CONCLUSIONS of a Meeting of the Cabinet held at 10, Downing Street, S.W., on Thursday, 1st June 1922 at 12 noon.

PRESENT:

The Prime Minister (in the Chair).


Right Hon. Viscount Esher, K.G., Lord Chancellor.

Right Hon. B. Shortt, K.C., Secretary of State for Home Affairs.

Right Hon. Viscount Peel, G.B.E., Secretary of State for India.

Right Hon. Lord Lee of Fareham, K.C., First Lord of the Admiralty.

Right Hon. Sir Alfred Mond, Bt., M.P., Minister of Health.

Right Hon. Sir A. Griffith, K.C.M.G., Minister of Agriculture and Fisheries.

Right Hon. Sir Hamar Greenwood, K.C.M.G., Chief Secretary for Ireland.

The Right Hon. the Earl of Balfour, K.G.V.O., Lord President of the Council.


The Right Hon. Sir J. Worthington Evans, Bart., M.P., Secretary of State for War.

The Right Hon. Stanley Baldwin, M.P., President of the Board of Trade.

The Right Hon. H.A.L. Fisher, M.P., President of the Board of Education.

The Right Hon. T.J. Massey, M.P., Minister of Labour.

The Right Hon. the Earl of Crawford and Balcarres, K.C., First Commissioner of Works.

The following were also present:

Viscount Fitzalan of open, K.G.V.O., M.P., General the Earl of Seven, K.G., General of the Imperial General Staff.


H. Thomas Jones, Principal Assistant Secretary.
With reference to Cabinet SO (22), Conclusion 3, THE PRIME MINISTER reported that a serious situation had arisen with respect to Ireland, which called for an immediate decision. Before the Cabinet separated for the Whitsuntide holiday he felt it essential that those left behind should know the general view of their colleagues on the latest developments of the Irish question.

The draft Constitution communicated by the Irish representatives on May 27th, THE PRIME MINISTER continued, was purely republican in character and but thinly veiled. It did not comply with the Treaty in substance or in form. He reminded the Cabinet that the provisions of the Constitution prescribing the relations between Canada and Great Britain had originally been taken as a model to govern the relations between Ireland and the Empire. At first the Irish representatives had resisted this, but eventually they had accepted. Now they had gone back on their acceptance. Originally the Irish representatives had desired an association with the British Empire, with the Crown as a sort of link. The British Government had refused this and had insisted that the Crown must have the same position in the Constitution of Ireland as in the Constitution of the British Dominions. The position of the Crown was not easy to define even in Great Britain, but it was a fact, and a greater potential force, if he might employ such a term, than any other in the every-day affairs for the government of the country. In Canada the Governor-General acted on the advice of his Ministers, but everything was done on the authority of the Crown, which was the fount and source of all authority. This the Irish representatives would not accept. In their draft Constitution the position of the representative of the Crown was reduced to that of a sort
of Commissioner. This was the first point in which their Constitution failed to stand the test.

The second test was in regard to the conclusion of Treaties with foreign Powers. This was a question which had been discussed at great length at the last Imperial Conference. Before the War, all Treaties had been concluded by the British Government, and the remainder of the Empire had not been consulted. Since the War, however, it had been agreed to consult the other parts of the Empire and not to take any decision affecting them without their consent. It had been understood, however, that when agreement was reached, the machinery of the Foreign Office should be used for concluding Treaties. The Irish now claimed a right to make their own Treaties.

The third test related to the Judicial Committee of the Privy Council. This was a very important matter, as questions would arise between Southern Ireland and Ulster and between the Government and the minorities, and so forth, just as they did in Canada in regard to the position of the French. In the Constitution submitted by the Irish, the Irish Supreme Court was the final Court of Appeal and the Committee of the Privy Council was definitely excluded.

The fourth test was that the oath was omitted altogether from their draft Constitution. It enabled them, if they wished, to alter the Treaty.

The fifth point arose in connection with the provision in the Treaty that when the Provisional Government was appointed all the Ministers would have to declare in writing their adhesion to the Treaty. Under the pact concluded with the Party of De Valera, however, the latter would have the right to appoint four Ministers. The Irish representatives would not say whether these four Ministers would be willing to take the Oath. If they were not, then
that would be a breach of the Treaty.

The sixth point was that the draft Constitution did not recognize the position of Ulster. THE PRIME MINISTER admitted, however, that this point differed from the others and was not so clearly a breach of the Treaty. In reply to the Minister of Education, he said that the writs would not run in the name of the Crown, and that the Crown was not the source and fountain of authority.

Continuing, THE PRIME MINISTER said that the Constitution as submitted by the Irish representatives was not based on the Monarchical principle, and did not bring Ireland inside the British Empire. The King was not part of the Legislature. He would not appoint the Ministers, nor would be summon or dissolve Parliament.

As the Colonial Secretary, in his brilliant speech in the House of Commons on the previous day (to which he felt sure the whole Cabinet would pay a tribute) had said, the Irish representatives had emphatically declared that they did adhere to the Treaty. The Lord Chief Justice, however, who had been conferring with them for two days, had come back with a somewhat dismal story of their attitude in this respect.

THE LORD PRIVY SEAL said he thought the Cabinet ought to know why the Irish draft Constitution had not been circulated. The British Signatories of the Treaty had proceeded on the assumption that the draft Constitution was the negation of the Treaty. They had felt, however, that if the Irish were to be induced to amend the Constitution and bring it into line with the Treaty, as at first they seemed inclined to do, it was vital to preserve secrecy. It would have put them in an impossible position if it leaked out that they had come over with one Constitution and gone back to Ireland with another.
At this point THE PRIME MINISTER started to read a Note prepared by the Lord Chief Justice on the progress of his negotiations with Mr Kennedy, K.C. (S.F. (b) 60) (Appendix I).

After the Prime Minister had proceeded a short distance, THE SECRETARY OF STATE FOR THE COLONIES and THE LORD PRIVY SEAL interrupted to explain that the Cabinet had not yet seen the criticisms of the Irish Constitution prepared by the British Signatories of the Treaty. THE LORD PRIVY SEAL therefore first read these criticisms (S.P. (c) 85), after which THE PRIME MINISTER completed reading S.F. (b) 60.

On the completion of the reading of the above documents, THE MINISTER OF HEALTH observed that the position appeared to be exactly what it was at the time of the Inverness meetings.

THE FIRST COMMISSIONER OF WORKS remarked that it was, in some respects, worse, as the draft Constitution appeared to be a deliberate breach of the Treaty. It was evident that the draughtsman must have been instructed to prepare a Constitution on these lines three months ago.

THE PRIME MINISTER agreed that the draughtsman must have acted under instructions. He felt that there should be no further postponement. The first thing to be done was for the Cabinet to ascertain the exact position, whether the Irish representatives proposed to carry out the Treaty or not. Second, if they decided to take this action, the Cabinet would have to settle in what form they should put the question; for example, what special points should be put. Third, they had to decide what action should be taken if the Irish refused to bring their Constitution into line with the Treaty.

THE MINISTER OF EDUCATION asked if the position had changed since the Cabinet considered it on May 30th?
THE PRIME MINISTER replied that the position had changed. On May 30th the suggestion had been that the Constitution was only a draft and that the Irish representatives were perfectly ready to bring it into line with the Treaty to which they adhered. The position today was that the Lord Chief Justice, after discussing the Constitution with the Irish legal representative, had reported that he could make no progress, and had handed to the Prime Minister the document (S.F.(b) 60) containing the following note on the last page:

"Mr Kennedy stated that he was instructed that, according to the views of the Irish Ministers, Parliament is not to be summoned or dissolved, nor are Ministers, Judges or other public officers, to be appointed in the name of the Crown, as in Canada."

THE LORD PRIVY SEAL pointed out that this note was initialled by Mr Kennedy and the Lord Chief Justice.

THE PRIME MINISTER said that the idea had been that two members of the Government should see the Irish representatives that afternoon.

THE LORD PRIVY SEAL recalled the circumstances in which the British Signatories of the Treaty had met Mr Griffith and Mr Collins. The two latter gentlemen had first asked to see the Prime Minister, who had felt, however, that it would be better if he were accompanied by some of his colleagues. The Conversation had not been opened by the Irish representatives, but by the Prime Minister himself. The Prime Minister had informed the Irish representatives that he himself had only been able to glance at the Constitution while driving to Downing Street, and that his colleagues also had not had time for a complete study of it. He had, however, taken a very serious view of the situation as disclosed by a preliminary reading. Mr Griffith and Mr Collins had then replied that the draft Constitution was meant to be
in conformity with the Treaty. This had been repeated later by themselves and by other Irish representatives in a more formal meeting. Subsequently, Lord Hewart had met Mr Kennedy in order to discuss the Constitution. After the first meeting Lord Hewart had appeared hopeful; after the second meeting, however, he had reported that he could get no further, and his report included the statement which had just been read.

THE LORD PRESIDENT OF THE COUNCIL asked what was the reason for this volte-face?

THE LORD PRIVY SEAL said that it certainly was not Mr Churchill's speech, which, according to all available information, had not been objected to by the Irish representatives. He could only guess the reason. His guess would be that when the Irish representatives received the criticisms of the Constitution they had realised that the gap between the two parties was too large to be bridged. They had seen that they must either quarrel with De Valera or with the British Government. This theory was rather borne out by the way they had used the interval, namely, to ask for a meeting with the Prime Minister and to raise the question of the disturbances in Ulster.

THE PRIME MINISTER pointed out that the attitude of the Irish representatives was that their position was rendered impossible by events in Ulster. They maintained that the Roman Catholic public in the South was so excited by what had happened in Ulster that it prevented them from going any further.

THE LORD CHANCELLOR said he had little doubt that the Irish representatives had come to the conclusion that they would have to quarrel either with De Valera or with the British Government. They were, no doubt, influenced by the attitude of their critics, who pointed to the murders in
critics Ulster, where, as they no doubt pointed out, there was a large British Army as well as some 46,000 Special Police, towards the upkeep of which the British Government had contributed £5,000,000. That, he believed, was Mr Collins' case.

THE SECRETARY OF STATE FOR THE COLONIES pointed out that a very serious case could be made on the other side. It could be shown that the supporters of the Sinn Fein party in Ulster, with the support of the I.R.A., was making government impossible in the North. So far as he could ascertain, they had been delighted with his speech in the House of Commons on the previous day.

THE LORD PRIVY SEAL pointed out that two days ago Mr Collins had been induced with the greatest difficulty to come to his own room in the House of Commons. On the previous day, however, they had asked for tickets to listen to the Debate, and had taken the most prominent seats in the Distinguished Strangers' Gallery.

THE SECRETARY OF STATE FOR THE COLONIES felt very little doubt that the Irish representatives were drifting about in great uncertainty, refusing to face up to either side.

THE PRIME MINISTER then read a bulletin which had been issued by the Irish Publicity Department, in which statistics were given in regard to the murders in Belfast over a period during which the murders of Catholics had greatly exceeded the murders of Protestants. This, he felt, was undoubtedly the weakest part of the British case.

THE SECRETARY OF STATE FOR THE COLONIES pointed out that the case had not been stated for the other side, and that a terrific case could be made out by Sir James Craig. Spread over a period of three years, this case would show very big figures of murders by the Catholics.

THE MINISTER OF HEALTH asked whether the present attitude of the Irish was not merely preparing the way for the
resignation of Mr Griffith and Mr Collins? How, he asked, could they ever hope to work with De Valera and his supporters and yet carry out the Treaty? He asked what would happen if an ultimatum were given to the Irish, with the result that the Provisional Government were to resign?

THE PRIME MINISTER pointed out that that was the difficulty that had faced them for some days.

THE MINISTER OF EDUCATION asked whether more could be done at present than the following:

(1) To say that the Constitution was altogether unacceptable;

(2) To undertake the restoration of order in Belfast by means of martial law or any other available method;

(3) To initiate a full enquiry by the Commission into the Belfast disorders and outrages.

If the Provisional Government were to resign, the British Government would be free to take what action they thought fit, and to do it in their own time. Why, he asked, should they take any action in other parts of Ireland before they had restored order in the North, where they had assumed certain responsibilities?

THE LORD PRIVY SEAL asked why Mr Fisher put Ulster in the dock and ignored the South of Ireland?

THE MINISTER OF EDUCATION said he had assumed it was probable that there would be a break with the South of Ireland. Prejudice, however, would be excited by the fact that the outrages had been more intense in Belfast than elsewhere, where the British Government was paying for part of the forces for the maintenance of order.
THE CHANCELLOR OF THE EXCHEQUER explained that there was some misunderstanding as to the British payments on account of forces in Ulster. The Ulster Government bore the cost of all the ordinary Constabulary, and half the cost of the Special Constabulary, the other half being borne by the British Government. The charge actually incurred by the British Government up to September was not £5,000,000 but £800,000. It was true that the Northern Parliament were asking for a larger subvention, which the British Parliament had not yet paid. The Ulster Government invited the fullest inspection and enquiry by the British Government into the way they performed their duties.

THE LORD CHANCELLOR said that the figure of £5,000,000 had arisen in this way: if the present situation continued and did not improve the total expenditure by the British Government might possibly reach £5,000,000.

THE MINISTER OF AGRICULTURE observed that the salient point appeared to him to be that the moment the draft Constitution was published, there would be a great outburst among those who had supported the Government in their Irish policy, but with some misgivings. These would claim that the Constitution was the negation of all that they stood for.

THE CHANCELLOR OF THE EXCHEQUER made the following remarks as to the three questions mentioned by the Prime Minister:

(1) He thought that action must be taken at once in order to satisfy those who had supported the Government...
with misgivings, and to whom Sir Arthur Griffith Boscawen had alluded.

(2) If the Irish representatives were only asked in general terms if they were supporting the Treaty, they would only give an answer in general terms. It was essential to put specific points to them, though he admitted it was difficult to select the points.

THE PRIME MINISTER pointed out that the third point he had put was what was to be done if the answer to the first question was unsatisfactory.

THE FIRST COMMISSIONER OF WORKS expressed doubts as to whether the Irish Provisional Government would fulfil their promise to publish the Constitution.

THE SECRETARY OF STATE FOR THE COLONIES thought they would fulfil their promise. They were pledged to De Valera to do so. He admitted that in their desire to wriggle out of a quarrel with either side they might shrink from publication, but he thought that in the end they would publish something. The question for decision now was whether to make our break with the Irish now by unfolding our terms and demanding a categorical answer.

THE LORD PRIVY SEAL said that what was required was the view of the Cabinet on this question. He suggested that there should be an interval of five minutes during which the Cabinet should read a tabular comparison which had been prepared between the Canadian Constitution and the draft Irish Constitution, S.F.(C) 35.
THE PRIME MINISTER said that the points stood out clearly in which the Irish draft Constitution conflicted with the Canadian. The most marked points of difference were as follows:

1. The position of the Crown was repudiated.
2. The Treaty-making power was vested in the Irish Government.
3. The Judicial Committee of the Privy Council was rejected as the final Court of Appeal.
4. The Oath was not included in the Document.

Thus the Irish were challenging the most fundamental points of the Treaty.

The question to be decided was what was to be done in the face of that attitude, when it should be done and how it should be done. The first point to decide was as to whether the time had come for demanding an explicit answer on vital definite questions.

THE LORD PRIVY SEAL said it was clear that it was impossible to accept anything in the nature of their Constitution. If they could not conform to the requirements of the Treaty as set forth in the British Memorandum, the British Government ought to resume their freedom.

THE SECRETARY OF STATE FOR WAR urged that the situation should be cleared up at once, otherwise the issue would be confused by border raids and so forth. At present there was a clear issue, and advantage should be taken of this situation.
THE MINISTER OF HEALTH pointed out that the Irish Representatives would probably wish to return to Dublin to confer with their friends.

THE PRIME MINISTER said it would be necessary to permit this.

THE MINISTER OF EDUCATION said it was clear that the Irish must be told to-day that their draft Constitution could not be accepted.

THE LORD PRESIDENT OF THE COUNCIL said that he would tell them in broad terms that this draft did not carry out the Treaty, and that if they would not bring their draft into line with the Treaty the British Government must hold themselves free. His advice would be to send for Sir James Craig and to consult with him as to the position in Belfast. In addition he would take the military steps which had been mentioned on the previous day, and he would consider the desirability of establishing a blockade.

THE PRIME MINISTER then pointed out that instead of a blockade it might be better to take steps to curtail the revenue. He had consulted the Chief of the Imperial General Staff on certain military questions connected with this, and Lord Cavan had very properly replied that he required time for further consideration. He did not see how the Cabinet could separate without taking a decision on this question.

The proposal was that two or three members
of the Cabinet should see the Irish Representatives. They had felt, however, that the Cabinet must be consulted first in order to ascertain whether they were unanimously in favour of a strong declaration facing the Irish Provisional Government with the Treaty.

He would also like the Cabinet to consider the following points to-morrow:

(1) The reply of the Irish Representatives.
(2) The Report of the Chief of the Imperial General Staff.
(3) The Report which he hoped the Admiralty would furnish in regard to the assistance they could give.

He thought that before the next meeting of the Cabinet there should be a consultation between representatives of the Admiralty, War Office and Air Ministry on the various military questions involved.
THE LORD PRIVY SEAL pointed out that if there were a break with the Irish Representatives the position of loyalists in the South of Ireland might be very serious. He hoped, therefore, that the question of refugee camps would not be overlooked.

THE SECRETARY OF STATE FOR THE COLONIES said that after the receipt of the document by Lord Hewart and Mr. Kennedy, it was impossible for us to allow the situation to go on for 24 hours without making it clear that the Constitution would have to be re-drafted if we were to be satisfied. That, in his view, was the best way of getting to business and there might be in that way, still a chance of their coming to heel.

He agreed that if necessary the Irish Representatives must be allowed to go back to Dublin to consult with their colleagues. Though they need not be given an ultimatum it should be understood that it must be ordered within a few days. He doubted if it was any use meeting them again. He thought it would be better to hand them a document stating precisely the view of the British Government. If they were allowed to meet again, they would wander weakly over the whole subject once more without reaching any decision. If they were really desirous of a final issue it would have been different. The point was, however, that the Government ought to know definitely whether they intended to adhere to the Treaty. As regards the steps to be taken in the event of a refusal on the part of the Irish to adhere to the Treaty, he thought the best plan would be to appoint a Committee to prepare a general report on the investigations.
investigations which had already been carried out. This would take two or three days.

THE PRIME MINISTER said that the Cabinet ought to have a general idea of the position before they separated. He did not think it possible to postpone it for two or three days.

THE SECRETARY OF STATE FOR THE COLONIES pointed out that not only military considerations but also economic and financial issues were involved.

THE LORD CHANCELLOR hoped that, in view of the gravity of the decision to be taken, a fresh meeting of the Cabinet would be held on the morrow. He inclined to the view that a further meeting with the Irish that afternoon would be of no use. The Irish representatives would merely give further expression to their goodwill and good intentions, but no result would be achieved. As a lawyer he felt that the time had come when something should be placed on record.

THE PRIME MINISTER suggested that if that was the view of the Cabinet, it would be advisable to appoint a Committee to draft a document.

THE LORD PRIVY SEAL thought it inadvisable to have an elaborate document. He would merely say that the Government had received the report of the Lord Chief Justice on his interview with Mr. Kennedy which was to the effect that the Constitution was incompatible with the Treaty. He would then simply ask the question as to whether the Irish would bring their Constitution into line with the Treaty as set forth in the document of criticism sent to them a few days before (S.F.(C)35).

THE LORD PRESIDENT OF THE COUNCIL agreed with the Prime Minister that the situation in Ulster created the main difficulties. The Ulster view was that
these outrages were not only due to old-standing animosities between the Roman Catholics and the Protestants, but were being deliberately fermented from the South with a view to breaking up the whole Treaty policy. He did not know which side was telling the truth, but it was vital that everything possible should be done to put ourselves right with the world and to show that we are doing all that we can to put a stop to the murders of Catholics and the counter-assassinations of Protestants. Hence, he felt it was very important to consult with Sir James Craig as to the best way of crushing out this disorder and to utilise the military forces available for the purpose in this comparatively restricted area.

From a letter from Sir James Craig which he had been shown, he gathered that the latest phase of the disorder was a succession of serious cases of criminal arson. This aspect of the question must also be considered.

THE SECRETARY OF STATE FOR THE COLONIES suggested that some members of the Cabinet who felt strongly on the Ulster situation should make a point of seeing Sir James Craig.

THE PRIME MINISTER agreed, but wished the whole world, whether Catholic or Protestant to feel that the British Government was doing its utmost impartially to deal with the situation.

THE LORD PRIVY SEAL suggested that Lord Balfour should see Sir James Craig.

THE PRIME MINISTER agreed and urged that Lord Balfour should put the matter in its widest aspects with the idea of strengthening the general position of the British
the British Government before the Empire and the world.

THE MINISTER OF EDUCATION said that on the previous day a distinguished Canadian judge - Protestant - had come to see him and said that the general opinion in Canada was that we had made a fair offer to the Irish but the murders in Belfast were causing anxiety and he, as a judge, was impressed with the fact that there had been no punishment of the murderers. That was having a considerable effect.

SIR MAURICE HANKEY reported that on the same morning he had seen Sir Charles Gordon who had been one of the Canadian Representatives on the Genoa Conference. Sir Charles though expressing no doubt as to the British attitude had expressed some misgivings as to whether the moral position of the British Government was fully realised in America and the Dominions.

THE SECRETARY OF STATE FOR WAR said that if there were a break there would have to be a great campaign of propaganda.

This remark led to some further discussion as to the form of the document, namely as to whether it should be a short document which, it was claimed, would be more widely read, or a comprehensive document which would set forth in full the British case.

The Cabinet agreed:-

(a) That an interview which had been provisionally arranged to take place between the Lord Chancellor, the Lord Chief Justice, Mr. Griffith and Mr. Collins, should be cancelled.

(b) That the British signatories of the Treaty with the addition of Lord Balfour should meet at 3.30 that afternoon to draft a document conveying to the Irish Representatives the views of the British Government on the Draft Constitution.
(c) That a general meeting of the Provisional Government of Ireland Committee and of the Sub-Committee on Ireland of the Committee of Imperial Defence should be held that afternoon in the Colonial Office at 4.30 p.m.

(d) That the Secretary of State for the Colonies and the Secretary of State for War should attend the latter rather than the former meeting.

(e) That the Cabinet should meet on the following day at 11 o'clock.

2 Whitehall Gardens, S.W.1.

1st June, 1922.
On Saturday 27th May the Draft Constitution of the Irish Provisional Government was handed to the Assistant Secretary to the Cabinet. On Monday, May 29th, a memorandum criticising this document on behalf of the British Government was handed to the Irish Ministers. It was informally arranged that efforts should be made to remodel the Draft Constitution so as to make it conform to the Treaty. To this end informal conferences were held on Tuesday and Wednesday, the 30th and 31st May, between Mr. Kennedy, K.C., and the Lord Chief Justice of England. The draft constitution with suggested amendments and additions was considered. No agreement, however, was arrived at. A document expressing the views of the Irish Ministers (Appendix) was handed to the Chief Justice under the name of "OBSERVATIONS /"
(1) It is essential, if there is to be mutual understanding in approaching the questions raised, that one or two considerations of special importance should be kept constantly in view. It is well, therefore, that these matters should be emphasised by way of preface to the observations on the particular criticisms which have been raised.

(2) In the first place, Ireland is not a British colony nor are her people British colonists, though there is a small proportion of British colonists among them. This fact is the vital distinguishing feature that differentiates Ireland and the matters now under consideration from the position of any of the great Dominions of the British Commonwealth of Nations.

(3) The matter of the preceding paragraph leads easily to the next consideration, so generally lost sight of in England and by the minority who are of British sympathies in Ireland but which is an essential fundamental consideration in approaching the questions between England and Ireland, and particularly the matters which have been raised on the draft constitution. It is this: The great body of law, institutions and forms, called the "English Common Law", which has sprung from and so grown to fullness with the genius and character of the English people as to be part of their living fibre, is not/
not in Ireland a Common Law at all. It is an alien structure imposed by statute, an exotic from which a cutting has been artificially fostered in Ireland but which has not taken root or become acclimatised in any real sense. English colonists have carried with them, among their penates, to those countries which are now the great Dominions, their own English Common Law and habits of thought formed in relation to it. Hence it is that in the making of constitutions for their new homes, their minds spring naturally to the institutions and forms embedded in the English Common Law. The true import and precise implications of which find instinctive interpretation which does not confuse the familiar form with familiar substance. By the very nature of things, this is not, and cannot be, the case in Ireland. The institutions, forms and ceremonials of the English Common Law have never been absorbed by the Irish People or become in any true sense their own. They have remained (however reverentially Irish lawyers may have applied themselves to the study and exposition of them) the features of a foreign system and of alien rule.

(4) After the Treaty had been entered into, glowing speeches were made by leading English statesmen, expounding as the inspiration of new hopes that now the Irish people would,
with freedom from English interference or influence, set themselves to build up a constitution for the government of their own country which constitution would be wholly of their creation and in accordance with their own wishes and views of their needs, with full play for Irish traditions and Irish thought to give colour and lend vitality to the framing and building up of institutions which the Irish people could honour as their own. Saorstat Eireann thus, living in its Irish constitution would come in as a member of the British Commonwealth of Nations.

5. Examination of the Treaty soon showed that the true position was appreciated by its draftsmen. The form and ceremonial of the English Common Law, in conformity with which the local constitutions of the Dominions reserve the executive power, (though constitutionally in merely technical and formal sense) to the King, was not insisted on and the substance was granted without the ceremonial, meaningless in Ireland and liable to be misunderstood. This formal distinction between the local constitutions of the Dominions and of Ireland was fully appreciated in Ireland and a large volume of the support of the Treaty is based upon it. It would be quite impossible now to go back on this position and to say that the substance of Irish free government could not be consummated without the imposition of formalities and ceremonial, alien, not understood or appreciated, and sure to be interpreted in a sinister sense because stated to /
be purely formal and yet insisted on.

6. Apart from the considerations mentioned in the preceding paragraphs, it is further submitted that the constitutional status of the Dominions in the Empire is such that they are at liberty to alter their constitutions even though it should be in favour of a form of constitution differing in principle from the British constitution. The Labour Party of Australia has in view an alteration to an elective extra-parliamentary executive. Will such amendment be prohibited because elected ministers will not fit into the British system of formal appointment by the British Crown?

7. The form of parliament and government which the Irish government has caused to be framed and submits, has been framed to meet the conditions of Ireland. They cannot agree that they are bound to mould that constitution into the forms of the English Common Law. There is no reason in history why they should be asked to do so, but every reason to the contrary, wherein the British Dominions differ by history and tradition. They point out that this distinction has been recognised in the Treaty. They further say that apart from the historical and traditional basis of their position, it is within the competence of the Dominions to adopt a form of constitution which would be incompatible with the technical forms and ceremonial of the English Common Law. They submit that the constitution which they present is one which the Dominion of Canada could not be debarred from adopting.
Mr. Kennedy stated that he was instructed that according to the views of the Irish Ministers, Parliament is not to be summoned or dissolved, nor are Ministers, Judges or other public officers to be appointed in the name of the Crown as in Canada.

(Initialled) H.E.
H.

(Signed) L. CURTIS 31st May, 1922
Secretary to the Irish Conference.
I. For the purpose of examining the draft constitution propounded on the 27th May last by the Provisional Government, it is essential to have regard to certain cardinal matters:

1. The constitution of the Irish Free State must be in accordance with the Treaty which was entered into by the representatives of Great Britain and the representatives of Ireland on the 6th December, 1921, and to which the force of law was given by the Irish Free State (Agreement) Act, 1922. A constitution containing anything inconsistent with the Treaty, or omitting any of its relevant stipulations would obviously not be in accordance with the Treaty.

2. By the Treaty, the representatives of Ireland agreed:
   
   (a) That Ireland should 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. (Article 1 of the Treaty);

   (b) That the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise should be that of the Dominion of Canada, and that the law practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to that Dominion should govern their relationship to the Irish Free State (Article 2 of the Treaty);

   (c) That the representative of the Crown in Ireland should be appointed in like manner as the Governor General of Canada, and in accordance with the practice observed in the making of such appointments (Article 3 of the Treaty).
3. The fundamental principles of the constitution of Canada are:

(a) That the executive authority is vested in the Crown which acts on the advice of Ministers. The Crown appoints a representative to be the chief executive officer of the dominion in whose name all acts of State are performed.

(b) That the Crown is a constituent part of the legislature. Hence it is that the royal assent to Bills is required and that Parliament is summoned and dissolved in the name of the King.

(c) That the Crown is the fountain of justice, and that there is a right to petition the Crown for leave to appeal to the Privy Council against a decision of the Supreme Court of the Dominion.

4. It is by the relation thus established between the Crown and the Executive, the Legislature and the Judicature that the constitutional position of the King as the head of the Community of Nations known as the British Empire is secured.

5. The Throne is the bond which knits together the Community of Nations known as the British Empire. No constitution which is in form or in substance republican can find a place within that Community. The Throne is non-political and non-partisan because non-elective. This is the essential quality which enables the Throne to symbolize above political, national and all other distinctions whatsoever, the common citizenship of all His Majesty's subjects, whatever their nation or race, and the common membership in the Commonwealth of all His Majesty's Governments, whatever their status or history. As Professor Dicey has said: "The prerogatives of the Crown have become the privileges of the people".

If the draft constitution now propounded is examined in the light of these principles, it appears to be not so much a departure from the Treaties as a direct negation of it. In other words, it is not an acceptance but a refusal to accept the constitutional status of the self-governing Dominions, and is, in fact, a republican constitution almost without disguise and adapted for an independent State.
Wore it not for the references to the Treaty in Articles 74 and 75, it would be difficult to believe that the framers of the constitution were aware of the existence of the Treaty. Until Article 74 is reached, the constitution is the constitution of an independent republic, with its President and Vice-President. The question arises: Are Articles 74 and 75 a sufficient qualification of what has preceded them to bring the constitution into conformity with the Treaty? Article 74 requires the Legislature and the Executive established by the constitution to pass the legislation and do all other things necessary for implementing the Treaty. Article 75 alone contains any reference to the Sovereign or to the representative of the Crown. It:

(1) lays down that the representative of the Crown is to be styled the Commissioner of the British Commonwealth;

(2) imposes a restriction on the discretion of the Crown in appointing its representative by expressly making the appointment subject to the previous assent of the Irish Executive Council;

(3) compels the representative of the Crown automatically and immediately to set his hand to any enactment which has been sealed by the President, and thereby to signify the Royal assent.

In practice Dominion Governments are always consulted as to the choice of the Governor-General. But that is a very different thing from making an appointment subject to the assent of the Irish Executive Council.

By constitutional practice the exercise of the power of vetoing bills passed by the Dominion legislatures is obsolete so far as legislation of a purely domestic character is concerned, except where by the constitution itself measures of a particular nature are required to be reserved.
reserved for the signification of His Majesty's pleasure, or where such a provision is contained in a particular measure passed by a Dominion legislature. But with respect to Dominion measures affecting relations with other parts of the Empire or with foreign nations the reservation of the power of veto is obviously essential, though in the last resort it would only be exercised on the advice of the Imperial Conference, that is to say, on behalf of the British Commonwealth as a whole.

If it were said that any discrepancies between the Constitution and the Treaty are required by Article 74 to be set right by legislation, the answer is that with the best will in the world the Legislature would probably be unable to perform this task. Such changes would be amendments of the constitution, required by Article 47 to be submitted to a referendum of the people, and at that referendum to be approved either by a majority of the total number of electors on the register or by a two-thirds majority of those who vote on the question.

Some of the principal points on which the law as Irish laid down in the draft constitution differs from the law and practice of the constitution in Canada may be seen by a comparison of the provisions as to (1) the executive, (2) the legislature, and (3) the judicature in Canada and in the draft Irish constitution respectively, set forth in the following Table:

Table:
1. In law the Executive authority is vested in the Crown. In practice, it is exercised on the advice of Ministers, who perform all the duties of their offices in the name of the Crown.

2. The Governor-General as representing the Crown is the Chief Executive Officer.

3. He is advised by a Cabinet the members whereof are in law appointed by and removable by him. In practice, the character and policy of the Government which advises him are determined by the majority in Parliament.

4. Every Cabinet Minister is sworn a Member of His Majesty's Privy Council in Canada.

1. The Executive Authority is vested in an Executive Council consisting of a President, Vice-President and other members, some of whom must be members of the Dáil (the Lower House) others cannot be members of either House of Parliament.

The President is appointed by the Dáil and appoints the other members of the Executive Council who are members of the Parliament. The remaining members are appointed by a Committee of the Dáil chosen in a particular manner and their term of office is fixed, but they may be removed by a Committee of the Dáil constituted as aforesaid.

The Representative of the Crown is in no way part of the Executive machinery of Government.
2. Legislature.

Canadian Constitution.

Parliament consists of the Sovereign represented by the Governor-General, and two Houses. The power of summoning and dissolving Parliament rests with the representative of the Crown, and is exercised in accordance with the law on the advice of Ministers.

In order to become law, a Bill after being passed by both Houses of the Legislature must secure the Royal assent through the Governor-General.

Subject to the practice stated in Paragraph 3 of this Memorandum, the Representative of the Crown by Constitutional practice acts upon the advice of his Ministers in giving and withholding the Royal assent to Bills.

Draft Irish Constitution.

Parliament is to consist of two Houses.

The power of dissolving Parliament rests with the Dail.

The power of summoning Parliament after a General Election rests with the Dail. The power of summoning Parliament at other times rests with the President who must summon it if required to do so by two-fifths of the members of the Dail.

The representative of the Crown is obliged automatically to give his assent to any enactment presented to him authenticated by the seal of the Free State which is to be in the custody of the President.

Canadian Constitution.

Judges are appointed by the Governor-General on the advice of the Dominion Government.

The common law right of a British subject to appeal to His Majesty's Privy Council from the courts of a Dominion is expressly recognised by Statute.

Draft Irish Constitution.

Judges are appointed by the Executive Council without reference to the Representative of the Crown.

The decisions of the Supreme Court are final and conclusive and not capable of being reviewed by any Court, Tribunal or Authority whatsoever, and the subject is deprived of his common-law right to appeal to the Privy Council.

To summarise, by Constitutional practice the Representative of the Crown in exercising his executive authority, in appointing and removing members of his Council, in summoning and dissolving Parliament, in appointing judges, and, subject to the qualifications stated in paragraph III, in giving and withholding the Royal Assent to Bills, acts upon the advice of his Ministers. But throughout the British Empire all writs issued under the authority of the State, whether executive or judicial, run without exception in the name of the Crown.
V. Constitutional practice as affecting the relations of the Crown, the Imperial Conference and the different Governments of the Empire was fully discussed at the last Imperial Conference, and a very strong objection was recorded against any attempt to crystallize the custom and practice of the constitution in a written document. It was, moreover, declared that any change in the status of a Dominion was a matter of vital interest to all the Dominions and therefore not to be determined without reference to the Imperial Conference as a whole. It follows that if the constitutional status of the Free State is to be in essence the same as that of Canada, as laid down in the Treaty, the constitution of the Free State must be framed on broadly the same lines as that of the Dominion. Any variation from the accepted constitutional forms would not be in accordance with the Treaty and could not be sanctioned by the British Government without reference to and consent of the Imperial Conference.
External relations are dealt with by Article 73. By it the relations between the Free State and other states are to be such as are now or may hereafter be defined in agreements or treaties made between the Irish Free State and other states to which the Free State assents. No Agreement or Treaty with any other State is to have any validity unless and until it has been approved by the Free State Parliament. The effect is, therefore, to give the Free State Parliament complete and independent control of all the foreign relations of the Free State, and the power of the British Government to ratify any treaty affecting the Free State is expressly excluded. It appears impossible to harmonise this Article 73 with Article 2 of the Treaty, and the power of making independent treaties without reference to their effect on other Members of the British Commonwealth of Nations is one which is not reconcilable with the interdependence which is an essential characteristic of that Commonwealth, nor with the recorded view of the Dominion Governments at the last Imperial Conference. The King is, in fact, and must remain, the Treaty-making power, though the constitutional practice is that in all matters of affecting the Empire as a whole, he exercises this power on broad lines approved by the Imperial Conference and on the advice of all the Governments concerned.

Further, the words of Article 73 are open to the interpretation that the Treaty itself falls within the Article, and that the Parliament of the Free State has power to determine how far the Treaty is to be regarded as valid and binding upon the Free State. The words "and other States", in line 1 of Article 73, are capable of being interpreted not only as applying to foreign States but also as applying either to the British Commonwealth of Nations as a whole or to individual Dominions within it.

In this connection it is to be observed that by the draft Irish constitution the interpretation of Treaties is entrusted
to the final jurisdiction of the Supreme Court (Articles 34-60), and that under Article 75 the duties, such as they are, of the Commissioner of the British Commonwealth continue only so long as the relations between the Free State and the British Commonwealth of Nations are regulated by the Treaty.

The matters hitherto dealt with are instances of inconsistency between the constitution and the Treaty. But the Treaty contains restrictions and imposes obligations as to which the constitution is altogether silent. The restrictions contained in the Treaty include:

(a) A limitation on the power of making provision for naval defence;
(b) A limitation of the extent of military establishments;
(c) A restriction on the closing of ports;
(d) Limitations on the exercise of powers in Northern Ireland;
(e) Restrictions for securing religious equality;
(f) The positive obligations imposed by the Treaty include:
   (a) Taking of oaths by members of Parliament in the form prescribed;
   (b) The assumption of liability for a share of the national debt and pensions;
   (c) Furnishing of harbour and other facilities, including in time of war or of strained relations with a foreign power such harbour and other facilities as the British Government may require for the purpose of defence;
   (d) The payment of compensation to existing judges and public officers.

With one exception, the only provision contained in the constitution with respect to these restrictions and obligations is that contained in Article 74, above mentioned, enjoining the Parliament and Government of the Free State to pass legislation and take steps for implementing the Treaty. The one exception is that there is an express provision as to religious equality, but it falls far short of the express obligations contained in Article 16 of the Treaty.
Even if it may be contended that the general provisions of Article 74 are sufficiently in accord with the provisions of the Treaty so far as it imposes positive obligations, it cannot be said that a constitution which is not expressly made subject to the restrictive provisions contained in the Treaty is one which the party to the Treaty at whose instance the restrictions were inserted can be asked to accept. Further, the omission of so vital a provision as that requiring an oath in the prescribed form to be taken by members of Parliament cannot be countenanced.

In connexion with the Oath it is also necessary to consider Article 48 of the draft constitution, which by requiring that some of the Ministers are not to be members of Parliament exempts them from the obligation of taking the prescribed oath.

An obligation thrown on a Legislature to pass certain legislation, an obligation which by the nature of Parliamentary institutions is impossible of enforcement, is no substitute for an express enactment in the constitution giving those obligations effect.

It should be added that these observations do not purport to be an exhaustive criticism of the draft constitution. They are merely a preliminary memorandum, written within a few hours of receipt of the draft, and intended not to exhibit in detail but only to illustrate how gravely the draft Irish constitution is in conflict with the terms of the Treaty. It cannot be accepted by His Majesty's Government as a fulfilment of the solemn engagement signed on the 6th December, 1921, by the representatives of Great Britain and Ireland.

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Whitehall Gardens, S.W.,
29th May, 1922.