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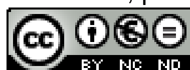

British Imperial Statutes and Irish Law

Imperial Statutes Passed Before the Creation of the Irish Free State

THOMAS MOHR

This is the first of two articles examining the relationship between British Imperial statutes and Irish law in the early years of the self-governing Irish state. British Imperial statutes represent a potential source of Irish law that has been rejected or ignored by Irish lawyers for over seven decades. This source of law is still perceived to constitute a threat to cherished ideals as to the nature and origins of the self-governing Irish state. The acceptance of Imperial legislation is perceived as being inconsistent with the autochthony of the Irish state. British Imperial legislation also represents a challenge to the assertion that the Irish state came into existence with a position of full legislative sovereignty. This article argues that, although Irish lawyers in the early twentieth century had real difficulties with this potential source of Irish law, they could not reject it with the same confidence as their counterparts in the early twenty first century. This article focuses on the assertion made by successive British governments that the birth of the Irish Free State in 1922 necessarily entailed the incorporation of a considerable body of existing Imperial legislation into Irish law. It will also examine the contention that this Imperial legislation enjoyed a superior status over Irish law under the provisions of the Colonial Laws Validity Act 1865. This article confines its analysis to Imperial legislation passed before the emergence of the Irish Free State in 1922. A subsequent article will examine the significance of Imperial statutes passed after the creation of the Irish Free State that were intended to apply to that self-governing entity. Both articles raise wider questions as to how concepts of national identity influence the acceptance or rejection of particular sources of law.

INTRODUCTION

In 2004 the Irish government announced its intention to carry out a major overhaul of Irish statute law. This initiative, known as the 'statute law revision project', will condense the volume of legislation applying to Ireland by imposing strict boundaries on the Irish statute book. The final objective is to confine the Irish statute book to legislation passed after the 6 December 1922, the date on which the Constitution of the 'Irish Free State' came into force.[1] In short, the project proposes to eliminate seven centuries of legislative history. All legislation passed from 1066 to the early twentieth century, including all legislation passed by Westminster and by the protestant dominated parliaments in Dublin, is to be swept away. This will ensure that Irish statute law will only consist of measures passed since 1922. According to the office of the attorney general the final objective of this ambitious project is 'to repeal all the legislation which remains on the statute book which was enacted prior to Irish independence in 1922'.[2]

The first step in any revision of statute law is to identify the existing body of legislation. Irish textbooks list the following sources for statutes extending to Ireland: Acts of the English parliament (pre-1707); Acts of the Irish parliament (pre-1800); Acts of the British parliament (1707-1800); Acts of the parliament of the United Kingdom of Great Britain and Ireland (1801-1922); Acts of the Oireachtas (parliament) of the Irish Free State (1922-1937) and Acts of the Oireachtas passed after the current Irish

[1] See website of the department of the attorney general. http://www.attorneygeneral.ie/slru/slrp.html Accessed on 24 October 2009.
[2] http://www.attorneygeneral.ie/slru/slrp.html Accessed 24 October 2009.

Constitution of 1937 came into force.[3] Yet, there is another possible source of statute law that is invariably ignored by textbooks written in the late twentieth and early twenty first centuries. The Anglo–Irish Treaty of 1921 provided for the creation of a self-governing Dominion in the twenty six counties of the south and west of Ireland. It was often asserted that the creation of the Irish Free State resulted in the incorporation of a considerable body of 'Imperial statutes' into Irish law. These were statutes passed by the parliament at Westminster for the colonies and Dominions[4] of the British Empire. These statutes were enacted by the parliament at Westminster in its identity as the legislature of the British Empire rather than as the legislature of the United Kingdom. It could be argued that statutes passed by the parliament at Westminster for Ireland before 1801, such as the Declaratory Act 1720, could also be considered as being a species of Imperial legislation. These statutes are not included in the analysis provided by this article. Statutes passed by the parliament at Westminster that concerned Imperial affairs but only had operative force in the United Kingdom, such as the Colonial Solicitors Act 1900, are not considered to be 'Imperial statutes' for the purpose of this article.[5]

The enactment of statutes for the colonies and Dominions ensured that the parliament at Westminster was often called the 'Imperial parliament' in the early twentieth century. The parliament at Westminster was never 'Imperial' in terms of representation but it did enjoy supreme legislative competence over the scattered

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[3] For example see Raymond Byrne and J. Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System* (Dublin, 5th Edition, 2007) p. 434.

[4] 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 – Public Records Office (TNA-PRO) HO 45/20030. This article will follow this convention.

[5] The British were prepared to recognise that the Irish Free State was capable of amending or repealing statutes of this nature. TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929.

territories of a vast global Empire. Irish lawyers tended to view the Imperial statutes passed by Westminster with suspicion and hostility in the 1920s and 1930s. Nevertheless, the assertion that Imperial statutes had been incorporated into Irish law could never be entirely ignored in these years.

This article examines the relationship between British Imperial statutes and Irish law in the early years of the self-governing Irish state. It will begin by analysing the nature of Imperial legislation in the early twentieth century and how this impacted on the Constitution of the Irish Free State that came into force in 1922. This will be followed by an examination of the claim made by British lawyers that the birth of the Irish Free State necessarily entailed the incorporation of a considerable body of Imperial statutes into Irish law. Irish lawyers living in the early twenty first century are almost unanimous in their rejection of this purported source of Irish law. Yet, it should be noted that their counterparts in the early twentieth century did not enjoy the same degree of certainty. This article will analyse a number of key Imperial statutes and will also examine areas of Irish law that were purportedly influenced by them. The concluding part of this article will attempt to illustrate how and why this source of law was finally rejected and later consigned to academic oblivion in Ireland. A subsequent article will examine the assertion that the parliament at Westminster continued to enjoy the power to pass additional Imperial legislation for the Irish Free State after the creation of that self-governing entity and actually put this power into practice on a number of occasions throughout the 1920s and 1930s.

IMPERIAL STATUTES

For centuries the parliament at Westminster, often called the 'mother of parliaments', enjoyed the right to legislate for all of Britain's far-flung possessions scattered along the sea lanes of the globe. Nevertheless, the sheer size of the Empire ensured that no one legislature could satisfy all its legislative needs. The Crown had the power to create local legislatures in British territories whether conquered, ceded or settled.[6] It was more convenient to allow these local legislatures to deal with most of the ordinary business that arose in the colonies. Yet the parliament at Westminster or 'Imperial parliament' reserved the right to intervene directly if the circumstances required it. One commentator noted in 1880 that 'the colonial possessions of the British Crown, howsoever acquired and whatever may be their political constitution, are subject at all periods of their existence to the legislative control of the Imperial Parliament'.[7] Colonial legislatures were subject to certain limits as to their legislative competence. Otherwise, a colonial legislature was sovereign and 'supreme within the limits of the colony for the government of its inhabitants'.[8] Colonial legislatures were not in any way considered the agents or delegates of the Imperial parliament at Westminster.[9] In the nineteenth century the position enjoyed by colonial parliaments was summarised in the judgment delivered by Willes J in *Phillips v. Eyre*:

[6] *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1.
[7] Alpheus Todd, *Parliamentary Government in the British Colonies* (London, 1880), p. 172.
[8] *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1 at 20.
[9] *Powell v. Apollo Candle Co.* (1885) 10 A.C. 282 at 290.

… a confirmed act of the local legislature lawfully constituted, whether in a settled or a conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the imperial parliament.[10]

This principle of final legislative control by the Imperial parliament remained intact in the early twentieth century. The need to extend Imperial legislation to the Dominions was maintained by a lack of certainty as to the power of the Dominion parliaments to legislate with extra-territorial effect.[11] This ensured that the Dominions needed Imperial legislation in order to deal with such matters as extradition and maritime law. All Imperial statutes that extended to the Dominions enjoyed an overriding status over the other laws of the Dominions. This higher status was recognised by the common law and had been restated in an important Imperial statute called the Colonial Laws Validity Act 1865. Section 2 of this statute provided that:

Any Colonial Law, which is, or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

The superior position enjoyed by Imperial statutes over colonial and Dominion laws was not confined to the realm of theory in the early twentieth century. The provisions of the 1865 Act were enforced as late as 1926 in relation to the self-

[10] (1870) L.R. 6 Q.B. 1 at 20.
[11] See Thomas Mohr, 'The Foundations of Irish Extra-Territorial Legislation' (2005) 40 *Irish Jurist* 86.

governing Dominions. In *Nadan v. R* the Judicial Committee of the Privy Council used the Colonial Laws Validity Act to strike down Section 1025 of the Canadian Criminal Code, 1888 on the basis that it was incompatible with a number of Imperial statutes passed by Westminster.[12]

IMPERIAL STATUTES AND THE CONSTITUTION OF THE IRISH FREE STATE

How were the above developments in British Imperial law relevant to the infant Irish Free State? The answer lies in the provisions of the 'Articles of Agreement for a Treaty between Great Britain and Ireland' signed in London on 6 December 1921. This document, known in Ireland as simply 'the Treaty', laid the constitutional foundations for an embryonic Irish state.

The Easter rising of 1916 created a new impetus for secession from the United Kingdom among Irish nationalists. A bitter armed conflict followed between 1919 and 1921. During this period Irish nationalists established their own parliament in Dublin known as 'Dáil Éireann' and purported to establish the institutions of an underground state that operated in defiance of the British authorities. The armed conflict was finally brought to an end when a truce was declared on 11 July 1921. This truce was followed by the conclusion of the 'Articles of Agreement' or 'Treaty' that was signed by British and Irish representatives on 6 December 1921. This document made reference to a new

[12] [1926] A.C. 482 and [1926] 2 D.L.R. 177.

self-governing entity in the south and west of the island of Ireland that would be known as the 'Irish Free State'. Article 1 of the 1921 Treaty made it clear that the Irish Free State would remain within the British Empire and enjoy the same constitutional status as the other self-governing Dominions. Article 2 linked key aspects of the constitutional status of the Irish Free State to that of the Dominion of Canada. The nature of the relationship between Irish law and British Imperial law was never clarified in the negotiations that preceded the creation of the 1921 Treaty. This issue finally came to the fore in the months that followed the drafting of the Constitution of the Irish Free State in 1922. It soon became clear that consideration of this matter could no longer be avoided when the British and Irish referred the draft Constitution to their respective parliaments.

In early 1922 it became clear that the Constitution of the Irish Free State would have to be enacted in parallel statutes passed by the Imperial parliament at Westminster and by the Irish house of representatives, known as 'Dáil Éireann', sitting as a special 'constituent assembly'. At this juncture the British and Irish governments were forced to consider two related issues. The first issue concerned the nature of the relationship between Irish law and existing Imperial legislation, in other words Imperial statutes passed before 1922. The second issue concerned the nature of the relationship between Irish law and future Imperial statutes that would be passed after 1922. The second issue, with its obvious implications for Irish legislative sovereignty, attracted most attention during the creation of the Constitution of the Irish Free State. Nevertheless the first issue, which is the primary focus of this article, was not ignored in 1922.

In January 1922, just weeks after the signature of the 1921 Treaty, a special British committee led by the attorney general came to the conclusion that the creation of

the Irish Free State would have to involve a significant body of Imperial statutes being incorporated into Irish law.[13] A definite agreement on this matter eluded the British and Irish governments in the negotiations that took place throughout 1922. The British attempted to settle the matter by inserting a special provision into the Imperial statute that, as far as they were concerned, would create the Constitution of the Irish Free State. Section 3 of the Irish Free State Constitution Act 1922 provided that:

> If the Parliament of the Irish Free State make provision to that effect, any Act passed before the passing of this Act which applies to or may be applied to self-governing Dominions, whether alone or to such Dominions and other parts of His Majesty's Dominions, shall apply or may be applied to the Irish Free State in like manner as it applies or may be applied to self-governing Dominions.

The meaning of this provision proved to be the cause of considerable dispute in later years. It was not reproduced in the parallel statute passed by the Irish constituent assembly in Dublin. This created an unfortunate divergence between the two Constituent Acts and an inevitable dispute as to the validity of these provisions. Even when these matters were set aside, Irish legal experts interpreted Section 3 of the Irish Free State Constitution Act 1922 in a manner that infuriated their British counterparts. They insisted that the wording of Section 3 gave the Oireachtas complete discretion as to whether to adopt Imperial legislation passed before 1922. It was argued that this provision implied that pre-existing Imperial legislation did not apply to the Irish Free State unless the Oireachtas took active steps to adopt it.[14]

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[13] TNA-PRO, CAB 27/153 CP 3653, Report of the attorney general's committee on the legislation required to establish the Irish Free State, 24 January 1922.

[14] University College Dublin (UCD) Archives, Costello papers, P190/101, John J. Hearne, legal adviser to department of external affairs, to John A. Costello, attorney general, undated and National Archives of

This stance was offensive to the British on the grounds that it seemed to constitute a denial of the status of the Irish Free State as a Dominion. It also created practical difficulties that damaged Anglo-Irish relations. For example, in the mid-1920s the question arose as to whether the Irish civil authorities could arrest deserters from the Royal Navy who had taken refuge in the territory of the Irish Free State. The British insisted that the Irish had the power to do so under the Naval Deserters Act 1847 and the Naval Discipline Act 1866.[15] The status of these Acts as Imperial statutes provided the Irish with a powerful incentive to deny that any such power existed. In 1926 the Irish authorities began to refuse to arrest deserters from British military forces as a result of doubts as to the application of these Imperial statutes.[16] This created an effective safe haven for British deserters within the Irish Free State.

British legal experts disputed the Irish interpretation of Section 3 of the Irish Free State Constitution Act 1922. They argued that Section 3 applied to a particular type of Imperial statute that contained optional provisions that the Dominions could adopt if they were so inclined. This interpretation held that the provisions of Section 3 of the Irish Free State Constitution Act 1922 did no more than allow the Irish Free State to 'opt in' to the optional provisions of Imperial statutes of this nature. Imperial statutes that did not contain such optional provisions were seen as applying in full to the Irish Free State. This position was seen as a necessary consequence of the acceptance of Dominion status as reflected in the provisions of the 1921 Treaty. As far as the British were concerned,

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Ireland (NAI), department of the Taoiseach, S5340/1, memorandum by Hearne, 15 July 1929. See also the judgment of Johnston J in *The State (Kennedy) v. Little* [1931] I.R. 39.

[15] TNA-PRO, HO 45/20026, opinion of the law officers (Sir Thomas Inskip and Sir Boyd Merriman), 30 April 1928.

[16] These doubts also focused on whether the Army and Air Force (Annual) Acts applied to the Irish Free State. These were Imperial statutes passed after 1922 and do not fall within the subject matter of the current article. TNA-PRO, HO 45/20026, desertion of members of His Majesty's forces to the Irish Free State, case for the opinion of the law officers, December 1927.

the creation of the Irish Free State as a self-governing Dominion of the British Empire had entailed the importation of a substantial body of Imperial statutes into the corpus of Irish law. This included the Colonial Laws Validity Act 1865 which gave Imperial statutes overriding effect over the entire corpus of Irish law.[17]

CONSTRAINTS ON IRISH LEGISLATIVE SOVEREIGNTY

The question of whether Westminster could be recognised as having the power to enact additional Imperial legislation for the Irish Free State dominated the field of controversy in 1922. The significant emphasis on this issue meant that questions concerning the relationship between Irish law and existing Imperial statutes were relegated to the background in the crucial year of 1922. The Irish were slow to appreciate the significance of Imperial legislation passed before 1922 applying to their self-governing state and the British did not push the matter this time. Nevertheless, the Irish provisional government did receive due warning of the belief held by the British government that a significant number of Imperial statutes would be incorporated into Irish law when the Irish Free State came into existence as a Dominion of the British Empire. The British made it clear during the Anglo–Irish negotiations that accompanied the redrafting of the Irish Constitution that they considered that the British Nationality and Status of Aliens Act 1914 would apply to the Irish Free State. This important Imperial statute regulated

[17] TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929. This committee was dominated by lawyers including Sir Maurice Gwyer (treasury solicitor), Sir Cecil Hurst (foreign office), Sir Frederick Liddell (parliamentary counsel), Sir John Risley (Dominions office), Sir Claud Schuster (Lord Chancellor's department), Sir Percy Thompson (board of inland revenue), Sir Thomas James Barnes (board of trade), Henry Grattan Bushe (colonial office). The secretary was Cecil Thomas Carr (editor of revised statutes).

the common status of British subjects throughout the Empire. The British even secured a direct reference to this Imperial statute in one of the early drafts of the Irish Constitution before eventually consenting to its removal from the final text.[18] The Irish also received adequate warning in 1922 that the British considered the Colonial Laws Validity Act 1865 as applying to the Irish Free State. This issue was raised in a letter to *The Times* written by Arthur Berriedale Keith, a notable scholar in the field of British Imperial law.[19] This letter was actually read out and discussed in the Irish constituent assembly in September 1922.[20] The constituent assembly failed to act on this warning and focused all of its attention on the issue of future Imperial statutes applying to the Irish Free State. In the years that followed the full significance of the assertion that a substantial body of Imperial statutes had been incorporated into Irish law when the Irish Free State had come into existence was revealed.

In 1922 a pro-Treaty government led by W.T. Cosgrave was firmly established in Dublin. Nevertheless, a substantial portion of the Irish electorate opposed the 1921 Treaty and the Cosgrave government could not be expected to remain in power forever. Soon after the Constitution of the Irish Free State came into force it became clear that the British intended to use the superior position of Imperial legislation as a padlock that would ensure that the Irish Free State could not depart from the legal settlement represented by the 1921 Treaty.[21] It should be remembered that, as far as the

[18] NAI, department of the Taoiseach, S8955, memorandum by Hugh Kennedy, legal adviser to the provisional government, 11 June 1922 and NAI, cabinet minutes, G1/2, 12 June 1922 and UCD Archives, Kennedy papers, P4/365, notes on draft Constitution, 1922.
[19] *The Times*, 19 June 1922.
[20] *Dáil Debates*, vol. 1, col. 779-81, 26 September 1922.
[21] The supremacy of Imperial statutes over Dominion law was underlined in the decision of the Judicial Committee of the Privy Council in *Nadan v. R.* [1926] A.C. 482 and [1926] 2 D.L.R. 177. Although the judgment in *Nadan* was made in relation to a Canadian appeal, it was widely believed in the 1920s that this decision was really aimed at maintaining the integrity of the 1921 Treaty in relation to the Irish Free State.

British were concerned, the Irish Constitution had been brought into force by an Imperial statute known as the Irish Free State Constitution Act 1922. This statute, along with the equivalent statute passed by the Irish constituent assembly, contained a special provision that was designed to ensure that Irish law remained in harmony with the provisions of the 1921 Treaty.[22] This special provision, known as the 'repugnancy clause', stated that any provision of the Constitution, any constitutional amendment and any law made under the Constitution that was inconsistent with the provisions of the 1921 Treaty would be rendered void and inoperative.[23] The repugnancy clause gave the 1921 Treaty an overriding position over Irish law that was similar to that given to Imperial statutes over Dominion laws under the Colonial Laws Validity Act. The overriding power of the repugnancy clause combined with that of the Colonial Laws Validity Act could be seen as a double lock that would prevent the Irish from making unilateral amendments to the settlement imposed by the 1921 Treaty. The repugnancy clause prevented any Irish law from amending the Treaty settlement while the Colonial Laws Validity Act prevented the Irish from amending the repugnancy clause that was contained in the Irish Free State Constitution Act 1922. This double lock seemed to place the sovereignty of the Irish Free State into a position of permafrost. In these circumstances, it is not surprising to

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See UCD Archives, Costello Papers, P190/94, memorandum on *Lynham v. Butler*, undated; W.P.M. Kennedy, 'The Imperial Conferences, 1926-1930' (1932) 48 *Law Quarterly Review* 191 at 207 and Jacqueline D. Krikorian, 'British Imperial Politics and Judicial Independence: The Judicial Committee's Decision in the Canadian Case *Nadan v. The King*' (2000) 33:2 *Canadian Journal of Political Science* 291.

[22] Preamble, Irish Free State Constitution Act 1922. An identical provision appeared in Section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922.

[23] The term 'repugnancy clause' was introduced by Leo Kohn. Leo Kohn, *The Constitution of the Irish Free State* (Dublin, 1932), p. 98.

learn that many Irish people in 1922 believed that the Irish Free State would be subject to the settlement imposed by the Anglo–Irish Treaty for many decades to come.[24]

LEGISLATIVE SOVEREIGNTY WITHIN THE CONTEXT OF IRISH HISTORY

For Irish nationalists living in 1922 the significance of the restrictions imposed by Imperial legislation was not limited to concerns as to their effect in stultifying the advance of Irish sovereignty for the foreseeable future. These limitations were also seen as having unfortunate precedents from the distant past. The creation of the Irish Free State in the 1920s was not the first occasion in which an external government sought to suddenly incorporate a considerable body of legislation into Irish law. It was also not the first occasion in Irish history in which it was claimed that the newly incorporated body of statutes enjoyed a superior position over other aspects of Irish law. An Irish parliament assembled at Drogheda from 1494 to 1495 passed Poynings' Act 1495[25] which recognised the reception of a considerable body of English statutes into Irish law.[26] This statute also placed Irish legislation in a subservient position to the newly incorporated

[24] For example, see *Dáil Debates*, vol. 1, col. 489-96, 20 September 1922 and col. 1470-3, 11 October 1922. See also *Poblacht na hÉireann,* 10 January 1922.

[25] 10 Henry VII c.22 (Irl). This statute is named as Poynings Act 1495 in Schedule II of the Statute Law Revision Act 2007. This title is used in preference to the traditional name of 'Poynings' law' which also used to describe 10 Henry VII c.4 (Irl). The confusion in the use of this term is described in A.G. Donaldson, *Some Comparative Aspects of Irish Law* (London, 1957), pp 42-3.

[26] The omnibus provisions of 10 Henry VII c.22 (Irl) created a sense of uncertainty as to which English statutes applied to Ireland that had certain parallels with the similar sense of uncertainty that surrounded the position of Imperial statutes in Irish law in the twentieth century. The difficulties in the former case were raised by Kennedy CJ in *R (Moore) v. O'Hanrahan* [1927] I.R. 406. See also W.N. Osborough 'The Legislation of the Pre-Union Irish Parliament' in *The Irish Statutes, 1310-1800* (Dublin, 1995), pp. E to F. It could be argued that this uncertainty has finally been dispelled by the Statute Law Revision Act 2007 which lists all pre-1922 statutes that are considered to apply to Ireland.

English statutes in a manner that had definite parallels with the inferior position of Irish laws to Imperial statutes, as asserted by reference to the Colonial Laws Validity Act.[27] The enactments of Poynings' parliament acted as the foundations for external rule in Ireland for the next three centuries. Historical precedents can never be entirely ignored in the context of Irish politics. Parallels with the events of the fifteenth century were raised in the debates of the special constituent assembly that considered the draft Constitution of the Irish Free State.[28] There were widespread fears among Irish lawyers and politicians that Imperial statutes could be used to ensure that the parliament at Westminster retained a substantial level of control over the infant Irish Free State. In 1929 John J. Hearne, legal adviser to the department of external affairs, wrote that 'a survey of existing legislation "affecting the Dominions" passed by the Parliament at Westminster will disclose how effectively that Parliament ruled and controlled the old British Empire through the operation of the Imperial statute'.[29]

IMPERIAL STATUTES PASSED BEFORE THE CREATION OF THE IRISH FREE STATE

Article 73 of the Irish Free State Constitution provided that all laws in force in the Irish Free State at the date of the coming into operation of that Constitution would continue to be of full force and effect. This left open the question of whether Imperial statutes passed

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[27] The statute of 1495 provided 'And if any estatute or estatutes have been made within this said land [of Ireland], hereafter to the contrary, they and every one of them by authority aforesaid be annulled, revoked, voyd, and of none effect in the law'. 10 Henry VII c.22 (Irl) 'An Act confirming all statutes made in England'. See *The Irish Statutes, 1310-1800*, (Dublin, 1995) p. 3.

[28] *Dáil Debates*, vol. 1, col. 363, 18 September 1922.

[29] NAI, department of the Taoiseach, S5340/1, memorandum by Hearne, 15 July 1929.

before 1922 could apply to the Irish Free State. British lawyers insisted that the acceptance of Dominion status by the Irish Free State, as provided in Articles 1 and 2 of the 1921 Treaty, had entailed the incorporation of a considerable body of Imperial statutes into Irish law.[30] This position was disputed by successive Irish governments in the 1920s and 1930s.

Those who accepted the assertion that number of Imperial statutes had been incorporated into Irish law in 1922 were faced with the difficult task of determining which Imperial statutes passed by Westminster could be considered as applying to the Irish Free State. This task was complicated by the position that there were several different types of statute that could be termed 'Imperial statutes'. These included:

(a) Statutes that applied in full to the United Kingdom and to all British overseas possessions, including the self-governing Dominions, from the time of their enactment. E.g. Act of Settlement 1701, Calendar (New Style) Act 1750, Naval Deserters Act 1847, Naval Discipline Act 1866, Extradition Act 1870, Territorial Waters Jurisdiction Act 1878, the Fugitive Offenders Act 1881 and the Demise of the Crown Act 1901.

(b) Statutes that applied to the United Kingdom which could be extended to other parts of the Empire by means of an Order in Council. E.g. Colonial Probates Act 1892. By the early twentieth century a constitutional convention had been established

[30] For example, see TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929.

that required Dominion consent before such Imperial statutes could be extended to any of the self-governing Dominions.[31]

(c) Statutes that were designed to apply to the United Kingdom and the non-self-governing British possessions but were not intended to be extended to the self-governing Dominions.[32] E.g. Maritime Conventions Act 1911 and Official Secrets Act 1920.

(d) Statutes that applied to the United Kingdom and the non-self-governing British possessions which could also be extended to the self-governing Dominions if a Dominion legislature chose to bring that statute into force within its territory. E.g. Copyright Act 1911 and Naval Discipline (Dominion Naval Forces) Act 1911.

(e) Statutes that that applied in full to the United Kingdom and the non-self-governing British possessions but only applied in part to the self-governing Dominions at the time of enactment. These statutes often permitted the legislatures of the Dominions to bring them into full effect within their territories. E.g. the British Nationality and Status of Aliens Act 1914.

(f) Statutes that applied to a particular part of the Empire outside of the United Kingdom. This included statutes that were only intended to apply to one particular self-governing Dominion. Examples of this type of Imperial legislation included the statutes that brought the Dominion Constitutions into force such as the British North America Act 1867, New Zealand Constitution Act 1852, Commonwealth of Australia Constitution Act 1900, South Africa Act 1909 and the Irish Free State Constitution

[31] TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929.

[32] On some occasions India was classed as a Dominion for the purposes of this type of Imperial statute. For example, see Section 11(1) of the Official Secrets Act 1920.

Act 1922. As might be expected, these statutes were only of direct interest to the Dominion in question. The constitutional link with Canada established by Article 2 of the Treaty did, however, ensure that the Irish Free State had an interest in the interpretation of certain aspects of the British North America Act 1867.

(g) Statutes that did not apply to the United Kingdom but did apply to all British overseas possessions including the Dominions. E.g. The Colonial Laws Validity Act 1865, the Colonial Prisoners Removal Acts 1869 and 1884, the Colonial Courts of Admiralty Act 1890 and the Colonial Boundaries Act 1895.

Irish governments in the 1920s and 1930s had real difficulties with the proposition that a substantial body of Imperial legislation had been incorporated into Irish law on the creation of the Irish Free State. Irish lawyers preferred to treat the Irish Free State as a successor state to the United Kingdom rather than as a Dominion of the British Empire. This stance suggested that Imperial statutes of type (a), (b), (c), (d) and (e) would continue to apply to the Irish Free State. The Irish rejected the application of type (f), which included the Irish Free State Constitution Act 1922, and type (g), which included the Colonial Laws Validity Act 1865.[33] To put it simply, the logical consequence of the stance adopted by successive Irish governments should have been that all Imperial legislation that had applied to the United Kingdom, but only Imperial legislation that had applied to the United Kingdom, should also apply to the Irish Free

[33] The Irish rejection of the application of the Irish Free State Constitution Act can be seen in *State (Ryan) v. Lennon* [1935] I.R. 170, *Re Irish Employers Mutual Insurance Association Limited* [1955] I.R. 176 at 218 and *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129 at 148. The arguments for the rejection of the Colonial Laws Validity Act 1865 are examined at a later stage in this article. A detailed analysis of this topic can also be found in Thomas Mohr, 'The Colonial Laws Validity Act and the Irish Free State' (2008) 43 *Irish Jurist* 21-44.

State. Unfortunately, Irish courts and legal advisers to the Irish government did not always adhere to this position. A good example of this lack of consistency can be found in a judgement delivered by the Irish Supreme Court in 1928.

In *Performing Right Society v. Bray Urban District Council* the Irish Supreme Court was required to decide whether or not a particular Imperial statute, the Copyright Act 1911, applied to the Irish Free State.[34] The Copyright Act 1911 belonged to the class of Imperial statutes that applied to the United Kingdom and the non-self-governing British possessions but did not apply to the self-governing Dominions unless a Dominion legislature declared the statute to be in force within its territory. The Supreme Court held that although the 1911 Act had applied to Ireland as part of the United Kingdom, it had not survived the creation of the Irish Free State as a self-governing Dominion. The provisions of the Copyright Act 1911 could no longer be applied as the Oireachtas had failed to declare that this statute was in force in the territory of the Irish Free State.[35] This line of reasoning threatened to invalidate a number of key statutes that the Irish government had assumed were still in force in the Irish Free State. These included the Official Secrets Act 1920 and the Copyright Act 1911 itself.[36] More importantly, this decision was incompatible with the stance that the Irish Free State should be treated as a successor to the United Kingdom and not as a Dominion when deciding the applicability of a statute passed by Westminster before 1922.

[34] [1928] I.R. 512.

[35] The Supreme Court did not consider the possibility that, assuming the Copyright Act 1911 did not apply to the Irish Free State, the Copyright Act of 1842 might still have been in force at the foundation of the state. This Act prevented colonial legislatures from dealing with copyright, a situation that the Copyright Act of 1911 was designed to remedy.

[36] See S.I. No. 36/1928 Official Secrets Acts, 1911 and 1920, Adaptation Order, 1928 and the Industrial and Commercial Property (Protection) Act 1927 which purported to repeal the Copyright Act 1911.

The decision of the Irish Supreme court in *Performing Right Society v. Bray Urban District Council* was appealed to the Judicial Committee of the Privy Council in London. The Privy Council held that the Copyright Act 1911 remained in force in the Irish Free State on the basis that the definition of a Dominion contained in that statute should be limited to those Dominions enumerated in its text.[37] This decision suggested that the Irish Free State should be treated as a successor to the United Kingdom rather than as a Dominion with respect to certain types of Imperial statute. Nevertheless, the Irish government had serious political difficulties with the institution of the appeal to the Privy Council and refused to accept this decision.[38] The Oireachtas sought to fill the void left by the removal of the Copyright Act 1911 by enacting the Copyright (Preservation) Act 1929. This reversed many of the ill effects of the decision of the Supreme Court by retrospectively preserving all copyrights that subsisted before the signature of the 1921 Treaty. Nevertheless, it did not entirely fill the void left by the exclusion of the Imperial statute of 1911. The Copyright (Preservation) Act 1929 made it clear that remedies would not be available for past infringements of copyright.[39] The dispute over the application of Imperial statutes to the Irish Free State had ripped a considerable hole in the protection of copyright under Irish law. This ensured that the Irish government was forced to endure accusations of failing to adhere to the Berne Convention by international copyright organisations.[40]

The decision of the Irish Supreme Court in *Performing Right Society v. Bray Urban District Council* was not an isolated incident. The Irish government itself did not

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[37] [1930] I.R. 509.
[38] See Thomas Mohr 'Law without Loyalty – The Abolition of the Irish Appeal to the Privy Council' (2002) 37 *Irish Jurist* 187.
[39] Section 4 of the Copyright (Preservation) Act 1929
[40] *Parliamentary Debates*, series 5, vol. 75, col. 490, 13 November 1929 (House of Lords).

always adhere to the position that all Imperial legislation that had applied to the United Kingdom, but only Imperial legislation that had applied to the United Kingdom, should also apply to the Irish Free State. For example, John A. Costello, who at that time was attorney general of the Irish Free State, expressed serious doubts over the survival of the Fugitive Offenders Act 1881 as a part of Irish law at a special Imperial conference in 1929.[41] This stance ignored the fact that the Irish government had relied on this Imperial statute in a number of extradition cases in the early years of the Irish Free State.[42] The matter seemed to be put to rest in 1930 when the Irish courts confirmed in *The State (Kennedy) v. Little* that the Fugitive Offenders Act 1881 had survived the enactment of the Constitution of the Irish Free State.[43] However, this judgment did not prevent the continuation of a significant amount of controversy on this matter.[44]

The Irish position with respect to Imperial statutes passed before 1922 was complicated by the position that the twenty six counties of the Irish Free State had once formed a part of the United Kingdom. This was a complicating factor for two reasons. First, there were a number of Imperial statutes that were incompatible with statutes that

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[41] TNA-PRO, CAB 32/69 D.L. 5th meeting. Costello would later serve as Taoiseach in the inter-party governments of 1948-1951 and 1954-1957. Costello was echoing a stance taken by Kevin O'Higgins, the first Irish minister for justice, who declared in 1923 that the Fugitive Offenders Act 1881 definitely did not apply to the Irish Free State in the absence of express enactment by the Oireachtas. *Dáil Debates*, vol. 3, col. 6, 12 April 1923.

[42] UCD Archives, Costello papers, P190/127, department of justice memorandum, October 1929.

[43] [1935] I.R. 39.

[44] One account of the history of Irish extradition law written in the 1950s concludes "The probability therefore is that the Fugitive Offenders [Act 1881] never did apply between the Irish Free State and Great Britain. However that may be, it almost certainly cannot now be applied in view of the fact that the Republic [of Ireland] is no longer one of "Her Majesty's dominions". Paul O'Higgins, 'Irish Extradition Law and Practice' (1958) 34 *British Yearbook of International Law* 274. This conclusion did not prevent O'Higgins from admitting the practical utility of the 1881 Act. *Ibid* at 291. Lord Goddard stated in *R. v. Metropolitan Police Commissioner, Ex parte Nalder* that 'It is not necessary to express an opinion whether that Act [i.e. the Fugitive Offenders Act 1881] can apply at all between England and Eire, though the strong inclination of my opinion is that it cannot.' [1948] 1 K.B. 251 at 256. The matter was only placed beyond dispute when the Fugitive Offenders Act 1881was expressly repealed by Section 6 of the Extradition Act 1965.

had applied to Ireland as a part of the United Kingdom. A good example of this was the Colonial Courts of Admiralty Act 1890 which clashed with the Courts of Admiralty (Ireland) Act 1867. The British government was forced to concede that the Imperial statute of 1890, which placed limits on the legislative powers of the Dominions, could not apply to the Irish Free State.[45] In another instance, the British government had to concede that the Colonial Boundaries Act 1895 did not apply to the Irish Free State. This conclusion seems to have been based on concerns of incompatibility with the special provisions of Article 12 of the Anglo-Irish Treaty of 1921 concerning the boundary between the Irish Free State and Northern Ireland.[46]

The second reason why the position of the Irish Free State as a former part of the United Kingdom was a complicating factor, was that many Imperial statutes applied to both the United Kingdom and the Dominions. Many of the Imperial statutes that were allegedly incorporated into Irish law in 1922 had already applied to Ireland prior to that date as a part of the United Kingdom. Yet, Imperial statutes that applied to both the United Kingdom and the Dominions often differed in their treatment of the 'mother country' and the 'daughter countries'. This raised the question as to whether these Imperial statutes should continue to treat the Irish Free State in the same way as the United Kingdom or whether these Imperial statutes had been re-incorporated into Irish law in such a way as to treat the Irish Free State in the same way as the other Dominions.

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[45] See 'The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929', Cmd. 3479, para. 110 and NAI, department of the Taoiseach, S5340/11, memoranda on colonial courts of admiralty, 1929. K.C. Wheare was, therefore, mistaken when he identified the Colonial Courts of Admiralty Act 1890 as a source of obligatory reservation that applied to the Irish Free State on the Canadian model. K.C. Wheare, *The Statute of Westminster and Dominion Status*, (Oxford, 5th Edition, 1953), p. 118. The conclusion that the Colonial Courts of Admiralty Act 1890 did not apply to the Irish Free State has not prevented the Statute Law Revision Act 2007 from naming this statute in the list of legislation that is specifically repealed. Schedule 2, Part 4, Statute Law Revision Act 2007.

[46] NAI, department of the Taoiseach, S5340/18, report on Colonial Boundaries Act 1895, 1929.

The Irish had an obvious interest in promoting the former position over the latter. For example, the Irish government insisted that the provisions of Sections 735 and 736 of the Merchant Shipping Act 1894, which restricted the legislative powers of the Dominions with respect to certain maritime matters, did not affect the Irish Free State. It was argued that although these provisions had been part of the law of Ireland as part of the United Kingdom they had been of no relevance to Ireland as part of the United Kingdom.[47] The new status of the Irish Free State as a Dominion of the British Empire was ignored in this instance.

Irish lawyers tended to treat the Irish Free State as a successor state to the United Kingdom in preference to treating it as a British Dominion. Yet even here, the position of the Irish government was not always consistent. The Irish position with respect to the British Nationality and Status of Aliens Act 1914 is especially difficult to reconcile with the position that all Imperial legislation that had applied to the United Kingdom should also apply to the Irish Free State as a former part of the United Kingdom. The British government was convinced that the 1914 Act applied in its entirety to the Irish Free State.[48] By contrast, John O'Byrne, attorney general of the Irish Free State from 1924 to1926, came to the conclusion that some of the provisions of the 1914 Act had been carried over into Irish law in 1922 while others had not.[49] The Irish

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[47] The legislative restrictions on the Dominions imposed by Sections 735 and 736 of the Merchant Shipping Act 1894 were finally removed by Section 5 of the Statute of Westminster Act 1931.
[48] TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929.
[49] O'Byrne concluded a general survey of the 1914 Act by declaring that Part I of the Act continued to operate in the Irish Free State. As regards Part II of the Act, he considered that Sections 8 and 9 did not apply but that Sections 2, 3, 4, 5, 6 and 7 did apply. NAI, department of the Taoiseach, S5340 Annex 7, memorandum on nationality and citizenship, undated. Other memoranda argued that all of Part II of this statute was inapplicable to the Irish Free State. For example, see NAI, department of the Taoiseach, S6501, memorandum on citizenship by Kevin O'Higgins, 13 October 1924.

government chose to simplify matters at the Imperial conferences of the 1920s and 1930s by insisting that *none* of the provisions of the British Nationality and Status of Aliens Act 1914 had been carried over into the law of the Irish Free State.[50] This stance, maintained by successive Irish governments, was at complete variance with the position that this legislation had certainly applied *in toto* to Ireland as a part of the United Kingdom.[51]

Similar doubts were raised with respect to other Imperial statutes that had applied to the territory of the Irish Free State when it had formed part of the United Kingdom. For example, a memorandum written by the department of justice raised doubts as to the continued application of the Extradition Act 1870. It recommended that this Imperial statute be replaced by an Irish statute in order to clear up these doubts.[52] The Irish government never followed up on this recommendation during the lifetime of the Irish Free State. This ensured that the Extradition Act, 1870 continued to be used by the Irish department of foreign affairs as late as the mid-1990s.[53]

The British position with respect to the application of pre-1922 Imperial statutes to the Irish Free State was more complex. The British saw the Irish Free State as enjoying a dual status in the legislative sphere. It was seen as a Dominion under the provisions of the 1921 Treaty. However, it was also seen as a successor to the position of United Kingdom, subject to limitations on its legislative sovereignty that did not apply to

[50] TNA-PRO, CAB 32/79 PM(30)13.
[51] NAI, department of foreign affairs, 1/56A, 6 February 1934, Eamon de Valera to James Thomas, 6 February 1934. However, certain doubts as to the application of the British Nationality and Status of Aliens Acts, 1914 and 1918 to the Irish Free State are reflected in Section 33(1) of the Irish Nationality and Citizenship Act 1935. For a detailed consideration on the challenges that faced the Irish Free State in the field of nationality and citizenship see Mary Daly, 'Irish Nationality and Citizenship since 1922' (2001) 32 *Irish Historical Studies* 377.
[52] NAI, department of the Taoiseach, S5340/7, department of justice memorandum for the proposed conference in London of October 1929, undated.
[53] *Dáil Debates*, vol. 466, col. 939, 5 June 1996. See also Section 1(3), Extradition (Amendment) Act 1994. All provisions of the Extradition Act 1870, except those contained in Section 24, had been repealed by Section 6 of the Extradition Act 1965. Section 24 was finally repealed by Section 51(7) of the Criminal Justice Act 1994.

the parliament at Westminster.[54] The British saw the former status as taking precedence over the latter when the two came into conflict. This line of reasoning resulted in the conclusion that Imperial statutes that applied to the United Kingdom and the Dominions now applied to the Irish Free State in a dual capacity. They had become a part of the municipal law of the Irish Free State under Article 73 of the Irish Constitution, but had also become part of the law of the Irish Free State in its status as a Dominion. Although Article 73 of the Irish Constitution permitted the Irish Free State to amend or repeal pre-1922 Imperial statutes as a part of municipal law, the Colonial Laws Validity Act 1865 prevented the Irish Free State from amending or repealing these Imperial statutes as part of the law of the Irish Free State in its status as a Dominion.[55] This ensured that, although the Oireachtas might amplify the terms of pre-1922 Imperial statutes, the Irish Free State could not repeal these statutes or amend their effect in any way that was repugnant to their provisions.[56]

As is readily apparent, the Irish Free State faced serious challenges in deciding how to deal with Imperial legislation passed before 1922. The British and Irish governments took widely divergent views on this matter. It is also clear that the Irish government did not always take a consistent stance in dealing with pre-1922 Imperial statutes. The one 'golden thread' policy of the Irish government was the staunch denial that Imperial statutes enjoyed superior status to statutes passed by the Oireachtas. This

[54] This included a limitation on the powers of the Oireachtas to pass legislation with extra-territorial effect. See Thomas Mohr, 'The Foundations of Irish Extra-Territorial Legislation' (2005) 40 *Irish Jurist* 86-110.
[55] TNA-PRO, HO 45/20026, law officers' opinion of 20 April 1928 and report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929.
[56] TNA-PRO, HO 45/20026, note on the law officers' opinion of 20 April 1928 by Sir Maurice Gwyer, 11 August 1928.

ensured that the Irish were particularly keen to reject the application of one specific Imperial statute to the Irish Free State. This was the Colonial Laws Validity Act 1865.

THE SUPREMACY OF IMPERIAL STATUTES UNDER THE COLONIAL LAWS VALIDITY ACT 1865

The expansion of the British Empire led to the development of a common law rule that legislation passed by a colonial legislature was void if repugnant to the law of England. This position had actually been enshrined in the Constitution granted to New Zealand in 1852.[57] Such a wide-ranging rule proved unworkable and was restricted with the passing of the Colonial Laws Validity Act in 1865. At the time of its enactment this Imperial statute was welcomed in the self-governing colonies that would soon develop into 'Dominions', because it restricted the circumstances in which colonial legislation could be rendered void by Westminster. It limited the scope of repugnancy to colonial legislation that was inconsistent with an Imperial Act or an order or regulation made under such Act that by express words or by necessary intendment extended to the colony. It also clarified the position that any offending colonial legislation would only be void to the extent of such repugnancy. The Act also made clear that a colonial law could no longer be declared void for being repugnant to the English common law or for being inconsistent with the instructions given to a Governor-General.[58] By 1922 a measure that had once been considered emancipatory was now considered unduly restrictive by the

[57] Section 53 of the New Zealand Constitution Act 1852.
[58] Sections 2 to 4 of the Colonial Laws Validity Act 1865.

Dominions. It was completely unacceptable to one particular Dominion of the British Empire. This was the Irish Free State.

The difficulties inherent in the application of Imperial legislation to the Irish Free State have already been noted with respect to the Copyright Act 1911 and the Fugitive Offenders Act 1881. The Colonial Laws Validity Act 1865 was, however, a different type of Imperial statute. The 1865 Act had never applied to the United Kingdom but only to 'colonies', which were defined to include 'all of Her Majesty's Possessions abroad in which there shall exist a legislature'.[59] Irish legal commentators noted that a legislature had not existed in the Ireland of 1865 which had not been an overseas possession but an integral part of the United Kingdom of Great Britain and Ireland. It should be remembered that Irish lawyers tended to view the Irish Free State as a successor state to the United Kingdom rather than as a British Dominion.[60] This perspective was taken to its logical conclusion when Irish legal advisers argued that the Oireachtas was no more bound by the limitations of the Colonial Laws Validity Act than the parliament at Westminster.[61]

Having established this point, Irish legal experts such as John J. Hearne turned their attention to the Irish Free State Constitution Act 1922 passed by Westminster. It may be recalled that Section 3 of this Imperial statute, which had no equivalent in the Irish version of this Act, provided that:

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[59] Section 1 of the Colonial Laws Validity Act 1865.
[60] It is interesting to note that E.C.S. Wade's introduction to Dicey's *The Law of the Constitution* uses this reasoning to confirm the Irish view on the Colonial Laws Validity Act. It is doubtful whether such a conclusion would have been palatable to the original author! A.V. Dicey, *The Law of the Constitution* (London, 1959), p. lxxxiv.
[61] UCD Archives, Costello papers, P190/101, Hearne to Costello, undated and NAI, department of the Taoiseach, S5340/1, memorandum by Hearne, 15 July 1929. For a more elaborate argument on this point see Henry Harrison, *Ireland and the British Empire, 1937* (London, 1937) pp. 147-158.

If the Parliament of the Irish Free State make provision to that effect, any Act passed before the passing of this Act which applies to or may be applied to self-governing Dominions, whether alone or to such Dominions and other parts of His Majesty's Dominions, shall apply or may be applied to the Irish Free State in like manner as it applies or may be applied to self-governing Dominions.

From the Irish perspective, this section seemed to operate on the assumption that British statutes affecting the Dominions did not apply *proprio vigore* to the Irish Free State. Section 3 of Westminster's Irish Free State Constitution Act 1922 was interpreted as giving the Oireachtas complete discretion as to whether or not to adopt any of this legislation. Given that the Oireachtas had not adopted the Colonial Laws Validity Act 1865, and was never likely to do so, it was concluded that the Act did not apply to the Irish Free State.[62]

There were numerous difficulties with Hearne's legal arguments, as presented above. The use of Section 3 of Westminster's Irish Free State Constitution Act was particularly problematic given that it was absent from the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 that had been passed by the Irish constituent assembly.[63] The Irish also had difficulties with the admission that the British had retained the right to legislate for the twenty six counties after the ratification of the 1921

[62] UCD Archives, Costello papers, P190/101, Hearne to Costello, undated and NAI, department of the Taoiseach, S5340/1, memorandum by Hearne, 15 July 1929. There was also the additional point, not raised by Hearne, that Article 73 of the 1922 Constitution only carried over legislation that was not repugnant to the provisions of that Constitution. It will never be known how an Irish court might have dealt with this argument. Nevertheless, the provisions of Articles 1, 2 and 12 of the Irish Free State Constitution would have provided powerful bases for finding that the 1865 Act was so repugnant.

[63] A memorandum by the department of justice recommended overcoming such difficulties by having the Oireachtas enact an amended version of Section 3 of Westminster's Irish Free State Constitution Act 1922. UCD Archives, Costello papers, P190/127, department of justice memorandum, October 1929.

Treaty.[64] A more serious difficulty emerged when it was considered that the acceptance of Section 3 as having binding force could be seen as justifying the claim that the 1922 Constitution had been created by the Imperial parliament. As far as the Irish were concerned the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 passed in Dublin, and not Westminster's Irish Free State Constitution Act 1922, had brought the Irish Constitution into force.[65] Even the admission that Section 3 was of value as an aid to interpretation was not without difficulties. If Section 3 could be used in this manner then what of Section 4 which recognised that Westminster retained the power to pass additional Imperial statutes for the Irish Free State?

The Irish interpretation of Section 3 was at complete variance with the approach taken by the British government. It may be recalled that British lawyers argued that Section 3 only referred to a particular type of Imperial statute that allowed the Dominions to 'opt in' to certain provisions. The Colonial Laws Validity Act 1865 did not fall within this category of Imperial statute.[66] In any case, it could be argued that if the Colonial Laws Validity Act did not apply to the Irish Free State this would mean that the

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[64] UCD Archives, Costello papers, P190/127, department of justice memorandum, October 1929. British and Irish authorities dispute the date on which the British formally ratified the Anglo–Irish Treaty of 1921. British authorities insist that although the Irish Free State (Agreement) Act 1922 enacted on 31 March 1922 gave the Treaty 'force of law' it did not constitute British ratification of the Treaty. Under this interpretation British ratification did not occur until the enactment of Westminster's Irish Free State Constitution Act on 5 December 1922. See Section 5, Irish Free State Constitution Act 1922. This has not prevented the Irish courts from holding that the British did ratify the Treaty in March 1922 under the Irish Free State (Agreement) Act 1922. *In Re W.J. Reade, A Bankrupt* [1929] IR 31. This position adopted by the Irish courts is not consistent with the intentions of the British government in 1922. See TNA-PRO, CAB 43/1 22/N/148(2), conference of British representatives, 26 May 1922.

[65] For example see Section 2(9) of the Interpretation Act 1923. See also *State (Ryan) v. Lennon* [1935] I.R. 170 and also *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129 at 148.

[66] TNA-PRO, HO 45/20026, law officers' opinion of 20 April 1928 and report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929 and law officers' opinion of 20 April 1928.

Irish had inherited the even more restrictive common law position that had maintained the supremacy of Imperial statutes before 1865.

The argument that the Colonial Laws Validity Act 1865 did not apply to the Irish Free State could be challenged by reference to the provisions of the 1921 Treaty. Article 2 of the 1921 Treaty provided that 'the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State'. The British government and British legal commentators were confident that this provision ensured that the Colonial Laws Validity Act did, after all, apply to the Irish Free State. The argument that no Imperial statute that extended to the Dominions could be seen as applying to the Irish Free State unless so provided by the Oireachtas was seen as incompatible with the status of the Irish Free State as a Dominion. This argument implied that the Irish Free State enjoyed a superior constitutional status to the Canada and all the other existing Dominions and that it was for all practical purposes an independent sovereign state.[67]

Irish leaders attempted to marginalise this argument by highlighting the difficulty in defining the limits of Article 2 of the 1921 Treaty. If the Colonial Laws Validity Act 1865 applied to the Irish Free State under Article 2 of the Treaty then why not the British North America Act 1867? The weakness of this argument inspired Hearne to dodge the issue of compatibility with the Treaty by claiming that the Colonial Laws

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[67] TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929. K.C. Wheare was satisfied to conclude that 'the legislative supremacy of the United Kingdom Parliament extended to the Free State on the Canadian model, and consequently the Colonial Laws Validity Act must apply to the Free State'. K.C. Wheare, *The Statute of Westminster and Dominion Status*, (Oxford, 5th Edition, 1953), p. 118.

Validity Act was not covered by the terms of Article 2. Hearne denied that there was any association between the 1865 Act and Canada's relationship with the Crown, the representative of the Crown or the Imperial parliament.[68] This was a surprising conclusion to reach with respect to an instrument whose roots extended to the very foundations of the relationship between the Dominions and the Imperial parliament at Westminster. The Colonial Laws Validity Act provided the basic framework for the relationship between Westminster and the Dominions as regulated by Imperial statute. Its structure pre-dated the Constitutions of all the major Dominions and, as the Canadians discovered in the aftermath of *Nadan v. R*, its provisions remained of considerable practical significance.

THE END OF THE SUPREMACY OF IMPERIAL STATUTES OVER DOMINION LAWS

Although the Irish government insisted that the Colonial Laws Validity Act 1865 did not apply to the Irish Free State it could not afford to be complacent about this important issue. During the Imperial conference of 1926 the Irish delegation raised a number of issues concerning the position of Imperial legislation in relation to the Dominions. This subject was considered to be too difficult and complex to be settled in its entirety in 1926. Detailed consideration was postponed until a special 'Conference on the Operation of Dominion Legislation' was convened in 1929. One of the most important issues on the agenda of the

[68] UCD Archives, Costello papers, P190/101, Hearne to Costello, undated and NAI, department of the Taoiseach, S5340/1, memorandum by Hearne, 15 July 1929.

1929 conference was the examination of the relationship between Imperial legislation and the laws of the Dominions as reflected in the provisions of the Colonial Laws Validity Act. The conclusions of this special conference mark the genesis of the celebrated Statute of Westminster.

The 1929 conference saw many Dominion statesmen call for changes in the relationship between Imperial legislation and Dominion law. The British government could not ignore these demands. Nevertheless, the British delegation to the 1929 conference made a determined effort to save the Colonial Laws Validity Act. The British conceded the need for reform but also insisted that a satisfactory outcome might be achieved by amending, rather than repealing, the 1865 Act.[69] They placed a great deal of emphasis on the utility of the 1865 Act in preserving legislative uniformity between the United Kingdom and the Dominions in certain key areas. This consideration allowed the British delegation to argue that the best solution was to retain the Colonial Laws Validity Act while narrowing its scope. They proposed a detailed examination of all Imperial statutes in order that their usefulness might be assessed. This scheme demanded the division of all existing Imperial statutes into three distinct categories. These categories would include (a) legislation covering areas in which Commonwealth uniformity was unnecessary; (b) legislation where uniformity was desirable on grounds of convenience and (c) legislation that might be considered fundamental to the structure of the British Empire or Commonwealth.[70] A Dominions office memorandum suggested that all Imperial legislation that was considered undesirable could be amended or repealed by Westminster.

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[69] TNA-PRO, CAB 32/69 D.L. 1st meeting.
[70] TNA-PRO, CAB 32/69 D.L. 6th meeting.

Although the British proposals received staunch support from New Zealand, they were unacceptable to Canada, South Africa and the Irish Free State. The British attempted to initiate discussions that would divide the existing Imperial statutes into the proposed categories. These discussions were doomed from the outset given the opposition of three Dominions to this scheme. The Irish proved to be a particularly disruptive influence when they insisted on highlighting their claim that no Imperial statute applied to the Irish Free State.[71] The attempt to preserve the supremacy of key Imperial statutes had to be abandoned.

The failure to defend the position of Imperial legislation had profound consequences. The report of the 1929 conference accepted that the best way to preserve legislative uniformity was by means of mutual consent and reciprocal legislation. Consequently, it was decided that the overriding effect of Imperial statutes over Dominion law, as reflected in the Colonial Laws Validity Act 1865, should come to an end.[72] This decision was reflected in Section 2(1) of the Statute of Westminster Act 1931:

> No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act order, rule or regulation in so far as the same is part of the law of the Dominion.

[71] TNA-PRO, CAB 32/69 D.L. 5th meeting.
[72] TNA-PRO, CAB 32/69 D.L. 11.

The removal of limitations reflected in the Colonial Laws Validity Act meant that provisions of Irish law could no longer be challenged on the grounds of incompatibility with an Imperial statute. This ensured that amendments of the Irish Constitution could no longer be declared null and void under British Imperial law on the grounds that they were inconsistent with the terms of the Anglo–Irish Treaty as enshrined in the Irish Free State Constitution Act 1922 passed at Westminster.

IMPERIAL STATUTES AND THE ANGLO–IRISH TREATY

The relationship between Irish law and Imperial statutes passed before 1922 is important to the history of twentieth century Ireland for a number of reasons. First, Imperial legislation was seen as safeguarding the settlement imposed by the Anglo–Irish Treaty of 1921. Secondly, the denial that Imperial legislation passed before 1922 applied to the Irish Free State proved to be an important pillar in the contention made by Irish politicians, historians and lawyers that the Irish Free State was never really a Dominion of the British Empire. These two points will be examined in turn.

The collapse of the Treaty settlement is often attributed to the accession to power of a new Irish government in 1932 that was composed of persons who had opposed the signing of the Anglo–Irish Treaty a decade earlier. It is true that the Treaty settlement was dismantled piece by piece over the course of the 1930s by the new government formed by the Fianna Fáil political party led by Eamon de Valera. Nevertheless, the removal of the safeguards offered to the Treaty settlement by key Imperial statutes should also be recognised as having played an important role in

facilitating this process. In 1931 the enactment of the Statute of Westminster removed the double lock represented by the repugnancy clause in Irish Free State Constitution Act 1922 and by the restrictive provisions of the Colonial Laws Validity Act 1865. It may be recalled that the repugnancy clause prevented any Irish law from amending the Treaty settlement while the Colonial Laws Validity Act prevented the Irish from amending the repugnancy clause that was contained in the Irish Free State Constitution Act 1922. The repeal of the Colonial Laws Validity Act meant that the Irish were no longer inhibited from legislating in defiance of the repugnancy clause contained in the Irish Free State Constitution Act 1922 passed by the Imperial parliament. De Valera took full advantage of the new position to dismantle the Treaty settlement piece by piece. In 1933 he removed the parliamentary oath whose wording mentioned the British monarch.[73] This oath was offensive to the sensibilities of many Irish nationalists and had proved to be an intractable source of political strife since the signing of the Treaty in 1921. The next target was the removal of the provisions of the Irish Constitution that recognised the appeal to the Judicial Committee of the Privy Council from the Irish courts.[74] De Valera also stripped the Governor-General, who acted as the representative of the King in the Irish Free State, of most of his substantive powers.[75] In 1936 de Valera took advantage of the abdication of Edward VIII to remove all references to the King from the text of the Constitution of the Irish Free State.[76]

The removal of the safeguards contained in Imperial statutes that protected the integrity of the Treaty settlement undermined British efforts to challenge the legality of

[73] Constitution (Removal of Oath) Act 1933.
[74] Constitution (Amendment No. 22) Act 1933
[75] Constitution (Amendment No. 21) Act 1933 and Constitution (Amendment No. 22) Act 1933.
[76] Constitution (Amendment No. 27) Act 1936

de Valera's constitutional reforms. This was confirmed in 1935 when the Judicial Committee of the Privy Council held in the case of *Moore v. Attorney General* that it was unable to prevent the abolition of appeals from the courts of the Irish Free State.[77] In 1937 de Valera took the final step and replaced the remaining provisions of the Constitution of the Irish Free State with a new Constitution that completely ignored the 1921 Treaty. The vulnerability of the Treaty settlement when stripped of the double lock offered by the Colonial Laws Validity Act 1865 and the Irish Free State Constitution Act 1922 had now been revealed.

IMPERIAL STATUTES AND DOMINION STATUS

This article has examined a potential source of Irish law that is largely unknown to many lawyers in twenty first century Ireland. Irish lawyers in the inter-war years did not enjoy the same luxury of being able to ignore the contention that Imperial statutes formed a part of the law of their infant state. This article has attempted to show that the rejection of this source of law by the Irish courts and by successive Irish governments in the 1920s and 1930s was not as certain, consistent or unambiguous a process as authorities in later decades might have liked to believe. This reality can be seen in the inconsistent attitude of the Irish government in relation to such Imperial statutes as the Fugitive Offenders Act 1881 and the British Nationality and Status of Aliens Act 1914, and in the difficulties faced by the Irish Supreme Court in interpreting the Copyright Act 1911. Nevertheless, British Imperial statutes were finally rejected as a source of Irish law in the 1930s and

[77] [1935] I.R. 472 and [1935] A.C. 484.

this position has been maintained by Irish lawyers since that date. This article has offered a number of reasons to explain this stance. British Imperial statutes evoked unfortunate memories of external domination from earlier periods of Irish legal history. Imperial statutes also served to safeguard the provisions of the 1921 Treaty and gave that instrument overriding force over all other provisions of Irish law. Yet, there remains another explanation for the rejection of British Imperial statutes that remains of some significance to this day. British Imperial statutes were rejected as a source of Irish law because they were seen as incompatible with popular perceptions as to the origins and nature of the self-governing Irish state.

The contention that Imperial statutes had been incorporated into Irish law provides support for the idea that the self-governing Irish state came into existence as a Dominion of the British Empire. The great majority of Irish lawyers and historians living in the twenty first century either reject or ignore the concept of an 'Irish Dominion'.[78] Few history books on the independent Irish state begin with 'Chapter One – the Dominion Years' or 'Chapter One – the Irish Dominion'. Although Articles 1 and 2 of the 1921 Treaty seemed to create a self-governing state with the legal status of a British Dominion in the south and west of Ireland, this effect has long been denied by Irish lawyers and by the Irish courts.[79] This denial of the legal status of the Irish Free State as a British Dominion was already well-established by the early 1930s. John J. Hearne insisted that the Anglo–Irish Treaty had done no more than compare the status of the Irish

[78] A rare analysis of Dominion status and the Irish Free State can be found in Henry Harrison, *Ireland and the British Empire, 1937* (London, 1937).
[79] A good example of this stance can be found in the judgment of the Irish Supreme Court in the case of *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129. This judgement denies the role of Imperial legislation in creating the Constitution of the Irish Free State and insists that the Statute of Westminster Act 1931 should be regarded as having recognised the pre-existing state of Irish law rather than making any changes in it.

Free State to that of the Dominion of Canada. In 1932 Hearne wrote that 'this State is an entirely different entity from any of the British Dominions'. Hearne insisted that the origins of the Irish Free State had been seriously misunderstood:

> [T]he new Irish State was not, like Canada, an entity slowly evolving from "British possession" through slow constitutional processes and difficult and protracted transitions to "British colony", "British Dominion" and finally to full Statehood. The Irish Free State became at once [sic] a clear-cut unhampered sovereignty.[80]

CONCLUSION

The relationship between pre-1922 Imperial statutes and Irish law remained ambiguous in the 1920s and 1930s. Although the position of Imperial statutes as a source of Irish law was often denied, the Irish government and the courts were not always consistent on this point. After the 1937 Constitution came into force the status of pre-1922 Imperial statutes was no longer denied. Instead, this status was simply ignored. The threat that they had once posed to Irish sovereignty had receded. Over time the very claim that pre-1922 Imperial statutes formed a part of Irish law was largely forgotten.

The question as to whether or not the parliament at Westminster could pass additional Imperial statutes for the self-governing Irish state after 1922 was not so easily put out of mind. This issue had threatened to derail the entire settlement represented by the 1921 Treaty, a development that would have had serious consequences for the history

[80] NAI, department of the Taoiseach, S12046, memo by John J. Hearne on 'The legal basis of the establishment of the Irish Free State' 31 March 1932.

of Ireland and the United Kingdom in the twentieth century. As events transpired, the Imperial parliament did pass a number of statutes that purported to apply to the Irish Free State in the 1920s and 1930s. These statutes were seen as a serious threat to Irish sovereignty in the decade that followed the signature of the 1921 Treaty. Their existence suggested that the Irish Free State was, after all, a Dominion. The companion to this article will examine these Imperial statutes and their treatment by Irish governments and by the Irish courts.