

1978 December 15

[A. LOIZOU, J.]

COMMERCIAL BANK OF THE NEAR EAST LTD.,
Plaintiffs,

v.

THE SHIP "PEGASOS III"
Defendant.

(*Admiralty Action No. 300/77*).

5 *Admiralty—Ship—Mortgage—Foreign mortgage—Validly executed and registered—In consideration of obtaining bank facilities—Outstanding indebtedness and default of owners of ship—Constitutes a cause of action against the ship—Whether discharge of any co-surety could discharge the other guarantors.*

10 *Admiralty—Ship—Creditors' priorities—Mortgagee—Necessaries men—No maritime lien for necessaries—Priority of mortgagee—Lien for necessaries a statutory lien which is attached only after the institution of an action in rem—Action of necessaries men after the mortgage was entered into—Their claim cannot take priority over that of mortgagee.*

15 *Admiralty—Ship—Creditors' priorities—Mortgagee and necessaries men—Repairs—Benefit to mortgagee as a result of repairs carried out by necessaries men—Whether expenditure for repairs should take priority.*

20 *Admiralty—Maritime lien—Transferability—Seaman's claim against ship for wages and other emoluments—Payment off by another party without the sanction of the Court—And assignment of claim to such party—Creditors' priorities—Said party cannot avail itself of the priority enjoyed by the seaman.*

25 On September 17, 1977 the plaintiffs brought an admiralty action in rem against the defendant ship claiming various amounts, as mortgagees under a first preferred mortgage and guarantee on the vessel, dated the 18th February, 1977, which was registered in Panama. On October 15, 1977 judgment,

by consent, was given in their favour for the sum of 159,131.66 U.S. dollars being the amount of principal outstanding under the said mortgage and guarantee and for various other sums which represented the interest due under the mortgage and the insurance premiums paid and/or guaranteed by the plaintiffs. 5
On the same day an order was made for the appraisal and sale of the defendant ship by public auction or private treaty. The ship was eventually sold and the proceeds of sale deposited in Court. In the meantime claims had been made against the ship, by means of admiralty actions, and the proceeds of the sale were subjected to numerous caveats. 10

As the amount in Court, which represented the proceeds of sale of the res, was not sufficient to satisfy the claims against it, the plaintiffs applied for an order of the Court "determining the priorities of the several claims against the defendant ship" and for an order directing that the plaintiffs be paid "their judgment-debt and costs out of the proceeds of sale of the defendant ship". 15

What the Court had to decide was whether the mortgage on the ship in respect of which judgment was given had priority over the claims of the other claimants which claims were admittedly for necessities. 20

The main contentions on behalf of the claimants were:

- (a) That the mortgage in question was discharged and therefore the applicants' claim is a gift and as such is not entitled to priority over the necessities men. 25

Counsel argued in this connection that there was no consideration supporting the mortgage and the guarantee and that such consideration was neither alleged in the petition nor proved; that the co-surety contract had not been strictly adhered to; and that the co-surety was released and/or did not execute his guarantee. 30

- (b) That, alternatively, on the assumption that the mortgage was found to be valid and legally binding, the circumstances of the present case were such that on the principle that equity shall be done to the parties the applicants should not be given priority but should follow the claims of the opponents. 35

Counsel submitted that the plaintiffs in Action No. 237/77, whose claim was for necessities supplied on the 20th October, 1976, had prior equity to that of the mortgagees.

- 5 (c) That the judgment creditor in Action No. 382/77, who obtained judgment for £580 in respect of repairs carried out to the winches of the defendant ship, should be given priority over the mortgage.

10 Counsel argued that the determination of priorities does not depend upon any rigid rules but on the principle that equity must be done to the parties in the circumstances of each particular case, and that a general order of priority is followed when there are no special circumstances.

15 The special circumstances relied upon in support of this contention were: (a) that though these repairs commenced before the arrest of the ship they were completed after her arrest and at a time when on account of it the Marshal had the custody and responsibility for its maintenance; (b) that the Marshal did not ask the repairs to be discontinued and he later used the repaired winches in order to discharge the cargo from the defendant ship and (c) that the ship was sold on account of these repairs as a going concern and all the creditors benefited from them.

- 20 (d) That the claim of the Chief Engineer of the defendant ship, in Action No. 205/77, for wages, other emoluments, costs of repatriation and pension contributions should be given priority over the mortgage.

30 By a written assignment dated 8th September, 1977, the Chief Engineer assigned all his rights claimed in the above action to the plaintiff in Action No. 410/77, after the latter had satisfied his claim.

35 In addition to the above claims there was a claim in Action No. 24/78 where the Court had to decide whether it was a claim for salvage or not; and in order not to delay the payment out upon the determination of the priorities it was agreed and direction was made that an amount of C£2,000 be retained by the

Registrar of the Court until this Action was adjudicated upon.

Held, (I) on contention (a) above:

(1) That on the material before it, this Court has not been satisfied that the mortgage in question has been discharged; that, as it appears from the guarantee, this guarantee was given in consideration of the plaintiff-applicant bank, making advances, or otherwise granting banking facilities and accomodation to a certain Potamianos and under clause 1 thereof it is a continuing security for the ultimate balance from time to time owing to the bank by the principal; and that, therefore, it is clear that there existed consideration for the guarantee and the mortgage.

(2) That, moreover, the petition as drafted discloses the existence of a mortgage and its registration with the Panamanian authorities which is not disputed; and that it was validly executed in Panama and there was an outstanding indebtedness and default on the part of the owners of the defendant ship, the mortgagors, which constituted a cause of action and which entitled them to the proceedings in rem against the ship on that mortgage (pp. 610-11 *post*).

(3) That there was no question of any co-surety, the guarantee not being a joint guarantee with any body else (see clause 2 of the guarantee); and that even if there had been a co-surety a discharge of such surety or any facility given to him would not and could not discharge the guarantors under clause 2 of the guarantee.

Held, (II) on contention (b) above:

That though the necessaries in Action No. 237/77 were supplied on the 20th October, 1976, and about five months before the attachment of the mortgage deeds the necessaries men have no prior equity because a lien for necessaries is a statutory lien and it is not attached until the institution of an action in rem; and that the lien of the judgment creditors in Action No. 237/77 and in fact any other statutory lien did not attach until such action was brought, which was long after the mortgage was entered into. (See *The Two Ellens* [1872] L.R. 4 P.C. 161).

Held, (III) on contention (c) above:

That there is no maritime lien for necessaries to or repairs effected on a ship; that a mortgagee takes priority over the claims of repairs and material men who have not issued pro-

ceedings before the date of the mortgage; that a claimant who has expended his money directly for the benefit of the mortgagee might be preferred to a mortgagee (a) if the mortgagee knew that the mortgagor was insolvent and (b) if the mortgagee had
 5 knowledge that the money had been so spent by the claimant; that in this case there is no evidence to establish these two prerequisites to the satisfaction of this Court and this Court is not prepared to depart from the usual rules of priorities; and that, accordingly, the claim for priority, over the mortgage, of
 10 the claimant in Action No. 382/77, will fail.

Held, (IV) on contention (d) above:

That where parties have paid off claims without a sanction of the Court they cannot avail themselves of the priority enjoyed by the person whose claim had been satisfied; and that,
 15 accordingly, the claim of the claimants in Action No. 410/77 cannot be given priority over the mortgage. (See *The Petone* [1917] P. 198).

Held, (V) in the result:

That, bearing in mind also the principles governing the question of priorities to the extent relevant to the claims in the present proceedings (see pp. 606–7 *post* and British Shipping Laws 1964, Vol. 1, Admiralty Practice, pp. 733–746), this Court has come to the conclusion that the order of priority in the present case will be as follows:

- 25 (a) Marshal's charges and expenses.
- (b) The applicants' mortgage debt as per the judgment given in their favour on the 15th October, 1977, in Action No. 300/77; and
- 30 (c) The claims of all opponents which should rank *pari passu* inter se and all other claims, not coming under categories (a) and (b) above.

Order accordingly.

Cases referred to:

- The Tagus* [1903] P. 44;
- 35 *The Colorado* [1923] P. 102;
- The Two Ellens* [1872] L.R. 4 P.C. 161;
- Stylianou v. Narkissos* (1965) 1 C.L.R. 291;

- The Pickaninny* [1960] 1 Lloyd's Rep. 533;
Chrysostomou v. G. S. Halkousi and Sons (1978) 1 C.L.R. 10;
The Petone [1917] P. 198;
First National Bank of Chicago v. The Ship "Blockland" (1977)
 4 J.S.C. 415 (to be reported in (1977) 1 C.L.R.); 5
The Cornelia Henrietta [1866] L.R. 1 A. & E. 51.

Application.

Application by the plaintiffs, judgment-creditors, for an order determining the priorities of several claims against the defendant ship and for an order directing that they be paid their judgment debt and costs out of the proceeds of the sale of the defendant ship which have been lodged in Court. 10

E. Constantinidou, (Mrs.) for Chr. Demetriades, for the applicants.

Cl. Theodoulou, (Mrs.), for the Marshal of the Admiralty Court. 15

For interested parties:

P. Sarris, for plaintiffs in Action No. 364/77.

G. Michaelides, for the judgment-creditor in Action No. 382/77. 20

M. Vassiliou with *C. Hadjioannou*, for the judgment-creditors in Actions Nos. 237/77 and 24/78.

S. Stavrinides, for the judgment-creditors in Actions Nos. 410/77 and 205/77.

Cur. adv. vult. 25

A. LOIZOU J. read the following decision. The applicants—judgment-creditors—by the present application pray for:—

“(a) An order of the Court determining the priorities of the several claims against the defendant-ship.

(b) An order of the Court directing that they be paid their judgment-debt and costs out of the proceeds of sale of the defendant-ship which have been lodged in Court. 30

(c) Any further or other relief.”

The application is based on the Admiralty Jurisdiction Order 35

1893, rules 111, 112, 113, 203 and 237, and on the general practice and inherent jurisdiction of the Court.

5 The said applicants filed on the 17th September, 1977, this admiralty action in rem against the defendant ship, as mortgagees under a first preferred mortgage on the said vessel dated the 18th February, 1977, and on the 15th October, 1977, by consent judgment was given in their favour as follows:-

- 10 “(a) The Cyprus pound equivalent of US \$ 159,131.66 being the amount of principal outstanding under the said Mortgage and Guarantee.
- (b) The Cyprus pound equivalent of US \$ 975.75 being interest due on the said sum under the Mortgage and Guarantee as at 25th August, 1977.
- 15 (c) Interest on the sum of US \$ 159,131.66 as agreed and secured by the said Mortgage, as from 25th August, 1977, until payment.
- (d) The Cyprus pound equivalent of US \$ 35,791.85 being insurance premiums paid and/or guaranteed by the plaintiffs.
- 20 (e) Interest on the amount referred to in (d) above as agreed and secured by the Mortgage on the sum of US \$ 18,729.35 from 13.7.1977 and on the sum of US \$ 17,062.50 from 13.10.1977 until payment with costs to be assessed by the Registrar.”

25 On the same day an order was made for the appraisal and sale of the defendant-ship by public auction or private treaty.

30 On the 11th January, 1978, the Marshal of the Court applied for directions so that the order of the 15th October, 1977, for appraisal and sale might be varied and leave be granted to him to sell the ship at less than the appraised value—which was C£ 180,000.— that is to say, at the price of C£ 103,000.— which was the highest bid obtained at a second public auction held on the 4th January, 1978.

35 On the 13th January, 1978, I made directions, the full text of which is reported in (1978) 1 C.L.R., p. 1, approving the

Marshal's application for the reasons appearing in the said directions. In the meantime, claims had been made against the ship and the proceeds of the sale were subjected to numerous caveats, and this application was served on all persons that were known to this Court to have a claim against the ship and/or the proceeds of its sale and/or to have filed a caveat. The Marshal of the Court submitted also his bill of expenses and objection was raised with certain items thereof, namely, for item No. 9, the customs import duties for short landed goods to the amount of C£1,852.-, item No. 10, expenses for the discharge of the cargo C£ 2,581.525 mils, and item No. 14, departmental charges C£ 776.300 mils.

The Marshal stated that the expenses for the discharge of the cargo, Item 10, were incurred at the request of his predecessor in office by Messrs. Orphanides & Murat in respect of bunkers and other essential expenses for the operation of the ship. The Court thereupon made the following direction:-

" In the circumstances and in view of the total amount realised by the sale of the ship and the urgency of the matter in relation to the payment of the crew who are out of the vessel and their departure from Cyprus should be facilitated the soonest possible, I make an interim order regarding the priorities as follows:-

- (a) That the Marshal's expenses be paid in respect of all items, except items 9, 10, and 14 for which, items, further consideration will be given in due course.
- (b) That the costs for the arrest of the ship incurred in Action No. 203/77 and the costs for the arrest of the ship in Action No. 300/77, be also paid forthwith, in view of their respective priority, upon filing a proper account with the Registrar and the total amounts approved by the Court.
- (c) That the claims of the crew, with the exception of the claim of Constantopoulos in respect of which there is the said assignment, be paid forthwith, as per judgments.

With regard to the remaining claims the determination of their respective priorities is deferred until the conclusion

of pending litigation and the determination of legal matters raised in respect thereof.

5 By this order, the application for the payment of the crews' claims in Action No. 206/77 is also disposed of accordingly.

Copy of this order to be included also in the file of Action No. 206/77.

10 We are left, therefore, with the examination of the remaining issues in Action No. 300/77, the hearing of which is adjourned to the 4th February, 1978, at 9.30 a.m.

In the meantime each party to file what may be described as a notice of opposition to the application, setting out the order of priority claimed for their respective claims."

15 On the 4th February, 1978, upon a submission to adjourn the application for priorities so that every caveator might obtain in the meantime judgment, the Court, in accordance with established practice of allowing reasonable time for the creditors to come in, adjourned the hearing of the application for 15 days as, considering the nature of the pending actions, that would
20 be sufficient for the plaintiffs to obtain judgment therein. Furthermore, direction was also made to the effect that claimants, who had not until then filed an opposition, to do so by the 21st February.

25 On the 7th March, 1978, an application was filed on behalf of a number of opponents to the applicants' claim for priority praying for an order of the Court directing that the alleged mortgage and guarantee and/or any other mortgage and guarantee securing debts be produced and proved in evidence. On the 20th March, 1978, I gave my Decision (reported in (1978)
30 1 C.L.R., 375) to the effect that at that stage of the proceedings I was not prepared to exercise my discretion under Rule 113 of the Cyprus Admiralty Jurisdiction Order 1893, and direct on the strength thereof the plaintiffs to produce the mortgage and guarantee or in any way decide for them the manner in which
35 they should establish the priority of the claim under the said mortgage. It may be mentioned here, however, that subsequently and in the course of the hearing of this application, copies of the loan agreement, the guarantee, the mortgage and a

certificate showing that the mortgage in question is a first mortgage on the defendant ship and duly registered as such in Panama were, at the request of Mr. Hadjioannou on behalf of all opponents to the claim of the applicants for priority, by consent produced and marked as *exhibits* "A", "B", "C" and "E" respectively. Also all the files of the actions against the ship or the proceeds from her sale were produced as *exhibit* "D". 5

Before examining the case of each party to these proceedings and the issues raised, it should be mentioned that a number of the original opponents withdrew their opposition in the course of the hearing of this application reserving, however, their rights in case there might be developments in the order of priorities that might entitle them to rank *pari passu* with other creditors for payment out of any amount available. 10

Also regarding item 9, on the Marshal's bill it was conceded on behalf of the Customs Authorities that their claim for import duty for short landed goods could not be part of the Marshal's expenses and as such have priority over the mortgage, but reserved their right to rank with other claimants after the determination of the priority to which the mortgage of the applicants is entitled. Item 10, the expenses incurred by Messrs. Orphanides & Murat at the Marshal's request in respect of the operation of the ship connected with the discharge of her cargo, has been paid out of the proceeds of the sale of the said cargo. It remains, therefore, item 14—the departmental charges of the Marshal amounting to C£776.300 mils. It has been the practice to allow these charges as part of the Marshal's expenses and in the absence of any authority to the contrary, I do not propose to depart from the established practice. Payment, therefore, of the said Marshal's expenses, including any expenses properly incurred by him since the submission of his last bill, should be made in priority to any other claim standing against the defendant ship. 15
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The principles which govern the question of priorities to the extent relevant to the claims in the present proceedings are: (1) Marshal's charges and expenses, which are paid in priority to all claims; (2) The cost of the plaintiff in whose action the res was arrested up to the moment of arrest and including the cost of arrest and later costs up to and including appraisal and sale either of that plaintiff or where the order for appraisal- 35
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ment and sale was obtained in a different action of the plaintiff in the latter action. These costs are accorded priority over all other claims whether for costs or not; (3) Mortgages, and (4) Necessaries, which rank *pari passu inter se* and no date is of any consequence (see *Brisith Shipping Laws 1964*, Vol. 1, Admiralty Practice, pp. 733–746).

It was because of this order of priorities that I made direction without objection from any side that the costs of the plaintiff in whose action the res was arrested up to the moment of arrest and including the cost of arrest, as well as the Marshal's charges and expenses be paid, in the latter case, of course, subject to the objections raised and in respect of which I had eventually to decide that item 14 was a charge to be included in the Marshal's expenses as hereinabove set out. What remains, therefore, to decide is whether the mortgage on the ship in respect of which judgment was given in Admiralty Action No. 300/77, has priority over the claims of the other claimants, which claims are admittedly for necessaries. As it is always the case, this problem arises because the funds in Court representing the proceeds of sale of the res are insufficient to satisfy all those entitled to claim against it.

The next principle relevant to our case because the mortgage in question was registered in Panama—a foreign mortgage at that—is that, though the rights given under a mortgage, its validity and construction, must be determined according to the law of the country in which the mortgage is registered, yet questions of priority are treated as being procedural and must be determined according to the *lex fori*. See *Dicey & Morris*, *The Conflict of Laws*, 9th Ed., p. 1099, and *Cheshire's Private International Law*, 9th Ed., p. 696, where under the marginal note "Priorities a matter for the *lex fori*", it is stated:

"... Where, for instance, two or more persons prosecute claims against a ship that has been arrested in England, the order in which they are entitled to be paid is governed exclusively by English law.

In the case of a right in rem such as a lien, however, this principle must not be allowed to obscure the rule that the substantive right of the creditor depends upon its proper law. The validity and nature of the right must be dis-

tinguished from the order in which it ranks in relation to other claims. Before it can determine the order of payment, the Court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature." 5

See also *The Tagus* [1903] P. 44 and *The Colorado* [1923] P. 102 (C.A.). The distinction, however, made between matters of procedure being governed by the *lex fori* and matters of substance being governed by the law of the country in which the mortgage is registered, has no significance in our case as there has been no evidence about the Panamanian law and in the absence of same being proved as a matter of fact, the Court will apply Cyprus law to such a case. See *Dicey & Morris (supra)*, p. 1124, and *The Colorado (supra)* at p. 111, where Atkin L.J. said: 10 15

"I think myself that the question is one of fact, namely, the nature of a hypothéque on a ship as created by French law. One has to deal with such questions remembering the presumption that unless there is proof to the contrary foreign law will be presumed to be the same as English." 20

It is the case for the opponents argued on their behalf by Mr. Hadjioannou that the present proceedings are independent from the various actions against the res. That the applicants' consent judgment does not bind the other parties and that it does not affect the res judicata between the parties to it, since it was entered before the petition was filed. That is only conclusive between them and the defendant ship, but as against the other parties to these proceedings the only facts that it establishes are that it exists, that it was given on the 15th October, 1977 and that the ship owes to the applicants a stated sum of money, and that it is binding against all the world, in so far as it is necessary to protect the title of the person who purchased the res pursuant to that judgment. 25 30

On account of that the defendant ship had it been represented in these proceedings would not have been estopped from raising a defence to claims of the applicants; consequently the Court might go behind this judgment in such independent proceedings in order to ascertain what was actually in issue, the position of the Court, in this respect, being akin to that of a trustee in bankruptcy. 35

Mr. Hadjioannou made it clear that he was neither asking the Court to set aside this judgment nor was he contending that the mortgage on which the judgment was given was not a registered mortgage under Panamanian Law. What he did contend was that the mortgage in question was discharged and therefore the applicants' claim is a gift and as such, not entitled to priority over the necessities men. He based this submission on three grounds: (a) That there was no consideration supporting the mortgage and the guarantee, and that such consideration was neither alleged in the petition nor proved; (b) that the co-surety contract had not been strictly adhered to, and (c) that the co-surety was released and/or did not execute his guarantee. Alternatively, he argued that on the assumption that the mortgage was found to be valid, and legally binding, the circumstances of the present case were such that on the principle that equity shall be done to the parties the applicants should not be given priority but should follow the claims of the opponents.

I must say that Mr. Hadjioannou has gone to great length to present an elaborate argument with reference to numerous authorities and by condensing it I hope that I do not take from it its force and quality. I do not feel, however, that I should answer every part of it because on the material before me I have not been satisfied that the mortgage in question has been discharged, I leave them therefore open. No one disagrees with the argument that these proceedings for the determination of priorities are independent proceedings. In England provision is usually made in the judgment for priorities to be reserved. There are of course instances, as in the case of the master and crew suing for wages and the only other plaintiffs are merely necessities men and there are no other claims pending and no caveats against release and payment, in which case the priority of the plaintiff is clearly unassailable and payment out may be ordered. When, however, priorities are reserved the matter has to be determined in Court by the Judge on a motion for determination of priorities and payment out. At the hearing of the motion any other party may be heard in opposition, provided he has either entered a caveat against release and payment or has intervened in the action, in which the motion is brought on for hearing. (See *British Shipping Laws Admiralty Practice* (1964) Volume 1 paras. 395, 409). In Cyprus such a motion

takes the form of an application by summons as in the present case.

On the question of judgments by consent or default, reference was made to *Halsbury's Laws of England* 3rd edition volume 15 p. 178 para. 349 where under the heading "Judgment by Consent or Default" it is stated:- 5

"A judgment which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained by consent or default, or as the result of admissions, provided the party against whom it is set up was under no disability; but the efficacy of a judgment so obtained is somewhat strictly limited". 10

Furthermore I was referred to para. 389 of *Halsbury's Vol. 15 (supra)* which reads:

"*Judgment by default or consent*—Where, however, the former judgment was a judgment by default, and the plaintiff has delivered no pleading, the estoppel is limited to what appears on the face of the judgment itself. On the same principle, a defendant who has consented to judgment before delivery of any pleading is not estopped as against the plaintiff from subsequently setting up matters which might have constituted a defence, because they have never been in issue; but it is otherwise with a defendant who has consented to judgment after pleading in his defence the matters which he seeks to set up in the later proceeding". 15 20 25

It may be pointed out here, however, that the petition had already been filed before the defendants consented to a judgment on certain paragraphs of the relief prayed for in the petition, admitting thereby the validity of the mortgage and his liability thereunder. 30

On the question of the alleged lack of consideration or the failure to allege and prove same, it appears from *exhibit "B"* that the guarantee was given in consideration of the plaintiff/applicant bank, making advances, or otherwise granting banking facilities and accommodation to a certain Panayis Potamianos and under clause 1, thereof this guarantee is a continuing security for the ultimate balance from time to time owing to the bank by the principal. It is clear therefore that there existed 35

consideration for the guarantee and the mortgage. Under exhibit "C" the mortgage had to be read together with the loan agreement and that it was given "IN CONSIDERATION of the premises and for the purposes of securing the payment
5 of the Outstanding Indebtedness and to secure the performance and observance of and compliance with the covenants terms and conditions herein and the other Security Documents the Owner hereby executes and first and absolute mortgage on the Ship...".

10 Moreover, the petition as drafted discloses the existence of a mortgage and its registration with the Panamanian authorities, which is not disputed, and that it was validly executed in Panama and there was an outstanding indebtedness and default on the
15 part of the owners of the defendant ship, the mortgagors, which constituted a cause of action and which entitled them to the proceedings in rem against the ship on that mortgage.

The other two points raised by learned counsel are also sufficiently answered by the allegations in the pleading and the contents of the loan agreement, the mortgage and the guarantee,
20 exhibits "A", "B" and "C" as well as by the fact that the mortgage was registered as such as per exhibit "E". If anything clause 2 of the guarantee shows that there is no question of any co-surety, the guarantee not being a joint guarantee with
25 anybody else and even if there had been a co-surety a discharge of such surety or any facility given to him would not and could not discharge the guarantors under clause 2 of the guarantee, exhibit "B". This disposes of the claim of the opponents that the mortgage has been discharged.

I turn now to their alternative argument that the circumstances
30 of the present case were such that on the principle that equity shall be done to the parties, and the claims of the opponents should be given priority over that of the applicants; also that the plaintiffs in action No. 237/77 have prior equity to that of the mortgagees, the short answer is that the necessities in
35 the said action were supplied on the 20th October, 1976, about five months before the attachment of the mortgage deeds. But necessities men have no prior equity because a lien for necessities is a statutory lien and it is not attached until the institution of an action in rem. In *Halsbury's Laws of England*
40 (*supra*) Volume 35 p. 736 para. 1211, it is stated:

“ Statutory lien. A statutory lien attaches when property is arrested in an action in rem in the Admiralty jurisdiction of the High Court.”

And at p. 792, para. 1221 it is stated:

“ 1221. *Necessaries*. The statutory lien for necessaries as a general rule ranks after maritime liens but takes priority over a master’s lien for wages and disbursements when supplied by the order of a master who is part owner of the ship. It is postponed to a mortgage, to execution creditors at whose instance the sheriff has seized the res before the necessaries man has arrested it, and to the solicitor’s costs in defending an action brought against the ship before the necessaries were supplied. Where there are several claims for necessaries they rank equally and are paid pro rata, provided the holder of the lien is not guilty of laches in prosecuting his claim, because when a ship is sold the Court holds the property not only for the first plaintiff, but for all creditors of the same class who assert their claims before an unconditional decree is pronounced. A claimant who supplies necessaries to a ship which is already under arrest obtains no right to priority over other claimants for necessaries, unless the necessaries which he supplies are supplied with the sanction of the Court.”

On the aforesaid authorities the lien of the judgment creditors in action No. 237/77 and in fact any other statutory lien did not attach until such action was brought, which was long after the mortgage was entered into. (See *The Two Ellens* [1872] L.R. 4 P.C. 161). This argument therefore also fails.

The judgment in action No. 364/77 is for C£ 5,334.- for necessaries, for provisions supplied to the defendant ship in April 1977 and they are on the same footing with regard to priorities as the other necessaries men.

I must deal, however, at some length with the argument advanced by Mr. Michaelides on behalf of the judgment creditors in action No. 382/77 who obtained judgment for £580.- plus £75.- costs in respect of repairs carried out to the winches of the defendant ship. He argued that the determination of priorities does not depend upon any rigid rules but on the principle that equity must be done to the parties in the cir-

cumstances of each particular case, and that a general order of priority is followed when there are no special circumstances.

In support of this proposition he referred me to *Halsbury's Laws of England* 3rd Ed. Vol. 35 para. 1213 where under the heading "Priorities of Liens Generally" it is stated:

" It would seem that the determination of the priority of liens over one another rests on no rigid application of any rules but on the principle that equity shall be done to the parties in the circumstances of each particular case. There is however, a general order of priority and there are certain general rules which in the absence of special circumstances the Court tends to apply."

The special circumstances relied upon by Mr. Michaelides are (a) that though these repairs commenced before the arrest of the ship they were completed after her arrest and at a time when on account of it the Marshal had the custody and responsibility for its maintenance; and (b) the Marshal did not ask the repairs to be discontinued and he later used the repaired winches in order to discharge the cargo from the defendant ship, the ship was sold on account of these repairs as a going concern and all the creditors benefited from them. As an authority for this proposition was given the case of *Stylianou v. Narkissos* (1965) 1 C.L.R. p. 291, in which certain necessities men were given priority over the mortgagees, because as stated all the creditors benefited by the supply of such necessities.

The other authority cited is *The Pickaninny* [1960] 1 Lloyd's Reports p. 533, referred to also in the *British Shipping Laws* Volume 11 p. 32, para. 74. Moreover it was argued on the authority of the *Pickaninny* case that the defendant ship was insolvent, they let the repairs to be continued and concluded and therefore benefited from this action of these claimants.

In the submission of counsel there were two possibilities:

- (a) Either these repairs had to be included in the Marshal's expenses for the discharge of the cargo because they were repairs concerning the winches of the ship, used for that purpose, or,
- (b) If they were not included in the Marshal's expenses again on the principle of equity they should be given priority over the claim of the mortgagees.

In the *British Shipping Laws* Vol. 11 para. 74 under the title *Repairs Necessaries* etc., it is stated:

“ At Common Law there is no maritime lien for necessities supplied to or repairs effected on a ship ... Therefore, the mortgagee takes priority over the claims of repairs and material men who have not issued proceedings before the date of the mortgage, from which date the mortgage becomes a valid charge upon the ship, even though the owner remains in possession. The right to sue in rem in Admiralty gives the plaintiff a charge upon the res from the date of the issue of the writ of summons: see *The Monica S.* [1967] 2 Lloyd’s Rep. 113. Accordingly, a change of ownership occurring after the institution of proceedings but before service of process or arrest does not defeat a ‘statutory right of action in rem’: see *The Monica S. supra*, but compare *The Banco*, *The Times*, December, 10, 1970. Registration, it should be noticed, only affects the priorities as between mortgagees: see, s. 33. A mortgagee whilst in possession is not liable for necessities supplied to the order of the ship, unless the master in ordering them acted as agent of the mortgagee: *The Troubadour* [1866] 16 L.T., 156. The master has no implied authority to act as his agent in that respect. ... On equitable principles, a necessities claimant might be preferred to a mortgagee if that mortgagee had stood by, knowing that the shipowners were insolvent, and that the claimant was carrying out work or supplying materials that were directly benefiting his interests. See *The Pickaninny* [1960] 1 Lloyd’s Rep. 533. See *The Zigurds, supra*, generally for various attempts by repairers and ‘necessaries men’ to obtain preference over an equitable mortgagee. Since a repairer has no maritime lien or similar charge upon the ship, he cannot proceed in rem if his contract was made with demise charterers and not the owners: see *Smith’s Dock Co. v. The St. Merriel (Owners)* [1963] 2 W.L.R. 488.”

On the aforesaid authorities this claim cannot be given priority over the applicants’ mortgage. Moreover it was never alleged that the Marshal was ever informed about them or that he ever asked for them to be continued, and in any event he could not do so without directions from the Court.

In the *Pickaninny case (supra)* necessities men claimed

that they should be given priority over the mortgagees, because, as they alleged the mortgagees knew that the ship owners were insolvent, yet, they stood by and allowed the repairs to the ship to be carried out and they thus benefited thereby. It was
5 stressed in that case by Justice Hewson at p. 537 that "... there would have to be very strong reliable evidence before a Court could upset the normal run of priorities established by judgments over many years in the admiralty Court ..."

This prerequisite to the postponement of the mortgagee to a
10 claimant who has expended his money directly for the benefit of the mortgagee, is that at the time the mortgagee knew that the mortgagor was insolvent and also that the mortgagee had knowledge that the money had been so spent by the claimant. In our case there is no such evidence to establish to my satis-
15 faction these two prerequisites, and I am not prepared to depart from the usual rules of priorities. The case of *Narkissos* (*supra*) has clearly no bearing in this case and cannot be followed.

Action No. 205/77 was instituted by the Chief Engineer of
20 the defendant ship and the claim was for wages and other emoluments, costs of repatriation, pension contributions, etc. The petition was filed but it was not pursued thereafter by the plaintiff in order to reach the stage of adjudication upon, nor any other step was taken. It seems that the plaintiff having
25 been paid his claim by the plaintiffs in Action No. 410/77 has no longer any interest in the matter, hence the filing of the opposition to the present application by counsel appearing also in Action No. 410/77.

Mr. Stavrinides has stated that this Chief Engineer assigned
30 by a written assignment dated 8th September, 1977, all his rights claimed in the aforesaid action to Colchis Maritime Agencies Ltd., who are the plaintiffs in Action No. 410/77, and in which action they included the amount of C£2,023.- which they paid to the Chief Engineer together with an amount of
35 C£32,400 mils his repatriation expenses. For both amounts judgment was given in their favour.

Judgment was obtained by default on the evidence of Andreas Georghiou, the manager of the plaintiff company, for the amount of C£4,109.077 mils with costs, and the question of the

priorities of the various items making up that amount was reserved.

I need not deal with the Law covering the question of assignments in Cyprus as the matter has been dealt with recently in the case of *Andreas Chrysostomou v. G. S. Halkousi and Sons* (1978) 1 C.L.R., p. 10, where it was held that there can be an equitable assignment of a legal chose in action and that an equitable assignment of a debt made between the assignor and assignee is complete even if no notice has been given to the debtor concerned.

Mr. Stavrinides further asked me to distinguish the case of *The Petone* [1917] P. 198 and the statement of the Law to be found in *Halsbury's Laws of England*, 3rd Ed., Vol. 35, pp. 794, 796, and paras. 1226 and 1228, where it is stated:-

"1226. *Transfer of maritime liens.* As a general rule maritime liens other than the lien for bottomry are not transferable but a Court having Admiralty jurisdiction has in some cases allowed persons who have, with the sanction of the Court, paid off claims against a ship to have the same advantages as to priorities as the person had whose claim they have satisfied."

"1228. *Enforcement of possessory liens....* A maritime or statutory lien is extinguished by giving bail or a guarantee to prevent the arrest or secure the release of the res in an action to enforce the lien, by the arrest and sale of the ship in an action in rem by a Court of competent jurisdiction, whether English or foreign, by assignment without the sanction of the Court."

The authority given for this proposition is the *Petone* case (*supra*).

I was also referred by him to the case of the *First National Bank of Chicago v. The Ship "BLOCKLAND"* (1977) 4 J.S.C. p. 415* but with regard to this latter case it should be pointed out that the plaintiffs applied to the Court for its sanction to perform certain duties including the settlement of the claims for wages of the crew, something which was not done in Case No. 410/77.

* To be reported in (1977) 1 C.L.R.

The case for payment off of claims without the sanction of the Court was considered in the *Cornelia Henrietta* [1866] L.R. 1 A. & E. 51, where the rule was laid down that such payments must be made with the sanction of the Court if the priority of the claim satisfied was to be claimed by the person satisfying the claim. All previous authorities, however, were exhaustively reviewed in the *Petone* (*supra*) and the position is now that the cases where parties paid off claims without the sanction of the Court and then availed themselves of the priority enjoyed by the person whose claim had been satisfied, would no longer be followed.

The claims therefore in action No. 410/77 cannot be given priority over the mortgage.

There remains the claim in Action No. 24/78 in which the applicants intervened and the Court has yet to decide whether it is a claim of salvage or not. In order not to delay the payment out upon the determination of the priorities in the present case, it was agreed and direction was made that an amount of C£2,000.- be retained by the Registrar of the Court until this action was adjudicated upon.

For all the above reasons I have come to the conclusion that the order of priority in the present case is as follows:-

- (a) Marshal's charges and expenses, as hereinabove determined.
- (b) The applicants' mortgage debt as per the judgment given in their favour on 15th October, 1977, in Action No. 300/77; and
- (c) The claims of all opponents which should rank *pari passu inter se* and all other claims, not coming under categories (a) and (b) above.

Further, I do hereby order and direct that payment be made in the aforesaid order of priorities, by the Registrar of this Court, out of the proceeds of sale of the ship "PEGASOS III" in his hands, subject to the retention of the C£2,000.- already ordered to be kept until the determination of Action No. 24/78, payment out thereafter to be made subject to the determination

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of priorities in these proceedings, the claimants therein to be entitled to priority over the applicants' mortgage in case they establish their claim for salvage.

Costs of these proceedings in favour of the applicants.

Order accordingly. 5