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

THOMAS MOHR

1. The Statute of Westminster in British Imperial History

The enactment of the Statute of Westminster in 1931 represents one of the most significant events in the history of the British Empire. The very name of this historic piece of legislation, with its medieval antecedents, epitomizes a sense of enduring grandeur and dignity.[1] The Statute of Westminster recognized significant advances in the evolution of the self-governing Dominions into fully sovereign states. The term “Dominion” was initially adopted in relation to Canada, but was extended in 1907 to refer to all self-governing colonies of white settlement that had been evolving in the direction of greater autonomy since the middle of the nineteenth century.[2] By the early 1930s, the Dominions included Canada, Australia, New Zealand, South Africa, Newfoundland, and the Irish Free State.

The significance of the Statute of Westminster has seen it ranked next to the American War of Independence as a turning point in British Imperial history.[3] It has even been suggested that if the former had existed in

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

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

3. David L. Lewis, “John Latham and the Statute of Westminster,” *Electronic Journal of Australian and New Zealand History* http://www.jcu.edu.au/aff/history/conferences/newcastle/lewis.htm (August 2, 2012). See also National Archives of Ireland (henceforth NAI),

Thomas Mohr, B.A., L.L.B., M.A., Ph.D. is a lecturer at the School of Law, University College Dublin <thomas.mohr@ucd.ie>. He is also secretary of the Irish Legal History Society and book review editor with the Irish Jurist.

Law and History Review November 2013, Vol. 31, No. 4
© the American Society for Legal History, Inc. 2013
doi:10.1017/S073824801300045X

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

1776, the latter might never have occurred.[4] The contribution of the Statute of Westminster to the advance of the Dominion autonomy has long been emphasized by historians. For example, one commentator concluded "The general effect of the Statute was to close the chapter of Commonwealth history which recorded the attainment of self-government and self-determination [of the Dominions], and to still any questionings that might yet arise as to the validity of that attainment."[5]

The significance of the Statute of Westminster Act, 1931 in the evolution of the Dominions is reflected in textbooks on public international law. In the 1920s, these textbooks had been unsure how to classify the British Dominions as self-governing entities. Could they be considered as constituting fully sovereign states? A lengthy examination of this specific question, conducted as late as 1929, concluded that although significant advances had been made by the Dominions in the early twentieth century, "it is impossible to admit that the Dominions are persons of International Law of identically the same kind as those which are called 'independent sovereign States.'"[6] This uncertainty evaporated after the enactment of the Statute of Westminster. Henceforth, the Dominions were firmly classified as enjoying the status of sovereign states.[7]

No history of the former Dominions in the twentieth century would be complete without some reflection on the significance of the Statute of Westminster. One Canadian work concludes: "The Statute of Westminster … essentially established the complete lawful autonomy of Canada."[8] An Australian text adds "This enactment removed the last formal restrictions on the sovereignty of the Commonwealth of

---

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

4. For example, *Hansard,* House of Commons, vol. 259, col. 1222, November 20, 1931. See also Manley O. Hudson, "Notes on the Statute of Westminster, 1931," *Harvard Law Review* 46 (1932): 261–289, esp. 262 and 276.

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

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

7. For example, see Hersch Lauterpacht (ed.), *Oppenheim's International Law* (London: Longmans, 1963), 203–5.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Australia."[9] South African historians recognize that "the Statute of Westminster opened a new period in the constitutional history of South Africa."[10] A New Zealand text passes judgment on Wellington's decision not to immediately adopt key provisions of the Statute of Westminster by concluding "New Zealand was content to remain a 'Dominion'" while "Canada, South Africa and the Irish Free State became sovereign, independent states in 1931."[11]

The only exception to the emphasis placed on the historical significance of the Statute of Westminster concerns works written in what was once the sixth Dominion of the British Empire. This was the Irish Free State, which formally joined the ranks of the Dominions in 1922.[12] It is not uncommon for general histories of Ireland in the twentieth century to offer the Statute of Westminster little more than a passing reference or to ignore it completely.[13]

9. Winston G. McMinn, *A Constitutional History of Australia* (Melbourne: Oxford University Press, 1979), 160.

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

11. W. David McIntyre, "Imperialism and Nationalism," in *The Oxford History of New Zealand*, ed. Geoffrey W. Rice (Auckland: Oxford University Press), 346. For an opposing view see *Hansard,* House of Lords, vol. 83, col. 187–88, November 26, 1931. It is not uncommon for historians to interpret the Statute of Westminster as giving legal force to the Balfour declaration of 1926. This recognized that the Dominions were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." command paper 2768, p. 14. For example, see Russell Ward, *A Nation for a Continent – the History of Australia 1901–1975* (Richmond, Victoria: Heinemann Educational, 1981), 199; Peter J. Gibbons, "The Climate of Opinion," in *The Oxford History of New Zealand* ed. Geoffrey W. Rice (Auckland: Oxford University Press), 335; David Day, *Claiming a Continent – A New History of Australia* (Sydney: Angus and Robertson, 1997), 251–52; and Marjorie Barnard, *A History of Australia* (Sydney: Angus and Robertson, 1980), 543.

12. Under British law, the Irish Free State came into existence on December 6, 1922. The date on which the Irish Free State came into existence cannot be so easily fixed under Irish law. See Thomas Mohr, "British Imperial Statutes and Irish Law," *The Journal of Legal History* 31 (2010): 299–321.

13. Nicholas Mansergh explains the relative paucity of attention to the Statute of Westminster in Irish historiography by reference to the reaction of the de Valera government, which took advantage of the concessions granted by this historic piece of legislation while repudiating the authority of British imperial statutes within the Irish Free State. Mansergh argues that historians have understood that Irish nationalism was in a revolutionary phase in the 1930s and stated that "[r]evolutionaries who respect constitutions, conventions and legal precedents are not revolutionaries at all." Nicholas Mansergh, *Survey of British Commonwealth Affairs: Problems of External Policy, 1931–1939* (London: Oxford University Press, 1952), 26. This conclusion should be treated with caution, given the

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

The marginalization of the Statute of Westminster in many general works of Irish political and constitutional history, something unthinkable in Canadian or Australian equivalents, is particularly unfortunate when the proper context of this historic piece of legislation is fully appreciated. The Irish Free State played an important role in the creation of the final text of the Statute of Westminster at successive imperial conferences in the 1920s and 1930s. In addition, parliamentary debates at Westminster reveal that this historic legislation was largely perceived at the time of its enactment as an incident in Anglo–Irish relations rather than a key moment in the development of the British Empire or Commonwealth.[14] The other Dominions were certainly mentioned in these parliamentary debates. Supporters and opponents of the Statute of Westminster tended to refer to the wishes of like-minded authorities in the Dominions to support their arguments.[15] Canada and Australia were often used as examples in the context of hypothetical arguments.[16] However, the discussions on the actual impact of the Statute on Australia, Canada, New Zealand, and even South Africa never received anything like the level of attention given to the Irish Free State. The lengthy discussions on the internal politics of the Irish Free State have no parallel with respect to any of the other Dominions.[17] Stanley Baldwin,

volume and length of the legal analyses on the constitutional position of the Irish Free State produced and given public expression by the Cosgrave and de Valera administrations. Some works on Commonwealth history do devote significant attention to the relationship between the Irish Free State and the Statute. For example, see Kenneth C. Wheare, *The Statute of Westminster and Dominion Status* (Oxford: Oxford University Press, 1938, 1942, 1949, and 1953). See also David W. Harkness' important work on the Irish Free State and the Commonwealth, *The Restless Dominion* (New York: New York University Press, 1970).

14. The terms "Empire" and "Commonwealth" were used interchangeably in the years between the wars. This reality was even reflected in legal documents. The Anglo–Irish Treaty uses both terms without any differentiation between them. The term "British Empire" is used in Article 1 of the Treaty, whereas "British Commonwealth of Nations" is used in the wording of the oath detailed in Article 4. The two terms were also used interchangeably in the "address to their Majesties" passed by the imperial conference of 1926. Cmd. 2768, pp. 54–60.

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

16. For example, see *Hansard,* House of Commons, vol. 259, col. 1177, November 20, 1931; vol. 260, cols. 253, 264, and 359–60, November 24, 1931 and *Hansard,* House of Lords, vol. 83, cols. 210–11, November 26, 1931. The Irish Free State was also used in the context of hypothetical examples. For example, see *Hansard,* House of Commons, vol. 260, cols. 267–8, and 275, November 24, 1931.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

leader of the Conservative party and former prime minister, expressed a sense of frustration in the House of Commons when he complained "There is a, tendency, in concentrating on Ireland, to lose sight of the fundamental question here, which is the question of Imperial relationship."[18] These considerations ensured that the debates on the enactment of the Statute of Westminster could be seen as the last in a series of great parliamentary debates on the future of Ireland, which were a major feature of British politics in the late nineteenth and early twentieth centuries.

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

A similar sense of ambivalence toward the Statute of Westminster was shown by Irish governments in the 1920s and 1930s. In 1931, the Irish government gave formal consent for the enactment of the Statute of Westminster while simultaneously denying that this measure had any legal impact on the Irish Free State. This article will attempt to explain the reasons behind this ambivalent attitude. It will also attempt to show why this stance toward the Statute of Westminster remains relevant in the spheres of Irish law, politics, and history.

18. *Hansard,* House of Commons, vol. 260, col. 342, November 24, 1931.
19. [1977] I.R. 129 at 148.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

2. Key Provisions of the Statute of Westminster

Maurice Gwyer, British procurator general and treasury solicitor, is often credited with having first suggested the name of this historic piece of legislation.[20] The great distinction of the elevated title of "Statute of Westminster" was its association with the imposing majesty of English legal history. This allowed the Statute to weather a tide of accusations of being inconsistent with British constitutional tradition, in that it regulated imperial relations by statutory means instead of by unwritten convention, by anchoring it to ancient legal antecedents.[21] The name also had the great merit of making no reference to the contents of the Statute. This was highly advantageous, as the provisions of the Statute were often condemned as sounding the death-knell of imperial unity.[22]

The name "Statute of Westminster" did provoke a number of supercilious comments as to the accuracy of its historical provenance. The Statutes of Westminster of 1275, 1285, and 1290 had dealt with such matters as the fixing of "legal memory," trial by jury at *nisi prius* and the prevention of sub-infeudation after the alienation of the fee simple.[23] The establishment of self-governing Dominions across vast oceans was beyond the wildest fantasies of the medieval English. A clumsy attempt was made to delay the passage of the bill on the basis that its title was inappropriate. It was argued that its contents had little in common with previous Statutes of Westminster.[24] Such quibbles were brushed aside by the solicitor general Thomas Inskip who concluded that the "splendid title" of "Statute of Westminster" was eminently suitable for "a landmark in the constitutional history of the British Empire."[25]

The most important provisions of the Statute of Westminster (henceforth "the Statute") that concerned all of the Dominions were found in Sections 2, 3, and 4 of the act. Section 2 of the Statute ensured that laws created in

20. Hessel Duncan Hall, *Commonwealth– A History of the British Commonwealth of Nations* (London: Van Nostrand Reinhold, 1971), 683; and L.S. Amery, *My Political Life, Vol. 3: The Unforgiving Years, 1929–1940* (London: Hutchinson, 1955), 74f. Gwyer certainly played an important role in the creation of this important piece of legislation. He chaired an important committee at the special imperial conference of 1929 that had recommended the removal of legal constraints imposed upon the legislative powers of the Dominion Parliaments.

21. For example, see *Hansard*, House of Lords, vol. 83, cols. 185–87, 195–96, and 202, November 26, 1931.

22. For example, see John Hartman Morgan, "Secession by Innuendo" *National Review* 106 (1936): 313.

23. The Statute of Westminster of 1290 is also known as *Quia Emptores*.

24. *Hansard*, House of Commons, vol. 259, cols. 1242–43, November 20, 1931.

25. Ibid., 1243.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

the Dominions would no longer occupy a subservient position to statutes passed by the Imperial Parliament. Previously, any Dominion law could be declared null and void if it was in conflict with a statute passed by the Imperial Parliament that extended to that Dominion. This position was recognized at common law and regulated by statute in the form of the Colonial Laws Validity Act, 1865. The provisions of the Colonial Laws Validity Act had actually been put into practice as recently as 1926 when Section 1025 of the Canadian Criminal Code, 1888 was struck down as being incompatible with certain statutes passed by the Imperial Parliament in London.[26] Section 2 of the Statute repealed the effect of the Colonial Laws Validity Act, 1865 with respect to the Dominions, and ensured that no Dominion law could ever again be struck down on this basis.

Section 3 of the Statute confirmed that the Dominions had the power to make laws that extended beyond the bounds of their own frontiers. There was a body of opinion that argued that the Dominions had always had the power to legislate with extraterritorial effect, but this was contradicted by a number of important judgments.[27] The Statute provided clarity on this important issue.[28]

The Statute confirmed the power of the Imperial Parliament to legislate for the Dominions. However, Section 4 provided that this power could only be used if the Dominion or Dominions in question had requested and consented to the legislation.[29] An American commentator noted that this provision "conjures up ghosts of the stuggle which led to the War for the Independence of the American Colonies in 1776."[30] In fact, as far as the Dominions of the twentieth century were concerned, this provision was not so revolutionary. It was nothing more than the formal enactment of a convention that had been recognized at the 1926 imperial conference and had been followed in practice for several preceding decades.[31]

The Preamble to the Statute reflected decisions made at the special imperial conference held in 1929 which, among other issues, discussed succession to the Crown.[32] The wording that was finally agreed recognized

26. *Nadan v. R.* (1926) A.C. 482 and (1926) 2 D.L.R. 177.

27. For example, see *Macleod v. Attorney-General for New South Wales* (1891) A.C. 455.

28. See Thomas Mohr, "The Foundations of Irish Extra-Territorial Legislation", *Irish Jurist* 40 (2005) 86–110.

29. The British government would later take the view that it was not obliged to automatically accede to such a request. See Anne Twomey, *The Australia Acts 1986 – Australia's Statutes of Independence* (Sydney: Federation Press, 2010), 23.

30. Hudson, "Notes on the Statute of Westminster, 1931," 276.

31. See Cmd. 2768, p. 18.

32. Cmd. 3479, para. 58–61. The special conference that met in London in 1929 was not a full imperial conference. Although this conference was a pivotal event in the history of the

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

"any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom." These provisions would prove to be of some significance when King Edward VIII abdicated in 1936. Before 1931, a single imperial statute passed at Westminster would have sufficed to recognize the abdication of Edward VIII and the accession of his brother George VI. Now, legislation had to be passed by each of the Dominion Parliaments to recognize the succession.

The Statute also contained a number of minor provisions that were of general interest. Section 5 of the Statute removed certain limitations on the power of the Dominion Parliaments to legislate in relation to merchant shipping. These limitations were reflected in Sections 735 and 736 of the Merchant Shipping Act, 1894. These restrictions had been activated as recently as 1925, when part of an Australian statute, the Navigation Act, 1912, was deemed null and void on the grounds of incompatibility.[33] The restrictive provisions were replaced with a common position based on voluntary agreement. This would later be enshrined in the Commonwealth Merchant Shipping Agreement of 1931.

Section 6 of the Statute removed the restrictions imposed by Sections 4 and 7 of the Colonial Courts of Admiralty Act, 1890 on the Dominions. Although it is not indicated in the text, this section of the Statute did not actually apply to the Irish Free State. The report of the special Imperial conference of 1929 recognized that the 1890 Act had never applied to the Irish Free State, where admiralty matters were governed by the Courts of Admiralty (Ireland) Act, 1867.[34]

3. The Irish Free State

The focus of this article is on the relationship between the Statute of Westminster and the Irish Free State. The particular emphasis on the impact of the Statute on Irish affairs in contemporary parliamentary debates is hardly surprising when it is considered that, in contrast to most of the other Dominions, the full provisions of this historic measure applied without any restriction or qualification to the Irish Free State in 1931. The most important provisions of the Statute, Sections 2 to 6, were not adopted by

British Empire, it defies easy classification. Its official name was the "conference on the operation of Dominion legislation and merchant shipping legislation."

33. *Union Steamship Co v. Commonwealth* (1925) 36 C.L.R. 130.

34. Cmd. 3479, para. 110.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Australia until 1942[35] or by New Zealand until 1947.[36] These provisions never applied to Newfoundland as a separate Dominion. Newfoundland ceased to be self-governing as a consequence of a financial serious crisis in 1933.[37] Canada agreed that its Constitution, at that time composed of imperial legislation, would remain unaffected by the provisions of the Statute.[38] Even South Africa passed a parliamentary resolution protecting certain entrenched provisions within its Constitution, the South Africa Act, 1909, from the impact of the Statute.[39] No equivalent action to exempt the Irish Constitution, or key aspects of it, from the impact of the Statute was ever undertaken by the Irish Parliament.

The special position of the Irish Free State with respect to the provisions of the Statute was an important consideration in ensuring that British parliamentary debates focused on this particular Dominion more than any other. The Irish also played a leading role in creating some of the most important provisions of this historic piece of legislation. These and other considerations require substantial consideration of the influence of the Irish Free State in any history of the Statute of Westminster. However, there were other special features of the Irish Free State that set it apart from Australia, Canada, and even South Africa. The Irish Free State did

35. Statute of Westminster Adoption Act, 1942. The adoption of these provisions of the Statute of Westminster was given retrospective effect from September 3, 1939, the day on which Australia entered the Second World War.

36. Statute of Westminster Adoption Act, 1947.

37. Newfoundland did not send delegates to the Operation of Dominion Legislation Conference in 1929 that created the first draft of the Statute of Westminster. It should be noted that Newfoundland was included in Section 1 of Statute, which provided the definition of a Dominion for the purposes of the Act. However, Section 10 named Newfoundland, along with Australia and New Zealand, as Dominions that would not be affected by key provisions of the Statute, Sections 2–6, until a statute passed by the parliament of the relevant Dominion adopted any or all of these provisions.

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

39. The resolution provided that "the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act." Hudson, "Notes on the Statute of Westminster, 1931," 266. The weakness of this constraint did not become entirely apparent for some time after the enactment of the Statute. In the 1950s, K.C. Wheare could still write "This resolution had no legal force, but it may well become a constitutional convention." Wheare, *The Statute of Westminster and Dominion Status*, 5th ed., 242. Soon afterwards, it became clear that the resolution would not prevent the South African Parliament from legislating in a manner incompatible with the entrenched provisions concerning the voting rights of non-white South Africans. See Denis V. Cowen, "The Entrenched Sections of the South Africa Act," *South African Law Journal* 70 (1953): 238–265; and Erwin N. Griswold, The 'Coloured Vote Case' in South Africa," *Harvard Law Review* 65 (1952): 1361–1374.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

not consider itself as constituting a self-governing Dominion. This, in turn, led it to deny that the Statute had any impact on Irish law.

The self-governing Irish state consisted of twenty-six counties in the south and west of the island of Ireland that had formerly been part of the United Kingdom. The Irish Free State was born out of an armed struggle against Crown forces that began with the Easter rising of 1916. The conflict recommenced in 1919 and only concluded in 1921 with the signature of the "Articles of Agreement for a Treaty between Great Britain and Ireland."[40] Article 1 of the 1921 Treaty provided that the Irish Free State would remain within the British Empire where it would enjoy the same constitutional status as the existing Dominions. Article 2 specifically linked certain key aspects of the constitutional status of the Irish Free State to that of Canada, the "eldest Dominion." Although it was clear that the Irish Free State was intended to be the latest addition to the existing Dominions, its origins in armed conflict and its former position as a part of the United Kingdom could never be entirely forgotten. It was difficult to reconcile this history with British perceptions as to the identity and history of the colonies of white settlement. These ensured that the Irish Free State was placed in a unique position among the Dominions of the British Empire. Indeed, there was an influential body of opinion throughout the Empire and within successive British governments that was reluctant to treat the Irish Free State in the same way as the other Dominions.[41] There was a corresponding body of opinion within the Irish Free State in the 1920s and 1930s that, coming from a different perspective, also rejected the very idea of an "Irish Dominion." The contention that the Irish Free State had come into existence as a Dominion was seen as incompatible with Irish identity and history.[42]

4. Irish Influence on Origins of the Statute of Westminster

Any analysis of the relationship between the Irish Free State and the Statute of Westminster must include a brief outline of the origins and provisions of

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

41. For example, see *Hansard,* House of Commons, vol. 260, cols. 303–4, November 24, 1931.

42. For example, see *Saorstát Éireann Official Handbook* (Dublin: Talbot, 1932), 72.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

this famous piece of legislation. The momentum behind the creation of the Statute was created in a number of imperial conferences that took place between 1926 and 1930. The imperial conferences were occasions in which the self-governing entities of the British Empire met to discuss matters of common interest in the late nineteenth and early twentieth centuries. The Irish had played a significant role in shaping each of the formal reports of the imperial conferences that preceded the enactment of the Statute. They had objected to the restrictions on the legislative sovereignty of the Dominions in a preparatory memorandum that was circulated at the imperial conference of 1926.[43] Detailed consideration of these matters was postponed until a special "conference on the operation of Dominion legislation" was convened in 1929. The British government made a determined effort to limit Irish demands for reform at the 1929 conference. It proposed a number of legal mechanisms for continuing the supremacy of imperial legislation considered fundamental to the unity of the British Empire. Although these proposals received staunch support from New Zealand, they were unacceptable to Canada, South Africa, and the Irish Free State.[44] The position advocated by the Irish government was finally accepted. The 1929 conference accepted that the overriding effect of imperial statutes over Dominion laws, as reflected in the Colonial Laws Validity Act, 1865, should come to an end.[45]

The Irish Free State was also a driving force behind the provisions of the Statute that recognized the power of the Dominion Parliaments to pass extraterritorial legislation. In the early 1920s, the Canadians attempted to persuade the British government to recognize that the Dominions could legislate with extraterritorial effect.[46] These efforts did not bear fruit. The Irish Free State revived this issue at the imperial conference of 1926 and at the special conference of 1929, using very different tactics than their Canadian predecessors. Instead of requesting concessions from the British government, the Irish presented this restriction on Dominion sovereignty as a deviant theory that required to be put to rest by clarifying the true position.[47] The British

43. University College Dublin Archives (henceforth UCDA), Costello Papers, P190/106 and McGilligan Papers, P35/184, untitled memorandum, November 2, 1926. See also UCDA, Blythe Papers, P24/217, memorandum on appeals to the Judicial Committee of the Privy Council.

44. TNA, CAB 32/69 D.L. 5th meeting of the 1929 conference on "Dominion Legislation".

45. TNA, CAB 32/69 D.L. 11.

46. TNA, CO 532/257, Colonial Office memorandum of April 4, 1924; and Library and Archives Canada (henceforth LAC), Oscar Skelton Fonds, MG30 D33, vol. 2, 2–14 Imperial Conference – Notes and Drafts.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

government saw the demand for identical legislative powers to those enjoyed by the Imperial Parliament at Westminster as an extravagant claim. It assumed that the other Dominions would accept limited powers to pass extraterritorial legislation.[48] This assumption proved to be incorrect when the Canadians and South Africans refused to accept the limitations that were proposed.[49] Although the British were particularly reluctant to recognize that the Irish Free State enjoyed full powers to pass extraterritorial legislation, the strong support provided to the Irish by Canada and South Africa made it impossible to refuse this concession. Section 3 of the Statute provided: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."[50]

Those who were hostile to the general scheme of the Statute often blamed the Irish Free State and South Africa for its introduction.[51] In Australia, former Prime Minister William Hughes deplored the fact that the British government "had listened to men who, in some instances, were newcomers to the table of the Empire, and had acceded to their demand that there should be such a modification of the existing relations between Great Britain and the countries they represented as would permit those countries to pose before the world as independent nations".[52] John Hartman Morgan, a leading authority on British constitutional law with strong unionist sympathies, noted with complete approval that the Statute of Westminster was often called the "Statute of Dublin" in loyal New Zealand.[53]

5. Irish Difficulties with the Statute of Westminster

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

48. TNA, DO 117/183.

49. TNA, CAB 32/69 D.L. 2nd Meeting.

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

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

52. Quoted in *Hansard*, House of Lords, vol. 83, col. 201, November 26, 1931.

53. John Hartman Morgan, "Secession by Innuendo," 313. John Hartman Morgan (1876–1955) was a British general, politician, lawyer, and professor of constitutional law at the University of London.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Crown. The British wished to retain this exclusive power, and advocated that an exception be made on this matter in the proposed Statute. This exception proved to be unacceptable and the British put forward a compromise proposal that would cover matters connected to the Crown together with the law of prize and the discipline of armed forces outside their own country. It was proposed that a formal agreement be concluded between all the governments whereby each would covenant to take no action for the purpose of altering the relevant areas of law without the consent of all. The agreement would be ratified by each Dominion Parliament and given the force of law by an imperial statute. The Canadians objected to this solution on the grounds that it savored of federalism and gave Westminster an overriding position.[54] Although the Irish had little enthusiasm for legal provisions that recognized the legislative dominance of the Parliament at Westminster, they seemed prepared to make a special exception in relation to succession to the Crown.[55] This was a subject that the Irish government did not want to raise in the Irish Parliament. The Canadians voiced fears during the 1929 conference that parliamentary debates on matters relating to the Crown would raise difficult political and religious questions, especially given the exclusion of Catholics under legislation relating to the succession.[56] These difficulties were far more acute in the Irish Free State than in Canada.[57] As events transpired, the Irish Parliament would be obliged to pass such legislation in 1936 when Edward VIII abdicated from the throne.[58]

There were other aspects of the Statute that caused some disquiet in Dublin. The Irish Free State, with some support from South Africa, made an unsuccessful attempt in 1929 to secure complete abolition of Westminster's powers to legislate for the Dominions irrespective of considerations of consent.[59] The retention by Westminster of a technical power to legislate for the Irish Free State was emphasized by domestic opponents of the Irish government, even though Irish consent was unlikely

54. TNA, DO 117/182, DO 117/184, and LAC, Oscar Skelton Fonds, MG30 D33, vol. 4, 4–1.

55. TNA, DO 117/184; and NAI, department of the Taoiseach S5340/13, memorandum by McGilligan, October 1929 and Michael McDunphy to Diarmuid O'Hegarty, October 19 1929. Oscar D. Skelton suggested the solution of simply listing possible alternative methods of dealing with such matters as the Crown. This was rejected by the Irish, who wanted the conference report to be a final document. TNA, DO 117/184.

56. LAC, Oscar Skelton Fonds, MG30 D33, vol. 4, 4–1.

57. See the comments of John A. Costello to the Gwyer Committee, November 14, 1929. UCDA, Costello Papers, P190/116.

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

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

to be forthcoming.[60] The retention of this power by Westminster seemed inconsistent with the principle of the equality of the Dominions and the United Kingdom that had been accepted at the imperial conference of 1926.[61] However, the formal abolition of Westminster's power to legislate for the Dominions in all circumstances was almost inconceivable for most British and Dominion statesmen. The Canadian prime minister, Richard B. Bennett told his Parliament that no imperial conference "has for a single moment thought of renouncing the supremacy of the Imperial Parliament, lest it be taken as a termination of the ties that bind together under the Crown all the overseas Dominions."[62] It is unlikely that the Statute could have been enacted without some provision guaranteeing the possibility of new imperial legislation for the Dominions in some shape or form. As events transpired, this provision permitted the passage of a number of important legislative acts in subsequent decades. These include such measures as the Australia Act, 1986 and the "patriation" of the Canadian Constitution in the Canada Act, 1982.

The most important difficulty that the Irish government had with the Statute of Westminster was that it was enacted as a British imperial statute that purported to extend to the Irish Free State along with other Dominions. Although the Irish government saw British recognition of enhanced autonomy as a positive development, it would have preferred that this be achieved without resort to imperial legislation. The alternatives of drawing up a formal agreement, something akin to an international treaty, or merely recognizing the changes in a report of an imperial conference, were not acceptable to the other Dominions.[63]

The Irish had not had everything their own way in the negotiations that hammered out the final form of the Statute. The inclusion of the Irish Free State in the provision that defined the term "Dominion" for the purposes of the act caused some disquiet among Irish commentators who refused to accept that their state was a Dominion.[64] However, as far as the Irish government was concerned, these drawbacks were easily outweighed by the beneficial provisions of the Statute. If sacrifices were required to win

60. *Dáil Debates,* vol. 39, cols. 2335–36, July 17, 1931. The Dáil is the lower house of the Irish Parliament.

61. Cmd. 2768, p. 14.

62. Arthur B. Keith, *Speeches and Documents on the British Dominions, 1918–1931* (Oxford: Oxford University Press, 1961), 256.

63. *Dáil Debates,* vol. 39, col. 2297, July 16, 1931 and *Seanad Debates*, vol. 14, cols. 1652–53, July 23, 1931.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

the support of other Dominions for these reforms, this was a price that the Irish government was prepared to pay.

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

The Irish had particular reason to welcome the provisions concerning the removal of limitations on legislative sovereignty contained within the Statute. Many aspects of the settlement imposed by the Anglo–Irish Treaty of 1921 were unpalatable to Irish nationalists. The Treaty made it clear that the Irish Free State would remain part of the British Empire. In addition, the Irish Free State was to be a constitutional monarchy and not a republic. The king and his representative, the governor general, were recognized as significant institutions in Irish internal affairs by the 1922 Constitution.[65] The Constitution of the Irish Free State also included an oath to be taken by all members of the Irish Parliament and government. The reference to the king in this oath provided one of the most divisive issues in Irish politics in the 1920s and 1930s.[66] These aspects of the Treaty settlement were exacerbated by British claims concerning limits on extraterritorial jurisdiction and insistance that the Irish Free State was still subject to imperial legislation enjoying superior status to Irish law under the Colonial Laws Validity Act, 1865.[67] In 1922, the Irish were forced to accept that the decisions of the Irish Supreme Court were subject to an appeal to the Judicial Committee of the Privy Council, the final appellate court for much of the British Empire.[68]

Soon after the signature of the Anglo–Irish Treaty of 1921, the British demanded that the Irish give a legal guarantee that they would continue to adhere to its provisions. This guarantee was to be enacted alongside the substantive articles of the Irish Constitution of the Irish Free State. The Irish Constitution of 1922 was enacted by parallel statutes, one passed by an Irish constituent assembly in Dublin and the other by the Imperial Parliament at Westminster. It was agreed that both statutes would provide that any provision of the Constitution, any constitutional amendment, and any law made under the Constitution that was inconsistent with the provisions of the 1921 Treaty, would be rendered void and

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

66. Article 17, Constitution of the Irish Free State. The oath was generally known as the "Oath of Allegiance" by Irish opponents of the 1921 Treaty.

67. See Thomas Mohr, "The Colonial Laws Validity Act and the Irish Free State," *Irish Jurist* 43 (2008): 21–44; and Mohr, "Irish Extra-Territorial Legislation," 86–110.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

inoperative.[69] This provision, sometimes called the “repugnancy clause,” was a serious impediment to the expansion of Irish sovereignty in the 1920s and early 1930s.[70]

The dual origins of the Irish Free State and its Constitution also proved to be problematic in the interwar years. The British and Irish each considered the statute enacted by their own Parliaments as enjoying primacy. The Irish were convinced that they had created their own self-governing state and their own Constitution by means of a statute passed by their constituent assembly. However, they were well aware that the British were equally convinced that the Irish Free State and its Constitution had been created by an imperial statute passed at Westminster in the same manner as the other Dominions of the British Empire. The Irish knew that the only way to remove the limitations of the Treaty settlement while avoiding a serious clash with the British was to find a means of doing so that was compatible with the British theory as to the legal origins of the Irish Free State. This was not easily done, as a result of the barrier imposed by the “repugnancy clause.” The obvious answer for the Irish was to pass an amending statute that removed this “repugnancy clause;” however, this was not possible because British imperial statutes outranked Dominion laws in terms of legal hierarchy. It may be recalled that this position was maintained by means of a rule of common law and also by means of the Colonial Laws Validity Act, 1865. This ensured that the limits on Irish sovereignty imposed by the 1921 Treaty were protected by a double padlock of repugnancy clause and supremacy of British imperial statutes. This padlock remained unbreakable throughout the 1920s.

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

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

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

7. The Irish Appeal to the Privy Council

In the early twentieth century, the "Judicial Committee of the Privy Council" heard appeals from most of the scattered territories that made up the British Empire. The awkwardness of its name ensured that it was often called by its short, although not entirely accurate, name of the "Privy Council." The Privy Council was the final court of appeal for the self-governing Dominions which, by 1922, included the newly created Irish Free State. Irish governments were never reconciled to the existence of an appeal to a court in London that could overrule the decisions of the Irish Supreme Court. British ministers were forced to apply intense pressure before their unhappy Irish counterparts finally agreed to recognize the Privy Council appeal in Article 66 of the Constitution of the Irish Free State. The appeal was seen as an integral aspect of Dominion status, and as a safeguard for unionists who remained in the Irish Free State.[71] A series of unfortunate decisions in the mid 1920s further alienated the Irish government from the Privy Council.[72] By 1926 the Irish government began to block appeals to the Privy Council by various means.[73] Before long, the government was openly advocating the formal abolition of the appeal. A determined effort to secure British agreement for the abolition of the appeal from the Irish courts was defeated at the imperial conference of 1930.[74] This reverse only reinforced the Irish desire to abolish the hated appeal to the Privy Council.

There were individuals in the United Kingdom who were equally convinced that the Irish Free State should not be permitted to abolish the appeal, which, they predicted, would form the first step in a wholesale revision of the settlement imposed by the 1921 Treaty. These persons were determined that the application of the Statute had to be limited with respect to the Irish Free State in order to protect the Privy Council appeal and the entire settlement imposed by the 1921 Treaty. The British government anticipated that the House of Lords was almost certain to introduce an amendment of this nature.[75] Edward Harding, the undersecretary at the

71. Thomas Mohr, "The Privy Council Appeal as a Minority Safeguard for the Protestant Community of the Irish Free State, 1922–1935," *Northern Ireland Legal Quarterly* 63 (2012): 365–95.

72. See Thomas Mohr, "Law without Loyalty – The Abolition of the Irish Appeal to the Privy Council," *Irish Jurist* 37 (2002): 187–226.

73. Ibid.

74. See Thomas Mohr, *The Irish Free State and the Legal Implications of Dominion Status, 1922–1937* (2007, unpublished thesis, University College Dublin), ch. 7.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Dominions Office, told the Irish high commissioner in London that he would be surprised if the House of Lords passed the Statute without an amendment relating to the Irish Free State.[76] Matters were not helped by the fact that the government's own leader of the House of Lords, Lord Hailsham, was widely known to oppose granting legal concessions to the Irish Free State.[77] The British prime minister, Ramsay MacDonald, promised that the provisions of the Parliament Act, 1911 would be set in motion in the event of an amendment by the House of Lords. He added that the worst-case scenario would be delay of approximately 18 months in enacting the Statute.[78] This was hardly encouraging news for an Irish government facing an election within the next 9 months. However, as events transpired, the main challenge took the more serious form of a proposal for amendment in the House of Commons. A successful amendment there would have had far more devastating consequences than mere delay. The Irish government could never accept a diluted version of the Statute, and the survival of the entire initiative would have been placed in jeopardy.

8. Attempts at Amendment in the House of Commons

On November 20, 1931, Colonel John Gretton MP proposed an amendment to the Statute of Westminster bill that was specifically aimed at the Irish Free State. Gretton was a wealthy Staffordshire brewer and one of the leading "die-hards" in the British Conservative Party. The "die-hards" were a group of Conservatives associated with staunch opposition to reform of the House of Lords and equally uncompromising opposition to concessions to Irish, and later Indian, nationalists.[79] Gretton had resigned as Conservative whip in 1922, in protest at the policies of the coalition government led by Lloyd George. He was outraged by the political settlement in Ireland that had culminated in the signing of the Anglo–Irish Treaty of 1921. A little less than 10 years later, Gretton sought legal advice as to the effect of the Statute on the Irish Free State. He also entered into correspondence with the Dominions secretary, James Thomas, on this matter.[80] Thomas explained that the Irish Free State would still be obliged to maintain the Treaty settlement on moral grounds after the enactment of the

76. NAI, Department of Foreign Affairs, 19/6, John Dulanty to Joseph Walshe, November 23, 1931. Harding had received a warning on this point from Claude Schuster. TNA, LCO 2/1190, Schuster to Harding, November 13, 1931.

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

78. NAI, Department of Foreign Affairs, 19/6, Dulanty to Walshe, November 23, 1931.

79. First Baron Gretton (1895–1947).

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Statute. He insisted that these moral considerations stood "on a higher plane than an obligation imposed by law."[81] Gretton was unimpressed by these assurances, and joined forces with such figures as Lord Carson, Lord Danesfort, "Annesley" Ashworth Somerville and John Hartman Morgan to circulate letters and hold public meetings that urged the amendment of the Statute with respect to the Irish Free State.[82] Gretton's proposed amendment was given additional force when it was endorsed by one of the British signatories of the 1921 Treaty. This person was Winston Churchill.

The original intention of the die-hard members of the House of Commons was to place the amending provisions in Section 7 of the bill. This provided "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930." The proposed amendment would insert the additional words "or to the Irish Free State Constitution Act, 1922."[83] By the time the amendment was finally introduced, it had been decided to place it in a section of its own and to expand the scope of protection: "Nothing in this Act shall be deemed to authorise the Legislature of the Irish Free State to repeal, amend, or alter the Irish Free State Agreement Act, 1922, or the Irish Free State Constitution Act, 1922, or so much of the Government of Ireland Act, 1920, as continues to be in force in Northern Ireland."[84]

This amendment had been drafted following the provision of legal advice from John Hartman Morgan. Morgan, like the great majority of British lawyers, considered the Irish Free State to have been created by imperial statute. As far as he was concerned, the Treaty settlement had been given force of law by the Irish Free State (Agreement) Act, 1922 and the Irish Free State Constitution Act, 1922. Morgan believed that the removal of the limiting provisions of the Colonial Laws Validity Act, 1865 would allow the Irish Free State to alter or repeal these imperial statutes. This would give the Irish Parliament the additional power to legislate contrary to the 1921 Treaty, and, therefore, allow the Irish Free State to repeal or amend the provisions of the Irish Constitution relating to such matters as the Privy Council appeal and the position of the king. It was

81. Ibid., Thomas to Gretton, November 16, 1931.

82. See the *Times,* November 16 and 17, 1931. Edward Carson, Baron Carson, (1854–1935) was a barrister, a judge who rose to the position of lord of appeal and the leader of the Irish Unionist Alliance and Ulster Unionist Party from 1910 to 1921. John Butcher, Baron Danesfort, (1853–1935) was a barrister and Conservative politician. Annesley Ashworth Somerville (1858–1942) was a Conservative politician born in Co. Cork and educated at Queen's College Cork. John Hartman Morgan (1876–1955), see note 53.

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

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

hoped that removing the Irish Free State (Agreement) Act, 1922 and the Irish Free State Constitution Act, 1922 from the effect of the Statute would ensure the preservation of the legal settlement with the Irish Free State.[85]

Colonel Gretton introduced his amendment by distinguishing the Irish Free State from the other Dominions. He argued that its position as the youngest and "least firmly established" Dominion set it apart from the others. Gretton also argued that the geographical position of the Irish Free State differentiated it from the more distant Dominions and made it a "special case."[86] Having made these points, Gretton and his supporters argued that their amendment was actually designed to remove an unfortunate distinction between the Irish Free State and the other Dominions that was inherent in the existing provisions of the Statute. The other Dominions had moved, by various means, to ensure that the Statute would not interfere with the provisions of their own Constitutions.[87] Colonel Gretton and his supporters argued that their proposed amendment would ensure that the Irish Free State Constitution, which had incorporated the text of the 1921 Treaty, would be similarly unaffected by the passage of the Statute.

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

In the words of the *Times*, there was an "unfriendly atmosphere" in the House of Commons on November 20, 1931 when Colonel Gretton's proposed amendment to the Statute was introduced. The House was sparsely attended, and the Dominions secretary, James Thomas, and the solicitor general, Thomas Inskip, were the only representatives of the government who were present. The attendance was largely composed of die-hards who loudly demanded that the Statute be amended in relation to the Irish Free State. There seemed a real possibility of a government defeat that would have put the entire Statute in jeopardy.[88] Thomas managed to

85. Morgan admitted his role as legal adviser to the supporters of Gretton's amendment in Morgan, "Secession by Innuendo," 313.

86. *Hansard,* House of Commons, vol. 260, cols. 303–4, November 24, 1931.

87. Sections 7 and 8 of the bill protected the integrity of the Constitutions of Canada, Australia, and New Zealand.

88. James Thomas was convinced that there was a real risk of the government suffering an embarrassing defeat on November 20. NAI, Department of Foreign Affairs, 19/6, John

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

calm the situation by announcing that "every consideration" would be given to the arguments behind the amendment, and stating "the Government will be asked to consider the whole situation in the light of the Debate that has taken place".[89] These assurances proved sufficient to buy time and stave off the immediate threat to the British government and to the Statute of Westminster itself.[90]

9. The Irish Response

Thomas' promise to consider Gretton's amendment caused much anxiety on the part of Irish government. The Irish took the threat of amending the Statute very seriously. An Irish memorandum noted that British acceptance of this amendment would "destroy the whole basis of the Irish Free State as we have conceived it" and set 9 years of government policy at naught.[91] The Irish prime minister in 1931 was William Thomas (W.T.) Cosgrave.[92] Cosgrave's government had largely adhered to the settlement enshrined in the 1921 Treaty and adopted a policy of constructive engagement with the Commonwealth. This was reflected in the importance placed by the Irish government in attending the imperial conferences of the 1920s and early 1930s. Cosgrave and his Cumann na nGaedheal Party had been in government since 1922, but by the early 1930s were facing a serious political challenge from Eamon de Valera and his supporters.[93] De Valera had been president of the underground government during the Anglo–Irish conflict of 1919–1921 and had opposed acceptance of the 1921 Treaty from the outset. In 1926, he founded a new political party, Fianna Fáil, and committed it to a program of extensive constitutional reforms that would radically alter the settlement enshrined in the 1921

Dulanty to Joseph Walshe, November 23, 1931. This assessment is supported by other sources. For example, see Department of Foreign Affairs, 19/6, John Dulanty to Joseph Walshe, November 23, 1931 and *The Times*, November 21, 1931.

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

90. Thomas later explained to the Irish high commissioner in London that he had only agreed to consider the amendments as part of a strategy of "playing for time." NAI, Department of Foreign Affairs, 19/6, John Dulanty to Joseph Walshe, November 23, 1931.

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

92. His official title was the "President of the Executive Council of the Irish Free State." For the origins of this title, see Thomas Mohr, "British Involvement in the Creation of the Constitution of the Irish Free State," *Dublin University Law Journal* 30 (2008) 166–86.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Treaty and in the Constitution of the Irish Free State.[94] By late 1931, it had become clear that de Valera had a good chance of winning an approaching general election.

It was not obvious to members of the Irish government that Thomas' apparent willingness to consider the proposed amendment to the Statute was based on a need to play for time. W.T. Cosgrave responded to the perceived threat by writing a letter to Prime Minister Ramsay MacDonald on November 21 that demanded resistance to Gretton's proposal.[95] Cosgrave insisted that the Statute of Westminster reflected agreements that had been approved by all participants at the imperial conference of 1930. However, the central theme of the letter concerned the position of the Anglo–Irish Treaty. Cosgrave wrote that the Irish government had reiterated time and again "that the Treaty is an agreement which can be altered only by consent."[96] He asserted that the Irish people believed in the solemnity of the Treaty, but added that any attempt by the British Parliament to alter its terms would undermine Irish faith in the sanctity of this instrument.[97]

Patrick McGilligan, the Irish minister for external affairs, echoed Cosgrave's initiative by writing his own letter to James Thomas. This letter followed the same approach as that sent by Cosgrave, although McGilligan placed greater emphasis on the danger of giving in to "reactionaries." McGilligan warned that there were "forces at work in both islands whose hatred for this country is so bitter that no consideration of general interest would stop them in their endeavour to overthrow the institutions built up here with so much toil and difficulty."[98] McGilligan also authorized John Dulanty, the Irish high commissioner in London, to impress upon James Thomas the "serious ill consequences" that would follow the acceptance of an amendment to the Statute relating to the Irish Free State.[99] It was, however, Cosgrave's intervention that made the real impact.

Cosgrave's letter was deplored by members of the Fianna Fáil opposition. They were disturbed by Cosgrave's commitment to securing bilateral consent before amending the Treaty settlement. Seán MacEntee, a leading

94. Fianna Fáil was founded as a political party in 1926. The name is usually translated as "Soldiers of Destiny."

95. NAI, Department of the Taoiseach, S5340/19, Cosgrave to MacDonald, November 21, 1931.

96. Ibid.

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

98. NAI, Department of the Taoiseach, S5340/19, McGilligan to Thomas, November 21, 1931.

99. NAI, Department of Foreign Affairs, 19/6, Dulanty to Walshe, November 23, 1931.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

figure in Fianna Fáil, called it "one of the most utterly foolish letters that ever passed from a spokesman of the Irish people into the hands of a British politician."[100] However, Cosgrave's emphasis on the solemnity of the Treaty and the need to maintain a position of good faith at the heart of Anglo–Irish relations had a different impact on a British audience. The British government was sufficiently impressed with the contents of the letter as to actually read out the vital paragraphs to the House of Commons.[101] Ramsay MacDonald declared that he agreed with every word of the letter.[102] Austen Chamberlain, one of the British signatories of the 1921 Treaty, revealed that he had been disinclined to intervene in the debate until the effect of Cosgrave's letter stirred him into open opposition to Gretton's amendment.[103] Even die-hard unionists seemed touched by Cosgrave's integrity.[104] The *Morning Post*, a unionist newspaper, described Cosgrave's letter as a "trump card."[105] One unionist member of Parliament, Arthur Shirley Benn, claimed that he had actually torn up his speech supporting Colonel Gretton's amendment on hearing Cosgrave's letter.[106]

Cosgrave was not without his admirers at Westminster. His government had received considerable praise for restoring stability to the Irish Free State. The Cosgrave administration and, perhaps more importantly, Cosgrave himself, enjoyed a certain amount of esteem even among die-hard unionists. Most of those who supported Gretton's amendment made sure to praise Cosgrave's record of adherence to the terms of the Treaty.[107] However, there were discordant voices that cast doubt on the apparent stability achieved by Cosgrave's government. Winston Churchill asserted that the Irish government had been forced to introduce public order legislation of such an extreme nature that it almost amounted to martial law.[108] It was well known that Cosgrave's majority in the Irish Parliament amounted to a mere handful of seats, and that this precarious position would be sorely tested in the approaching election. There was a real possibility that Cosgrave might be replaced by de Valera in a matter

100. *Dáil Debates*, vol. 41, col. 595, April 27, 1932.

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

102. NAI, Department of Foreign Affairs, 19/6, Dulanty to Walshe, November 23, 1931.

103. Ibid., November 25, 1931.

104. Ibid., November 27, 1931 and December 5, 1931; and *The Times*, November 26, 1931.

105. NAI, Department of Foreign Affairs, 19/6, Dulanty to Walshe, November 25, 1931.

106. Ibid., NAI, Department of Foreign Affairs, 19/6, Dulanty to Walshe, November 26, 1931.

107. For example, see *Hansard*, House of Commons, vol. 260, cols. 320 and 328–29, November 24, 1931.

108. Ibid., col. 329, November 24, 1931.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

of months. The political situation in the Irish Free State exerted a powerful influence throughout the debate on the Statute of Westminster.

The prospect of a de Valera government strengthened the resolve of those who supported the amendment of the Statute with respect to the Irish Free State. Supporters of Colonel Gretton's amendment refused to be convinced by the argument that the provisions of the Anglo–Irish Treaty rested on a moral plane that transcended questions of law. They highlighted the importance of maintaining existing legal controls even if it became clear that a future Irish government would defy them. Supporters of the amendment often asked whether de Valera would recognize the moral sanctity of the Treaty on which so much emphasis was laid. They also questioned the logical basis of handing the Irish the legal power to legislate contrary to the Treaty and then telling them that the exercise of such a power would be considered immoral.[109]

Supporters of Gretton's amendment also argued that its acceptance would actually strengthen the position of the Cosgrave administration in relation to its domestic opponents. It was argued that the removal of the legal bonds of the 1921 Treaty would ensure that the status of the Irish Free State would become the focus of every subsequent Irish election. Supporters of the proposed amendment concluded that this development would only be of benefit to Cosgrave's opponents. It was also argued that the retention of certain legal limits would provide continued grounds for restricting calls for radical change by those who did not recognize any moral dimension to the Treaty. These arguments were clearly out of line with political realities in the Irish Free State. If Gretton's amendment had been enacted, it would have been seen as a snub to the Cosgrave administration and its policy of constructive engagement with the Commonwealth. This is evident in the dismay with which the Cosgrave administration greeted the proposal. The proponents of Gretton's amendment were too intent on safeguarding the Treaty settlement to contemplate pragmatic means of extending the survival of the Cosgrave administration vis-à-vis their more extreme domestic opponents.[110]

109. For example, see *Hansard,* House of Commons, vol. 259, cols. 1209–10 and 1227–28, November 20, 1931.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

10. The Final Fate of Colonel Gretton's Amendment

The British government could never accept the proposed amendment to the Statute of Westminster, notwithstanding the strength of unionist opinion that lay behind the efforts of Gretton and Churchill. This was made clear in internal memoranda drafted for the benefit of the British government. These memoranda noted that the British government had accepted Irish arguments based on the moral sanctity of the Treaty that existed "on a higher plane than any legal sanction" at recent imperial conferences.[111] The introduction of legal safeguards at this eleventh hour would be seen as a reversal of the agreements reached at these conferences.[112] Acceptance of the amendment would have forced the British to violate established constitutional practice by enacting imperial legislation for a Dominion that no longer consented to the measure.[113] British officials also argued that it was difficult to see how their government could justify placing legal safeguards in the Statute relating to the Anglo– Irish Treaty without making similar demands with respect to the "entrenched clauses" in the South African Constitution that were designed to protect the rights of the English-speaking minority and the black majority. It was obvious to British officials that the latter course "would arouse the most violent opposition from General Hertzog, and cannot be contemplated for one moment."[114]

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

112. According to K.C. Wheare, the fact that these amendments were moved at all showed that some members of the British Parliament "had failed to grasp or were unwilling to accept the plain implications of the declaration of equality of status" declared at the Imperial Conference 1926, and its elaboration at the conferences of 1929 and 1930. Wheare, *The Statute of Westminster and Dominion Status*, 5th ed., 255–56.

113. K.C. Wheare argued that if the proposed amendments with respect to the Irish Free State had taken a different form they would have had a better chance of satisfying constitutional convention. Wheare contended that although the Parliament at Westminster could only enact clauses with respect to the Irish Free State that the Irish had requested and consented to, it was not constitutionally bound to enact any and every clause that the Irish had requested and consented to. This approach would have allowed the British Parliament to refuse to enact such clauses unless and until the Irish agreed to key amendments in the Statute of Westminster. Wheare, *The Statute of Westminster and Dominion Status*, 5th ed., 256–57. This approach was not feasible in 1931 when the provisions of the Statute had already been agreed upon at the Dominion Legislation Conference of 1929 and the Imperial Conference of 1930. British efforts to limit the impact of the proposed Statute of Westminster on the provisions of the 1921 Treaty at these conferences were not successful. See Thomas Mohr, *The Irish Free State*, ch. 6 and 7.

114. Ibid. See also *Hansard*, House of Commons, vol. 260, cols. 311–12, November 24, 1931.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

The British government would have faced serious opposition from the Dominions even if attempts to amend the Statute of Westminster were limited to the Irish Free State. Their Irish counterparts had long feared that an attempt would be made to introduce an amendment to the Statute of Westminster that would deny the Irish Free State the full benefit of this historic measure. In early 1931, Irish ministers went to the trouble of trying to secure advance support from the other Dominions in resisting a possible amendment of this nature. These efforts met with some success. Patrick McGilligan was able to tell the Dominions secretary, James Thomas, that Prime Minister Bennett of Canada had assured him that "the Free State would have the support of all members of the Commonwealth if the House of Lords were to attempt to tack on to the Statute of Westminster a provision saving the right of appeal in the Free State."[115] The British took this claim seriously and concluded that any attempt to limit the effect of the future Statute of Westminster with respect to the Irish Free State would meet opposition from Canada, Australia, and South Africa in addition to the Irish Free State itself.[116] In late 1931, the administration in London was a coalition government that had recently emerged from a general election and was attempting to deal with a continuing financial crisis. Civil servants were forced to make decisions without meaningful ministerial guidance, which led to mishandling of some aspects of the enactment of the Statute.[117] The British government was also struggling to meet a deadline of December 1, 1931 in enacting the Statute.[118] In these trying circumstances, the British government could not afford a serious clash with the Irish Free State that might drag in the other Dominions.

The desire not to undermine the Cosgrave administration on the eve of a general election provided the British government with an additional incentive to defeat Gretton's amendment. The positive record of the Irish government in adhering to the Treaty was often emphasized. The great exception to this otherwise positive record was the attitude toward the Privy Council appeal. One memorandum noted that the Irish had acted

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

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

117. A good example is the confusion and errors that surrounded provisions concerning the application of the Statute of Westminster to the Australian states. Twomey, *The Australia Acts 1986,* 47–49.

118. This deadline was imposed by the report of the Imperial Conference 1930, Cmd. 3717. The pressures facing the British government in late 1931 ensured that the Statute of Westminster did not receive royal assent until December 11, 1931.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

as "very wrong-headed people" and had only themselves to blame for the creation of suspicions on this issue.[119] However, British memoranda were prepared to concede that the Irish position was "honestly held."[120] It was noted that the Statute would do no more than place the Irish Parliament in the same position as the Imperial Parliament, which had always enjoyed the legal right to legislate contrary to the terms of the 1921 Treaty.[121] One memorandum summed up by asking whether the future relations of the members of the Commonwealth were to be based on trust and confidence or not. Using an American analogy, it asked whether the British government intended to deal with this issue "in the spirit of Chatham or of Lord North"?[122]

The supporters of Gretton's amendment were in no doubt that removal of the limiting effect of the Colonial Laws Validity Act, 1865 by the Statute of Westminster would give the Irish Free State the power to legislate contrary to imperial statutes that protected the settlement imposed by the 1921 Treaty. Some of the opponents of the amendment, most notably Thomas Inskip as solicitor general, denied the accuracy of this legal argument.[123] Stanley Baldwin, then lord president of the council, claimed that he had received legal advice that concluded "the binding character of the Articles of Agreement will not be altered by one jot or tittle by the passing of the Statute."[124] It is curious that none of the supporters of Gretton's amendment asked for a detailed explanation of these conclusions. The advice in question was based on perceptions that the signing of the 1921 Treaty had created a contractual relationship between the United Kingdom and the Irish Free State that was unaffected by the enactment of the Statute.[125] This argument was not tested in public in 1931. Instead, Stanley Baldwin was content to provide the blithe, although vague, conclusion "That Treaty will be just as binding, so I am advised after the passing of this Statute as before" and added "this country has every security."[126] Although Baldwin's prognostications had a calming effect in 1931, they would later return to haunt him.

119. TNA, LCO 2/1190, "Statute of Westminster," November 16, 1931.

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

121. Ibid., "Statute of Westminster," November 16, 1931.

122. Ibid., "Reasons why it is impossible to accept the amendment standing in the name of Colonel Gretton and others," undated.

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

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

125. This contractual argument was raised at the Imperial Conference of 1930. TNA, CAB 32/79 PM(30)5. It was later raised by Thomas Inskip during the pleadings in *Moore v. Attorney General* (1935) A.C. 484 at 488–89.

126. Ibid., 345.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Contemporary accounts indicate that an amendment to the Statute of Westminster was a seen as a real possibility when Gretton revealed his initiative on November 20.[127] This possibility had evaporated when the debate resumed 4 days later. The determined efforts of the British government undermined die-hard efforts to win support outside their traditional consituency. Thomas had spent the previous weekend meeting with the editor of the *Times* and also with the media magnate Lord Beaverbrook. These meetings had yielded undertakings that leading articles would appear in the *Times* and the *Daily Express* supporting the enactment of the Statute without amendment. The leadership of the Conservative Party was mobilized to counter the influence of Winston Churchill.[128] The amendment was finally defeated by 360 votes to 50. It was often asserted in 1931, and in the years that followed, that the amendment had been defeated by the argument that the Statute would not undermine the settlement imposed by the 1921 Anglo–Irish Treaty and by the emotional impact of Cosgrave's letter of November 21.[129] These arguments are not convincing. As illustrated earlier, constitutional practice and Dominion pressure ensured that the British government could never accept Gretton's amendment. Nevertheless, Cosgrave's intervention was useful in limiting support for Gretton's initiative. The Cosgrave administration has often been accused, from the 1920s to the present, of displaying a postcolonial psyche that craved the approval of former masters.[130] However, the positive reputation that had been cultivated by the Cosgrave government was vital to the process of advancing the status of the Irish Free State at the imperial conferences of the 1920s and early 1930s. This positive image proved its worth during the final enactment of the Statute of Westminster.

11. Attempts to Amendment in the House of Lords

The only serious blot on the record of the Cosgrave administration, as far as the British were concerned, was its position with respect to the appeal to the Privy Council. In addition to numerous instances of blocking the

127. See note 88.

128. Stanley Baldwin and Philip Snowden also seem to have been involved in lobbying the newspapers on this point. NAI, Department of Foreign Affairs, 19/6, Dulanty to Walshe, December 5, 1931.

129. For example see *Hansard,* House of Lords, vol. 83, col. 232, December 1, 1931, NAI, Department of Foreign Affairs, 5/3, Dulanty to Walshe, undated and *Irish Independent,* December 23, 1953.

130. For example, see John Joseph Lee, *Ireland 1912–1985* (Cambridge: Cambridge University Press, 1989), 173.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

appeal, members of the Irish government had made repeated declarations advocating its abolition in the very near future.[131] This issue provoked the second attempt at amending the Statute of Westminster with respect to the Irish Free State.

The amendment introduced in the House of Lords by Lord Danesfort did not seek to replicate the attempt made by Colonel Gretton to exclude the entire settlement enshrined in the 1921 Treaty from the effect of the Statute of Westminster. Instead, Danesfort confined his amendment to safeguarding the specific issue of the appeal to the Privy Council from the Irish courts. His proposed amendment would have inserted the following provisions into the Statute:

> Without prejudice to maintenance of the other provisions of the Treaty of sixth December, nineteen hundred and twenty-one, and of the Irish Free State (Agreement) Act, 1922, and of the Irish Free State Constitution Act, 1922, it is hereby declared that nothing in this Act shall be deemed to authorise the Parliament of the Irish Free State to alter or repeal Section two of the said Treaty or the provisions contained in the Irish Free State Constitution Act, 1922, as to the right of any person to petition His Majesty for leave to appeal from the Supreme Court of Southern Ireland to His Majesty in Council or the right of His Majesty to grant such leave.[132]

Danesfort was one of the most obdurate of the "southern unionists," persons of a unionist persusion who hailed from the territory of the Irish Free State, in the House of Lords. He made it clear that his amendment was motivated by a desire to safeguard the position of the unionist minority in the Irish Free State. Danesfort was in no doubt that the appeal to the Privy Council was an effective safeguard for the southern unionists who continued to reside in the Irish Free State.[133] He seemed prepared to accept Cosgrave's sincerity when the Irish premier wrote in his letter of November 21, 1931 "The Treaty is an agreement which can only be altered by consent." However, Danesfort noted that this statement was not sufficient to safeguard the appeal to the Privy Council, given that members of the Irish government had argued that the appeal to the Privy Council was not strictly required by the 1921 Treaty.[134] He also pointed to statements

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

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

133. Ibid. at 232–33.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

made by Cosgrave himself that advocated abolition of the Privy Council appeal.[135]

Danesfort's amendment was, in many respects, a poorly drafted provision. The reference to the Articles of Agreement of 1921 as "the Treaty" was particularly regrettable, given the stance of many British legal authorities on the legal nature of this instrument. Even though British officials, for the sake of convenience, often referred to the agreement reached in 1921 as a "treaty," it was often asserted that it was nothing of the sort in strict legal terms.[136] The reference to the "Supreme Court of Southern Ireland" was also an unfortunate, if not atypical, error. There was no such legal entity as "Southern Ireland" in existence in the 1930s. In any case, the proposed amendment had little chance of acceptance. Lord Hailsham spoke for the government when he made clear that the amendment would never be acceptable to the Dominions as a whole. The imposition of this provision against the will of the Irish Free State would be seen as incompatible with the insistence of the Dominions that they enjoyed a position of equality with the United Kingdom. Hailsham made it clear that acceptance of the amendment would damage Anglo–Irish relations, and would also have wider ramifications throughout the Empire.[137] Lord Midleton, a peer from the south of Ireland, added that even if the amendment were passed, it would prove ineffective as "We all know that we are not going by force of arms to reaffirm the right of appeal to the Privy Council."[138]

The British and Irish governments had long anticipated that the Irish appeal to the Privy Council would exert a powerful influence over the passage of the Statute of Westminster. The Irish had openly announced their intention to unilaterally abolish the appeal in the aftermath of their failure to secure multilateral agreement on this issue at the imperial conference of 1930.[139] Nevertheless, the Irish government had not introduced any legislation seeking to put this objective into action in the year preceding the enactment of the Statute. Public attention on this controversial issue seems to have declined during this period of inertia. The failure of the Irish government to follow through on its promises ensured that the much-anticipated abolition of the appeal could only be mentioned in the conditional tense. The most Danesfort could do was to call upon

135. Ibid. at 232–35.

136. For example, see *Hansard,* House of Commons, vol. 151, cols. 599–625, March 2, 1922.

137. *Hansard,* House of Lords, vol. 83, cols. 237–41, December 1, 1931.

138. Ibid. at 244.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Cosgrave to pause before deciding whether to execute a measure that would be seen as a "gross breach of faith."[140]

The fears expressed by Churchill, Gretton, and Danesfort were not without foundation. The Cosgrave administration had already drafted its proposed legislation for abolishing the Irish appeal to the Privy Council.[141] The Irish government decided to postpone the publication of this draft legislation in the period preceding the parliamentary debates on the Statute. As events transpired, the Cosgrave government never had the opportunity to enact this proposed legislation. It lost power in a general election that occurred within weeks of the enactment of the Statute of Westminster.

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

The Statute of Westminster was finally passed on December 11, 1931. The Cosgrave government had played a leading role in the creation of the Statute, and openly claimed credit for this achievement. A press statement issued by the Irish government boasted "it must be said that while very valuable help was received from Canada and South Africa the brunt of the task was admittedly borne by our Government."[142] More importantly, the Irish government had ensured that the final form of the Statute applied without restriction or qualification to the Irish Free State. The Cosgrave administration trumpeted the final enactmentment as representing "the end of an epoch" and as marking a "mile-stone on the onward march of this nation."[143] However, the Cosgrave adminisration did not get the credit that it must have expected for this achievement. There were a number of reasons for this development, which had a long-term impact on Irish politics.

The first reason concerns the reaction of Cosgrave's opponents in the Irish Parliament. Although is unlikely that Irish ministers expected much credit from the parliamentary opposition, they must have been chagrined at accusations that their efforts had actually retarded the advance of Irish sovereignty.[144] Seán T. O'Kelly, a future Irish president, accused the

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

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

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

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

144. Thomas Johnson did, however, propose a resolution in the Seanad that would have commended the minister for external affairs for his efforts in "procuring the full

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

Cosgrave administration of having "worked with all their might to bind us more closely to the British Empire, politically, economically and financially."[145] Much Irish criticism of the Statute of Westminster focused on its status as a British imperial statute that purported to apply to the Irish Free State. The government was accused of having recognized British hegemony and of having "used its power to fasten for ever upon us, in so far as they can do so, this Dominion status."[146] Seán Lemass, a future Irish prime minister, insisted "What one British Parliament has enacted another British Parliament can repeal … without the consent of the Parliament of this State or of this Dominion."[147] Fossilized fears of "Imperial federation," a movement that sought to convert the British Empire into a single state, still lingered in some nooks and crannies of Irish political life. Although this movement was in obvious decline in the 1930s, the Statute of Westminster was sometimes portrayed in Ireland as a possible cornerstone for a future imperial constitution.[148] Patrick McGilligan was forced to refute speculation of this nature on numerous occasions, notwithstanding the obvious reality that the Statute had placed the final nail in the coffin of grandiose dreams of imperial federation.[149]

The second reason for the failure of the Cosgrave administration to win electoral credit for securing the statute concerns the stance taken by Irish ministers in relation to this historical piece of legislation. Patrick McGilligan emphasized "The passing of this Statute writes no new Constitution for this State." He added "Everything that is there I claim, and have claimed, we possess already."[150] McGilligan and his

establishment and international recognition of the independence and sovereign status of Saorstát Éireann." *Seanad Debates,* vol. 14, col. 1607, July 23, 1931.

145. *Dáil Debates,* vol. 39, cols. 2309–10, July 16, 1931.

146. Ibid. at 2309.

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

148. *Dáil Debates,* vol. 39, col. 2296 July 16, 1931 and *Seanad Debates*, vol. 14, col. 1621–22 and 1627, July 23, 1931.

149. *Seanad Debates,* vol. 14, col. 1627, July 23, 1931.

150. Ibid., col. 1653, July 23, 1931. George Gavan Duffy, a signatory of the 1921 Treaty, future judge of the Irish High Court (1936) and later President of the High Court (1946), advised the de Valera government in 1932 "The Statute of Westminster adds little or nothing to the powers of the Irish Free State or the Oireachtas" (the Irish parliament). NAI, Department of the Taoiseach, S12046, George Gavan Duffy, "The Treaty and the Statute of Westminster," March 25, 1932.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

governmental colleagues argued that the reforming provisions of the Statute were simply declaratory of powers that the Irish Free State had enjoyed since its foundation.[151] The legislative limits imposed by the common law and reflected in the Colonial Laws Validity Act, 1865 had applied to the other Dominions, but had never applied to the Irish Free State. The limits on extraterritiorial jurisdiction that had applied to the other Dominions had never applied to the Irish Free State. The Imperial Parliament could never pass imperial legislation for the Irish Free State after 1922, in contrast to the other Dominions. The Privy Council appeal should never have applied to the Irish Free State even though it was a key institution in the other Dominions. The stance maintained by the Irish government in 1931, like that of their parliamentary opponents, denied that the Irish Free State had ever really constituted a Dominion.[152] This is reflected in Patrick McGilligan's statement to the Seanad (the Irish senate) in 1931: "We have a peculiar position, quite different from the position of the Dominions."[153] McGilligan went further in presenting the Irish Free State as enjoying greater autonomy than the other Dominions when he declared that his country was "the first of the Commonwealth States to have attained a position of equality with Great Britain."[154]

There are a number of difficulties with the position that the provisions of the Statute of Westminster were merely declaratory of a position of autonomy that had been enjoyed by the Irish Free State since the time of its foundation. If the Irish Free State already enjoyed the autonomy granted by the Statute of Westminster, why did it devote so much time and effort in bringing key aspects of this measure into being at successive imperial conferences? Any contention that these efforts were motivated by an unselfish desire to advance the position of the other Dominions must be rejected as unreal and inconsistent with the history of the imperial conferences. The alternative explanation, that the Irish merely wished to gain British recognition of their pre-existing position, is also problematic.[155] First, it should be emphasized that the provisions of the Statute did not

151. NAI, Department of Foreign Affairs, 5/3, press statement by Patrick McGilligan on the Statute of Westminster, December 11, 1931.

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

153. *Seanad Debates,* vol. 14, col. 1652, July 23, 1931.

154. NAI, Department of Foreign Affairs, 5/3, Press release by Patrick McGilligan, December 11, 1931.

155. Ibid.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

apply retrospectively. In addition, the actions of the Cosgrave administration in shelving the publication of key constitutional reforms in order to facilitate the enactment of the Statute of Westminster in 1931 are difficult to reconcile with the confident declarations of pre-existing autonomy that followed once the Statute was safely in force.[156] Finally, the Irish government had not always claimed all aspects of the enhanced autonomy offered by the Statute of Westminster. For example, it should be remembered that Section 3 of the Statute provided that the Dominion parliaments could enact legislation that had extraterritorial effect. This was not a power that was claimed by Irish Free State at the time of its foundation. In 1922, the Irish government actually rejected a proposed amendment to the draft Irish Constitution that would have confirmed that the Irish Parliament enjoyed the power to legislate with extraterritorial effect.[157] Kevin O'Higgins, the minister for home affairs, pointed out that a provision of this nature would be meaningless unless it was recognized by other countries.[158]

These difficulties have not prevented the Irish courts from maintaining the position that the Statute of Westminster was merely declaratory of a legal position enjoyed by the Irish Free State since the time of its creation.[159] However, the adoption of this stance in 1931 was not conducive to winning popular acclaim for the achievements of the Cosgrave administration. Where was the merit in achieving new autonomy if the State had always enjoyed such autonomy from the time of its foundation? The argument that the achievement lay in securing British recognition for the pre-existing situation as an "Act of Renunciation" was less likely to capture the attention of the public.[160] What little credit was derived from this argument was easily outweighed by the government's inability to answer awkward questions on the right to secede from the Empire and by the public nature of the failure to remove the appeal to the Privy Council.

The third reason for the failure of the Cosgrave administration to win popular acclaim for securing the advantagous provisions of the Statute

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

157. *Dáil Debates,* vol. 1, cols. 1742–43, October 19, 1922.

158. Ibid., col. 1743, October 1, 1922. See also Mohr, "Irish Extra-Territorial Legislation," *Irish Jurist* 40 (2005) 86–110.

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

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

was its loss of power a few weeks after the enactment of the Statute of Westminster. The new government led by Eamon de Valera soon moved to remove the key features of the 1921 Treaty settlement. Over the next 5 years, the de Valera administration dismantled the settlement imposed by the 1921 Treaty piece by piece. A deeply controversial parliamentary oath that mentioned King George V was removed.[161] The powers of the governor general, the king's representative in the Irish Free State, were diluted.[162] The appeal to the Judicial Committee of the Privy Council, a vital policy objective for the Cosgrave administration, was finally abolished.[163] The Irish had never had any enthusiasm for the provisions of the Statute that required legislation from each Dominion with respect to succession to the Crown. Nevertheless, this aspect of the Statute actually proved to be beneficial to the Irish. In 1936, Eamon de Valera made use of the need for legislation to recognize the abdication of King Edward VIII to remove all references to the king from the text of the Constitution of the Irish Free State.[164] De Valera cut the Gordian knot in 1937 when he abolished the Irish Constitition of 1922, regarded by many Irish nationalists as too closely associated with the 1921 Treaty, and replaced it with the Constitution that remains in force in Ireland today. These reforms did much to solidify Fianna Fáil dominance of Irish politics for the next seven decades.

Although the Statute of Westminster was of inestimable importance in facilitating this program of constitutional change, de Valera was careful not to justify his reforms by reference to its provisions. De Valera did examine the possibility of doing so soon after coming to power in 1932.[165] Open reliance on the provisions of the Statute would have allowed de Valera to circumvent a number of obstacles presented by domestic Irish law. Many legal commentators argued that the Irish constituent assembly of 1922 was a very different entity from subsequent Irish parliaments.[166] This argument suggested that subsequent Irish parliaments could not

161. Constitution (Removal of Oath) Act, 1933.

162. Constitution (Amendment No. 20) Act, 1933; and Constitution (Amendment No. 21) Act, 1933.

163. Constitution (Amendment No. 22) Act, 1933.

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

165. NAI, Department of the Taoiseach, S12046, John J. Hearne, "The legal basis of the establishment of the Irish Free State," March 31, 1932.

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

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

amend the statutory provisions enacted by the constituent assembly. These included the infamous "repugnancy clause" that rendered Irish laws void and inoperative if found to be incompatible with the provisions of the 1921 Treaty.[167] The provisions of the Statute of Westminster ensured that no such obstacles existed with respect to the amendment of the restrictive provisions of the British imperial statute that also purported to enact the Irish Constitution of 1922. By a strange twist of fate, the Statute of Westminster offered greater autonomy to the Irish Free State than was provided by Irish domestic law. However, de Valera was informed by his legal advisors that the use of the provisions of the Statute to justify his program of constitutional reforms would sacrifice key principles that were held dear by many Irish nationalists.[168] This approach would have conceded that the Irish Free State itself had been created by means of imperial statute, that it was not autochtonous and that the Irish Free State had come into existence as a Dominion of the British Empire. All of these claims were and remain anathema to many Irish people.

De Valera finally decided to follow the counsel of his legal advisers and did not rely directly on the legal provisions of the Statute in initiating his constitutional reforms. Instead, he tended to base his arguments, at least when speaking before a domestic audience, on the principle of co-equality and the general enhancement in the status of the Dominions.[169] From the Irish perspective, the Statute was useful in that it reflected British recognition of the changed situation within the Commonwealth.[170] However, even in this limited context, the Irish were reluctant to place too much emphasis on the Statute. For example, de Valera had considered making extensive use of the Statute in the early drafts of his speech on the introduction of legislation for the abolition of the Privy Council appeal. De Valera seems to have thought better of this, and all references to the Statute of Westminster were removed from the speech that was finally delivered.[171]

167. See note 70.

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

169. For example, see *Dáil Debates*, vol. 41, col. 570, April 27, 1932. De Valera's ambiguous stance illustrates the danger of assuming that Irish historical works that devote attention to Irish participation at the Imperial Conferences of 1926 and 1930 necessarily admit that the Statute of Westminster altered the constitutional position of the Irish Free State.

170. For example, see *Dáil Debates,* vol. 41, cols. 1090–91, April 29, 1932 and NAI, Department of the Taoiseach, S12046, George Gavan Duffy, "The Treaty and the Statute of Westminster," March 25, 1932.

171. NAI, Department of Foreign Affairs, 3/1, draft speech for Constitution (Amendment No. 22) Act, 1933; and *Dáil Debates*, vol. 49, cols. 2115–16, October 4, 1933.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

The ambiguous stance adopted by de Valera did not limit the utility of the Statute of Westminster in inhibiting the British government from successfully challenging the legality of these measures. This became apparent in 1935, when the Judicial Committee of the Privy Council rejected a legal challenge to key aspects of de Valera's program of constitutional reform. In *Moore v. Attorney General*, the Privy Council held that it had to be assumed that the Irish Free State was acting under the authority of the Statute of Westminster in initiating these constitutional reforms, notwithstanding its refusal to justify its actions by reference to the provisions of that historic piece of legislation.[172] The court summarized the significance of the Statute to the advance of Irish sovereignty in a single sentence: "The simplest way of stating the situation is to say that the Statute of Westminster gave to the Irish Free State a power under which they could abrogate the Treaty, and that, as a matter of law, they have availed themselves of that power."[173]

The supporters of Colonel Gretton's attempt to amend the provisions of the Statute of Westminster in relation to the Irish Free State made no attempt to hide their dismay and fury in the aftermath of this decision. They focused their ire on Thomas Inskip, who now held the office of attorney general. Inskip had been among those who had insisted that the enactment of the Statute would not confer unfettered powers upon the Irish Free State to abrogate the settlement embodied in the 1921 Treaty. He raised the argument that the 1921 Treaty had created a contractual relationship between the United Kingdom and the Irish Free State that was unaffected by the enactment of the Statute of Westminster, in his submissions to the Privy Council in *Moore v. Attorney General*.[174] This argument had failed to persuade the Privy Council to rule against de Valera's program of constitutional reform.[175] Winston Churchill subjected Inskip to a deluge of criticism, blaming him, among others, for giving the government "wrong

172. (1935) I.R. 472 at 487 and (1935) A.C. 484 at 499.

173. (1935) I.R. 472 at 486–87 and (1935) A.C. 484 at 499. It is interesting to note that Viscount Sankey, who delivered this judgment on behalf of the entire Judicial Committee of the Privy Council, was also responsible for moving the Statute of Westminster through the House of Lords in 1931. See *Hansard,* House of Lords, vol. 83, cols. 176–228, November 26, 1931. K.C. Wheare criticizes the approach taken by the Privy Council in determining the impact of the Statute on the Irish Free State. Wheare, *The Statute of Westminster and Dominion Status*, 5th ed., 265–71.

174. (1935) A.C. 484 at 488–89.

175. The judgment of the Privy Council stated "It would be out of place to criticise the legislation enacted by the Irish Free State Legislature. But the Board desire to add that they are expressing no opinion upon any contractual obligation under which, regard being had to the terms of the Treaty, the Irish Free State lay." (1935) I.R. 472 at 486.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

advice both legal and political."[176] Stanley Baldwin, who had only returned to the post of prime minister a month earlier, was not allowed to forget the assurance that he had given in 1931 that the provisions of the 1921 Treaty would remain "just as binding" after the enactment of the Statute.[177] Churchill was convinced that the blatant incompetence displayed by the British government in 1931 had nullified his own efforts, along with those of his former colleagues in the Lloyd George administration, during the negotiations that had preceded the signing of the 1921 Treaty.[178]

13. Wider Perspectives

Perceptions of the Statute of Westminster are often influenced by the historical context of the former Dominion that is the focus of a particular piece of scholarship. In Canada, the Statute is often placed alongside the 1926 Balfour declaration, which recognized the equality of the Dominions with the United Kingdom, as a key incident in an evolution toward full sovereignty.[179] The status of the Statute in Canada has always been less controversial than in other former parts of the British Empire. This is reflected in the practice of celebrating Statute of Westminster Day every December 11, the date of enactment of this historic piece of legislation, which is marked by flying the Union flag alongside the Canadian flag over federal buildings.[180] In Australia, the Statute tends to be associated with the impact of the Second World War, as reflected in the preamble of that country's Statute of Westminster Adoption Act 1942.[181] The adoption of the main provisions of the Statute were even given retroactive effect from September 3, 1939, the day in which Australia entered the Second World War.[182] In South Africa, the conferring of greater powers of

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

177. Ibid. at 443.

178. Ibid. at 439–47.

179. See notes 8 and 11.

180. The Union flag or Union jack is often called the "Royal Union flag" in Canada. http://www.pch.gc.ca/pgm/ceem-cced/symbl/union-eng.cfm (January 13, 2013).

181. "An Act to remove Doubts as to the Validity of certain Commonwealth Legislation, to obviate Delays occurring in its Passage, and to effect certain related purposes, by adopting certain Sections of the Statute of Westminster, 1931, as from the Commencement of the War between His Majesty the King and Germany."

182. Section 3, Statute of Westminster Adoption Act, 1942. Retrospective effect was deemed to be necessary as there were doubts as to the validity of parts of the Navigation Act, 1912 and the National Security Act, 1939 on the grounds that they could be considered incompatible with an Imperial statute, the Merchant Shipping Act, 1894. Twomey, *The Australia Acts 1986,* 22.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

self-government on the dominant white minority is often presented as a prelude to the imposition of apartheid. The enhanced autonomy offered by the Statute released the South African Parliament from the restriction of certain entrenched clauses of the South African Constitution, including provisions designed to safeguard voting rights.[183] This eventually allowed non-white South Africans to be gradually deprived of a meaningful right to vote.[184] The position of New Zealand as the last Dominion to adopt the most important provisions of the Statute, which it did in 1947, is used to illustrate the relative longevity of imperial sentiment in that country.[185] According to Prime Minister Peter Fraser, this restraint had been motivated by a desire to avoid allowing enemy propagandists to misrepresent such a measure as evidence of the disintegration of the British Commonwealth, a claim that had also been made in Australia prior to 1942.[186] New Zealand finally adopted the operative provisions of the Statute of Westminster in order to facilitate constitutional reform that included the abolition of its upper house of Parliament.[187] The unfortunate fate of the Dominion of Newfoundland is reflected in the position that the significant provisions of the Statute never applied until it became a Canadian province in 1949.[188] In the United Kingdom, the Statute of Westminster is used as an interesting example of limits on the principle of parliamentary sovereignty.[189] The examples of Irish scholarship that do give some attention to the Statute of Westminster almost invariably associate it with the abolition of the settlement imposed by the 1921 Anglo–Irish Treaty.[190]

183. South Africa Act, 1909, Sections 35 and 152.

184. See note 39.

185. Michael King, *The Penguin History of New Zealand* (North Shore: Penguin, 2003), 366–67 and 421–22.

186. Wheare, *The Statute of Westminster and Dominion Status,* 4n: 1949) 216 h and 324.

187. The New Zealand Parliament passed the Statute of Westminster Adoption Act, 1947, and the New Zealand Constitution (Request and Consent) Act, 1947 received the royal assent on December 10, 1947. The latter measure was supplemented by the New Zealand Constitution (Amendment) Act, 1947 passed at Westminster.

188. Wheare, *The Statute of Westminster and Dominion Status*, 235–38. Section 2 of the Statute was extended to the Canadian provinces under Section 7(2). No equivalent provision existed with respect to the Australian states. See Twomey, *The Australia Acts 1986*.

189. For example, see Emlyn Capel Stewart Wade's introduction in Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th edn., 1964), lxxxvii–xcii; W. Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 1933), 129–34; and Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 148.

190. For example, see Leo Kohn, *The Constitution of the Irish Free State* (London: Allen and Unwin, 1932), 377 and 380; and Alan J. Ward, *The Irish Constitutional Tradition* (Washington D.C: Catholic University Press of America, 1994), 216, 226– 227.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

However, the Statute of Westminster also has a wider historical significance that is of relevance to all of these countries as part of a larger community. It has already been noted that the enactment of the Statute facilitated the recognition of the Dominions as sovereign states in leading works on public international law. Few authorities before the outbreak of the First World War were prepared to recognize that the Dominions had any separate status or personality under international law. The 1912 edition of Oppenheim's *International Law* maintained that the Dominions "have no international position whatever; they are, from the standpoint of the Law of Nations, nothing else than colonial portions of the mother-country."[191] The participation of separate Dominion delegations at the peace talks that followed the First World War did much to change this position. The Dominions were founding members of the League of Nations with the exceptions of Newfoundland, which declined separate representation, and the Irish Free State, which had not yet come into existence.[192] Nevertheless, these developments did not result in the immediate recognition of the Dominions as sovereign states. The 1920 edition of Oppenheim's *International Law* admitted that the Dominions now enjoyed "a position in International Law," but added that it "defies exact definition."[193] As mentioned earlier, an examination of the question as to whether the Dominions constituted sovereign states in 1929 produced a definite conclusion in the negative. P.J. Noel Baker concluded that the Dominions could be considered "part sovereign States," but confidently concluded "they are not wholly 'independent sovereign States' like France or Belgium."[194]

The Dominion experience of a slow evolution to the status of sovereign states, in which the Statute of Westminster acts as a useful symbol, is difficult to reconcile with constitutive theories of state recognition in public international law. These theories maintain that the creation of a new sovereign state and its endowment with legal personality is derived from acts of recognition by other states.[195] The process by which a state obtains full

191. Lassa Oppenheim *International Law: A Treatise*, vol. 1 (London: Longmans, Green and Co., 1912), 110.

192. The Irish Free State finally joined the League of Nations in 1923. Michael Kennedy, "The Irish Free State and the League of Nations, 1922–32: The Wider Implications," *Irish Studies in International Affairs* 3 (1992): 9–23.

193. Lassa Oppenheim and Ronald F. Roxburgh, *International Law: A Treatise*, vol. 1 (London: Longmans, Green and Co., 3rd edn., 1920), 170.

194. P.J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (London: Longmans, 1929), 356.

195. Malcolm N. Shaw, *International Law* (Cambridge: Cambridge Unversity Press, 1997), 296–97.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

independence has little relevance in the context of constitutive theories. The main obstacle in applying this approach to the former Dominions lies in the absence of clear acts of recognition from other states that these self-governing enities were now sovereign states and not autonomous parts of the British Empire. It is impossible to explain the sovereign status of the former Dominions without some reference to the history of their slow evolution toward full sovereignty. The evolutionary process followed by the Dominions is only compatible with declaratory theories of state recognition. This approach maintains that recognition is no more than an acceptance by states of an already existing situation.[196] The advance of Dominion autonomy, in which the Statute of Westminster was a key part, supports the contention that the process of transformation toward full sovereignty is not reliant on acts of recognition by other states.

Champions of declaratory theories of state recognition faced their own barriers in recognizing the full extent of Dominion autonomy before 1931. These difficulties were based on the importance of unwritten custom to Dominion autonomy in the early twentieth century.[197] The declaratory appraoch has been heavily influenced by traditional postivist thought on the supremacy of the state.[198] Austinian theories of tacit recognition of custom can never be fully reconciled with the evolution of the Dominions toward greater autonomy.[199] In the early twentieth century, it had become clear that Westminster could only legislate for a Dominion if it had the consent of that Dominion. It was never possible to pinpoint the exact moment in which this custom came into existence or when the Parliament at Westminster became aware of this reality. Evidence of tacit recognition through enforcement by the courts cannot apply to the Dominions, as this custom was never challenged in the context of litigation. The Statute of Westminster removed the barriers that prevented traditional positivist thought from recognizing the legal status of important aspects of Dominion autonomy.

This is not to say that all the provisions of the Statute of Westminster were merely declaratory in nature. In particular, the removal of the position under which Dominion laws could be declared null and void on the grounds of incompatibility with British imperial statutes was a new and

196. Ibid.

197. Oppenheim recognized in 1920 that the Dominions had "silently worked changes, far-reaching but incapable of precise definition, in the Constitution of the Empire, so that the written law inaccurately represents the actual situation." Oppenheim and Roxburgh, *International Law: A Treatise,* 1:170.

198. Shaw, *International Law,* 296–97.

199. The concept of recognition by "tacit order" was robustly criticised by H.L.A. Hart in *The Concept of Law*, 43–48.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

important advance in Dominion autonomy. The Statute was an important step in the evolution of the Dominions in becoming fully sovereign states, but it was only one step among many. A failure to recognize this reality has led to some exaggeration of the significance of the Statute of Westminster in historical and legal scholarship emanating from former parts of the British Empire.[200] Even courts have occasionally fallen into this trap.[201] The Statute tempts scholars and lawyers with a neat and tidy shortcut that avoids having to describe a lengthy and complex evolution from colonial status to full sovereignty. The only exception to this trend concerns scholarship focusing on the Irish Free State, which has not always recognized the full significance of the Statute in the development of Irish sovereignty. The Irish courts maintain the position that the Statute of Westminster had no direct impact on Irish law.[202]

14. Conclusion

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

200. A Canadian scholar recognizes this reality by noting “The Statute of Westminster is the one act most often pointed to in deciding when Canada became sovereign.” Brian M. Mazer, “Sovereignty and Canada: An Examination of Canadian Sovereignty from a Legal Perspective,” *Saskatchewan Law Review* 42 (1977–1978): 1.

201. The Judicial Committee of the Privy Council once noted that it was necessary “to pass the Statute of Westminster 1931 in order to confer independence and Sovereignty on the six Dominions therein mentioned.” *Madzimbamuto v. Lardner-Burke* (1969) 1 AC 645 at 722.

202. See note 19.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press

the impact of the Statute on the other Dominions and on the British Empire as a whole to the margins of political debate. The extent to which Anglo–Irish relations dominated the deliberations of the British government is illustrated by the resistance of the Dominions Office to a late amendment to the Statute of Westminster concerning the position of the Australian states. This position was based on fears that the Irish Free State could demand similar eleventh hour amendments.[203] The extent of the Irish influence on the Statute of Westminster is not always appreciated by scholars of imperial and Commonwealth history or by scholars of Irish history.

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

203. Twomey, *The Australia Acts 1986*, 47–48.

https://doi.org/10.1017/S073824801300045X Published online by Cambridge University Press