while two men, Hugh Gavigan and John Cleary from the village of Kildoney, walked leisurely down from the nearby hills carrying a net between them. On arrival at the riverbank the two men immediately entered a waiting tar and canvas fishing boat that was already occupied by four other men, William Phillips, Michael Mulhartagh, William Goan and William Morrow, also from Kildoney. As their boat moved slowly away from the shore it became clear to the people watching on the bank that their intention was to poach salmon from tidal estuary of the River Erne, over which the Protestant owned Erne Fishery Company operated a several fishery. The fishery had been in existence since at least the time of the Plantation of Ulster and was presently owned by Major Robert Lyon Moore, who lived not far from the place where this incident occurred, together with various members of his family and other persons. Their extremely profitable exclusive fishing rights on the Erne's tidal estuary was much resented by many of the local people who, inevitably, had a long history of poaching salmon from those waters.

[1] Nicholas Mansergh, *The Irish Free State -Its Government and Politics*, London, 1934, p.324.

However when the six men rowed out onto the Erne on 3 June 1925 they seemed to be employing an eccentric method of poaching. Not only were they operating quite openly in broad daylight, but they seemed totally unperturbed by the fact that an Erne Fishery Company motor boat had recently been spotted patrolling nearby. Moreover these would-be poachers had also brought a very substantial audience with them to watch their illegal activities, an audience which included several members of the local Garda Siochana. Nor was this strange attempt at poaching to yield a single fish as not long after the six fishermen had shot their net the roar of the nearby conservators' motor boat was heard descending on Robert's Hole. Before the fishermen had time to haul their net back in the motor boat sped towards them and rammed their craft at full speed. The side of the small tar and canvas boat caved in immediately, and as it sank the conservators seized the empty net and hauled it in themselves. Their next task was to haul in the six Kildoney men whose boat was sinking fast, a task which was achieved in spite of the attempted heroics of the injured William Morrow who was rescued in spite of his repeated protests that he wanted to go down with the boat. When the motor boat dropped the six would-be poachers off at the Mall Quay the watching crowd descended on them and rewarded the Kildoney men for their strange performance with a rapturous round of applause[2].

Why had these six men deliberately put themselves up for criminal prosecution? There is little doubt that this incident was clearly orchestrated in order to provoke the Erne Fishery Company into taking legal action which would provide an opportunity to challenge the legitimacy of that company’s much resented title to its several fishery. As for the individual responsible for organising the incident the most likely candidate is local solicitor Frank Gallagher who had been preparing a legal challenge to the company's title to the fishery for several years. In order to successfully challenge a fishery which was, at the very least, three centuries old Gallagher had amassed a formidable array of historical evidence. Yet it is unlikely that Gallagher, while making his preparations for this personal campaign, could

[2] This incident is described in detail in a number of *Donegal Democrat* reports on 5 June 1925, 2 October 1925 and 5 August 1933.

have foreseen that what was to become known as the Erne Fishery Case would itself make history for a number of reasons. Firstly the case delved into the realms of Irish history to an almost unprecedented degree with many of the most eminent historians of the day giving evidence on both sides. Thus historical controversies concerning the Plantation of Ulster, the Anglo-Norman conquest and the nature of pre-conquest Gaelic society were argued before the courts. Secondly, issues of the long obsolete Brehon law proved to be crucial to the eventual outcome of the case and thus this ancient law code would briefly come back to life as they were interpreted by twentieth century judges. Thirdly the Erne Fishery Company's appeal to the Judicial Committee of the Privy Council would ignite a legal and political dispute concerning one of the most controversial legacies of the 1921 Anglo-Irish Treaty. Although this controversy has received little attention from historians, who generally prefer to concentrate on that surrounding the Oath of Allegiance, it was to cause considerable friction between the Irish Free State and Great Britain at a time during the Economic War when Anglo-Irish relations were already thought to have reached their lowest ebb. It would also see the remaining Southern unionists, aided one last time by their great chief, Lord Edward Carson, protest that barely a decade after the signing of the Treaty the few safeguards that were left them were being ruthlessly stripped away. The resulting case heard before the Privy Council, in spite of de Valera's attempts to stop it, would see a group of British lords sitting in judgement over de Valera's programme of Constitutional reforms which, in spite of being blatant breaches of the Treaty, were declared by those same lords to be legitimate according to Commonwealth law. Finally this case would examine the legal origins of the Irish Free State itself in a manner that is still of great relevance today and would ultimately decide the important question of whether that state was to enjoy full judicial sovereignty or not.

* * *

The limitation of the newborn Irish Free State's judicial sovereignty was undoubtedly one of the most objectionable requirements of the 1921 Treaty for legally minded

nationalists. An unavoidable consequence of attaining the Constitutional status of Canada was the inheritance of the appeal to the Judicial Committee of the Privy Council to which Canada was still subject. Although by the early 20th Century the scope of the appeal from the Dominion courts had been progressively restricted, Irish nationalists still looked with distaste at the prospect of their Supreme Court being overruled by a body of British lords, especially as one of these British lords included the former colossus of Irish unionism Lord Edward Carson. Such was the abhorrence felt among Irish nationalists at the prospect of the judicial decisions of their new state being subject to appeal to the Judicial Committee of the Privy Council that not only did the first draft of the 1922 Constitution make absolutely no mention of that appeal, but Article 65, dealing with the jurisdiction of the Supreme Court, seemed specifically designed to exclude any possibility of that appeal becoming effective. This article, which later became Article 66 when the text of the Constitution was finalised, declared that;

The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever.

When the British reviewed the first drafts of the Free State Constitution the omission of any mention of the Privy Council appeal, along with several other important Treaty requirements such as the Oath of Allegiance and the role of the Crown in the new state, caused Lloyd George to call it 'a complete evasion of the Treaty and a setting up of a republic with a thin veneer.'[3] Such was the level of British discontent with the draft that on 27 May 1922 Collins and Griffith had to meet with the British signatories of the Treaty in London and, in almost a repeat performance of that given before December 1921, had to engage in some intensive negotiations to arrive at a satisfactory compromise. The Irish delegation voiced a number of objections when Lloyd George insisted that it was an essential Treaty requirement that the Free State accept the appeal to the Privy Council. Collins put it to the Prime Minister that Irish nationalists could not accept a situation in which Edward

[3] Joesph M. Curran, *The Birth of the Irish Free State 1921-1923* , Alabama, 1981, p. 205.

Carson, and those with similar views, could sit in judgement over Irish court cases. Lloyd George assured him that no judge that had been involved in a controversy would hear any case connected with it, which the Irish delegates probably believed meant that Carson would not be allowed hear sensitive cases emanating from the new Irish state. Griffith felt that the Irish people would need some kind of guarantee of impartiality towards Irish cases if the Free State courts were ever to be subject to the appeal. After all, even leaving Carson aside there were undoubtedly a number of Privy Councillors who shared many of his views. He went on to complain that the great expense involved in making an appeal might handicap poorer litigants. In any case Griffith disputed whether the appeal to the Privy Council really did constitute a genuine Treaty requirement but would ultimately have to cede the point in the face of determined British resistance.

When it was agreed on 6 June 1922 to allow Hugh Kennedy and Sir Gordon Hewart to redraft the Constitution the resulting amendments created a very different Constitution to the one brought to London by Collins and Griffith. Under this scheme of revision Article 66, which declared that all Supreme Court decisions were to be 'final and conclusive' and not 'capable of being reviewed by any other Court, Tribunal or Authority whatsoever', was given a seemingly contradictory addition.

> Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council of the right of His Majesty to grant such leave.

Thus in Article 66, as nowhere else in the 1922 Constitution, can the great gulf that lay between the spirit of the Constitution originally drafted and the one eventually enacted be seen.

The unhappy circumstances surrounding the birth of the appeal to the Judicial Committee of the Privy Council from the Irish Free State did not augur well for its future. In

spite of this when the first Irish appeals came before that body on 25 July 1923 the proceeding were smooth and relatively free from controversy. Since this was the infant Irish Free State's first tentative steps in developing its unwritten Constitution with respect to Privy Council appeals Viscount Haldane felt it necessary to give an introductory speech before hearing the three petitions brought before him.[4] No doubt aware of Irish fears with respect to the objectivity of Privy Councillors Haldane emphasised that 'we have nothing to do with politics, or policies, or party considerations'[5]. He was eager to stress that the Judicial Committee was in no sense 'an English body'[6] since in law the Sovereign was omnipresent throughout the Empire and therefore the King in Council could just as well sit in South Africa or in India, in Ottawa or even in Dublin. That it sat in London, Haldane informed the listening Irish observers, was purely a matter of convenience[7]. Furthermore, in order to refute the contention that the Judicial Committee was dominated entirely by British Lords, Haldane pointed to the recent policy of inviting Dominion judges to hear its petitions.

Most comforting of all to the group of Irish observers, which included Attorney General Hugh Kennedy and future Taoiseach John A. Costello, was Haldane's admission that 'it is obviously proper that the Dominions should more and more dispose of their own cases'[8] and therefore the Judicial Committee did not interfere 'unless the case is one involving some great principle or is of some very wide public interest'[9]. Therefore, according to Haldane, the Irish Free State 'must in a large measure dispose of her own justice'[10], a sentiment with which

[4] 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.* There was also a fourth appeal *The King (John Bowman) v Joesph Healy and Another* but this petition was withdrawn. All are reported at (1926) IR 402. *Alexander E. Hull and Co. v Mary A. E. M'Kenna,* 2 (1923) IR 112 was a negligence case involving a foot-passenger who had stepped onto the roadway to get round a hoarding which was blocking a footpath and was hit by a military lorry. Alexander Hull and Co., who had erected the hoarding, were found to have been negligent and ordered to pay £2, 700 damages at the trial of action. This was subsequently upheld by the Court of appeal. *The "Freeman's Journal" Limited v Erik Fernstrom* and *The "Freeman's Journal Limited" v Follum Traesliberi* both involved Swedish paper manufacturing firms who successfully sued the "Freeman's Journal" Limited for breach of a contract providing for the supply of a large quantity of paper.

[5] Ibid. at 403.

[6] Ibid.

[7] Ibid. at 404.

[8] Ibid.

[9] Ibid.

[10] Ibid. at 407-408.

Lord Buckmaster fully concurred, adding that 'as far as possible, finality and supremacy are to be given to the Irish Courts'[11]. Thus the Irish Free State's first encounter with the Privy Council appeal passed off in a surprisingly gracious manner. The Irish Attorney General was offered the chance to make any observations he wished on the matter before the Court, 'we are always ready to learn'[12] added Haldane. However the cynic might argue that this relatively amicable beginning was only made possible by the fact that the Judicial Committee dismissed all three Irish petitions for leave to appeal brought before them that day. When the Privy Council finally did grant an Irish petition for leave to appeal the Free State Government was in uproar.

On the 7 December 1925 four more Irish petitions were heard by the Privy Council. *FitzGerald v Commissioners for Inland Revenue* [13] was rejected while *Rev James O' Callaghan v The Right Rev. Charles O' Sullivan, Bishop of Kerry* [14] was never likely to be given leave to appeal due to the controversial nature of its content. This case involved a dispute concerning the construction of a specific aspect of the Canon Law of the Roman Catholic Church, a controversial topic, especially in relation to a country like Ireland, which the Judicial Committee wisely decided to steer well clear of. However when the remaining two petitions were accepted the Irish Government, which considered both of these cases to be entirely local disputes concerning purely domestic interests, saw this action as a breach of the assurances they had been given by British ministers in 1922 as well as those given by Viscount Haldane in the Privy Council itself in 1923.

In the case of *Lynham v Butler* [15] the appellants appealed to the Privy Council in order to overturn the Irish Supreme Court's interpretation of an Irish statute, the Land Act of 1923. When the Privy Council agreed to hear this case the Cosgrave Government responded by

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[11] Ibid. at 409.
[12] Ibid. at 406.
[13] [1926] I R 585. This was a tax case concerning the restoration of property damaged in the 1916 Rising.
[14] [1926] I R 586. Also see UCD Archives, McGilligan Papers P 35B/102. This case threatened a rerun of the celebrated case of O'Keefe v. Cullen reported on demurrer at I.R. 7 C.L. 319.
[15] [1921] I R 185. Also Irish Law Times [1926] vol. 60 p. 31 and 43. Also McGilligan P35B/102.

passing the Land Act of 1926 which had the effect of declaring that the Irish Supreme Court's interpretation of the 1923 Act had always been the correct interpretation of that statute. The creation of such ad hoc legislation, which would have the effect of forcing the Privy Council to accept the Supreme Court verdict, was undoubtedly creating a distasteful parliamentary precedent, but the Irish Government considered such drastic measures justifiable in the circumstances. The effectiveness of these measures was proved when the case was withdrawn and the impotence of the Privy Council in the face of a hostile Dominion displayed for all to see.[16]

The fourth case, *Wigg and Cochrane v The Attorney General of the Irish Free State* [17], involved a dispute over compensation payable to British civil servants who had been transferred to the Irish civil service in 1922 and had subsequently retired shortly after the creation of the State. Although this case was actually heard by the Judicial Committee, its effect was to prove even more damaging to the Privy Council's already tarnished image than *Lynham v Butler*. When the Privy Council reversed the Supreme Court's decision the Irish Government accused it of interpreting Article 10 of the Treaty in a manner inconsistent with the intentions of the signatories and refused to pay any compensation whatsoever to the civil servants. The case was re-heard in 1928 after it was alleged that a mistake of fact had been made by the Judicial Committee which had affected its decision.[18] The Committee had believed that the civil servants in question had been transferred before the 20 March 1922, the date of a Minute of the British Treasury concerning the calculation of compensation for such persons. In fact the civil servants had not been transferred until after that date. The Judicial Committee ultimately held that the Minute in question was not applicable and upheld its original decision which had reversed that of the Irish Supreme Court. The Irish Government continued its objections and the controversy was only resolved when the British Government agreed to pay the civil servants' compensation themselves.

[16] It is likely that the Privy Council's involvement in the 1924 Boundary Commission, in which it decided that the Northern Ireland Government could not be compelled to appoint a representative to take part in the negotiations, did much to add to that body's unpopularity in Ireland even before *Lynham v Butler.*

[17] [1927] I R 285, 293.

[18] [1929] I R 44.

After the disaster of *Wigg and Cochrane* the next Irish petition heard by the Privy Council, *Performing Rights Society v Bray Urban District Council*[19], saw the respondents challenge the very jurisdiction of the Court to hear that appeal. Their novel argument contended that, although Article 66 of the Constitution claimed to save the right of any person to appeal to 'His Majesty in Council', such a right could not be saved as no such right had existed before the creation of the State since in those days Irish appeals, as in Great Britain, had gone to the House of Lords. Therefore if any such right to appeal to 'His Majesty in Council' existed in the Irish Free State it could only lie with the Irish Privy Council and not with the Judicial Committee of the Privy Council which sat in London. Such an argument was never likely to succeed and Sankey L C declared it to be untenable and based on a misinterpretation of Article 66. The case itself concerned a claim of copyright over certain pieces of music under the British Copyright Act 1911 which the Irish Supreme Court claimed had ceased to apply in Ireland at the time of the creation of the State. When the appellants appealed this decision to the Judicial Committee, the Oireachtas, in a move which echoed *Lynham v Butler,* upheld the Supreme Court's decision in the Copyright (Preservation) Act 1929 which effectively prevented the Privy Council from granting compensation to the appellants.

The fact that the proviso saving the Privy Council appeal in Art. 66, which denied the Irish Free State full judicial sovereignty, had been placed in the 1922 Constitution under British pressure, coupled with the unhappy history of the cases that had been appealed to the Privy Council to date caused the Cosgrave government to seriously examine the possibility of abolishing the appeal altogether. However it was not entirely clear if they could do this through unilateral legislation while keeping within the limits of the law as it existed at the time. After all, the British had insisted in 1922 that the appeal was an indispensable condition of the Treaty, under which, according to Section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922, no Act of the Oireachtas could be passed that was

[19] [1930] I R 509.

repugnant to its terms. Therefore in order to abolish the appeal to the Privy Council, or to enact any legislation that ran foul of the Treaty for that matter, the Irish Government had first to amend Section 2 of the statute that had created the Constitution. The question was which statute had actually created the 1922 Constitution? When the Irish Free State came into existence in late 1922 its birth was preceded by the passing of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 at Westminster which was passed a short time after a similar Constituent Act had been enacted by the Dáil in Dublin. Which statute, therefore, had created the Free State Constitution, the Irish or the Westminster statute? The issue of whether or not the Cumann na nGaedheal Government could legally amend the Constitution in a manner inconsistent with the restraints of the Treaty depended on the answer to this question. In the opinion of many Irish legal experts as an Act of the Oireachtas the Irish parliament should have been able to amend the Constituent Act at will[20]. However the British Government rejected such an interpretation and was adamant that it was the Westminster statute that had in reality created the 1922 Constitution. As a British statute the Constitution of the Irish Free State (Soarstát Éireann) Act 1922 was entitled to the protection of the Colonial Laws Validity Act 1865 which prevented a Dominion parliament from enacting legislation that ran foul of any statute extending to a colony passed by Westminster. Since any Irish statute abolishing the appeal to the Privy Council would clearly be contrary to the Judicial Committee Acts of 1833 and 1844 the British argued that the Oireachtas could not unilaterally effect such an abolition.

In the face of such arguments espoused by the British the Cosgrave Government made a determined effort to achieve the abolition of the Privy Council by agreement with Westminster at the Imperial Conferences of 1926 and 1930. Although these efforts were unsuccessful the Irish delegations to those conferences nevertheless made a substantial contribution to the creation of one of the most far reaching pieces of Commonwealth legislation; the Statute of Westminster. The Statute of Westminster had the effect of

[20] This view is challenged by Niall Lenihan in 'Royal Prerogatives and the Constitution' (1989) 24 *Irish Jurist* 1.

repealing the terms of the Colonial Laws Validity Act 1865 which, from an Irish perspective, meant that, even if it was accepted that the 1922 Constitution was the consequence of a British statute, any restraints on a unilateral abolition of the Privy Council seemed to have been removed.

The Cosgrave Government lost no time in late 1931 in drawing up the statutes that would be necessary to finally rid the Irish Free State of the interfering actions of the Judicial Committee of the Privy Council. These proposed statutes included amendments to the 1922 Constitution removing the proviso saving the appeal to the Privy Council under Article 66 thereby ensuring the finality of Supreme Court decisions[21]. Envisaging protests from the British Government at such a move the Cumann na nGaedheal Government also drew up alternative legislation that, while leaving Article 66 intact, would have the effect of rendering the appeal *de facto* inoperative. The Supreme Court (Confirmation of Judgement) Bill[22], if enacted, would have allowed the Executive Council to immediately give statutory effect to any Supreme Court decision thus rendering it immune from interference from the Privy Council. In addition to this there was also to be a Judicial Committee Bill[23] which would have prohibited the enforcement of a decision of the Privy Council in a case concerning the Irish Free State.

However the Cumann na nGaedheal Government was never to bring any of this proposed legislation before the Oireachtas for reasons that are not altogether clear. It may well be that for the Cosgrave Government, which went out of office in early 1932, time had simply run out, in spite of the fact that such legislation could only have strengthened their chance of re-election. Thus the prize of abolishing the much resented appeal to the Privy Council, as well as amending other unsatisfactory conditions of the Treaty, would be inherited by Eamon de Valera. Yet when de Valera attempted to put into effect his own

[21] See proposed Constitution (Amendment No. 17) Bill 1931 and Constitution (Amendment No. 18) Bill 1931 in National Archives, Dept. of Foreign Affairs, Pre 100 Series (Part 1), 3/1.
[22] National Archives, Dept. of Foreign Affairs, Pre 100 Series (Part 1), 3/1.
[23] Ibid.

abolition of the Privy Council appeal he discovered to his horror that there was at that very moment an appeal from the Irish Free State pending before that body. Unless promptly stopped in its tracks this would be a case that would give a golden opportunity to a body of British lords to sit in judgement over the legality of his entire programme of Constitutional reform, a case which had begun with a seemingly insignificant fishing incident in Co. Donegal.

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The Erne Fishery Company's title to their fishery could be traced back over three centuries to the time when the jurisdiction of the English Common Law was finally extended to North-West Ireland. At the Inquisition of Asseroe in 1588 various monastic fishing rights on the upper Erne were vested in the Crown, a decision later upheld by a jury of natives at the Inquisition of Rathmullen on 5 September 1603. After a complex series of grants of title to various individuals, none of whom held the fishery for more than a few years, the fishery was eventually granted to a planter called Thomas ffolliott in 1639 from whom the present owners of the Erne Fishery Company derived their own title in the 1920s. Given the fact that the fishery had been in unbroken existence for over three centuries how did Gallagher hope to successfully remove such an ancient institution. Ultimately his case against the fishery was entirely reliant on the interpretation of Chapter 16 of that hallowed English medieval legal document the Magna Charta. Translated into English that portion of the Great Charter declares that;

> No banks shall be defended from henceforth, but such as were in defence in the time of King Henry our grandfather, by the same places and the same bounds, as they were wont to be in his time.[24]

Since the late 19th Century, as the result of judgements made in cases such as *Malcomson v O'Dea* [25] and *Neill v Duke of Devonshire* [26], this passage was interpreted as

[24] *Moore v Attorney General* [1929] I R 191, at 213.

meaning that after the creation of the Magna Charta the Crown could no longer create an exclusive fishery on tidal waters unless those waters had already been 'put in defence', or appropriated as a several fishery, before Henry II's death in the year 1189. Although this interpretation of Chapter 16 of the Magna Charta has been questioned in recent decades[27] it was widely accepted in the 1920s, and therefore it was on this basis that Frank Gallagher hoped to declare invalid the title of a several fishery that had existed since at least the early 17th Century.[28] After all, County Donegal remained unconquered by the Anglo-Normans at the time of Henry II's death in 1189 and according to Professor Eoin MacNeill, a leading authority on early Irish society, exclusive fisheries did not exist in Gaelic Ireland. It was on the basis of this historical argument that Gallagher would eventually mount his challenge against the Erne Fishery Company.

'Erne Fishery Co. on the ropes'[29] exclaimed the *Donegal Democrat* after the six fishermen were summoned for trespass before Ballyshannon District Court, 'ye Kildoney lads win first bout'[30]. In an emotional trial heard before District Justice O' Hanrahan, Gallagher argued that the fishermen had a bona fide right to fish on the Erne's tidal estuary arguing aggressively that the company's title was based on an act of theft carried out under the Stuart kings which was directly prohibited by Chapter 16 of the Magna Charta. O' Hanrahan DJ was not only impressed with Gallagher's legal arguments but seemed to share his sentiments towards the Plantation of Ulster concluding that 'the mere fact that James Stuart had anything to do with it suggests fraud to me'[31]. The Kildoney fishermen had won the first bout simply because District Justice O' Hanrahan, on the basis of Gallagher's argument, had refused to carry on with the action for trespass being taken against them. He

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[25] 10 H L C 593.
[26] 8 Appeal Cases 135.
[27] See Bryan Murray, 'The Lawyer as Historian: Magna Charta and Public Rights of Fishery' (1968) 3 *Irish Jurist* 131
[28] This interpretation of Chapter 16 was apparently unknown or not yet accepted on the previous occasion when the title to the fishery was challenged in *R. (Gillen) v County Donegal Justices* 5 Irish Jurist N. S. 185.
[29] *Donegal Democrat,* 2 October 1925.
[30] Ibid.
[31] Ibid.

held that he had no jurisdiction to hear the case as, in his opinion, the Erne Fishery Company's title to their several fishery was now questionable, and this matter would have to be settled by a higher court before he could continue with any action against the fishermen. The Erne Fishery Company's response to O'Hanrahans decision was to seek an Order of Mandamus compelling him to hear the case against the Kildoney fishermen.[32] When this course of action proved ultimately unsuccessful Robert Lyon Moore and the other owners of the company decided to return once more to the courts, this time seeking a declaration that their title to the fishery was sound in addition to damages from the Irish Attorney General as the representative of the public and the State.[33]

When the case reached the High Court Johnston J. held that the plaintiffs, on the basis of their long possession, were entitled to rely on a presumption of legal origin with respect to their several fishery. Under this presumption of legal origin once the test of long possession was proved then the onus of proof did not lie with the plaintiffs to prove that exclusive fishing rights had existed before 1189 on the tidal region of the river Erne. Rather, it lay upon the defendants to prove that such rights did *not* exist on those waters before the year 1189. As a result of this very favourable rule, at least from the perspective of the fishery owners, Chapter 16 of the Magna Charta had never before operated to invalidate any long established fishery in any English or Irish river, a fact which must have given them much confidence with respect to the strength of their case. After all it is undoubtedly a far more difficult task for a person to prove on the balance of probabilities that a particular institution did *not* exist at a certain point in time than to prove that such an institution actually *did* exist, especially when dealing with a period of history as remote as the 12th Century AD.

While the Common Law presented a number of difficulties for the defendants the ancient Brehon Law seemed to hold out considerable promise of salvation. This was largely because their contention that the Brehon Law had never recognised that exclusive fishing

[32] [1927] I R 406.
[33] [1929] I R 191.

rights, such as those enjoyed by the plaintiffs, was supported by none other than the leading authorities on the Brehon Law of the day. In light of the considerable reputation as a scholar held by Eoin MacNeill in the 1920s it is hardly surprising that he was called to give evidence on behalf of the Kildoney fishermen in the first court case to be decided on the interpretation of the Brehon Law in over three centuries. MacNeill was a strong exponent of the position that fishing rights were held in common by the local inhabitants and was supported at this time by his colleague Daniel Binchy who was called to give evidence for the Attorney General. In contrast the Erne Fishery Company was unable to produce any scholar of similar stature to MacNeill and Binchy to refute the contention that the Brehon Law did not recognise several fisheries and thus that their fishery at the mouth of the Erne could not possibly have existed before the year 1189.

However, Johnston J. was not satisfied to simply accept the conclusions reached by MacNeill and Binchy and insisted on interpreting various passages taken from the ancient Brehon law texts himself. He rejected MacNeill's interpretation of a passage referring to "the salmon of the place" taken from the tract "Of Confirmation of Right and Law" which, according to MacNeill, guaranteed members of the local community common rights with respect to salmon fishing. Johnston J. concluded that this passage was nothing more than "an attempt to lay down regulations of an eleemosynary or charitable character - something in the nature of poor-law relief, with a curious admixture of social and domestic precepts."[34]

Another treatise of Brehon Law produced by Prof. MacNeill in order to prove that fishing rights were held in common under that legal system was interpreted by Johnston J as not only lacking any real substance to support such a proposition but could even be seen as providing evidence to the contrary. This treatise came from the ancient text of Senchas Mar and was concerned with the regulation of the law of distraint. This passage implied that under the Brehon law private ownership of fishing weirs was actually recognised.[35] Among

[34] [1929] I R 191 at 240.

[35] 'If a man has dammed the head of the stream more than one-sixth on each side of the river, if he owns [the lands lying on] both sides of it, or more then one third on one side, if he owns but one side, two thirds of

other things the original text produced by Professor MacNeill provided a right to distrain property for a period of ten days for the offence of unlawfully damming a stream to the detriment of other persons also making use of the river. MacNeill argued that this constituted evidence that fishing rights were held in common in Gaelic Ireland, in that no individual could construct a private weir which had the effect of damaging the equal fishing rights of the general public. Johnston J rejected this conclusion and claimed that in previous cases the mere existence of such privately owned weirs had been recognised as evidence of a right of exclusive fishery existing in that place. In his view this passage, which had been submitted by MacNeill to support the case of the Kildoney fishermen, actually seemed more beneficial to the owners of the Erne Fishery Company.

In the light of these conclusions Johnston J. held that none of the evidence given by Professor Eoin MacNeill, Professor Daniel Binchy and others were sufficient to displace the presumption of lawful origin or convince him that the several fishery on the Erne was of modern origin. Their failure to convince Johnston J. that the Brehon Law had not recognised exclusive fishing rights, together with Johnston J.'s finding that there was no defect in the Erne Fishery Company's title to the fishery, effectively doomed the defendants' case.

However when the defendants appealed the case to the Supreme Court this decision was ultimately reversed.[36] In stark contrast to Johnston J.'s judgement with its detailed treatment of the evidence submitted in relation to the Brehon Laws Kennedy CJ. and Murnaghan J. dealt with it laconically by simply stating, without explaining how they had arrived at this conclusion, that they were "clearly of the opinion that the Brehon law of the twelfth century did not incorporate the feudal notion of the ownership of fishing in tidal waters."[37] It does, however, seem clear that they were impressed by MacNeill and Binchy's

the excess of fish [taken] to be given by him to the owners of the other weirs up or down which ever way the fish pass. This is by way of 'smacht'-fine, and it has a stay of three days, and not having the wealth of his rank extends it to five days, and denial to ten days.' Ibid. at 238.

[36] *Moore v Attorney General* [1934] I R 44.

[37] Ibid. at 69.

evidence with respect to "the salmon of the place" taken from the tract "Of Confirmation of Right and Law" as they concluded that;

It is perfectly clear that as in Roman Law, the right of fishery was *publici juris*, so in Brehon law the right of fishery for salmon was vested in the inhabitants of the Tuath and an effort was made to secure equality for all by allowing each person to take one salmon.[38]

No effort was made by these judges to refute Johnston J.'s interpretation of that passage and no mention was made at all to the references to privately owned weirs in the Senchas Mar which seemed to point to a conclusion different from that ultimately reached by the Supreme Court.

In accepting Eoin MacNeill's position that the Brehon law did not recognise such private fishing rights as enjoyed by the Erne Fishery Company the presumption of legality relied on by the owners of that company was effectively defeated. To make matters worse Kennedy C.J. and Murnaghan J. disagreed with FitzGibbon J.'s dissenting judgement in the Supreme Court together with Johnston J.'s earlier finding in the High Court that the Erne Fishery Company's title to the fishery had ever been the subject of a plantation grant and thus protected by a number of statutes passed in the reign of Charles I. This meant that the title to the fishery was found to be defective and for Robert Lyon Moore and the other owners of the Erne Fishery Company a legal title that had seemed so secure just a few short years ago in the High Court had been destroyed and at least three hundred years of uninterrupted possession had fallen from their grasp.

'Victory' declared the *Donegal Democrat* 'the Kildoney men jubilate'.[39] The celebrations for the victory over the owners of the Erne Fishery Company began on the evening of 5 August 1933 at the Mall Quay, Ballyshannon. A large crowd of people from

[38] Ibid. at 68.
[39] *Donegal Democrat* 12 August 1933.

the surrounding district gathered 'jubilant over the victory'[40]. Clearly the excited crowd considered this victory as one not only of local importance but indeed as one of national dimensions as was evidenced by the large tricolours which flew in the wind at the meeting. Loud applause was reserved for an exultant Frank Gallagher, the solicitor whose apparent crusade against the Erne Fishery Company had first provoked the dispute with the owners of the fishery back in June 1925. He told his listening supporters that 'by our magnificent fight, we have righted a grievous wrong: a wrong that has root three hundred years and more'[41]. He and his supporters had succeeded in 'snapping another of the links of the chain of steel with which this country has been bound for hundreds of years'[42]. No longer, he triumphantly added, would 'native fishermen' have to trawl the open ocean for fish in canvas boats while 'all the river mouths around the coast were in the hands of foreigners with their spurious fishing rights to which they stuck with the tenacity of brallions to a rock'[43]. Yet many of the 'foreigners' Gallagher was referring to here were in fact residents of the very same town in which the current celebrations were being held. The Chairman of the meeting P. B. McMullin reminded his listeners that 'as a result of the victory some had begun to suffer'[44] and expressed his hope that the victors would not forget the many fishery employees who had all lost their jobs as a result of the Supreme Court's decision. After long and prolonged cheering for Gallagher and his colleague Martin Keegan the National Anthem was sung and tar barrels were set alight on the Mall Quay to mark the victory.

Considerable evidence now exists that brings into question many of the findings of the Supreme Court in the Erne Fishery Case in 1933. Many scholars now believe that the interpretation of Chapter 16 used in the Erne Fishery Case was an 18th Century perversion and claim that the Magna Charta never intended to forbid the granting of private fishing

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[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid. According to Bernard Share, *Slanguage- a dictionary of slang and colloquial English in Ireland*, Dublin,
Gill and Macmillan, 1997 a brallion or breallan means "a good-for-nothing oaf". This is derived from the Irish word breallán, meaning a blunderer or fool.
[44] *Donegal Democrat* 12 August 1933.

rights on tidal waters.[45] Moreover Professor Daniel Binchy would later revise his opinions that the Brehon laws had not permitted the existence of several fisheries and produced considerable evidence that pointed to the opposite conclusion. Binchy had the courage and the honesty to admit his change of opinion to the High Court when he gave evidence in the case of *Little v Cooper*[46] also known as the Moy Fishery Case in 1936. This evidence proved to be decisive in the High Court's finding in that case that 'there was no historical or legal impossibility in an appropriation of an exclusive right of fishery in the River Moy previously to the Magna Charta' which was sufficient, along with evidence of long title given by the fishery owners, to uphold the legitimacy of that fishery."[47]

Yet all this was of little assistance to the Moore family and the other owners of the Erne Fishery Company in the aftermath of the Supreme Court's decision in August 1933. The only means of saving their several fishery which had existed for at least three centuries lay in appealing the Supreme Court's decision to the Judicial Committee of the Privy Council. While it was clear that such a move would cause considerable political controversy the fishery owners may now have felt that they had little to lose. The Erne Fishery Case, which had begun as a local legal dispute, was about to become a legal and political controversy of international dimensions.

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In accordance with his overall programme of constitutional reform Eamon de Valera introduced three amendments to the text of the 1922 Constitution on 9 August 1933. Two of these reduced the power of the Governor-General, a move which caused no little consternation in British political circles.[48] The likes of Lord Wigram, so incensed at the

[45] See Bryan Murphy, 'The Lawyer as Historian: Magna Charta and Public Rights of Fishery' (1968) 3 *Irish Jurist* 131. and also S. A. and H. S. Moore, *History and Law of Fisheries*, London, 1903, Chapter II 'Of putting rivers in defence'.
[46] [1937] IR 1.
[47] *Little v Cooper* [1937] IR 1 at 21 and 22.
[48] Constitution (Amendment No. 20) Act 1933 and Constitution (Amendment No. 21) Act 1933, Public Statutes of the Oireachtas 1933 at 1133 and 1135.

diminution of what he perceived to be an honourable office, wanted the King to end the current farcical situation and abolish the office himself in protest since ‘the current occupier [Donal Buckley] ...in present circumstances is a non- entity and certainly not the King's representative in the Irish Free State’[49]. However the issue of the Governor-General was almost completely overshadowed by the third statute, Constitution (Amendment No.22) Bill 1933, which had the effect of abolishing the right to appeal to the Judicial Committee of the Privy Council from the Irish Free State.[50]

As early as September 1930 Dominion Secretary J.H. Thomas had told the British Cabinet that if it was to be conceded that Canada had the right to abolish the appeal then the same right must be available to the Irish Free State, a position with which many Conservative hard liners would have difficulty adhering to. The minority Labour government's fears of a possible Tory backlash may well have been the primary reason why the Imperial Conference of 1930 failed to resolve this thorny issue. The Irish delegates to that conference blamed Thomas for this failure who failed to take any decisive measures on this controversial topic in spite of the fact that several figures in the Dominion Office were sympathetic to the position of the Cosgrave Government, some of whom even went so far as to advise the Irish to take unilateral measures on the matter.[51] As a result of the change of government on 9 March 1932 W.T. Cosgrave missed his chance of doing so and the final accolades were to go to de Valera.

The *Irish Press*, while naturally welcoming these historic amendments, was unable to resist the opportunity of taking a swipe at the previous Cumann na nGaedheal Government for its failure to abolish the appeal themselves, implying that Cosgrave had meekly bowed to British pressure over the issue.[52] The chagrin of the Cumann na nGaedheal leadership, now

[49] Deirdre McMahon, *Republicans and Imperialists - Anglo Irish Relations in the 1930s*, London, 1984, p.129.
[50] Public Statutes of the Oireachtas, p. 1261.
[51] Dominion Office legal adviser Grattan Bushe is reported to have suggested that the Irish Government might take unilateral action on this matter 'instead of insisting that the British Government should act, and do their dirty work for them'. Deirdre McMahon, *Republicans and Imperialists - Anglo Irish Relations in the 1930* , London, 1984, p. 129.
[52] *Irish Press* 10 August 1933.

incorporated into Fine Gael, at having had this legislative trophy stolen from them, after their not insubstantial role in making such a move possible, is evident in the *Irish Independent*'s reaction to the news of the appeal's forthcoming abolition. That newspaper, while also welcoming the constitutional amendment, dismissed it as being of inflated importance since the appeal had, in any case, become 'virtually a dead letter under Mr. Cosgrave's government'[53]. This was followed by a plaintive statement written in large print that under the Cosgrave government 'agreement as to the deletion of the Article had almost been arrived at between the Irish and British Governments'[54]. The Fine Gael political party, smarting at having had its own chance to abolish the appeal denied them, understandably kept up this dismissive tone and in September 1933, when the statutes were going through their later stages, Frank MacDermot TD declared that 'these much flaunted Constitutional Amendment Bills are really trivial and should not excite the smallest enthusiasm in anyone'[55]. Subsequent events were to prove the fallacious nature of this blasé comment. For even as the Fianna Fáil government were engaged in drawing up these statutes Robert Lyon Moore and the other owners of the Erne Fishery Company were in discussion with their solicitors as to the possibility of their appealing the Supreme Court's unfavourable verdict to the Judicial Committee of the Privy Council. Although such a move would heavily inflate their already burdensome legal bills failure to make the appeal would mean acquiescing in the destruction of the Erne Fishery Company's very existence. In fact five days before Frank MacDermot had declared that the abolition of the appeal to the Privy Council to be of no interest to anybody the Company's solicitors had already lodged a formal request with the Privy Council for leave to appeal.

The Bill proposing the removal of the right to appeal to the Judicial Committee of the Privy Council from the 1922 Constitution was brief and to the point. Firstly it removed from the text the proviso saving the Privy Council appeal contained in Article 66;

[53] *Irish Independent* 9 August 1933.
[54] Ibid.
[55] *Constitution (Amendment No. 20) Bill 1933- Second Stage*, Dáil Éireann 1933 vol. 49, 2113 at 2114, 4 October 1933

Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.

However, because of the existence of Article 2 of the Treaty, which linked Ireland's Dominion status to that of Canada, the appeal to the Privy Council from the Irish Free State could still be held to exist in law in spite of the removal of this passage. If Canada had the appeal, which it still did in spite of efforts to remove it with respect to criminal matters in the celebrated case of Rex v Nadan[56], so too by implication did the Irish Free State. In order to avoid this the Parliamentary Draftsman drew up a new passage to be inserted into the text of Article 66 in the place of the deleted section;

and no appeal shall lie from a decision of the Supreme Court or of any other Court in the Irish Free State (Soarstát Eireann) to His Majesty in Council, and it shall not be lawful for any person to petition His Majesty for leave to bring any such appeal.[57]

The abolition of the appeal to the Privy Council was considered to be of such importance that a number of extremely lengthy speeches were drafted for de Valera to read to the Dáil justifying his government's actions.[58] The near certain prospect of Labour and Fine Gael support for abolishing the appeal precluded any need for such a lengthy piece of oratory to convince them of the righteousness of this measure. More likely this lengthy piece

[56] [1926] 2 Dominion Law Reports 177 and [1926] AC 482. In this case the Judicial Commitee of the Privy Council found that Section 1025 of the Criminal Code of Canada, insofar as it prevented appeals to the Privy Council with respect to criminal cases, was invalid. It held that the legislative authority of the Parliament of Canada as to criminal law and procedure, under section 91 of the British North America Act, 1867, was confined to action taken in Canada. Moreover, any enactment that annulled a royal prerogative to grant special leave to appeal was held to be inconsistent with the Judicial Committee Acts, 1833 and 1844, and therefore was invalid under Section 2 of the Colonial Laws Validity Act, 1865. The Criminal Code of Canada had received the royal assent but this was held not to give validity to an enactment which was void by Imperial statute. The Privy Council concluded that the royal prerogative granting leave to appeal to the Privy Council could only be excluded by an Imperial statute.

[57] Public Statutes of the Oireachtas, p. 1261.

[58] National Archives, Department of Foreign Affairs Pre 100 Series (Part 1) 3/1.

of justification was intended for the benefit of Southern unionist members of the Oireacthas and for the benefit of the ever watching British Government. The speech touched on matters as diverse as the expense and delay of taking an appeal to the King in Council, the unsatisfactory nature of many of its decisions and in one draft de Valera was even to give a brief history of the Judicial Committee of the Privy Council right from the days of the Plantaganet Kings up to the events of the Imperial Conferences of 1926 and 1930! De Valera was also to go on to provide a lengthy legal justification for a bill which would finally give the Free State full judicial sovereignty by extensive reference to the principle of co-equality of the Dominions as established by the Balfour Declaration at the Imperial Conference of 1926. The terms of the Statute of Westminster were also used to justify the legality of this measure along with several quotes from Arthur Berridale Keith, considered to be the leading authority on Commonwealth Law of his time, and even a few from Fine Gael martyr Kevin O' Higgins who had played a not insignificant role in the long term creation of that famous piece of legislation. The presence of such legal arguments in these draft speeches provide further evidence that they were written for the benefit of the British Government in that official Irish legal opinion considered these issues of Dominion co-equality and the Statute of Westminster irrelevant. From de Valera's perspective the 1922 Constitution was the product of a statute of the Provisional Government which the Oireacthas was free to amend at any time, an interpretation disputed by the British who considered the Saorstát Constitution to have been created by Westminster and thus only amenable by Imperial legislation. In his draft speech de Valera was to apologise to the House for even having mentioned the legal situation from the Westminster perspective;

> I hope the House will forgive me for having gone into that aspect of the matter...So long as Article 2 of the Treaty remains that sort of discussion will, I suppose, be unavoidable.[59]

On the question of the appeal providing a safeguard for the minority community de Valera was to make the rather surprising claim that 'this country knows nothing about

[59] Ibid.

religious persecution and intolerance'[60]. Whatever of this, de Valera pointed out that no appeal to the Privy Council in its ten years of existence in the Irish Free State had ever been made over a religious dispute. Yet this was to assume that complaints from the minority community could only concern matters of religion. In fact the very paragraph in de Valera's draft speech claiming that the appeal to the Privy Council was no safeguard whatsoever for the minority community was ironically to conclude with a warning intended for the owners of the Erne Fishery Company, themselves members of that community, stating that;

> If any appeal is made before this Bill becomes law we will take whatever steps may be necessary, whether by legislation or otherwise, to nullify and render ineffective any advice of the Privy Council purporting to reverse a decision of the Supreme Court or to alter such a decision in any way.[61]

In fact the great majority of this lengthy speech was never delivered. The Constitutional issue together with the question of the Privy Council constituting a safeguard for the minority community were dangerous subjects and perhaps de Valera came round to the opinion that the less said about them the better. Yet significantly the warning given above to the owners of the Erne Fishery Company was delivered nonetheless.[62]

In addition to the owners of the Erne Fishery Company there were other Southern Protestants without the same heavy financial interest in the survival of the appeal who were dismayed at the prospect of the possible destruction of what many of them perceived to be one of the most important safeguards guaranteed them by the 1921 Treaty. During the Imperial Conference of 1930 when the issue of the appeal to the Privy Council from the Irish Free State was raised for discussion Church of Ireland Archbishops Gregg and D'Arcy wrote a letter to The Times objecting to this threat to what they regarded an important 'safeguard' and one of 'the fundamental Treaty rights' of the minority community.

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[60] Ibid.
[61] Ibid.
[62] *Constitution (Amendment No. 22) Bill 1933 - Committee and Final Stages,* Dáil Éireann 1933, vol. 49, 2383, 12 October 1933.

We would remind you that memories in Ireland are long and that the removal from the Constitution of the safeguard referred to, or the consent of Great Britain to its exercise only with the consent of the Supreme Court in Ireland (as has been suggested), or any similar abrogation or limitation, while it may gratify the desire of Irishmen for independence, will inevitably weaken the security enjoyed by the members of a vulnerable minority, and as time passes lead most certainly to infringements of their liberty which they would be powerless to withstand.[63]

At the final reading of the bill in the Dáil abolishing the appeal on the 12 October de Valera expressed his confidence that the constitutional amendment, in the light of opposition support, would receive unanimous support. This hope was to be dashed by the actions of two Independent TDs Professor William Edward Thrift TD for Dublin University and John Good TD for Dublin County, both significantly representatives of the minority community, who registered a strong protest to the loss of the appeal to the Privy Council. Thrift reacted angrily to what he saw as arrogant claims de Valera's suggestion that there were no objections in the House to the legislation. According to the Irish Times Thrift was a man who spoke so seldomly in the Dáil that the extremely forceful nature of his objection came as a complete surprise to many in the House. Thrift declared that on every occasion that Article 66 had been attacked protests to amending it had been made by Independents such as himself.[64] He emphasised his opinion that, although he personally could never imagine himself ever taking an appeal to the Judicial Committee of the Privy Council, the fact remained that the insertion of the appeal into the Constitution formed an integral part of a bargain made in good faith. By this he claimed that he was not referring to any bargain made with the British but rather one made between members of the majority and the minority communities of the State. In other words Thrift believed that the safeguard of having the right to appeal to the Privy Council was one of a number of crucial concessions that had won Southern unionist acquiescence to the Treaty without which no Treaty would have emerged

[63] *National Archives*, Department of Foreign Affairs Pre 100 Series (Part 1) 3/1.
[64] *Constitution (Amendment No. 22) Bill 1933 - Committee and Final Stages,* Dáil Éireann 1933, vol. 49, 2383 at 2389.

in 1921, a bargain that had been honourably adhered to by that community ever since. According to Thrift this was a fact that, of its nature, had no documentary proof but was one of which each and every member of the House was aware. Thrift concluded that;

> When concessions are made in a bond it is not an honest way of dealing with that bond immediately to set yourself out to remove from the bargain- because you have the power- anything that you do not like in that bargain. That is not the way I understand such a bargain at any rate...Whittle away this concession and every other concession until you get the Treaty to the form in which you want it and what chance have you of making any bargain in the future with those who disagree with you.[65]

Such sentiments won little sympathy from de Valera who, in the absence of concrete proof for the existence of such a bargain, flatly denied its very existence. When pressed by Prof. Thrift's angry objections to this opinion de Valera concluded;

> 'If there are any bargains standing in the way of the sovereignty of our people they have got to go. That is our attitude at any rate, and that is the spirit in which I move that the Bill do now pass.'[66]

However the passage of this Constitutional amendment was not to prove as smooth as de Valera might have hoped. On the 10 November an order of the King in Council finally granted the owners of the Erne Fishery Company special leave to appeal their case to the Privy Council. Although de Valera had indirectly warned the company that any measures necessary would be employed to block the progress of their appeal he had neglected to make the bill abolishing the Privy Council appeal retrospective in effect, thus leaving the illegality of the appellants' actions in doubt from the Irish perspective. This was in spite of a warning given by Fine Gael Deputy Osmond Grattan Esmonde in the Dáil on 12 October who drew the House's attention to the forthcoming possibility of the Erne Fishery Company being successful in securing an appeal of their case to the Privy Council and demanded that the

[65] Ibid at 2389- 90.
[66] Ibid at 2392.

Fianna Fáil government take action now 'instead of waiting until the Privy Council have carried out what can only be described as provocative action on their part in order to try to complicate the political and constitutional relations between the two countries'[67]. Although Esmonde admitted that the use of retrospective legislation in order to block the progress of an individual case was 'a bad Parliamentary principle'[68] it had on several occasions proved highly successful in blocking appeals under the Cosgrave Government. In any case Esmonde argued that in this case its use was especially justified given the fact that he regarded the Privy Council as acting with respect to this case from a 'semi-political standpoint'[69]. Indeed Esmonde's attitude towards the Privy Council is indicative of the not insubstantial level of distrust felt by many in the Irish Free State towards that body which could be seen when Esmonde claimed that 'on many occasions their Lordships have adopted, with reference to the politics of this country, a very mischievous attitude'[70].

De Valera's failure to immediately make the bill abolishing the appeal retrospective may be attributable to his adopting a 'wait and see' attitude towards the Erne Fishery Case which at the time of Esmonde's speech had yet to even be accepted by the Privy Council. However when the appeal looked likely to be accepted action was very swiftly taken in the Oireachtas. On the 31 October Senator Joseph Connolly, interestingly the Minister for Lands and Fisheries, introduced an addition to the bill that would render it retrospective in effect and so ensure that no attempt was made to evade the 'decision of the Oireachtas in the abolition of appeal to the Privy Council'.[71]

The amendments made in this Act in Article 66 of the Constitution shall, in relation to judgements and orders pronounced or made by the Supreme Court before the passing of this Act, apply and have effect in regard to the institution and prosecution, after the passing of this Act, of an appeal or a petition for leave to appeal from any

[67] Ibid at 2384.
[68] Ibid.
[69] Ibid at 2385.
[70] Ibid at 2384.
[71] *Constitution (Amendment No. 22) Bill 1933 - Report Stage*, Seanad Éireann 1933, vol. 17, 1680, 31 October 1933.

judgement or order and to the further proceeding after the passing of this Act, of an appeal or a petition for leave to appeal from any judgement or order which was instituted before such passing.[72]

An individual protest at this action was made by Senator Sir John Keane over what he saw as a 'thoroughly sad and discreditable' affair which was 'on a par with the whole sad and unfortunate history connected with the question of Privy Council appeals'.[73] In spite of the fact that the new section to the bill abolishing Privy Council appeals was couched in general terms Keane pointed out that every member of the House was 'in no doubt of the intention of the amendment'[74]. What every Senator knew, but not even Keane openly said, was that the new section of the bill was designed to halt the progress of a case which, if it went ahead, could threaten the Free State's claims to judicial sovereignty as well as giving the much distrusted Privy Council the opportunity to examine the legality of de Valera's entire programme of Constitutional change. In addition to this the Privy Council was undoubtedly going to view the terms of the Treaty together with the circumstances under which the 1922 Constitution was created from a Westminster, as opposed to an Irish, perspective which many believed would result in the dice being heavily loaded against the Free State.

On 15 November 1933 the Dáil passed the Constitution (Amendment No. 22) Bill complete with the Senate's addition rendering it retrospective in effect. That same evening the Erne Fishery Company declared to the press its intention to continue with its appeal in defiance of this legislation and against the wishes of the Irish Government.[75] They had little to lose from such a defiant stance against such opponents. Failure to make their appeal meant the termination of the company's very existence. Thus the stage was set for a controversy which would not only decide whether or not the Free State genuinely possessed full judicial sovereignty but would decide the nature of that state's position as a Dominion in

[72] Ibid.
[73] Ibid at 1681.
[74] Ibid.
[75] *Irish Times* 16 November 1933.

the British Commonwealth of Nations. However it remained to be seen what form the British reaction to the abolition of the appeal to the Privy Council, together with the questions raised by the Erne Fishery Company's individual appeal, would finally take, and crucially how the de Valera Government would respond to that reaction.

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By this time the British Government was beginning to sit up and take notice of what was happening in the Irish Free State. On 14 November 1933 Dominions Secretary J. H. Thomas stated in the House of Commons that the constitutional amendment abolishing the Privy Council appeal was a clear breach of the 1921 Anglo-Irish Treaty. Thomas was under no illusions that this move was a precursor to the Irish Free State's complete secession from the British Commonwealth.

De Valera responded by writing a letter to the Dominions Secretary in which he protested that the Irish people had never sought Commonwealth membership in the first place and claimed that lasting Anglo-Irish friendship was impossible under the present relationship that bound the two countries.[76] Later, in response to questions from Irish Times journalists de Valera claimed that:

> The British Government has never ceased to threaten that if the Irish people exercised that fundamental right [to choose their own government institutions] it would be regarded as a hostile act and made the excuse for aggressive action against us.[77]

The Dominions Secretary had always denied the existence of such a threat and was greatly dismayed at de Valera's continuing suspicion. In order to clarify his position he had officials in the Dominions Office draft a statement stating that 'the question of armed intervention on our part has never been considered'[78]. Although the British did not consider that a military

[76] The full text of this letter is printed in *Irish Times* 6 December 1933.
[77] Ibid.
[78] Deirdre McMahon, *Republicans and Imperialists- Anglo-Irish Relations in the 1930s,* London, 1984, p. 132.

response to de Valera's actions was a viable option there was considerable opposition to Thomas' draft statement in government circles. Lord Hailsham, although agreeing that the use of force was out of the question, disagreed with the publication of such a statement on the basis that it was best to keep de Valera guessing with regard to British intentions. He was staunchly supported by the Attorney General, Thomas Inskip, who feared that the abolition of the Privy Council appeal was only a part of an overall plan for secession which could have dangerous ramifications for the Empire as a whole.[79] This hardline attitude disturbed Thomas, together with much of the Dominions Office, who were afraid that the absence of a clear renunciation of the possibility of armed intervention in the event of Irish secession from the Commonwealth could be seen by de Valera, together with world opinion, as implying that the British Government actually regarded military intervention as a viable option. Such an implication, the Dominions Office argued, could only damage the United Kingdom in the eyes of world opinion and would serve to enhance de Valera's position. When the Irish Situation Committee sided with Hailsham and Inskip the exasperated Dominion Secretary took the matter all the way to the Cabinet.[80] However he was to find little support there and, as a result, never issued his guarantee against military intervention. In the end this proved to be of little consequence as the Irish Government never seriously believed that the British would take such a drastic step. They were fully aware that international public opinion would scarcely have tolerated such a disproportionate response to Ireland's unilateral revision of the 1921 Anglo-Irish Treaty. De Valera had only hinted at the possibility for his own propaganda purposes.

British reaction to the proposed abolition of the appeal to the Privy Council was not confined to concern over the repercussions of Irish secession to the Empire as a whole. Southern unionist peers, who raised the issue in the House of Lords, were more concerned about the effect it would have on the Protestant population of the 26 counties. One of these peers proved to be none other than the former colossus of Irish unionism Lord Edward

[79] Ibid.
[80] Ibid.

Carson. Carson's speech on this occasion, one of his last, illustrates the deterioration of his health at the time, his voice was reported to be halting and at times scarcely audible[81], as well as his intense and lasting bitterness towards what he perceived as the continued betrayal of those loyalists who, unlike himself, had chosen to remain in residence in the 26 counties. He began by claiming that the sole reason for his ever entering into the realm of politics was his desire to represent and defend the interests of Irish loyalists 'and I saw them in the end betrayed; but at all events betrayed under the pretext that certain safeguards were provided'[82]. Now he felt that he had lived to see every one of these safeguards 'absolutely set at naught and made useless'[83]. Carson was especially bitter when he recalled the patronising reassurances given to the Southern loyalists during the Treaty debates. They had been told;

> What are you afraid of? Won't you have the appeal to the Privy Council? Don't you trust the Privy Council?[84]

Yet now not even twelve years later this safeguard was to go and those politicians who had made all those assurances could only suffer verbal condemnation for the breach of all their promises. As Carson himself said on the advantages of being a politician;

> The extraordinary thing about politics is that it is about the only profession I know of in which a man may be the most false prophet or be the most false in giving promises and breaking them and yet be liable to no penalty whatsoever.[85]

Carson next turned his attention to the Erne Fishery Case itself which he claimed that, in the light of the Senate's retrospective legislation, the Free State Government was apparently afraid of having heard. While he admitted that to comment on the facts of the case would be wrong, especially when it is remembered that Carson himself was a Privy

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[81] *Irish Times* 7 December 1933.
[82] *Irish Free State- Appeals to the Privy Council*, House of Lords, Official Report, Fifth Series, 1933- 34, vol. 90, 325 at 332.
[83] Ibid.
[84] Ibid at 333.
[85] Ibid at 334.

Councillor, he declared that having looked over the facts himself 'if ever there was a case that wanted investigation not merely by a judicial tribunal but by some great impartial tribunal this is one'[86] Carson, who had little respect for the Free State legal system, pointed out the fact that of all the judges who had heard the appeal five were in favour of the appellants while just two had held against them.[87] It must be remembered that the background of the Erne Fishery Case, the removal of property rights belonging to Southern Protestants that had existed since the Plantation of Ulster, was in itself an emotive issue for the likes of Carson. The fact that the Irish Supreme Court had justified the removal of such important property rights on the basis of the pre-conquest Brehon Law must have seemed scarcely credible to Carson. In this light it is hardly surprising that he went on to allege the possibility of executive tampering with the case claiming that 'every possible thing that is revolting to a man who has been brought up in the administration of justice in the Courts in this country has been done'[88].

In spite of the great respect in which Carson was held by many in the House of Lords, his political star, along with his health, had long since waned and he was unable to bring to bear any influence over British policy in this matter. As he admitted when speaking of the situation and of the position of the Southern unionists in general;

I wish I was younger and I wish I was better in health, I would do what I could. I meet these men from day to day. They come to see me and I am almost ashamed to meet them.[89]

In just 18 months time in early June 1935, the exact time in which the Privy Council would eventually reach its verdict over the Erne Fishery Case Carson would take ill and

[86] Ibid at 333.
[87] At the various stages of the Erne Fishery Case Johnston J, Sullivan P., Hanna and O'Byrne JJ, of the High Court, and FitzGibbon J, of the Supreme Court. had all found in favour of Moore and the other fishery owners while only Kennedy CJ and Murnaghan J, of the Supreme Court, found against them.
[88] *Irish Free State- Appeals to the Privy Council*, House of Lords, Official Report, Fifth Series, 1933- 34, vol. 90, 325 at 333.
[89] Ibid at 334.

eventually die a few months later. The conclusion to his speech the Erne Fishery Case and the abolition of the appeal to the Privy Council, which was to be one of his last, was that;

> Every single promise we have made to the loyalists of Ireland has been broken, that every pledge of law and order has been destroyed, that every that makes life and property safe has gone and now the last remnant is to be taken away.[90]

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It now seemed certain that the Erne Fishery Company would have their day in court before the Judicial Committee of the Privy Council in defiance of the terms of Constitution (Amendment No. 22) Act 1933. The addition affixed by the Seanad rendering the abolition of the Privy Council appeal retrospective in effect had failed in its intention to block the progress of the case. However the Irish Government still had a number of cards to bring into play. The Irish Supreme Court flatly refused to transmit its records of the Erne Fishery Case, as required by Privy Council procedure, and moreover, refused to release the formidable volume of evidence which had been submitted to it during the proceedings.[91] As a result of this troublesome obstacle the company requested whether they could submit their own records of the Supreme Court proceedings to the registrar of the Privy Council in the light of Irish intransigence on this matter. In addition to this the company also requested that the Judicial Committee decide the preliminary issue concerning the legitimacy of the Irish abolition of the appeal before entering the complex and time consuming area surrounding the title to the Erne fishery. Such a course of action could potentially save the company a great deal of time, not to mention legal fees which must already have been formidable, as should they fail to win the preliminary issue then their entire appeal would fall apart then and there. These suggestions were duly accepted by the Privy Council, which could now set a firm date

[90] Ibid at 335.
[91] National Archives, Dept of Foreign Affairs, Pre 100 Series (Part 1) 3/1.

for the appeal, and the Irish Attorney General, together with other relevant persons in the Free State Government, were instructed to 'take notice and govern themselves accordingly'.[92]

De Valera's legal advisers disagreed on what action to take in response to this ruling. J. J. Hearne, legal adviser to the Department of External Affairs, favoured tendering advice to the King while Irish Attorney Conor Maguire favoured making a diplomatic protest.[93] In fact when the time came for de Valera to decide he chose neither of these options. The Irish Free State did not recognise the right of the Privy Council to sit in judgement over legislation passed by the Oireacthas and therefore the proceedings would be officially ignored by Dublin. The Irish Attorney General was instructed to boycott the proceedings and the other respondents to the appeal, the Kildoney fishermen whose actions in the summer of 1925 had begun this long drawn out controversy, were doubtless only too happy to follow suit. Nevertheless the Irish Government could not delude itself into believing that the final decision of the Privy Council would be without consequences for the Irish Free State. As Maguire advised de Valera, the government could 'hardly await calmly the situation which will arise if advice is given by the Judicial Committee to the effect that the Act abolishing the appeal is void'.[94] In such a scenario the Government would be faced with the option of either obeying the Order which would follow and thus avoid yet another collision with the British Government, or, alternatively, the Order could be ignored in which case the Erne Fishery Company might seek its enforcement through the machinery of the courts. To avoid such enforcement the Government might have to resort to ad hoc legislation which the Erne Fishery Company would undoubtedly challenge once again. In view of such a potentially dangerous situation arising Maguire counselled that the Government would do well to prepare in advance its response to such attempts to enforce the Privy Council's decision should the Erne Fishery Company emerge victorious.

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[92] Ibid.

[93] *National Archives,* Dept. of the Taoiseach, S6757. The Irish Free State had won the important concession of direct access to the King under the Cosgrave administration.

[94] Ibid.

The decision that the Irish Attorney General should boycott the Privy Council's proceedings in London might been consistent with the Government's official line of refusing to recognise the Privy Council's jurisdiction over the Irish Free State but the result was that when proceedings began on 3 December 1934 the Irish Government's position would not be represented against the Erne Fishery Company. Anticipating the probable absence of their adversaries the Erne Fishery Company had requested that the assistance of the Attorney General of England, Thomas Inskip, in their place. When the Privy Council granted this request, in order that the Judicial Committee would not be dependant on the counsel for the Erne Fishery Company alone for legal advice, the net result was that not only would the Irish Government's position have no representation before the Privy Council, but that its place would be taken by one of the fiercest critics that existed within the British Government of the Free State's actions in this matter.

The hearing was postponed on 4 December 1934 in order that the Judicial Committee could first hear *British Coal Corporation and Others v The King*[95], a Canadian appeal on the subject of that country's abolition of criminal appeals to the Privy Council. When the Irish hearing resumed in April 1935 Inskip's argument was brief and confined itself to the precise effect of the Treaty.[96] According to Inskip the Anglo-Irish Treaty of 1921 was far more than merely an agreement made between two countries which was subject to renunciation. It had been made law by statute both in the United Kingdom and in the Irish Free State and was therefore legally binding on both countries. Inskip was prepared to concede that the Statute of Westminster seemed to give the Irish legislature the power to pass laws contrary to the requirements of the Treaty, and this it had done in spite of the fact that the Oireachtas had never actually invoked the authority of that statute. However Inskip argued that the signing of the Treaty had created a contractual relationship between the United Kingdom and the Irish Free State which had not been affected in any way by the Statute of Westminster. One of the contractual obligations binding on the Irish Free State was that it retain the appeal to

[95] [1935] IR 487 and [1935] Appeal Cases 500.
[96] [1935] Appeal Cases 484 at 488.

the Judicial Committee of the Privy Council which the Irish legislature was consequently not free to abolish. Therefore it would be a clear breach of these obligations if the Free State were to attempt to unilaterally dispose of the terms of the Anglo-Irish Treaty as it currently seemed to be engaged in doing.

It is interesting to note that this very line of argument had been anticipated by Eamon de Valera over a decade earlier. On the eve of the Civil War he rejected Michael Collins' argument that the Treaty represented a stepping stone along the path to complete independence in a newspaper interview in which he claimed:

> It is not a stepping stone, but a barrier in the way to complete independence. If this Treaty be completed and the British Act resulting from it accepted by Ireland, it will certainly be maintained that a solemn binding contract has been voluntarily entered into by the Irish people, and Britain will seek to hold us to that contract. It will be cited against the claim for independence of every Irish leader.[97]

Over a decade later de Valera, in one of Irish history's greatest ironies, having utterly rejected Collins' position, was now the very person putting it to the test. Thus the eventual decision of the Privy Council in *Moore v Attorney General* would not only prove to be of relevance to the question of Privy Council appeals but would ultimately provide a verdict on the entire 'stepping stone' argument advocated by de Valera's Civil War opponents.

Wilfrid Greene KC, representing the Erne Fishery Company, began his argument by giving a detailed examination of the 1922 Constitution and also of the history of constitutional development in Ireland to date.[98] When this history arrived at the question of Free State Constitution's legal origin Greene's advocacy took a surprising turn. De Valera had always denied the British claims that the Free State Constitution had been created by Westminster legislation and instead asserted that it had been created by the Constituent Act

[97] Tim Pat Coogan, *De Valera- Long Fellow, Long Shadow*, London, 1993, p. 304.
[98] Ibid at 485.

passed by the Constituent Assembly, also known as the Third Dáil Éireann. Crucially de Valera's legal argument depended on the perception of the Third Dáil as just another Irish legislature which meant that the Constituent Act, as a statute passed by an Irish Parliament, was capable of alteration in any way desired by amending legislation passed by succeeding Irish Parliaments.[99] Thus de Valera had a vision of the 1922 Constitution as being an extremely fluid legal document that was infinitely malleable to the whim of a Legislature to which it was entirely subservient. Such a view of the Constitution's subservience was amply expressed by J. J. Hearne in a letter to Keith when he stated that 'we [the Irish Government] are satisfied that the Oireachtas is above the Constitution'[100].

The Erne Fishery Company, arguing before the Judicial Committee of the Privy Council in London, took a different view. While they agreed that the 1922 Constitution owed its origin to Irish, and not British, legislation, they argued that the Third Dáil had not constituted a legislature as succeeding Dáils had, and indeed had never been intended to be such. This impression of the nature of the Third Dáil was supported by Nicholas Mansergh in his book 'The Irish Free State' as can be seen when he claims that 'this assembly considered itself purely as a Constituent, and not a Legislative Assembly'. Thus the Third Dáil was not a Legislature as the Fourth Dáil onwards had been, a fact that can be seen from the fact that it never created a single piece of ordinary legislation, a function which it left entirely to the Provisional Government. This conception was once again expressed by Mansergh when he stated that;

This rigid separation of the Constituent and Legislative Power emphasised the important issue, namely that, unlike the Dominion Constitutions, that of the Free State emanated from a national Constituent Assembly.[101]

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[99] There is much irony in de Valera's legal argument, which was based on the view that the Third Dáil constituted an Irish legislature, in view of the fact that de Valera had refused to recognise any such position during the Civil War. During that unhappy era he refused to recognise the Third Dáil on the basis that the Second Dáil had not been summoned to abolish itself formally and because the Third Dáil would derive its authority from Britain rather than from the Second Dáil. Over a decade later de Valera seemed content to forget this during the debates surrounding the abolition of the Privy Council appeal

[100] National Archives, Dept of the Taoiseach, S14145.

[101] Nicholas Mansergh, *The Irish Free State*, London, 1934 p. 49.

The Third Dáil had been elected by the Irish people with the specific purpose of forming a Constituent Assembly and when it had completed its task of creating the 1922 Constitution it had gone out of existence without appointing any successor and therefore leaving no authority capable of amending the terms of the Constituent Act. Consequently de Valera had not been acting legitimately when he had purported to amend the Constituent Act under Constitution (Removal of Oath) Act 1933 in such a way as to remove the fetter that all amendments to the Constitution must be consistent with the terms of the Treaty. He had done this while acting under the authority of the Oireachtas, but this body was a Legislature and not a Constituent Assembly as the Third Dáil had been, and had received no mandate from the Constitution nor from any act of the Constituent Assembly to style itself as such.

Greene's interpretation of the relationship between the Oireachtas and the Constituent Act was by no means an original one. He was in fact drawing on judicial opinions given in the Supreme Court by Kennedy CJ and FitzGibbon J in the recent case of *State (Ryan) V Lennon*. Chief Justice Kennedy, incensed at a recent Irish Government publication claiming that the 1922 Constitution was enacted by the Oireachtas[102], stated that the correct interpretation was that 'the Constitution was enacted by the Third Dáil, sitting as a Constituent Assembly, and not by the Oireachtas, which, in fact, it created'[103]. FitzGibbon J added that in his opinion 'an amendment of Article 50 by the deletion of the words "within the terms of the Scheduled Treaty" would be totally ineffective, as effect is given to those words by the Constituent Act itself, which the Oireachtas has no power to amend'[104]. Such remarks immeasurably strengthened the Erne Fishery Company's argument as they could now oppose the official Irish Government line by drawing not only on the opinion of a respected author such as Nicholas Mansergh, but also on the authority of the Irish Supreme Court itself.

[102] [1935] IR 170 at 203.
[103] Ibid.
[104] [1935] IR 170 at 227.

If the Irish Legislature was not free to amend the terms of the Constituent Act then, far from constituting the fluid Constitution envisaged by de Valera, the 1922 Constitution was in fact a semi-rigid one. If this interpretation were accepted it would mean that while the Oireachtas could legitimately amend the Constitution at will, in so far as the Constituent Act allowed, it could not interfere with the terms of the Constituent Act itself unless a new Constituent Assembly was formed. However the Third Dáil had left behind no mechanism for doing this. By adopting such a position the Erne Fishery Company could argue that if Constitution (Removal of Oath) Act 1933, which had purported to amend the Constituent Act in order to allow amendments contrary to the Treaty, was *ultra vires,* then Constitution (Amendment No.22) Act 1933, the amendment which abolished the Privy Council appeal, fell with it. Thus Irish sovereignty was evoked, in that the Erne Fishery Company were asserting an Irish origin for the Free State Constitution as opposed to a British one, in an attempt to limit the extent of that same sovereignty.

However Viscount Sankey speaking for the entire Judicial Committee of the Privy Council could not accept that the Irish Constitution was the product of Irish legislation.[105] He reiterated the position of successive British Governments in asserting that the Free State Constitution was the creation of an Imperial statute created at Westminster. As far as the British were concerned the Constituent Assembly, while it might have assisted in drawing up what eventually was to become the Irish Constitution, had never been given any powers to actually enact any Constitution whatsoever. In their view the Free State Constitution had come into existence when it was proclaimed by King George V on 6 December 1922. Since the Irish Free State (Saorstát Éireann) Act 1922 was an Imperial statute it was not open to the Oireachtas, before the existence of the Statute of Westminster, to pass any Constitutional Amendment abrogating the Anglo-Irish Treaty, also enshrined in British statute, as the Colonial Laws Validity Act 1865 denied Dominion Parliaments the right to pass statutes repugnant to any Imperial Act. However since the passing of the Statute of Westminster in 1931 the fetter of the Colonial Laws Validity Act had been removed, with the result that the

[105] [1935] IR 472 at 485 and [1935] Appeal Cases 484 at 497.

Oireachtas was now perfectly free under British law to pass any legislation it wished irrespective of whether or not it was repugnant to any Imperial statute. Thus de Valera was acting quite legitimately when he passed Constitution (Removal of Oath) Act 1933, and, consequently, the same was true of the abolition of the appeal to the Privy Council. With respect to Inskip's arguments concerning the contractual position of the Irish Free State the Privy Council declared that, while it would be out of place to criticise any legislation passed by the Oireachtas, the Board wished to add that they were not expressing any opinion on any contractual obligations owed by the Free State under the Treaty. By making such a statement it seemed clear that while individual Privy Councillors might agree with Inskip's assertion that the Free State was bound by certain moral obligations, by refusing to comment on them in their judgement they seemed to be admitting that such considerations were bereft of any legal basis. The Erne Fishery Company attempted to argue that the abolition of the Privy Council appeal could not be considered to be valid under the Statute of Westminster as the Oireachtas had never purported to be acting under the Statute, but claimed to be proceeding under the terms of Irish law alone. However the Privy Council ruled that it had to be assumed that the Oireachtas had abolished the appeal in the only way in which they legally could, which as far as the Privy Council was concerned meant that the Oireachtas must be deemed to have been proceeding under the Statue of Westminster.[106] The Judicial Committee therefore concluded by summarising its judgement into a single sentence;

The simplest way of stating the situation is to say that the Statute of Westminster gave to the Irish Free State a power under which they could abrogate the Treaty, and that, as a matter of law, they have availed themselves of that power.[107]

Thus less than ten years after the Irish delegates had signed the Treaty in London in 1921 the Irish Free State had been legally released from obeying its terms when the Statute

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[106] Greene's additional argument that the Irish abolition of the appeal to the Privy Council violated the King's prerogative to hear such appeals was also rejected on the basis that the prerogative had been merged *pro tanto* in the Statute of Westminster which had given powers of amending and altering the statutory prerogative.

[107] [1935] IR 472 at 486- 487 and [1935] Appeal Cases 484 at 499.

of Westminster was passed in 1931. The judgement of the last appeal to the Privy Council from the Irish Free State issued on 6 June 1935 had conclusively decided to uphold the legitimacy of its own abolition. As a result of this decision the date of 6 June 1935 can be considered the day in which Ireland finally won undisputed judicial sovereignty and therefore can be considered a great victory for Irish sovereignty as a whole. Ironically in seeming to deny Irish sovereignty by refusing to recognise an Irish origin for the first internationally recognised Irish Constitution the Privy Council had immeasurably advanced the cause of that same sovereignty. One of the Treaty obligations most repugnant to Irish nationalists had been swept away and it was now recognised that the Irish Legislature could legitimately break the terms of the Anglo-Irish Treaty at will, all of which, moreover, had been achieved with the legal endorsement of the Privy Council itself.

* * *

The decision of the Privy Council in *Moore v Attorney General* in June 1935 was internationally seen as a tremendous advance for the cause of Irish sovereignty. This could be seen in the comments of the American media which applauded the decision was 'a confirmation of the sovereign status of the Irish Free State'[108] and also as 'an affirmation that the British Dominions are bound to the mother country less by law than by family affection'.[109] In Ireland itself, where the legitimacy of the appeal was not recognised and full judicial sovereignty had officially been achieved almost two years earlier, the reaction was one of vindication rather than of jubilation. This can be seen in the *Irish Press'* headline 'Power to Pass Act Admitted', and also in that of the Irish Independent 'Saorstát's Policy Proved to be Right, with the *Irish Independent* typically placing particular emphasis on the Cosgrave Government's contribution to the achievement of abolishing the appeal.[110]

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[108] *The Boston Herald,* 9 June 1935, National Archives, Dept. of Foreign Affairs, Pre 100 Series (Part 1) 5/88F.

[109] *The Elmira Star Gazette,* 10 June 1935, National Archives, Dept. of Foreign Affairs, Pre 100 Series (Part 1) 5/88F.

[110] Cosgrave had his own particular justification for the legitimacy of the abolition of the appeal to the Privy Council. (See *Irish Press* 7 June 1935.) In his own, and in his party's official view, the Statute of Westminster, together with everything that flowed from it, was actually subordinate to the Treaty. He also

In Britain it was a very different story. Canada's abolition of Privy Council appeals with respect to criminal cases had also been vindicated in a judgement that was made public simultaneously to that of *Moore v Attorney General*.[111] Yet, unsurprisingly, the Canadian case failed to make nearly the same impact in Britain as the case emanating from the Irish Free State. One contemporary, Henry Harrison complained that the controversy caused in Britain by the Erne Fishery Company's appeal 'furnished one of the material causes for the further prosecution of the Anglo-Irish "economic war"'.[112] However it could also be argued that the defeat of the British Government's position towards the Irish abolition of the Privy Council appeal provided valuable ammunition for those in favour of a rapprochement with the Irish Free State. In the days immediately after the publication of the Privy Council's advice to the King, culminating in a special debate on the impact of the decision on 10 July 1935, MPs such as Major James Milner and Sir Stafford Cripps complained in the House of Commons that it was no longer any use for the British Government to continue preaching about the Irish Free State's renunciation of its moral obligations. A better course would be to use the opportunity of the Privy Council's confirmation of the legality of de Valera's constitutional amendments to create a friendlier atmosphere and finally end the long running dispute between the two countries. According to Milner the Government should immediately end a policy towards Ireland that had hitherto been 'unreasonable, foolish and detrimental to the interests not only of this country but of the Empire as a whole'.[113] Even Winston Churchill, no supporter of de Valera's constitutional reforms, conceded that the decision of the Privy Council in this matter had to be accepted and queried how long 'this continued state of semi warfare' with the Free State should be allowed to continue.[114]

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seemed to imply that depending on the Statute of Westminster was dangerous since he claimed that the Parliament had passed it could later amend its provisions. In his opinion the abolition of the appeal was justified on the basis it was not expressly safeguarded in the words of the Treaty itself. There are several objections to this position not the least of which that it forgets that Ireland's constitutional status was to be linked to Canada, which still had the appeal in 1921. It also takes the extremely unrealistic view that the United Kingdom could one day take back the powers it had given the dominions under the Statute of Westminster.

[111] *British Coal Corporation and Others v The King*, [1935] IR 487.

[112] Henry Harrison, *Ireland and the Empire 1937,* (London 1937) p. 195.

[113] *Irish Free State,* House of Commons, Official Report, Fifth Series, 1934-35 vol. 304, 400.

[114] Ibid at 428.

The special debate of 10 July proved to be extremely embarrassing for the National Government in power throughout this controversy, and especially for Attorney General Thomas Inskip. During the debates in the Commons concerning the enactment of the Statute of Westminster in 1931 a number of Conservative MPs, including Winston Churchill, having obtained legal advice from J. H. Morgan who deduced, correctly as it turned out, that the Statute would allow the Irish Free State to break the Treaty, put forward an amendment designed to exclude the Free State from its operation.[115] Their predictions of dire consequences should the Irish be allowed to benefit from the Statute were waved aside by Inskip, then the Solicitor General, who denied the accuracy of Morgan's legal arguments and claimed that 'there can be no suggestion of the possibility of the repeal of the Treaty'.[116] Now Inskip's assurances had proved hollow and his arguments before the Privy Council itself had met with failure. Churchill subjected him to a deluge of criticism, blaming him, among others, for giving the Government 'wrong advice both legal and political'.[117] Nor was the wrath of the die-hard prophets confined to Inskip. The comments of Sir Donald Somervell, the current Solicitor General, during the Statute of Westminster debates were also resurrected on 10 July. 'It is plain' Somervell had claimed 'that if this Statute is passed it will be wholly wrong to say that the Irish Free State would have power to repeal the Treaty'.[118] Even the current Prime Minister Stanley Baldwin, who had only returned to the post a month earlier, was not allowed to forget his own remarks made in 1931 that 'the Treaty will be just as binding, so I am advised, after the passing of this Statute as before' and his claim that in this respect 'this country has every security'.[119] The controversy surrounding the Irish abolition of the Privy Council appeal had ended very badly for the National Government. Churchill was adamant that it was nothing less than the blatant incompetence displayed by many in that

[115] In his article 'Secession by Innuendo', *National Review*, March 1936 p. 313 Morgan speaks of the recent revelation that he was the hitherto unnamed legal adviser who advised those seeking the amendment as to what effect what he called the 'Statute of Dublin'. Morgan saw de Valera as being involved in a secession race with General Hertzog of South Africa with the decision in *Moore v Attorney General* inching de Valera temporarily ahead.

[116] Ibid at 314.

[117] *Irish Free State,* House of Commons, Official Report, Fifth Series, 1934-35 vol. 304, 391 at 441.

[118] *Statute of Westminster,* House of Commons, Official Report, Fifth Series, 1931-32, vol. 259, 1224.

[119] *Statute of Westminster,* House of Commons, Official Report, Fifth Series, 1931-32, vol. 260, 345.

Government, such as Inskip and Somervell, that was responsible for having so effectively nullified his own efforts, along with those of his colleagues, in the Treaty negotiations of 1921.

Perhaps most critical of all of the National Government's performance were those who spoke on behalf of the loyalists who had remained in the Irish Free State, who had now been stripped of one of their most valued safeguards. Ulster Unionist Ronald Ross attacked the Government on the behalf of his Southern brethren, appalled at the prospect that loyalists in the Irish Free State were 'now at the mercy of the courts of that country without appeal'.[120] Particularly vehement was Colonel John Gretton who demanded that the British Government give some assurances to such loyalists whose position 'grows worse and worse under the present regime and the spirit which is being inculcated in Ireland'[121]; assurances which might 'help them to secure the rights which ought to be secured for them'.[122] As seen earlier, de Valera had always vigorously denied the assertion that the appeal to the Privy Council constituted any kind of safeguard whatsoever for the 'ex-Unionist' minority. Whatever of the merit or otherwise of de Valera's arguments, it is clear from the reaction of many of the members of that community, as described during the course of this paper, that a large portion of Southern loyalists felt strongly otherwise. It could be argued that the owners of the Erne Fishery Company had a substantial monetary interest in the preservation of the appeal, however there were others members of that community who, in the absence of any form of financial incentive, argued passionately for what they regarded as an important source of security. The majority communities in Commonwealth countries such as Canada and the Irish Free State might argue as much as they wished that the Privy Council appeal was useless and provided no real safeguard for minorities, however the minorities themselves, such as the French Canadians, the loyalists of the Irish Free State and more recently the Maoris of New Zealand clearly believed that it did. These communities protested, in Canada

[120] *Supply Committee -Dominions Office,* House of Commons, Official Report, Fifth Series, 1934-35 vol. 303, 581 at 639 -640.
[121] *Irish Free State,* House of Commons, Official Report, Fifth Series, 1934-35 vol. 304, 391 at 408.
[122] Ibid.

and Ireland unsuccessfully while in New Zealand members the Maori community continue to campaign to retain the appeal, at the actions of their respective majorities in removing a legal avenue which they perceived as an important mechanism for the protection of their rights.[123] De Valera wrote as he put in place his preparations to abolish the Privy Council appeal:

I am convinced that the minority as a whole are prepared to trust the good sense and the good will of their fellow-citizens who belong to the majority, and to work with them in securing the freedom and in building up the prosperity of their common country. That, if safeguard be needed, will, in the last resort, be the greatest safeguard of all.[124]

In the wake of the Privy Council decision in *Moore v Attorney General* the remaining loyalists living in the Irish Free State would have to content themselves with being entirely dependant on such goodwill from that time forward.

Whatever of the political consequences of the aftermath of *Moore v Attorney General* the case continues to pose a number of legal questions of contemporary importance. The irony of the situation that the British interpretation of the origin of the 1922 Constitution, as expressed by the Privy Council, offered more sovereignty to the Irish Free State than Irish interpretation has already been remarked upon in the course of this paper. Yet the interpretation that the 1922 Constitution was created by Irish legislation remains the official view of the Irish courts today, a position which creates a number of legal problems. Firstly, if the Irish interpretation is to be accepted how can the legality of de Valera's constitutional reforms, such as the removal of the Oath and the abolition of the Privy Council appeal, be defended when they had been made possible by interference with the terms of the Constituent Act to the effect that amendments no longer needed to be consistent with the terms of the Treaty. Kennedy CJ and FitzGibbon J in *State (Ryan) v Lennon* had both

[123] In April 2002 Margaret Wilson, Attorney-General of New Zealand, announced plans to abolish the appeal to the Privy Council from that country after 18 months of of consultation with the Moari community. Its proposed replacement, the Supreme Court of New Zealand, would consist of five judges with one well versed in Maori culture.

[124] National Archives, Dept. of Foreign Affairs, Pre 100 Series (Part 1) 3/1.

decided that the Oireachtas had no power to tamper with the text of the Constituent Act and it may be recalled that FitzGibbon J went as far as saying:

In my opinion an amendment of Article 50 by the deletion of the words 'within the terms of the Scheduled Treaty' would be totally ineffective, as effect is given to those words by the Constituent Act itself, which the Oireachtas has no power to amend.[125]

Therefore it would seem that the legitimacy of de Valera's constitutional reforms can only be defended if one accepts the view espoused by the Privy Council in the Erne Fishery Case that the 1922 Constitution was the creation of Westminster legislation, a bitter pill for even contemporary Irish courts to swallow.

Secondly if the Irish interpretation is taken to extremes it could even be argued that the Statute of Westminster could never have applied to the Irish Free State.[126] The British Parliament in passing the Statute was interfering with the operation of the Irish Constituent Act, an action which, from the Irish point of view, they had no legal right to do. Of course it could be argued that the British could do this since they had the consent of the Irish legislature to do so. Yet how could the Irish consent to have the terms of the Constituent Act interfered with when, according to *State (Ryan) v Lennon*, they had no right to do this themselves?

A legal difficulty of more contemporary concern relates to the question of whether the State has retained any Crown prerogatives since the creation of the 1937 Constitution.[127] Article 49 of that Constitution expressly carries over any such prerogatives providing that they remained in existence on 11 December 1936. However in *Byrne v Ireland*[128], which

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[125] [1935] IR 170 at 227.

[126] See W. I. Jennings, 'The Statute of Westminster and Privy Council Appeals' (1936) 52 *Law Quarterly Review* 173. Also of relevance to this area is O. Hood Philips 'Ryan's Case' (1936) 5 *Law Quarterly Review* 241.

[127] Niall Lenihan, 'Royal Prerogatives and the Irish Constitution', (1989) 24 *Irish Jurist* 1. Also see J. M. Kelly, 'Hidden Treasure and the Constitution' (1988) 10 *Dublin University Law Journal* 5.

[128] [1972] IR 241.

concerned whether or not the State had inherited the Crown prerogative of immunity from suit, and later on in *Webb v Ireland*[129], which concerned the Crown prerogative of treasure trove, the Supreme Court denied that any such prerogatives had been taken over from the Crown by the modern Irish State. This decision was made on the basis that Article 2 of the 1922 Constitution provides that 'All powers of government and all authority legislative, executive and judicial in Ireland, are derived from the people of Ireland'. Therefore under the 1922 Constitution it was the people, and not the Crown, who were the personification of the State, thus preventing the operation of Crown prerogatives under the 1922 Constitution. Niall Lenihan finds several faults with this line of reasoning, the most important of which being the fact that since the Irish Free State's constitutional status was linked to that of Canada under the Treaty, with which the 1922 Constitution had to be consistent, and since the personification of the Dominion of Canada is the Crown, then the Crown likewise must have been the personification of the Irish Free State in spite of Article 2. Thus if the Irish origin of the 1922 Constitution is accepted then the Crown must have remained the personification of the Irish Free State, since the Oireachtas could not change this relationship by altering the Constituent Act, until the arrival of the 1937 Constitution in which case the Crown prerogatives must have survived. Only under the British origin of the 1922 Constitution could the Oireachtas have legitimately have altered the relationship between the Crown and the Irish Free State and thus prevent the survival of Crown prerogatives in contemporary Ireland.

Few countries attempting to obtain complete sovereignty by constitutional means have left behind such glaring legal anomalies in the wake of their advance as Ireland. It could be argued that the first two anomalies mentioned in this paper are solely of interest to the legal historian. After all, the legal order surrounding the 1922 Constitution was swept away by what is often called the 'Constitutional Revolution' that brought in the present 1937 Constitution. However the question of whether the State may have inherited Crown prerogatives is undeniably of great contemporary significance. The possibility that the State

[129] [1988] ILRM 565

may possess immunity from suit, together with the right to claim ownership of valuable archaeological finds, also known as the prerogative of treasure trove[130], are important issues which may be raised again in the future. If they are then the trail of legal anomalies left behind by *State (Ryan) v Lennon* and *Moore v Attorney General* may one day have to be examined in detail by the Supreme Court. It is difficult to see how these anomalies could be resolved in such a future proceeding unless the Supreme Court makes the difficult decision, from a political standpoint, of admitting that our first internationally recognised Constitution[131] was, in fact, legally created by the legislature of the United Kingdom, and not, as we have so vigorously asserted since the creation of the State, by our own.

Finally, in the light of our examination of the final appeal to the Privy Council, what conclusions can we draw with respect to the history of that appeal's operation in Ireland? In the early 20th century the Judicial Committee of the Privy Council enjoyed final appellate jurisdiction over most of the British Empire and was credited with maintaining the uniformity of the Common law throughout that vast expanse of territory. Moreover it fulfilled the indispensable service of providing developing colonial legal systems with a mechanism which allowed them to take advantage of the centuries old legal experience of the mother country. However in spite of these obvious advantages the appeal lost much of its popularity with the rapid growth of an increasing sense of Dominion self-confidence that had developed on the battlefields of the First World War. The Dominion leaders voiced their strong objections to the appeal as early as the War Conference of 1918. The Canadians were extremely vocal in their demands that their own courts should have final authority and Canadian Prime Minister Sir Robert Borden declared that henceforth the tendency in his country would be to restrict such appeals as much as possible.[132] The appeal was

[130] The importance of whether the State has inherited the prerogative of treasure trove has been lessened by the decision in *Webb v Attorney General* that the State has the right to claim such finds on the basis that they constitute a 'natural resource' under Article 10 and on the basis that such ownership is an essential aspect of Irish sovereignty.

[131] It should not be forgotten that there was a 1919 Irish Constitution created by the First Dáil. However this document never achieved any form of international recognition.

[132] Henry Harrison, *Ireland and the Empire 1937*, London, 1937, p. 186.

increasingly seen in the dominions, as Keith himself put it, as 'a badge of inferiority'[133] and even the Prime Minister of a Dominion as loyal as Australia could claim in 1918 that there was a strong demand among his people that 'there should be no appeal to the Privy Council or to any Imperial Court of Appeal at all' and that if a vote were taken on the matter in Australia 'it would be carried overwhelmingly'.[134] At the beginning of the 20th century Imperial commentators often quoted the words of Herbert Bentwich who declared that 'the King, the Navy and the Judicial Committee are three solid and apparant bonds of the Empire; for the rest, the union depends on sentiment'.[135] As the century wore on it became clear that sentiment in the Dominions was beginning to undermine this third pillar of Empire.

The history of the Privy Council's operation in Ireland, a new Dominion far more hostile to the appeal than either Canada or Australia, was never destined to be a glorious one. In fact the appeal never managed to work in the Free State in the manner in which it was intended. It was simply never allowed to do so by a relentlessly hostile Irish legislature. Lord Balfour's claim that 'law without loyalty cannot strengthen the bonds of Empire' had never proved so accurate.[136] Ireland had never seen herself as a colony but rather as a mother country in her own right. Moreover, in spite of the fact that the Irish Free State was a new political entity, its judicial system was far from undeveloped, and many Irish lawyers, with the doubtless exception of much of those belonging to the minority community, simply saw no reason for the appeal's existence. The Privy Council was undoubtedly destined for unpopularity in Ireland even before it had heard a single case. The construction of Article 66 of the Constitution amply illustrated that its provision was an addition inserted into the text against the will of the Provisional Government. Moreover its involvement in the 1924 Boundary Commission and the mere fact that Edward Carson sat on its board did not help its case. Tensions appeared to ease slightly when the Judicial Committee heard the first Irish applications for leave to appeal in 1923, but this was only because all these applications were

[133] A. B. Keith, *Responsible Government in the Dominions,* London, 1928 p. 1149-1150.
[134] National Archives, Dept. of Foreign Affairs, Pre 100 Series (Part 1) 3/1.
[135] See *The Times* 14 August 1933 and Donal McEgan, 'John Bull's Privy Council', (September 1933), Vol 23, No. 9, *The Catholic Bulletin*, p. 736 at 738.
[136] Nicholas Mansergh, *The Irish Free State -Its Government and Politics* London, 1934 p.324.

ultimately rejected by the Privy Council on that occasion. The moment the Judicial Committee agreed to actually hear an appeal in the case of *Lynham v Butler* [137] the news was met with furious opposition from the Irish Government, which considered the issue in that case to be a matter of purely internal concern, and thus began a decade long policy of using legislative instruments to confound the effective functioning of the appeal. Doubtless the fiasco that surrounded the later case of *Wigg and Cochrane v Attorney General*[138] was of great embarrassment to the Judicial Committee, but by the time this case arose the Privy Council's reputation was already irredeemable in for most in Ireland.

Yet Irish feelings of hostility towards the Privy Council appeal were not limited to the fact that it constituted a limitation of Irish judicial sovereignty that had been forced into the text of the 1922 Constitution by the demands of the Treaty. Irish politicians and legal commentators frequently and quite openly accorded the Privy Council the worst insult that can be given to any judicial tribunal; that of having a political agenda which overrode its duty to interpret the law objectively. During the debates in the Dáil which preceded the abolition of the appeal the Privy Council was accused of acting from 'a semi-political standpoint'[139] and one TD, Osmond Grattan Esmond claimed that he had noticed over the years that 'on many occasions their Lordships have adopted, with reference to the politics of this country, a very mischievous attitude'.[140] One legal commentator even went so far as to call the Judicial Committee of the Privy Council a 'pocket tribunal of the English political party in power'.[141] This image of the Privy Council as a politically tainted tribunal was maintained throughout the controversy which surrounded the final appeal to that body in *Moore v Attorney General*.. An example of this can be seen in Irish Attorney General Conor Maguire's letter to de Valera in which he expressed his suspicion that the Judicial Committee

[137] [1921] I R 185. Also Irish Law Times [1926] vol. 60 p31 and 43.
[138] [1927] I R 285, 293. For second special hearing see [1929] I R 44.
[139] *Constitution (Amendment No. 22) Bill 1933 - Committee and Final Stages,* Dáil Éireann 1933, vol. 49, 2382 at 2385, 12 October 1933.
[140] *Constitution (Amendment No. 22) Bill 1933 - Committee and Final Stages,* Dáil Éireann 1933, vol. 49, 2382 at 2384, 12 October 1933.
[141] Donal McEgan, 'John Bull's Privy Council', (September 1933), Vol 23, No. 9, *The Catholic Bulletin*, p. 736 at 739.

might only 'pretend to deal with the question as one of pure law'.[142] In the light of such accusations the decision in *Moore v Attorney General* must be seen as a vindication of the Privy Council's reputation as an impartial judicial tribunal. In that case the Judicial Committee not only legally sanctioned its own abolition, but did so by using a legal interpretation that accorded the Irish Free State a greater degree of sovereignty than many Irish legal experts, by their own interpretations, were to prepared concede. Moreover it had done this in the face of official British Government policy and against the legal opinions of that Government's highest legal officers who had always strongly believed that the Irish Free State's constitutional reforms could never be justified either morally, or more importantly, legally. In this respect, whatever of the rest of its history, the final hour of the Privy Council's dealings with the Irish Free State was undoubtedly its finest.

[142] National Archives, Dept. of the Taoiseach, S6757.