1982 June 3

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DAVID CHRISTOU AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR AND DEFENCE,

Respondent.

(*Cases Nos.* 414/81, 459/81, 468/81).

National Guard Law, 1964 (*Law* 20/64 *as amended*)—*Force established under section* 3(1) *of the Law—Is not the Army envisaged by Article* 129 *of the Constitution—But a force established with the object of aiding the Army or the Security Forces of the Republic or both—Its establishment, therefore, does not contravene Article* 129 *of the Constitution—Having regard to the events which preceded its establishment the National Guard could be established by virtue of the law of necessity—Issue of a Proclamation of Emergency, under Article* 183 *of the Constitution, not a condition precedent or in any way connected to the enactment of the above law—Nor can it be said to be an adequate alternative to its enactment.*

Necessity—Law or doctrine of necessity.

Constitutional Law—Constitutionality of legislation—National Guard Law, 1964 (*Law* 20/64) *not contrary to Article* 129 *of the Constitution.*

Constitutional Law—Human Rights—Compulsory military service—Article 10.3(*b*) *of the Constitution and Article* 4.3(*b*) *of the European Convention on Human Rights and Fundamental Freedoms —They relate to conscientious objectors and not to any religious sect including Jehovah witnesses—They do not make recognition of conscientious objectors mandatory and they do not exempt*

them from military service—What they provide is that, where they are recognized by a law, provision for alternative service may be made.

Constitutional Law—Human Rights—Right to freedom of thought, conscience and religion under Article 18 *of the Constitution and Article* 18 *of the International Covenant on Civil and Political Rights—May be subjected only to such limitations as are prescribed by law and are necessary, inter alia, in the interests of the security of the Republic—As Constitution is the Supreme Law of the Republic issue whether compulsory military service in the case of conscientious objectors offends against the above Articles must be decided in the light of the provisions of the Constitution—And as Article* 10.3(*b*) *refers expressly to conscientious objectors and does not exclude them from military service, such service by conscientious objectors does not offend against Article* 18 *of the Constitution.*

Military Service—Compulsory military service—Conscientious objectors—Religious sect—Jehovah witnesses—Articles 10.3(*b*) *and* 18 *of the Constitution, Article* 4.3(*b*) *of the European Convention on Human Rights and Fundamental Freedoms, Article* 18 *of the International Covenant on Civil and Political Rights and Article* 5(*d*)(*vii*) *of the International Convention on the Elimination of all forms of racial discrimination.*

The applicants in the above recourses were Greek Cypriots and they claimed to be Jehovah witnesses. By applications to the Minister of Interior they applied to be exempted from service in the National Guard on the ground that such service was contrary to their religious beliefs. The Minister refused their applications on the ground that under the provisions of the National Guard Law they could not be exempted from their obligation for military service; and hence these recourses.

Counsel for the applicant mainly contended:

(a) That the National Guard Law was unconstitutional as it was contrary to the provisions of Article 129* of the Constitution in that whereas paragraph 2 of the said Article provides that "compulsory military service shall not be instituted except by common agreement of the President and the Vice-President of the

* Article 129 is quoted at p. 373 post.

Republic" under the provisions of s.3(1)* of the National Guard Law, 1964 such power is exercised by the Council of Ministers; and that although, in view of the events of 1963, the agreement of the Vice-President of the Republic was impossible the power of the President of the Republic existed under the Constitution and it was not possible to be overlooked.

(b) That even if the circumstances warranted resort to the law of necessity when the National Guard Law was enacted in 1964, today, after the lapse of seventeen years it should have been regulated in accordance with the Constitution.

Counsel submitted in this connection that since the Council of Ministers did not declare a state of emergency as provided in Article 183.1 of the Constitution the Court could not consider the case on the basis of the law of necessity because this could be contrary to the Constitution and to the doctrine of the separation of powers.

(c) That since Jehovah witnesses were a religious group which was recognized by the Constitution they could not be compelled by the National Guard Law, which was enacted after the European Convention on Human Rights was ratified by Law 39 of 1962, to do compulsory military service and this in view of the provisions of Article 4** of the Convention and Articles 18 and 10.3(b)*** of the Constitution.

(d) That applicants could not be compelled by the National Guard Law to do compulsory Military Service in view of Article 18 of the International Covenant on Civil and Political Rights, which was ratified by the Republic

* Section 3(1) provides as follows:

"3(1) The Council of Ministers may, when it considers it expedient because of a threatened invasion or any activity directed against the independence or the territorial integrity of the Republic or threatening the security of life or property, proceed to the establishment of a force, to be called 'National Guard' with the object of aiding the army of the Republic or its security forces or both in all measures required for its defence".

** Article 4(3)(b) of the convention is quoted at p. 378 post.

*** Article 10.3(b) of the Constitution is quoted at p. 377 post.

by Law 14 of 1969, and Article 5(d)(vii) of the International Convention on the Elimination of all Forms of Racial Discrimination ratified by Law 12 of 1967.

Held, (1) that the force established under the provisions of s.3(1) of the National Guard Law, 1964, is not the army envisaged by Article 129 of the Constitution; that that army, in so far as the Greek members are concerned, still continues to exist and function and its constitution is governed by the Army of the Republic (Constitution, Enlistment and Discipline) Laws, 1961-1975 and the Regulations made thereunder; that, on the other hand, the National Guard functions by virtue of the National Guard Laws, 1964 to 1978 and the Regulations made thereunder; that this is not an instance in which the organ or body envisaged by the Constitution ceased to exist or function and it was replaced by another organ but an instance where the organ envisaged by the Constitution still exists and functions and there was established another organ with the object of aiding the organ existing and functioning under the Constitution; that since the National Guard is not the "army" envisaged by Article 129 of the Constitution but a force established with the object of aiding that army or the security forces of the Republic or both it cannot be said that its establishment contravenes the provisions of Article 129 of the Constitution; that having regard to the events* which preceded the establishment of the National Guard, which are matters of common knowledge of which this Court can take judicial notice, those exercising the power of the State in Cyprus could, on the strength of the law of necessity take the exceptional measure of establishing the National Guard, with the object of aiding the army of the Republic, for the salvation of the country; and that since the army of the Republic, envisaged by Article 129 of the Constitution still continues to exist and function, and that the force created by means of s.3(1) of the National Guard Law was a different force, there was no need to comply with the provisions of Article 129.2 of the Constitution; accordingly contention (a) should fail.

(2) That Article 183 gives power to the Council of Ministers in the circumstances therein specified to issue a Proclamation of Emergency suspending any of the Articles of the Constitution

* These events are summarised at pp. 375-76 post.

which may, under the provisions of this Article be so suspended (Article 129 is not included among the Articles that can be suspended) or make any ordinance strictly connected with the state of emergency; that the issuing of the Proclamation of
5 Emergency cannot be said to be a condition precedent or in any way connected to the enactment of the sub–judice law and the Proclamation of Emergency for which provision is made in Article 183 cannot, in the circumstances, be said to be an adequate alternative to the enactment of the National Guard
10 Law; accordingly contention (b) should fail.

(3) That the words "subject to their recognition by a law" in Article 10.3(b) of the Constitution and "in countries where they are recognized" in Article 4.3(b) of the Convention relate to conscientious objectors and not to any religious sect including
15 Jehovah witnesses; that neither Article makes the recognition of conscientious objectors mandatory nor do they exempt them from military service but what they provide is that, where they are recognized by a law, provision for alternative service may be made; accordingly contention (c) should fail.

20 (4) That Article 18 of the International Covenant on Civil and Political Rights, guarantees the right to freedom of thought, conscience and religion and its material parts are substantially similar to the provisions of Article 18 of the Constitution; that under both Articles freedom to manifest one's religion or
25 belief may be subject to certain limitations; that under the Constitution such freedom may be subject only to such limitations as are prescribed by law and are necessary in the interests of the security of the Republic or the Constitutional Order or the public safety or the public order or the public health or the
30 public morals or for the protection of the rights and liberties guaranteed by the Constitution to any person; that this being the position and as the Constitution is the supreme law of the Republic the issue whether compulsory military service in the case of conscientious objectors offends against the right to
35 freedom of thought, conscience or religion must be decided in the light of the provisions of the Constitution; that as Article 10.3(b) refers expressly to conscientious objectors and does not exclude them from military service it cannot reasonably be argued that such service by conscientious objectors offends
40 against Article 18 of the Constitution and neither does it offend

against Article 18 of the Covenant; accordingly contention (d) should, also, fail.

Applications dismissed.

Cases referred to:

Attorney-General of the Republic v. *Ibrahim and Others*, 1964 C.L.R. 195;

Ioannides v. *Police* (1973) 2 C.L.R. 125;

Grandrath case (decision of the European Commission of Human Rights).

Recourses.

Recourses against the refusal of the respondent to exempt applicants from their liability to serve in the National Guard.

E. Vrahimi (Mrs.), for the applicants.

A. Vladimirou, for the respondent.

Cur. adv. vult.

L. LOIZOU J. read the following judgment. These three recourses were, on the application of the parties, heard together as they involve the same legal issues.

The relief claimed by the applicants in recourses Nos. 414/81 and 468/81 is (a) a declaration that the decision of the Minister of Interior and Defence rejecting applicants' application to exempt them from military service is void, illegal and unconstitutional and (b) a declaration that the applicants as Jehovah witnesses have no obligation to serve in the National Guard. In recourse No. 459/81 the relief claimed is (a) a declaration that the decision of the Minister of Interior and Defence rejecting applicants' application to be exempted from service as reservists in the National Guard is void, illegal and unconstitutional and (b) that the applicants as Jehovah witnesses have no obligation to serve in the ranks of the National Guard.

The facts of these cases are briefly as follows:

All applicants are Greek Cypriots and they claim to be Jehovah witnesses. A number of them in recourses 414/81 and 468/81 were called up for service in the National Guard and cthers are of such ages that their call up is imminent. According to the information contained in the schedules attached to the applications some of the applicants have been Jehovah

witnesses since birth and others adopted this religion at various dates, most of them after the enactment of the National Guard Law. The applicants in recourse 459/81 have all done their National Service and became Jehovah witnesses after they served, 5 a number of them after the Turkish invasion and some of them not long before the filing of the recourse.

Applicants in case No. 414/81 by a letter dated 29th July, 1981, exhibit 1, forwarded by their counsel to the Minister of Interior and Defence applied to be exempted from service in 10 the National Guard on the ground that such service was contrary to their religious beliefs. By letters dated 9th November, 1981, exhibit 3, 11th November, 1981, exhibit 4, and 23rd November, 1981, exhibit 5, counsel for applicants made similar applications to the Minister on behalf of the applicants in case No. 15 468/81; and by letter dated 11th November, 1981, exhibit 9, counsel applied that applicants in case No. 459/81 be relieved of their obligations as reservists for the same reasons. All the applications were refused on the ground that under the provisions of the National Guard Law they could not be exempted 20 from their obligation from military service. As a result these recourses were filed.

The grounds of law in support of all three Applications are identical. They are to the following effect:

(a) The National Guard Law is unconstitutional as it contra- 25 venes Article 129 of the Constitution;

(b) If it were to be considered that under the law of necessity the National Guard Law was not unconstitutional in 1964 when it was enacted, today, after the lapse of 17 years the element of necessity should have been regulated constitutionally;

30 (c) Article 2.3 of the Constitution recognizes the existence of religious groups which may elect to what community to belong and Jehovah witnesses are a religious group which pre-existed the Constitution and its existence is ipso facto lawful as recognized by Article 18 of the Constitution;

35 (d) Article 10.3(b) of the Constitution provides that the term "forced or compulsory labour" shall not include "any service of a military nature if imposed or, in cases of conscientious objectors, subject to their recognition by a law, service exacted

instead of compulsory military service". Article 4.3(b) of Law 39 of 1962 which ratified the European Convention on Human Rights speaks of conscientious objectors in the countries where this is recognized as legal whereas the English text of the Convention which is considered as the original provides as follows: "Any service of a military character or in case of conscientious objectors in countries where they are recognized, service exacted instead of military service";

(e) Jehovah witnesses are a recognized religious group which pre-existed the Constitution. When the National Guard Laws were enacted no provision was made by the Republic of Cyprus for any service instead of compulsory military service as provided by Article 10.3(b) of the Constitution and in the European Convention on Human Rights. As the law now stands Jehovah witnesses are not bound to do any military service;

(f) Furthermore the right of freedom of thought, conscience and religion has been recognized by Article 18 of the International Covenant on Civil and Political Rights. This Covenant has been ratified by the Republic of Cyprus by Law 14 of 1969. The same right has been recognized by Article 5(d)(vii) of the International Convention on the Elimination of all Forms of Racial Discrimination which has been ratified by Law 12 of 1967;

(g) By Article 169.3 of the Constitution both its provisions as well as the provisions of International Covenants have superior force to any municipal law.

A last ground of law to the effect that decision 19018 of the 24th April, 1980, of the Council of Ministers which exempts Maronites, Armenians and Latins from military service covers also Jehovah witnesses has been abandoned.

The argument advanced by learned counsel for the applicants with regard to the first ground of law was that the National Guard Law was unconstitutional as it is contrary to the provisions of Article 129 of the Constitution in that whereas paragraph 2 of the said Article provides that "compulsory military service shall not be instituted except by common agreement of the President and the Vice-President of the Republic" under the provisions of s.3 of the National Guard Law 1964 such power is

exercised by the Council of Ministers; and that although, in view of the events of 1963, the agreement of the Vice-President of the Republic was impossible the power of the President of the Republic existed under the Constitution and it was not 5 possible to be overlooked. And, counsel continued, it would have been more proper for the President of the Republic to continue exercising the power vested in him by Article 129.2 of the Constitution in the case of the National Guard Law instead of such power being transferred to the Council of Mini- 10 sters contrary to the provisions of the said Article.

Article 129 comes under Part VIII of the Constitution under the heading "The forces of the Republic" which comprises Articles 129-132 both inclusive. The relevant Articles for the purposes of these recourses are Articles 129 and 130 which 15 read as follows:

" Article 129

1. The Republic shall have an army of two thousand men of whom sixty per centum shall be Greeks and forty per centum shall be Turks.

20 2. Compulsory military service shall not be instituted except by common agreement of the President and the Vice-President of the Republic.

Article 130

1. The security forces of the Republic shall consist of the 25 police and gendarmerie and shall have a contingent of two thousand men which may be reduced or increased by common agreement of the President and the Vice-President of the Republic.

2. ....".

Section 3(1) of the National Guard Law on the other hand 30 provides as follows:

"3(1) The Council of Ministers may, when it considers it expedient because of a threatened invasion or any activity directed against the independence or the territorial integrity of the Republic or threatening the 35 security of life or property, proceed to the establishment of a force, to be called 'National Guard' with the object of aiding the army of the Republic or its

security forces or both in all measures required for its defence".

As it will be seen from the above-quoted Articles of the Constitution which make provision for the forces of the Republic Article 129 relates to the "army" and Article 130 relates to the "security forces" i.e. the police and the gendarmerie whereas s.3(1) of the National Guard Law makes provision for the "establishment of a force, to be called 'National Guard' with the object of aiding the army of the Republic or its security forces or both". So, it is clear that the force established under the provisions of s.3(1) of the National Guard Law, 1964, is not the army envisaged by Article 129 of the Constitution. That army, in so far as the Greek members are concerned, still continues to exist and function and its constitution is governed by the Army of the Republic (Constitution, Enlistment and Discipline) Laws, 1961-1975 and the Regulations made thereunder. On the other hand, the National Guard functions by virtue of the National Guard Laws 1964 to 1978 and the Regulations made thereunder. We are not, therefore, here faced with an instance in which the organ or body envisaged by the Constitution ceased to exist or function and it was replaced by another organ; but with an instance where the organ envisaged by the Constitution still exists and functions and there was established another organ with the object of aiding the organ existing and functioning under the Constitution. And since the National Guard is not the "army" envisaged by Article 129 of the Constitution but a force established with the object of aiding that army or the security forces of the Republic or both it cannot be said that its establishment contravenes the provisions of Article 129 of the Constitution.

Although it has not been directly or seriously contested that resort to the law of necessity could not be made by the State I will deal very briefly with this issue.

It is mainly based on the maxim "salus populi est suprema lex" and judicial decisions in various countries have established that in abnormal conditions exceptional circumstances impose on those exercising the power of the State the duty to take exceptional measures for the salvation of the country on the strength of the above maxim. An extensive exposition as to the circumstances and criteria which justify resort to the law

of necessity is to be found in the judgments delivered by the Supreme Court in the case of *The Attorney-General of the Republic* v. *Mustafa Ibrahim and Others*, 1964 C.L.R. 195 and in subsequent cases such as *Ioannides* v. *The Police* (1973) 2
5 C.L.R. 125.

It is noteworthy that the *Ibrahim* case related to the constitutionality of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33 of 1964) which was enacted by the House of Representatives on the 9th July, 1964, whereas
10 in the present cases what is in issue is the constitutionality of the National Guard Law, 1964 (Law 20 of 1964) which was enacted on the 2nd June, 1964.

The "recent events" to which reference is made in the preamble to the former law, which had rendered impossible the functioning
15 of the Supreme Constitutional Court and the High Court of Justice and have rendered necessary the making of legislative provision so that justice should continue to be administered unhampered by the situation created by the said events are the same "recent events" mentioned in the preamble to the
20 latter law which "rendered necessary the establishment of a separate force to assist the regular forces of the Republic, in all measures necessary for its defence". The "recent events" referred to above are matters of common knowledge of which this Court can take judicial notice. They are enumerated in
25 detail in the *Ibrahim* case at p. 246 et seq. I need only mention for the purposes of these recourses that it is a matter of common knowledge:

(a) That since the 21st December, 1963, there was unlawful armed opposition to the authority of the State by Turks on an
30 organized basis;

(b) that on the 26th December, 1963, the Cyprus Government brought to the attention of the Security Council of the United Nations a complaint against the Government of The Republic of Turkey for acts of aggression, intervention in the internal
35 affairs of Cyprus by the threat and use of force against its territorial integrity and political independence perpetrated on the 25th December, specifying the acts complained of as violation of the air-space of Cyprus by Turkish military aircraft, violation of the territorial waters of Cyprus, threats of use of force by

the Prime Minister of Turkey stated to have been made on the 25th December, 1963, before the Turkish Parliament, and the movement of Turkish troops into Nicosia (see United Nations Document S/5488 dated the 26th December, 1963). This complaint was the subject of discussion in the United Nations Security Council of the 27th December, 1963; 5

(c) that the complaints of the Government of Cyprus were brought again to the United Nations Security Council where a full discussion took place and eventually a resolution was voted upon unanimously on the 4th March, 1964, which, *inter alia*, recommended the creation, with the consent of the Government of Cyprus, of a United Nations peace keeping force in Cyprus; 10

(d) the above resolution was reaffirmed on the 13th March, 1964, 20th June, 1964, 9th August, 1964 and the 25th September, 1964 (see United Nations Docement S/5986). The force became operational on the 27th March, 1964 and its term has since been extended at regular intervals; 15

(e) that ever since the last week of December, 1963, neither the Turkish Vice-President nor the Turkish Ministers or members of the House of Representatives have participated in the affairs of the Government. 20

Having regard to these matters and particularly those in paragraph (b) above, those exercising the power of the State in Cyprus could, on the strength of the above maxim take the exceptional measure of establishing the National Guard, with the object of aiding the army of the Republic, for the salvation of the country, and that since the army of the Republic, envisaged by Article 129 of the Constitution still continues to exist and function, and that the force created by means of s. 3(1) of the National Guard Law was a different force, there was no need to comply with the provisions of Article 129.2 of the Constitution. 25 30

With regard to ground (b) it was contended that even if the circumstances warranted resort to the law of necessity when the National Guard Law was enacted in 1964, today, after the lapse of seventeen years it should have been regulated in accorddance with the Constitution. And, learned counsel submitted, 35

that since the Council of Ministers did not declare a state of emergency as provided in Article 183.1 of the Constitution the Court could not consider the case on the basis of the law of necessity because this would be contrary to the Constitution and
5 to the doctrine of the separation of powers. I am afraid that I fail to see the relevance of learned counsel's submission to the cases under consideration. Article 183 gives power to the Council of Ministers in the circumstances therein specified to issue a Proclamation of Emergency suspending any of the
10 Articles of the Constitution which may, under the provisions of the Article be so suspended (Article 129 is not included among the Articles that can be suspended) or make any ordinance strictly connected with the state of emergency. But it does not seem to me that the issuing of the Proclamation of Emergency
15 can be said to be a condition precedent or in any way connected to the enactment of the sub–judice law. Nor do I think that the Proclamation of Emergency for which provision is made in Article 183 can, in the circumstances, be said to be an adequate alternative to the enactment of the National Guard Law.

20 Learned counsel next referred to Article 18 of the Constitution which safeguards freedom of thought, conscience and religion and submitted that applicants were free to profess their faith and religion and also to change their religion. This point, as counsel submitted, was made by way of introduction to the
25 next two grounds i.e. grounds (d) and (e) which relate to Article 10.3(b) of the Constitution and Article 4.3(b) of the European Convention on Human Rights, the relevant parts of which are almost identical.

Article 10.3(b) reads as follows:

30 "3. For the purposes of this Article the term 'forced or compulsory labour' shall not include—

(a) ....

(b) any service of a military character if imposed or, in case of conscientious objectors, subject to their recognition by a law, service exacted instead of compulsory
35 military service;

(c) ....".

And Article 4.3(b) of the European Convention reads:

"3. For the purposes of this Article the term 'forced or compulsory labour' shall not include—

(a) ....

(b) Any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service; 5

(c) ....

(d) ....".

The argument of learned counsel, as far as I understood it, was that since Jehovah witnesses are a religious group which is recognized by the Constitution they could not be compelled by the National Guard Law, which was enacted after the Euro- 10 pean Convention on Human Rights was ratified by Law 39 of 1962, to do compulsory military service and this in view of the provisions of Article 4 of the Convention.

With all respect to counsel I think she misconceived the meaning both of Article 10.3(b) of the Constitution and Article 15 4.3(b) of the Convention. I am of the view that the words "subject to their recognition by a law" in the above-quoted Article of the Constitution and "in countries where they are recognized" in the Article of the Convention relate to conscientious objectors and not to any religious sect including Jehovah 20 witnesses. In other words neither Article makes the recognition of conscientious objectors mandatory nor do they exempt them from military service but what they provide is that, where they are recognized by a law, provision for alternative service may be made. 25

It is interesting and helpful to note that the European Commission on Human Rights when dealing with a case under Article 4.3(b) of the Convention (the *Grandrath* case) held that "As in the provision of Article 4 it is expressly recognized that civilian service may be imposed on conscientious objectors 30 as a substitute for military service, it must be concluded that objections of conscience do not, under the Convention, entitle a person to exemption from such service".

The above applies with equal force to Article 10 of our Constitution. 35

Lastly, learned counsel in support of her case referred the Court to Article 18 of the International Covenant on Civil and Political Rights ratified by the Republic by Law 14 of 1969 and Article 5(d)(vii) of the International Convention on
5 the Elimination of all Forms of Racial Discrimination ratified by Law 12 of 1967. With regard to the last mentioned Convention I fail to see that it is at all relevant to the present case, even if we were to assume that it is self-executing. What the Convention safeguards is the rights of all men without any distinction
10 as regards race, colour or ethnic origin.

Article 18 of the International Covenant on Civil and Political Rights, on the other hand, guarantees the right to freedom of thought, conscience and religion and its material parts are substantially similar to the provisions of Article 18 of the Consti-
15 tution. But under both Articles freedom to manifest one's religion or belief may be subject to certain limitations. Under the Constitution such freedom may be subject only to such limitations as are prescribed by law and are necessary in the interests of the security of the Republic or the Constitutional
20 Order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by the Constitution to any person.

This being the position and as the Constitution is the supreme law of the Republic the issue whether compulsory military service
25 in the case of conscientious objectors offends against the right to freedom of thought, conscience or religion must be decided in the light of the provisions of the Constitution.

I am clearly of the view that as Article 10.3(b) refers expressly to conscientious objectors and does not exclude them from
30 military service it cannot reasonably be argued that such service by conscientious objectors offends against Article 18 of the Constitution and neither does it offend against Article 18 of the Covenant.

In the light of all the above I find no merit in any of the
35 grounds on which these recourses are based and as a result they are hereby dismissed.

In all the circumstances I do not propose to make any order as to costs.

Recourses dismissed. No order as
40 *to costs.*