BRITISH, COMMONWEALTH, AND IRISH RESPONSES TO THE ABDICATION OF KING EDWARD VIII

DONAL K. COFFEY*

In late 1936, the Commonwealth was rocked by the abdication crisis. There were three legal elements to this crisis. First, the British Parliament responded with a statute in order to amend the line of the succession to the throne. Secondly, the crisis provided an insight into the evolving nature of the British Commonwealth of Nations. The members of the Commonwealth were consulted before the passage of the British Act. The British legislation was subsequently adopted by different means according to the constitutional conventions of the respective countries. Thirdly, only one member of the British Commonwealth failed to assent to the British legislation. This was the Irish Free State. The abdication crisis was perceived in the Free State as an opportunity to remove the Representative of the Crown from the internal affairs of the State. Despite this, the British Government were prepared to accede to the Irish response to the abdication crisis.

This article will analyse the legal situation in relation to the abdication. It consists of three sections. Section one considers the internal British legislative framework and, in particular, the primary British Act engaged by the abdication crisis, the Act of Settlement 1701 (the "1701 Act").[1] Section two examines the necessity for Dominion acquiescence to British proposals in the abdication crisis. This was as a result of the Statute of Westminster 1931. Section three examines the response of the Irish Free State to the crisis.

SECTION ONE: THE INTERNAL CRISIS

This section will briefly sketch the circumstances in which the abdication crisis came about.[2] It will then consider the issue of the 1701 Act which regulated the religion of the Monarch. Finally, it will examine what implications the Statute of Westminster 1931 had for the abdication crisis within Great Britain.

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1. 12 & 13 Will. III c 2.
2. A useful chronology of the events may be found in W. Hancock, *Survey of British Commonwealth Affairs Volume One: Problems of Nationality 1918–1936* (Oxford: Oxford University Press, 1937), pp.621–627. R. Latham submitted a draft of this paper to the Dominion Office for comment, see TNA: PRO DO/35/531/2/31. Latham did not

Edward VIII had been introduced to Wallis Simpson while she was still married and he had yet to ascend the throne. The two first met in 1931 and came to gradually spend more time in each other's company. Eventually, they did so without the presence of Ernest Simpson.[3] On January 20, 1936 George V died and Edward succeeded as King. Wallis Simpson accompanied the King on a Mediterranean cruise in the summer of 1936. It was widely covered by foreign newspapers but the British press, displaying a reticence which was to last until December 1936, decided not to cover the cruise.[4]

In October 1936, Wallis Simpson filed for a divorce decree. Edward VIII invited the Prime Minister, Stanley Baldwin, to Buckingham Palace on November 16, where he indicated his intention to marry Mrs Simpson at the first available opportunity. Baldwin had already received legal advice from Sir Maurice Gwyer, first parliamentary counsel to the Treasury,[5] on November 5, 1936. Gwyer began his analysis by noting that, "[f]or every act or omission of the King which has any political significance, Ministers must be prepared to assume responsibility."[6] Gwyer stated:

> "Ministers would have constitutionally both a right and a duty to advise the King against an imprudent marriage, or against a marriage distasteful to the King's subjects at large and regarded by them as tending to bring discredit upon the monarchy."[7]

Gwyer noted that in the event that such advice was not accepted then the Government could offer their resignation. He pointed out that the Government should consult with the Opposition before tendering the advice to the King. This would mean that the King could form no alternative Ministry and the King would therefore have to accept the advice or abdicate. Gwyer ended by noting the delicacy of the matter. He pointed out that a de facto abdication, without legislative grounding, would leave the country without an executive government, which was formally vested in the King. Even an abdication which was formalized in a statute would not provide a complete solution "in the case of the Dominions and especially of those which assert the divisibility of the Crown". We shall deal with the Commonwealth implications of the abdication crisis in section two. Fortified by Gwyer's advice, Baldwin prepared to tender his advice to the King.

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have access to the departmental papers on the abdication so I have corrected his account where appropriate. Hereinafter, the references to the appendix in the above volume will refer to Latham, while references to the main body of the text will refer to Hancock.

3. Simpson was a maritime broker.
4. See generally, on press coverage F. Siebert, "The Press and the British Constitutional Crisis" (1937) 1 *The Public Opinion Quarterly* 120.
5. Gwyer was to become Chief Justice of India shortly after the abdication crisis.
6. TNA: PRO PREM 1/449.
7. He stated that the preamble to the Royal Marriages Act 1792 (12 Geo. III, c.11) bolstered this point, although he conceded it did not apply to the King. The relevant section states "marriages in the royal family are of the highest importance to the state."

The Act of Settlement 1701

The line of succession to the English throne had been settled by the 1701 Act.[8] The primary purpose of the Act was to prevent Roman Catholics from ascending to the throne. Section 1 provided that the line of succession was to be through William III and his issue, Anne and her issue, and then the Elector Sophia of Hanover "and the heirs of her body, being Protestants." This section fixed the line of succession. Any alteration in the line of succession would therefore require a statutory amendment. Section 2 provided that if a Roman Catholic held the throne, or if the Monarch married a Catholic, then a demise of the Crown would take place[9] and the next in line to the throne who was a Protestant would ascend to the throne.[10] Section 3 stated that, "whosoever shall hereafter come to the possession of this Crown, shall join in communion with the Church of England, as by law established."[11]

The position under the 1701 Act was as follows. First, the line of succession was set by the legislation; the only qualification was that it could only pass through a Protestant. Secondly, whoever ascended to the throne had to be a member of the Church of England. Thirdly, a Monarch could lose the throne by becoming a Catholic or by marrying a Catholic.[12]

Edward VIII was therefore legally the British King and, as long as he did not convert to Roman Catholicism or marry a Catholic, could not be legally deprived of his title. Gwyer's advice was based on constitutional convention and on the principle of the King's duty to have regard to the advice of his ministers. That ministerial advice was political, rather than legal. One potentially embarrassing consideration was that Wallis Simpson had only secured a provisional decree nisi at the time of the abdication crisis. The decree absolute could only be granted after six months had elapsed, and during that time the King's Proctor could investigate Wallis Simpson. In 1936, a divorce could not be granted if both sides had committed adultery and there was a real danger that an investigation could interfere with the King's marriage plans.[13]

In his meeting of November 16, Baldwin attempted to discourage Edward from his intentions by pointing out this fact. Edward accepted this point and this was to prove a telling blow against Edward's ambitions to marry Wallis

8. 12 & 13 Will. III, c.2.
9. On a demise of the Crown see A. Keith, *The King and the Imperial Crown* (London: Longmans, Green and co, 1936), pp.29–30.
10. The Act of Settlement 1701 made reference to the Bill of Rights 1689. The procedure outlined is drawn from the Bill of Rights.
11. There were further elements to the Act of Settlement dealing with matters such as limitations on the right of the King to travel and the Privy Council, but they fall outside the remit of this article.
12. Maitland noted "[t]here is no clause saying that he forfeits the crown if he ceases to be a member of the English Church, if, for instance, he becomes a Wesleyan Methodist". F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1909), p.344.
13. See S. Cretney, "Edward, Mrs. Simpson and the Divorce Law" (2005) *History Today* 26.

Simpson. At the meeting of November 16, Edward leaned toward abdication in favour of the Duke of York, Prince Albert.

The proposal for morganatic marriage originated with Viscount Rothermere,[14] the editor of the *Daily Mail*, and was communicated to the King through his son Esmond. A morganatic marriage is one in which societal unequals marry and the lesser party achieves a lesser rank, while the rights of the superior do not pass to his or her issue. If Edward married Simpson in a morganatic marriage then their children could not succeed to the throne. As the line of succession was fixed by the 1701 Act, a morganatic marriage would therefore require a statutory amendment. This amendment would have to do two things. First, it would have to amend the Act of Succession to bar all the issue of the marriage of Edward and Wallis Simpson. Secondly, it would need to provide that the new line of succession was to proceed through the Duke of York and his heirs.

It was this suggestion which Edward VIII next pursued. On November 25, Baldwin once again met the King, where he proposed morganatic marriage as a solution which fell short of abdication. The Prime Minister pointed out that, in the event of legislation, the Dominions would need to be contacted. Baldwin received the assent of the King to offer three alternatives to the Dominion governments:

(i) The King's marriage to Mrs Simpson, she becoming Queen.
(ii) The King's marriage to Mrs Simpson, Mrs Simpson not becoming Queen, and the necessary legislation.
(iii) A voluntary abdication of the King in favour of the Duke of York.[15]

The abdication crisis breaks

In the aftermath of the November 25 meeting, Baldwin suggested the three approaches to the Dominion governments. At this point in the correspondence, the responses were the individual private responses of the heads of the Dominion governments rather than the Dominion governments as a whole. Baldwin discerned on November 27 that his own cabinet had no intention of agreeing to a morganatic marriage and the discussion thereafter was as to the necessary legislation in order for the King to voluntarily abdicate. On December 2, Baldwin informed the King that the morganatic approach had been rejected by the Government and the Dominions, and advised him he could either finish his relationship with Simpson, marry Mrs Simpson (which would lead to the resignation of his Ministers), or abdicate.

On December 3, the British press finally broke their silence on the issue. That evening the King again met with Baldwin where he indicated his desire to

14. The provenance of the idea, had it been known, would hardly have endeared the idea to Baldwin who had, since the early 1930s, been a strong critic of media barons.
15. NAI: DFA/s.57.

appeal directly to the Commonwealth through a broadcast in which he would point out that,

> "he wanted to be happily married, and that he was firmly resolved to marry the woman he loved when she was free to marry him, and that neither she nor he had ever sought to insist that she should become Queen."[16]

Baldwin consulted his cabinet colleagues the next day where they agreed this was impossible, as the broadcast could embarrass the cabinet: if the King was to make such a broadcast, and it was to succeed, it would leave the entire cabinet in an untenable position where they had indicated their intention to resign rather than introduce the necessary legislation.

Drafting

Baldwin received legal advice on the possibility of an abdication statute in a memo dated November 23, 1936.[17] The memorandum was drafted by Maurice Gwyer. Gwyer had represented the United Kingdom as treasury solicitor at the 1929 Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation and this knowledge of Commonwealth affairs was to prove important in the drafting process. We will consider the Commonwealth implications in the next section. Gwyer proposed a three-step procedure for abdication. First, Edward would issue a Royal message which would indicate Edward's desire to renounce the throne and his willingness to concur in any legislation necessary to accomplish this. Second, Gwyer proposed enabling legislation should be passed on foot of Edward's message.[18] The legislation would include the message in a recital. Third, the legislation would provide the form for an instrument of abdication. If Edward executed the instrument of abdication then the throne would pass to the Duke of York. Gwyer indicated this procedure would be "preferable" but did not provide his reasons for this. His reasons may have been influenced in this regard by Commonwealth considerations. Gwyer later noted that an instrument of abdication would show that the King acted on his own initiative and not on the advice of the Government of the United Kingdom. There would be no need to consider,

16. NAI: DFA/s.57.
17. TNA: PRO PREM 1/449.
18. This advice was bolstered by the analysis of Maitland: "There is, I think, no way in which a reigning king can cease to reign save by his death, by holding communion with the Church of Rome, professing the Popish religion or marrying a Papist, and possibly by abdication. I cannot regard the events of 1327, 1399 or 1688 as legal precedents. I can deduce no rule of law from them: they seem to me precedents for a revolution, not for legal action. If we had a very bad king, we should very probably depose him; but unless he consented to an act of parliament depriving him of the crown, the deposition would be a revolution, not a legal process. Even the king's power to abdicate, except by giving his assent to a statute declaring his abdication may, it seems to me, be doubted."

under this procedure, whether the King should act on the advice of each of His Dominion governments separately.

Gwyer advocated three legislative amendments. The first was to the Act of Settlement. As we have seen, this was necessary in order to change the line of succession. The second was the Civil List Act 1936.[19] This Act provided for the expenditure of the Royal family. Section 1 provided for the payment of certain monies "during the present reign and a period of six months afterwards". Gwyer maintained this was "altogether inappropriate in the circumstances under consideration". As we shall see, this aspect of the advice was not acted upon. The final Act which required amendment was the Royal Marriages Act 1792.[20] Section 1 provided that no descendant of George II could marry without the consent of the King. Section 2 provided for an exception, whereby a member of the royal family could marry provided they gave 12 months' notice to the Privy Council and, during this 12-month period, both Houses of Parliament did not expressly disapprove of the marriage. Gwyer pointed out that once Edward abdicated he would have to ask the permission of his brother, "which it might be thought in the circumstances that He should not be under an obligation to do", or comply with the 12-month period. Accordingly, Gwyer recommended amendment of the Royal Marriages Act to exempt Edward and his heirs from the operation of the Act.

Some early drafts of the Bill exist.[21] One of December 4, 1936, which proposed an Act to be known as "His Majesty's Abdication Act, 1936" contained a draft s.1(1) which provided for the succession of "that member of the Royal Family ... who would have succeeded if His Majesty had died." By December 8, this rather macabre phrasing had given way, apparently due to an Australian request, to the more elegant "there shall be a demise of the crown" which would appear in the final Act. The most difficult part of the drafting process was the second Preamble which extended the Act to the Dominions.[22] We shall deal with this difficulty later.

On December 11, 1936 His Majesty's Declaration of Abdication Act 1936 (the "1936 Act") was passed. It included the instrument of abdication signed by Edward on December 10 in a Schedule to the Act. The 1936 Act provided in s.1(1) that Edward would, upon Royal Assent to the Act by Edward, cease to be King and "accordingly the member of the Royal Family then next in succession to the Throne shall succeed thereto." Section 1(2) eliminated any progeny of Edward from the line of succession and amended the Act of Settlement accordingly. Section 1(3) removed Edward and his heirs from the ambit of the Royal Marriages Act 1772.

See Maitland, above, fn.12, p.344. For a contrary view see K.H. Bailey, "The Abdication Legislation in the United Kingdom and in the Dominions" (1937–38) III *Politica* 1 at 7.

19. 26 Geo. V & 1 Edw. VIII c.15.
20. 12 Geo. III c.11.
21. TNA: PRO CAB 21/4100/2.
22. The only other change was in the first Preamble where the phrase "has signified His desire that effect should be given thereto" was replaced with "has signified His desire that effect thereto should be given immediately".

SECTION TWO: ABDICATION AND THE COMMONWEALTH

This section will analyse how the Commonwealth responded to the abdication crisis. The abdication crisis was also a conflict between two theoretical views of Commonwealth relations. These were the *inter se* doctrine and the doctrine of the divisible Crown. This section will consider these doctrines. This analysis will inform the understanding of the Commonwealth dimension to the abdication crisis. This section will then consider the Statute of Westminster 1931. This provided that matters affecting the line of succession were a Commonwealth concern. Finally, this section will consider the diplomatic exchanges between the Commonwealth countries.

The inter se *doctrine and the divisibility of the Crown*

In the 1930s, the British Government adhered to the *inter se* doctrine of Commonwealth relations. This doctrine held that relations between the Commonwealth countries were of an Imperial constitutional rather than international nature. J.E.S. Fawcett stated that there were three elements to the *inter se* doctrine:

a) It only applied to the self-governing members of the Commonwealth, and not colonies;
b) It was based upon the traditional constitutional principles of the unity and indivisibility of the Crown and the common allegiance owed to it by its subjects in the Commonwealth, though it was directed outwards, to securing the unity of the Commonwealth in its international relations; and
c) It was developed to standardise treaty practice and no general form of the doctrine was accepted.[23]

The most important element for our purposes is (b), which is based upon the indivisibility of the Crown. The indivisible Crown meant that the King was King of all of the Commonwealth countries at the same time, rather than King of each separately. This theoretical point had a number of practical applications. If the King was a single King then it axiomatically followed that treaties, which were concluded in the name of Heads of State, could not be concluded between Commonwealth members, as the Head of State in both instances was the same person performing the same function. Therefore, Commonwealth relations were, under the *inter se* doctrine, constitutional rather than international.

An alternative view was most commonly associated with General James Hertzog, the Prime Minister of South Africa.[24] Hertzog claimed that the King held all of his titles separately. The King was King of the United Kingdom,

23. J. Fawcett, *The* Inter Se *Doctrine of Commonwealth Relations* (London: The Athlone Press, 1958), pp.6–7; the second element is a direct quote.
24. See, e.g. TNA: PRO DO 35/2167.

King of South Africa, King of the Irish Free State, etc. On this view of multiple crowns it was theoretically possible for the King to be replaced in one of the Commonwealth countries and yet remain King in the others, e.g. the King would cease to be King of South Africa but remain King of the other Commonwealth countries.

An historical parallel was drawn between the Commonwealth position and the fact that King George III, King George IV, and King William had been Kings of Hanover and, at the same time, Kings of Great Britain and Ireland. The same person was King in both jurisdictions but the person did not hold the title of King of Hanover by virtue of the title of King of Great Britain and Ireland. Hanover was governed by agnatic succession. This meant that a female could not succeed to the Crown. When Victoria became Queen of the United Kingdom, her uncle became King Ernest Augustus I of Hanover. This historical parallel therefore indicated the possibility of having separate monarchs in Great Britain and the Dominions.[25]

This view was incompatible with the British *inter se* doctrine. This conceptual distinction must be borne in mind when considering the abdication crisis. It was important, from the British point of view, to ensure a co-ordinated response to the abdication crisis in order to preserve their concept of the indivisible Crown and, thus, of the *inter se* doctrine.

The Statute of Westminster 1931

There were two issues that arose as a result of the Statute of Westminster 1931 in the abdication crisis. First, why was Commonwealth input necessary at all? Secondly, how were the various Commonwealth countries to implement the abdication?

The Preamble to the Statute of Westminster 1931[26] provided that any change in the law of royal succession would require the assent of the parliaments of all of the Dominions:

> [I]nasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne ... shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

The noted constitutional scholar Professor E.C.S. Wade remarked in the aftermath of the abdication "that no reliance was placed upon the technical plea

25. This is not the only historical parallel that may be drawn. The concept was based on the idea of personal union which has a strong historical pedigree.
26. 22 & 23 Geo. 5.

that the contents of the preamble are outside the operative parts of the Statute."[27] In the debates on the Statute of Westminster, Winston Churchill stated "[t]he Preamble is nothing. It has no legal force."[28] Why was the "technical plea" not advanced?

Two reasons may be identified as supporting the conclusion that the Preamble to the Statute of Westminster was legally binding. First, the preamble was inserted as recognition of a Commonwealth conventional rule. In 1929 the Conference on the Operation of Dominion Legislation recommended the adoption of such a constitutional convention on the basis that the Royal succession was a "[matter] of equal concern to all".[29] This proposal had been adopted in the 1930 Commonwealth Conference[30] and was, as a result of this, incorporated in the Statute of Westminster. The preamble was a Commonwealth constitutional convention even in the absence of implementing legislation. James Thomas, the Secretary of State for Dominion Affairs, referred to the preamble as a "constitutional convention" in the debates which led to the enactment of the Statute of Westminster.[31] Secondly, if the preamble had been ignored, the British Government would have broken the principle of the indivisible Crown which, as we have seen, was a component of the *inter se* doctrine. If the British Government had legislated unilaterally on the matter then it would mean that the other Commonwealth governments would have to legislate unilaterally. The Commonwealth had, as a result of this constitutional convention, to be consulted before the line of succession could be changed.

The second question that we must address is the different procedures which each Commonwealth country had to adopt to implement any proposed change. The Statute of Westminster did not extend to all of the Dominions. Section 10 of the Statute of Westminster provided that certain sections of the Statute did not apply to New Zealand or Australia unless the Parliament of the respective country adopted the sections.[32] These Parliaments had not adopted the Statute of Westminster in 1936. New Zealand and Australia were governed by a declaration, also contained in the preamble to the Statute of Westminster, which provided that no British legislation could affect a Dominion save at the request of that Dominion:

> And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

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27. E. Wade, "Declaration of Abdication Act 1936" (1937) 1 *Modern Law Review* 64.
28. 259 *Parliamentary Debates* 1195 (November 20, 1936).
29. *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929*, Cmd. 3479 at [59]–[61].
30. *Summary of the Proceedings of the Imperial Conference of 1930* Cmd. 3717, p.21.
31. Above, fn.29, at 1180. See also M. Hudson, "Notes on the Statute of Westminster 1931" (1932) 46 *Harvard Law Review* at 269–270.
32. Section 10 also applied to the Dominion of Newfoundland but this was under direct British rule in 1936.

The legislative alteration in the identity of the King affected those Dominions of which he was head of state. This consultation requirement, which enshrined the "established constitutional position," applied to Australia and New Zealand.

South Africa, the Irish Free State and Canada were governed by s.4 of the Statute of Westminster which stated:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

This section simply entrenched the declaration contained in the preamble. Section 4 did not stipulate any particular procedure for a Dominion to "request and consent" to legislation. It would appear that this could be provided either by an order-in-council or by legislative resolution or some other measure. Under the preamble to the Statute of Westminster, however, it was declared that a change to the royal succession would require the assent of the parliaments of the Dominions. South Africa clarified this point in the Status of the Union Act 1934. Section 2 of the Act provided:

> [N]o Act of the Parliament of the United Kingdom ... passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.

To sum up: (i) the preamble to the Statute of Westminster required that any alteration in the law of royal succession required "the assent ... of the Parliaments of all the Dominions"; (ii) in addition, Canada, the Irish Free State and South Africa were protected by s.4 of the Statute of Westminster which also required "request and consent" to Imperial legislation. Since legislation affecting royal succession was Imperial legislation, the process of "request" and "consent" was required; and (iii) s.4 did not apply to Australia and New Zealand. However, this was of little consequence, since the British Parliament was bound by the preamble to the Statute of Westminster which required "request" and "consent" of the Dominion parliament to Imperial legislation. Thus, Imperial legislation providing for a change in royal succession required a request by all of the Dominions and assent by their parliaments. It was not clear whether "assent by parliament" in the preamble meant legislative consent or consent by resolution. The position in South Africa was clear: no Imperial Act could extend to that Dominion unless it was confirmed by an Act of the Union Parliament. The proposal for morganatic marriage or a change to the Act of Settlement 1701 required internal legislative change.

The preamble to His Majesty's Declaration of Abdication Act 1936

Gwyer's memorandum of November 23 dealt with the issue of compliance with the Statute of Westminster.[33] Gwyer first noted that non-compliance with the constitutional convention laid down in the Statute of Westminster would not necessarily invalidate any British Act. In other words, an amendment of the Act of Settlement would be quite effective in English law notwithstanding any failure to obtain the "request and consent" of the Dominions. Gwyer pointed out that if a Dominion did not request and consent to the British legislation it could not extend to that Dominion by reason of the Statute of Westminster and, therefore, the statutory amendments contained in the British legislation would not apply to that Dominion. So, if the British Act amended the Act of Settlement but Canada did not request and consent to it, then the Act of Settlement would remain unamended in Canada. If a Dominion refused to request and consent to the British Act then they would have to pass an Act in their own parliament altering the succession. Gwyer presumed this would follow the British example, but that the line of succession would be set in that Dominion by Dominion, rather than British, legislation. Gwyer concluded that if such events were to take place "the doctrine of the indivisibility of the Crown will have received a shock from which it will not easily recover." The abdication crisis could therefore undermine the *inter se* doctrine.

On December 3, 1936 Baldwin telegrammed the Dominion prime ministers and pointed out the necessity for the introduction of British legislation to alter the line of succession.[34] He proposed,

> "in the circumstances of the case the less legislation, and therefore the less opportunity for public discussion and debate, the better, and accordingly that if possible legislation should be confined to the UK Act."

This statement had, as we have seen, an ulterior motive: the preservation of the *inter se* doctrine. Baldwin stated that the most desirable method was, therefore, to extend the British Act to the Dominions by s.4 of the Statute of Westminster. This could be done in a recital to the British Act. Baldwin invited the Dominions to consider whether a resolution passed by the respective Dominion parliaments when they next sat would be sufficient to satisfy the requirements of the preamble to the Statute of Westminster.

As we have seen, one interpretation of the preamble to the Statute of Westminster was that it required both (i) assent and (ii) legislation. A rival view was that a parliamentary resolution (rather than legislation) would suffice. The former was an interpretation with which the British Prime Minister was uncomfortable. Baldwin was particularly anxious that the process should not involve Dominion legislation. In Baldwin's view legislation was not necessary. The change in succession, Baldwin argued, was automatically re-incorporated

33. Above, fn.7.

34. TNA: PRO DO 121/37.

in local law. He pointed out that s.2 of the Commonwealth of Australia Constitution Act[35] provided that references to the Queen "shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom." Thus, the Crown in Australia followed, according to this theory, the British Crown. Section 3 of the South African Constitution followed the Australian model, and Baldwin pointed out that this had been supplemented by the definition in s.5 of the Status of the Union Act 1934 which stated:

> "heirs and successors" shall be taken to mean His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland as determined by the laws relating to the succession of the Crown of the United Kingdom of Great Britain and Ireland.

According to Baldwin, "what is made explicit in these two Acts may also be regarded as implicit in the Constitution of the other Dominions."[36] According to Baldwin, the internal law of the Dominions already fixed the line of succession to follow the British line. Therefore, any change in the British line of succession would be automatically incorporated in the respective Dominions. As a result of this there was no necessity for any further Dominion legislation. This was a theory of "implied incorporation" of the British legislation.

On December 5, 1936, the Canadian Government responded and rejected Baldwin's theory of implicit incorporation "in view of recognised position of Dominions in regard to the Crown" and on the basis that the preamble to the Statute of Westminster explicitly provided a role for the Dominion parliaments when the line of succession was changed.[37] They indicated that they would be unable to convene the Canadian parliament given the vastness of the country. They were "considering the feasibility" of Baldwin's proposals. If they adopted Baldwin's suggested course they proposed that the Canadian Government would consent to the British legislation. This would receive the assent of the Canadian parliament at their next sitting. They admitted "[t]his course might be held not to be in strict accord with constitutional convention, but it conforms to it in substance."

The New Zealand Government replied on December 5, but made no mention of Baldwin's implied line of succession theory.[38] They indicated that British legislation was sufficient and that the preamble to the British Act should contain a recital of the request and consent of New Zealand. On December 5,

35. 63 & 64 Vict. c. 12.
36. Baldwin did not stipulate what provision of the Irish Free State Constitution provided for this but the British Attorney-General subsequently indicated it was his view that Art.51 did so; see further below. Article 51 provided "[t]he Executive Authority of the Irish Free State ... is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada."
37. TNA: PRO DO 121/37.
38. TNA: PRO DO 121/37.
39. TNA: PRO DO 121/37.

the Australian Government indicated that they felt that an Act of the Australian parliament which would incorporate the British legislation was necessary.[39] Baldwin suggested that a parliamentary resolution, rather than legislation, might suffice to satisfy the Statute of Westminster, and indicated that Australian legislation might lead to the conclusion that legislation was necessary in all the Dominions. He pointed out that New Zealand and Canada were considering this course of action. On December 6, the Australian Government indicated that they would consider whether a parliamentary resolution or legislation was necessary. On December 6, the South African Government stated that, as they had adopted the Statute of Westminster, they were required to introduce legislation to extend the British Act.[40] This response implicitly rejected Baldwin's "implied incorporation" theory. Both the South African and Canadian Governments in their telegrams indicated that they wished to make it clear that the Dominions had responded to the King's request and had not demanded the course of action. On December 6, the Canadian Government also advised Baldwin that, contrary to his advice to the Australian Government on December 5, they had not decided whether to assent to the legislation by means of an Act of the Canadian Parliament or by parliamentary resolution.[41] They indicated that, at that time, they were inclined to do so by statute. As we shall see, this is the course they eventually adopted.

On December 6, Baldwin proposed the following: the inclusion of the following recital in the British legislation—"[a]nd whereas following upon the communication to His Dominions of His Majesty's said declaration and desire the (here insert the names of Dominions) have requested and consented to the enactment of this Act." On December 7, the South African Government responded and noted that this form of words would bring the British statute within the terms of s.4 of the Statute of Westminster. The South African situation was governed by s.2 of the Status of the Union Act which required an Act of the South African parliament to extend the British Act to South Africa. The South African Government therefore proposed that the preamble should simply declare that South Africa "assents" to the British legislation, which was all that was necessary in order to comply with the preamble to the Statute of Westminster governing the royal succession.

As a result of this, the British Government proposed to state that the Dominions of Canada, New Zealand, and Australia "requested and consented" to the British legislation, while the Union of South Africa "assented" to the legislation.[42] Canada, Australia and New Zealand objected to this wording as it seemed to imply that they had sought the abdication of the King more forcefully than the South Africans. New Zealand proposed that all Dominions should be listed as "assent[ing]".[43] The Canadian Government proposed separate preambles for each of the Dominions.[44] Baldwin again proposed that the UK

40. TNA: PRO DO 121/37.
41. TNA: PRO DO 121/37.
42. TNA: PRO DO 121/37 (December 7, 1936).
43. TNA: PRO DO 121/37 (December 9, 1936).
44. TNA: PRO DO 121/37 (December 9, 1936).

legislation was impliedly incorporated in South Africa, but this view was not accepted by the South African Government. The Canadian Government further indicated that they were not prepared to allow the word "assent" to be used to describe the Canadian position. They pointed to the word "request" used in s.4 of the Statute of Westminster and stated it did "not appear desirable to set precedent for a lesser procedure or phraseology so far as Canada is concerned."[45] At this point, December 10, time was pressing and it was necessary to reach immediate agreement. It will be recalled that Edward signed the instrument of abdication on December 10. Baldwin therefore proposed the following preamble:

> And whereas following upon the communication to His Dominions of His Majesty's said declaration and desire, the Dominion of Canada, pursuant to the provisions of the Statute of Westminster 1931 has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa have assented thereto.

Canada requested the inclusion of the phrase "section four" before "of the Statute of Westminster" and this phrasing was eventually adopted.

However, the compliance with the preamble to the Statute of Westminster 1931 was extremely casual. The preamble stated:

> inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne ... shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

However, the assent of all of the Dominion Parliaments had not been secured before the passage of the British Act. The Australian Parliament sat contemporaneously in order to ratify the actions of the British Parliament but it was alone in doing so. Furthermore, neither the Free State Parliament (as required by the preamble) nor the Government (as required by s.4) had assented in advance to the British Act changing the line of succession. Accordingly, the Irish Free State was not mentioned in the preamble to the His Majesty's Declaration of Abdication Act 1936. Non-compliance with the 1931 Act did not, of course, affect the legality of the change of succession. The constitutional doctrine, under which parliament was not bound by earlier parliaments,[46] meant

45. TNA: PRO DO 121/37 (Dec 10, 1936).

46. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (London: MacMillan and Co, 1915), pp.62–65, available online at *http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F3753346665&srchtp=a&ste=14* [Last accessed March 1, 2010].

that His Majesty's Declaration of Abdication Act 1936 could legally declare George VI King, notwithstanding non-compliance with the Statute of Westminster.

Dominion legislation

As we have seen, the preamble to the Statute of Westminister provided "any alteration in the law touching the Succession to the Throne ... shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom." It was unclear whether this preamble had full legislative force. Two Dominions, Canada and South Africa, implemented the change in succession by legislation, while two others, Australia and New Zealand, proceeded by resolution.[47]

The Canadians resisted Baldwin's invitation to proceed by resolution alone and insisted on legislation. This was embodied in the Succession to the Throne Act 1937. Of more interest for our purposes is the stance taken by the South African Government.

The Union of South Africa was the most audacious of the Dominions. South Africa had a strong republican lobby which demanded the right to secede from the Commonwealth.[48] This demand may have been purely theoretical, but it formed a part of South Africa's insistence that the Crown was divisible. During the abdication crisis, Hertzog came to form a view that was to subvert the doctrine of the indivisibility of the Crown. This view was that the abdication of Edward had taken place on December 10, when Edward signed the instrument of abdication, and not on December 11, when the British legislation came into force. This point of view was based upon a number of historical precedents cases involving Edward II, Richard II and James II.[49] It is sufficient for our purposes to consider the case of James II. The relevant statute here is the Bill of Rights 1689,[50] which declared in the preamble "whereas the late King James II had abdicated the Government, and the Throne was thereby vacant". On this view the King could abdicate unilaterally. According to Hertzog, abdication was "nothing else than a unilateral act which is free to any man who has undertaken services to a master or to anybody else".[51]

Hertzog's argument overlooked two crucial points. First, it could be argued that any right of unilateral abdication had been repealed by virtue of the Act of Settlement 1701 which had statutorily fixed the line of succession. A Canadian commentator noted:

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47. 1 EDW VIII *Commonwealth of Australia Parliamentary Debates* (Vol. 152) at 2893–4 for the Senate and 2901 for the House of Representatives (Dec 11, 1936) and 25 *New Zealand Parliamentary Debates* 5 at 7 (September 9, 1937).
48. E. Brookes, "The Secession Movement in South Africa" (1933) 11 *Foreign Affairs* 347, W. Hancock, *Survey of British Commonwealth Affairs: Volume I Problems of Nationality* (Oxford: Oxford University Press, 1937), pp.527–535.
49. See (1937) 28 *Union of South Africa: Debates of the House of Assembly* at 635 (January 25, 1937).
50. 1 Will. & Mary c.2.
51. Above, fn.49 at 636.

> "It seems obvious that a voluntary declaration of abdication by His Majesty would have had no effect whatever on his position as heir of the body of the most excellent Princess Sophia. In the absence, therefore, of a statutory exception permitting a voluntary abdication, or of a well-recognized common law principle that could, with some plausibility, be read into the Act of Settlement, it is submitted that the courts would have continued to regard His Majesty as the reigning sovereign until Parliament had declared to the contrary."[52]

Secondly, it was arguable that the instrument of abdication itself was not intended to apply *ex proprio vigore*. The instrument declared

> I, Edward the Eighth ... do hereby declare My irrevocable determination to renounce the Thrones for Myself and for My descendants, and My desire that effect should be given to this Instrument of Abdication immediately.

It is arguable that this wording simply declared the King's intention and that further action was necessary for it to take place.[53]

South Africa did not raise this issue when it could possibly have been incorporated in the British legislation. The South African insistence on the argument after the passage of the British Act infuriated the British. On January 6, 1937, the Secretary of State for Dominion Affairs, Malcolm MacDonald, noted:

> "The Union never raised this point when they saw our proposed legislation, had plenty of time to think about it, and assented to its enactment. Had they raised it, we could have considered legislating so that the late King's abdication took effect as from the moment of his signing the Instrument. Not having raised the point, and having assented to our proposal, surely the Union are now morally bound to make their legislation conform in this respect with ours."[54]

Hertzog presented his case in person to the Governor-General, George Villiers, at Groote Schuur on January 10, 1937.[55] Villiers asked Hertzog why any British legislation was necessary under the theory which Hertzog held. Hertzog replied that the heirs of Edward had to be excluded from the line of succession. Hertzog asked why the British Government had included the word "immediately" in the instrument of abdication, which made it automatically effective according to Hertzog, and Villiers tartly responded "that the British Government could hardly be expect to provide for a contingency which according to their view of the law could not arise."

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52. F. Cronkite, "Canada and the Abdication" (1938) 4 *The Canadian Journal of Economics and Political Science* 181.
53. See K.H. Bailey, "The Abdication Legislation in the United Kingdom and in the Dominions" (1937–38) III *Politica* 8–9.
54. TNA: PRO DO 35/531/2/5.

Section 1(1) of His Majesty King Edward the Eighth's Abdication Act 1937, as passed by the South African parliament, stated "[i]t is hereby declared that the Instrument of Abdication ... has, and has had, effect from the date thereof." This Act was important from a theoretical point of view. Edward VIII abdicated one day earlier in South Africa compared to Britain. It was impossible, in light of this development, to maintain that the Crown was indivisible. This undermined the *inter se* doctrine which had hitherto been the British approach to Commonwealth relations. This constrained how the British Government could approach the Irish response to the abdication crisis.

SECTION THREE: THE IRISH FREE STATE AND THE ABDICATION CRISIS

The Irish Free State was the only member of the British Commonwealth of Nations which was not mentioned in the preamble to the His Majesty's Declaration of Abdication Act 1936. The Irish Free State Government perceived that the abdication crisis could be used to further advance their claims to internal sovereignty. Their response to the abdication crisis was tempered by the internal politics of the Free State. This section analyses the diplomatic events and drafting process which gave rise to the legislation passed by the Free State. It concludes by considering the position of the Free State within the Commonwealth after the abdication crisis.

The internal situation

Fianna Fáil came to power in 1932 with the intention to pursue a republican constitutional agenda. The party aimed to eliminate all traces of British influence from the Constitution of the Irish Free State. In 1936, however, the process was far from complete. The Crown, through its representative, the Governor-General, continued to perform prominent, if only symbolic, functions in the Constitution. From the time of his election as President of the Executive Council, de Valera had pressed to have the institution excised from the Constitution. In 1932, James MacNeill retired as Governor-General and de Valera attempted to have the functions of the office exercised by either the Chief Justice or the President of the Executive Council.[56] In 1934, draft amendments to the Constitution were prepared which would have curtailed the influence of the Governor-General further.[57] On both occasions the institution of the Governor-General survived. In April and May 1935, de Valera instructed

55. TNA: PRO DO 35/231/2/27.
56. See further D. McMahon, "The Chief Justice and the Governor General Controversy in 1932" (1982) 17 *Irish Jurist* 145 and B. Sexton, *Ireland and the Crown 1922–1936: The Governor-Generalship of the Irish Free State* (Dublin: Irish Academic Press, 1989), pp.125–151.
57. NAI: Taois s. 2793, 2794, 2795, and 2796.

John Hearne, legal advisor to the Department of External Affairs, to begin drafting a new Constitution.[58] In his oral instructions de Valera indicated the new Constitution was:

> "To provide for the establishment of the office of President of Saorstát Eireann, the holder of which would fulfil all the functions now exercised by the King and the Governor General in internal affairs; and
> To contain provision for the retention of the King as a constitutional officer of Saorstát Eireann in the domain of international relations."[59]

On June 10, 1936, John Dulanty, Irish High Commissioner to the United Kingdom, submitted a memorandum drafted by the Irish Government to Clive Wigram, private secretary to the King, which outlined the Irish Government's intention to introduce a new Constitution which would, inter alia, create the office of a directly-elected President and abolish the office of Governor-General.[60] In subsequent meetings between Dulanty and Malcolm MacDonald from June to October 1936, a number of difficulties emerged.[61] The British Government wished to ascertain whether the King would be retained in the internal affairs of the country.[62] This was necessary in order for the British Government to be satisfied that the Free State remained within the Commonwealth. The British Government therefore recommended consultation between officials on both sides to clarify the legal position envisaged under the new Constitution.[63] De Valera viewed the matter as purely internal and made clear that no consultations about the new Constitution could take place. On November 3, Joseph Walshe, secretary of the Department of External Affairs, composed a note on a meeting which had taken place that day between Dulanty and Horace Wilson.[64] In this meeting, Wilson said "[e]ven if the King did not participate at all in internal affairs something might be done provided there was not a complete eviction." Walshe did not attach any importance to statements by civil servants but noted that the statement illustrated "how far the [British] have been obliged to move towards us by the system of the 'fait accompli.'" The abdication of the King was to provide the opportunity for a greater *fait accompli*.

The first recorded message on the Irish side mentioning the abdication was a letter dated November 19, 1936 from Dulanty, in which he mentioned the rumours circulating about the King.[65] On November 29, 1936, Sir Harry

58. UCDA: P150/2370.
59. UCDA: P150/2370.
60. UCDA: P150/2368.
61. NAI: DFA/2003/17/181.
62. NAI: DFA/2003/17/181, see e.g. meetings of June 24 and September 8.
63. NAI: DFA/2003/17/181, see e.g. meeting of October 19. At this meeting were Dulanty, Harry Batterbee, assistant under-secretary at the dominions office, and Horace Wilson, head of the British civil service.
64. UCDA: P150/2173. The note refers to a meeting between Dulanty and British civil servants but does not identify the others present.
65. NAI: DFA 2003/17/181.

Batterbee[66] held a meeting with Eamon de Valera, Joseph Walshe, John Dulanty, and John Hearne. Batterbee transmitted the three choices which Baldwin had discussed with the King.[67] De Valera emphasised that the King was viewed differently in the Free State than in the United Kingdom, as the former's "interest in the King was purely from the point of view of function and not from any personal point of view". De Valera also noted he had indicated his intent to remove the King from the internal constitutional position of the Free State and expressed his wish that this position had been clarified before the abdication crisis.[68]

De Valera indicated that he did not intend to acquiesce to the British suggestion that the Free State request and consent to the British legislation, as he believed this would,

> "[e]xpos[e] himself to the charge that he had not preserved for the Irish Free State the position of complete equality in constitutional matters which had been attained under the Statute of Westminster."[69]

It will be recalled that the "request and consent" procedure was designed to comply with the Statute of Westminster; it may be that de Valera's interpretation of the "equality" guaranteed under the Statute of Westminster was closer to a guarantee of national sovereignty.

In the course of his discussion, de Valera indicated that he would prefer the morganatic alternative. Both Dulanty and Walshe agreed with this point. De Valera pointed out that, "every avenue ought to be explored before he was excluded from the throne". Batterbee interjected that the British approach to the throne was different to that of the Free State:

> "[M]ost of us regarded it with an almost religious veneration and all our information went to show that public opinion in this country ... would not tolerate the King marrying a woman of the nature of Mrs. Simpson – Caesar's wife must be above suspicion."[70]

At this stage de Valera indicated his preference, given Batterbee's representation, for the third option—abdication. Significantly, Batterbee noted that de Valera intended to "impress upon me, for better or worse, we had reached a parting of the ways".

In an interesting development, later that day Batterbee met Walshe and Hearne separately from de Valera.[71] In the course of that discussion the Irish

66. TNA: PRO DO 121/37. Batterby (1880–1976) was assistant under-secretary at the Dominions Office.
67. See further s.1.
68. TNA: PRO DO 121/37.
69. TNA: PRO DO 121/37. Batterbee had indicated the preferred British approach. De Valera's quote was a response to this approach.
70. De Valera apparently based his preference for the morganatic option on the basis of the legality of divorce as a recognized institution in England.
71. TNA: PRO DO 121/37.

officials broached the possibility of a constitutional settlement between the two countries. They suggested privately that the only way the Free State could retain the King's internal influence was "for the principle of a United Ireland and for that alone". The Irish officials suggested, inter alia, a federative body drawn from the representatives of the parliaments of Northern Ireland and of the Free State, a financial settlement, and some form of Commonwealth citizenship.

De Valera decided to proceed slowly with implementing the abdication procedure. On December 5, de Valera telegrammed Baldwin, noting,

> "[T]he news of intended sudden action on Monday next within a week of the receipt of the first information concerning the position gives me serious cause for anxiety. Apart from other reasons legislation in our Parliament would be necessary in order to regularize the situation ... Such legislation at this moment would cause grave difficulty. Is there no alternative to immediate abdication?"[72]

One further source of difficulty was that the Dáil had adjourned on November 27, 1936 and did not plan to sit until February 3, 1937.[73]

On December 10, 1936, the cabinet resolved to pass two pieces of legislation to deal with the abdication.[74] It was unsurprising that the Free State would choose to legislate separately from the rest of the Commonwealth given the independent position which had been staked out by Fianna Fáil in relation to constitutional affairs since 1932. This legislation was introduced:

> [T]o give effect to the abdication as far as the Saorstát was concerned;
> - to delete from the Constitution all mention of the King and of the Representative of the Crown whether under that title or under the title of Governor General;
> - to make provision by ordinary law for the exercise by the King of certain functions in external matters as and when so advised by the Executive Council.[75]

Also on December 10, Walshe had a telephone conversation with Batterbee in which Batterbee attempted to convince Walshe that a resolution would suffice for the purposes of the preamble to the Statute of Westminster, i.e. no legislation was necessary, and that the change in succession was automatically incorporated by Art.51 in the Irish Free State:

> "The Attorney-General would at least have to say that, as a lawyer, he had to look at the law and interpret the Constitution, especially Article 51, as implying 'that the King of the United Kingdom was the King in the Irish

72. NAI: DFA s.57.
73. 64 *Dáil Debates* Col.1228, November 27, 1936.
74. NAI: CAB 7/377.
75. NAI: CAB 7/377.

> Free State within the meaning of the Irish Free State Constitution until the Dáil otherwise provided.' The Attorney-General would enunciate this doctrine as mere theory if that would help ...".[76]

Walshe indicated that such an account would be intolerable and in a memorandum entitled "Note for Immediate Meeting of Parliament", prepared on the day noted Batterbee's suggestion, commented,

> "Such an answer made on such authority would cause serious detriment to our position as established in the Statute of Westminster. Indeed, if it were accepted as a Constitutional convention it would destroy the effect of the renunciation in the Statute of Westminster that the British have no right to legislate for the other Members of the Commonwealth without their request and consent."[77]

It is unclear whether the memorandum was delivered sufficiently quickly to influence the cabinet discussion or whether the cabinet reached its conclusion as to the merits of a swift legislative response independently of this advice. What is clear is that by 1.30pm on December 10, de Valera had instructed Walshe to contact Batterbee and let him know that de Valera was attempting to convene the Dáil the following day. The agreed text to be delivered to a question asked in the House of Commons about the legislative situation in the Free State stated:

> "I have received a message from Mr de Valera that the Government of the Irish Free State are summoning their Parliament, if possible, tomorrow to make provision for the situation which has arisen in the Irish Free State."[78]

De Valera viewed the possibilities raised by the abdication crisis with some excitement. In a handwritten note contained in his papers are the following notes:

> No barrier
> 32 Counties Repub.
> New Constit. foreshadowed[79]

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76. NAI: DFA 2003/17/181.
77. NAI: DFA 2003/17/181.
78. NAI: DFA 2003/17/181.
79. UCDA: P150/2345. The note contains references to the numbers voting for and against the Bills in the Dáil sessions. We can place this part of the note as, at the latest, December 10, 1936, however, as it makes reference to "Exec. – Functions". The Bill, which was to become the Executive Authority (External Relations) Act 1936, was first called the Executive Functions (Foreign Relations) Bill 1936 when it was drafted by the parliamentary draftsman. The Bill had been redrafted by December 11, with the title it was eventually to bear.

The fact that the Dáil was to reconvene the next day meant that the Bills were drafted with some haste. The parliamentary draftsman, Arthur Matheson, drafted the Bills on December 10, handed three copies to John Hearne, received revisions, redrafted the Bills and sent them to the printers on the same day.[80] Matheson's diary from the period indicates he met with Hearne and George Gavan Duffy, then a Senior Counsel,[81] to discuss the legislation.[82] It seems clear one copy was for Hearne, one for De Valera and one may speculate that the third copy was either for Walshe, who was present at the Batterbee meeting, or for Gavan Duffy, who was informally providing the government with constitutional advice.

Legislation

Of the two pieces of legislation introduced, only part of the Executive Authority (External Relations) Act was necessary to deal with the abdication crisis itself. Section 3(2) of the Act stated:

> Immediately upon the passing of this Act, the instrument of abdication executed by His Majesty King Edward the Eighth on the 10th day of December, 1936 ... shall have effect according to the tenor thereof and His said Majesty shall, for the purposes of the foregoing sub-section of this section and all other (if any) purposes, cease to be king, and the king for those purposes shall henceforth be the person who, if His said Majesty had died on the 10th day of December, 1936, unmarried would for the time being be his successor under the law of Saorstát Eirean.[83]

This phrasing was only inserted at the committee stage of the Bill on December 12, 1936.[84] At 1.38am on December 11, the Free State received a telegram containing the text of the British Act and, given the resemblance in wording, it seems clear that this final version of the text was substantially influenced by the final British version. This was a precautionary measure as explained by De Valera when introducing the amendment,

> "I indicated that there were certain words raised last night in which there might be some nook or corner which Edward VIII or his disembodied spirit might be hovering around to get possession of. It was to make quite certain that, if there was any such nook or corner, it would be taken possession of, if I might put it that way, not by Edward VIII, but by his successor."[85]

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80. NAI: AGO/2000/22/738 and AGO/2000/22/739.
81. He was appointed to the High Court on December 21, 1936.
82. NAI: AGO/2001/49/81.
83. A schedule to the Act contained the instrument of abdication.
84. 64 *Dáil Debates* Col.1500, December 12, 1936.
85. 64 *Dáil Debates* Col.1500, December 12, 1936.

Sections 1 and 2 of the Act provided that consular and diplomatic representatives would be appointed on the advice of the Government of the Free State and that all international agreements would require the assent of the Parliament of the Free State. Section 3(1) stated that the Irish Free State was,

> associated with the following [Commonwealth] nations and so long as the king recognized by those nations as a symbol of their co-operation continues to act on behalf of each of those nations ... the king so recognized may, and is hereby authorized to, act on behalf of Saorstát Eireann for the like purposes as and when advised by the Executive Council to do so.[86]

In the Irish Free State, however, the King was retained only as a "symbol" and then only insofar as he was a symbol of co-operation of an international body. It would have been legitimate, under the statute, for the Commonwealth to agree to elect a President by majority voting between Prime Ministers.

The Executive Authority (External Relations) Act 1936 came into force on December 12, 1936. Section 3(2) of the Act provided that the abdication was operative within the Free State from the date the Act came into force, i.e. December 12, 1936. It will be recalled that the South African Government maintained the abdication operated from December 10, 1936 but that the British Government claimed Edward VIII abdicated on December 11, 1936. The South African claim undermined the *inter se* doctrine of commonwealth relations.[87] The Free State legislation undermined the doctrine for the same reasons.

The Constitution (Amendment No. 27) Act 1936 contained a schedule which amended 10 Articles of the Free State Constitution which essentially deleted the internal functions of the King in the State.[88] This piece of legislation was unnecessary from a purely legal standpoint to successfully resolve the abdication crisis. The result of these two Acts was that the link between the Free State and the Crown was relegated from a constitutional to a statutory basis.

In the Dáil, Deputy John A. Costello pointed out that he "failed to see any possible connection between the abdication of the King and the provisions of [the Constitution (Amendment No. 27) Act] purporting to take out the references to the King in the Constitution."[89] De Valera's speech explained the Irish response to the abdication crisis:

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86. The earlier draft had made reference to the "British Commonwealth" and the "monarch" rather than the more passé statements contained in the final draft, see above fn.33. John A. Costello attempted to insert a reference to the "British Commonwealth of Nations" at the Committee Stage, see 64 *Dáil Debates* Col.1485, December 12, 1936.
87. See above, s.2.
88. The amended Articles were 2A, 12, 24, 41, 42, 51, 53, 55, 60 and 68. Some Articles were deleted, e.g. Art.60, while others transferred duties requiring the King's assent to the Chairman of the Dáil, e.g. Art.42.
89. 64 *Dáil Debates* Col.1293, December 11, 1936.

> "In these two Bills we are giving expression to the position as it is to-day, in reality and in practice, and, if we are to take responsibility for Bill No. 2, we are not prepared to do so unless we have Bill No. 1, which makes quite clear what the functions of the King are for whom succession is provided. We think this is the proper time. In the time of King Edward VIII I had indicated quite clearly that we proposed in the new Constitution to make the position of the King roughly as it was in the old Constitution, with these deletions."[90]

What is clear from the speeches of Deputies Costello, Frank MacDermott[91] and Desmond Fitzgerald[92] is that their primary concern was with whether the proposed constitutional amendment would result in the Free State being excluded from the Commonwealth. This issue had been raised, rather unusually, at the first stage by the leader of the Opposition, William Cosgrave, who put three questions to de Valera:

> "One: is it the intention of the Executive Council, in these Bills, to sever the connection of this State with the Commonwealth of Nations? The second question is: has consideration been given by the Government as to whether the Bill severs or jeopardizes our membership of the Commonwealth? And, three, in connection with the second question, has there been consultation with all or any of the other States, members of the Commonwealth of Nations, as to the effect of the proposed legislation on our relations with them?"[93]

De Valera answered that there had been no change in Commonwealth status, as Art.1 of the 1922 Constitution was not affected by the legislation.[94] He stated there had been no need to consult the other Dominions on the matter as the matter was one which "affects ourselves alone".[95] The concern of the Deputies subsequent to de Valera's answer was as a result of the fact that they were not sure whether de Valera's answer would be accepted by the other relevant parties.

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90. 64 *Dáil Debates* Col.1279, December 11, 1936. Strictly speaking, of course, the "time of King Edward VIII" continued in Ireland until the Bills were passed, and the use of the past tense would only have been appropriate under the Westminster approach rejected by the Free State on December 10.
91. 64 *Dáil Debates* Cols 1310–1311, December 11, 1936.
92. 64 *Dáil Debates* Cols 1315–1318, December 11, 1936.
93. 64 *Dáil Debates* Col.1232, December 11, 1936.
94. Article 1 stated "[t]he Irish Free State is a co-equal member of the Community of Nations forming the British Commonwealth of Nations".
95. 64 *Dáil Debates* Col.1233, December 11, 1936.

Anglo-Irish relations[96]

On January 14, 1937 a meeting was held between MacDonald, the Secretary of State for Dominion Affairs, and de Valera in London. MacDonald questioned de Valera about the Executive Authority (External Affairs) Act 1936 but made an important concession when dealing with the constitutional legislation:

> "The Constitution (Amendment No 27) Act 1936 dealing as it did with the internal affairs of An Saorstát was clearly the concern only of the people of An Saorstát. Absolute freedom in internal affairs was of course one of the bedrock principles of the Commonwealth ...".[97]

In a memo circulated on January 18, 1937, MacDonald outlined the reasons for accepting or rejecting the Irish legislation.[98] The reasons for rejection were first, that the legislation was a breach of the Treaty. Secondly, if the Free State was allowed to remain a member of the Commonwealth under such circumstances, then other countries might also attempt to join under like conditions. Thirdly, the legislation might not signal "the beginning of Mr. de Valera's permanent acceptance of the King". MacDonald did not believe this was correct, as he placed weight on de Valera's desire for a united Ireland and the only possibility for attaining this was within the Commonwealth. Fourthly, and most importantly, it could serve as a bad example to other Dominions. MacDonald pointed to Hertzog's difficulties with a republican movement in South Africa and the Indian unrest which was occurring at that time. MacDonald discounted this risk as "the other Dominions are already rather inclined to regard the Irish as curious people who must do things differently from everybody else ...".

The reasons for accepting the legislation were as follows: first, if they attempted to force the Irish out of the Commonwealth, they would be doing so to a country which had voluntarily accepted the King as King of Ireland. Secondly, it would exacerbate the ongoing political difficulties. Thirdly, it would strengthen the British defensive position if they could come to some sort of arrangement regarding defence. Fourthly, the Commonwealth was not a static organisation and there was no reason to accept the internal functions of the Crown in Dominions as the final resting place of the organisation. Finally, it was a matter of common concern for all members of the Commonwealth.

On February 2, 1937, the Dominions were telegrammed on the Irish legislation.[99] The telegram laid out the basic structure of the Acts and pointed out that de Valera did not intend to include Art.1 of the 1922 Constitution, which provided that the State was "a co-equal member of the Community of Nations forming the British Commonwealth of Nations" in the new Constitution. The

96. See generally D. Harkness, "Mr. de Valera's Dominion: Irish relations with Britain and the Commonwealth, 1932–1938" (1970) 8 *Journal of Commonwealth Political Studies* at 220–221.
97. NAI: DFA 2003/17/181.
98. TNA: PRO CAB 24/267.
99. TNA: PRO CAB 24/268 C.P. 52 (37).

British Government stressed the need for consultation with the other members of the Dominion but was prepared to accept the legislation as "not affecting a fundamental alteration in the position of the Irish Free State as a Member of the Commonwealth".

They attached three further points to be brought to de Valera's attention. First, they "attach[ed] particular importance" to the proposition that Art.1 be included in the new Constitution or else in an amendment to the Executive Authority (External Affairs) Act to include this. Secondly, they wanted it made clear that the Free State recognised the King as a symbol of *their* co-operation with the Commonwealth and not just as a symbol of other's co-operation. Thirdly, they wanted the King to be referred to specifically and not as an "organ".

The Bodenstein memorandum

In February 1937, Dr H.D.J. Bodenstein, secretary of the Department of External Affairs of South Africa, authored a memorandum on the Irish response to the abdication crisis.[100] This memorandum examined the question of whether the Free State legislation placed the country outside the Commonwealth. Bodenstein stated that according to the 1926 Balfour declaration there were two essential factors in the Commonwealth:

1) Members were united by a common allegiance to the Crown, and
2) Members were freely associated.

Bodenstein pointed out that allegiance is "relationship between the person of the Sovereign and his subject as a natural person". Allegiance could not describe the relationship between bodies politic, i.e. between the Dominions and the Crown.[101] Bodenstein concluded that allegiance was not used in a legal sense but must have been used to describe some identical relationship between the Dominions and the Crown. He stated that in 1926 the King was the head of the Executive, formed a part of the Legislature and justice was dispensed in his name in each of the Dominions. Bodenstein did not thereafter establish which of the three elements, or perhaps a combination thereof, best described the relationship between the Dominions and the Crown. Instead, Bodenstein asked "how much of his royal powers the king may be deprived of without the relationship existing between the equal autonomous communities ceasing to exist." Bodenstein left a considerable gap in his analysis. Unless one could ascertain what the elements of the relationship between the Dominions and the Crown were, it would seem impossible to determine subsequently whether that relationship had ceased to exist.

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100. NASA: BTS/1/31/1 memo entitled "Memorandum on Recent Changes in the Irish Free State Constitution and its Effect on the Membership of the Irish Free State of the British Commonwealth".

101. He relied on *Calvin's Case* (1608) 77 E.R. 377, where it was held "[a] body politic (being invisible) can neither make nor take homage," at 389.

Bodenstein pointed out that the King could be deprived of powers by either: (1) assigning the powers to another body but continuing to exercise the powers in the name of the King, or (2) assigning the powers to another body simpliciter. The first procedure did not impair the position of the King, as the power was still nominally exercised by the King. If the King were deprived of all legal power under the second procedure then the King would "be merely an ornament in the community, useful perhaps for social purposes, and wield only such influence as he may command in virtue of his own personality." Bodenstein pointed out that it would be difficult to exclude a Dominion even under these circumstances "merely because it has ... brought legal theory into line with actual practice". Although theoretically the Crown was a part of the executive, legislature, and judiciary, as a matter of practice the power was vested in the Government, the popular representatives, and the judiciary respectively. Bodenstein concluded that the Free State had not even gone so far as to completely eliminate the King, as they had retained the Crown in relation to external affairs. Therefore, Bodenstein concluded that the Free State had not violated the common allegiance to the Crown.

Bodenstein then turned to the matter of free association. He concluded that the question of how states associated within the Commonwealth was entirely in the field of politics and:

> "It is possible for the Members of the British Commonwealth of Nations to continue to co-operate and to remain associated even if the King plays no role whatsoever in their constitutional law. It is also possible for such co-operation to cease completely without altering the relationship between the Members of the British Commonwealth of Nations provided the king be maintained."

This memorandum shows that legal thinking, within South Africa at least, was conciliatory in regard to the Irish position. As will be recalled, the Irish Free State fulfilled the first of the two criteria outlined above. This memorandum illustrates the difficulties which Britain faced if it attempted to expel the Free State from the Commonwealth. In fact, the South African Government was prepared to consider the possibility that even in the absence of the External Relations (Executive Authority) Act 1936, the Free State would remain within the Commonwealth.

The Dominions accepted the position outlined by the British Government in the telegram of February 2, 1937, and it was in those terms that the position of the Commonwealth was outlined to de Valera. The Commonwealth position was not communicated to the Free State until April 1937. At this point, the Government of the Free State was preparing the final draft of the proposed Constitution and they were unwilling to alter this to placate Commonwealth concerns.

Concluding remarks

The abdication of King Edward VIII tested the foundations of the Commonwealth. The United Kingdom was forced to consult with the Dominions in order to pass legislation altering the line of succession. Canada and South Africa used the situation to pass legislation which bolstered their claims that the Crown was divisible. This was a blow to the British theory of *inter se* relations between Commonwealth countries. The South African violation of the indivisibility of the Crown meant that the Irish Free State government found itself negotiating with a British government whose confidence had weakened. The British administration of December 1936 was a less muscular one than the British administration which had confronted de Valera in June 1932. One potential problem which faced de Valera in the enactment of a new Constitution which excluded the Crown from the internal affairs of the State, a recalcitrant British Government and Commonwealth, had been removed.

Donal Coffey is a PhD candidate in law at University College Dublin.