KATHLEEN BYRNE, PLAINTIFF, *v.* IRELAND AND THE ATTORNEY GENERAL, DEFENDANTS.

[1967. No. 936 P.]

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1968

March 5
Oct. 17

Supreme Court
1969

Feb. 25-28
March 3

1971

July 30

Constitution — The State — Sovereignty — Whether the State has immunity from suit — Prerogative — Personal rights — Right of action in courts — Parties — Representation — Attorney General the proper person to represent the State — Negligence — Vicarious liability of the State for tortious acts of its servants — Ministers and Secretaries Act, 1924 (*No.* 16), *s.* 6 — *Constitution* (*Amendment No.* 27) *Act*, 1936 — *Constitution of the Irish Free State*, 1922, *Article* 73 — *Constitution of Ireland*, 1937, *Articles* 5, 30, 34, 40, 49, 50.

The plaintiff was walking on a public footpath when she fell and was injured by reason of a subsidence of the path at a point where a trench had recently been excavated and refilled by persons, employed in the Department of Posts and Telegraphs, who were civil servants. The plaintiff brought an action in the High Court in which she named "Ireland" and the Attorney General as defendants and claimed damages from the defendants for the negligence of their servants or agents. At the trial of a preliminary point of law it was

Held by Murnaghan J. that the declaration in Article 5 of the Constitution that Ireland is a sovereign State excludes from the jurisdiction of the Courts an action in which the State is the defendant.

On appeal by the plaintiff it was

Held by the Supreme Court (Ó Dálaigh C.J., Walsh J., O'Keeffe P., Budd and FitzGerald JJ.), in allowing the appeal, 1, that the former prerogative of immunity from suit did not exist in Ireland after the enactment of the Constitution of the Irish Free State, 1922, and therefore was not vested or continued by Articles 49 and 50 of the Constitution of Ireland, 1937.

2. (FitzGerald J. dissenting) That the State is a juristic person which is liable vicariously for the tortious act of a servant of the State committed in the course of his employment, and that the Courts have jurisdiction to entertain and determine an action brought by a plaintiff who claims damages from the State in respect of that tort.

Comyn v. *The Attorney General* [1950] I.R. 142 and

Macauley v. *Minister for Posts & Telegraphs* [1966] I.R. 345 approved.

3. That the Attorney General was the proper person to be appointed to represent the State in the action.

Attorney General v. *Northern Petroleum Tank Co. Ltd.* [1936] I.R. 450 considered.

4. That the evidence established that the persons who had been working at the trench had been working as public servants of the State.

TRIAL OF POINT OF LAW

On the 18th September, 1965, the plaintiff suffered personal injuries as a result of a fall caused by the sub-

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sidence of the footpath on which she was walking. The subsidence occurred at a point where recently a trench had been cut and refilled by persons employed in the Department of Posts and Telegraphs. Neither the Minister for Posts and Telegraphs nor his Department was the relevant highway authority. It had been held by the High Court in *Carolan* v. *Minister for Defence*[1] that the relationship of master and servant did not exist between the Minister for Defence and a member of the armed services of the State so as to make the Minister liable vicariously for the negligence of a soldier.

In actions where the claims were *per quod servitium amisit* it had been held by the High Court in *The Attorney General* v. *Dublin United Tramways*[2] that the relationship of master and servant existed between the People of Ireland and a policeman; and the Supreme Court had held in *Minister for Finance* v. *O'Brien*[3] and in *The Attorney General* v. *Córas Iompair Éireann*[4] that the relationship existed between the People of Ireland and a postman. However, in *The Attorney General* v. *Ryan's Car Hire Ltd.*[5] the Supreme Court had held that a member of the defence forces was not within the class of servants in respect of whom the action *per quod servitium amisit* lies, thus overruling the earlier cases in respect of that cause of action.

On the 19th April, 1967, the plaintiff issued and served a plenary summons claiming from the People of Ireland and from the Attorney General damages for the negligence, breach of statutory duty and nuisance of the defendants, their servants[6] and agents; on the same day service of the summons was accepted by the Chief State Solicitor on behalf of the Attorney General "without prejudice to the issue as to the right of any citizen to sue 'the People of Ireland' so named and as to my entitlement to represent such named defendant . . ." On the 21st April the Chief State Solicitor entered an appearance "for the defendant in this action with the sanction of the Attorney General without prejudice" as aforesaid. On the 13th June the plaintiff delivered the following statement of claim:—

[1] [1927] I.R. 62.
[2] [1939] I.R. 590.
[3] [1949] I.R. 91.
[4] (1951) 90 I.L.T.R. 139.
[5] [1965] I.R. 642.
[6] See pp. 285-6, 303-5.

"1. The plaintiff is a children's nurse and resides at The Cottage, Kilmacanogue in the County of Wicklow.

2. On the 18th September, 1965, the plaintiff was lawfully walking along the public highway known as King Edward Road, Bray, in the County of Wicklow when owing to the negligence and breach of duty of the defendants, their employees servants and agents in the laying of installations under the footpath forming part of the said highway the said footpath subsided causing the plaintiff severe personal injuries loss and damage. Alternatively the plaintiff says that the condition in which the said footpath was left as aforesaid amounts to a nuisance in law.

3. *Particulars of special damage*

Doctor Kennedy (continuing)	...	...	...	£15.15.0d.
Surgeon McAuley	...	...	...	3. 3.0d.
X-ray	...	...	...	2. 2.0d.

The second named defendant is sued as one of and as representing The People of Ireland and a representative order will if necessary be sought at or before the trial hereof. The plaintiff claims damages.

John B. Cassidy"

At the trial of the point of law the plaintiff adduced evidence to establish that the subsidence of the footpath had been caused by the excavation and subsequent filling of a trench in the footpath by persons employed in the Department of Posts and Telegraphs.[7]

On the 9th August, 1967, the defendants delivered a defence of which the first paragraph was as follows:—

"1. The defendants will object that the statement of claim is bad in law and discloses no cause of action against the defendants or either of them on the grounds following:—

(*a*) The Court cannot exercise jurisdiction over The People of Ireland in this action as the judicial power granted by the Constitution does not of common right extend to actions against the sovereign authority.

[7]See pp. 303-5, *post*.

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(*b*) The action, based on alleged tortious acts and omissions and breach of duty, is not maintainable in law by reason of the immunity of the People as the sovereign authority against such actions.

(*c*) The action cannot be maintained against the Attorney General as one of or as representing the People and the representative order sought cannot be made."

In her reply delivered on the 9th October the plaintiff pleaded that the judicial power granted by the Constitution is not limited by the Constitution so as to confer immunity upon the People; that the Court had full original jurisdiction and power to determine all matters and questions of law or fact, civil or criminal; and that the Attorney General was one of the People of Ireland and that the Court had jurisdiction to appoint him to represent the People.

On the 6th November the High Court (O'Keeffe P.) ordered by consent "that 'Ireland' be substituted as defendant for the above-named 'The People of Ireland' and that the originating plenary summons and all subsequent proceedings herein be amended accordingly"; and it was thereby on consent further ordered "that the following issues be tried by a judge without a jury with liberty to any party to adduce evidence on such issues:—

1. Whether the Court can exercise jurisdiction over 'Ireland' in this action as the judicial power granted by the Constitution does not of common right extend to actions against the sovereign authority.
2. Whether the action based on alleged tortious acts and omissions and breach of duty is maintainable in law by reason of the immunity of 'Ireland' as the sovereign authority against such actions.
3. Whether the action can be maintained against the Attorney General as representing 'Ireland' and the representative order sought can be made.
4. Whether the persons or any of them alleged to have committed any of the tortious acts alleged in this action were either servants, employees or agents of 'Ireland'.

The plaintiff to set said issues down for trial accordingly."

Article 30, s. 1, of the Constitution of Ireland, 1937, provides that:—"There shall be an Attorney General who shall be the adviser of the Government in matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by this Constitution or by law."

N. St. J. McCarthy S.C., J. B. Cassidy and *D. P. M. Barrington*, for the plaintiff.

T. J. Conolly S.C., D. P. Sheridan S.C. and *A. F. Browne*, for the defendants.

Cur. adv. vult.

Oct. 17

MURNAGHAN J.:—

Evidence was given before me from which it would appear that, on the day or days prior to the accident, employees of the Department of Posts and Telegraphs had opened and then filled in a trench in the footpath on which the plaintiff alleges she was walking on the date of the accident; and that the plaintiff suffered personal injury due to an alleged subsidence in the trench.

The essential question for my decision on this issue is whether the plaintiff can maintain successfully an action for damages against "Ireland." The short answer is:—"No."

It was stated by the plaintiff's counsel that the defendant "Ireland" was synonymous with "The State" and the entire of the argument proceeded on that basis. The basic submissions on behalf of the plaintiff were, first, that the State is a creature of the Constitution; secondly, that the State is a juristic person; and, thirdly, that the State is not sovereign in relation to its internal affairs and that, therefore, it can be sued in the same way as a body corporate. It was in effect conceded on behalf of the plaintiff that, if the State was sovereign in all respects, this action would not lie.

The Articles of the Constitution appear under different headings. The first three Articles appear under the heading of "The Nation." Article 4 gives the State the

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name "Ireland." Article 5 then provides that "Ireland is a sovereign, independent, democratic state." The Article would have had the same meaning if it had read "The State is sovereign, independent, and democratic." Article 6 makes it clear that it is the People who have the right to designate the rulers of the State and, in final appeal, to decide all questions of national policy, and that the powers of government are exercisable only by or on the authority of the organs of the State established by the Constitution.

It is difficult to appreciate why a consistent practice was not adopted of either describing the State as such or as "Ireland" in all Articles subsequent to Article 4 in which it is necessary to refer to the State. As will appear from an examination of the Constitution, it is clear that the expression "the State" or the name "Ireland" is used indiscriminately throughout.

In Articles 4, 5 and 6 the expression "the State" and the word "Ireland" are used to describe the same thing, which is something which everybody understands but which is difficult to define precisely. Neither the expression "the State" nor the word "Ireland" appears in Article 7, but the expression "the State" is used in Article 8, s. 3, which lays down that provision may be made by law for the exclusive use of either the Irish language or the English language for any one or more official purposes either throughout the State or in any part thereof. In this Article the term "the State" is clearly used with a purely geographical meaning. The same meaning would seem to be that which is intended in Article 12, s. 1, which speaks of the President taking precedence "over all other persons in the State"; and again in s. 9 of that Article which provides that:—"The President shall not leave the State during his term of office save with the consent of the Government." The word "Ireland" would appear to be used four times in the same geographical sense in Article 44, s. 1, sub-s. 3, which provides:—"The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, The Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation

of this Constitution." This is the only place other than Article 4, so far as I am aware, where the expression "The State" and the word "Ireland" appear in the same paragraph in the Constitution. In this paragraph the expression "the State" and the word "Ireland" would appear to have different meanings. Here the word "Ireland" would appear to be used on four occasions as the expression "the State" is used in earlier Articles, namely, in a purely geographical sense. It is I think here worth drawing attention to the fact that in Article 16, s. 4, sub-s. 1, which deals with polling at general elections, the expression "throughout the country" is used to describe the territory which could also have been described as "throughout the State" or "throughout Ireland."

Article 9, s. 1, which deals with nationality and citizenship, provides that "any person . . . shall . . . be a citizen of Ireland." It cannot be suggested that in using the word "Ireland" in this Article, having used the expression "the State" in Articles 6 and 8, it was intended that the Article should have any different meaning than if the Article had provided that "any person . . . shall . . . be a citizen of the State." It is to be noted that while the name "Ireland" is used in s. 1, the phrase "Fidelity to the nation and loyalty to the State" is used in section 2. Article 12, s. 1, provides that "There shall be a President of Ireland." The same meaning would have been conveyed by a provision that "There shall be a President of the State." Similarly the reference to the "welfare of the people of Ireland", in the declaration to be taken and subscribed by the President in accordance with s. 8 on entering upon his office, might as well have read "welfare of the people of the State." The reference to "the people" in this context would suggest that the name "Ireland" did not of itself connote the people living in "Ireland" or in "the State". This view would seem to get support (1) from the provisions of Article 28, s. 3, sub-s. 3, which state that "Nothing in this Constitution shall be invoked to invalidate any law . . . for the purpose of securing the public safety and the preservation of the State in time of war"; (2) from the provisions of s. 1 of Article 45 which commences with the words "The State shall strive to promote the welfare of the whole people . . ." and of s. 2 of the same Article

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which provides that "The State shall, in particular, direct its policy towards securing . . . iv. That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole"; and (3) from the provisions of Article 30, s. 3, which provides that certain offences "shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised." The People in enacting the Constitution did not give the State power to prosecute: they reserved that power for themselves. This is the only instance in the Constitution where the word "people" is spelt with a capital "P". The word "people" occurs, I believe, at 18 places in the remaining Articles of the Constitution but in these instances, in my opinion, the word does not always describe the same body of individuals. I think I should draw attention to the fact that, having referred to "the whole people" in s. 1 and to "the people as a whole" in s. 2 (iv), Article 45 goes on to refer in s. 3, sub-s. 2, to "the public." The term "the people" is used six times in Article 47 but in this particular context the expression clearly is not intended to describe all the individuals in the State.

It emerges I think clearly from a consideration of the foregoing and other Articles of the Constitution that the word "Ireland" or the expression "the State" does not mean the body of people within the national territory but that, in addition to having the concept which as I have said earlier everybody understands, the word "Ireland" and the expression "the State" are sometimes used indifferently to describe the national territory itself. In the circumstances if "Ireland" is named as a defendant, without more, it is difficult to be certain that it is the State and not the national territory that is being sued; it cannot, as I hope I have indicated, be understood as meaning that it is the people of the State who are being sued.

I now turn to the Articles basically relied on by counsel for the plaintiff. These are Articles 10, 40, 41, 42, 43, 44 and 45. The propositions made on behalf of the plaintiff, and based on these Articles, may be shortly stated as follows:—

1. The State is a juristic person.
2. The State can only act through its agents.

3. The State is sovereign only in the sense that it is nationally independent: it is not sovereign in relation to internal matters, and in respect thereof it is not above and free from the law and is amenable to the High Court.
4. The State's powers are limited and defined and the State is subject to the Constitution and, as a consequence, it is not sovereign in internal matters.
5. The plaintiff alleges that she has suffered injury due to the negligence of servants of the State.

In support of these propositions I was referred to the following three cases.

Comyn v. *The Attorney General.*[8] Reference was made in particular to the passage from the judgment of Kingsmill Moore J. in the High Court at p. 159 of the report, and to the passage in the judgment of Maguire C.J. giving the judgment of the Supreme Court at p. 165 of the report. The latter passage states the only relevant legal proposition as far as this case is concerned:—"Under our Constitution the State is a juristic person with a capacity to hold property."

Commissioners of Public Works v. *Kavanagh.*[9] In that case the judgment of Ó Dálaigh J. (with which Maguire and McLoughlin JJ. agreed) has the following passage at p. 226 of the report:—"In my opinion the word, "person" [*in the Landlord and Tenant Act,* 1931] should, therefore, be construed as not being limited to human persons, and the word is general enough to include the concept, new to our law, of the State as a juristic person . . . it is not necessary for me to say whether the State as a juristic person is to be looked upon as an abstract concept or viewed rather as the body of the citizens in a corporate capacity." Mr. Barrington said that this passage was *obiter dicta.*

Macauley v. *Minister for Posts and Telegraphs.*[10] Particular reference was made to the following passage in the judgment of Mr. Justice Kenny at p. 353 of the report:—"The subsequent cases in our Courts (*Comyn* v. *Attorney General*[8] and *Commissioners of Public Works* v.

[8][1950] I.R. 142.
[9][1962] I.R. 216.
[10][1966] I.R. 345.

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Kavanagh[11]) have, however, established an entirely new concept which is more in accord with modern thought than the ideas which inspired the decision in *Carolan* v. *Minister for Defence*.[12] These two cases establish that the Republic of Ireland (or the People) is, and that Saorstát Eireann was, a legally recognized juristic person capable of holding property. In my view, the State may now be sued in the Courts whenever this is necessary to vindicate or assert the rights of a citizen. I reserve the question whether the decision in *Carolan* v. *Minister for Defence*[12] is now a correct statement of the law."

These three cases were relied on in support of counsel's first proposition that the State is a juristic person. I cannot accept Mr. Barrington's first proposition, as amplified by him in argument, because I do not understand either *Comyn's Case*[13] or *Kavanagh's Case*[11] to decide anything more than that the State is a juristic person capable of holding or dealing with property. To this limited extent I accept what has been decided as, in my opinion, this proposition would seem to emerge from the provisions of Articles 10 and 11 of the Constitution. While this is one of the attributes of the State, it does not necessarily follow that the State is a juristic person capable of acting in every regard, and in all respects, as if it were a company or a corporation; or that it is capable of being sued in the Courts. I must respectfully dissent from the opinion of Mr. Justice Kenny that, because the Republic of Ireland (or the People) is a legally recognised juristic person capable of holding property, the State can now be sued in the Courts whenever this is necessary to vindicate or assert the rights of a citizen. The conclusion does not necessarily follow from the premise, it obtains no specific support from the Constitution and, in my opinion, it is inconsistent therewith. *Comyn's Case* [13] and *Kavanagh's Case*[11] did not decide that "the Republic of Ireland (or the People) is . . . a legally recognized juristic person" which are the words used by Mr. Justice Kenny.

The people of Eire, which is the manner in which they describe themselves in the preamble to the Constitution, in adopting and enacting and giving to themselves the

[11] [1962] I.R. 216.

[12] [1927] I.R. 62.

[13] [1950] I.R. 142.

Constitution, laid down in Article 5 that "Ireland is a sovereign, independent, democratic state." The language used in this Article is simple and straightforward and, as far as this case is concerned, the important word is "sovereign." If this word means what it says, then Ireland is a sovereign state. Mr. Barrington's argument proceeded on the basis that he had to displace this view. He sought to delimit the word "sovereign" in two ways, first, by submitting that it must be taken as applying to external matters only and, secondly, by submitting that because of the provisions of Article 10 and of Articles 40-45 inclusive (which come under the heading of "Fundamental Rights") it was clear that, in so far as internal matters were concerned, the State was not sovereign. He further submitted that the Constitution created a State of limited and defined powers and, as such, the State was not sovereign in internal matters.

It was submitted that Article 40, s. 1, is to be read as forbidding the enactment of discriminatory laws; that Article 40, s. 2, forbids the State to confer titles of nobility; that Article 40, s. 3, sub-s. 1, requires the State to guarantee in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen; that Article 40, s. 3, sub-s. 2, obliges the State by its laws to protect as best it may from unjust attack and, in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen; that Article 41, s. 3, sub-s. 2, forbids the enactment of any law providing for the grant of a dissolution of marriage; that Article 42, s. 3, sub-s. 1, restricts the State from obliging parents to send their children to any particular type of school; that Article 42, s. 4, places positive duties on the State in relation to education as also does s. 5 of that Article; that Article 42, s. 3, sub-s. 2, places a duty on the State of requiring that children should receive a certain minimum of education; that under Article 43, s. 2, sub-s. 2, the State is granted permission as occasion should require to delimit the exercise of the rights as to private property mentioned in that Article; that the State by Article 44, s. 2, sub-s. 3, is forbidden to impose any liabilities or make any discrimination on the ground of religious profession, belief or

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status; and that Article 44, s. 2, sub-s. 6, prevents the diversion of the property of any religious denomination or any educational institution save in certain circumstances and subject to certain conditions.

In referring to Article 40, s. 3, sub-s. 2, Mr. Barrington submitted that it follows logically from its provisions that the State cannot resort to the prerogative to defeat a just claim; I think Mr. Barrington must have used the expression "the State" in that context in mistake for "the people", to whom any such prerogative belongs by virtue of s. 1 of Article 49. I cannot agree that it would be illogical that the People should exercise, by or on the authority of the Government, such a prerogative on behalf of the State.

I have read and re-read the provisions of the Constitution relied on by counsel for the plaintiff, namely, Articles 10 and 40-45 inclusive and, having done so, in the context of the remaining Articles of the Constitution I cannot accept the contention that the provisions contained in the aforementioned Articles in any way delimit, or were intended to delimit, the sovereign State which the people of Eire gave to themselves. In enacting the Constitution it was necessary to set out guidelines for the present and future exercise of the powers of government (referred to in Article 6) by the legislative, executive, and judicial organs of State established by the Constitution. This is the primary purpose, in my opinion, of the Articles on which such great reliance is placed by counsel for the plaintiff.

In my opinion, the State is sovereign in all respects. This is not to say that the State when acting by one of its organs, namely, the legislature, could not provide that the executive organ, or one of its Ministers, should be responsible for the compensation of an individual in certain circumstances. Such a provision would in itself be an act of sovereignty, and in fact it was made in s. 170 of the Road Traffic Act, 1933, and in s. 116 of the Road Traffic Act, 1961, and now in s. 59 of the Civil Liability Act, 1961. If the view propounded by the plaintiff's counsel is accurate, these sections were all unnecessary. Until the view was expressed by Mr. Justice Kenny that the State can now be sued in the Courts whenever this is necessary to vindicate or assert the rights of the citizen, the contrary view was

held by the legislature, by the executive, and in all previous decisions of the Courts of which I am aware. I was not referred to any decision to the contrary.

If the State or Ireland can be sued in a case such as the present, the State or Ireland can only be sued as being vicariously liable for the acts or omissions of the servants or agents of the State. To this extent I accept Mr. Barrington's second proposition. If this is the law, I propound the question whether the State can be sued if it is shown that a person has suffered loss or damage due to the negligence of one of the organs of government. If the answer to this question is in the affirmative, it would then seem to be open to the unsuccessful party to bring an action in the Courts to sue the State if such party could establish that the unfavourable decision arose because of some carelessness, amounting to negligence, on the part of the judge; such as the failure of the judge to advert to a crucial piece of evidence, or his failure (as it has been said at the Bar) "to put the plaintiff's (*or the defendant's*) case to the jury." It would be very invidious if the High Court had to entertain an action against the State based on an allegation of negligence against the Supreme Court. Again, if the question which I propounded must be answered in the affirmative, it must I think follow that if a Minister negligently said or did something, or omitted to do something, which caused damage to an individual the State could be sued for compensation.

Mr. Barrington presented an elaborate and lengthy argument on the question of whether or not under the Constitution there now existed the prerogative, formerly enjoyed by the monarch, of immunity from being sued in his own courts. Mr. Barrington relied on the provisions of Article 49, s. 1, as the basis for his submission that all powers, functions, rights and prerogatives which may have been outstanding as a matter of history were recalled to the People. He then went on to refer to the provisions of s. 2 of that Article which provide that all such powers, functions, rights or prerogatives (save to the extent thereby provided) shall not be exercised, or be capable of being exercised, in or in respect of the State save only by or on the authority of the Government; he submitted that this constitutional provision was included purely because of an

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abundance of caution and that, in order to ascertain what prerogatives belonged to the People as a result of Article 49, one had to ascertain by examining the Constitution which prerogatives were consistent therewith; he finally submitted that the State (by which I imagine he meant the People) had not inherited the prerogative that the State could not be called to account for its actions in its own Courts. He submitted that the prerogative I have just mentioned was not in existence on the 11th December, 1936, on the grounds that (*a*) the removal of the monarchy from the Constitution in 1936 ended the royal prerogative in Saorstát Éireann; (*b*) the royal prerogative of immunity is inconsistent with the Constitution and (*c*) Article 49, s. 2, does not contemplate a prerogative of immunity from being sued because, as he submitted, the form of the Article is that the said powers and prerogatives "shall not be exercised or be capable of being exercised in or in respect of the State save only by or on the authority of the Government" and that only a positive power etc. can be "exercised" and that the proper verb to use, in respect of the prerogative of immunity from being sued, is "claim." I find this submission difficult to accept because I am unable to imagine from whom the prerogative is to be claimed. Mr. Barrington's final submission on this branch of his argument was that Article 49 is "merely a carry-over Article and that it is inconceivable that the People would have intended it to cover something which is inconsistent with the rest of the Constitution."

Mr. Conolly asked me to reject out of hand Mr. Barrington's submissions on the construction of Article 49. While I do not accede fully to Mr. Conolly's request, I have to say that during this part of his argument I found Mr. Barrington unconvincing, and on further consideration I reject his thesis mainly because, for the reasons I have already given, I reject his submission that the prerogative of immunity from being sued in the Courts is inconsistent with the rest of the Constitution. In my opinion the People who adopted, enacted, and gave to themselves the Constitution and who in Article 5 laid down that "Ireland is a sovereign . . . state" simply meant what is stated in Article 5. The simple statement that "Ireland is a

sovereign . . . state" is completely inconsistent with the propositions that the State is subject to one of the organs of the State, the judicial organ, and can be sued as such in its own courts.

I accept the submission of Mr. Conolly that the State cannot be sued in its own courts in respect of tortious acts. This fact does not leave a person injured as a result of a tortious act without a legal remedy. He or she can, in certain circumstances covered by statute, sue the Minister for Finance and can, of course, sue the individual who by his tortious act has caused the injury, loss or damage. It is not sufficient for Mr. Barrington to endeavour to dispose of this fact by saying that the individual is not a mark for damages. In the first place there is no evidence of this fact in this case but, in any event, anybody who is engaged in the practice of the law comes into touch regularly with cases where an unanswerable claim for damages exists but the defendant is a man of straw. A typical example of this type of case is the pillion passenger on a motor bicycle.

While it does not necessarily decide the point, the fact is that it is difficult to see how the State or the Attorney General could be made amenable to answer a judgment for a sum of money as damages. In this context Mr. Barrington told me that both the named defendants represent the same interest, namely, the State; and he submitted that the plaintiff would be entitled to execute for the amount of such damages against any State property, or against the Attorney General's private property. The latter submission is so preposterous that it has made it difficult for me at times to take many of Mr. Barrington's arguments seriously.

I did not get any assistance from any of the following cases which were cited to me:—*Macauley* v. *Minister for Posts and Telegraphs*[14]; *Quinn* v. *Stokes*[15]; *Buckley and Others (Sinn Féin)* v. *Attorney General*[16]; *Viscount Canterbery* v. *The Attorney General*[17]; *Galway County Council* v. *Minister for Finance*[18]; *Carolan* v. *Minister for Defence*[19]; *Attorney General* v. *Dublin United Tramways*

[14] [1966] I.R. 345.
[15] [1931] I.R. 558.
[16] [1950] I.R. 67.
[17] (1842) 1 Ph. 306.
[18] [1931] I.R. 215.
[19] [1927] I.R. 62.

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Co. Ltd.[20]; *Attorney General* v. *Ryan's Car Hire Ltd.*[21]; *In re P.C.*[22]; and *In re Irish Employers Mutual Insurance Association Ltd.*[23]

Many times in the course of his argument Mr. Barrington spoke of "the People" or "the public" as the State. As is obvious from what I have already said and from the preamble and from the Constitution itself, the State is a different conception from "the People" or "the public" who inhabit the State's territory. I can nowhere find any authority for the proposition that the Attorney General can be sued as representing "the State" or "Ireland", and none was cited to me. Mr. Barrington said that the question was not free from doubt. He should have conceded that there was no doubt about the matter and that the Attorney General cannot be sued as representing the State. The defendant "Ireland" has not in fact been represented before me on the trial of the present issues. The statement of claim set out that the Attorney General was sued as one of, and as representing, the People of Ireland. No authority has been cited to me establishing that the People of Ireland can be sued as such, and I would imagine that if, perchance, damages were recovered against the People a very interesting question would arise as to how such the judgment could be executed. I know of no provision of the Constitution, and I was not referred to any statutory provision, authorising the Attorney General to be sued as a defendant representing the State. I have heard Mr. Conolly's argument, first as appearing on behalf of the Attorney General but also as *amicus curiae*, to assist me in my consideration of Mr. Barrington's forceful and detailed submissions.

As I have already stated, I accept Mr. Barrington's second proposition, namely, that the State can only act through its agents. In the present case the agent would be the Department of Posts and Telegraphs. If the law permitted, the Department could be sued; if not, an action would lie against individual employees of the Department if by their negligence they had caused damage to the plaintiff. It may well be that a case can be made for a future statutory provision in relation to employees of the

[20] [1939] I.R. 590.
[21] [1965] I.R. 642.
[22] [1939] I.R. 306.
[23] [1955] I.R. 176.

Post Office similar in effect to that contained in s. 59 of the Civil Liability Act, 1961, but no such provision at present exists to aid the plaintiff.

Mr. Conolly opened a number of American decisions and Mr. Barrington, in reply, stated that he was aware of the difficulty created for him by those decisions. I do not propose to consider these decisions because it is unnecessary in the circumstances. For the reasons I have already given, the proper answer to each of the four issues set out in the order of the learned President dated the 6th November, 1967, is "No."

The plaintiff appealed to the Supreme Court from the judgment and order of the High Court.

D. P. M. Barrington S.C. (with him *N. St. J. McCarthy S.C.* and *J. B. Cassidy*) for the plaintiff :—

The preamble to the Constitution clearly envisages that the State shall be as much subject to the rule of law as its citizens. The concept of "sovereign" as being equivalent to "above the law" is false. Since the people of the State have adopted the Constitution, the State may act only in accordance therewith and must relinquish whatever claim to supreme sovereignty it might have retained had there not been a Constitution. The description of Ireland as "a sovereign . . . state" in Article 5 of the Constitution is designed solely to indicate that it is an independent state which is free to determine its own affairs independently of foreign control; this is emphasised by Article 29, s. 6, which states that no international agreement shall be part of the domestic law save as may be determined by the Oireachtas. Nevertheless, the powers of the State are limited in many ways by the Constitution in regard to internal affairs. In addition, the Constitution has imposed several positive duties on the State, usually by employing the phrase "the State shall . . ."

Under the Constitution the State must be considered to be a juristic person which is capable of holding property: *Comyn* v. *The Attorney General*[24]; *Commissioners of Public Works* v. *Kavanagh*.[25] It is submitted that the

[24] [1950] I.R. 142.

[25] [1962] I.R. 216.

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State may now be sued in the Courts whenever a suit is necessary to vindicate or assert the legal rights of a citizen: *Macauley* v. *Minister for Posts and Telegraphs.*[26] [He referred to *Carolan* v. *Minister for Defence*[27]; *Graham* v. *Public Works Commissioners*[28]; *Minister of Works and Planning* v. *Henderson*[29]; and *Quinn* v. *Stokes*[30]]

In the absence of a particular statutory procedure to enable a plaintiff to sue the relevant Minister of State, the proper defendant is the Attorney General as he is the person who is authorised to represent the State in all actions brought against or by the State: *Melia* v. *The Attorney General* (Henchy J. — 8th June, 1962).

The High Court has sufficient jurisdiction in this case as Article 34, s. 3, sub-s. 1, invests the High Court with full original jurisdiction and power to determine all matters and questions whether of law or fact, civil or criminal.

It is conceded that the State can act only through its servants or agents. The reported cases are confusing as to who are the servants of the State; this confusion arises from a failure in the early cases to consider the juristic personality of the State, and from the indiscriminate use of phrases such as "the State", "the public" and "the people". A person may be a servant of the State without being a servant of the Government: *McLoughlin* v. *Minister for Social Welfare*[31]; *Attorney General* v. *Ryan's Car Hire Ltd.*[32]

The plaintiff's claim to damages, if established. is a personal right and a property right within the meaning of Article 40, s. 3, of the Constitution which the State must defend and vindicate; they can only be vindicated by enabling the plaintiff to pursue her claim in the Court established pursuant to the Constitution.

Even if the royal prerogative of immunity from suit survived the enactment of the Constitution of the Irish Free State, 1922, it is submitted that it disappeared when the Constitution (Amendment No. 27) Act, 1936, was passed on the 11th December, 1936; but it is also sub-

[26] [1966] I.R. 345.
[27] [1927] I.R. 62.
[28] [1901] 2 K.B. 781.
[29] [1947] K.B. 91.
[30] [1931] I.R. 558.
[31] [1958] I.R. 1.
[32] [1965] I.R. 642.

mitted that the former royal prerogative did not continue after the enactment of the Constitution of 1922 which was founded on the concept of the sovereignty of the People. It has never been expressly held by the Courts that the royal prerogative continued in any form: *In re Maloney*[33]; *In re P.C.*[34]; *Cork County Council* v. *Commissioners of Public Works.*[35] Such part of the former royal prerogative which gave priority to Crown debts has been held to have ceased: *In re Irish Employers Mutual Insurance Association Ltd.*[36]

T. J. Conolly S.C. (with him *D. P. Sheridan S.C.*, *S. T. McKenna S.C.* and *H. J. O'Flaherty*) for the defendants:—

In the American Constitution, which was the pattern for the Constitution of 1937, the internal sovereignty of the state is not restricted by the guarantees of individual rights which are contained therein: *Larson* v. *Domestic and Foreign Corporation*[37]; *Minnesota* v. *United States*[38]; *American Stevedores* v. *Posello.*[39] The United State may be sued only with the specific sanction of Congress: *Ickes* v. *Fox.*[40]

The State, by its nature, must possess certain prerogative powers and their existence is not affected by the fact that under the Constitution these powers are exercisable by the Government and are declared to be vested in the People. If a judgment were to be obtained against the State, it is not clear how that judgment could be executed.

The immunity of the State from suit does not prevent the person injured from suing in tort the servant of the State who is alleged to be at fault, and a liability may even extend to the Minister who was the ultimate source of a particular directive. The State's immunity may be waived as in the case of persons injured at work in factories owned or occupied by the State: see ss. 3, 100 and 118 of the Factories Act, 1955. Again the Conditions of Employment Act, 1936, which regulates the conditions of industrial work and authorises summary prosecution for breaches of the Act, provides at s. 6 that the Act shall

[33] [1926] I.R. 202.
[34] [1939] I.R. 306.
[35] [1945] I.R. 561.
[36] [1955] I.R. 176.
[37] (1949) 337 U.S. 682.
[38] (1939) 305 U.S. 382.
[39] (1947) 330 U.S. 446.
[40] (1937) 300 U.S. 82.

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apply to civilian employees of the State in like manner "as if such persons were employed by a private person" — this is a recognition of the existence of the State's immunity from suit.

It would be strange if the State lacked an immunity from suit which was possessed by a foreign diplomat. The Diplomatic Relations and Immunities Act, 1967, expressly grants immunity from suit to certain foreign diplomats though the immunity appears to be less than that which existed under the common law.

Any waiver of the State's immunity is conditional on the sanction of the legislature. [He also referred to *In re Irish Employers Mutual Insurance Association Ltd.*[41]; *Cork County Council* v. *Commissioners of Public Works*[42]; *Wheeler* v. *Commissioners of Public Works*[43]; *Murphy* v. *Soady*[44]; and *Kenny* v. *Cosgrave*[45]]

D. P. M. Barrington S.C., in reply:—

The immunity granted by statute to diplomats is authorised by Article 29, s. 3, of the Constitution which states that Ireland "accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

There is a clear implication to be drawn from the fact that the Constitution expressly confers on the President an immunity from suit and does not confer any express immunity on the State.

The mechanics of executing a judgment against the State may still have to be determined, but there is no reason to suppose that execution will be necessary or that customary methods will be inadequate. [He referred to *Bainbridge* v. *The Postmaster-General*[46]; *Callaghan* v. *Minister for Posts and Telegraphs* [47]; *Conroy* v. *Minister for Defence*[48]; *Abrath* v. *North Eastern Railway Co.*[49]; *Chuter* v. *Freeth & Pocock Ltd.*[50], *In re Philip Clarke*[51] and *Ryan* v. *The Attorney General*[52].]

Cur. adv. vult.

[41] [1955] I.R. 176.
[42] [1945] I.R. 561.
[43] [1903] 2 I.R. 202.
[44] [1903] 2 I.R. 213 n.
[45] [1926] I.R. 517.
[46] [1906] 1 K.B. 178.
[47] (1947) 81 I.L.T.R. 162.
[48] [1934] I.R. 679.
[49] (1886) 11 App. Cas. 247.
[50] (1911) 27 T.L.R. 467.
[51] [1950] I.R. 235.
[52] [1965] I.R. 294.

Ó DALAIGH C.J.:—

I agree with the judgments of Mr. Justice Walsh and Mr. Justice Budd. The President has asked me to say that he concurs in the judgment of Mr. Justice Budd.

WALSH J.:—

The plaintiff claims that when she was lawfully walking along the public highway at Bray in the County of Wicklow the footpath upon which she was walking subsided, and that this was due to the negligence and breach of duty of persons employed in the Department of Posts and Telegraphs when they had been laying installations under the footpath. The plaintiff has claimed that these persons were employees of the State and that the State is vicariously liable for their negligence. The portions of the defence relevant to this appeal are those which claim that the Court cannot exercise jurisdiction over the State as the judicial power granted by the Constitution does not of common right extend to actions against the sovereign authority. It claims further that the action, being one based on an alleged tortious act or omission, was not maintainable in law by reason of the immunity of the State against such actions as sovereign authority. It is also claimed that the action could not be maintained against the Attorney General as a representative of the State and that the representative order, which the plaintiff seeks, could not be made. By order of the President of the High Court dated the 6th November, 1967, it was directed that special issues[53] be tried by a judge without a jury.

By the Constitution which was adopted and enacted by the People and came into force on the 29th December, 1937, the People created a State which is described in Article 5 of the Constitution as "a sovereign, independent, democratic state" and under Article 4 the name of the State in the English language is "Ireland". If the State can be sued, then in my opinion it can be sued by its official name which is "Ireland" in the English language.

Article 6 of the Constitution provides[54] that all powers of government — legislative, executive and judicial — "derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to

[53]See p. 244, *ante*.

[54]See p. 296, *post*.

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decide all questions of national policy, according to the requirements of the common good." Article 46 of the Constitution provides that every proposal for an amendment of the Constitution shall, upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by referendum to the decision of the People, and Article 47 provides that every such proposal for an amendment shall be held to have been approved by the People if, upon having been so submitted, a majority of the votes cast at such referendum shall have been cast in favour of its enactment into law. The preamble to the Constitution is a preamble by the People formally adopting, enacting and giving themselves a Constitution.

It appears to me abundantly clear from those provisions that the State is the creation of the People and is to be governed in accordance with the provisions of the Constitution which was enacted by the People and which can be amended by the People only, and that in the last analysis the sovereign authority is the People. This is in contrast to the position in the United States of America where Chief Justice John Marshall initially established the basic premise that the United States was created by the States and the people of the States, and not by the people separated from the States. It is also in contrast to the position which prevailed in England and now in Great Britain that the King was the personification of the State and that, even with the development of constitutional monarchy where the distinction between the King in his public and private capacities could be perceived, no legal acknowledgment of this distinction was made with the consequence that the King, or the Crown, was and remains the personification of the State in Great Britain.

Article 6 of our Constitution, having designated the powers of government as being legislative, executive and judicial and having declared them to have been derived from the People, provided that these powers of government are exercisable only by or on the authority of the organs of State established by the Constitution. The question which now arises for decision is whether the judicial power of government which is exercised by the judiciary through the Courts is exercisable so as to bind the

State itself, one of whose organs is the judiciary.

It has already been established that the State is a juristic person capable of holding property: see *Comyn* v. *The Attorney General*[55] and *Commissioners of Public Works* v. *Kavanagh*.[56] It was implicit in the judgments in those cases that the State could have been sued as such. Drummond's famous dictum that property has its duties as well as its rights is no less true in this context. Even in mediaeval England the petition of right was available for all proprietary actions in the wide sense of the term in that it lay not merely for the recovery of land but for claims for damages for interference with proprietary rights, and also for the recovery of chattels. Not only in England but in many other countries in Europe the inviolability of propery was acknowledged in law as a right superior even to that of sovereignty itself. The petition of right fell into disuse from the fifteenth century onwards until the nineteenth century during which time it was superseded by the real actions. In a very full investigation of the history of the petition of right, Lord Sommers in the *Bankers' Case*[57] was able to treat as precedents (for the competence of the petition of right in contract) cases in which the facts corresponded to those in modern suits in contract but which had been decided as proprietary actions. Therefore, the concept of proprietary actions lying against the State, even when the King was the personification of the State, is not a new one.

The point which arises in the present case is whether a right of action lies against the State for a wrong and, in particular, whether the State is vicariously liable for the wrongs committed by its servants. The learned High Court judge, Mr. Justice Murnaghan, who tried these issues came to the conclusion that the State is not so liable and he based his rejection of the submission on the statement in Article 5 of the Constitution that Ireland is "a sovereign . . . state." He says that "the simple statement that 'Ireland is a sovereign . . . state' is completely inconsistent with the propositions that the State is subject to one of the organs of State, the judicial organ, and can be sued as such in its own courts." This appears to me to

[55] [1950] I.R. 142.

[56] [1962] I.R. 216.

[57] (1700) 14 St. Tr. 1.

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assume that, even if the State is the sovereign authority and not simply the creation of the acknowledged sovereign authority, the People, the concept of being sued in court is necessarily inconsistent with the theory of sovereignty. In the first place I think that the learned trial judge misconstrued the intent of Article 5 if he construed it as a constitutional declaration that the State is above the law. Article 1 of the Constitution affirms that the Irish nation has the "sovereign right to choose its own form of Government." Our constitutional history, and in particular the events leading up to the enactment of the Constitution, indicate beyond doubt, to my mind, that the declaration as to sovereignty in Article 5 means that the State is not subject to any power of government save those designated by the People in the Constitution itself, and that the State is not amenable to any external authority for its conduct. To hold that the State is immune from suit for wrong because it is a sovereign state is to beg the question.

In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed. The Oireachtas cannot prevent or restrict the citizen from pursuing his remedy against the State in order to obtain or defend the very rights guaranteed by the Constitution in the form of obligations imposed upon the State; nor can the Oireachtas delegate to any organ of state the implementation of these rights so as to exonerate the State itself from its obligations under the Constitution. The State must act through its organs but it remains vicariously liable for the failures of these organs in the discharge of the obligations, save where expressly excluded by the Constitution. In support of this it is to be noted that an express immunity from suit is conferred on the President by Article 13, s. 8, sub-s. 1, and that a limited immunity from suit for members of the Oireachtas is contained in Article 15, s. 13,

and that restrictions upon suit in certain cases are necessarily inferred from the provisions of Article 28, s. 3, of the Constitution.

It is also to be noted that Article 45 of the Constitution, which sets forth certain principles of social policy intended for the general guidance of the Oireachtas, contains an express provision that the application of those principles "shall not be cognisable by any Court under any of the provisions of this Constitution." This express exclusion from cognisance by the Courts of these particular provisions reinforces the view that the provisions of the Constitution obliging the State to act in a particular manner may be enforced in the Courts against the State as such. If, in particular cases, the State has already by law imposed on some organ of State or some servant of the State the duty to implement the right or protection guaranteed by the Constitution then, in cases of default, it may be sufficient and adequate in particular instances to bring proceedings against the person upon whom the duty has been so imposed; but that does not absolve the State, upon which the primary obligation has been imposed, from responsibility to carry out the duty imposed upon it. If under the Constitution the State cannot do any act or be guilty of any omission save through one or more of its organs or servants, it is nonetheless answerable because of the identification declared by the provisions of Article 6 of the Constitution.

The suggestion advanced in this case that the State cannot be made amenable for civil wrong stems from the English feudal concept that "the King can do no wrong." There is some authority for believing that this phrase originally meant precisely the contrary to what it now means, and that its original meaning was that the King *must not*, was not allowed to, and was not entitled to, do wrong. However, while for many centuries past there has been no doubt as to the meaning of the phrase "the King can do no wrong", that is a concept which differs from the concept that he was immune from suit. A great variety of devices emerged for obtaining relief against the Crown; some of these took the form of suits against the officers or agents of the King personally where no consent was necessary, and some of them took the form of suits against

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the King himself where it was permitted by the grant of a petition of right rather than by suing by writ. The grant of a petition of right in such a case was based precisely on the proposition that the King had acted contrary to law. In the sphere of tort the petition of right did not normally lie outside real actions. Tortious immunity was a judge-made rule. It would appear to have been based on the view that it would be a logical anomaly for the King to issue or enforce a writ against himself. The theory was that the King, as the source of all justice, was incapable of committing a wrong. But the theory was reserved for torts which lay outside the sphere of interference with proprietary rights. There does not appear to be any record of how this doctrine fared in England during the years of the republic under the Cromwellian régime. The theory at least included the safeguard, frequently of little practical worth, that the servant of the Crown was personally liable for the wrongs committed by him in the performance of his service; this was based on the presumption that the officer who committed the wrongful act did so of his own accord and was thus liable for it because the King, who was incapable of committing a wrong, could not have authorised it.

By contrast, when the doctrine of sovereign immunity was imported into the United States, the doctrine was extended to cover the officers and agents of the State and over the course of years it could be availed of even by municipal authorities. The doctrine appears to have been imported into the common law in the United States as basic to the common law without, perhaps, a proper recognition of the nature of its origin, namely, that it rested upon the King being the personification of the State and, therefore, was applied only to a person. The fact that this English theory of sovereign immunity, originally personal to the King and with its roots deep in feudalism, came to be applied in the United States where feudalism had never been known has been described as one of the mysteries of legal evolution. It appears to have been taken for granted by the American courts in the early years of the United States — though not without some question, since Chief Justice Jay in *Chisholm* v. *Georgia*[58]

[58] (1793) 2 Dall. 419.

said:— "I wish the state of society was so far improved and the science of government advanced to such degree of perfection that the whole nation could in the peaceable course of law be compelled to do justice and be sued by individual citizens." In later cases the United States courts defended the doctrine of immunity on the grounds that it was vital for the efficient working of government. Mr. Justice Holmes sought to justify it in *Kawananakoa* v. *Polyblank*[59] by saying that "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." It had also been suggested that the immunity rested on a policy imposed by necessity. In *United States* v. *Lee*[60] after full historical investigations the Supreme Court of the United States reached the conclusion at p. 206 of the report "that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts." Other decisions based it on public policy. In England the enactment and operation of the Crown Proceedings Act, 1947, and in the United States the Federal Torts Act, 1945, would appear to have invalidated these rationalisations.

Under our own constitutional provisions it is the Oireachtas which makes the laws and it is the judiciary which administers them; there is no apparent reason why the activities of either of these organs of state should compel the State itself to be above the law.

That the concept of state liability is not a juristic problem is also evident from the laws of several other countries. In France prior to the revolution the principle of *le Roi ne peut mal faire* prevailed as in the English legal theory upon the same basis of the King being the personification of the state. Since the revolutionary period the liability of the state gradually grew until finally, in the Blanco case of 1873, it was clearly established that the state was liable for the tortious act of its servant if it amounts to a *faute de service*, though the public servant

[59] (1907) 205 U.S. 349, 353.

[60] (1882) 106 U.S. 196.

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involved may be personally liable for actions which are clearly outside the scope of his employment. In France these actions against the state for the tortious actions of its servants are heard in the administrative courts. In Germany the law developed in a somewhat similar way. Article 839 of the German Civil Code of 1896 and Article 34 of the Constitution of the Federal Republic of Germany make the state liable to a third party for the tortious activities of the state's servants in the exercise of their public functions, and these actions may be brought before the ordinary civil courts.

Many other countries in the world have imposed, to a greater or lesser extent, liability on the state for the tortious acts of public servants, and included in these are common-law countries in the British Commonwealth. Section 78 of the Constitution of the Commonwealth of Australia (appearing in s. 9 of the Commonwealth of Australia Constitution Act, 1900) provided that the legislature of Australia might make laws for conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power. Part 9 of the Judiciary Act of 1903 permitted suits by and against the Commonwealth and the States; it gave a right to sue the Commonwealth both in contract and tort without a petition of right and laid down that "in any suit in which the Commonwealth or a State is party the rights of parties shall as nearly as possible be the same and judgment may be given and costs awarded on either side as in a suit between subject and subject." Under the Canadian Petition of Right Act the Crown can be sued in the Court of Exchequer and Separate Court on petition of right in contract and tort. Although a previous limitation in tort to "public work" was abolished by the Exchequer Act, 1938, a petition of right is still required. In New Zealand the Crown can now be sued in contract and tort under the Crown Proceedings Act, 1950. Under the Crown Liability Act, 1910, the former Union of South Africa could be sued without petition of right in contract and for torts arising "out of any wrong committed by any servant of the Crown acting in his capacity within the scope of his authority as such servant." In India a distinction has been drawn between acts of State and

ordinary acts done under cover of municipal law. The latter case would include the negligence of the driver of a military vehicle in the ordinary use of that vehicle, as distinct from acts arising out of the exercise of a sovereign power like that of making war for which the State would not be liable: see *Union of India* v. *Jasso*.[61]

In our own context it is to be noted that the Factories Act, 1955, applies to factories belonging to or in the occupation of the State: see s 3, sub-s. 9, and s. 118 of the Act of 1955. Section 59 of the Civil Liability Act, 1961, makes the Minister for Finance liable for the negligent use of a motor vehicle belonging to the State; that section replaced virtually identical provisions in s. 116 of the Road Traffic Act, 1961, which had replaced s. 170 of the Road Traffic Act, 1933. For an example of a similar statutory provision enacted by the Oireachtas of Saorstát Éireann, see s. 6 of the Conditions of Employment Act, 1936.

I have referred to these several different matters for the purpose of indicating that there is ample support for my view that immunity from suit for wrong is not a necessary ingredient of State sovereignty.

For many years in this country, like the American experience, the notion of sovereign immunity of the State seems to have been accepted as part of the common law, without full regard to its true origin in the common law. The confusion was increased by the fact that the King enjoyed some place under the Constitution of the Irish Free State, 1922, and by the fact that in these years the law was practised and interpreted by persons who, quite naturally, had been mostly orientated by education and practice towards a system in which this concept of sovereign immunity of the Crown held sway.

However, I have not found any Irish case decided since 1922 which deals with the point at issue here. There were cases which dealt with the question of whether or not the Crown, or the State, enjoyed prerogative rights of exemption from statutory provisions. In *In re Maloney*[62] a question arose under s. 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, whether the Land Commission could rely on the prerogatives of the Crown to give

[61] A.I.R. 1962 Punj. 315. (F.B.)

[62] [1926] I.R. 202.

their claim priority. In that case the Land Commission were acting for and on behalf of the Minister for Finance and counsel in the course of his argument conceded that the prerogative of the Crown, on which the Land Commission relied, could not be disputed. In his judgment Johnston J., in referring to the concession made by counsel, omitted to refer to the point of whether or not the Constitution of the Irish Free State, 1922, had impaired or extinguished the prerogative. In that case it was also conceded by counsel that the royal prerogative of not being bound by a statutory provision, unless it was expressly or by necessary implication referred to, remained in full force and effect in the Irish Free State because Article 12 of the Constitution of the Irish Free State, 1922, provided that the Oireachtas should consist of the King, the Dáil and the Senate, and because Article 51 of that Constitution provided that the executive authority of the Irish Free State was to be vested in the King and would be exercisable in accordance with the law and constitutional usage governing the exercise of the executive authority in the case of the Dominion of Canada by the representative of the Crown. In my view, the reference to the constitutional usage of Canada, in addition to being the basis of a concession, was used too generally in the context because it did not follow that, because in the law of Canada the Crown had the prerogative right to claim priority in the payment of debt, the right necessarily existed also in the Irish Free State. Five years later in *Galway County Council* v. *Minister for Finance*[63] Johnston J. at p. 232 of the report rejected the plea of the Galway County Council, that sums claimed by the Minister were statute barred, by saying:— "There can be no doubt, and it has not been argued in the present case to the contrary, that the prerogative and prerogative right can be relied upon by the Irish Free State, and is part of the law of the land . . . I can see nothing in sect. 51, sub-sect. 7, that suggests that it was intended to have any applicability to the Crown or the State, and I think, therefore, that the defendant is entitled to rely on this set-off." In this context it is to be noted that by virtue of s. 3 of the Statute of Limitations, 1957, a State authority is now put on the same footing as

[63] [1931] I.R. 215.

a private citizen where limitations of many kinds of actions are concerned. A State authority means a Minister of State, or the Commissioners of Public Works in Ireland, or the Irish Land Commission, or the Revenue Commissioners or the Attorney General. There are certain exceptions which prevent the statute being pleaded in actions for the recovery of tax or duty under the care and management of the Revenue Commissioners, or certain other fines, taxes or duties. It is to be noted that in the *Galway C.C. Case*[64] a further reference is made to the position in Canada and that reliance was placed on *Maritime Bank of Canada* (*Liquidators*) v. *Receiver General of New Brunswick*[65] where it was decided that the prerogative right could be relied upon not only by the Dominion Government but also by the Provincial Governments in Canada.

In *Cork County Council* v. *Commissioners of Public Works*[66] the question before the former Supreme Court was whether the Commissioners of Public Works were liable for the rates on houses which had formerly belonged to the Crown. That case, like the *Galway C.C. Case*[64], is unsatisfactory as an examination of the question on principle because the Cork County Council admitted that, in so far as the houses in question were concerned, the State enjoyed the same right of prerogative immunity as that which had been enjoyed by the Crown. The constitutional question propounded was whether the defendants, the Minister for Finance and the Commissioners of Public Works, were "entitled to enjoy the like immunity from liability for rates as was formerly claimed and enjoyed by the Crown prior to the Constitution of the Irish Free State." Murnaghan J. stated at p. 571 of the report that it was unnecessary to give any answer to that question because of the admission made by the plaintiffs, and that the case then was concerned only with the extent of the prerogative. Formerly, the Crown was not liable for rates unless it was engaged in private trading. At p. 578 of the report O'Byrne J. referred to Article 73 of the Constitution of the Irish Free State in this context. Article 73 was the one which carried forward all the laws in force at the date of the coming into operation of that Constitu-

[64] [1931] I.R. 215.

[65] [1892] A.C. 437.

[66] [1945] I.R. 561.

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tion — save to the extent to which such laws were inconsistent with that Constitution. He treated Article 12 and Article 51 of that Constitution as saying that the prerogative rights of the Crown, being part of the common law of England and of Ireland up to the date of that Constitution, continued to apply as part of the common law in the Irish Free State by virtue of Article 73. The implication being, though not expressly stated, that there was nothing in that Constitution inconsistent with such continuance.

In my view, that was an erroneous over-simplification of the issues. He appears to have overlooked the fact that the basis of the Crown prerogatives in English law was that the King was the personification of the state. Article 2 of the Constitution of the Irish Free State declared that all the powers of government and all authority, legislative, executive and judicial, in Ireland were derived from the people of Ireland and that the same should be exercised in the Irish Free State through the organisations established by or under and in accord with that Constitution. The basis of the prerogative of the English Crown was quite inconsistent with the declaration contained in that Article. The King enjoyed a personal pre-eminence; perfection was ascribed to him. These were the prerogatives pertaining to the royal dignity. It was under this heading that he was personally immune from civil or criminal proceedings. So far as the royal authority was concerned, the prerogative relating to this was a general one by virtue of which the King was the supreme head of the executive; he had the prerogative right to make treaties and alliances with foreign states and the power to declare war and to make peace, and he was regarded as the fountain-head of justice and the general conservator of the peace of the kingdom. In the early days the King sat in person to administer justice and all jurisdictions in the civil courts were derived from him, either mediately or immediately. To this very day in England every civil suit in the High Court commences in the form of a command by the sovereign to the defendant to enter an appearance. In criminal proceedings the Sovereign acts as prosecutor, and judges derive their appointments from the Sovereign. In Ireland it is to be noted that by Article 30, s. 3, of the Constitution

of Ireland, 1937, all crimes and offences in any court, other than a court of summary jurisdiction, shall be prosecuted in the name of the People, who are the sovereign authority.

The provisions of Article 2 of the Constitution of the Irish Free State expressly rejected the concept that any of the powers of government, legislative, executive or judicial, derived from the Crown. The position of the King in the Constitution of the Irish Free State was confined to the express provisions in that regard which were contained in that Constitution; and that position was owed not to any right on the part of the King but rather to the election of those who enacted the Constitution to give him a place in it. Article 12 of that Constitution made him a part of the Oireachtas and Article 51 vested the executive authority of the Irish Free State in him to 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, by the Representative of the Crown." The reference to "the law, practice and constitutional usage . . . of Canada" had its origin in Article 2 of the Agreement for a Treaty between Great Britain and Ireland of the 6th December, 1921, and has been examined by Kingsmill Moore J. (when he was in the High Court) in *In re Irish Employers Mutual Insurance Association Ltd.*[67] at p. 218 of the report. It is unnecessary to investigate what was the law, practice and constitutional usage of Canada governing the exercise of the executive authority by the King; Article 51 of that Constitution by its very terms circumscribed the exercise by the King of the executive authority vested in him by the Article. It covered such matters as the declaration of war (although active participation in war, save in the case of invasion, required the assent of the Oireachtas under Article 49 of that Constitution), the making of treaties, the accrediting of diplomats and the dissolution of parliament. These were powers expressly granted to the King and could not be enforced in so far as they conflicted with the rights of any private individual, whether existing by virtue of the provisions of the constitution of the day or the law of the day. As supreme head of the executive the King, through the

[67] [1955] I.R. 176.

officers and departments of the executive, was primarily concerned with carrying into execution all the Acts passed by the Oireachtas of Saorstát Éireann. Even assuming that in such capacity he enjoyed the royal prerogative of being personally immune from any civil or criminal proceedings, it did not mean that everything transacted by the then executive council was just and legal; nor was any personal immunity thereby afforded to individual officers or servants of Saorstát Éireann. He was but the executive organ of Saorstát Éireann, and if he had a personal immunity that did not relieve the principal, Saorstát Éireann, from making good the damage caused by the executive organ in carrying out the executive powers of government of the principal, Saorstát Éireann, which itself was the creation of the sovereign People.

So far as the judicial sphere was concerned, Article 68 of that Constitution provided that judges of the Supreme Court, the High Court and other courts established under that Constitution should be appointed by the representative of the Crown on the advice of the executive council; and Article 66 of that Constitution, which dealt with the finality of the decisions of the Supreme Court, added a proviso to the effect that a person should retain the right to petition the King for special leave to appeal from the Supreme Court to "His Majesty in Council" or, in other words, to the Privy Council. The position and power granted to the King in that Constitution owed everything to the express provisions to that effect in that Constitution. In Saorstát Éireann he was not the personification of the State and, therefore, the common-law immunities or prerogatives of the King which were personal to him did not exist in Saorstát Éireann because any such claim postulated, of necessity, the acceptance in the Constitution of Saorstát Éireann of the King as the personification of the State. All royal prerogatives to be found in the common law of England and in the common law of Ireland prior to the enactment of the Constitution of Saorstát Éireann, 1922, ceased to be part of the law of Saorstát Éireann because they were based on concepts expressly repudiated by Article 2 of that Constitution and, therefore, were inconsistent with the provisions of that Constitution and were not carried over by Article 73

thereof. I am fortified in this view by the opinion expressed by Murnaghan J., and concurred in by all the members of the former Supreme Court, in *In re Irish Employers Mutual Insurance Association Ltd.*[68] at p. 240 of the report. In my view, the assumptions and the concessions in the cases which I have mentioned, that the former royal prerogatives were carried over by common law into the law of Saorstát Éireann, were incorrect. While those cases dealt with statutory provisions and the question whether or not the State was bound by the statutory provisions, the observations which I have made as to the question of the prerogatives apply with even greater force to causes of action which are not based upon statutory provision.

So far as statutory provisions are concerned, it is to be noted that in the *Cork C.C. Case*[69] both O'Byrne J. and Black J. referred to *United States* v. *Hoar*[70] which was decided by Mr. Justice Story, a justice of the United States Supreme Court, while he was acting as a Circuit Justice. The case involved the question of whether the United States could be barred from recovering in assumpsit in the Federal Court in Massachusetts by the Massachusetts statutes of limitations. Section 34 of the Judiciary Act of 1789 provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Mr. Justice Story framed the issue as to whether that was the case where the statutes of limitations of Massachusetts applied. He held that the federal sovereign was privileged not to be bound by the statutes of limitations of a state and that, in the absence of a federal statute waiving the privilege, the state statute did not apply to the United States. Mr. Justice O'Byrne cited a passage from p. 330 of the report of *United States* v. *Hoar*[70]; I now propose to cite that passage with a sentence from the passage which was omitted by O'Byrne J.:— "We find accordingly, in our own state, the doctrine is well settled, that no laches can be imputed to the government, and against it no time runs,

[68] [1955] I.R. 176.

[69] [1945] I.R. 561.

[70] (1821) 26 Fed. Cas. 329.

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so as to bar its rights (*Inhabitants of Stoughton* v. *Baker*[71]); so, that it is clear, that the statutes of limitations pleaded in this case would be no bar to a suit brought to enforce any right of the state in its own courts. *But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention.* Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." The text that I have quoted appears in the American report which I have already cited; the sentence which I have placed in italics does not appear in the passage as quoted by O'Byrne J. In my view it is a most vital sentence because it rationalises the principle expressed by Story J. Mr. Justice O'Byrne went on to say that he would be prepared, apart from any special reason arising out of the Constitution, to follow the reasoning of Story J. and to hold that the same rule was applicable in this State. It is to be noted that the state referred to by Story J. in the passage quoted is the State of Massachusetts and not the United States. Mr. Justice Black in his judgment also referred to the American decision. I think Professor Kelly in his book "Fundamental Rights in Irish Law and Constitution" (2nd ed. at p. 326) is correct in his observation that these two judges, of the three who decided that case, relied not only upon their view of the constitutional provisions but also upon the rationalisation of the principle underlying the prerogative right in question.

[71]4 Mass. 528.

So far as the constitutional provision in question is concerned, I have already dealt with the observations of O'Byrne J. in his reliance upon the provisions of Articles 12, 51 and 73 of the Constitution of the Irish Free State. He also relied upon the provisions[72] of Article 49 of the Constitution of Ireland, 1937, as carrying over the Crown prerogatives which, for the reasons he stated, he felt had been part of our common law after the year 1922. If, however, I am correct in the view I have expressed that this was an erroneous construction of the Constitution of Saorstát Éireann, then such privileges, prerogatives, and other rights which are carried over by Article 49 of the Constitution of Ireland are only those which were exercisable in or in respect of Saorstát Éireann immediately before the 11th December, 1936, whether by virtue of the Constitution of Saorstát Éireann or otherwise by the authority in which the executive power of Saorstát Éireann was then vested. Exemption from the provisions of a statute by virtue only of a royal prerogative existing at common law is not one of them.

At this point it is also relevant to note *In re The Irish Aero Club*; *Gillic* v. *Minister for Industry and Commerce.*[73] In the winding up of the company the Minister for Defence claimed priority against other general creditors. His claim was grounded on s. 38, sub-s. 2, of the Finance Act, 1924, and he also submitted that the State was entitled to enjoy the prerogative which had accorded to the British Crown a right to a payment in full in priority to its subjects. At p. 209 of the report Gavan Duffy J. said:— ". . . in the course of the hearing, Mr. Dixon, on behalf of the two Ministers, has expressly abandoned this second claim, very properly, if I may say so, for such a claim would be hard to reconcile with the Constitution." Gavan Duffy J. emphatically rejected the claim of the Minister for Posts and Telegraphs in *In re P.C.*[74] to be entitled to the common-law royal prerogative of payment in priority to other debtors: see pp. 314-16 of the report. He observed at p. 314 of the report that it was well established that whenever the King's claims and those of his subjects "came into competition, the King's claims must be pre-

[72]See p. 300, *post.*

[73][1939] I.R. 204.

[74][1939] I.R. 306.

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ferred, not because he was the executive authority, but by reason of the pre-eminence which he enjoyed at common law over all persons, on the principle expressed in the phrase *detur digniori.*" He pointed out, as had Kennedy C.J. in *In re K.*[75], that in Saorstát Éireann the Central Fund was a State fund and was in no sense a royal exchequer, and that the latter concept would have been in violation of Article 61 of the Constitution of Saorstát Éireann.

In so far as the State may be exempted from the provisions of a statute, it may possibly be capable of being rationalised on the basis on which it was done in *United States* v. *Hoar*[76] and which was adopted by O'Byrne J. as one of his reasons; but it is not necessary to decide that matter in this case as we are not concerned with the construction of a statute or with the question of whether or not the State is bound by the restrictive provisions of some statute. With reference to the quotation from *United States* v. *Hoar*[76], it is well to bear in mind that the vital words are:— "Where the government is not expressly *or by necessary implication* included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute." Immediately before the passage cited from the judgment of Story J., there appears the sentence:— "And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments." It is already apparent from the provisions of s. 3 of the Statute of Limitations, 1957, which I have mentioned earlier in this judgment[77], that in areas outside the collection of the public revenues and taxes and kindred subjects the public benefit no longer appears to the Oireachtas to require that the State, in its several departments therein mentioned, should have exemption from the provisions of the limitation periods laid down in that statute.

I wish to make it clear that nothing I have said is to be taken as expressing any view, one way or the other, upon

[75] [1927] I.R. 260, 273. [76] (1821) 26 Fed. Cas. 329.

[77] See p. 270, *ante*.

the competence of the Oireachtas to exempt the State in respect of general statutory duties from liability for breaches of those duties committed by its officers, servants or employees within the scope of their service or employment. This case is concerned with the ability of the plaintiff to maintain a common-law action against the State for the tortious acts of its employees.

I have already stated the reasons for my opinion that the King had no place in the Irish legal system after 1922, save that which was expressly provided by the terms of the Constitution of Saorstát Éireann. The power and position granted to him by Article 51 of that Constitution did not purport to grant immunity from suit in exercise of the executive authority of the Irish Free State thereby declared to be vested in him. In my view, for the reasons I have already stated, no such immunity was available in Saorstát Éireann by virtue of any inherent quality in the royal person. If immunity from suit could have been claimed for the State, it could only have been on the basis of a rationalisation such as that enunciated in *United States* v. *Hoar*[78] and adopted by O'Byrne J. in *Cork County Council* v. *Commissioners of Public Works*[79]; that immunity, if it existed, would have been enjoyed by Saorstát Éireann and not by the King.

There is no basis, theoretical or otherwise, for a claim that the State can do no wrong or, in the particular context, that Saorstát Éireann could do no wrong; and there is no basis, in theory or otherwise, for a submission that the State cannot be made vicariously liable for a wrong committed by its officers, employees and servants in the course of the service of the State. Earlier in this judgment I have given my reasons for holding that immunity from suit is not a necessary ingredient of State sovereignty.

Several provisions of the Constitution of the Irish Free State imposed obligations upon the State and conferred rights on the citizens as against the State and a breach of these, or a failure to honour them, on the part of the State would clearly have been a wrong or a breach of obligation; it is of no consequence that the wrong or breach might not be within the recognised field of wrongs in the law of tort. In principle, a wrong which arises from the failure

[78] (1821) 26 Fed. Cas. 329.

[79] [1945] I.R. 561.

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to honour an obligation must be capable of remedy, and a contest between the citizen and the State in the pursuit of such a remedy is a justiciable controversy cognisable by the Courts save where expressly excluded by a provision of the Constitution if it is in respect of obligations and rights created by the Constitution, or save where expressly excluded by law if it is simply in respect of rights or obligations created by law. To take one example, Article 10 of the Constitution of Saorstát Éireann provided that all citizens of the Irish Free State "have the right to free elementary education." In my view, that was clearly enforceable against Saorstát Éireann if no provision had been made to implement that Article of its Constitution. There are several instances in the Constitution of Ireland also where the State undertakes obligations towards the citizens. It is not the case that these are justiciable only when some law is being passed which directly infringes these rights or when some law is passed to implement them. They are justiciable when there has been a failure on the part of the State to discharge the obligations or to perform the duties laid upon the State by the Constitution. It may well be that in particular cases it can be shown that some organ of the State already has adequate powers and in fact may have had imposed upon it the particular duty to carry out the obligation undertaken by the State, but that would not mean that the State was not vicariously liable for the non-performance by its various organs of their duties.

Even if one were to adopt the concept that the State can do no wrong because, as it acts by its organs, agents or employees, any wrong arising must be attributed to them rather than to the State itself, the doctrine of *respondeat superior* would still apply. That doctrine is not invalidated by showing that the principal cannot commit the particular tort. It rests not on the notion of the principal's wrong but on the duty of the principal to make good the damage done by his servants or agents in carrying on the principal's affairs. It may well be that in many cases the appropriate organ of State, or the officer or person, charged with the particular duty could be compelled by mandamus proceedings to carry out the duty imposed including, if necessary, an order to apply to the Oireachtas

for the necessary finance: see *Conroy* v. *Minister for Defence.*[80] However, that does not exonerate the State as the principal from the damage accruing from the failure to do so or from the damage accruing from the wrongful manner in which it was done.

Where the People by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available. It is as much the duty of the State to render justice against itself in favour of citizens as it is to administer the same between private individuals. The investigation and the adjudication of such claims by their nature belong to the judicial power of government in the State, designated in Article 6 of the Constitution of Ireland[81], which is vested in the judges and the courts appointed and established under the Constitution in accordance with the provisions of the Constitution.

In my view, the whole tenor of our Constitution is to the effect that there is no power, institution, or person in the land free of the law save where such immunity is expressed, or provided for, in the Constitution itself. Article 13, s. 8, sub-s. 1 (relating to the President) and Article 15, ss. 12 and 13 (relating to the Oireachtas) are examples of express immunities. For an example of provision for the granting of immunity, see Article 29, s. 3, by which diplomatic immunities may be granted. There is nothing in the Constitution envisaging the writing into it of a theory of immunity from suit of the State (a state set up by the People to be governed in accordance with the provisions of the Constitution) stemming from or based upon the immunity of a personal sovereign who was the keystone of a feudal edifice. English common-law practices, doctrines, or immunities cannot qualify or dilute the provisions of the Constitution: see *The State* (*Browne*) v. *Feran.*[82] I think it is apposite to quote here the words of Murnaghan J. in *In re Tilson*[83] where he said at p. 32 of the report:— "The archaic law of England rapidly disintegrating under modern conditions need not be a guide for the fundamental principles of a modern state. It is not a proper method of construing a new constitution of a

[80] [1934] I.R. 342, 679.
[81] See p. 296, *post.*
[82] [1967] I.R. 147.
[83] [1951] I.R. 1.

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modern state to make an approach in the light of legal survivals of an earlier law."

While the King had a limited place in the Constitution of Saorstát Éireann, he had no place in the present new republican form of constitution which was enacted in 1937 and came into force on the 29th December, 1937. The present Constitution provides at Article 28, s. 2, that the executive power of the State shall, subject to the provisions of the Constitution, be exercised by or on the authority of the Government. Section 3 of that Article provides that war shall not be declared and that the State shall not participate in any war save with the assent of Dáil Éireann, except that in the case of actual invasion the section provides that the Government may take whatever steps it may consider necessary for the protection of the State and that the Dáil, if not sitting, shall be summoned to meet at the earliest practicable date. Article 29, s. 4, reserves exclusively to the authority of the Government the exercise of the executive power of the State in connection with its external relations. By Article 15 the national parliament (to be known as the Oireachtas) consists of the President of Ireland, Dáil Éireann and Seanad Éireann. Article 34 expressly reserves the administration of justice to the judges and the courts to be appointed and established under the Constitution, subject to the provision in Article 37 for the exercise of limited functions and powers of a judicial nature by other persons or bodies duly authorised by law to exercise such functions in matters other than criminal matters. The defendants have placed reliance upon the provisions of Article 49 of the Constitution. Section 1 of that Article provides as follows :—

> "All powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstát Éireann was then vested are hereby declared to belong to the people."

This is a reference to the Constitution (Amendment No. 27) Act, 1936, which provided in s. 1 that several

Articles of the Constitution of Saorstát Éireann set out in the schedule to that Act were amended, or otherwise dealt with, in the manner set out in the schedule. The Act came into force on the 11th December, 1936, and the effect of it was to remove from the Constitution of Saorstát Éireann all references to the King, the representative of the Crown, and the Governor General. In particular the effect of the changes, in so far as Article 51 of that Constitution was concerned, was to divest the King of the executive authority of Saorstát Éireann and to vest it in the Executive Council. At that date the King was Edward VIII who had abdicated from the throne of England on the 10th December. On the 12th December, 1936, the Executive Authority (External Relations) Act, 1936, came into force and it provided that the diplomatic representatives of Saorstát Éireann should be appointed on the authority of the Executive Council, and that every international agreement concluded on behalf of Saorstát Éireann should be concluded by or on the authority of the Executive Council. Section 3 of that Act provided that so long as the king recognised by Australia, Canada, Great Britain, New Zealand and South Africa as the symbol of their co-operation continued to act on behalf of those nations on the advice of their several governments for the purpose of the appointment of diplomatic and consular representatives and the conclusion of international agreements, and so long as Saorstát Éireann was associated with those nations, the king so recognised was thereby authorised to act on behalf of Saorstát Éireann for the like purposes as and when advised by the Executive Council to do so. The same section provided that, immediately upon the passing of that Act (12th December, 1936), King Edward VIII should cease to be King for the purpose of those activities and for all other, if any, purposes and that his successor for the time being would be his successor under the law of Saorstát Éireann. The joint effect of those two Acts was to remove the King entirely from the Constitution of Saorstát Éireann, to remove from him all powers and functions in relation to the executive or other authority of Saorstát Éireann or the exercise of any of the powers of government of Saorstát Éireann, and to authorise him to act on behalf of Saorstát Éireann only when so advised by

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the Executive Council to do so in respect of certain matters concerned only with external relations. It is to be noted that neither of these Acts made any reference whatsoever to the immunities or prerogatives of the King, if any, which existed in Saorstát Éireann on the 10th December, 1936; these Acts made no reference whatsoever to any question of succession to or transmission of these prerogatives or immunities, if any.

It is unnecessary to enquire what powers, functions, rights or prerogatives were exercisable by the King on the 10th December, 1936, in or in respect of Saorstát Éireann as, for the reasons I have already given, they did not include a right of immunity from suit in the courts of Saorstát Éireann. Therefore, the provisions of Article 49, s. 1, of the Constitution of Ireland which vested in and declared to belong to the People all the powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before the 11th December, 1936, whether in virtue of the Constitution of Saorstát Éireann or otherwise, did not carry over or set up an immunity from suit. It was quite within the competence of the People in enacting the Constitution of 1937 to provide for an immunity from suit which did not exist prior to the coming into operation of the Constitution, but no such provision was made. Section 2 of Article 49 provides[84] that save to the extent to which provision is made by the Constitution or might thereafter be made by law for the exercise of any such power, function, right or prerogative by any of the organs established by the Constitution, the powers, functions, rights and prerogatives mentioned in s. 1 shall not be exercised or be capable of being exercised in or in respect of the State, save only by or on the authority of the Government. Even assuming that such a common-law immunity from suit did exist so as to be capable of being carried over by Article 49 of the Constitution in accordance with the terms of that Article, is would become thereby the immunity of the People as distinct from the State. While the present action in its original form was an action brought against the People, the parties were changed[85] so that it is now an action against the State and the Attorney General, and the

[84]See p. 300, *post*.

[85]See p. 244, *ante*.

original plea in the defence claiming the immunity of the People as the sovereign authority from such action must be read as a plea claiming such immunity on behalf of the State. In either its original form or in its present form the plea would, in my view, fail even if such immunity were vested in and belonged to the People, because there is no evidence of any authority from the Government for the assertion of any such claim and, by virtue of s. 2 of Article 49 of the Constitution, no such claim could be set up in respect of the State save only by or on the authority of the Government. It is to be noted that the same situation arose in *In re P.C.*[86] where Gavan Duffy J. expressed the same view on the necessity for evidence of authority from the Government for the assertion of the claim of immunity.

As the pleadings and the evidence already taken in the present case indicate, the claim of the plaintiff arises out of an allegation of negligence in the carrying out of certain works on the public road in County Wicklow, which works consisted in the laying of telephone or telegraph cables for the Department of Posts and Telegraphs by persons employed in that Department. Section 1(ix) of the Ministers and Secretaries Act, 1924, sets out the functions of that Department and provides that the head of the Department shall be the Minister for Posts and Telegraphs. The Minister is a corporation sole with perpetual succession and, as such, may be sued under his style or name: see s. 2, sub-s. 1, of the Act of 1924. The officials and other employees in that Department are not the employees of the Minister for Posts and Telegraphs, and he cannot be made liable in damages for the tortious acts committed by these employees even though they may have been appointed by him to their particular employment. Both they and the Minister are persons employed by or under the State and in my view it makes no difference if, being civil servants, they are civil servants in the service of the Government or are civil servants in the service of the State — a distinction which was adverted to in *McLoughlin* v. *Minister for Social Welfare*.[87] All such persons employed in the various Departments of the Government and the other Departments of State, whether they be in the Civil

[86] [1939] I.R. 306, 311.

[87] [1958] I.R. 1.

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Service or not, are in the service of the State and, for the reasons I have already given, the State is liable for damage done by such persons in carrying out the affairs of the State so long as that person is acting within the scope of his employment. The decision of this Court in *The Attorney General* v. *Ryan's Car Hire Ltd.*[88] provides no support for a contrary view. That case simply decided that the State employee who was involved in the case was not a servant of the menial status in respect of the loss of whose services the State could seek to avail of the action *per quod servitium amisit*, which action was based on a feudal concept having its origins in the rules of law applicable to villein status.

The concept of a Minister or a member of the Government being a fellow servant or fellow employee of the other persons employed in his Department was fully discussed in *Carolan* v. *Minister for Defence*[89] and, while the constitutional position has altered since that decision, I think the concept is still valid. In that particular case it was held by the High Court that members of the Defence Forces and the Minister for Defence were fellow servants in the employment of the Government. The real point of the case, however, was whether the Minister for Defence was the employer of such members or their fellow employee. The court's view that they were both in the employment of the Government is not, I think, of any great materiality because no point was raised as to whether they were in the employment of the Government as distinct from the State. In *McLoughlin* v. *Minister for Social Welfare*[90] it was indicated that persons in the Civil Service may be in the Civil Service of the State rather than the Civil Service of the Government, but I think that the correct view is that they are all in the service of the State. In *Carolan* v. *Minister for Defence*[89] Sullivan P. referred at p. 66 of the report to the Minister for Defence and his subordinates as "both being servants of the public" and at p. 68 he referred to the subordinates as "servants of the public in the employment of the Government, and, as such, fellow-servants of the Minister for Defence . . ." As the Minister is not a servant of or in the employment of the

[88] [1965] I.R. 642.

[89] [1927] I.R. 62.

[90] [1958] I.R. 1.

Government, it seems quite clear that the court in that case was not deciding that the subordinate was in the service of the Government as distinct from the State. It is in the latter instance only that he is a fellow servant with the Minister. This latter concept is one which was recognised by s. 64 of the Workmen's Compensation Act, 1934, just as it is recognised by s. 59 of the Civil Liability Act, 1961, in relation to motor vehicles used by the different Departments of Government or of the State. The Government is the organ of State established by the Constitution to exercise the executive power of the State subject to the provisions of the Constitution, and by the Constitution it is bound to act as a collective authority and to be collectively responsible for the Departments of State administered by the members of the Government. It is responsible to Dáil Éireann. It was not claimed in the present case that the plaintiff's action should have been more properly brought against the Government than against the State, and I do not think that such claim would have been sustainable; but it is ironic to note that, if such were the case, the very provisions of Article 49, s. 2, of the Constitution which were relied upon by the defendants to enforce their claim for immunity from suit would not be applicable to a suit against the Government itself.

I come now to deal with the joining of the Attorney General as a defendant in these proceedings. Article 30 of the Constitution constitutes the office of Attorney General. It provides that the Attorney General shall be the adviser of the Government in matters of law and legal opinion, and that he shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by the Constitution or by law. By virtue of the Constitution he is an independent constitutional officer of State with powers and duties some of which are of a quasi-judicial nature and some of an executive nature. However, he is not in any sense the servant of the executive, and any exercise by him of executive powers is not the exercise of the executive powers of the Government but rather those of the Attorney General himself: see Ó Dálaigh J. (as he then was) in *McLoughlin* v. *Minister for Social Welfare*[91] at pp. 24 and 25 of the report. The

[91] [1958] I.R. 1.

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Attorney General is not answerable for the acts of the Government or of its members, or for the acts of those in the service of the State. Section 6, sub-s. 1, of the Ministers and Secretaries Act, 1924, specifies particular powers, functions and duties which are vested in the Attorney General, including the administration and business generally of public services in connection with the representation of the Government and of the public in all legal proceedings for the enforcement of law and the assertion or protection of public rights and all powers, duties and functions connected with the same. In the case of *O'Doherty* v. *The Attorney General*[92] a somewhat similar point was raised with regard to the propriety of joining the Attorney General in an action in which, ultimately, an order for mandamus was made to compel the referee under the Military Service Pensions Act, 1934, to carry out his functions in accordance with law. It would appear from the report that the mandamus was directed only to the referee. At p. 585 of the report Gavan Duffy J. said:— "My view is that the plaintiff was right in joining the Attorney General. The Referee is a statutory delegate, reporting upon some 60,000 cases for the Minister for Defence; he is doing very difficult work of an administrative character, but so extensive that the normal machinery of the Department of Defence could not cope with it; the Minister is necessarily interested in an attack of this kind upon the proceedings of the Referee, an attack which in some cases might have far-reaching effects, if successful; and the State is interested, because the work of the Referee in the case of every successful applicant leads directly to a demand on public funds. The Minister for Defence was not sued and the Minister for Finance was not sued; the public interest was represented by the Attorney-General instead. I think that was right." He went on to note that no additional costs would be incurred by joining the Attorney General as the referee and the Ministers or the Attorney General, when sued, should have the same solicitor and counsel, except in a case where the referee was defending his own conduct which was not supported by the Government and where he had decided to fight the case though the Government disapproved.

[92] [1941] I.R. 569.

In the present case I think the same general reasoning applies. There can be no doubt that when the State is sued it is entitled to defend itself; this power or right to defend itself is one which can be exercised in respect of the State only by or on the authority of the Government by virtue of the provisions[93] of Article 49, s. 2, of the Constitution. If in such a case it is the Attorney General's opinion that the Government should authorise the defence by the State of the claim brought against it, the defence is a matter of public interest and is properly financed out of public moneys. If the Government does not wish to authorise the defence by the State, then the Attorney General would not defend the case either. In all such cases it is my view that the correct procedure would be to sue the State and to join the Attorney General in order to effect service upon the Attorney General for both parties. In effect the Attorney General would be joined in a representative capacity as the law officer of State designated by the Constitution. If the claim should succeed, judgment would be against the State and not against the Attorney General.

It is unnecessary at this juncture to consider how such a decree would be executed or enforced but it is sufficient to say that an order for mandamus to compel compliance with the judgment would be an appropriate step and not without precedent.

For the reasons I have given, the order of the High Court should be reversed and in lieu thereof an order should be made answering in the affirmative the question raised in each of the four issues directed to be tried by the Order of the 6th November, 1967. I have had the privilege of reading the judgment about to be delivered by Mr. Justice Budd and I agree with it.

BUDD J. :—

Mr. Barrington, on behalf of the plaintiff, submitted that the answer to all the issues[94] should be in the affirmative. With regard to the first two, he contended that the State was a juristic person which is subject to suit and is liable to have proceedings in law taken against it in the Courts, and that litigants had the right of recourse to the Courts

[93]See p. 300, *post*.

[94]See p. 244, *ante*.

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to assert and maintain their legal rights against the State. The Constitution of Ireland, 1937, itself contained no impediment to their doing so. Mr. Conolly's submission to the contrary was that the State was sovereign, as stated in Article 5 of the Constitution, and that by reason of its sovereignty it was not liable to suit or to be sued in the Courts of the State; he also contended that there was vested in the State a right of immunity from suit of a prerogative nature formerly vested in the Crown. From the practical point of view, it was submitted that there was no method of enforcing or recovering a decree against the State. Mr. Barrington replied that Article 5 had reference to the international or external status of the State as appeared from an analysis of the provisions of the Constitution as a whole, which analysis showed that the powers of the State were confined and limited internally and were not of a sovereign quality within the State itself. Further, he submitted that no such immunity from suit as was alleged to have been vested in the Crown was now vested in the State. There was no reason for supposing that the executive authority would not honour the orders of another organ of State made within its own sphere. There were, of course, other subsidiary contentions which I shall be dealing with in the course of this judgment.

I should make it clear at the outset that throughout the arguments "Ireland" as an entity was equated with the State. Under the heading of "The State" the Constitution in Article 4 deals with the State in these words:— "The name of the State is Éire, or in the English language, Ireland." By suing "Ireland" the plaintiff is doing no more than suing the State. In considering the first issue as to whether the Courts can exercise jurisdiction over the State, one must consider from the juristic aspect the nature, qualities and attributes of that entity which constitutes the State. Is the State a juristic person cognizable by the Courts and capable of suing and being sued therein ?

The legal nature of the State is not defined in the Constitution but, as Kingsmill Moore J. points out in his learned disquisitions on the matter at p. 159 of the report of *Comyn* v. *The Attorney General*[95], the nature of the

[95] [1950] I.R. 142.

State has to be discovered in an indirect fashion from the various Articles thereof. In his summary of what the Constitution says about the nature of the State, he points out that it has a name, is sovereign and independent, possesses rulers and a territory, has citizens who owe loyalty, and it owns natural resources (mines, minerals and water) and can acquire such property in the future. He cites many other examples of what the Constitution says about the State as aiding an assessment of the nature of the entity, but I feel I need not go further into these except to point out that he refers to the provisions contained in Article 40 and the following Articles, in which the State is definitely personified and accepts obligations, as being the most remarkable provisions. Article 40 deals with the State's guarantee to respect and vindicate the personal rights of the citizen and, in the case of injustice done, to vindicate the life, person, good name and property rights of the citizen, I shall refer to that Article in more detail later. Finally, the learned judge comes to the conclusion and expresses his view that the State is a juristic person and can hold property. The proceedings were taken further to the Supreme Court where the judgment of the Court was read by Maguire C.J., who said at p. 165 of the report:— "Under our Constitution the State is a juristic person with a capacity to hold property." Further, I find that in *Commissioners of Public Works* v. *Kavanagh*[96] Ó Dálaigh J. (as he then was) expressed the view that the word "person", appearing in a statute, should be construed as not being limited to human persons, and that the word is general enough to include the concept, new to our law, of the State as a juristic person. To my mind *Comyn's Case*[97] establishes that the State is a juristic person, which is no more than saying that it is in law recognised as a legal person. It also decided that it was a juristic person capable of holding property. In *Kavanagh's Case*[96] Ó Dálaigh J. also accepted the concept of the State as a juristic person. Once it is established that the State is a juristic person, then *prima facie* there would not seem to be any reason why in the eyes of the law the State should not be in the same position as any other legal *persona* and be thus capable of being sued, unless some

[96] [1962] I.R. 216. 226.

[97] [1950] I.R. 142.

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particular reason can be shown to the contrary.

The assertion of legal rights depends, however, upon the constitutional right of the citizen to have recourse to the courts of the State to enable him to assert his legal rights in the Courts, particularly when suing the State. Certain legal rights are given to the citizens of the State by the Constitution. Article 40, s. 3, sub-s. 1, of the Constitution provides that "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen" and s. 3 further provides at sub-s. 2 that:— "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." In *Ryan* v. *The Attorney General*[98] Mr. Justice Kenny took the view that the guarantee was not confined to the rights specified in Article 40 but extended to other personal rights of the citizen, and this view was upheld by the Supreme Court. These are personal rights given to the citizen and they would be quite meaningless, in so far as suing the State is concerned, unless they were in some way enforceable against the State. I turn next to deal with the matter of the assertion of these rights which the plaintiff submits can only be achieved through the operations of the Courts. In the first place it should be observed that it is provided[99] in Article 6, s. 2, of the Constitution that all powers of government are exercisable only by or on the authority of the organs of State established by the Constitution. One of these organs is the judicial arm of the State which exercises the judicial power of the State through the Courts. Under the heading of "The Courts", it is provided by Article 34, s. 1, that:—"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution . . ." Article 35 provides for the manner of the appointment of judges. Article 34, s. 2, provides that "The Courts shall comprise Courts of First Instance and a Court of Final Appeal" and by s. 3, sub-s. 1, of the same Article it is provided that:—"The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine

[98] [1965] I.R. 294.

[99] See p. 296, *post*.

all matters and questions whether of law or fact, civil or criminal." The manner of the assertion of these rights and the machinery for the enforcement thereof are thus provided by the Constitution. Therefore, it would appear in the first place that the Constitution has conferred certain personal rights on the citizens of the State and, secondly, that the Constitution has also provided the means whereby those rights may be asserted and enforced, that is to say, through the courts of the State. It would seem a proper inference to draw from these Articles that it was intended by these Articles that the citizens should have the right of recourse to the High Court to assert those rights.[100] The question, however, remains as to whether they may be asserted in particular against the State.

The right of a citizen to have recourse to the Courts for the determination of justiciable controversies between a citizen and the State itself was dealt with in *Buckley and Others* (*Sinn Féin*) v. *The Attorney General*[101]; at p. 84 of the report O'Byrne J., having referred to the distribution of powers effected by Article 6 of the Constitution, goes on to say:—"The effect of that article and of Arts. 34 to 37, inclusive, is to vest in the Courts the exclusive right to determine justiciable controversies between citizens or between a citizen or citizens, as the case may be, and the State. In bringing these proceedings the plaintiffs were exercising a constitutional right and they were, and are, entitled to have the matter in dispute determined by the judicial organ of the State." The learned judge was delivering the judgment of the Supreme Court. *Prima facie* these words appear to recognise the right of a citizen, under the provisions of the Constitution, to have recourse to the Courts for the purpose of having determined any justiciable controversy between a citizen and the State. However, *Buckley's Case*[101] was concerned with the question as to whether a matter involving a controversy as to legal rights to property could be dealt with by the Legislature by legislation or whether it lay exclusively within the judicial domain; the matter of the immunity of the State by reason of its sovereignty was not directly in issue. Therefore, it was submitted in this case that the matter of the State's immunity from suit was still open for

[100]See [1966] I.R. 345; and p. 155 *ante*.

[101][1950] I.R. 67.

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decision, and it was contended that under the provisions of the Constitution the State was sovereign and that, by reason of its sovereignty, it could not be sued in its own courts. It was suggested that this aspect of the matter of the sovereignty of the State, in so far as it affected the question of immunity from suit, had not been adequately considered heretofore and that once the State's sovereignty was shown to exist the result followed that it was immune from suit. It was also submitted that under Articles 49 or 50 of the Constitution the State had inherited, or acquired, some pre-existing prerogative right of immunity from suit in respect of tortious acts; but I shall deal with that submission later.

The basis of the first contention was that, while the citizens of the State may, generally speaking, have recourse to its courts to obtain redress for wrongs and in order to assert legal rights, the State itself cannot be sued in what should be regarded as its own courts because the State is sovereign and this places it in a position that it cannot be sued as being itself above the reach of the law. It is itself the fountain of justice and in its sovereign capacity it extends rights to those over whom it is sovereign but not to the extent of granting any rights against itself. Such an argument depends upon equating the position of the State, as regards legal proceedings, to the position of the Crown which in former political theory embodied the State and was the executive authority. Gradually, however, the results and effects of having a written Constitution have been borne in on us. The tendency to equate the former sovereign position and power of the King to the constitutional position of the State is not now so evident. One does not, I think, have to consider here in great depth the philosophical theories with regard to the concept of sovereignty and its various attributes; it is sufficient for the purposes of dealing with this aspect of the case to consider whether or not the State is sovereign in the sense that it has immunity from suit under the provisions of the Constitution which, in my view, must determine the matter. It is said that support for the proposition that the State is sovereign is to be found in Article 5 of the Constitution which states that "Ireland is a sovereign, independent, democratic State." On the other hand, it is

contended that, in the light of other provisions of the Constitution and from the historical background of its enactment, it must be inferred that the provision in that Article that the State is sovereign relates only to the external or international status of the State as being internationally sovereign in the sense that it is not answerable to any foreign State, as distinguished from its being anything in the nature of a colony or dominion. These other provisions also show, it is said, that the Article was not intended to impart to the State that sort of internal sovereignty which would give it, against the citizens and institutions of the State, a legal and constitutional immunity from proceedings in law. It is pointed out that, on the contrary, the Constitution makes the State subject to a number of restrictions, duties and obligations which are not consistent with full sovereignty. I shall now refer to some of these.

One finds in the enacting portion of the Constitution perhaps the most striking indication that the State is not sovereign in the sense under consideration. We find that it states that:—"We, the people of Éire, . . . do hereby adopt, enact, and give to ourselves this Constitution." This Constitution was passed by the Oireachtas and submitted to the People in a referendum; it was enacted by the People on the 1st July, 1937, and came into operation as and from the 29th December, 1937. It can now only be amended by way of a referendum by a decision of the People. Therefore, the Constitution and its form are the creation of the People and depend upon the will of the People both for its existence and the determination of its form from time to time by way of the referendum provided for by Articles 46 and 47 of the Constitution. The State is, in its turn, recognised by the Constitution. Its powers and obligations are determined by it. It is thus to be seen that it is the People who are paramount and not the State. Such a conclusion is inconsistent with any suggestion that the State is sovereign internally. In addition, it would appear to me that there are to be found in the Constitution itself further indications that the powers of the State are limited and confined in a fashion which is inconsistent with the State being of a sovereign nature. Amongst the Articles dealt with under the heading

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of "The Nation" is to be found Article 1 which states that:—"The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government . . ." Further, under the heading of "The State" is to be found Article 6 which provides:—

"1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

Article 1 of the Constitution itself underlines that it is the nation, which can only be a reference to the People, which has the sovereign right to choose its form of government; it has in fact done this by the enactment of the Constitution. Article 6 shows that the powers of government, which are all provided for in the Constitution, also derive from the People. Both Articles indicate that it is recognised in the Constitution itself that there is a higher authority than the State, and this again is incompatible with any theory that the State is sovereign as regards internal affairs of government and their exercise through the organs of Government. The Constitution also contains many restrictions on the exercise of the powers of the State and places on the State duties, obligations and guarantees. Every restriction on the power of the State, and every imposition on the State of duties, obligations or guarantees, tends to show that it is not sovereign. They impinge upon its authority, powers and status. A truly sovereign body in the political sense is generally regarded as having untrammelled power and authority, accepting only such obligations as it sees fit which affect or bind it only so far as it sees fit. I intend to refer to such of the restrictions, duties and obligations imposed on the State by the Constitution as are sufficient to illustrate further that the State is not sovereign internally. I am indebted to Kingsmill Moore J. for his able analysis of the Constitution which is relevant to these matters.

First of all it is clear that there are restrictions on the powers of the State; I cite these examples. The State must hold all citizens equal before the law and must not impose any disabilities or make any discrimination on the ground of religious profession, belief or status. It shall not confer titles of nobility. No citizen may be deprived of his personal liberty save in accordance with law. No law may be enacted providing for a dissolution of marriage. The State shall not oblige parents, in violation of their conscience, to send their children to schools established by the State or designated by the State. The property of any religious denomination or any educational institution may not be diverted save for necessary works of public utility and on payment of compensation. The above are examples of positive restrictions on the power of the State. There are also duties imposed upon the State which involve obligations of a nature not usually associated with a sovereign body, either by way of imposing guarantees or by way of direct imposition. It shall require that children receive a certain minimum education and it shall provide for free primary education. The State further guarantees in its laws to respect the personal rights of the citizens and accepts the obligation to protect from unjust attack and to vindicate the life, person, good name, and property rights of every citizen. It also guarantees the personal liberty of the citizen of which he may not be deprived save in accordance with law. It further guarantees, subject to public order and morality, the exercise of the right of the citizens to express freely their convictions and opinions, to assemble peaceably and without arms, and to form free associations and unions. It further guarantees to protect the family and its constitution and authority; it pledges itself to guarantee the institution of marriage; and it guarantees to pass no law attempting to abolish the right of private ownership subject to delimitation in the interest of the common good. The imposition of each of these restrictions, guarantees, duties and obligations obviously limits and diminishes the status, power, authority and function of the State. Their imposition shows that the State is not above the law of the Constitution, but is subject to it.

To my mind it is not unreasonable to take the attitude

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that one ought to approach the whole question as to the existence in the Constitution of an immunity from suit, be it based upon the sovereignty of the State or otherwise, as if it was something which one should be surprised to find in a modern constitution of a modern State. It is a mediaeval concept based on such feudal theories as are contained in the maxim that "the King can do no wrong", a proposition which is based on and justified by the conception of the perfection of the monarch. All these conceptions and theories, which are dealt with in Blackstone (Book I, Ch. 7, p. 239, paras. 240, 242, 245), are conceptions which seem quite irreconcilable with modern ideas. Ours is a State established in modern times and its Constitution is of but recent enactment in historical perspective. The very nature of the State as exemplified in the wording of the provisions of the Constitution would seem, speaking generally, to be such that old feudal conceptions are irreconcilable with it. The King is completely absent from the Constitution and gone with him is any idea of the King as the personification of the State; I can find no suggestion in the Constitution of anything in the nature of perfection in the State. The first Article of the Constitution affirms the right of the Irish nation to choose its own *form of government*, and any feudal ideas of government are impliedly repudiated by Article 6 which provides[102] that all powers of government (legislative, executive and judicial) derive from the People and that these powers of government are exercisable only by or on the authority of the organs of State established by the Constitution. So far from any rights of immunity from suit being given in a positive fashion to the State, the position is quite the reverse in that duties are cast on the State, such as those contained in the provisions[103] of Article 40, s. 3, which provide for the defence and vindication of the personal rights of the citizen and the vindication of his life, person, good name and property rights. It is to be observed also that under the terms of Article 13, s. 8, sub-s. 1, it is provided that the President shall not be answerable to any court for the exercise and performance of the powers and functions of his office, or for any act done or purporting to be done by

[102]See p. 296, *ante*.

[103]See p. 154, *ante*.

him in the exercise and performance of those powers and functions; that Article shows that the framers of the Constitution had before their minds the matter of providing expressly for immunity from suit in at least this instance, but in sharp contrast they did not see fit to provide directly for any such immunity in the case of the State. This would seem to me to carry an implication of some weight that it was not intended to confer any such immunity on the State.

From what is to be deduced in the main from an analysis of the foregoing provisions of the Constitution, in so far as they affect the immunity of the State from suit, it would seem correct to say that the Constitution is not imbued with feudal conceptions of privilege and exemptions but rather with modern conceptions of the duty of the State and the recognition by it of the human rights and needs of those who are the citizens of the State so that, instead of hedging the State with privileges and immunities, the general trend is to place obligations on the State. Therefore, I arrive at the conclusion that the State is not internally sovereign but, in internal affairs, subject to the Constitution which limits, confines and restricts its power. In the result, any contention that the State enjoys immunity from suit by reason of its sovereignty falls to the ground; apart from what may be provided by Articles 49 and 50, I am unable to find elsewhere in the wording of the provisions of the Constitution any indication of an intention to confer on the State any immunity from suit. So much of the general tenor thereof as is relevant to the topic is basically inconsistent with any contention that the Constitution has given any immunity from suit to the State. What I have said, however, is not to be taken as in any way derogating from the external sovereignty of the State in so far as the rest of the world is concerned.

However, it is contended that, apart from any grant of immunity from suit being conferred directly on the State by the general provisions of the Constitution, certain of the old prerogatives of the Crown (including immunity from suit) survived the creation of the Irish Free State (Saorstát Éireann) and, being part of the constitutional policy of that State, were in turn carried over into our present Constitution by the provisions of Article 49 thereof. The

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provisions of Article 49 of the Constitution are as follows:—

"1. All powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstát Éireann was then vested are hereby declared to belong to the people.

2. It is hereby enacted that, save to the extent to which provision is made by this Constitution or may hereafter be made by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution, the said powers, functions, rights and prerogatives shall not be exercised or be capable of being exercised in or in respect of the State save only by or on the authority of the Government.

3. The Government shall be the successors of the Government of Saorstát Éireann as regards all property, assets, rights and liabilities."

This submission is combined with a second one to the effect that Article 50, s. 1, has a similar effect in carrying over the laws which were in force in Saorstát Éireann immediately prior to the date of the coming into operation of the Constitution, and that such laws included the common law and the constitutional prerogatives and immunities which formerly had been those of the Crown. The provisions of Article 50, s. 1, are as follows:—

"Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

In the course of his judgment Mr. Justice Walsh has considered the effect of Article 49. He has examined the question of whether any prerogative right of the Crown

of immunity from suit was carried into the Constitution of Saorstát Éireann so as to be exercisable in or in respect of Saorstát Éireann immediately prior to the 11th December, 1936, by the authority in which the executive power of Saorstát Éireann was then vested. He has found that an immunity from suit did not exist during the period of the existence of Saorstát Éireann, so that Article 49 could not have carried forward any such immunity. I agree with his conclusions and the reasoning on which they are based. Therefore, in so far as Article 49 is concerned, I wish only to add some observations which, in my view, indicate in a different way that immunity from suit was not carried over by this Article to the State. It is to be noted that the powers, functions, rights and prerogatives which were declared by Article 49 to belong to the People were those which were exercisable in or in respect of Saorstát Éireann immediately before the 11th December, 1936, by the authority in which was vested the executive power of Saorstát Éireann. It is at least questionable whether a right of immunity from suit is properly describable as a right that can be "exercised", which is a word that imports the notion of something positive having to be done. It would seem more correct to say that a right of immunity from suit is something which an authority such as a State has in itself—something of a passive nature reposing in it without the right having to be set in motion in a positive sense. It can at least be said that, by reason of the nature of the wording of the Article, there are some reasonable grounds for thinking that this particular type of immunity was not intended to be included in the provisions of the Article; but one has not to rely finally on this line of reasoning to show that such a right was not intended to be included in the ambit of the Article because it is perfectly clear that, whatever types of powers, functions, rights and prerogatives are covered by Article 49 and whether they include a right of immunity from suit or not, these rights were not vested in the State but were expressly declared to belong to the People. Moreover, s. 2 of Article 49 provides that (save to the extent that provision is made by the Constitution or may hereafter be made by law for the exercise of such power, function, right or prerogative by any of the organs established by the Constitution) the

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said powers, functions, rights or prerogatives shall not be exercised or be capable of being exercised in or in respect of the State save only by or on the authority of the Government. There is no provision made by the Constitution for the exercise by any of the organs established by the Constitution of any of these powers, functions, rights or prerogatives, nor has provision been made by any post-Constitution legislation for such an exercise nor has any governmental authority been given for such an exercise in or in respect of the State. In conclusion, it would therefore appear that these powers, functions, rights and prerogatives clearly belong to the People and not to the State; in so far as they are capable of being exercised in or in respect of the State, the necessary antecedent steps have never been taken. Therefore, no right of immunity is vested in the State by reason of the operation of Article 49 in respect of the plaintiff's present proceedings.

I turn now to the provisions[104] of Article 50 of the Constitution which provide that, subject to the Constitution and to the extent that they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of the Constitution shall continue in full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas. I have already expressed my agreement with the views of my learned colleague Mr. Justice Walsh to the effect that a prerogative right of immunity from suit in or in respect of Saorstát Éireann did not exist during the period of the existence of Saorstát Éireann; this would exclude it from the ambit of Article 50 because it was not part of the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of the present Constitution. In the result, no alleged immunity from suit was carried over or continued in force by Article 50. Assuming that a right of immunity from suit of a prerogative nature is properly describable as a right existing at common law, one must consider whether any law granting such alleged immunity or involving its inclusion in the common law is consistent with the Constitution as a whole, because it is only such laws as are not inconsistent therewith that are continued

[104]See p. 300, *ante*.

in full force and effect by Article 50. It cannot be reasonably suggested that any indication of an intention to confer on the State an immunity from suit of a prerogative type resting on the idea of royal perfection, or otherwise, can be deduced from the wording of the provisions of the Constitution taken as a whole. On the contrary, the King has gone from the Constitution and with him any feudal theories of immunity from suit based on the royal prerogative. Further, any such theory of immunity is also inconsistent with the provisions of Article 40, s. 3, whereby the State guarantees in its laws to defend and vindicate the personal rights of the citizen and to protect and vindicate the life, person, good name and property rights of every citizen. Therefore, such a right of immunity from suit would appear inconsistent with the provisions of the Constitution and it follows that, if it existed prior to the coming into operation of the Constitution, it was not carried over by Article 50 by reason of its inconsistency with the Constitution.

The third issue directed to be tried was whether the action could be maintained against the Attorney General as representing the State; in saying that, I am treating "Ireland" as meaning "the State" in the context. During the arguments about the vicarious liability of the State, the question of some alleged difficulties in regard to the practical matter of recovery against the State, with which I shall also deal later, was discussed. The last issue directed to be tried was whether the persons who were alleged to have committed the wrongful acts were either servants or agents of Ireland. This issue involves the question as to whether the State was vicariously responsible in law for their acts or omissions of a tortious nature. It would seem more logical to deal first with the fourth issue.

The plaintiff has submitted that she was injured through the negligence of servants of the State. At the hearing in March, 1968, certain evidence was given. The plaintiff during the course of that evidence said that prior to the accident she had seen "P. & T. men" (meaning Posts and Telegraphs men) putting down cables or pipes and breaking open the path for the purpose of doing so. After some further questions as to who was doing the work and where it was being done, Mr. Cassidy stated that he understood

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it was admitted that they were Posts and Telegraphs men. The persons belonging to the Department of Posts and Telegraphs who were engaged in the work were called to the witness box by the defendant's counsel by agreement. There is no need to dwell on it because there does not appear to be any controversy about the matter but it appeared that they were part of the personnel of that Department and some of them were asked about their status therein. The persons concerned were the engineer in charge, a foreman and about nine workmen. Mr. Coffey, a higher executive officer in the engineering branch of the Post Office, and the engineer and foreman gave evidence as to the status of those concerned in the work in the Department; it appeared that all were established civil servants—save two of the labourers who were not established. It would appear that those who were not established were civil servants nevertheless, but that they had different rights.

It is abundantly clear from the evidence that those persons employed in the Department of Posts and Telegraphs who were concerned in carrying out the excavations and alterations, which the plaintiff claims resulted in her injuries from the subsidence of the pathway on which she was walking, were civil servants. In *McLoughlin* v. *Minister for Social Welfare*[105] it was decided that an assistant solicitor employed in the Chief State Solicitor's office was not employed in the civil service of the Government within the meaning of the Social Welfare Act, 1952. Kingsmill Moore J. in the course of his judgment said at p. 16 of the report that the status of a civil servant is that of a servant of the State. Ó Dálaigh J. (as he then was) stated that he had reached the conclusion that the public services committed to the care of the Attorney General were not to be regarded as caught up, or capable of being caught up, in the Department of the Taoiseach, and that the officers and staff of those services were not employed in the civil service of the Government as the expression was used in Part I of the first schedule to the Social Welfare Act, 1952; he goes on to say (at pp. 25-6) that they are public servants none the less and

[105] [1958] I.R. 1.

that it was an apt description of their position to say that their employment was in that wider category of public servants called "the civil service of the State" in s. 6 of the Presidential Establishment Act, 1938. Following these views as to the legal status of civil servants it would seem to me that those persons employed in the Department of Posts and Telegraphs as civil servants who were engaged in the work which the plaintiff alleges resulted in her injuries were carrying out that work as public servants of the State; for the reasons I have already stated there would seem to be no reason for supposing that the plaintiff was not entitled to sue the State and, if successful, to recover compensation from it on the principle of *qui facit per alium facit per se.* The doctrine of the vicarious liability of an employer for the tortious acts of his servants, committed in the course of and within the scope of their employment, is a well-established principle of the common law. One of the personal rights of the citizen is the right to recover damages against a wrongdoer or his employer for injuries sustained through a tortious act, provided it is shown that the tortious act was committed during the course of the wrongdoer's employment and arose out of it, which would appear to be the position from the evidence given in this case. On the evidence the alleged tortfeasors also appear to have been civil servants or public servants in the employment of the State. Since it has been shown that the State (the employer in this case) has no immunity from suit, it would appear to be clear, save for one matter which I shall deal with next, that there is no reason why the plaintiff should not proceed against the State as a legal *persona* on the basis of its vicarious liability and recover damages against it, if she establishes her case successfully on the facts.

The matter I have just mentioned is an alleged difficulty of a practical nature which, it was said, impeded the implementation and enforcement of the plaintiff's rights even assuming that she succeeded in establishing the right to sue the State. It was said that there might be difficulty in enforcing any decree obtained or in compelling the payment of any award made. In reply to this submission the plaintiff relied on *Conroy* v. *Minister for Defence.*[106]

[106] [1934] I.R. 342, 679.

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In that case the plaintiff claimed a declaration that he was entitled to a pension under the Military Service Pensions Act, 1924, and an order for payment of the same. It was held that he had a statutory right to a pension and that he was entitled to a declaration that the Minister for Defence was bound, with the sanction of the Minister for Finance, to grant him such pension and to do everything necessary to obtain the sanction of the Minister for Finance to the payment thereof; it was also held that the pension could not be arbitrarily or capriciously withheld and that the Minister for Defence, having obtained such sanction and having granted such military service pension, was bound to submit it to the Oireachtas for the purpose of having money for the payment of such military service pension voted by the Oireachtas. In that case the plaintiff claimed in the High Court a declaration that he was entitled to a pension under the Act of 1924 and an order for payment of the same; it was held by Johnston J. that the action was not maintainable because the power of the Minister for Defence to grant a pension to anyone to whom a certificate of military service had been granted was permissive only and did not impose an imperative duty. The plaintiff appealed against that order and sought an order discharging it and declaring that he was entitled to the relief claimed in the action or that the action might proceed for trial. In the Supreme Court Kennedy C.J. ended his judgment by saying (at p. 689) that the defence had failed so far but he did not think that the Court could go further and order payment of the pension or the arrears thereof or, at that stage of the action, consider what the amount of the pension ought to be. Murnaghan J. pointed out (at p. 692) that the plaintiff sought an account of arrears of pension and said that in the form in which the matter had come before the Court, as an argument on a point of law, that question was not before the Court. FitzGibbon J. agreed with the judgment of Kennedy C.J. The Court obviously felt no apprehension about the enforcement of the orders of the Courts; it certainly expressed no doubts as to the pension being ultimately recoverable which it most assuredly would have done if it had any such doubts.

If the plaintiff is successful, in the ordinary way the damages would be assessed during the course of the trial;

there would seem to be no reason to believe that the necessary moneys to meet the decree would not be voted. That would only be what would be normally expected in a State governed according to the rule of law, and there would seem to be no reason to believe that the State would not honour its legal obligations. I would need cogent reasons to be submitted to me before I should be prepared to hold the contrary view. No one doubts that the State would honour an order of the Court made under the provisions of s. 59 of the Civil Liability Act, 1961, and pay the amount of any decree awarded against the Minister for Finance in respect of the tortious acts of its servants in the driving of a mechanically-propelled vehicle which is the property of the State. In *Comyn* v. *The Attorney General*[107] Kingsmill Moore J. (who was affirmed by the Supreme Court) held that the acquisition of the plaintiff's rights had been made by the State as a juristic person and not by a government department within the meaning of s. 1, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919, and he granted a declaration that the plaintiff was entitled to compensation for loss and damage resulting from the compulsory acquisition of his rights and directed that an inquiry should be held before a judge of the High Court for the purpose of assessing compensation. The Supreme Court decided that this was the correct course and ultimately he held the inquiry himself and assessed the amount of compensation. No question seems to have arisen as to the payment of the award. The case certainly shows that a decree can be made against the State and that no point was raised as to the ultimate recovery from the State of the amount assessed. The event of the amount of the decree not being provided for in this case by the State where the rule of law prevails seems so remote that I feel it safe to say that no real difficulty of the kind envisaged has been shown to my satisfaction to exist. Therefore, it is unnecessary to come to a final decision on the ways and means of enforcing such a decree beyond remarking that *prima facie* the ordinary procedure of execution by way of levy or enforcement by mandamus would both seem to be appropriate.

The last point to be dealt with is the propriety of joining

[107] [1950] I.R. 142.

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the Attorney General as a party. The office of Attorney General is constituted by Article 30 of the Constitution. He is to be the adviser of the Government in matters of law and legal opinion and is to exercise and perform such powers, functions and duties as are conferred or imposed on him by the Constitution or by law. He is not a member of the Government; he is an independent officer of State and, as the defendants point out, he is not answerable for the acts of those who are servants of the State. Section 6, sub-s. 1, of the Ministers and Secretaries Act, 1924, vests in him the administration and business generally of the public services in connection with the representation of the Government of Saorstát Éireann (now Ireland) and of the public in all legal proceedings for the enforcement of law and the assertion or protection of public rights and all powers, duties and functions connected with the same respectively.

In *Attorney General* v. *Northern Petroleum Tank Co. Ltd.*[108] Johnston J. had to consider the provisions of s. 6 of the Act of 1924. The proceedings were instituted by the Attorney General on behalf of Saorstát Éireann against the owners of a steamship in respect of damage to a water-main in Cork harbour. The water-main was found to be State property and during the hearing it was argued that the action did not lie at the suit of the Attorney General. At p. 461 of the report Johnston J. said:— "There is the further question whether the Attorney-General is the proper person to sue, and as to that I need only repeat the words of the Lord Chancellor in the case of *Wigg and Cochrane* v. *Attorney-General of Saorstát Éireann*[109]: '. . . their Lordships are of opinion that the appellants have a legal right which may be asserted in the Courts of the Irish Free State; and they see no objection to the form of the action, which is brought against the Attorney-General for a declaration of rights . . .' Since that time the Attorney-General has appeared in these Courts on at least a dozen occasions, whether as plaintiff or as defendant, to assert or to defend the rights and property of the State, and in no case has it been held that he was not the proper party to sue or be sued. It seems to me that sect. 6 of the

[108] [1936] I.R. 450.

[109] [1927] I.R. 285, 290.

Ministers and Secretaries Act, 1924, places this matter beyond controversy."

The matter was further discussed in *O'Doherty* v. *The Attorney-General*[110] in which the plaintiff sought a declaration that he was entitled to a military service pension and in which an order was ultimately made by way of mandamus to compel the referee under the Military Service Pensions Act, 1934, to carry out his functions under the Act according to law. A point was raised as to the propriety of joining the Attorney General in the proceedings. At p. 585 of the report Gavan Duffy J. said:— "My view is that the plaintiff was right in joining the Attorney-General. The Referee is a statutory delegate, reporting upon some 60,000 cases for the Minister for Defence; he is doing very difficult work of an administrative character, but so extensive that the normal machinery of the Department of Defence could not cope with it; the Minister is necessarily interested in an attack of this kind upon the proceedings of the Referee, an attack which in some cases might have far-reaching effects, if successful; and the State is interested, because the work of the Referee in the case of every successful applicant leads directly to a demand on public funds. The Minister for Defence was not sued and the Minister for Finance was not sued; the public interest was represented by the Attorney-General instead. I think that was right." This case also may have far-reaching effects if the plaintiff is successful and, of course, if she is successful a demand must be made on the public funds to pay the amount of the decree. I agree with Johnston J. that the wording of s. 6 of the Ministers and Secretaries Act, 1924, places the matter beyond controversy. Since there is vested in the Attorney General the administration and business generally of public services in connection with the representation of the Government and of the public in all legal proceedings for the enforcement of law and the assertion or protection of public rights and all powers, duties and functions connected with the same respectively, it would seem to me to have been a proper course to join the Attorney General in these proceedings which involve a claim against the State and the

[110] [1941] I.R. 569.

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possibility of there having to be a resort to the public funds to meet the plaintiff's claim if she is successful.

For the reasons stated I would, in agreement with my learned colleague Mr. Justice Walsh, answer in the affirmative the questions raised in the issues ordered to be tried.

FITZGERALD J.:—

In my opinion this appeal should be dismissed. The facts relating to the plaintiff's accident have been stated in the judgments already delivered and it is unnecessary for me to repeat them. As the majority of the Court are of the opinion that the appeal should be allowed, I also consider it unnecessary to discuss the details of the cases mentioned in the judgments already delivered, other than to summarise my view of their effect.

This country by Article 5 of its Constitution is declared to be a "sovereign" state. A State to be sovereign does not have to have a king. The immunity which exists in England and which existed in this country prior to 1922 (based, as it was, on the royal prerogative) no longer exists in this country. In my opinion, it does not follow that the State is not entitled to immunity, it being declared to be "sovereign." If the State is sovereign internationally, as appears to be accepted, I see no reason why the word "sovereign" should be differently construed in relation to the State's relationship with a citizen.

Since the year 1922 the position of the State in relation to one of its citizens has been the subject of the judicial decisions in the cases already mentioned. They appear to establish that the State is a "juristic person" in the context of the particular issue with which the court in each case was then concerned, but limited to that extent. No case has gone the length of holding that the State is a juristic person which is liable in tort for the action or neglect of a public servant. It appears to me to have been accepted since 1922 that a liability of the State for tort did not exist, unless created by statute — like the liability for negligence imposed on the Minister for Finance under the Road Traffic Act and liability under the Workmen's Compensation Act, 1934.

In my view, the extension of the liability of the State as a "juristic person" to the law of tort involves such a

radical change in the accepted view both of the Courts and of the Legislature that this Court should decline to undertake such a step. Such an extension of the meaning of juristic person would appear to leave the State liable to the same control and sanctions which are applicable to a private individual, including the criminal and bankruptcy jurisdictions.

If the liability of the State for the tort of a public servant is to be established, in my view it should be imposed by the Legislature as has already been done in this country under the Road Traffic Act and the Workmen's Compensation Act. It is significant that in the United States, Canada, Australia and in England, as late as 1947, such liability on those states was imposed by statute. In my opinion, the judgment of Mr. Justice Murnaghan was correct and this appeal should be dismissed.

Solicitor for the plaintiff: *Joseph P. Tyrrell.*

Solicitor for the defendant: *The Chief State Solicitor.*

E.P.de B.