1963
June 3,
Oct. 11
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ANTONAKIS
PANAYI
v
WALTER
GEORGE
FRASER

[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

ANTONAKIS PANAYI,

*Appellant-Plaintiff,*

*v.*

WALTER GEORGE FRASER,

*Respondent-Defendant,*

(*Civil Appeal No.* 4421).

*Courts—Jurisdiction—Ouster—Armed Forces of the United Kingdom stationed at the Sovereign Bases—Tort committed in the territory of the Republic of Cyprus by such member in the performance of his official duty—The Courts will not entertain an action against such member in respect of such tort—Principles of International Law—The Treaty of Establishment of the Republic of Cyprus, Article* 4, *and section* 9, *paragraphs* 5, 6 *and* 10 *of Annex* C *to the aforesaid Treaty—The person aggrieved is left with the remedies provided by paragraph* 6 (supra).

*The Treaty of Establishment of the Republic of Cyprus—Whether it is binding on the citizens of the Republic—Whether it has constitutional force.*

*International Law—Immunity of the armed forces of the U.K. from the jurisdiction of the Courts of the Republic in respect of torts committed in the territory of the Republic—Principles of customary international law in the matter.*

*International Law—Whether the rules of customary international Law (as opposed to conventional international law) form an integral part of the municipal or domestic law of Cyprus.*

*International Law—Treaties—Whether and how far they are binding upon the subject.*

*International Law—Treaties—Whether they have superior force to any municipal or domestic law other than the Constitution—Articles* 179, 169.3 *and* 195 *of the Constitution.*

*International Law—Treaties—Construction of—Canons of Construction.*

*Constitutional Law—Jurisdiction of the Courts—Ouster—Article* 30.1 *of the Constitution.*

*Statute—Particular remedy provided by statute—Whether this particular remedy must be followed to the exclusion of other remedies.*

*Practice—Writ of summons and service thereof—Setting aside service of the writ on the application of the defendant before appearance—The Civil Procedure Rules, Order 16, r. 9—The corresponding English rule i.e. Order 12, r. 30—The rule is applicable in cases such as the present one viz. where the Court cannot entertain the action.*

The appellant-plaintiff sustained personal injuries as a result of a road accident in which a military and a civilian vehicle were involved, the military vehicle being driven at the time by respondent (defendant No. 1) who was a member of the armed forces of the United Kingdom stationed at one of the Sovereign Bases (*viz.* at the Akrotiri Sovereign Base). At the time of the accident, which occurred in the treritory of the Republic of Cyprus, the respondent driver was acting in the performance of his official duties as member of the aforesaid armed forces. The appellant instituted in the District Court of Nicosia an action claiming damages for negligence against both drivers of the aforesaid two motor vehicles, the one of whom was the respondent, the driver of the military vehicle. After the service of the writ, the respondent (defendant No. 1 *i.e.* the military driver) took out a summons praying the Court to set aside the writ and service thereof for want of jurisdiction by the Court to entertain the action against him. His application was based on the Civil Procedure Rules, Order 16, r. 9 and on paragraphs 5, 6 and 10 of section 9 of Annex C to the Treaty of Establishment of the Republic of Cyprus. (*Note :* These paragraphs are set out in full in the judgment of JOSEPHIDES, *post* on pp. 390—393). Order 16, r. 9 of the Civil Procedure Rules provides : "A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to take out a summons to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorizing such service".

The trial Judges, granted the application and set aside the writ and service thereof as against the respondent on the ground that the District Court has no jurisdiction to entertain the action in view of the provisions of paragraph 6 of section 9 of Annex C to the aforesaid Treaty of Establishment : they held further that the provisions of paragraph 5 were subordinated to the

provisions of paragraph 6 the latter specifying the kind of remedy which was available to any one in the Republic who suffered damage by a tort committed in the territory of the Republic by a member of the armed forces of the United Kingdom acting in the performance of his official duty ; and they finally ruled that the effect of those provisions was to oust the jurisdiction of the Courts of the Republic.

Article 4 of the Treaty of Establishment of the Republic of Cyprus provides :

> " The arrangements concerning the status of forces in the Island of Cyprus shall be those contained in Annex C to this Treaty."

Annex C, section 1, paragraph 1, provides :

" (*a*) 'Force' means—

(i) in relation to the forces of the United Kingdom . . . the personnel belonging to the land, sea and air arm services of that country when in the territory of the Republic of Cyprus, provided that . . . . . .

(*e*) ' Sending State ' means the state to which the force in question belongs ;

(*f*) ' Receiving State ' means—

(i) . . . . . .

(ii) in relation to the territory of the Republic of Cyprus ;

(*g*) ' The territory of the receiving State ' means—

(i) . . . . . .

(ii) in relation to the Republic of Cyprus, the territory of the Republic of Cyprus as defined in Article 1 of this Treaty. . . . . ."

Section 9, paragraph 5 of Annex C to the aforesaid Treaty provides :

> " Subject to the provisions of paragraph 6 of this section, claims (other than contractual claims and those to which the provisions of paragraph 7 or 8 of this section apply) arising out of acts or omissions of members of a force or . . . done in the performance of official duty . . . ., and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions :—
>
> (*a*) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

(*b*)
(*c*)
(*d*)
(*e*)
(*f*)

(*g*) A member of a force . . shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties."

And by paragraph 6 of section 9 of Annex C it is provided :

"Where the United Kingdom is the only contracting party involved as a sending State in a claim, the following provisions shall apply, in lieu of those set out in sub-paragraphs (*a*) to (*f*) of paragraph 5 of this section :—

(*a*) the claim shall be made to the appropriate District Officer or other officer nominated for the purpose by the Government of the receiving State (hereinafter in this paragraph referred to as the "Officer"), who shall forthwith notify the appropriate authorities of the sending State.

(*b*) the Officer shall . . . make any necessary investigation of the claim and shall forward to the appropriate authorities of the sending State particulars of the claim, together with the results of any such investigation . . . .

(*c*) the appropriate authorities of the sending State shall . . . . consider the claim . . . . and shall then notify the Officer whether they are prepared to pay any compensation in satisfaction of the claim and, if they are so prepared, the amount of such compensation ;

(*d*) on receipt of that notification, the Officer shall communicate to the claimant its contents . . . .

(*e*) if a claim is rejected altogether, or if the claimant does not agree to the compensation offered to him, or if, within four months from the date of the submission of the claim no compensation is offered to the claimant, the question whether any compensation is payable or of the amount of such compensation, as the case may be, may be submitted by the claimant or by the Officer or by the appropriate autho-

rities of the sending State to an arbitrator appointed in accordance with sub-paragraph (*b*) of paragraph 2 of this section, whose decision on the question shall be final and conclusive : provided that . . . ."

Paragraphs 7, 8 and 10 of section 9 of Annex C to the aforesaid Treaty of Establishment provide :

" Paragraph 7 (*a*). Claims against members of a force . . . arising out of tortious acts or omissions in the receiving State not done in the performance of official duty shall be dealt with in the following manner . . . .

Paragraph 8. Claims arising out of the unauthorised use of any vehicle of the armed services of a sending State shall be dealt with in accordance with paragraph 7 of this section, except in so far as the force or . . . is legally responsible.

Paragraph 10. The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or . . . in respect of the civil jurisdiction of the courts of the receiving State except to the extent provided in sub-paragraph (*g*) of paragraph 5 of this section."

Article 181 of the Constitution reads as follows :—

" The Treaty guaranteeing the independence, territorial integrity and constitution of the Republic concluded between the Republic, the Kindgom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland, and the Treaty of Military Alliance concluded between . . . , copies of which are annexed to this Constitution as Annexes I and II, shall have constitutional force." .

Article III of the Treaty of Guarantee provides :

" The Republic of Cyprus, Greece and Turkey undertake to respect the integrity of the areas retained under United Kingdom sovereignty at the time of the establishment of the Republic of Cyprus, and guarantee the use and enjoyment by the United Kingdom of the rights to be secured to it by the Republic of Cyprus in accordance *with the Treaty concerning the Establishment of the Republic of Cyprus signed at Nicosia on* . . . "

Article 195 of the Constitution provides ;

" Notwithstanding anything in this Constitution contained, the person elected as first President of the Republic and the person elected as first Vice-President of the Re-

public, who under Article 187 are deemed to be the first President and the first Vice-President of the Republic, whether before or after their investiture as in Article 42 provided, conjointly shall have, and shall be deemed to have had, the exclusive right and power to sign and conclude on behalf of the Republic *the Treaty concerning the Establishment of the Republic of Cyprus* between the Republic, the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland together with the Exchanges of Notes drawn up for signature with that Treaty, and the Treaty guaranteeing the independence, territorial integrity and Constitution of the Republic, between the Republic, the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland, the Treaty of Military Alliance between the Republic, the Kindgom of Greece and the Republic of Turkey and the Agreement between the Republic, the Kingdom of Greece and the Republic of Turkey for the application of the Treaty of Alliance concluded between these countries, *and such Treaties, Agreements and Notes exchanged shall be thus validly concluded on behalf of the Republic and shall be operative and binding as from the date on which they have been so signed.*"

The plaintiff appealed against the order of the District Court setting aside the service of the writ against the respondent (defendant No. 1), on the main ground that the trial Court erred in law in holding that the provisions of section 9 of Annex C to the Treaty of Establishment of the Republic of Cyprus oust the jurisdiction of the Courts of the Republic to entertain actions in tort committed in the territory of the Republic by members of the armed forces of the United Kingdom in the performance of their official duty.

Counsel for the appellant argued that the claim in the action is against a citizen of the Republic and a member of the United Kingdom Armed Forces and not against the United Kingdom Government ; and, that, consequently, the provisions of paragraph 6 of section 9 of Annex C (*supra*) are inapplicable. He further submitted that the provisions of the aforesaid paragraph 6 are applicable in cases where the claimant wishes to recover compensation from the United Kingdom Government as a sending State, and not against an individual member of the United Kingdom Armed Forces. He finally submitted that only express words in a statute can oust the jurisdiction

of a Court and that the only immunity which can be claimed is to the extent provided in sub-paragraph (*g*) of paragraph 5 of section 9, as laid down in paragraph 10 of the aforesaid section.

Counsel for the respondent submitted :—

(*a*) that in view of Articles 181 and 195 of the Constitution and Article 111 of the Treaty of Guarantee (*supra*) the provisions of the Treaty of Establishment have constitutional force and that they consequently are the supreme law of the Republic ; and

(*b*) that the effect of the provisions of sub-paragraphs (*a*) to (*e*) of paragraph 6 of section 9 (*supra*) was such as to exclude the jurisdiction of the Courts of the Republic by implication ; and that, where the tortious act which gave rise to a claim was an act done in the course of official duty, the only way a claimant could proceed was by following the aforesaid provisions of the Treaty of Establishment, that is to say, arbitration and not adjudication in Court.

He based his submission on the proposition that the provisions of paragraph 6 of section 9 have the same effect as the provisions of any statute which specifies a particular remedy and the mode of obtaining it.

The High Court (ZEKIA and JOSEPHIDES, JJ. *dissenting*) dismissing the appeal :—

*Held*, *I. Per* WILSON, P.:

(*a*) The fact that the respondent was at the time of the accident acting in the performance of his official duty as a member of the Armed Forces of the United Kingdom at Akrotiri, Cyprus, raises the legal question at issue in this case. Before discussing it I should like to point out that the United Kingdom forces are lawfully in this country, that this accident occurred in peacetime when there was no state of emergency and that this is a civil proceeding based upon a civil wrong called negligence, and that in construing this judgment the reader must limit the interpretation to the dispute before us.

(*b*) The Law applicable to the issue appears to be very clear and to be recognized in many, if not all, civilized countries. The principle is stated in Oppenheim's International Law, 8th ed. (1955) at p. 846 as follows :

" Armed forces are organs of the State which maintain them, because they are created for the purpose of maintaining the independence, authority, and safety of the

State. In this respect it matters not whether armed forces are at home or abroad ; for they are organs of their home State ; even when on foreign territory, provided only that they are there in the service of their State, and not for their own purposes."

(*c*) This principle is so widely acknowledged that there seem to be very few relevant decisions reported. However, there are some of interest.

(*Editor's Note* : A brief analysis of these decisions is given in the judgment of his Honour, the President of the High Court (post).

(*d*) The Courts in the United Kingdom and the United States of America in principle extend the immunity of a foreign state over a much wider field. For the purposes of this case, however, I need not refer to their decisions.

(*e*) In Cyprus an aggrieved person in cases such as the present has his remedy by following the procedure laid down in the said Treaty of Establishment, Annex C, section 9 paragraph 6 (*supra*) which provides that " Where the United Kingdom is the only Contracting Party involved as a sending State in a claim, the following provisions shall apply, in lieu of those set out in sub-paragraphs (*a*) to (*f*) of paragraph 5 of this section " (*supra*). This provides the procedure to be followed in cases such as the present.

(*f*) It was contended in argument that sub-section (*g*) of paragraph 5 of section 9, of Annex C to the Treaty of Establishment (*supra*) by implication gives the right to bring the present action and to carry it through to judgment. In my opinion it would only prevent recovery from the individual if a Court should give judgment against him. It has no application in this case, a necessary conclusion from the basis of my reasons for judgment given above.

*Held, II. Per* VASSILIADES, J.:

(*a*) In approaching this case one must not lose sight of the fact that the Treaty in question is part of the arrangement " presented to Parliament by the Secretary of State for Foreign Affairs and the Minister of Defence, by command of Her Majesty in July, 1960 " (Comnd. 1093 ; the officially published White Paper) upon which the British Government obtained the authority of Parliament to agree to the independence of a Crown Colony, and to sign the documents containing the

terms under which Her Majesty's subjects therein, were to be established as a new State, and to transfer their allegiance thereto. It is a treaty under which the Crown could, undoubtedly in my opinion, bind the subject ; and a treaty which the new State must, I think, treat as binding on its present citizens. I am mentioning this because certain doubts were expressed during the argument, as to the binding force of the Treaty in question. I take my law on the point from the Chapter on Constitutional Law in vol. 7 of the 3rd ed. of Halsbury's Laws of England, under the heading " Treaties " at p. 286, paragraphs 604 *et seq.* There can be no doubt, I believe, that the matter is governed by English Law as preserved in force by Article 188 of the Constitution.

(*b*) Another point which, I think, one must bear in mind in approaching this appeal, is that the application to set aside the service upon the respondent, is made under r. 9 of O. 16 of our Rules, corresponding to r. 30 of O. 12 of the English Rules, where the question of jurisdiction need not necessarily arise at all. Our rule is practically identical to the English rule. In the Annual Practice for 1962, one can find it at p. 198. And at p. 201 under the heading " To set aside the service, etc.", one can find instances where the rule was applied for irregularity in the form, or in the service of the writ. In *Watkins* v. *N. American Land Co.* (20 T.L.R., 534, H.L.) for example, this rule was applied to set aside service upon a person who had been induced by fraud to come within the jurisdiction for the concealed purpose of serving him with the writ. The principle behind the rule (as I understand it in the complete absence of argument on the point in this case) is that the Court will not allow its process to be abused, or to be irregularly used, for the purposes of litigation, even where there is no question of jurisdiction at all.

(*c*) In this case the District Court of Nicosia wherein the appellant-plaintiff filed his action, has undoubtedly jurisdiction to deal with this claim as set out in plaintiff's pleading, against the second defendant. And it might probably entertain the action against both defendants, if it were not for the provisions of the treaty in question, under which this Republic came into existence, and was thus able to establish its present Courts.

(*d*) I am, therefore, inclined to approach this case without entering into the technical question of whether the relevant provisions in the Treaty of Establishment were intended to oust, or not oust, the jurisdiction of the District Court, a Court

which, after all, came into existence four months after the establishment of the Republic, under a law, the makers of which must be presumed to have had in mind the provisions of this Treaty. I take the view that in these circumstances, quite apart of any question of jurisdiction, the Courts of the Republic should not allow their process to be used for the violation of the Treaty in question : or, for that matter, of any treaty binding upon the Republic.

In the present stages of world-developments towards the gradual establishment of a World Rule of Law, or let me say, of Law as the incoming Ruler of the World, every detail sustaining international law as the basis of international relations, is important. And so long as public international law continues to be to a great extent a matter of agreement between States, such agreements are, I think, entitled to the utmost consideration by the Courts in every country.

(*e*) I am, therefore, inclined to think that the District Court of Nicosia could well make use of their discretionary power under O.16 r. 9 to set aside the service of a Court's writ, in a case where it was made to appear to the Court that such writ was issued in violation or disregard of a binding Treaty. Surely it is not for the Courts, in a proceeding of this nature, to enquire into the validity, or the binding force of a treaty ; in this case the Treaty under which the Republic became established. It seems to me that the question upon which this case should be decided is not whether the Treaty of Establishment ousts the jurisdiction of the District Court of Nicosia ; but whether the action of the appellant against the respondent herein, and the service of the writ upon him, running counter to the provisions of the Treaty should be discontinued.

(*f*) I shall now proceed to look on the relevant parts of this Treaty. For the sake of convenience, I refer to the English text of the officially published White Paper (Comnd. 1093). The " Drafts " therein contain the text of the documents eventually signed.

The Treaty of Establishment is Appendix " A ". And in my opinion, it constitutes the foundation upon which the rest of the structure stands. The Notes published at Part III at p. 7 should, I think, be read as part of the whole arrangement. Note 14 at p. 9 dealing with the " Status of Forces ", indicates what was intended in that connection. I do not propose citing it all, but part of it reads :

> " . . Among the more important provisions is that concerning jurisdiction which generally follows Art. III

of the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty, Cmnd. 9363 section 8 . . . Special arrangements are made for the settlement of claims arising from injury or damage caused by members of the forces (Section 9) . . . . "

The parties to the Cyprus Agreements obviously intended to introduce in their arrangements the provisions regarding the Status of Forces in other countries under the N.A.T.O. Agreements. Arrangements affecting thousands of persons, in different European Countries, and found workable for a number of years, were considered suitable for Cyprus as well.

Article 4 of the Treaty of Establishment (at p. 13), introduces into the Treaty itself, the arrangements in question, as Annex C. And Article 11 (at p. 15) provides that they " shall have force and effect as integral parts " thereof. Article 10 provides the course to be followed where " any question or difficulty " arises as to interpretation.

I then take Annex C at p. 53 ; and after reading definitions (*a*), (*e*), and (*f*) I look into sections 3, 4 and 7 as they affect the respondent as a driver of a military vehicle on duty. He circulates freely within the territory of the Republic ; without a driving licence or insurance cover, as all these matters are provided for in the Treaty, and are made the responsibility of the States involved.

(*g*) Section 9 now, at pages 59 to 64 inclusive, deals with claims for damage caused in certain circumstances. Far from ignoring the individual rights of third persons, arising from such circumstances, special arrangements are made in the section for their protection. Paragraph 5 of this section deals with—

" . . . claims . . . arising out of acts or omissions of members of a force . . . done in the performance of official duty . . . and causing damage to third parties . . . "

Such claims are to be dealt with in a manner obviously intended to be less expensive, shorter in time, and more fully protective of individual rights than the ordinary civil litigation, which eventually is fully recognized, as sub-paragraphs (*a*) and (*c*) of paragraph 5 clearly indicate.

Where the damage is caused by a member of the Forces of the United Kingdom, as the appellant in this case contends, special provisions apply as set out in detail in paragraph 6 at page 62. I do not think that anybody reading these provi-

sions can say that the arrangements made thereunder constitute anything like an inroad on individual rights ; or that paragraph 2 (*b*) of this section (at p. 60) does not afford sufficient judicial protection of such rights.

(*h*) Reference was made during the hearing, to the wording of paragraph 7 (*b*), at p. 63, which refers to the jurisdiction of the civil courts in dealing with actions of this nature. It is, I think, clear that 7 (*b*), refers to " claims . . . arising out of tortious acts . . . not done in the performance of official duty. And, as submitted by learned counsel for the respondent, the contents of this paragraph, if relevant to the present claim at all, rather tend to support his client's case.

(*i*) All these elaborate provisions in the Treaty in question, careful worked out in the light of experience, and agreed to by the States involved (one of which is the Republic of Cyprus) for the purpose of regulating the assessment and settlement of claims such as this, were entirely disregarded by the plaintiff-appellant, whose advocate, even at this stage in the proceedings, was unable to state whether the object of his client's action against the serviceman in question, is to recover the amount claimed, from the defendant personally, or to apply eventually to the Army Authorities for satisfaction. This, in my opinion, throws useful light, not only on the intentions of this particular plaintiff, but also on the reasons for which such provisions were found necessary in these agreements.

Having entirely disregarded the terms of the Treaty, the appellant now wants the Courts of the Republic to disregard them as well. And when the District Court taking the view that paragraph 6 of section 9 of Annex C specifies the remedy available " to any one in the Republic who suffers damage by a member of the Armed Forces of the United Kingdom when acting on official duty ", granted respondent's application and set aside the service of the writ upon him, the appellant dissatisfied with the Court's order, seeks to attack it by this appeal.

(*j*) For the reasons already stated, I am of opinion that, in the circumstances of this case, the Courts of the Republic should not entertain a proceeding taken in utter disregard of the Treaty of Establishment ; and the order made by the District Court setting aside the service of the writ on the respondent, should, in my judgment, be sustained. I would dismiss the appeal with costs.

*Held*, III. *Per* JOSEPHIDES, J. in his dissenting judgment, ZEKIA, J. concurring :

(*a*) The respondent's first submission that the Treaty of Establishment has constitutional force was not challenged by the other side and the case was argued on that assumption. As I entertain doubts as to whether the Treaty of Establishment has constitutional force, I wish to make it clear that I am assuming that for the purposes of this appeal, without in any way deciding the matter which I wish to leave open.

(*b*) In this case we are concerned with the interpretation of a Treaty and I think it is necessary to consider the canons of construction applicable to this document. (*Note :* The learned Justice went on to consider those canons). In this case, however, the argument was based on the assumption that the Treaty of Establishment was an ordinary statute of the Republic and not an international treaty.

(*c*) The second submission of the respondent's counsel was that the effect of the provisions of sub-paragraphs (*a*) to (*e*) of paragraph 6 of section 9 of Annex C to the Treaty of Establishment (*supra*) was such as to exclude the jurisdiction of the Courts of the Republic by implication and that, where the tortious act which gave rise to a claim was an act done by a member of the armed forces of the U.K. in the course of official duty in the territory of the Republic, the only way a claimant could proceed was by following the aforesaid provisions of the Treaty of Establishment, that is to say, arbitration and not adjudication in Court. Counsel went on to argue that as a specific remedy and a machinery is provided in the statute, no other remedy or way of redress is available to the claimant and, thus, the jurisdiction of the Courts of the Republic is ousted. In support of that proposition counsel for the respondent relied on three cases : *Pasmore and Others* v. *Oswaldwistle Urban Council* (1898) 67 L.J.Q.B. 635 ; *Wilkinson* v. *Barking Corporation* (1948) 1 All E.R. 564 ; *and The Municipal Council of Karavas* v. *Kyriakos Tsiomouni* (1930) 14 C.L.R. 61. In my opinion the above three cases are distinguishable from the case under consideration.

(*d*) I think that the following extract from the judgment of Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859) 6 C.B. (N.S.) 336, 356, summarises the principle with regard to ouster of the jurisdiction of the Courts :—

> " There are three classes of cases in which a liability may be established founded upon a statute. One is, where

there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law : there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides no particular form of remedy; there the party can proceed by action at common law. But there is a third class viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it .... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class."

(*e*) If the submission of respondent's counsel were accepted, the result will be that the decision of the arbitrator " shall be final and conclusive " and the jurisdiction of the Courts of the Republic ousted. This would be contrary to the express provisions of Article 30·(1) of the Constitution which provides that " No person shall be denied access to the court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional courts under any name whatsoever is prohibited ". The general rule undoubtedly is that the jurisdiction of the Court is not taken away except by express words or necessary implication (*Albon* v. *Pyke* (1842), 4 Man. & G. 421, at page 424, Tindal, C.J.; *Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485, at page 500 ; *Jacobs* v. *Brett* (1875), L.R. 20 Eq. 1, at pages 6-7 ; and *Goldsack* v. *Shore* (1950) 1 K.B. 708 a p. 712, per Evershed M.R.).

It should also be observed that paragraph 6 (*e*) (*supra*) provides that the claim "may" be submitted by the claimant, etc., to an arbitrator, and it may well be that the provision is permissive and not mandatory.

(*f*) Finally, the opening words of paragraph 6 (*supra*) refer expressly to a case " where the United Kingdom is the only Contracting Party involved as a sending State in a claim". I take these words to refer to a claim against the United Kingdom Government and not against individual members of U.K. Forces. In this case, the claim is not a claim against the

United Kingdom Government as a sending State, but against an individual member of the United Kingdom Forces *personally* ; and, according to the provisions of paragraph 10 of the same section, (*supra*) the only immunity from the jurisdiction of the Courts of the receiving State that can be claimed for members of a force in respect of the civil jurisdiction of the Courts of the receiving State, is that provided in sub-paragraph (*g*) of paragraph 5, (*supra*) which, as I read it, applies also to paragraph 6, because only sub-paragraphs (*a*) to (*f*) of paragraph 5 are replaced by sub-paragraphs (*a*) to (*e*) of paragraph 6 ; (*supra*) ; and the very wording of paragraph 5 (*g*) (*supra*) shows that the only immunity that a member of a force has is in respect of " any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties ", and nothing else.

If it were the intention of the framers of the Treaty that the arbitrator, envisaged under the provisions of paragraph 6 (*e*), (*supra*) should have exclusive jurisdiction, that paragraph should have been differently worded as in the case of criminal proceedings under section 8, paragraph 2 (*a*) in the same Annex C, which provides that the service authorities of the sending State shall have the right to exercise " exclusive jurisdiction " in criminal matters over certain persons who are subject to the jurisdiction of its service Courts. See also paragraph 2 (*b*) of section 8.

(*g*) To sum up, the construction I place on paragraph 6 of section 9, (*supra*) is that an injured person is not precluded from instituting civil proceedings against a member of the United Kingdom Forces personally in respect of a tortious act committed on official duty ; that the jurisdiction of the Courts of the Republic to hear the case and give judgment against such member of the United Kingdom Forces personally, but not against the United Kingdom Government, is not ousted ; but that under the provisions of paragraph 5 (*g*) (*supra*) such judgment given against a member of the Forces cannot be enforced against him in Cyprus.

(*h*) Counsel for the respondent has also sought to argue that the expression " proceedings for the enforcement of any judgment " in the aforesaid paragraph 5 (*g*) means the institution of an action *i.e.* the issue of the writ of summons and the hearing of the action, but his arguments, though most attractively presented, have not convinced me that that is so.

*Per* JOSEPHIDES, J.: in his dissenting judgment, ZEKIA, J., concurring :

(1) It may be argued that if it was the intention of the framers of the Constitution that the Treaty of Establishment of the Republic of Cyprus should have constitutional force there is no reason why that Treaty should not have been expressly referred to in Article 181 of the Constitution (*supra*) in the same way as it is referred to in Article 195 (*supra*) ; and one view may be that the Treaty of Establishment is legally binding on the state but not on the individual, or that it may or may not have superior force to any municipal or domestic law other than the Constitution (Cf. Articles 179, 195 and 169.3 of the Cyprus Constitution ; the Constitutions of the United States of America, Article VI (2), and of Ireland, Article 29 (6)).

Be that as it may, I leave this question open and proceed to consider this case on the assumption that the Treaty of Establishment has constitutional force.

(2) In this case we are concerned with the interpretation of a Treaty and I think it is necessary to consider the canons of construction applicable to this document : *see* " Lord McNair, The Law of Treaties ", 1961, at p. 364-365 ; I. M. Sinclair, " The principles of Treaty interpretation ", in the " International and Comparative Law Quarterly ", April 1963, Vol. 12, Part 2, at p. 508 *et seq* ; general Fitzmaurice, in (1957) 33 British Year Book of International Law, pp. 211-212.

(3) Although no reference was made to Article 10 of the Treaty of Establishment, either before us or in the Court below, I think that I ought, for record purposes, to note that that Article provides that any question or difficulty as to the interpretation of the provisions of that Treaty in so far as they affect the status, rights and obligations of the United Kingdom forces etc., shall ordinarily be settled by negotiation between the authorities concerned, and in case of disagreement, such question or difficulty shall be referred to an *ad hoc* tribunal, composed of representatives of the four Governments concerned, together with an independent chairman nominated by the President of the International Court of Justice. But, as no submission was made to us on this question by either side I shall proceed to consider the points raised before us on appeal without any reference to the aforesaid Article 10.

(4) The question whether by virtue of the rules of International Law a member of the United Kingdom forces has jurisdictional immunity in Cyprus was not relied upon by the res-

pondent (a member of the United Kingdom forces) nor was the case argued before us on that basis, and I would, therefore, express no opinion on that. If the case were argued on that basis I apprehend that the following matters might, *inter alia*, arise for consideration :

1. Having regard to the written Constitution of Cyprus, do the rules of customary International Law (as opposed to conventional International Law) form an integral part of the municipal or domestic law of Cyprus ? (Cf. the Constitutions of the Federal Republic of Germany (Article 25), of Austria (Article 9) of Italy (Article 10), of Ireland (Article 29 (3)) and the English constitutional tradition.

2. If they do, do such rules of customary International Law have superior force to the Constitution or the laws of the Republic ?

3. It does not seem that the view as to the jurisdictional immunity of armed forces, expressed in *Oppenheim's* International Law, 8th edition (1955), at page 847, (the opening words in paragraph 445) has universal support, because it is therein stated (at pages 848-9) that " the view which has the support of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle would require specific agreement of the local State by the treaty or otherwise. " It is also stated that when in 1942 Great Britain conferred upon the military tribunals of the United States exclusive jurisdiction with regard to offences committed by members of the United States forces stationed in Great Britain, she made a concession going beyond the accepted rule of International Law in the matter (page 849).

Finally the agreement between the Parties to the North Atlantic Treaty, dated June 19, 1951, recognised the general jurisdiction of the receiving States; and " by way of exception, the Agreement permits the jurisdiction of the sending State over the members of its armed forces (in relation to offences) which are directed solely against the property or security of that State or solely against the person or property of another member of its forces or *which arise out of any act or omission done in the performance of a legal duty* " (p. 849). In fact, the framers of section 9 of Annex C of the Cyprus Treaty of Establish-

ment followed closely the provisions of this Agreement of 1951 but, as already stated, paragraph 6 of that section is a new provision and does not appear at all in Article VIII of the aforesaid Agreement, while paragraphs 5 (*g*) and 10 of our section 9 reproduce verbatim paragraphs 5 (*g*) and 9 of Article VIII of the said Agreement.

In order to give statutory effect to the Agreement of 1951 in England the Visiting Forces Act, 1952, was enacted incorporating, *inter alia*, the provisions of this Agreement. (See *Oppenheim* at p. 849 and Halsbury's Laws of England, 3rd edition, Vol. 33 at page 898, paragraph 1507). This Act imposes restrictions on the jurisdiction of the England Courts in criminal matters and grants power to the appropriate service authorities and confers jurisdiction on their Courts in relation to members of a visiting force. It also contains special provisions as to the making of arrangements for the settlement of claims against visiting forces by payments to be made by the Minister of Defence of such amounts "as may be adjudged by any United Kingdom Court or as may be agreed between the claimant and the said Minister . . " (Section 9 of the Act). It will be observed that the English Act does not impose any restriction on the civil jurisdiction of the English Courts. In Cyprus no law has been passed by the House of Representatives regarding any of the provisions of Annex C to the Treaty of Establishment.

4. Does the view expressed in Oppenheim (at page 847, paragraph 445) as to the jurisdictional immunity of armed forces apply to claims in civil actions against soldiers on duty ? It would seem that English Courts assume jurisdiction in civil actions for negligence against members of visiting armed forces while on duty in England. In *Merlihan* v. *A. C. Pope Ltd., and J. W. Hibbert Pagnello (Third Party)* (1946) 1 K. B. 166, it was held that a member of the Canadian Armed Forces on duty would have been liable in a negligence action for damages but for the protection afforded by section 21 (1) of the Limitation Act, 1939 : See also *Reeves* v. *Deane-Freeman* (1952) 2 All E.R. 506, Lord Goddard, C. J., at page 507 ; affirmed on appeal (1953) 1 All E.R. 461.

5. In England, where the private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the previous or subsequent consent

of Parliament is in all cases required to render the treaty binding upon the subject and enforceable (see Halsbury's Laws of England, 3rd edition, Vol. 7, p. 288 paragraph 607). Lord McNair in his book entitled "The Law of Treaties" (1961) states the proposition that treaties entailing for their execution and application in the United Kingdom a change in or addition to the law administered in the Courts require parliamentary sanction for their municipal execution and application which must be given in the form of a statute (p. 83). The classic authority for this proposition is the judgment of Sir Robert Phillimore in The *Parlement Belge* (1879) 4 P.D. 129 at p. 154. See also *Attorney-General for Canada* v. *Attorney-General for Ontario* (1937) A.C. 326, per Lord Atkin at p. 347 (P.C.); and *The Republic of Italy* v. *Hambros Bank. Ltd.* (1950) Ch. 314. During and after the Second World War the United Kingdom became a party to a number of Conventions whereby *jurisdiction* in varying degree was conferred upon allied and associated States in respect of their armed forces who were or are on United Kingdom territory. All or most of these Conventions required legislation (See McNair "Law of Treaties", page 87, and Mc Nair "International Law Opinions" Vol. 1 pp. 72–4).

However, as these questions were not raised before us I do not consider it necessary for the purposes of this appeal to express any opinion.

*Appeal dismissed with costs.*

Cases referred to :

*Watkins* v. *N. American Land Co.* 20 T.L.R. 534, H.L.;

*Pasmore and Others* v. *Oswaldtwistle Urban Council* (1898), 67 L.J.Q.B. 635 ;

*Wilkinson* v. *Barking Corporation* (1948) 1 All E.R. 564 ;

*The Municipal Council of Karavas* v. *Kyriakos Tsiomouni*, (1930) 14 C.L.R. 61 ;

*Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859) 6 C.B. (N.S.) 336, at p. 356 *per* Willes, J.;

*Albon* v. *Pyke* (1842) 4 Man. & G. 421, at p. 424 *per* Tindal C.J.;

*Balfour* v. *Malcolm* (1842) 8 Cl. & F. 485, at p. 500 ;

*Jacobs* v. *Brett* (1875) L.R. 20 Eq. 1, at pp. 6–7 ;

*Goldsack* v. *Shore* (1950) 1 K.B. 708, at p. 712, *per* Evershed M.R.;

*Merlihan* v. *A. C. Pope Ltd.*, and *J. W. Hibbert Pagnello* (*Third Party*) (1946) 1 K.B. 166 ;

*Reeves* v. *Deane-Freeman* (1952) 2 All E.R. 506, at p. 507 *per* Lord Goddard, C.J., affirmed on appeal *v.* (1953) 1 A 11 E.R. 461 ;

*The Parlement Belge* (1879) 4 P.D. 129, at p. 154 *per* Sir Robert Phillimore ;

*Attorney-General for Canada* v. *Attorney-General for Ontario* (1937) A.C. 326, at p. 347 *per* Lord Atkin (P.C.) ;

*The Republic of Italy* v. *Hambros Bank, Ltd.*, (1950) Ch. 314 ;

*Riccio* v. *Little*, Italian case in Giurisprudenza Italiana, 1934, I (1) p. 976 ; Annual Digest, 1933–1934, case No. 68, referred to in Oppenheim's International Law, 8th ed. (1955) at p. 264 ;

*Galila Bassionni Amrane* v. *John*, Egyptian case, Civil Tribunal of Alexandria (Third Chamber) January 14, 1934 ; Annual Digest and Reports of Public International Law Cases, 1933–1934, p. 187 ;

*Darowany Etal* v. *The Queen*, Canadian case, (1956) Ex. C.R. 340 ;

Re *Hoover*, A.I.R. 1956 Patna 46 (*i.e.* The All India Reporter) reported also in International Law Reports 1956, p. 265 ;

*January* 24, 1958 : *Case B.A.G.* (1958) p. 196 ; International Law Reports 1958, II p. 201.

**Appeal.**

Appeal against the judgment of the District Court of Nicosia (Evangelides and Ioannides D:JJ.) dated the 5.1.63 (Action No. 4343/61) setting aside the writ of summons and service thereof as against the 1st defendant (respondent) in an action for damages for negligent driving.

X. *Syllouris* for the appellant.

*C. Cacoyiannis* for the respondent.

*Cur. adv. vult.*

The facts sufficiently appear in the judgment delivered by VASSILIADES and JOSEPHIDES, JJ. On the 11th of October 1963 the following judgments were read :—

WILSON, P. : This is an appeal from the order made on January 5, 1963, setting aside the writ of summons and the service thereof on defendant No. 1, without costs.

The question at issue in this appeal, as will be more fully explained later, is whether the plaintiff has the right to bring this action against the defendant No. 1, who, at the time of the accident, was a member of the Royal Air Force and on duty.

The facts are quite simple. The action is one for damages for negligent driving. Two motor vehicles, one driven by the defendant No. 1 and the other by the defendant No. 2 collided on the Nicosia–Limassol road on the 9th September, 1960. The plaintiff was a passenger in a bus driven by the defendant No. 2 which was proceeding from Limassol to Nicosia when it collided with a motor car being driven in the opposite direction by the defendant No. 1. At the time of the accident, defendant No. 1 was acting in the perfomance of official duty as a member of the Armed Forces of the United Kingdom stationed at Akrotiri.

The plaintiff alleges that the accident was the result of the negligence of the drivers of both vehicles. It is unnecessary to consider the grounds alleged against each of them because they do not bear on the question at issue in this appeal. On November 1, 1961, he commenced this action against the defendants jointly and severally. His injuries were serious and it was some time before the extent of the recovery could be ascertained. On or about October 3, 1962, his statement of claim was delivered. On October 10, 1962, the statement of defence of defendant No. 2 was filed, denying any liability and alleging that the collision was caused solely by the negligence of defendant No. 1.

On June 4, 1962, an application was filed on behalf of defendant No. 1, applying that the writ of summons issued against him in his personal capacity and the service thereof, and all subsequent proceedings, be set aside for want of jurisdiction by the Court to entertain this action against him, or any proceedings against him in respect of the subject matter of this action. He also asked that the plaintiff be required to pay him his costs of the action and the application.

The application was heard on December 18, 1962. Judgment was delivered on January 5, 1963, setting aside the writ of summons and the service thereof without costs. The Court arrived at its conclusion on the ground that it had no jurisdiction to try the claim against this defendant because (*a*) the provisions of the Treaty of Establishment of the Republic of Cyprus, in particular paragraph 6 of section 9 of Annex 'C' apply, (*b*) it has the force of law

under Article 181 of the Constitution, and (*c*) the real question to be decided was the interpretation of the Treaty. In its view, the provisions of paragraph 5 are subordinated to the provisions of paragraph 6 of the said section. (1) See footnote to this judgment.

In held also that the latter paragraph specifies the remedy which is available to anyone in the Republic who suffers damage by a member of the Armed Forces of the United Kingdom, when such member is acting on official duty. " It is clear to us that the effect of these is such as to oust the jurisdiction of the Courts of the Republic in cases of this kind ".

The plaintiff's appeal was based upon the following grounds :

1. The trial Court erred in setting aside the writ of summons and the service thereof as against respondent-defendant 1 and erred in its finding that it had no jurisdiction to entertain the action against respondent-defendant 1.

2. The trial Court erred in its finding that the provisions of section 9 of Annex C of the treaty of Establishment oust the jurisdiction of the Courts of the Republic to entertain actions when the defendant is a member of the armed forces of the United Kingdom and the claim is based on a civil wrong committed on the territory of the Republic by such member of the United Kingdom armed forces when on official duty.

The argument before us was exhaustive, dealing entirely with the interpretation of the Treaty of Establishment.

At the beginning let it be said that the plaintiff's desire, as an innocent victim of the accident, to bring his action against the drivers of the vehicles involved—one or both of whom are alleged to have been guilty of negligence—follows the usual practice in such cases. But the fact that defendant No. 1 was acting in the perfomance of official duty as a member of the Armed Forces of the United Kingdom stationed at Akrotiri, Cyprus, at the time of the accident, raises the legal question we now have to consider.

Before discussing it I should point out the United Kingdom forces are lawfully in this country, that this accident occurred in peacetime when there was no state of emergency and that this is a civil proceeding based upon

a civil wrong called negligence, and that in construing this judgment the reader must limit the interpretation to the dispute before us.

The law applicable to the issue appears to be very clear and to be recognized in many, if not all, civilized countries. The principle is stated in Oppenheim's International Law, 8th ed. (1955) at p. 846 as follows :

> " Armed forces are organs of the State which maintain them, because they are created for the purpose of maintaining the independence, authority, and safety of the State. In this respect it matters not whether armed forces are at home or abroad ; for they are organs of their home State ; even when on foreign territory, provided only that they are there in the service of their State, and not for their own purposes."

This principle is so widely acknowledged that there seem to be very few relevant decisions reported. However, the following are some of interest. In the Italian case of *Riccio* v. *Little. Giurisprudenza Italiana*, 1934, I (1), p. 976 ; Annual Digest, 1933–1934, Case No. 68, referred to in Oppenheim op. cit. p. 264,—the Local Committee entrusted with the administration of the British cemetery at Naples, owned by the British Government, dismissed Riccio who had been employed at the cemetery. The Italian Court of Cassation held that the cemetery was the property of Great Britain which desired to give protection to its subjects, also after their death, by providing a place of burial according to their religion. This was a public law function over the performance of which the Italian State could not exercise its jurisdiction, as otherwise the political severeignty of a foreign State would be infringed.

In Egypt an action for damages was brought against the Officer in Command of the British Army of Occupation in Egypt in respect of an accident caused by a soldier belonging to that army while driving a lorry in the course of his duty.

*Held* : That the mixed tribunals were incompetent to hear the case. In the course of its judgment the Court said : " Although there is neither written convention between Egypt and Great Britain, nor an Egyptian decree conferring jurisdictional immunity upon the Britain Army of Occupation in Egypt (except the decree of February 25, 1895, which creates a special tribunal for crimes and torts committed against officers and soldiers of the army of occupation) the British Military Authorities had by custom

submitted to the jurisdiction of mixed tribunals . . . . " However, " international usage recognizes a special immunity in favour of an army of occupation and its members, when acting in the course of their duty . . . . " *Galila Bassionni Amrane* v. *John*. Egypt. Civil Tribunal of Alexandria (Third Chamber) January 14, 1934. Annual Digest and Reports of Public International Law Cases 1933–4 p. 187.

In the Canadian case of *Darowany Etal* v. *The Queen* 1956 Ex. C.R. 340 the petitioners sought damages for injuries to mink on their mink farm as a result of low flying by students undergoing instruction at courses conducted by NATO, the pilots being nationals of U.K., France, Belgium, the Netherlands, Norway and Italy as well as Canadian pilots. The petition was refused by Thorson P. " . . . . Thus even if the students who were not Canadians were subject to the discipline of the school they were not members of the airforces of Her Majesty in right of Canada . . . .and could not in the absence of appropriate legislation, be deemed to be servants of the Crown." Later in September 16, 1953, legislation came into force which would make the Crown liable for damages caused by low flying.

*Re Hoover* A.I.R. 1956 Patna 46 (A.I.R.—The All India Reporter also reported in International Law Reports 1956, p. 265). This was a Japanese case heard in the District Court of Aomori on February 14, 1956. Hoover, the Secretary of an officers' club at the U.S. airforce base at Mesawa Japan, discharged Yukawa, an employee of the club. The latter took various proceedings before Japanese tribunals which held he was entitled to be reinstated. In the end the Aomori Prefectural Local Labour Relations Board fined Hoover for failure to reinstate Yukawa and pay him lost wages.

*Held :* No fine would be levied on Hoover, who was the representative of the United States of America, an independent foreign state, over whom the Court had no jurisdiction.

" Obviously, it is an established fundamental principle in international law that, except where a State voluntarily submits itself to the jurisdiction of foreign Courts and in a few other special cases, a State is not subject to the jurisdiction of foreign courts." Therefore, it is reasonable to consider that the Japanese courts, unless it is otherwise agreed by treaties or consent is given in certain individual cases, cannot exercise jurisdiction to impose a fine, as in the present case, upon the United States of America.

January 24, 1958. Case B.A.G. (1958) p. 196 ; International Law Reports 1958—II p. 201. The plaintiff and defendant were both employed as members of an "auxiliary service group" by a British Military Unit in the Federal Republic of Germany. The defendant reversed a motor vehicle which collided with a stationary vehicle on which the plaintiff was working and as a result of the collision the plaintiff was seriously injured. The plaintiff sued the defendant personally. The court below held defendant liable. The appellate Court remitted the case to have determined whether defendant was acting in the course of his duties. If so he was not liable and a claim lay against the Republic. According to Article 8 (2) of the Finance Convention of May 26, 1952, acts of employees of foreign forces were deemed to be the acts of foreign forces themselves. If defendant was not acting in course of discharge of his official functions the plaintiff has his normal remedy against the person who has caused the loss or damage. This follows from Article 8 (16) of the finance convention.

Finally I draw attention to an article entitled " The Competence of Courts in regard to non sovereign acts of Foreign States " by W. R. Fox of Princeton University. It appears in the American Journal of International Law (1941) vol. 35, p. 632. He says :—

> " Differing types of judicial reasoning have been used either in defence of the traditional immunity or in the formulation of exceptions to it (3).
>
> (3) The conclusions of M. Matsuda, rapporteur for the subcommittee in regard to Foreign States of the League of Nations Committee of Experts for the Progressive Codification of International Law, reflect this disagreement. His conclusions may be summarized as follows :—
>
> There is unanimous agreement that no jurisdiction exists with respect to sovereign states peforming sovereign functions. With respect to other cases there are two main groups subscribing to the following doctrines : (1) Immunity attaches to the person of the states and is independent of the intrinsic nature of the act performed. This immunity can only be lost through tacit or express waiver. (2) Immunity attaches only to acts which represent true manifestations of sovereign authority. These ' true manifestations ' he declares to be difficult to discover."

League of Nations Doc. C. 201 M. 78 1927 V. American Journal of International Law Supp. vol. 22 (1928), p. 127.

The Courts in the United Kingdom and the United States of America in principle extend the immunity over a much wider field. For purposes of this case, however, I need not refer to their decisions.

In Cyprus an aggrieved person has his remedy by following the procedure laid down in the said Treaty of Establishment.

For these reasons, the appeal will be dismissed, with costs.

*Footnote* 1. Paragraph 5 section 9-provides that, subject to paragraph 6, claims arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of acts or omissions of persons locally employed in the service of a force done in the performance of their duties as such, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties shall be dealt with by the receiving State in accordance with the provisions therein stated (other than contractual claims and those to which paragraph 7 and 8 apply, *i.e.* 7, claims against members of a force or civilian component arising out of tortious acts or omissions in the receiving State not done in the performance of official duty; 8, claims arising out of the unauthorized use of any vehicle of the armed services of a sending State).

Paragraph 6 provides that " Where the United Kingdom is the only Contracting Party involved as a sending State in a claim, the following provisions shall apply, in lieu of those set out in sub-paragraphs (*a*) to (*f*) of paragraph 5 of this section." This provides procedure to be followed in cases such as the present.

It was contended in argument that sub-section (*g*) of paragraph 5, by implication gives the right to bring the present action and to carry it through to judgment. In my opinion it would only prevent recovery from the individual if a Court should

give judgment against him. It has no application in this case, a necessary conclusion from the basis of my reasons for judgment given above.

JEKIA, J.: I am of the opinion that the appeal should be allowed. As to the reasons, I associate myself with those to be stated by my brother, Mr. Justice Josephides, in his judgment.

VASSILIADES, J.: In a collision between a civilian omnibus and a military vehicle, on a public road in the territory of the Republic of Cyprus, on the 9th September, 1960, the appellant who was a passenger in the civilian omnibus, sustained severe personal injuries. He had to receive medical treatment for several months, and eventually he found himself with a permanent partial disability.

For the damage suffered, as a result of those injuries, the appellant instituted civil proceedings on 1st November, 1961, in the form of an action in the District Court of Nicosia, within the jurisdiction of which the collision occurred, claiming against the drivers of the two vehicles involved, jointly and severally, a substantial sum of money, as damages for negligence, on the allegation that the cause of the collision was the negligence of both or either of these two drivers.

The first defendant (respondent in this appeal) is the driver of the military vehicle, a serviceman, Walter George Fraser, described in the writ of summons as S.A.C. 4240884 of R.A.F. Akrotiri ; the second is the driver of the civilian omnibus, Andreas Pantzarou of Skylloura village, a citizen of the Republic of Cyprus.

Both defendants were duly served. But the first defendant, the airman, entered up no appearance. The second defendant, having entered an appearance in due course, received through his advocate, plaintiff's statement of claim, copy of which is on the record, dated the 3rd October, 1962.

Plaintiff's pleading, alleging negligence against each defendant severally, and giving particulars of the injuries incurred by the plaintiff, claims against both defendants £1,500 in three items of special damages, plus £2,000 general damages for "shock, pain and suffering."

On the 10th October, 1962, the second defendant filed his defence. He denied negligence on his part ; and alleging that the collision and the resulting damage "was solely caused by the negligence of the first defendant," denied liability.

On the 4th June, 1962 (prior to any pleading), an application was filed by counsel on behalf of the first defendant " now serving in England " (still in the Royal Air Force) " that the writ of summons . . . .the service thereof and all subsequent proceedings as against him, be set aside for want of jurisdiction . . . . ". This application was based on r. 9 of 0.16 of our Rules, " and also on paragraphs 5, 6 and 10 of section 9 of Annex C to the Treaty of Establishment." That is to say, the Treaty between the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Greece and the Republic of Turkey of the one part and the Republic of Cyprus on the other part, signed in August, 1960, under which the British Colony of Cyprus attained independence, and was established as the Republic of Cyprus, as from the 16th August, 1960.

In approaching this case one must not lose sight of the fact that the Treaty in question is part of the arrangement " presented to Parliament by the Secretary of State for Foreign Affairs and the Minister of Defence, by command of Her Majesty in July, 1960 " (Cmnd. 1093 ; the officially published White Paper) upon which the British Government obtained the authority of Parliament to agree to the independence of a Crown Colony, and to sign the documents containing the terms under which Her Majesty's subjects therein, were to be established as a new State, and to transfer their allegiance thereto. It is a treaty under which the Crown could, undoubtedly in my opinion, bind the subject ; and a treaty which the new State must, I think, treat as binding on its present citizens. I am mentioning this because certain doubts were expressed during the argument, as to the binding force of the Treaty in question. I take my law on the point from the Chapter on Constitutional Law in vol. 7 of the 3rd ed. of Halsbury's Laws of England, under the heading " Treaties " at p. 286, paragraphs 604 et seq. There can be no doubt, I believe, that the matter is governed by English Law as preserved in force by Article 188 of the Constitution.

Another point which, I think, one must bear in mind in approaching this appeal, is that the application to set aside the service upon the respondent, is made under r. 9 of O. 16 of our Rules, corresponding to r. 30 of O. 12 of the English Rules, where the question of jurisdiction need not necessarily arise at all. Our rule is practically identical to the English rule. In the Annual Practice for 1962, one can find it at p. 198. And at p. 201 under the heading " To set aside the service etc. ", one can find instances

where the rule was applied for irregularity in the form, or in the service of the writ. In *Watkins* v. *N. American Land Co.* (20 T.L.R., 534, H.L.) for example, this rule was applied to set aside service upon a person who had been induced by fraud to come within the jurisdiction for the concealed purpose of serving him with the writ. The principle behind the rule (as I understand it in the complete absence of argument on the point in this case) is that the Court will not allow its process to be abused, or to be irregularly used, for the purposes of litigation, even where there is no question of jurisdiction at all.

In this case the District Court of Nicosia wherein the appellant-plaintiff filed his action, has undoubtedly jurisdisction to deal with this claim as set out in plaintiff's pleading, against the second defendant. And it might probably entertain the action against both defendants, if it were not for the provisions of the treaty in question, under which this Republic came into existence, and was thus able to establish its present Courts.

I am, therefore, inclined to approach this case without entering into the technical question of whether the relevant provisions in the Treaty of Establishment were intended to oust, or not oust, the jurisdiction of the District Court ; a Court which, after all, came into existence four months after the establishment of the Republic, under a law, the makers of which must be presumed to have had in mind the provisions of this Treaty. I take the view that in these circumstances, quite apart of any question of jurisdiction, the Courts of the Republic should not allow their process to be used for the violation of the Treaty in question ; or, for that matter, of any treaty binding upon the Republic.

In the present stages of world-developments towards the gradual establishment of a World Rule of Law, or, let me say, of Law as the incoming Ruler of the World, every detail sustaining international law as the basis of international relations, is important. And so long as public international law continues to be to a great extent a matter of agreement between States, such agreements are, I think, entitled to the utmost consideration by the Courts in every country.

I am, therefore, inclined to think that the District Court of Nicosia could well make use of their discretionary power under O. 16 r. 9 to set aside the service of a Court's writ, in a case where it was made to appear to the Court that such writ was issued in violation or disregard of a binding Treaty.

Surely it is not for the Courts, in a proceeding of this nature, to enquire into the validity, or the binding force of a treaty ; in this case the Treaty under which the Republic became established. It seems to me that the question upon which this case should be decided is not whether the Treaty of Establishment ousts the jurisdiction of the District Court of Nicosia ; but whether the action of the appellant against the respondent herein, and the service of the writ upon him, running counter to the provisions of the Treaty should be discontinued.

I shall now proceed to look on the relevant parts of this Treaty. For the sake of convenience, I refer to the English text of the officially published White Paper (Comnd. 1093). The " Drafts " therein, contain the text of the documents eventually signed.

The Treaty of Establishment is Appendix "A". And in my opinion, it constitutes the foundation upon which the rest of the structure stands. The notes published at Part III at p. 7, should, I think, be read as part of the whole arrangement. Note 14 at p. 9 dealing with the " Status of Forces ", indicates what was intended in that connection. I do not propose citing it all, but part of it reads :

> " . . . Among the more important provisions is that concerning jurisdiction which generally follows Art. III of the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty, Comnd. 9363 (Section 8)
>
> Special arrangements are made for the settlement of claims arising from injury or damage caused by members of the forces (Section 9) . . . . . "

The parties to the Cyprus Agreements obviously intended to introduce in their arrangements the provisions regarding the Status of Forces in other countries under the N.A.T.O. agreements. Arrangements affecting thousands of persons, in different European Countries, and found workable for a number of years, were considered suitable for Cyprus as well.

Article 4 of the Treaty of Establishment (at p.13), introduces into the Treaty itself, the arrangements in question, as Annex C. And Article 11 (at p. 15) provides that they " shall have force and effect as integral parts " thereof. Article 10 provides the course to be followed where " any question or difficulty " arises as to interpretation.

I then take Annex C at p. 53 ; and after reading definitions (*a*), (*e*) and (*f*), I look into sections 3, 4 and 7 as they affect the respondent as a driver of a military vehicle on duty. He circulates freely within the trritory of the Republic ; without a driving licence or insurance cover, as all these matters are provided for in the Treaty, and are made the responsibility of the States involved.

Section 9 now, at pages 59 to 64 inclusive, deals with claims for damage caused in certain circumstances. Far from ignoring the individual rights of third persons, arising from such circumstances, special arrangements are made in the section for their protection. Paragraph 5 of this section deals with—

> " . . . claims . . . arising out of acts or omissions of members of a force . . . done in the performance of official duty . . . and causing damage to third parties . . "

Such claims are to be dealt with in a manner obviously intended to be less expensive, shorter in time, and more fully protective of individual rights than the ordinary civil ligitation, which eventually is fully recognised, as sub-paragraphs (*a*) and (*c*) of paragraph 5 clearly indicate.

Where the damage is caused by a member of the Forces of the United Kingdom, as the appellant in this case contends, special provisions apply as set out in detail in paragraph 6 at page 62. I do not think that anybody reading these provisions can say that the arrangements made thereunder constitute anything like an inroad on individual rights ; or that paragraph 2 (*b*) of this section (at p. 60) does not afford sufficient judicial protection of such rights.

Reference was made during the hearing, to the wording of paragraph 7 (*b*), at p. 63, which refers to the jurisdiction of the civil courts in dealing with actions of this nature. It is, I think, clear that 7 (*b*) refers to " claims. . . arising out of tortious acts . . not done in the performance of official duty ". And, as submitted by learned counsel for the respondent, the contents of this paragraph, if relevant to the present claim at all, rather tend to support his client's case.

All these elaborate provisions in the Treaty in question, carefully worked out in the light of experience, and agreed to by the States involved (one of which is the Republic of Cyprus) for the purpose of regulating the assessment and settlement of claims such as this, were entirely disregarded by the plaintiff-appellant, whose advocate, even at this stage in the proceedings, was unable to state whether the

object of his client's action against the serviceman in question, is to recover the amount claimed, from the defendant personally, or to apply eventually to the Army Authorities for satisfaction. This, in my opinion, throws useful light, not only on the intentions of this particular plaintiff, but also on the reasons for which such provisions were found necessary in these agreements.

Having entirely disregarded the terms of the Treaty, the appellant now wants the Courts of the Republic to disregard them as well. And when the District Court taking the view that paragraph 6 of section 9 of Annex C specifies the remedy available "to any one in the Republic who suffers damage by a member of the Armed Forces of the United Kingdom when acting on official duty, granted respondent's application and set aside the service of the writ upon him, the appellant, dissatisfied with the Court's order, seeks to attack it by this appeal.

For the reasons already stated, I am of opinion that, in the circumstances of this case, the Courts of the Republic should not entertain a proceeding taken in utter disregard of the Treaty of Establishment ; and the order made by the District Court setting aside the service of the writ on the respondent, should, in my judgment, be sustained. I would dismiss the appeal with costs.

JOSEPHIDES, J.: This is an appeal by the plaintiff against the order of the District Court of Nicosia setting aside the writ of summons and service thereof as against the first defendant (respondent).

The plaintiff (appellant) took out a writ of summons against two defendants for damages for negligent driving. The first defendant (respondent) is a member of the Armed Forces of the United Kingdom and was, on the day of the accident, on the posted strength of the Royal Air Force, Akrotiri, stationed in the Island of Cyprus. The second defendant is a citizen of the Republic of Cyprus.

The plaintiff's (appellant's) case is that while he was a passenger in a bus driven by the second defendant, a collision took place between that bus and a motor car driven by the first defendant (respondent), and that he, the appellant, suffered personal injuries as a result of the collision and he claims £3,500 damages.

After the service of the writ the respondent took out a summons praying the Court to set aside the writ and service thereof for want of jurisdiction by the Court to entertain

the action against him. His application was based on Order 16, r. 9 of the Civil Procedure Rules and on paragraphs 5, 6 and 10 of section 9 of Annex C to the Treaty of Establishment of the Republic of Cyprus. The facts relied upon were set forth in an official certificate under the hand of the Air Officer in charge of Administration, Headquarters, Near East Air Force. It was stated in that certificate that the respondent is a member of the Armed Forces of the United Kingdom and that on the day of the accident he was on the posted strength of the Royal Air Force, Akrotiri, stationed in the Island of Cyprus. It was further stated that at the material time the respondent was driving a service vehicle owned by the armed forces of the United Kingdom and that he was on official duty as a member of the armed forces of the United Kingdom.

The appellant's opposition to the respondent's application was based on two grounds :—

(*a*) that paragraphs 5, 6 and 10 of section 9 of Annex C to the Treaty of Establishment do not exclude the jurisdiction of the Court to entertain the action ; and

(*b*) that the action is based on a civil wrong committed on the territory of the Republic of Cyprus and according to the Courts of Justice Law, 1960, the Nicosia District Court had jurisdiction to entertain the action as one of the defendants, *i.e.* the second defendant, is a resident and carries on business within the District of Nicosia.

It was not in dispute that the respondent, who was a member of the Royal Air Force at the material time, was on the posted strength of the Royal Air Force Akrotiri, and that at the time of the accident he was on official duty as a member of the armed forces of the United Kingdom, stationed at Akrotiri.

The trial Judges were of the view that the District Court had no jurisdiction to hear the action against the respondent in view of the provisions of paragraph 6 of section 9 of Annex C of the aforesaid Treaty of Establishment ; that the provisions of paragraph 5 were subordinated to the provisions of paragraph 6 and that paragraph 6 specified the remedy which was available to any one in the Republic who suffered damage by a member of the armed forces of the United Kingdom when such member was acting on official duty ; and they finally ruled that the effect of those provi-

sions was to oust the jurisdiction of the Courts of the Republic, and they set aside the writ and service thereof as against the respondent.

The plaintiff now appeals on the ground that the trial Court erred in its finding that the provisions of section 9 of Annex C oust the jurisdiction of the Courts of the Republic to entertain actions when the defendant is a member of the armed forces of the United Kingdom and the claim is based on a civil wrong committed on the territory of the Republic by such member of the armed forces when on official duty.

Counsel for the appellant argued before us that the claim in the action is against a citizen of the Republic and a member of the United Kingdom Armed Forces and not against the United Kingdom Government ; and, that, consequently, the provisions of paragraph 6 of section 9 of Annex C are inapplicable. He further submitted that the provisions of the aforesaid paragraph 6 are applicable in cases where the claimant wishes to recover compensation from the United Kingdom Government as a sending State, and not against an individual member of the United Kingdom Armed Forces. He finally submitted that only express words in a statute can oust the jurisdiction of a Court and that the only immunity which can be claimed is to the extent provided in sub-paragraph (*g*) of paragraph 5 of section 9, as laid down in paragraph 10 of the aforesaid section.

Counsel for the respondent submitted—

(*a*) that the provisions of the Treaty of Establishment have constitutional force and that they consequently are the supreme law of the Republic ; and

(*b*) that the effect of the provisions of sub-paragraphs (*a*) to (*e*) of paragraph 6 of section 9 was such as to exclude the jurisdiction of the Courts of the Republic by implication ; and that, where the tortious act which gave rise to a claim was an act done in the course of official duty, the only way a claimant could proceed was by following the aforesaid provisions of the Treaty of Establishment, that is to say, arbitration and not adjudication in Court.

He based his submission on the proposition that the provisions of paragraph 6 of section 9 have the same effect as the provisions of any statute which specifies a particular remedy and the mode of obtaining it.

Before I proceed further, I think that it would be helpful if I quoted the provisions of Annex C to the Treaty of Establishment which we are called upon to consider in this appeal. They are paragraphs 5, 6 and 10 of section 9, and they read as follows :

" 5. Subject to the provisions of paragraph 6 of this section claims (other than contractual claims and those to which the provisions of paragraph 7 or 8 of this section apply) arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of acts or omissions of persons locally employed in the service of a force done in the performance of their duties as such, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State, to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions :—

(*a*) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

(*b*) The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.

(*c*) Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.

(*d*) Every claim paid by the receiving State shall be communicated to the Sending States concerned together with full particulars and a proposed distribution in conformity with sub-paragraphs (*e*), (i), (ii) and (iii) of this paragraph. In default of a reply within two months the proposed distribution shall be regarded as accepted.

(*e*) The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs of this paragraph and paragraph 2 of this section shall be distributed between the Contracting Parties, as follows :—

(i) Where one sending State alone is responsible, the amount awarded or adjudged, shall be

distributed in the proportion of 25 per cent chargeable to the receiving State and 75 per cent chargeable to the sending State.

(ii) Where more than one State is responsible for the damage, the amount awarded or adjudged shall be distributed equally among them ; however, if the receiving State is not one of the States responsible, its contribution shall be half that of each of the sending States.

(iii) Where the damage was caused by the armed services of the Contracting Parties and it is not possible to attribute it specifically to one or more of those armed services, the amount awarded or adjudged shall be distributed equally among the Contracting Parties concerned ; however, if the receiving State is not one of the States by whose armed services the damage was caused, its contribution shall be half that of each of the sending States concerned.

(iv) Every half-year, a statement of the sums paid by the receiving State in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a percentage basis has been accepted shall be sent to the sending State concerned, together with a request for reimbursement. Such reimbursement shall be made within the shortest possible time, in the currency of the receiving State.

(*f*) In cases where the application of the provisions of sub-paragraphs (*b*) and (*e*) of this paragraph would cause a Contracting Party serious hardship, it may request the arrangement of a settlement of a different nature under the procedure set out in Article 10 of this Treaty.

(*g*) A member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.

(*h*) Except in so far as sub-paragraph (*e*) of this paragraph applies to claims covered by paragraph 2 of this section, the provisions of this paragraph shall not apply to any claim arising out of or in

connection with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this section does not apply.

6. Where the United Kingdom is the only Contracting Party involved as a sending State in a claim, the following provisions shall apply, in lieu of those set out in sub-paragraphs (*a*) to (*f*) of paragraph 5 of this section:—

(*a*) The claim shall be made to the appropriate District Officer or other officer nominated for the purpose by the Government of the receiving State (hereinafter in this paragraph referred to as the Officer), who shall forthwith notify the appropriate authorities of the sending State.

(*b*) The Officer shall, as expeditiously as possible, make any necessary investigation of the claim and shall forward to the appropriate authorities of the sending State particulars of the claim, together with the results of any such investigation, his recommendations and copies of any experts' reports or other documentary evidence which may have been obtained by him or submitted by the claimant.

(*c*) The appropriate authorities of the sending State shall, as expeditiously as possible and after making any further investigation that they may think necessary, consider the claim, taking into account the results of any investigation made by the Officer, his recommendations and any copies of experts' reports or other documents forwarded by him, and shall then notify the Officer whether they are prepared to pay any compensation in satisfaction of the claim and, if they are so prepared, the amount of such compensation.

(*d*) On receipt of that notification, the Officer shall communicate to the claimant its contents and, where the claimant accepts the amount of any compensation offered, the claim shall be settled by the Officer paying to the claimant the amount of compensation accepted by him, which shall then be reimbursed by the sending State.

(*e*) If a claim is rejected altogether, or if the claimant does not agree to the compensation offered to him, or if, within four months from the date of the submission of the claim no compensation is offered to the claimant, the question whether any compensation is payable or of the amount of such compensation, as the case may be, may be submitted by the claimant or by the Officer or by the appropriate authorities of the sending State to an arbitrator appointed in accordance with sub-paragraph (*b*) of paragraph 2 of this section, whose decision on the question shall be final and conclusive :

Provided that—

(i) the receiving State may at any time elect that the provisions of sub-paragraphs (*a*) to (*f*) of paragraph 5 of this section shall apply in lieu of the provisions of this paragraph, and the provisions of sub-paragraphs (*a*) to (*f*) of paragraph 5 of this section shall apply to claims made after the expiration of four months from the notification of that election to the sending State ;

(ii) the receiving State may at any time thereafter revoke the election aforesaid, and the provisions of this paragraph shall apply to claims made after the expiration of four months from the notification of that revocation to the sending State ;

(iii) the right of election accorded by this proviso may be exercised by the receiving State as many times as that State may think fit ;

(iv) the provisions of this paragraph shall not be interpreted as preventing the authorities of the sending State and the authorities of the receiving State from modifying by agreement the procedure to be applied in particular cases or particular classes of cases.

10. The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of the civil jurisdiction of the courts of the receiving State except to the extent provided in sub-paragraph (*g*) of paragraph 5 of this section."

It should be noted that section 9 of Annex C substantially follows the provisions of Article VIII of the "Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty", signed in London on June 19, 1951; but paragraph 6 of our section 9 is a new provision and does not appear at all in Article VIII of the aforesaid Agreement while paragraphs 5 (*g*) and 10 of our section 9 reproduce *verbatim* paragraphs 5 (*g*) and 9 of Article VIII of the said Agreement.

The respondent's first submission that the Treaty of Establishment has constitutional force was not challenged by the other side and the case was argued on that assumption. As I entertain doubts as to whether the Treaty of Establishment has constitutional force, I wish to make it clear that I am assuming that for the purposes of this appeal, without in any way deciding the matter which I wish to leave open.

Respondent's counsel in submitting that the Treaty of Establishment has constitutional force relied on the provisions of Article 181* of the Constitution which provides that the Treaty of Guarantee and the Treaty of Military Alliance, copies of which are annexed to the Constitution as Annexes I and II, "shall have constitutional force". That article makes no mention whatsoever of the Treaty of Establishment, but counsel argued that by virtue of the provisions of Article III of the Treaty of Guarantee, the provisions of the Treaty of Establishment are deemed to be incorporated into Article 181 of the Constitution which provides that the Treaty of Guarantee and the Treaty of Military Alliance shall have constitutional force. It is true that by virtue of Article 195 the Treaty of Establishment is "operative and binding", but Article 195 does not state expressly that the Treaty of Establishment has constitutional force, and it may be observed that, while the Treaty of Guarantee and the Treaty of Military Alliance are expressly referred to in Article 181, there is no mention in that Article (Art. 181) of the Treaty of Establishment as is the case with Article 195 which expressly refers to all three Treaties.

It may also be argued that if it was the intention of the framers of the Constitution that the Treaty of Establishment should have constitutional force there is no reason why that Treaty should not have been expressly referred to in Article 181 in the same way as it is referred to in Article 195; and one view may be that the Treaty of Establishment is legally binding on the State but **not** on the individual, or that it

* For Article 181 see page 404 of this volume.

may or may not have superior force to any municipal or domestic law other than the Constitution (cf. Articles 179, 195 and 169 (3) of the Cyprus Constitution ; the Constitutions of the United States of America, Article VI (2), and of Ireland, Article 29 (6)).

Be that as it may, as I have already stated, I leave this question open and proceed to consider this case on the assumption that the Treaty of Establishment has constitutional force.

In this case we are concerned with the interpretation of a Treaty and I think that it is necessary to consider the canons of construction applicable to this document. As Lord McNair said in his book entitled " The Law of Treaties " (1961), at page 364, " there is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation. From the time of Grotius onwards, if not before, successive generations of writers and, more recently, of arbitrators and judges, have elaborated rules for the interpretation of treaties, borrowing mainly from the private law of contract. One result of this activity has been to obscure the main task of any tribunal which is asked to apply or construe or interpret a treaty ".

Some jurists have concentrated attention on the decisions of international tribunals to the effect that the function of the tribunal is to ascertain the intentions of the contracting parties ; others have concentrated attention on conflicting pronouncements to the effect that the duty of the tribunal is to give effect to the plain terms of the treaty, unless patent ambiguities or obscurities render a textual interpretation virtually impossible. Others again favour a more dynamic approach and state that the task of the tribunal is to ascertain the object and purpose of the Treaty and then to interpret the treaty so as to give effect to that object or purpose (the " teleological " approach) (see a very interesting article entitled " The principles of Treaty interpretation and their application by the English Courts ", by I. M. Sinclair, Assistant Legal Adviser, Foreign Office, in the " International and Comparative Law Quarterly ", April 1963, vol. 12, Part 2, at page 508).

Sir Gerald Fitzmaurice, having conducted a searching inquiry into the law and procedure of the International Court of Justice during the period 1946–1954 has propounded six principles which are based on the decisions of that Court relating to Treaty interpretation. Those are : the principle

of actuality (or textuality), the principle of the natural and ordinary meaning, the principles of integration, the principle of subsequent effectiveness, the principle of subsequent practice and the principle of contemporaneity. (See (1957) 33 British Year Book of International Law, pages 211–212).

Lor McNair appears to favour a synthesis between the "intentions" and "textual" approach and summarises the position as follows in his book (quoted above), at page 365 ; "In our submission that task can be put in a single sentence ; it can be described as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances*".

As Sinclair says in his article, at page 550, the authorities taken as a whole "would seem to warrant the tentative conclusion that, in this type of case, the English Courts will not interpret the treaty in the light of doctrines peculiar to English law but will attempt to construe the treaty as a whole, taking into account its object and purpose, in an endeavour to give effect to the expressed intentions of the framers of the treaty."

In the present case, however, the argument was based on the assumption that the Treaty of Establishment was an ordinary statute of the Republic and not an international treaty.

Although no reference was made to Article 10 of the Treaty of Establishment, either before us or in the Court below, I think that I ought, for record purposes, to note that that Article provides that any question or difficulty as to the interpretation of the provisions of that Treaty in so far as they affect the status, rights and obligations of the United Kingdom forces, etc., shall ordinarily be settled by negotiation between the authorities concerned, and in case of disagreement, such question or difficulty shall be referred to an *ad hoc* tribunal, composed of representatives of the four Governments concerned, together with an independent chairman nominated by the President of the International Court of Justice. But, as no submission was made to us on this question by either side I shall proceed to consider the points raised before us on appeal without any reference to the aforesaid Article 10.

The second submission of the respondent's counsel was, as aleady stated :—

> "(*b*) that the effect of the provisions of sub-paragraphs (*a*) to (*e*) of paragraph 6 of section 9 was such as

to exclude the jurisdiction of the Courts of the Republic by implication and that, where the tortious act which gave rise to a claim was an act done in the course of official duty, the only way a claimant could proceed was by following the aforesaid provisions of the Treaty of Establishment, that is to say, arbitration and not adjudication in Court."

In support of his submission he stated that paragraph 5 of section 9 of Annex C provided for adjudication before the Courts but that that paragraph was not applicable to this case because the United Kingdom was "the only Contracting Party involved as a sending State" in the present "claim" and, that, consequently, the provisions of paragraph 6 were applicable. Paragraph 6 lays down the machinery which is to be followed in such cases, that is to say, the claimant shall first make his claim to the District Officer for submission to the appropriate authorities of the sending State. And, if the sending State agrees to pay any compensation, then such compensation, if accepted by the claimant, is paid to him by the District Officer and eventually reimbursed by the sending State. But if a claim is rejected altogether, or if the claimant does not agree to the compensation offered to him, etc., the question whether any compensation is payable or what the amount of such compensation, as the case may be, "may be submitted by the claimant or by the Officer or by the appropriate authorities of the sending State to an arbitrator appointed in accordance with sub-paragraph (*b*) of paragraph 2 of this section, whose decision on the question shall be final and conclusive" (paragraph 6 (*e*)).

Counsel went on to argue that as a specific remedy and a machinery is provided in the statute, no other remedy or way of redress is available to the claimant ; that is to say, that the claimant can only proceed by arbitration and the jurisdiction of the Courts of the Republic is ousted. In support of that proposition counsel for the respondent cited the following cases :

*Pasmore and Others* v. *Oswaldtwistle Urban Council* (1898), 67 L.J.Q.B. 365 ;

*Wilkinson* v. *Barking Corporation* (1948) 1 All E.R. 564 ;

*The Municipal Council of Karavas* v. *Kyriakos Tsiomouni*, (1930) 14 C.L.R. 61.

In the *Pasmore case* the Lord Chancellor (Earl of Halsbury) at page 637 said :

> " The principle upon which the question arises that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Rochester* (*Bishop*) v. *Bridges* (1831). He says : ' Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner '. The words which the learned Judge, Lord Tenterden, uses there appear to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are repealed ; you must take your stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper Government department."

It will, therefore, be seen that this decision does not support counsel's submission for the very reason that the statute that is to say the Treaty, does not create the obligation and provide the specified remedy. It is true that the remedy of arbitration is provided in paragraph 6 but the obligation or the right, already existed. It was the common law right to recover damages for negligence codified in the Civil Wrongs Law, Cap. 148 ; and that statute (Cap. 148) gives the right to a person who has suffered injury by the negligence of another to bring an action in the Courts of the Republic to recover the remedies which the Courts have power to grant (see sections 3 and 51 of the Civil Wrongs Law and sections 21 and 22 of the Courts of Justice Law, 1960). Consequently, in this case the '*Pasmore*' case is inapplicable.

The same applies to the *Wilkinson* case. Asquith L.J. at page 567 says :

> " It is, undoubtedly, good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforce-

ment, a party seeking to enforce the rights must resort to this remedy or this tribunal and not to others. As the House of Lords ruled in *Pasmore* v. *Oswaldtwistle Urban Council*, per Earl of Halsbury, L.C. ((1898) A.C. 394) :

> ' The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.' "

It will be seen that the *Wilkinson* case refers to the *Pasmore* case and the same principle is applied. But, in the case under consideration, the Treaty does not create the right. The right already existed and only a specific remedy is provided in respect of claims against the United Kingdom Government as a sending State.

In the *Tsiomouni* case, 14 C.L.R. 61, the same principle was applied and it was held that " the Municipal Councils Law, 1885, created new rights and duties and, therefore, the particular remedies specified in that Law for their enforcement must be followed ".

For these reasons the above three cases are distinguishable from the case under consideration.

I think that the following extract from the judgment of Willes J. in *Wolverhampton New Waterworks* Co. v. *Hawkesford* (1859) 6 C.B. (N.S.) 336, 356, summarises the principle with regard to *ouster of the jurisdiction of the Courts* :—

> " There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law : there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides no particular form of remedy ; there the party can proceed by action at common law. But there is a third class viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class."

If the submission of respondent's counsel were accepted, the result will be that the decision of the arbitrator " shall be final and conclusive " and the jurisdiction of the Courts of the Republic ousted. This would be contrary to the express provisions of Article 30 (1) of the Constitution which provides that " No person shall be denied access to the court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional courts under any name whatsoever is prohibited ". The general rule undoubtedly is that the *jurisdiction of the Court is not* taken away except by *express words or necessary implication* (Albon *v. Pyke* (1842), 4 Man. & G. 421, at p. 424, Tindal, C.J.; *Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485, at page 500 ; *Jacobs* v. *Brett* (1875), L.R. 20 Eq. 1, at pages 6–7 ; and *Goldsack* v. *Shore* (1950) 1 K.B. 708 at page 712, per Evershed M.R.).

It should be also be observed that paragraph 6 (*e*) provides that the claim " may " be submitted by the claimant, etc., to an arbitrator, and it may well be that the provision is permissive and not mandatory.

Finally, the opening words of paragraph 6 refer expressly to a case " where the United Kingdom is the only Contracting Party involved as a sending State in a claim ". I take these words to refer to a claim against the United Kingdom Government and not against individual members of U.K. Forces. In this case, the claim is not a claim against the United Kingdom Government as a sending State, but against an individual member of the United Kingdom Forces *personally* ; and, according to the provisions of paragraph 10 of the same section, the only immunity from the jurisdiction of the Courts of the receiving State that can be claimed for members of a force in respect of the civil jurisdiction of the Courts of the receiving State, is that provided in sub-paragraph (*g*) of paragraph 5, which, as I read it, applies also to paragraph 6, because only sub-paragraphs (*a*) to (*f*) of paragraph 5 are replaced by sub-paragraphs (*a*) to (*e*) of paragraph 6 ; and the very wording of paragraph 5 (*g*) shows that the only immunity that a member of a force has is in respect of " any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties ", and nothing else.

If it were the intention of the framers of the Treaty that the arbitrator envisaged under the provisions of paragraph 6 (*e*), should have exclusive jurisdiction, that paragraph should have been differently worded as in the case of criminal proceedings under section 8, paragraph 2 (*a*)

in the same Annex C, which provides that the service authorities of the sending State shall have the right to exercise "exclusive jurisdiction" in criminal matters over certain persons who are subject to the jurisdiction of its service Courts. See also paragraph 2 (*b*) of section 8.

To sum up, the construction I place on paragraph 6 of section 9, is that an injured person is not precluded from instituting civil proceedings against a member of the United Kingdom Forces personally in respect of a tortious act committed on official duty; that the jurisdiction of the Courts of the Republic to hear the case and give judgment against such member of the United Kingdom Forces personally, but not against the United Kingdom Government, is not ousted; but that under the provisions of paragraph 5 (*g*) such judgment given against a member of the Forces cannot be enforced against him in Cyprus.

Counsel for the respondent has also sought to argue that the expression "proceedings for the enforcement of any judgment" in paragraph 5 (*g*) means the institution of an action, *i.e.* the issue of the writ of summons and the hearing of the action, but his arguments, though most attractively presented, have not convinced me that that is so.

Before concluding my judgment I would like to say a few words as regards the question whether or not the rules of International Law are applicable to the present case. In determining this matter it should be borne in mind that the only question before the Court in this case (which was argued before us) was whether, on the assumption that the Treaty of Establishment has constitutional force, the provisions of paragraph 6 of section 9 of Annex C oust the jurisdiction of the District Court by necessary implication.

The question whether by virtue of the rules of International Law a member of the United Kingdom forces has jurisdictional immunity in Cyprus was not relied upon by the respondent (a member of the United Kingdom forces) nor was the case argued before us on that basis, and I would, therefore, express no opinion on that. If the case were argued on that basis I apprehend that the following matters might, *inter alia*, arise for consideration:

1. Having regard to the written Constitution of Cyprus, do the rules of customary International Law (as opposed to conventional International Law) form an integral part of the municipal or domestic law of Cyprus? (Cf. the Constitutions of the Federal Republic of Germany (Article 25), of Austria (Article 9), of Italy (Article 10), of Ireland (Article 29 (3)) and the English constitutional tradition.

2. If they do, do such rules of customary International Law have superior force to the constitution or the laws of the Republic ?

3. It does not seem that the view as to the jurisdictional immunity of armed forces, expressed in *Oppenheim's* International Law, 8th ed. (1955), at page 847, (the opening words in paragraph 445) has universal support, because it is therein stated (at pages 848–9) that " the view which has the support of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle would require specific agreement of the local State by treaty or otherwise ". It is also stated that when in 1942 Great Britain conferred upon the military tribunals of the United States exclusive jurisdiction with regard to offences committed by members of the United States forces stationed in Great Britain, she made a concession going beyond the accepted rule of International Law in the matter (page 849).

Finally, the Agreement between the Parties to the North Atlantic Treaty, dated June 19, 1951, recognised the general jurisdiction of the receiving State ; and " by way of exception, the Agreement permits the jurisdiction of the sending State over the members of its armed forces (in relation to offences) which are directed solely against the property or security of that State or solely against the person or property of another member of its forces or which arise out of any act or omission done in the performance of a legal duty " (p. 849). In fact, the framers of section 9 of Annex C of the Cyprus Treaty of Establishment followed closely the provisions of this Agreement of 1951 but, as already stated, paragraph 6 of that section is a new provision and does not appear at all in Article VIII of the aforesaid Agreement, while paragraphs 5 (*g*) and 10 of our section 9 reproduce verbatim paragraphs 5 (*g*) and (9) of Article VIII of the said Agreement.

In order to give statutory effect to the Agreement of 1951 in England the Visiting Forces Act, 1952, was enacted incorporating, *inter alia*, the provisions of this Agreement. (See *Oppenheim* at page 849 and Halsbury's Laws of England, 3rd ed. vol. 33 at page 898, paragraph 1507). This Act imposes restrictions on the jurisdiction of the English Courts in criminal matters and grants power to the appropriate service authorities and confers jurisdiction on their Courts in relation to members of a visiting force. It also contains special provisions as to the making of arrangements for the settlement of claims against visiting forces by payments to

be made by the Minister of Defence of such amounts " as may be adjudged by any United Kingdom Court or as may be agreed between the claimant and the said Minister . . " (Section 9 of the Act). It will be observed that the English Act does not impose any restriction on the civil jurisdiction of the English Courts. In Cyprus no law has been passed by the House of Representatives regarding any of the provisions of Annex C to the Treaty of Establishment.

4. Does the view expressed in Oppenheim (at page 847, para. 445) as to the jurisdictional immunity of armed forces apply to claims in civil actions against soldiers on duty? It would seem that English Courts assume jurisdiction in civil actions for negligence against members of visiting armed forces while on duty in England. In *Merlihan* v. *A.C. Pope Ltd., and J.W. Hibbert Pagnello (Third Party)* (1946) 1 K.B. 166, it was held that a member of the Canadian Armed Forces on duty would have been liable in a negligence action for damages but for the protection afforded by section 21 (1) of the Limitation Act 1939 : See also *Reeves* v. *Deane-Freeman* (1952) 2 All E.R. 506, Lord Goddard, C.J., at page 507 ; affirmed on appeal (1953) 1 All E.R. 461.

5. In England, where the private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the previous or subsequent consent of Parliament is in all cases required to render the treaty binding upon the subject and enforceable (see Halsbury's Laws of England, 3rd edition, volume 7, page 288 paragraph 607). Lord McNair in his book entitled " The Law of Treaties " (1961) states the proposition that treaties entailing for their execution and application in the United Kingdom a change in or addition to the law administered in the Courts require parliamentary sanction for their municipal execution and application which must be given in the form of a statute (page 83). The classic authority for this proposition is the judgment of Sir Robert Phillimore in *The Parlement Belge* (1879) 4 P.D. 129 at page 154. See also *Attorney-General for Canada* v. *Attorney-General for Ontario* (1937) A.C. 326, per Lord Atkin at page 347 (P.C.) ; and *The Republic of Italy* v. *Hambros Bank, Ltd.* (1950) Ch. 314. During and after the Second World War the United Kingdom became a party to a number of Conventions whereby *jurisdiction* in varying degree was conferred upon allied and associated States in respect of their armed forces who were or are on United Kingdom territory. All or most of these Conventions required

legislation (See McNair " Law of Treaties ", page 87, and McNair " International Law Opinions ", volume 1, pages 72–4).

However, as these questions were not raised before us I do not consider it necessary for the purposes of this appeal to express any opinion.

In the result, for the reasons stated earlier in this judgment, I would allow the appeal and set aside the order of the District Court.

WILSON, P. : *In the result the appeal is dismissed with costs.*

Article 181 of the Constitution (referred to at page 394 of this volume) reads as follows :

> " The Treaty guaranteeing the independence, territorial integrity and Constitution of the Republic concluded between the Republic, the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland, and the Treaty of Military Alliance concluded between the Republic, the Kingdom of Greece and the Republic of Turkey, copies of which are annexed to this Constitution as Annexes I and II, shall have constitutional force."

*Appeal dismissed with costs.*