

Robert Lyon Moore and others - - - - - *Appellants*

*v.*

The Attorney-General for the Irish Free State and others - *Respondents*

FROM

THE SUPREME COURT OF THE IRISH FREE STATE.

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 6TH JUNE, 1935.

---

*Present at the Hearing:*

THE LORD CHANCELLOR (VISCOUNT SANKEY).

LORD ATKIN

LORD TOMLIN.

LORD MACMILLAN.

LORD WRIGHT.

[*Delivered by* THE LORD CHANCELLOR.]

---

This is a petition to have it declared that an amendment to the Constitution of the Irish Free State, viz., Constitution (Amendment No. 22) Act, 1933, is no bar to the maintenance by the petitioners, who are the appellants, of their appeal before this Board. The petitioners claim to be owners of a fishery in the tidal waters of the River Erne in Ireland. They had brought an action in the Irish Courts to enforce their claim and had succeeded before the trial Judge. On appeal to the Supreme Court that judgment was reversed on the 31st July, 1933, by a majority. The petitioners then presented to the Privy Council their petition for special leave to appeal, the grant of which leave was, on the 9th October, 1933, advised by this Board, and on the 10th November, 1933, an order granting such leave was made by the King in Council. But on the 15th November, 1933, an Act was passed by the Oireachtas of Saorstát Éireann, the Parliament of the Irish Free State, hereinafter called the Oireachtas, providing that no appeal should lie to His Majesty in Council from any Court in the Irish Free State: this enactment was also expressed to apply to appeals then pending. The petitioners thereupon brought this petition praying to have it declared that the enactment was void and did not bar their appeal.

The Attorney-General of the Irish Free State and the other respondents did not appear before this Board; the Attorney-General of England did, however, appear and gave the Board his assistance on the law relevant to the questions at issue.

For the decision of these questions it is necessary to consider the mode in which the Constitution of the Irish Free State was established.

On the 6th December, 1921, there were signed in London "Articles of an Agreement for a Treaty between Great Britain and Ireland": this instrument will hereinafter be referred to as "the Treaty": it was signed by representatives of Great Britain on the one hand and of the Irish Free State (or what became the Irish Free State) on the other. On the 31st March, 1922, an Act of the Imperial Parliament was passed. It was entitled the Irish Free State (Agreement) Act, 1922, and by section 1 (1) it provided that as from the date of that Act the Treaty, which was scheduled to it, should have the force of law. It also provided by section 1 (2) that there should be elected certain members of a body to be called the House of the Parliament to which the Provisional Government should be responsible and which should have power, as respects matters within the jurisdiction of that Government, to make laws in like manner as the Parliament of the Irish Free State when constituted. The latter provision was expressed to be in order to give effect to article 17 of the Treaty, which was in the following terms:

"By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof."

This Act gave no power to "the House of the Parliament" to enact a Constitution for the Irish Free State.

In due course "the House of the Parliament," which was a single chamber body, was elected and met on 9th September, 1922; it proceeded to sit as a constituent assembly for the settlement of the Constitution of the Irish Free State. The measure which it so passed was scheduled to an Act of the Imperial Parliament entitled the Irish Free State Constitution Act, 1922, which received the Royal Assent on the 5th December, 1922, and which described the measure as the Constituent Act and by section 1 provided as follows:

"The Constitution set forth in the First Schedule to the Constituent Act shall, subject to the provisions to which the same is by the Constituent Act so made subject as aforesaid, be the Constitution of the Irish Free State, and shall come into operation on the same being proclaimed by His Majesty in accordance with Article eighty-three of the said Constitution, but His Majesty may at any time after the proclamation appoint a Governor-General for the Irish Free State."

The provisions to which the Constitution was made subject by the Constituent Act were recited in the Act and were as follows :

"The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as the Scheduled Treaty) which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty."

Sections 4 and 5 of the Act were in the following terms :

"4. Nothing in the said Constitution shall be construed as prejudicing the power of Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions.

"5. This Act may be cited as the Irish Free State Constitution Act, 1922 (Session 2), and shall be deemed to be the Act of Parliament for the ratification of the said Articles of Agreement as from the passing whereof the month mentioned in Article eleven of the said Articles is to run."

Thus the Treaty received the force of law, both in the United Kingdom and in Ireland by reason of the passing of an Act of the Imperial Parliament; and the Constituent Act owed its validity to the same authority.

Before referring to the material clauses of the Constitution, it will be convenient to quote clauses 1 and 2 of the Treaty which were as follows :

"1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

"2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and 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 construction and effect of clause 2 were considered by the Judicial Committee in *Performing Right Society v. Bray Urban District Council* [1930], A.C. 377, at pp. 395 and 396: it was there held that the words of that clause specially ensured the right to petition His Majesty in Council, because that right was part of the law, practice and constitutional usage then governing the relationship of the Crown or representative of the Crown and of the Imperial Parliament to the Dominion of Canada. Their Lordships in the present case follow that decision.

Of the Articles of the Constitution the following are so material in this matter that they should be set out here in full:

“ *Article 12.*—A Legislature is hereby created to be known as the Oireachtas. It shall consist of the King and two Houses, the Chamber of Deputies (otherwise called and herein generally referred to as ‘Dáil Eireann’) and the Senate (otherwise called and herein generally referred to as ‘Seanad Eireann’). The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Eireann) is vested in the Oireachtas.

“ *Article 50.*—Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters on the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof.

“ *Article 66.*—The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever:

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

It seems that the proviso to article 66 of the Constitution was inserted to give effect in that particular regard to article 2 of the Treaty, and hence under article 50 of the Constitution that proviso could not be amended in the way in which it is sought to amend it by abolishing the right of appeal because such an amendment would not be within the terms of the Scheduled Treaty.

On the 6th December, 1922, there was issued a Proclamation of His Majesty announcing the passing and adoption of the Constitution, and thereafter the House of Parliament

or Constituent Assembly or Provisional Parliament was in due course dissolved and a Parliament called the Oireachtas for the Irish Free State was elected in due course.

On the 14th May, 1929, the Oireachtas passed an Act (the Constitution Amendment No. 16 Act, 1929) which substituted for the eight years specified in article 50 as being the period during which amendment might be made without a referendum, a period of 16 years. All the subsequent amendments which are referred to in this judgment were made without a referendum, in accordance with this amendment. Mr. Wilfrid Greene for the petitioners rightly conceded that Amendment No. 16 was regular and that the validity of these subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum.

On the 11th December, 1931, the Statute of Westminster, hereinafter called the Statute, was enacted. It was the result of the proceedings at the Imperial Conference, 1930, in which representatives of the Irish Free State took part together with the delegates of the other Dominions; that fact is recorded in the first recital, and in the last recital it is recorded that the Irish Free State, with the other Dominions, had requested and consented to the submission of the measure to the Parliament of the United Kingdom. Section 1 includes in the expression Dominion (with the other Dominions) the Irish Free State. Of the other sections that which is most relevant in these proceedings is section 2, which is in the following terms:

“ 2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

“ (2) 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.”

Sections 3 and 4 also refer to the Irish Free State as being a Dominion within the meaning of the Statute.

On the 3rd May, 1933, the Oireachtas passed an Act, No. 6 of 1933, entitled the Constitution (Removal of Oath) Act, 1933; that Act by section 2 provided that section 2 of the Constitution of the Irish Free State (Saorstát) Act, 1922, should be repealed and by section 3 that article 50 of the Constitution should be amended by deleting the words “ within the terms of the Scheduled Treaty.”

Finally, on the 15th November, 1933, the Oireachtas, as already stated, enacted the Constitution (Amendment No.

22) Act, 1933, amending article 66 of the Constitution so as to terminate the right of appeal to His Majesty in Council.

It is clear that, if this last mentioned amending Act is valid, the petition must fail because the amendment of the Constitution embodied in that Act must bar the right of appeal to the King in Council, if it is effective. But it cannot be effective unless the earlier Act (No. 6 of 1933) is also valid, viz. that which is directed to removing from article 50 the condition that there can be no amendment of the Constitution unless it is within the terms of the Scheduled Treaty. On the construction of article 2 of the Treaty, which has been adopted above, article 50, while it stands unamended, must prevent any amendment of the Constitution which would impair that right of appeal, that is, any amendment whereby the right of appeal to the King in Council is to be impaired. Hence it must be determined whether that Act of the Oireachtas, No. 6 of 1933, was validly enacted.

Mr. Greene for the petitioners has contended that this last mentioned Act was not valid. His argument was that the constitution derived its existence not from any legislation of the Imperial Parliament but solely from the operations of an Irish body, the Constituent Assembly, which is called in Ireland the Third Dail Eireann: this body, it is said, though mentioned in the Irish Free State (Agreement) Act 1922, was in fact elected pursuant to a resolution passed on the 20th May, 1922, by the Second Dail Eireann, an Irish legislative assembly. The Third Dail Eireann was thus, it was alleged, set up in Ireland by election of the people of Ireland of their own authority as a Constituent Assembly to create a constitution, and having accomplished its work went out of existence, leaving no successor and no body in authority capable of amending the Constituent Act. The result of that argument is that a constitution was established which Mr. Greene has described as a semi-rigid constitution, that is one capable of being amended in detail in the different articles according to their terms, but not susceptible of any alteration so far as concerns the Constituent Act, unless perhaps by the calling together of a new constituent assembly by the people of Ireland. Thus the articles of the constitution may only be amended in accordance with article 50, which limits amendments to such as are within the terms of the scheduled Treaty. On that view Mr. Greene argues that the law No. 6 of 1933 is ultra vires and hence that the amendment No. 22 of 1933 falls with it. It follows from that argument, if accepted, that the right of appeal to the King in Council is preserved unimpaired. In support of his argument that the Constituent Act and the Constitution are subject only to what is called Irish law and outside the authority of the Imperial Parliament, either in inception or in possibility

of alteration save as provided therein, Mr. Greene referred their Lordships to an unreported case in the Supreme Court of Ireland, *The State (Ryan and others) v. Lennon and others*, the judgment in which was delivered on the 19th December, 1934. In that case Kennedy, C.J., is reported to have expressed a view which corresponds in substance to that contended for by Mr. Greene. But their Lordships cannot accept these contentions. In their opinion the Constituent Act and the Constitution of the Irish Free State derived their validity from the Act of the Imperial Parliament, the Irish Free State Constitution Act, 1922. This Act established that the Constitution, subject to the provisions of the Constituent Act, should be the constitution of the Irish Free State and should come into operation upon being proclaimed by His Majesty, as was done on the 6th December, 1922. The action of the House of Parliament was thereby ratified; apart from such ratification that body had no authority to make a constitution; all the authority it originally possessed was derived from the Irish Free State (Agreement) Act, 1922, section 1 (1) and (2) of which have been referred to above; those sub-sections only gave the House of Parliament jurisdiction to make laws in respect of matters within the jurisdiction of the Provisional Government. It has been pointed out in the foregoing that in the Statute the Irish Free State was treated as one of the Dominions, the delegates of which took part in the Imperial Conference of 1930. The Irish Free State is in their Lordships' judgment bound by the Acts of the Imperial Parliament in the same way as any other of the Dominions; if it were not for section 2 of the Statute the Oireachtas would have had no power to amend or repeal an Act of the Imperial Parliament and has now such power only so far as any such Act is part of the law of the Dominion in virtue of section 2 of the Statute. Hence the Act No. 6 of 1933 and the Amendment No. 22 of 1933, and certain other Acts of the Oireachtas not here material which contain amendments of the articles which are not within the terms of the Treaty, are only valid Acts of the Oireachtas in virtue of the Statute. For the Statute alone gives to the Oireachtas power to repeal or amend the Constituent Act, which has the force of an Imperial enactment by reason that it is embodied in the Irish Free State Constitution Act, 1922. Mr. Greene has contended that these amendments cannot be deemed to be valid under the Statute because the Oireachtas in enacting these Acts was not purporting to proceed under the Statute, but was assuming to proceed solely under Irish law. But as what the Oireachtas was doing was in truth, as already stated, the repealing or amending of parts of an Imperial Statute, viz., the Irish Free State Constitution Act, 1922, what the Oireachtas did must, in their Lordships' judgment, be deemed to have been done in the way in

which alone it could legally be done, that is by virtue of the powers given by the Statute. It follows that by virtue of the Statute, article 66 of the Constitution has been validly amended with the result that the proviso to that article is removed and appeals to the King in Council are now prohibited.

The position may be summed up as follows:—

(1) The Treaty and the Constituent Act respectively form parts of the statute law of the United Kingdom, each of them being parts of an Imperial Act.

(2) Before the passing of the Statute of Westminster it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty because the Colonial Laws Validity Act forbade a Dominion Legislature to pass a law repugnant to an Imperial Act.

(3) The effect of the Statute of Westminster was to remove the fetter which lay upon the Irish Free State Legislature by reason of the Colonial Laws Validity Act. That Legislature can now pass Acts repugnant to an Imperial Act. In this case they have done so.

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. 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.

Mr. Greene has finally contended that the amendment is invalid because it affects the prerogative of the King in a matter outside the Dominion and outside the competence of the Oireachtas. It might be possible to state many objections to this contention, but it is enough here to say that whatever might be the position of the King's prerogative if it were left as matter of the common law, it is here in this particular respect and in this particular enactment made matter of Parliamentary legislation, so that the prerogative is *pro tanto* merged in the Statute, and the Statute gives powers of amending and altering the statutory prerogative. This objection also fails.

In the result their Lordships are of opinion that the petition should fail and be dismissed.

They will humbly so advise His Majesty.



1875

THE UNIVERSITY OF CHICAGO  
LIBRARY

In the Privy Council.

---

ROBERT LYON MOORE AND OTHERS

v.

THE ATTORNEY-GENERAL FOR THE  
IRISH FREE STATE AND OTHERS.

---

---

DELIVERED BY THE LORD CHANCELLOR.

Printed by His Majesty's STATIONERY OFFICE Press  
Pocock Street, S.E.1.

1935.