1978 January 23, 24, March 31

[HADJIANASTASSIOU, J.]

KATARINA SHIPPING INC.,

Plaintiffs,

v.

THE CARGO NOW ON BOARD THE SHIP "POLY"

Defendants.

(*Admiralty Action No.* 232/77).

Civil Procedure—Judgment—Accidental omission or slip by Judge—Correction—Drawn up order—Accidental omission or slip by Registrar—Correction in order to bring it into harmony with the judgment pronounced by the Court—Slip rule—Rule 6 *of Order* 25 *of the Civil Procedure Rules.*

Civil Procedure—Appeal—Stay of execution pending appeal—Discretion of Court—Principles applicable.

Admiralty—Bill of lading.

On August 23, 1977, upon an *ex parte* application by the plaintiffs in this action, the Court issued a warrant of arrest of the defendant cargo. This warrant was set aside on December 12, 1977 when the Court made a *consent* order for the release of the said cargo. When the Registrar of the Court drew up the said consent order by a clerical mistake or error erroneously stated therein that the costs to be incurred by virtue of the warrant of arrest of the cargo in this action should be paid by the plaintiffs. He, further, omitted to include in the drawn up order the following part of the consent order:

> "On filing with the Registrar of the Court the amount of U.S. $ 50,000 or its equivalent in Cyprus pounds, Registrar to inform the Marshal, subject to his payment of his fees, to release all the cargo".

The record of the Court taken on December 12, 1977 referred to Action No. 232/77 and to another Action (No. 235/77) but through an accidental omission or slip on the part of

the Judge the number and title of the first action was not inserted therein.

The plaintiffs appealed against the consent order and by means of an application, filed on January 11, 1978, applied for an order for stay of execution until the final determination of the appeal.

On the other hand the defendants by means of an application, filed on January 13, 1978, applied for an amendment of the "drawn up order made on the 12th December, 1977".

On March 24, 1978, the Court issued written directions to the Marshal with a view to expediting and safely unloading or releasing and/or discharging the said cargo from the ship. Immediately after these directions were made an appeal was filed against them by the plaintiffs and was followed by an *ex parte* application for stay of execution pending the determination of the appeal.

Regarding the application for the stay of execution of the consent order made on December 12, 1977, counsel for the applicants contended that arrangements were made for the immediate unloading of the cargo from the ship and loading same on another ship and that as the drawn up order was different from the Judge's notes on the question as to which of the parties is bound to pay the expenses of unloading and warehousing and on the question as to which part of the cargo was covered by the order, if execution of the order under appeal were not stayed it was obvious that the appeal lodged would be nugatory.

Held, (I) with regard to the application for amendment of the drawn up order:

(1) That an application to correct a drawn up order ought to have been made to the Court of first instance or the Judge having jurisdiction to correct the drawn up order, though passed and entered, if it does not express what the Court intended.

(2) That the Court has jurisdiction over its own records and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then it will in a proper case exercise jurisdiction

to correct its own record, that it may be in accordance with the order really pronounced, or in order to bring it into harmony with the order which the Judge obviously meant to pronounce.

(3) That the correction ought to be made upon a motion to that effect, and is not a matter either for rehearing or for appeal (See *Hatton* v. *Harris* [1892] A.C. 547).

(4) That even though the requirements of the slip rule (rule 6 of Order 25 of the Civil Procedure Rules) are satisfied, there is, nevertheless, a discretion in the Court to allow or to refuse an order for amendment if something has intervened which would render it inexpedient or inequitable to do so.

(5) That this Court has reached the conclusion that the requirements for acting under the slip rule are satisfied and that once it was a mere accidental omission made by the Registrar or any other ministerial officer in drawing up the order and not an omission made by the Court itself, that the said part of the consent order was not inserted, the correction should be made.

(6) That the statement in the drawn up order that all expenses in connection with the cargo's arrest should be paid by the plaintiffs is an accidental slip and rule 6 comes into operation.

(7) That as the applicants lost no time in making their application under the slip rule and because there are factors in favour of making the order under the slip rule—once the amount of U.S. $ 50,000 in the form of a guarantee is in the hands of the Registrar—this Court has decided, in exercising its discretion, once nothing has intervened which would render it inexpedient or inequitable to do so, and once there is no reason why it should not exercise its inherent jurisdiction, to correct the drawn up order which the Registrar has issued in order to bring it into harmony with the order which obviously it has pronounced (See *Hatton* v. *Harris* (*supra*).

(8) That as the non-inclusion of the number of action No. 232/77 and its title in the record of the Court taken on December 12, 1977 was due to a mere accidental omission or slip on the part of the Court, this Court has decided to correct

the record of the Court by adding also the number of Action 232/77 and its title in order to set right the mistake in not inserting it earlier.

Held, (II) with regard to the application for stay of execution of the order made on December 12, 1977:

(1) That the Court has a discretion to grant or refuse a stay; that though when a party is appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory (see *Wilson* v. *Church* (*No.* 2) [1879] 12 Ch. D. 454 at pp. 458–459) the very reason for which the parties have moved this Court for an order to release the whole cargo was to avoid the payment of costs and other expenses which were rapidly mounting day after day by keeping same in the warehouses and in open spaces.

(2) That to grant a stay of execution at a time when the plaintiffs were fully aware that arrangements were made for the immediate unloading of the cargo from their ship and loading same on another ship in order to carry it to its proper destination to the distant country of Nigeria, would indeed defeat the very purpose for which the order was made, and would quite naturally increase the losses of the cargo owners who will have to meet all the expenses of keeping it in Cyprus or of sending it away until the appeal is concluded; and that that delay would undoubtedly cause further losses and expenses (see the observations made in *The Siskina* [1977] 3 All E.R. 803 at pp. 806, 807, 809).

(3) That looking at this matter in the view of men of business, it would serve no beneficial purpose to anyone, either the cargo owners or the ship owning company, in keeping the cargo in Cyprus, once the order was made by consent, the ship owning company being fully aware that they had a claim for lien on the cargo only, and that by agreeing to release the said cargo for the amount of $ 50,000 security, in effect, they may have been abandoning that right; and that, accordingly, in the special circumstances of this case, a stay of execution will be refused.

Held, (III) with regard to the application for stay of execution of the order made on March 24, 1978:

That in issuing the directions to the Marshal it was certainly intended to do justice to all those people who for a long time

are expecting to have the goods in their hands; that once the ship owner has not fulfilled his obligation to carry the goods it was necessary for this Court to issue the said directions in order to save further undue delay to the owners; that since one set of bills of lading was issued by the master of the ship, if the said cargo was delivered to various people and not to the true owners the ship owning company would not be facing actions for damages from third persons (see *Barber* v. *Meyerstein* [1869–70] L.R. 4 (H.L.) E. & I. App. 317); and that, accordingly, the stay will be refused because this Court is of the view that had it really exercised its discretion to order a stay at this very late stage, it would have been contrary to justice having regard to all the circumstances of this case.

Application for amendment of drawn up order granted; applications for stay of execution refused.

Cases referred to:

Thynne v. *Thynne* [1955] P. 272;

Pearlman (Veneers) S.A. (Pty.) v. *Bernhard Bartels* [1954] 1 W.L.R. 1457;

In re City Housing Trust [1942] Ch. 262;

In re Swire Mellor v. *Swire* [1885] 30 Ch. D. 239 at pp. 242, 243, 246, 247;

Hatton v. *Harris* [1892] A.C. 547 at pp. 558, 560;

Lawrie v. *Lees* [1881] 7 App. Cas. 19 at pp. 34–35;

Oxley and Others v. *Link* [1914] 2 K.B. 734 at p. 741;

Moore v. *Buchanan* [1967] 3 All E.R. 273;

Milson v. *Carter* [1893] A.C. 638 (P.C.) at p. 640;

In Re Inchcape. Craigmyle v. *Inchape* [1942] 2 All E.R. 157 at p. 160;

Tak Ming Co. Ltd. u. Yee Sang Metal Supplies Co. [1973] 1 All E.R. 569 (P.C.) at p. 575;

R. v. *Michael* [1976] 1 All E.R. 629 at p. 633;

Orphanides v. *Michaelides* (1968) 1 C.L.R. 295 at p. 303;

The Annot Lyle [1886] 11 P. 114 at pp. 115–116;

*Wilson*v. *Church* (*No.* 2) [1879] 12 Ch. D. 454 at pp. 458, 459;

Erinford Properties Ltd., v. *Cheshire County Council* [1974] 2 All E.R. 448 at p. 454;

Grade One Shipping Ltd. v. *The Cargo on board the Ship "CRIOS II"* (1977) 11 J.S.C. 1760 (to be reported in (1976) 1 C.L.R.);

The Siskina [1977] 3 All E.R. 803 at pp. 806, 807, 809;

Barber v. *Meyerstein* [1869-70] L.R.4 H.L. E. & I., App. 317.

Application.

Application by defendants for the amendment of the drawn up order, made on the 12th December, 1977, relating to the release of the whole cargo, on board and ex the ship 'Poly', from the arrest effected by virtue of a warrant of arrest issued by this Court on the 23rd August, 1977, and applications by plaintiffs for the stay of execution of the above order and of an order giving directions to the Marshal, regarding the discharge of the cargo, pending the final determination of the appeals against the said orders.

P. Ioannides, for the plaintiffs, in the first two applications.

C. Erotokritou, for the defendants in the first two applications.

T. Papadopoullos, for the plaintiffs in the last (*ex-parte*) application.

Cur. adv. vult.

1978, January 23.

HADJIANASTASSIOU J. read the following judgment. In this application dated 13th January, 1978, the applicants-defendants, the cargo on board the ship Poly, claimed (a) amendment by the Court of the drawn up order made on the 12th December, 1977, in respect of the release of the whole cargo on board and ex the ship Poly from the arrest effected by virtue of the warrant of arrest dated 23rd August, 1977; and (b) any other order that the Court may deem fit.

The facts in support of that application are contained in the affidavit sworn by Mr. Ioannis P. Erotokritou of Nicosia, dated 13th January, 1978. The application was based on the Civil Procedure Rules, 0.25 r.6, and 0.48; the Courts of Justice Law 14 of 1960; the Cyprus Admiralty Jurisdiction Order 1893 rules 60, 62, 63, 64, 203, 207, 211, and 237; and on the general practice of the Admiralty Division of the High Court of Justice in England, the practice and inherent powers of the Supreme Court of Cyprus in its Admiralty Jurisdiction.

It will be convenient I think, first to trace the sequence of events, then to refer to the relevant procedural provisions and to consider the questions raised in this application.

In the present case, the ship owning company, Katarina Shipping Corporation, in an action dated 23rd August, 1977, against the defendant cargo, claimed *inter alia* (a) a declaration of the Court that the plaintiffs were entitled to a lien against the cargo now on board the SS Poly in accordance with the terms of the charter party dated 19th May, 1977, and the booking note dated 20th May, 1977, and the bills of lading; (b) ..... (c) an amount of US $458,790, freight due to the ship SS Poly by the cargo on board the ship by virtue of the booking note dated the 20th May, 1977, and/or by virtue of the bills of lading.

On the same date, the plaintiffs applied (a) for a warrant of arrest of the cargo on board the SS Poly lying in the port of Limassol; (b) an order directing the Marshal of the Court to arrange for the removal of the cargo under arrest to a place of storage under his safe custody; and (c) an order directing that the costs and expenses to be incurred to be a first charge on the cargo pending the release of the cargo or its sale.

On August 23, 1977, the Court issued a warrant of arrest of the cargo laden on board the ship SS Poly and the applicant-plaintiffs were ordered to file a security bond in the sum of £10,000, to be answerable in damages to the charterers or owners of the cargo, as the case may be, against whom the claim was made.

As was expected, the owners of the cargo in question filed an opposition and on September 15, 1977, I have made the following statement recorded in Admiralty Actions Nos. 232/77 and 235/77 for the attention of counsel. In the meantime, the ship was also arrested by order of the Court, and I read:-

> "I have given instructions to the Registrar of this Court to get in touch with you because unfortunately, when the case was adjourned, we could not find an additional date for further hearing. Having in mind the difficulties which this will entail to the parties and having already drawn the attention of counsel during the hearing of showing cause, to the observations made in the St. Eleftherio, Schwarz & Co. (*Grain Ltd.* v. *St. Eleftherio ex Arion* (Owners), [1957]

2 All E.R. 374 at pp. 377 and 378), I have decided to issue further directions to the Marshal to the effect that if the respondents-defendants in the first application will enter into a bail of the amount which will satisfy the Registrar of this Court in the particular circumstances of each case, then the goods will be released to the owners of the cargo. This direction applies also to the owners of the ship in the second application."

Then, counsel appearing for the owners of the cargo, informed Mr. Vasiliou, counsel for the applicant-plaintiff that they were prepared to have a Lloyd's agent to submit a valuation of the goods in question which they should identify themselves. Furthermore, counsel applied for directions as to the costs and expenses until that date, *i.e.* the discharging expenses, transport expenses, storage insurance, and other expenses which have occurred, no doubt with a view to considering the position as to how much the unloading and other expenses had cost because of the warrant of arrest of the cargo, in order, as he put it, to consider whether his side would decide to file bail or not for the release of the cargo arrested. In spite of the fact that Mr. Vasiliou promised to consult Mr. Mylonas, his senior, nevertheless, nothing has materialized until the 12th December, 1977. When the hearing of the application for the warrant of arrest of the cargo was concluded, and because it was closely connected with Action No. 235/77, I thought it expedient to reserve judgment and deliver both on the same date.

With this in mind, and when the hearing of the second application was taking place, on December 12, the same counsel who appeared during the hearing of both actions 232/77 and 235/77, came before me with a view to finding a new date for the continuation of the application to show cause against the warrant of arrest of the ship Poly. On that date, because of the late hour, and when I did not have the services of a stenographer, I took down a statement made by counsel and which finally became the subject of the present proceedings.

The record of the Court under the heading "Judge's Notes" shows that counsel appearing on behalf of the cargo was worried because the Registrar of the Court was unable to fix a date for the completion of the hearing of the application for the warrant

of arrest of the ship. Having been told, he said, that there was a possibility that the next sitting of this Court to complete the said application was possibly the 9th January, 1978, he discussed the question with counsel concerned with regard to the possibility of releasing the cargo after giving a satisfactory amount of bail. An agreement was reached and the Court ordered the release of the cargo. In due course, I shall quote from those notes more extensively.

In order to complete the history of these proceedings, I think that I should have said that although both Mr. Mylonas and Mr. Vasiliou were aware that because of the agreement reached for the release of the whole cargo and also that counsel on behalf of the cargo owners was negotiating to engage another ship (not the Poly) in order to load the cargo and take it to its destination in Nigeria, surprisingly enough, an application was made by a different counsel to this Court. What was the application? The application was an *ex parte* one, dated 10th January, 1978, for an order for the stay of execution of the order dated 12th December, 1977, issued in action No. 232/77 until the final determination of the application by summons which was filed also on the same date. In the meantime, before that application was made, an amount of $ 50,000 or its equivalent in Cyprus pounds was lodged with the Registrar in the form of a bank guarantee. That application was supported by the affiant, Mr. Michael Vasiliou, one of the lawyers of the Katarina Shipping Inc., the plaintiff company.

Having read the affidavit, I refused to stay the execution of the order made by consent and an appeal was lodged immediately to the Supreme Court. On January 11, 1978, the President of the Court dealt with Civil Appeal No. 5783, which was finally withdrawn by counsel, and a new application was made to this Court for the stay of the execution of the order until the final determination of the Civil Appeal No. 5783. I have dealt with that new application and I shall be delivering judgment on the same date as this application.

Reverting now once again to the facts of the present application, it appears that the affiant stated that on 12th December, 1977, a consent order was made by this Court for the release of all the cargo on board which was put under arrest pursuant to a warrant of arrest dated 23rd August, 1977. By a clerical

mistake in the drawn up order, and/or in the record, or errors arising therein from an accidental slip or omission, the said order, the affiant added, did not carry its own meaning and the meaning thereof is not plain. Furthermore, the affiant stated that Action No. 235/77, which was closely connected with these proceedings, was for damages for breach of contract and/or breach of duty and/or negligence to carry goods to their destination, and in the said action (as already stated by this Court) the ship Poly was put under arrest.

The affiant makes it quite clear that the said order in Action 232/77, by a clerical mistake and/or error and/or accidental slip, and/or omission and/or inadvertence was embodied in Admiralty Action No. 235/77.

Finally, the affiant stated that the error or omission is definitely an error in expressing the manifest intention of the Court as well as of the parties and it was obvious from the record and the Judge's Notes and, therefore, in order that the meaning and intention of the Court would be carried out, it was necessary and expedient for the Court to correct the Order and/or record in the appropriate action and bring same into harmony with the order which the Judge obviously meant to make and the parties agreed to, on the 12th December, 1977.

On the contrary, counsel for the ship owning company opposed the application and in accordance with the affidavit of Mr. Michael Vasiliou dated 16th January, 1978, he stated on oath that he was aware of the facts of Action No. 232/77 because he was the lawyer of the plaintiffs; and once he was handling the said case in the light of instructions which he has received from the ship owning company and from the documents which he has in his possession; and because he was authorized to make that statement.

It appears from this affidavit that the affiant, having read the affidavit of Mr. Ioannis Erotokritou, made what I describe his first objection on a point of law—which has nothing to do with the facts—and alleged that the application of the applicants could not proceed once (a) the Court has no jurisdiction to deal with the said application in view of the fact that the plaintiffs (the ship owning company) have filed an appeal (Civil Appeal 5783) against the order of the Court which is connected with the application of the defendants. The said appeal is still

pending before the Court of Appeal and the whole drawn up order is attacked.

The affiant then goes on that because the appeal was still pending, the Court of first instance could not grant the remedy applied for in this application or indeed could not interfere with regard to the said order because, *inter alia*, that would have amounted to an interference in the jurisdiction of the Court of Appeal, and/or it would prejudice the decision of the Court of Appeal and/or that it would deprive the plaintiffs of their right to appeal and/or argue the grounds of the appeal before the said Court. Then, in para. 5, the affiant stated that the applicants-defendants, having received and brought to the knowledge of the third interested parties copies of the drawn up order, they are now proceeding with the execution of that order, and that when they were served with the notice of appeal, they filed the present application. Furthermore, he stated that the applicants-defendants were not entitled to the remedy applied for.

The affiant, in dealing with the affidavit of Mr. Erotokritou, said that with regard to paragraph 2 of that affidavit, the order referred to was not issued in Action 232/77, but in Action 235/77, a fact which is shown from the Judge's Notes. There were a number of other statements made, but, as I said earlier, some of those statements were relating to the legal issues.

In England, with regard to amendment and setting aside judgments or orders, the position appears to be that "Until a judgment or order has been entered or drawn up, there is inherent in every Court the power to withdraw alter or modify it, either on the application of one of the parties or on the initiative of the Judge himself. In the meantime, it is provisionally effective and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced ....." But after Judgment or Order drawn up, "As a general rule, except by way of appeal, no Court, Judge, or master has power to rehear, review, alter, or vary any judgment or order after it has been entered or drawn up, respectively, either in an application made in the original action or matter, or in a fresh action brought to review such judgment or order. The object of the rule is to bring litigation to finality, but it is subject to

a number of exceptions". (See 22 Halsbury's Laws of England, 3rd edn., at p. 784, paras. 1664 and 1665 and the cases quoted in the footnotes).

In Cyprus, the amendment of judgments and orders is regulated by Order 25 rule 6, which says that:-

> "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on application without an appeal."

This rule, I may add, was taken from the English Rules of the Supreme Court, 0.28 r.11, and the position now is that the prevailing rule, as it appears from the Supreme Court Practice, 1976(1) is 0.20 r.11 and that latter rule was taken from R.S.C. 8 (Rev.) 1962, 0.20, r.11 which again had been taken from the former 0.28, r.11.

It appears further that rule 6 and indeed the English rule 11 applies only in cases where there is a clerical mistake in a judgment or Order or an error arising from an accidental slip or omission. I would also add that apart from rule 6, the Court has an inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain. See *Thynne* v. *Thynne* [1955] P. 272, C.A.; *Pearlman (Veneers) S.A. (Pty.)* v. *Bernhard Bartels*, [1954] 1 W.L.R. 1457; *In re City Housing Trust*, [1942] Ch. 262.

Before dealing with the submissions of counsel, it is necessary to quote two extracts from the "Judge's Notes" (as described) to show what was the background with regard to the agreement reached for the release of the whole cargo laden on the vessel Poly and of the rest of the cargo which was unloaded earlier under an order of this Court dated 23rd August, 1977, and which was kept in private warehouses and/or was deposited in an open space. Mr. Erotokritou, is recorded in addressing the Court as follows:-

> "My colleagues and I, with the help of the Court, have discussed the problem of the cargo and of the possibility of releasing the cargo after giving a satisfactory amount of bail in order to save further expenses and costs for everyone interested in this cargo. In view of your observations, Your Honour, during the hearing of the appli-

cations, and particularly of the Ruling made that the Marshal was empowered to release either part or the whole of the cargo, I have informed my learned colleagues that I am ready to provide satisfactory security, taking into consideration even the stand of the other side that, an amount of freight has been paid, for the release of all the cargo, *viz.*, the one still remaining laden on the vessel Poly and the rest which has been stored in private stores or the part of the cargo which remained stored in open space.

I am aware of course, of the objections of the other side about the amount I have offered earlier, but having regard to Your Honour's intervention, I have decided to increase the amount. I am prepared, therefore, to put an extra security of the amount of US $ 50,000 over and above the amount of $ 10,000 already deposited in Court."

Pausing here for a moment, with respect to any other view, there cannot be any doubt, particularly in the light of the previous order of this Court dated 23.8.77, that that statement refers to the release of all the cargo concerned, that which was still loaded on the said ship and that which was unloaded. Then Mr. Mylonas who appeared and argued the case in Case No. 232/77 made this statement:-

"In view of the discussions we have had with my learned colleagues and particularly with your Honour's help, I have decided, in view of all the difficulties and the delay because of not being able to complete both cases due to the difficulty of finding continuous dates, to accept a bank guarantee for the amount of US $ 50,000 within a period of two weeks to enable my colleagues to forward that amount for security."

Pausing once again here, it appears that counsel knew exactly what he was saying and what he was deciding when he agreed to accept the guarantee offered by his colleague for the release of the whole cargo. He knew because this Court, on a number of occasions made observations and issued directions to the Marshal, (as it appears from the record quoted earlier in this judgment). He also knew from the language of the Court used during the hearing of the two applications and that therefore his stand was consistent with his decision in accepting the

bail for the release of the whole cargo in order to minimize the losses of both the ship owning company and indeed of the cargo owners, whose cargo, instead of reaching its proper destination, was stranded in Cyprus, with which the ship owning company or the charterers had no business to be here at all. See the observations of Lord Denning, M.R. in the *Siskina* [1977] 3 All E.R. 803 at pp. 806, 807, 808. Indeed, this was the reason I praised the stand of both counsel because of past experience, and I had this to say:-

> "There cannot be any doubt that counsel in reaching that decision, they have acted in the interest of their clients, because of the expenses in keeping the cargo in bonded warehouses and also of other expenses incurred by the owners of the cargo, and finally, of minimizing damages. In any event, once I have indicated earlier in my ruling that such a course was warranted by the nature of this action, having in mind the observations in the *St. Eleftherio* (*supra*), I would reiterate that the agreement reached is the correct one. The Marshal, therefore, is directed to release all the cargo still laden on board the ship Poly, and all the rest of the cargo, subject to the payment of expenses for the unloading of the cargo, hiring of the stores etc. On filing with the Registrar of the Court the amount of US $ 50,000 or its equivalent in Cyprus pounds, Registrar to inform the Marshal—subject to the payment of his fees—to release all the cargo."

It is true, of course, that the notes I have taken in recording the statements and the agreement reached for the release of the whole cargo, were taken in my own handwriting and were signed by me. It should be further added that the notes which were taken in my handwriting were handed over to my secretary and to the Registrar of the Court in order to be typed, but except from the words "appearances as before" and the date, the title of the case was not included in my handwritten notes. Be that as it may, it is clearly correct that when the notes were put on stencil I signed them, erroneously, without noticing the title.

Turning now to the "drawn up order" which has been attacked by counsel on behalf of the ship owning company I have to make these observations. As I have already stated earlier this

Court accompanied by Registrar visited in the presence of Mr. Erotokritou and Mr. Mylona the port of Limassol with a view to solving some of the problems relating or connected with the expenses of unloading part of the cargo and also regarding the expenses of transporting and keeping the said cargo in private warehouses.

As it appears also from the Judges' notes, the reason why those expenses were necessary, was because counsel on behalf of the cargo undertook to pay in accordance with an earlier order of the Court, those costs and expenses being a charge on the whole of the cargo. It was, therefore, correct in my view, that the Registrar or his assistant, having realized or understood that the true meaning of the consent order was for the release of the whole cargo, connected it only with Action No. 232/77. That this is so finds further support from the record and/or from further directions issued to the Marshal on the 15th September, 1977. That record shows clearly that the directions were applicable to both actions, 232/77 and 235/77.

It is equally true, of course, that when the ministerial officer or someone under his instructions, in drawing up the order complained of, dated 12th December, 1977, by a clerical mistake or error arising from an accidental slip or omission, erroneously refers that the costs to be incurred by virtue of the warrant of the arrest of the cargo in Action No. 232/77 should be paid by the plaintiffs. But there is a further omission, because erroneously for the same reasons again, the said order omits to refer to the fact that the Marshal would release the cargo only on being informed by the Registrar that the cargo owners had filed a security in the amount of US $ 50,000 or its equivalent in Cyprus pounds.

This was the part from the drawn up order complained of:-

> "Now, you are hereby commanded to release the said cargo on board the ship "POLY" from the arrest effected by virtue of the warrant of this Court in this action subject to payment of the expenses, if any, incurred in connection with the cargo's arrest. Such costs to be paid by plaintiffs directly, or in the case of dispute through the Registrar of the Supreme Court."

I think I should have added that this drawn up order was never signed by me.

Turning now to the order made to the Marshal, in the consent order dated 12th December, 1977, this was the part which was accidentally omitted from the drawn up order:

> "On filing with the Registrar of the Court the amount of US $ 50,000 or its equivalent in Cyprus pounds, Registrar to inform the Marshal, subject to his payment of his fees, to release all the cargo."

Having heard the contentions of both counsel, and particularly the contentions of counsel for the ship owning company (a) that this application does not come within the said rule 6 of the Civil Procedure Rules; and (b) that in any event once an appeal was made against the whole of the order, this Court had no jurisdiction to amend the order complained of, I turn now to consider the question whether both under the "slip rule" and under the "inherent power", this Court should exercise its discretionary power to order an amendment to rectify both the drawn up order itself and the record of the Court in such a way as to carry the intention of the Court, once the requirements for acting were satisfied.

As I said earlier, the Court has also an inherent jurisdiction to amend or rectify the drawn up order and its own records so that it may be in accordance with the order really pronounced; and to carry the intentions of the Court. What were those intentions appear clearly in the order of the Court.

I think the first case which clearly laid down this principle was *In re Swire. Mellor* v. *Swire* [1885] 30 Ch. D.239. Cotton, L.J. delivering the first judgment of the Court of Appeal said at pp. 242-243:-

> "This is an application of a somewhat unusual nature—a motion to vary an order after it has been passed and entered. The regular course is this, that when an order is settled any party who desires to object to the terms of it as settled should intimate to the Registrar that he intends to give a notice of motion to vary the order. He must state what variation he desires, and then he must move the Court, at the risk of costs, to have that variation made. It is the duty of the Registrar at once to pass and enter the order when settled, unless some of the parties state that they intend to move to vary it. It would cause great delay in

the Registrar's office if any one, by simply saying, 'I object to that form of order,' without giving any notice to vary it, could prevent the Registrar from going on to pass and enter it. But although that is the regular course, and it is only in special circumstances that the Court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced."

Lindley, L.J. delivering a separate judgment said at p. 246:

"This case has raised a discussion of some importance, because it was contended that when once the order of the Court was passed and entered it could not be put right, even although as drawn it did not express the order as intended to be made. I protest against any such notion. There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal. According to the old practice there was no difficulty, because the ordinary practice in the Chancery Division was, that after a decree or order had been passed and entered, any error could be put right by an application to rehear, unless the order had been inrolled. After inrolment the Court had no power over its decree. But even then there was power to vacate the inrolment on proper grounds, and when that had been done the Court again had power over its own decree. Now, rehearing has been abolished, and inrolment has become obsolete, but does it follow from that that the Court cannot correct a blunder of the kind I have assumed? I maintain that it has such a power, and I am glad to find that Lord Penzance and the House of Lords have asserted it. It appears to me, therefore, that if it is once made out

that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not."

Bowen L.J., in the same case, said at page 247:

"I think the true view is, as stated by the Lord Justice Cotton, that every Court has inherent power over its own records as long as those records are within its power, and that it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice."

In *Hatton* v. *Harris* [1892] A.C. 547 Lord Watson in dealing with Order 28 rule 11 of the Rules of the Supreme Court said at p. 560:

"When an error of that kind has been, committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce. The correction ought to be made upon motion to that effect, and is not matter either for appeal or for rehearing. The law upon this point was fully and satisfactorily discussed by the late Lord Justice Cotton in *Mellor* v. *Swire*[1], an authority which appears to me fully to bear out the proposition I have just stated. I am unable to regard *Wilson* v. *Poe*[2] as a decision the other way. In that case, it is obvious that the only question the parties had raised was as to the construction of the decree. Sir Edward Sugden said, 'If that be error it must be corrected in a different way.' The language of the Lord Chancellor does not suggest that the error, if it existed, was incurable, but, on the contrary, plainly implies that it might be cor-

1. 30 Ch. D. 239
2. 2 J. & Lat. 765

rected on a proper application for that purpose, although his Lordship had no power to make the correction in the proceeding then before him.

Lord Herschell, delivering a separate speech, in the same case, said at p. 558:-

"I myself think that it was a mere accidental omission that the words were not inserted that in the case of a bond the amount should not exceed the penalty; and if attention had been called to the fact that those words were not so inserted, and that one incumbrancer might thereby be prejudiced as against another in respect of the omission, I cannot doubt that the correction would at once have been made.

Now the terms of the General Order are clear, that such a correction may be made at any time. It is true that many years have elapsed since the date of this order; but on the other hand nothing has been done since the date of this order until recently, when the money being found in Court the matter was revived. I cannot see any difference in the circumstances of this case from what they would have been if the matter had arisen immediately after judgment was pronounced.

This being so it seems to me that upon an application being made in the suit, the proper course would have been, and must have been, in accordance with the rule which I have read, to correct the degree pronounced in that suit; and then the rest would have followed, because if that decree had been corrected in the manner to which I have alluded, the rights of the parties would have been clearly defined.

There is one observation which I ought to make, and it is this, that there may possibly be cases in which an application to correct an error of this description would be too late. The rights of third parties may have intervened, based upon the existence of the degree and ignorance of any circumstances which would tend to shew that it was erroneous, so as to disentitle the parties to the suit or those interested in it to come at so late a period and ask for the correction to be made. There might be a ground of that

description which would induce the tribunal to say 'No; although this is a slip, and one which would have been corrected at the time, you have delayed so long that you have allowed rights to grow up which it would now be unjust to prejudice, and it is impossible to make the correction.' "

In *Lawrie* v. *Lees*, [1881] 7 App. Cas. 19, Lord Penzance said at pp. 34-35:-

"I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning and where language has been used which is doubtful, to make it plain. I think that power is inherent in every Court. Speaking of the Courts with which I have been more familiar all my life, the Common Law Courts, I have no doubt that that can be done, and I should have no doubt that it could also be done by the Court of Chancery."

In *Oxley and Others* v. *Link* [1914] 2 K.B. 734, Buckley L.J., dealing with the question whether the Judges under Order 28 rule 11 have the power and the duty to correct mistakes which are made by the officers in the performance of their ministerial duties on drawing up orders, said at p. 741:

"It is argued that this is a judgment which can be set right under the slip rule, Order XXVIII., r. 11. The words relied upon are: 'errors arising therein,' that is to say, in a judgment—errors arising in a judgment 'from any accidental slip or omission may at any time be corrected by the Court or a Judge on motion or summons without an appeal.' To my mind an error in something means that the thing of which you are speaking contains parts which are right and parts which are wrong, and that you are going to alter so much of it as is wrong. It is not correcting an error in a thing which is wrong from beginning to end to substitute for it something which is right. In order to see if this Order applies I have to see whether this judgment contains something which is right and which I am to correct by adding something, if it be a mistake which arises from

omission, or by correcting something, if it be something which requires modification or correction of some sort. So that to see whether the Order applies or not, it is vital in the first instance to see whether this is a document parts of which are right and parts of which are wrong. If I am right in what I have said already, there is no part of it which is right; it is wrong altogether. For that reason it seems to me that the slip rule does not apply."

It was further said that the jurisdiction of the Court to correct its judgment under Order 20 rule 11 necessarily involves the jurisdiction to exercise its discretion not to do so, not only in cases where the rights of third parties have intervened but also in cases where it would be inexpedient and inequitable to do so. See *Moore* v. *Buchanan*, [1967] 3 All E.R. 273, C.A.

That an omission from an order should be rectified finds also support in *Milson* v. *Carter* [1893] A.C. 638, P.C. Lord Hobhouse, delivering the opinion of their Lordships, said at pp. 640–641:-

"Their Lordships do not doubt that the Court has power at any time to correct an error in a decree or order arising from a slip or accidental omission, whether there is or is not a general order to that effect. A recent instance of the exercise of this power occurred in the case of *Hatton* v. *Harris* before the House of Lords ([1892] App. Cas. 547), where an error arising from an accidental omission was corrected after the lapse of forty years. The House of Lords in that case approved the views expressed by the Court of Appeal in *Mellor* v. *Swire* (30 Ch. D. 239).

Their Lordships observe that the fund which was intended to be a security for the costs of the appeal is still in Court. It cannot be dealt with except by the order of the Supreme Court. It can only be dealt with in accordance with the real meaning and intention of the order of the 26th of September, 1890, by first correcting the slip in that order. The existence of this fund in the hands of the Court would seem to remove any difficulty that could possibly be suggested in the way of an application directed to that purpose.

Unfortunately the respondent did not take the proper course of applying to the Supreme Court to correct the

accidental omission in the order granting leave to appeal. If he had done so no doubt the mistake would have been put right as a matter of course."

In *Re Inchcape. Craigmyle* v. *Inchcape*, [1942] 2 All E.R. 157, Morton, J. said at p. 160:-

"Thus I have had cited to me cases where the omission arose by a slip on the part of counsel, on the part of a solicitor and on the part of a party to the action. Having regard to those authorities, I am satisfied that I can make the order asked for under the provisions of R.S.C., Ord. 28, r. 11. It is true that, when the case was before me, I made the order which I intended to make in regard to the costs for which I was asked to make provision. There was, however, an accidental omission on the part of counsel, and I did not make the order which I would have made if that accidental omission had not occurred. I am glad to find it possible to give this construction to the rule, as I think that it is a rule of great convenience; and that, in the present case, real hardship would have resulted if I had not felt able to make the order which I propose to make."

In *Tank Ming Co. Ltd.* v. *Yee Sang Metal Supplies Co.* [1973] 1 All E.R. 569, P.C., Lord Pearson, delivering the judgment of their Lordships, having quoted the slip rule 0.20 r. 11, said at p. 575:-

"Finally there is the question of discretion. Even though the requirements of the slip rule are satisfied, and the Court is not precluded from making an order under it by any res judicata in the narrow or the extended sense, there is nevertheless a discretion in the Court to refuse an order under the slip rule if something has intervened which would render it inexpedient or inequitable to do so: *Moore* v. *Buchanan* ([1967] 3 All E.R. 273) following Lord Watson in *Hatton* v. *Harris* ([1892] A.C. 547 at 560).

In this case there was considerable delay by the respondents before they made their application under the slip rule. It does not appear, however, that the delay caused the appellants to take any step which they would otherwise have refrained from taking or to omit any step

which they would otherwise have taken. The liability for interest was of course dependent on the liability for the principal sum, the balance due to the respondents, and there was no final decision as to the appellants' liability for the principal sum until the appeal to Her Majesty in Council was dismissed by Order in Council on 27th October 1971. There were also factors in favour of making the order under the slip rule. The respondents had been kept out of their money—the b lance due to them, for which the appellants have been held responsible—for several years, and it is just that they should have interest on it. Also they had asked for interest in their statement of claim, and had indicated when directions were given on 8th February 1969 that they intended to apply for interest 'at the appropriate time', and they had made the application for interest on 6th August, 1969, which was rejected by Briggs J. for want of jurisdiction on 16th August 1969, and they made their application under the slip rule on 26th May, 1970. Thus they had taken several steps with a view to recovering interest. This question of discretion was carefully considered by both Courts below, and no sufficient ground has been shown to their Lordships for interfering with the exercise of the discretion which was made by Pickering J. and affirmed by the Full Court."

Finally, there is a very recent case, *R.* v. *Michael*, [1976] 1 All E.R. 629. Judge Rubin, after stating that the application before him raised an important question on the jurisdiction of the Crown Court over its own record, followed the principle enunciated by Lord Watson in *Hatton* v. *Harris*, [1892] A.C. 547 at p. 560, and said at p. 633:-

"I am satisfied that I have jurisdiction to direct an amendment of the record of the order which I made so that the record shall show that the costs to be recovered by the defendant include the costs of the committal proceedings. The jurisdiction is a discretionary jurisdiction and should not be exercised if it is not equitable. Delay of itself, it appears from the cases, is not a bar to the remedy, but an adverse consequence to a third party might well be a ground for refusing to exercise the jurisdiction.

It is said on behalf of the Crown that there must be an

end to matters of taxation in a case and it causes grave inconvenience if, after completion of taxation, the taxing office cannot put aside its papers. I can see the force in that argument and in a case where a party has elected to conduct a taxation on the order with knowledge of the mistake he should not be allowed to apply to rectify the recorded order after the conclusion of the taxation. That is not the present case as the defendant's advisers tried to apply to me but could not because of my absence from this Court. I can also see force in the argument that the Crown has a duty to protect the public purse but not against a claim which would have been met without question but for the defect as it now appears in the record of the Court.

I can find no reason in the present case why I should not exercise the inherent jurisdiction of the Court and accordingly I direct that the record of the order I made at the conclusion of the trial so far as it concerns the defendant's costs be amended to include in those costs the costs of the committal proceedings. I am glad that I am able to reach this conclusion as otherwise the defendant would have been deprived of any remedy in respect of the loss he has suffered from the slip made at the conclusion of his trial."

In Cyprus the recent case decided under the slip rule regarding the amendment of a judgment is *Orphanides* v. *Michaelides* (1968) 1 C.L.R. p. 295. Triantafyllides, J., as he then was, delivering the unanimous judgment of a Court composed of five Judges, said at p. 303:-

"Therefore, once, in Cyprus, a judgment has been delivered, signed and filed, there can be no possibility for the Court which has delivered it to rehear argument and to change it or set it aside, except, of course, to the extent to which it has always been possible to correct an error in a judgment under the provisions of Order 25, rule 6 (which is known as the 'slip' rule and corresponds to Order 20 rule 11 of the Rules of the Supreme Court in England), and under the inherent jurisdiction of the Court."

Having reviewed the authorities at length, it becomes clear in my view (a) that an application to correct a drawn up order ought to have been made to the Court of first instance or the

Judge having jurisdiction to correct the drawn up order, though passed and entered, if it does not express what the Court intended; (b) that the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then it will in a proper case exercise jurisdiction to correct its own record, that it may be in accordance with the order really pronounced, or in order to bring it into harmony with the order which the Judge obviously meant to pronounce; (c) the correction ought to be made upon a motion to that effect, and is not a matter either for rehearing or for appeal (*Hatton* v. *Harris supra*); and (d) that even though the requirements of the slip rule are satisfied, there is, nevertheless, a discretion in the Court to allow or to refuse an order for amendment if something has intervened which would render it inexpedient or inequitable to do so.

Directing myself, therefore, with those weighty judicial pronouncements quoted earlier in the judgment, I have reached the conclusion—having regard to what I have said earlier—that the requirements for acting under the slip rule were satisfied. I myself think that once it was a mere accidental omission made by the Registrar or any other ministerial officer in drawing up the order and not an omission made by the Court itself, that the words quoted earlier were not inserted, i.e. "that in the case of filing with the Registrar the amount of US $ 50,000, the Marshal should—subject to the payment of his fees—release all the cargo", the correction should be made.

Furthermore, I regard also the omission of the words in the said drawn up order as an accidental slip, that all the payment of the expenses in connection with the cargo's arrest should be paid by the plaintiffs (ship owning company). I think I would add that if the attention of the Registrar had been called by counsel who were before this Court in reaching that agreement, in the first place that those words were not so inserted, and in the second instance were inserted in such a way as to prejudice the interest of the ship owning company, I have no doubt that the correction would at once have been made after comparing the drawn up order with that made by the Court in the Judge's notes. Once, therefore, the terms of rule 6 are clear, that an omission or error of that kind is committed, in my view, it suffices to bring the rule into operation again.

Having reached this conclusion, and fully aware that in this case the applicants lost no time in making their application under the slip rule and because there were factors in favour of making the order under the slip rule—once the amount of US $ 50,000 in the form of a bank guarantee is in the hands of the Registrar, I have decided, in exercising my discretion, once nothing has intervened which would render it inexpedient or inequitable to do so, to correct the drawn up order which the Registrar has issued in order to bring it into harmony with the order which obviously I have pronounced. I have further considered the record of the Court and for the reasons I have given earlier, I have decided, being a mere accidental omission or slip on my part, to correct the record of the Court, *viz.*, by adding also the number of action 232/77 and its title in order to set right the mistake in not inserting it earlier. (See the minute dated 15.9.77 which was filed in both actions 232/77 and 235/77).

Finally, having adopted and followed the principle laid down in *Hatton* v. *Harris* (*supra*) by Lord Watson, and as I can find no reason in the present application why I should not exercise the inherent jurisdisdiction of the Court, I direct (a) that the drawn up order prepared by the Registrar so far as it concerns the omission or the inserting of the amount of US $ 50,000, be amended to include that amount to enable the Marshal to release the whole cargo; (b) that the drawn up order, so far as it concerns the error with regard to the payment of all the costs and expenses by the respondents (ship owning company) be amended so that those costs or expenses—which were already a charge on the cargo—be paid by the applicants-defendants and (c) that the record of the Court, so far as it concerns the slip or error or omission in not inserting the number of the first action, a practice followed in the directions to the Marshal dated, 15th December, 1977, to be amended or rectified to include also Action No. 232/77 and its title.

I have considered also the question of costs in this case, and I came to the conclusion not to make an order for costs in favour of the applicants-defendants.

Application, therefore, granted. No order as to costs.

1978, January 24.

HADJIANASTASSIOU J. gave the following judgment. This was an *ex parte* application by the applicants-plaintiffs filed on

January 11, 1978, applying for an Order of the Court for the stay of execution of the order dated 12th December, 1977 issued in Action No. 232/77, until the final determination of the appeal.

This application was supported by the affiant, Mr. Michael Vasiliou, a lawyer appearing for the ship owning company. The affiant who was authorised to make the statements in the affidavit said that on 12th December, 1977, certain statements were made by counsel who appeared in Admiralty Action No. 235/77, and in accordance with those statements the cargo would have been released from arrest, security being given by the lawyers of the cargo.

The said order of arrest of the cargo was issued in Action No. 232/77 on 23.8.77. The statements of counsel appear in the "Judge's Notes" and were circulated on 9th January, 1978. On the same date an order was issued in the present action No. 232/77 and in accordance with the affiant's information it was served to the appropriate authority for execution on the same date and by which order the Marshal was directed to release from arrest the whole cargo laden on the said ship on the same day, and an appeal was lodged against the said order.

Then the affiant stated in paragraph 4 of the affidavit that if the order of the Court was based on the Judge's notes in Action No. 235/77, then obviously that order is either inconsistent or is different from the Judge's notes, and *inter alia*, differs in substantive points, *i.e.* as to which of the parties is bound to pay the expenses of unloading, warehousing, dues, etc., and as to the part of the cargo which the order covers, and the time limit the letter of guarantee covers; the terms under which that letter is made payable; and on the basis of which action the order was issued, and to which persons the cargo would have to be delivered.

Furthermore, the affiant went on to add that in accordance with his information, arrangements were made for the immediate unloading of the cargo from the ship of the plaintiffs and loading same, as well as the cargo, which was unloaded earlier and was placed in bonded warehouses, on another ship with a view to transporting same abroad. If the execution of the order under appeal was not stayed, it was obvious, the affiant said, that the appeal lodged would be nugatory; and that the plaintiffs would

suffer irreparable damage; and that having regard also to the points which are not clear and to the said contradictions, and particularly because it is not specified that the cargo would be delivered only on production of all and properly issued bills of lading, those points might be misconstrued.

In paragraph 6, the affiant goes on, that once the order under appeal did not specify the points referred to in paragraph 4 of the affidavit, and because it contained inconsistent statements, viz–a–vis, the Judges notes, there is an obvious danger of the cargo falling in the hands of persons who would not be entitled to it and/or to unauthorised persons with the result that the ship–owning company to find itself in ovbious danger of facing actions from those persons claiming rights on the said cargo or part of it in Cyprus and/or elsewhere.

I must confess that having read the whole of the contents of the said affidavit, I had some doubts as to which part of the order of the Court it was inconsistent with the Judge's notes, as it was put by the affiant. But having heard the contentions of counsel for the applicants, and because of the production of the document marked *exhibit* 1, I have realized that what the affiant was complaining about was the drawn up order. It is important, therefore, to quote this document which had been certified as a true copy by the Registrar or his assistant. I read:–

> "Whereas in this action you were commanded by this Court to arrest the cargo on board the ship POLY and to keep the same under safe arrest until you should receive further orders from the Court; and you are further directed upon arrest of the cargo to arrange for the removal of the cargo to a place of storage under your safe custody provided sufficient funds as may be required will be advanced to you by the plaintiffs, or provided plaintiffs arrange for the discharge of the cargo.
>
> Now, you are hereby commanded to release the said cargo on board the ship POLY from the arrest effected by virtue of the warrant of this Court in this action subject to payment of the expenses, if any, incurred in connection with the cargo's arrest. Such costs to be paid by the plaintiffs directly, or in the case of dispute through the Registrar of the Supreme Court.
>
> Dated this the 12th day of December, 1977."

There is no doubt that in spite of the fact that the document in question has been certified as a true copy, certainly it is not so, when one reads the order issued by this Court. Having in mind, however, the statements made by counsel, there cannot be any room for doubt that what the parties had in mind was for the release of the whole cargo laden on the ship Poly or which was to be found kept in the warehouses or left in open spaces. One must also bear in mind that this Court, on a number of occasions stressed the desirability of parties finding a common denominator by providing security for the release of both the full cargo, and of the ship Poly. This is clearly shown in a direction issued to the Marshal in Actions Nos. 232/77 and 235/77, on the 15th September, 1977, and I propose quoting that passage:-

> "I have given instructions to the Registrar of this Court to get in touch with you because unfortunately, when the case was adjourned, we could not find an additional date for further hearing. Having in mind the difficulties which this will entail to the parties and having already drawn the attention of counsel during the hearing of showing cause, to the observations made in the *St. Eleftherio, Schwarz & Co. (Grain) Ltd.* v. *St. Eleftherio ex Arion (Owners)*, [1957] 2 All E.R. 374 at pp. 377 and 378, I have decided to issue further directions to the Marshal to the effect that if the defendants-respondents in the first application will enter into a bail of the amount which will satisfy the Registrar of this Court in the particular circumstances of each case, then the goods will be released to the owners of the cargo. This direction also applies to the owners of the ship in the second application."

With this in mind, and fully aware of the difficulties and the expense of keeping the cargo and the ship under arrest, I turn to the consent order made for the release of the full cargo dated 13.12.77. I read:-

> "There cannot be any doubt that counsel in reaching that decision, they have acted in the interest of their clients, because of the expenses in keeping the cargo in bonded warehouses and also of other expenses incurred by the owners of the cargo, and finally, of minimizing damages.

In any event, once I have indicated earlier in my ruling that such a course was warranted by the nature of this action, having in mind the observations in the St. Eleftherio (*supra*), I would reiterate that the agreement reached is the correct one. The Marshal, therefore, is directed to release all the cargo still laden on board the ship Poly, and all the rest of the cargo, subject to the payment of expenses for the unloading of the cargo, hiring of the stores etc. On filing with the Registrar of the Court the amount of $ 50,000 or its equivalent in Cyprus pounds, Registrar to inform the Marshal — subject to the payment of his fees — to release all the cargo."

On the 10th January, 1978, in an *ex parte* application by the plaintiffs-applicants in Action 232/77, they applied for an order of the Court for the stay of execution until the final determination of the application by summons filed by the plaintiffs-applicants. The Court, having read the affidavit, rejected that application. I understand there was an appeal, but it appears that counsel appearing in the appeal made a statement that he intended to apply for stay of execution in the first instance to this Court against whose order the appeal was made. In the light of this statement, he sought leave to withdraw that application for the stay of execution, and the application was dismissed with costs against the appellants.

On January 11, 1978, as I said earlier, the plaintiffs-applicants applied for a new order for the stay of execution of the same order; and it was based on the Cyprus Admiralty Jurisdiction Order 1893, rules 203-212, 60-64, 237, the Courts of Justice Law 14/60 s.29 and s.32; the Civil Procedure Rules 0.35 rules 18, 19 and on the inherent power of the Court.

Having considered the contentions of both counsel — notice having been given to the other side to appear and argue this application — I turn to Order 35 r. 18 of the Civil Procedure Rules which says that:-

"An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the Court appealed from or the Court of Appeal, or a Judge of either Court, may order; and no intermediate act or proceedings shall be invalidated, except so far as

the Court appealed from may direct. Before any order staying execution is entered, the person obtaining the order shall furnish such security (if any) as may have been directed. If the security is to be given by means of a bond, the bond shall be made to the party in whose favour the decision under appeal was given."

This Order, I may add, was taken from the English Rules of the Supreme Court, Order 58, rule 12. It has been said in a number of cases with regard to the stay of execution that the Court does not make a practice of depriving a litigant of the fruits of his litigation to which *prima facie* he is entitled. The first case which laid down this principle is the Annot Lyle, [1886] Probate Division 114. Lord Esher, M.R., in a short judgment, said at pp. 115–116:-

"We are invited to lay down a general rule applicable to appeals in Admiralty cases from this Court, differing from that which is in force in regard to other cases. It was argued that we ought to do this because bail has been given by the defendants, and interest is payable on the amount of the damages. Although this may be so, yet the respondents would not receive either the principal or the interest till the decision of the appeal. I see no sufficient reason why they should thus be kept out of their money. It was said that it was the practice of the Privy Council to stay execution in similar cases, but that practice must be taken to have been known to the legislature, when it transferred the jurisdiction of that tribunal in Admiralty appeals to this Court, and made such appeals a branch of the ordinary business of this Court, and subject to the same rule in this respect as all other business, viz., that an appeal shall be no stay of proceedings except the Court may so order. We are asked to depart from that rule, although it is admitted that there are no special circumstances in this case which afford a ground for so doing. If in any particular case there is a danger of the appellants not being repaid if their appeal is successful, either because the respondents are foreigners, or for other good reason, this must be shewn by affidavit, and may form a ground for ordering a stay. To grant the present application would, in the absence of special circumstances, clearly be

to act contrary to the provisions and intention of the Rules of Court".

Bowen, L.J., delivering a separate judgment said:-

"I am of the same opinion. An unsuccessful litigant comes to ask us to deprive a successful one of the fruits of his success, until a further appeal is determined. No affidavit has been made on behalf of the applicants, and we must therefore assume tha if the money is paid over to the respondents, and the appeal is successful, the appellants will be able to get it back. There is no reason, in my opinion, why in Admiralty cases we should make a practice of depriving a successful litigant of the fruits of his ligitation, and locking up funds, to which *prima facie* he is entitled, for a long time because they are secured by the bail bond. We cannot assume that it is a matter of small importance to a successful party to go without his damages for a long time. The rule which this Court laid down in *Barker* v. *Lavery* (14 Q.B.D. 769) applies to Admiralty cases as much as to the others which come before the Court, for no special distinction between the different classes of cases has been drawn in the Rules of Court."

There cannot be any doubt, however, that the Court has a discretion to grant or refuse a stay, but it is equally true that when a party is appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory. (*Wilson* v. *Church* (*No.* 2) [1879] 12 Ch. D. 454 at pp. 458, 459).

This principle applied in *Erinford Properties Ltd.* v. *Cheshire County Council*, [1974] 2 All E.R. 448. Megarry, J., in a long judgment, having dealt with *Wilson* v. *Church* (No. 2) (*supra*) and a number of other cases, reached this conclusion at p. 454:-

"I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is

whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a Judge may be very clear in his conclusions; and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for Judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the Judge become functus officio quoad granting any injunction at all.

There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton L.J. in *Wilson* v. *Church* (*No.* 2) ([1879] 12 Ch. D. at 458), where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, 'when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory'. That was the principle which Pennycuick J. applied in the Orion case ([1962] 3 All E.R. 466); and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.

I accept, of course, that convenience is not everything, but I think that considerable weight should be given to the consideration that any application for a stay of execution must be made initially to the trial Judge. He, of course, knows all about the case and can deal promptly with the application. The Court of Appeal will not be troubled with it unless one of the parties is dissatisfied with the decision of the Judge, in which case the Court of Appeal will at least have whatever assistance is provided by knowing how the Judge dealt with the application. Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal. Except where there is good reason to the contrary (and I can see none in this case), I would apply the convenience of the procedure for the one to the other. Accordingly, for these reasons, the county council's motion to discharge the injunction fails and the *ex parte* injunction stands."

In *Grade One Shipping Ltd., owners of the Cyprus Ship "CRIOS II"* v. *The Cargo on board the ship "CRIOS II"*, dated November 12, 1976 (unreported)*, the Supreme Court dealt with an Admiralty Action; counsel for the appellant sought an order staying the execution of the decision dated October 29, 1976. Triantafyllides, P., delivering the judgment of the Court in dismissing the application for a stay of the execution of that Order said:-

"We do not think that there arises, in the circumstances of this case, any question of exercising our concurrent, with those of the trial Judge, powers of granting, under rule 18 of Order 35 of the Civil Procedure Rules, a stay of execution of the aforesaid decision of October 29, 1976, because, actually, there is nothing to be stayed, since the appellants, who are applying for such a stay, are not required by means of such decision to do anything in order to comply with it; it is, simply, a decision which discharged

* Now reported in (1977) 11 J.S.C. 1760; to be reported in (1976) 1 C.L.R.

an order of arrest of the defendant cargo which had been previously made on the application of the appellants. A similar application for stay of execution was made to the trial Judge, after his said decision, but it was refused by him on October 30, 1976.

We have perused carefully all the material before us, including the reasoned decision of the trial Judge for the discharge of the order of arrest and the grounds of appeal filed in support of the appeal against such decision, and, assuming, without so deciding—as it is not necessary for us to do so in this case—that this is a matter which could be raised before us by way of an original, such as the present, application in an appeal, we have reached the conclusion that, in any event, we would not be prepared in the circumstances of the present case, to exercise our discretionary powers, assuming again that we were entitled to do so, in order to issue now a new order for the arrest of the defendant cargo under the said rule 50.

Once we would not be prepared to make, in any event, an order for the arrest of the cargo under the said rule 50, which is the specific provision in the Rules applicable in relation to this Court's Admiralty Jurisdiction, in the exercise of which the appellants' appeal is to be heard by us and by virtue of which we are dealing with the present interlocutory application, we see no justification, as at present advised, for acting under any one of the analogous provisions in the province of the Civil Procedure, such as section 32 of the Courts of Justice Law, 1960 (Law 14/60), or section 4 of the Civil Procedure Law, Cap. 6, for the purpose of making an order for the preservation of the status quo in relation to the defendant cargo pending the hearing and determination of the appeal."

The main complaint of counsel was that because the drawn up order made the position of the ship owning company very onerous indeed, having to pay all the costs and expenses for the cargo under arrest, the Court should see, once an appeal was made, that the said appeal, if successful, is not nugatory.

Having reviewed the authorities, it seems to me that once it is in the discretion of the Court to grant or refuse a stay, the

Court may grant it where the special circumstances of the case so require. What are the special circumstances in this case? It was said in the affidavit that if execution of the order would be carried out, the execution would deprive the appellant of the means of prosecuting the appeal. But with the greatest respect, the very reason for which the parties have moved this Court for an order to release the whole cargo, laden still on the ship Poly and that which has been unloaded earlier, was to avoid the payment of costs and other expenses which were rapidly mounting day after day by keeping same in the warehouses and/or in open spaces. Those costs were in the mind of counsel when they reached the agreement for the release of the cargo, no doubt in order to save both parties from incurring continuously heavy losses.

To come now to ask for a stay of execution, fully aware as stated in the affidavit on behalf of the ship owning company that arrangements were made for the immediate unloading of the cargo from the ship of the plaintiffs and loading same as well as the cargo unloaded earlier and placed in bonded warehouses on another ship, in order to carry the goods to their proper destination to the distant country of Nigeria, would indeed defeat the very purpose for which the order was made, and would quite naturally increase the losses of the cargo owners who will have to meet all the expenses of keeping it in Cyprus or of sending it away until the appeal is concluded. That delay would undoubtedly cause further losses and expenses. See the observations made by Lord Denning in The *Siskina*, [1977] 3 All E.R. 803 at pp. 806, 807, 809.

Now, it seems to me that looking at this matter in the view of men of business, it would serve no beneficial purpose to anyone, either the cargo owners or the ship owning company in keeping the cargo in Cyprus, once the order was made by consent, the ship owning company being fully aware that they had a claim for lien on the cargo only, and that by agreeing to release the said cargo for the amount of security referred to earlier in this judgment, in effect, they may have been abandoning that right.

It is convenient to add also at this stage that when I had granted the warrant of arrest and the action was based in rem,

it was because the ship owning company was claiming (a) that they were entitled to a lien against the cargo; and (b) an order enforcing the lien against the cargo by selling same by public auction or private treaty.

With this in mind, I have no hesitation to add that because of the expenses getting bigger and bigger, and which still remain a charge on the whole cargo, the Court would very soon be facing applications for an order for the sale of the said cargo in order to meet the demands of the people who keep the cargo in warehouses, those who unloaded it, and those who have transported it.

In the light of the authorities, and fully aware of my discretionary powers to grant or refuse a stay, I have decided, in the special circumstances of this case, to refuse to order a stay of execution for the reasons I have given earlier in this judgment.

I would, therefore, dismiss the application for a stay but without an order for costs.

1978, March 31.

HADJIANASTASSIOU J. read the following judgment. I think it is necessary to state once again—as I have done in the past in other applications relating to the ship Poly, that I am continuously faced with applications for an order to stay the execution of every order I have issued until now. There is no doubt that a consent order was made between the same parties some time ago for the release of the property arrested and security in the form of a bank guarantee was accepted by the ship owning company. No doubt the property in question, on service of the order of release and on payment to the Marshal of all fees due to and charges incurred by him in respect of the property in question, the cargo still laden on the said ship should have been at once released or unloaded or discharged.

Unfortunately, for various reasons, the cargo still remains loaded on the ship Poly and on March 28, 1978—after an application was made, I have issued written directions to the Marshal with a view to expediting and safely unloading or releasing and/or discharging the said cargo from the ship Poly and delivering same to the party or parties and/or their agents

who presented to the M .rshal bills of lading issued by the Master of the ship.

Immediately after the directions were made to the Marshal, I understand an appeal was filed by the ship owning company against that orde1, the plaintiffs Katarina Shipping Inc., and an application dated March 29, 1978, whereby the applicants applied for an order of this Court for the stay of execution of the order dated March 24, 1978, until the final determination of the appeal filed as I said, by the plaintiffs against that order.

This application, like the rest of the applications was based on the Cyprus Admiralty Jurisdiction Order 1893 rules 2, 203–213, 60–64, 237; and the Courts of Justice Law 14/60 s.29 and s.32 and on the inherent power of the Court. On the same date of the application, an affidavit was made by Mr. P. Ioannides supporting the granting of the stay of execution. Having read the said affidavit, regretfully I have reached the conclusion —that the sole reason for relying now on the other set of bills of lading issued was to prevent the effective discharge of the order made to the Marshal.

It can not be challenged that freight is the reward payable to the carriers for the safe carriage and delivery of goods to the owners of the cargo, and as I said earlier, the ship owning company for reasons I need not repeat, did not carry safely and did not deliver the goods in question to the port of destination, n mely, Nigeria.

It should also be added that in issuing the directions to the Marshal, it was certainly intended to do justice to all those people who for a long time are expecting to have the goods in their hands and I think it is necessary to state that once the ship owner has not fulfilled his obligation to carry the goods that it was necessary for this Court to issue directions on the lines I have suggested in order to save further undue delay to the owners. There can be no doubt, and there was ample evidence before me during the hearing of the various applications, that at the time of issuing the warrant of arrest and during the subsequent discussions, one set of bills of lading was issued by the Master of the ship.

In view of the importance the mercantile world attaches to the bills of lading, in issuing the said direction, I have derived

further assistance, *inter alia*, from the case of *Barber* v. *Meyerstein*, reported in [1869–70] L. R. 4 H. L. E. & I. App. 317. Lord Westbury, I think provides the answer to the complaint made by the deponent in para. 6 of the affidavit that if the said cargo was delivered to various people and not to the true owners there was a danger for the shipowning company from third persons suing for damages.

I do not want to appear as criticizing that statement, but in my view, any further delay of keeping the cargo would make mockery of the consent order issued by this Court and it will appear in the eyes of the commercial world that no justice is done. However, with this observation, I will return to Lord Westbury where his Lordship said at pp. 335–336:–

> "Unquestionably the bill of lading, as long as the engagement to the shipowner has not been fulfilled, is a living current instrument, and no doubt the transfer of it for value passes the absolute property in the goods. It is unquestionable (as has been said here by one of the Judges), that the handing over the bill of lading for any advance, under ordinary circumstances, as completely vests the property in the pledge as if the goods had been put into his own warehouse. There can be no doubt, therefore, that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner, having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party. But although that may be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods, for the legal ownership of the goods must still remain in the first holder for value of the bill of lading, because he had the legal right in the property."

I think the words of Lord Westbury would alleviate the fears of the affiant that when the Marshal unloads and delivers the cargo the ship owning company would be facing actions for damages.

For all these reasons, I have decided to refuse the stay because I am of the view that had I really exercised my discretion to order a stay at this very late stage, it would have been contrary to justice having regard to all the circumstances of this case.

Order accordingly. Application dismissed. No order as to costs.

Application for amendment of drawn up order granted; applications for stay of execution refused. No order as to costs.