(September 5, 1928)

What We Owe to the Canadian Constitution

By Hon. Hugh Kennedy,
Chief Justice, Irish Free State.

President Daly:—During the past few days we have had the pleasure of meeting representatives of the Government of the Irish Free State who have been visiting Toronto as members of the Empire Parliamentary Association. Today we are indebted to the Canadian Bar Association for an opportunity of welcoming to this Club the Chief Justice of the Irish Free State, who has recently returned from Regina, where he delivered a much appreciated address before the Association at its annual meeting there. It would be hard to conceive of a man more closely identified with the development of a nation than to be the guiding mind in evolving its constitution, in serving as its first Attorney-General, then to be appointed its Chief Justice. In fact, it seems rather more than one man should be asked to do: first, as friend of the nation to draft its constitution, and then to be called upon as its Chief Justice to interpret the meaning of his own document. For in Canada here, even after a period of more than sixty years, we still have a little doubt sometimes as to the exact meaning of the British North America Act. I assume, however, that the genius of the Irish people will be more than sufficient to overcome any difficulties in interpretation in that respect.

We greet our distinguished guest here today as one of those who, loyal to country and to King are devoting their lives to the building of a nation, and we welcome him as the representative of one of the sister nations within the Empire who are co-operating with us and the other

Dominions and the Mother Country in what Sir John Marriott described the other day as the supreme opportunity which the Empire gave for service to mankind. I have very great pleasure in introducing the Honourable Chief Justice Kennedy.

CHIEF JUSTICE KENNEDY:—Mr. President and gentlemen, I hear that you have had an assorted group of politicians within a quite recent period at your Club luncheons, and I feel it necessary to warn you at the beginning that you have now the dullest thing on earth, a lawyer on his way home from a meeting of lawyers, and that you cannot expect the entertainment I am sure you had from those people who are at large in the realm of politics, and party politics at that. I can only offer you some, I fear, rather drab remarks, but such as they are I offer them in the hope that I may interest you in matters in my country, always wondering whether you may have acquired certain views from intercourse with the politicians to whom I have been referring, and who are very brilliant in their own particular spheres. Now I should tell you that I am not in Canada on a speaking tour. I am not a politician; I am not collecting funds for any forlorn cause, and I am not selling anything. I came to this continent in absolute innocence, as the guest of my legal brethren, to read at their request an address at their annual meeting. At the American Bar Association I read an address upon the character and sources of the constitution of the Irish Free State. At the Canadian Bar meeting I read an address on the debt which the Irish Free State constitution owes to Canada, and it was suggested to me it would interest you in some degree if I were to offer you here, upon this occasion, something of the views which I presented to the Canadian Bar Association at their far Western meeting recently, which may not have permeated so far East, or perhaps not to non-professional people. I therefore propose, if you can endure it, to offer you some little account of our borrowings from your constitutional achievements, and I hope they may prove of some interest to you.

At the American Bar meeting, as I have said, I discussed in a general way the character and sources of the constitution of the Irish Free State, and on that occasion

I sketched in outline the historical foundations leading up to and culminating in the treaty of 1921 which was made between Ireland and Great Britain. I am not going over that ground again on the present occasion. It is only necessary for my present purpose to ask you to bear in mind that the armed struggle in Ireland, which at its most acute stage ceased upon the truce of the 11th of July, 1921, was the latest and most sustained and determined effort of the Irish people to realize the ideal of Ireland as a sovereign nation. The purpose of the negotiations upon which delegates from Ireland and Great Britain entered in the conference following the truce was, to quote the actual terms in which it was promulgated, "with a view to ascertaining how the association of Ireland with the community of nations known as the British Empire may best be reconciled with Irish national aspirations." The Treaty of 1921 is, we must assume, the best solution which able and patriotic men, acting sincerely to the best of their ability, with compromise in detail but without sacrifice of essential principle, could devise for that problem. The gist of the solution is contained in the first four Articles of the Treaty of 1921.

The first Article contains the substantial agreement by which Ireland agreed to enter the British Commonwealth of Nations as an equal Dominion member thereof. It is in these terms: "Ireland shall have the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland, and an executive responsible to that Parliament, and shall be styled and known as the Irish Free State."

The fourth Article contains the agreed form of oath to be taken by members of Parliament of the Irish Free State, in lieu of that required in the other Dominions. It is divided into two parts. The second is a restatement of the constitutional status of the Dominion, agreed upon in the first Article. The first part is an oath of true faith and allegiance to the constitution of the Irish Free State, by law established, and in the second part the attest-

ant swears he will be faithful to His Majesty King George V, his heirs and successors by law, in virtue of the association of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

Now these Articles might be thought to make sufficiently clear the status upon the basis of which Ireland was to adhere to the British Commonwealth of Nations. The plenipotentiaries, however, agreed further to define the position by the second and third Articles, which read as follows:

2. "Subject to the provisions hereinafter set out, the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown and representative of the Crown and of the Imperial Parliament, of the Dominion of Canada shall govern their relationships to the Irish Free State."

3. "The representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada, and in accordance with the practice observed in making such appointments."

Now you will be as interested, probably, as we are, in the reasons which led to insertion of these two Articles in our treaty. None of the papers, or minutes, if any were kept, of the treaty negotiations have been published by the Irish Government, but sufficient was disclosed in the course of discussion subsequent to signing of the instrument to reveal the grounds upon which these clauses were urged by, as we know, the Irish delegation. The fact thus appears that Canada provided the key of the problem for solution by the parties to the negotiations, the problem, namely, of how the association of Ireland with the community of nations known as the British Empire might best be reconciled with Irish national aspirations. Australia, South Africa and New Zealand had each received, by enactment of the British Parliament, as had Canada, a written constitution as a Dominion, whereby the relationship of the Dominion to the Imperial Parliament and Government had been stated in substantially identical terms, as for instance

in the case of the veto and reservation of legislation. Yet Canada, with much the oldest of the Dominion constitutions, was picked out of the group as the one Dominion whose relation to the British Parliament and Government was to be the standard by which such relations in the case of the Irish Free State were to be fixed.

There must have been, and there was a good reason for such preference of the Canadian position over the more modern cases of Australia, in 1900, and South Africa in 1909. The reason was that during the period of more than fifty years which had elapsed since Canada as a group of British colonies had received her constitution by enactment of the British North America Act, 1867, Canada had outgrown her colonial status as well as her constitution, and in the gradual evolution of law, practice and constitutional usage had reached national stature and exhibited marks of national sovereignty. Canada is, in fact, the great example today of the truth of the statement that no man can set bounds to the onward march of a nation, even by a written constitution.

The late President Wilson in his book on The State, edition revised by Professor Eliot, December, 1918, at page 91, referring to the definition of sovereignty of the analytical jurists, says, "The law of the more fully developed English colonies, for example, though it is made by the enactment of their own parliaments, is not law by virtue of such enactment, because these parliaments are in the habit of being obedient to the authorities of London and are not themselves sovereign. The sovereignty which lies back of all law in the colonies is said to be the sovereignty of a Parliament of England." The learned editor overlooked that passage when revising the work, or perhaps it was that he mistook free and voluntary co-operation with, for obedience to, the authorities in London. If the constitutional status of Canada had been correctly so described, then Canada would not have provided a model for the solution of the Irish problem. It is no secret that Canada, in particular of the Dominions, exhibited two indices of sovereignty which particularly impressed the delegates upholding Irish national aspirations at the conference.

The first of these particular marks of sovereignty was the right of separate diplomatic representation, which had been asserted by Canada for some years, and asserted apart from general principles in a manner of special interest to Ireland, the country of origin of great numbers of citizens of the United States. The second of the marks of sovereignty to which I have alluded is expressly mentioned in the third article of the treaty. It is the right which had been asserted by Canada to have a controlling voice in selection of the representative of the Crown. After the Treaty of Versailles, the separate signatures of the instrument on behalf of several Dominions, and the corollary to such recognition, the separate admission of each of the Dominions to full and individual membership of the League of Nations, was much confused by politicians and jurists of other countries, who had confused ideas of the status of the Dominions and contended that the effect was simply to give six additional votes to Great Britain. Among the articles published on the subject, I remember to have read one written by an eminent international jurist in the learned Journal of International Law, who argued that the Dominions had not the attributes of sovereignty, and the final and to me conclusive argument for his thesis was that they had no voice in the choice of governor-generals. The writer was apparently ignorant of the constitutional practice established by Canada on the subject. The Irish delegates therefore made no mistake when they insisted upon the Canadian practice in this connection as an element in reconciling Irish national aspirations with membership in the British Commonwealth of nations.

The matter was of greater practical importance at that time, 1921, when the Governor-General was the ordinary channel of communications between the British Government and Dominion Government, than it would be now since the Imperial Conference of 1926, when the functions of the Governor-General were so altered as to make him strictly the representative of the Crown, acting upon the advice of the responsible government, and not the representative, in any sense, of the party government for the time being in office in Great Britain. Even if, however, the manner of appointment of the governor-general be of

less practical importance now, from the point of view of its altered functions, it is no less important from the point of view of those who were engaged in that momentous conference.

I have so far been dealing only with the association of Canada with the Irish Free State through the Treaty of 1921. I come now to deal with some practical applications of these treaty provisions to the constitution of the Free State itself. I have described elsewhere the processes by which the constitution of the Free State was produced. I have pointed to the fact that the committee of draftsmen appointed by the Irish provisional government to prepare a draft constitution did not, nor did the provisional government itself, in the draft submitted by it to the Dail as a constituent Assembly, adopt any of the existing Dominion constitutions as a model, and I explained the actual course taken. Accepted practice, as regards drafting the constitution for a Dominion, is founded on the precedent set by Canada; that is to say, the responsible authorities of the Dominion itself—the people who are familiar with its conditions and requirements—draft the instrument which in their opinion best meets those conditions and answers those requirements. So it was made clear from the beginning that the provisional government would prepare, or cause to be prepared, a draft constitution for the Irish Free State, which the provisional government would submit to an Irish constituent assembly as a constitution prepared by Irishmen for the constitution of an Irish government, designed upon lines dictated by Irish conditions and recommended by an Irish government to an Irish legislative body for enactment, with or without amendment, for the future organization of the new state.

The British Government from the first disclaimed any wish or claim of right to interfere with, or even give a lead as to the form or substance of the instrument. But of course if the document should violate the terms of the treaty the whole situation between Great Britain and Ireland, based on the treaty, would be fundamentally altered. At the peril, therefore, of throwing everything into the melting-pot again, the provisional government was bound to take care that its draft constitution—and the Assembly

must necessarily take care—that the constitution enacted by it would not contravene any of the agreements in the treaty contract. It would have been very inconvenient if when the provisional government produced its draft any controversy should arise as to whether it ran counter to anything in the treaty. Moreover, the government was anxious to carry out, on its part, the bargain made, as, indeed, the British Government had on its part been scrupulous to implement the treaty in the letter and in the spirit.

The provisional government therefore arranged to produce to the British Government the draft constitution which was to be produced to the constituent assembly, so that it might be examined from the point of view of the treaty, and any doubt or question discussed and disposed of at the most convenient time for the purpose, and so that the provisional government would then be in a position to propose their draft with the assurance that if enacted there would be no question as to its contravening the treaty in any particular. The document was also, in fact, submitted to representative southern Unionists, so that there might be similar assurance that the pledges given to them as to protection of minority interests were duly fulfilled.

The draft of the proposed constitution was in due course settled by the provisional government early in 1922, and it was laid before the British Government for the purpose I have mentioned. In the meantime, unfortunately, political events had occurred in Ireland, with the merits of which I have no concern, but the effect of which has a practical bearing upon the subject of my present discourse. Amidst much confusion of thought and interpretation of action, there sprang up doubt and quite ill-founded distrust as to intentions of the provisional government, and there were a number of persons who had not rejoiced at settlement of the old feud and opening up of a vista of peaceful co-operation between Britain and Ireland.

I am concerned only with one of the difficulties, a purely legal matter. It was put forward by some people, and strenuously and mischievously urged, that the Irish Free State was bound by the references in the treaty to Canada

to adopt the written constitution of Canada as it stood in the British North America Act, 1867, and was bound to adopt it in the letter. A couple of years after the matter of which I am speaking, I was appearing before the Privy Council, as Attorney-General, in the first appeal taken from Ireland, when the late Lord Haldane addressed to me the observation that we in the Free State had now a written constitution, but that that was only a skeleton which we had to build up with flesh and blood into a living and vital thing. Our critics of 1922 urged that we must be made to content ourselves with the skeleton upon which Canada had built up the vital reality of a constitution worthy of a national status to which Canada has herself grown. If these people had had their way, we were to recede to the position of a colony of the earliest period of colonial autonomy. Though it is unthinkable that the British Parliament would attempt to amend the Canadian constitution, unless asked by Canada to do so, or that it would deny to Canada the powers of amendment possessed by Australia or South Africa, still it was urged that that was the letter of the Canadian constitution. It was suggested that the absolute veto be revived, and so on through the whole gamut.

It is curious that the people who put forward these contentions forgot, or perhaps ignored, the explicit statement in the second article of the treaty, that the law, practice and constitutional usage of the Dominion of Canada should govern the relationship of the Irish Free State to the Crown and the British Parliament. Upon the provisional government fell the task of countering once for all this clamor, and defending the treaty position whereby Ireland was to enjoy the national status of a Dominion, in equal association with other nations, and had certainly not agreed to dance a constitutional 'danse macabre' with the bones of an obsolete constitutional skeleton.

When the controversy had reached its height, Michael Collins, active leader in the recent struggle, who had signed the treaty and was then chairman of the Irish provisional government, presented himself at the official residence of the British Prime Minister, head of the British delegation, who had signed the treaty on behalf of Great

Britain. Mr. Collins had no reason to suppose there was any difference of opinion between the members of the two delegations, signatories to the treaty. He sought the interview for the purpose of clearing the air and allaying a most mischievous controversy calculated to undo much valuable achievement. The interview was a short one, and as Mr. Collins came out he handed to me, then legal adviser of the Irish provisional government, a small sheet of the Prime Minister's note-paper, headed 'Ten Downing Street', on which he had taken down the words, 'Benefit of advance made by Canada.' The contracting parties had known what they meant, and there was no difference between them as to what they had intended to convey by the second and third articles of the treaty. The air was cleared. The short statement on the sheet of paper was subsequently embodied in a number of clauses of the constitution, in order to prevent future controversy.

It is this special bond of association between the Dominion of Canada and the Irish Free State, an association in a great work of peace-making between peoples, which seemed to me a happy subject to present to you upon this occasion. It is true that, having regard to the declaration and definition of the Imperial Conference of 1926, the subject of my address may not now be more than a piece of history, but it is history of common interest, even if it does not now contain the seeds of litigated controversy for our courts.

As a matter of completeness, I propose to add a few words on what I may call completed clauses in the Canadian constitution. Before I refer to the particular clauses, let me make one correction of an error which, as I gather from the press, is rather common. A Dominion member of the British Commonwealth of Nations has a two-fold constitutional aspect: that is, a constitutional relation to the Commonwealth of Nations itself, which may be called its external constitutional aspect, and a constitutional organization of its own, as an individual state, which may be called its domestic constitutional aspect. Now while it is quite correct to say that the external constitutional aspect of the Irish Free State—its relation to the Crown, the representative of the Crown and the British Parliament, and generally its constitutional status as a Dominion member of the British Commonwealth of Nations—has been modeled on the Canadian position in all these matters, it is not correct to say, as I see it sometimes stated, that the domestic constitutional organization of the Free State has been modeled on that of Canada. I can, without inflicting on you a detailed exposition of our constitution, indicate to you that it could not be otherwise, by reminding you that the Free State as it stands is what might be called a unitary country, although if the detached provinces called Ulster had continued in their separate Parliament under the treaty we should have had a constitutional situation analagous to the Dominion and provinces of Canada.

To return to the Canadian clauses. Canada is specifically mentioned in three provisions of our constitution. The first is Article 41, which contains the old-fashioned provision as to reserving bills for the signification of the King's pleasure, to which has been added by us the provision that the representative of the Crown shall, in withholding such assent to or reservation of any bills, act in accordance with the law, practice and constitutional usage governing withholding of assent or reservation in the Dominion of Canada.

The second clause is Article 51, which declares the executive authority of the Irish Free State to be vested in the King, and goes on to provide that such executive authority shall be exercisable in accordance with the law, practice and constitutional usage governing the exercise of executive authority in the case of the Dominion of Canada by the representative of the Crown.

The third and only other clause in which the Dominion has been introduced by name is Article 60, which provides that the representative of the Crown, who shall be styled the Governor-General of the Irish Free State, shall be appointed in like manner as the Governor-General of Canada, and in accordance with the practice observed in making such appointments.

The clauses which I have stated are three obvious corollaries from the second and third articles of the treaty, and are, of course, far from exceeding the scope of application of those articles. Apart from the particular clauses

wherein Canada is named, the influence of the Canadian constitution may be traced elsewhere in the instrument. Let me mention one such case which may be of interest in this country, I hope without touching upon any matter of party politics. I refer to the 5th article, which reads as follows:

> "No title of honor, in respect of any service rendered in or in relation to the Irish Free State may be conferred on any citizen of the Irish Free State except with approval of or upon advice of the executive council of the State."

There has been at all times a strong feeling among the Irish people upon the matter of titles, an inevitable tradition from some of the more unhappy pages of our history and, having particular reference to the history of the Act of Union of 1800, was far from being part of the dead and buried past.

It is no secret the draftsmen had before them and studied carefully the action taken in Canada on this subject some time previously, and the text of the resolution in which Canadian public men of the time expressed themselves. The qualifications introduced into this clause are due to peculiar Irish conditions, for we have our far-flung millions of population scattered to the ends of the earth, many of whom have won distinction abroad for services rendered in and to their countries, and very many of whom have reached eminence in the British Army and Navy and diplomatic and other services outside of Ireland. It was therefore necessary so to frame our restriction that these men should not be deprived of what they would regard as legitimate rewards of eminent labors.

Setting up of a new State, clothing with national form an ancient nation, the creation of the machinery of a new government, with all departments necessary for executing the public business of the State, the disentangling of the affairs of two countries lately governed as one—under any of these headings the topic is fascinating and absorbing, and ample for many papers which would interest, especially, the legal profession. But the subject with which I have dealt, however inadequately, should appeal not only to the minds of lawyers but to your pride as patriotic citizens and men of the world, because your association with the constitution of the Irish Free State implies your association with the ending of one of the historic feuds of the world, a feud which had a prominent place in world politics; and implies your association with the basis upon which the new relationship of friendship between Ireland and Great Britain has to be built up, and your association with the statement in terms of constitutional law of the latest phase of constitutional evolution of the British Commonwealth of Nations, now a family group of seven sister States, differing in ages, in histories and in material inheritance, but equal one with another in the community. If the relationship of free and voluntary co-operation in this community of equal nations is to bear the fruit of which it is capable in future, the first essential is knowledge, sympathetic understanding, knowledge of one another.

To those observations upon the actual historical association of Canada with the constitution of the Irish Free State I will only add a few words. First let me say that under our constitution, I think, we have a constitution than which there is none more democratic at present in any nation, so far as I know. We have universal suffrage at the age of 21. We anticipated England in her recent concession to the ladies, by granting equal political privileges and imposing equal political obligations upon both sexes. Our Parliament deals with the whole ambit of government. There is no matter which is excluded from it. We have the whole of our taxation—imposition, collection and payment of taxation—entirely in our own hands. I am afraid it would take perhaps too long if I were to embark upon an account of how these powers have been used in the few years in which the State has existed.

You know that government is no matter of fun, and contrary to the expectations of people who have been fed with a certain view of the Irish people, the Irish Parliament is no institution of amusement. Tourists, particularly those from the other side of the border, who come to Ireland to see the sights, and have always heard that if ever there should be an Irish legislature it would be a

rival to the celebrated institution called Donnybrook Fair, pack around the doors of the Parliament House for tickets of admission, and I am sorry that when they have, after some trouble secured tickets of admission, they can hardly stand the proceedings for half an hour, because the Parliament is concerned with business, the organization of a great business, the business of government, and is carried on by—well, shall I say mostly seriously-minded men? And in the serious and laborious work of the last few years the entire machinery of government has had to be created. All the departments of the State have had to be set up, new schemes of law and order to be established. Incidentally, I may say here that Ireland, always a country without systematic or organized crime population, is now regulated in its ordinary daily affairs by a police force called the Civic Guard, which has taken the place of the quasi-military Royal Irish Constabulary; and one of the great acts of faith and courage in the new Ireland was the act of the late Mr. O'Higgins, when he sent out in the year 1923, through the roads and streets and byways, an unarmed police force carrying on the ordinary daily regulation of people's conduct and lives, insofar as police may interfere with it—wholly unarmed—and that police force has established itself as the force of the people; the people regard it with respect and they walk in safety through the country. And resting upon that police force as its executive arm, to a large extent, the Parliament has set up a new set of courts. Now that was not called for by any reason which would be derogatory to the fame and reputation of the great lawyers who have at all times sat upon the Irish bench, some of them men of outstanding genius—great Irishmen. But the system was bad. The system of appointment was one which detached the people from respect for the courts, and hence it became necessary to set up a new set of courts, with new judges, some of the former judges retained, established on a basis of total independence of the executive government under the constitution; and I think I can say without any vanity that the courts so set up have won the confidence and allegiance of the people of the Free State, of all parties.

Apart from law and order, the economic reconstruction of the country called for very arduous labors, and of course our economic prosperity depends upon agriculture. Drastic measures have been taken, some of them in the realm of control of production, as a result of which one of the achievements accomplished is that our butter and eggs now hold the top place on the English markets, and enter into competition with the best that Denmark and other countries can do. Education has been reorganized from the foundation and given an entirely agricultural bent, so that an agricultural population may be brought up in the proper attitude of mind towards a country whose life-blood is agriculture. Millions have been spent in making roads that will carry your motorcars when you come to see us, without any danger of liability to mishap. And our finances, I think, are such, that we stand in a very sound position upon the financial market. Our total national debt is less than a year's revenue. At present it is £7 17/6 per head of population, the smallest of any country I have been able to examine. Canada has something like £65 a head.

All these matters have been engaging the attention and time of our legislators, and I can assure you that in one respect—and there is one matter I should mention before I conclude—whatever may have been the threats of politicians in the past, you will find no country in which toleration is more cherished than in the Free State; no country in which equality of opportunity, regardless of religion or politics, has been more firmly established, and it only remains for me to say this, that I think I can assure you that this young sister Dominion stands ready to enter into friendly co-operation with all her sisters in the British Commonwealth of Nations in all the directions in which co-operation is possible, and I hope that the minds of those who can make concrete contributions to that very desirable object will be directed to indicating lines, and concerting lines, as they have been to a large extent concerted already in England, upon which this Dominion, as the other Dominions, may be brought into actual working harmony and co-operation with their young sister, the Irish Free State.

Gentlemen, I feel that I have really trespassed too long

upon you. As I say, I am not touring with any mission, but as I am here, I have that message to offer you, and I hope that it will arouse your interest and perhaps your affectionate regard for my country, and that it may be perhaps productive of some fruit in the future. I thank you for having listened to me so long and so patiently, and for having done me the compliment of assembling here to-day to hear me. I know it is a compliment to my country, and as such I cannot lay it to my own credit too much. But, gentlemen, I will tell them at home of your willingness to hear all about Ireland, your desire to hear about it, and the way you have so kindly listened to me.