

1982 July 2

[TRIANTAFYLIDIS, P., HADJIANASTASSIOU, MALACHTOS, SAVVIDES,
STYLIANIDES AND PIKIS, JJ.]

1. THE SHIP "GLORIANA",
2. THE CARGO LADEN ON BOARD THE SHIP "GLORIANA",
Appellants-Defendants,

v.

EDDY BREIDI AND ANOTHER,
Respondents-Plaintiffs.

(Civil Appeals Nos. 6374 and 6375).

*Admiralty—Practice—Arrest of property—Release—Has to be applied
for by independent application—Rule 60 of the Cyprus Admiralty
Jurisdiction Order 1893—In the circumstances of this case such
non-compliance with prescribed procedure does not render the
5 whole proceedings a nullity—Treated as an irregularity—Rule
70 of the old English Rules, applicable by virtue of rule 237 of
the Cyprus Admiralty Jurisdiction Order, 1893.*

*Admiralty—Jurisdiction—Action in rem against cargo—It lies when
plaintiffs possess a maritime lien on cargo—Section 3(3) of the
10 English Administration of Justice Act, 1956—Plaintiffs having no
maritime lien on defendant cargo—And not entitled to invoke
admiralty jurisdiction by an action in rem against cargo—There-
fore warrant of arrest against cargo issued without jurisdiction
—Discharged.*

*15 Admiralty—Action in rem—Arrest of ship—Pending determination
of action—Principles applicable—Court has to be satisfied that
there is a question to be tried at the hearing—Action for damages
for breach of contract of carriage of goods and/or for negligence—
Sufficient material before the Court raising triable issues—Order
20 of arrest of ship upheld.*

The respondents-plaintiffs brought an action in rem against
the appellant ship and her cargo claiming the equivalent amount
in Cyprus pounds of the sum of U.S. Dollars 1,000,000 as
damages for loss for non-delivery of cargo and/or for breach
25 of contract of affreightment and/or for negligence and/or for

breach of contract of carriage of goods. The trial Court on the ex parte application of the respondents issued an order* for the arrest of the appellant ship and her cargo and fixed the case for the 22.1.1980 "in case it was decided to show cause against the continuance in force of the order of arrest made to-day ex parte". The order of arrest provided, inter alia, that the Marshal could release the ship and the cargo on the filing of a security bond by or on behalf of the ship in the sum of £200,000 for the satisfaction of any order or judgment in favour of the plaintiffs. The appellants filed a security bond as required by the order of the Court and the cargo was unloaded at Limassol and the ship left the port.

On 22.1.1980, the date fixed by the Judge, the appellants appeared by their advocates in Court and they orally opposed the application for the issue of the warrant of arrest. Thereupon the Court fixed the application for hearing on 11.3.1980 and the appellants filed written notices of opposition supported by affidavits. Though the trial Judge on 10.11.1980 expressed the view that an application for the discharge of the warrant of arrest be made in writing the respondents did not file any application in compliance with this direction and the Judge proceeded to hear it and dismiss it. Hence this appeal on behalf of the ship and the cargo.

Held, (1) (*on the question whether the procedure followed by the appellants by notice of opposition against the issue of the warrant of arrest instead of separate applications moving the Court for the release of the property arrested, was correct*) that though the appellants had to file an independent application for the release of the arrested ship and cargo (see rule 60 of the Cyprus Admiralty Jurisdiction Order, 1893), in the circumstances of this case such non-compliance does not constitute a fundamental defect which made the whole proceedings a nullity and which could not be waived by the subsequent steps taken by the respondents-plaintiffs in the first instance Court; that having regard to all the facts and circumstances of this case relating to the procedural aspect, the notice of opposition accompanied with the sworn affidavits, may well be considered, and they are considered as motions within the concept of the

* The order is quoted at pp. 413-414 post.

relevant Rule for the discharge of the order; that there is no inherent illegality and this is treated as an irregularity which was cured by what followed in these proceedings and the matter is brought within the ambit of Order 70* of the old English Rules of the Supreme Court, which are applicable by virtue of rule 237 of the Cyprus Admiralty Jurisdiction Order, 1893.

(3) That plaintiffs could proceed by an action in rem against the cargo only if they had a maritime lien on the cargo (see section 3(3)** of the English Administration of Justice Act, 1956); that counsel for the respondents admitted that the plaintiffs have no maritime lien on the cargo; that consequently the plaintiffs are not entitled to invoke the Admiralty Jurisdiction of this Court by an action in rem against the cargo; that their claim falls outside the ambit of section 3(3) and they have neither a maritime lien nor a charge on the cargo; that if it appears that the Court lacked jurisdiction to issue a warrant of arrest or a warrant is issued on insufficient grounds, then such order may be discharged and the property may be released; that, therefore, the order against the cargo will be discharged.

(3) That the Court in dealing with interlocutory applications of this nature is not called upon to decide finally on the rights of the parties; that it is necessary that the Court should be satisfied that there is a question to be tried at the hearing; that the Court no doubt must be satisfied that the claim is not frivolous or vexatious; that it is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend not to decide difficult questions of law which call detailed argument and mature considerations; that these are matters to be dealt with at the trial; that the claim of the plaintiffs against the ship is for breach of contract of affreightment and/or for negligence and/or for breach of contract of carriage of goods; that there is a bill of lading; that there is a factual and legal dispute as to that bill of lading and as to the contract of affreightment which are matters that cannot be determined at this stage; that they are issues to be tried and determined at the hearing of the case and even on appeal; and

* Rule 70 is quoted at p. 419 post.

** Section 3(3) is quoted at p. 421 post.

they will come up in due course, when the case is set down for hearing; that there is sufficient material before the Court raising triable issues; that the action is one in rem and the plaintiffs are entitled to have the ship arrested as security for their claim, if they succeed, and consequently to the security given in lieu of the ship—to enable the release of the ship and her sailing away; that, therefore, the appeal of the ship is dismissed. 5

Appeal of cargo allowed.

Appeal of ship dismissed. 10

Cases referred to:

Asimenos and Another v. Chrysostomou and Another (1982)
1 C.L.R. 145;

Re Pritchard (Deceased) [1963] 1 All E.R. 873 at pp. 881, 882;
Craig v. Canssen [1943] 1 All E.R. 108; [1943] K.B. 256; 15

Wright v. Prescott Urban District Council, Law Times Reports,
Vol. 115, p. 772 at p. 773-774;

American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All E.R. 504;

Rigas v. The Ship Baalbeck (1973) 1 C.L.R. 159;

*The St. Elefterio—Schwarz & Co. (Grain), Ltd. v. St. Elefterio
ex Arion (Owners)*, [1957] 2 All E.R. 374, at p. 377. 20

Appeals.

Appeals by defendants against the judgment of the Supreme Court of Cyprus (Demetriades, J.) dated the 16th January, 1982 (Admiralty Action No. 13/80*) whereby defendants' opposition against the issue of a warrant of arrest was dismissed. 25

C. HjiIoannou, for the appellants in Civil Appeal No. 6374.

L. Demetriades with *St. Nathanael* for the appellants in
Civil Appeal No. 6375.

D. Demetriades, for respondents in both Appeals. 30

Cur. adv. vult.

TRIANAFYLLIDES P.: The judgment of the Court will be delivered by Stylianides, J.:

STYLIANIDES J.: These two appeals, taken together on the directions of the Court, are for a warrant of arrest of the ship "GLORIANA" and the cargo loaded on same ship issued on 16.1.198 by a Judge of this Court. 35

* Reported in (1982) 1 C.L.R. 1.

The plaintiffs raised this action against the ship, the cargo and a firm of manufacturers of T.Vs., Grunding A.G. of West Germany, claiming thereby "the equivalent amount in Cyprus pounds of the sum of U.S. Dollars 1,000,000 as damages for loss for non-delivery of cargo, and/or for breach of contract of affreightment and/or for negligence and/or for breach of contract of carriage and/or for breach of contract for the sale of goods now loaded on defendant ship and/or otherwise on or about 14.1.1980".

10 The plaintiffs applied for the issue of a warrant for the arrest of the ship "Gloriana" and the cargo loaded on board same, lying then in the port of Limassol.

The facts in support of this application were set out in an affidavit sworn by Pavlos Kakopieros. The Judge issued the following order:-

- 15 "1. Let a warrant of arrest of the ship GLORIANA, now lying at the port of Limassol, and her cargo, be issued.
2. Notice of such arrest to be served on the Master of the ship.
- 20 3. The Marshal shall release the ship and the cargo upon directions of the Registrar of this Court on the filing of security bond by or on behalf of the ship in the sum of ~~£200,000.=(two hundred thousand pounds)~~ for the satisfaction of any order or judgment in favour of the plaintiffs-applicants.
- 25 4. The plaintiffs-applicants shall comply with the following requirements:-
 - 30 (a) Lodge in Court the sum of £200.—(two hundred pounds) deposit for any expenses which may be incurred by the Marshal in connection with the custody of the ship and her cargo whilst under arrest, subject to this sum being increased later on;
 - 35 (b) Lodge in Court any further amount that the Registrar of this Court will ask the plaintiffs to pay with regard to the arrest and failing to comply within six days therefrom from the demand, the order of arrest to be discharged;

- (c) File a security bond in the sum of £75,000.—(seventy-five thousand pounds) to be answerable in damages for the defendant ship, her owners and the owners of the cargo.
5. Warrant of arrest not to be drawn up and executed until and unless the plaintiffs comply with sub-para. (c) of para. 4 hereinabove. 5
6. The Marshal is required to report to this Court by the latest at 9.30 a.m. on the 22nd January, 1980, with regard to the arrest of the ship and the cargo, and probable costs to be incurred in connection with such arrest. 10
7. This case is fixed for the 22nd January, 1980, at 9.30 a.m. in case it is decided to show cause against the continuance in force of the order of arrest made today ex-parte. 15
8. Question of costs reserved.
- Order accordingly".

The defendants-appellants—the ship and the cargo—filed a security bond in the sum of £200,000.—, as appointed in paragraph 3 of the order, and the cargo was unloaded at Limassol and the ship left the port. 20

On 22.1.1980, the date fixed by the Judge, they appeared by their advocates in Court and they orally opposed the application, apparently for the issue of the warrant of arrest, and plaintiffs-respondents' advocate moved the Court for a date of hearing of the application. Thereupon the Judge fixed the application for hearing on the 11th March, 1980, and directed that, as the security bond for the release of the ship and the cargo ordered under paragraph 3 of the order of 16.1.1980 had been filed and the ship had already been released and left the port, the goods that had been discharged at Limassol were free for clearance. 25 30

Both appellants filed notices of opposition supported by affidavits sworn by the Manager of the agents of the ship in Cyprus and a qualified practising advocate of Western Germany, respectively. 35

On 11th March, 1980, the hearing of the application was

adjourned on the motion of the plaintiffs-respondents' advocate as the lawyers representing them in Lebanon were unable to attend. The hearing of the "Application for warrant of arrest" was repeatedly adjourned as plaintiffs-respondents' witnesses, due to the anomalous situation prevailing in a neighbouring country, could not arrive in Cyprus.

On 10.11.1980 the Judge expressed the view that an application for the discharge of the warrant of arrest be made in writing. Argument by counsel on this point was not invited or heard and the application was again adjourned for hearing. The respondents did not file any application in compliance with this direction and on 10th September, 1981, the hearing of the application proceeded.

The plaintiffs-respondents called one witness, namely, Robert Anid, a merchant of Beirut, who testified before the Court. The advocates of the parties addressed the Court.

The Court by its decision dismissed the oppositions of the defendants and ordered that the bail put up by the defendants should remain in force until the final determination of the action, on the ground that the plaintiffs had a right to have the issues raised by the evidence of Mr. Anid tried and thus they were entitled to have the ship and the goods loaded on her arrested. The concluding part of the judgment reads as follows:-

"In my view, a party claiming the release of arrested property or the discharge of bail put up for the release of such property, can only succeed if he can prove that the plaintiff's claim or the defendant's counterclaim is frivolous and vexatious. Similarly, since the arrested property is substituted by the bail, it is upon the party seeking its release to apply to the Court.

In the present case, the defendants have failed to apply to the Court for the discharge of the bail they have put up for the release of the vessel and the cargo and for this reason I cannot order the release of the bail.

For all the above reasons, the oppositions of the defendants are dismissed and the bail put up by the defendants shall remain in force until the final determination of the action".

Against this judgment these appeals were taken.

Mr. HjiIoannou for the appellant-ship maintained that for a warrant of arrest to be issued (a) the Admiralty Jurisdiction of this Court can be invoked in rem; (b) that there must be a prima facie case against the ship, and that the Court failed to examine whether the alleged contract of carriage has been fulfilled and there are no triable issues between the plaintiffs and the respondents; and (c) the procedure followed in the circumstances was not wrong and could not be a ground for dismissing their opposition.

Mr. L. Demetriades for appellant-cargo challenged the said decision of the trial Judge on the following grounds:-

- (a) That no warrant of arrest could be issued as there was no maritime lien attached to the res—cargo—and, therefore, no action in rem could be invoked;
- (b) That an order for arrest may be discharged not only when the plaintiff's claim is frivolous or vexatious; and,
- (c) The procedure followed in the circumstances was not wrong and could not be a ground for dismissing their opposition.

PROCEDURE:-

It is a common ground of appeal that the procedure followed by the appellants by notice of opposition instead of separate applications moving the Court for the release of the warrant of arrest and/or the security given for the bailing out of the arrested ship and property was not wrong. It was further argued that in view of the order of 16.1.1980, calling upon them to appear on 22.1.1980 and show cause against the continuance in force of the order of arrest made ex-parte, the filing by them of notices of opposition instead of applications, more so having regard to the procedure followed during the protracted litigation of that application, could not be a ground against them. It was further stressed that they did not have the opportunity to argue the procedural issue before the trial Court.

Counsel for the respondents submitted that the warrant of arrest proceedings came to an end when the ship and the cargo

were bailed out, and, as in the bank guarantee or security bond no reservation was made for a right to apply to set aside the warrant of arrest, the appellants were precluded either by opposition or by application to move the Court for the discharge
 5 of the order. He further referred to the new English Order 75, to Atkin's Court Forms and to Halsbury's Laws of England, 4th Edition, Volume 1, with regard to warrant of arrest, application for release, bailing out, etc.

By virtue of sections 19(a) and 29(2)(a) of the Courts of
 10 Justice Law, 1960, Law 14/60, this Court as a Court of Admiralty is vested with and exercises the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty Jurisdiction on the day immediately preceding the 16th August, 1960, the day of Independence.
 15 In the exercise of such jurisdiction it applies the Law as applied in England on the day in question subject to the overriding provisions of the Constitution and save in so far as other provision has been, or shall be made by any Law.

By the Cyprus Admiralty Jurisdiction Order, 1893, the
 20 Colonial Courts of Admiralty Act, 1890, in England was made applicable to Cyprus and our aforementioned Admiralty Jurisdiction Rules were enacted as a schedule to such Order and they have remained in force ever since.

Rule 237 of the Admiralty-Jurisdiction Rules provides that:-

25 "In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice in England, so far as the same shall appear to be applicable, shall be followed".

It is now well settled authoritatively that the English Rules
 3 applicable by virtue of rule 237 are those that were in force on the day prior to Independence in 1960. (*Asimenos & Marcou v. Chrysostomou & Another*, (1982) 1 C.L.R. 145).

The arrest of property is governed by rules 50-59 and the
 35 release of arrested property by rules 60-64. There is a separate chapter on applications; it comprises rules 203-212.

The warrant of arrest in this case was issued, was executed by the Marshal and served, as prescribed by the Rules, on the

persons concerned—the appellants. The contents of the order served made it unnecessary for the respondents to invoke 0.60 and apply to the Court for the release of the property arrested as this Rule empowers the Court or a Judge by order to direct the release of such property upon such terms as to security or as to payment of any cost of appraisalment or removal or inspection or otherwise as to the Court or Judge shall seem fit. Such course might entail loss of time and expenses as the property in question, until such order of release is issued, continues to be in the custody of the Marshal but the cargo has to be unloaded and ships to sail from port to port. As the order given by the Judge provided that on filing security, the arrested property is released, the defendants reasonably and rightly preferred to file the appointed security, have the goods unloaded and the ship released. This is the practice that is followed invariably in this country. It serves the interests of both sides—the party who seeks the security of the arrest of the res and the defendant, the arrested res. It is a convenient and speedy means of serving both sides. This, however, is not the end of the arrest proceedings; on filing the security prescribed in the order for the issue of the warrant of arrest, the arrested property is released. A date is fixed for the appearance in Court in connection with that order as, due to urgency, the order is given on an ex-parte application, pursuant to rr. 205 and 50.

Rule 206 provides that:—

“No order made under rule 205 shall remain in force for a longer period than shall be necessary for service of notice thereof on all parties affected thereby and for enabling them to appear before the Court or Judge and object thereto, and the Court or Judge may, by the order, fix a time within which notice of the order shall be served on the parties affected thereby and for their appearance”.

This cannot be correlated with the provisions of 0.48, r.4, of the Civil Procedure Rules in the sense that the party affected has to file a notice of opposition. In the case of arrest in the Admiralty Jurisdiction it is preferable for the Court, on the appearance of the parties in Court, if in the meantime no application to set aside the order whereby the warrant of arrest is issued or application to release the property is filed, to direct

for a motion by way of application to be made for the discharge of the order and consequently the warrant of arrest. This practice is actually followed by Judges of this Court. In such orders a date is fixed "for anyone to appear and, if he so decides,
 5 *to move* the Court against the continuance in force of the order of the Court made *ex-parte*".

Order 70 of the old English Rules, which are applicable in virtue of rule 237 of the Cyprus Admiralty Rules, is in these terms:-

10 "Non-compliance with any of these Rules shall not render any proceedings void unless the Court or Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such
 15 terms as the Court or Judge shall deem fit".

Therefore, no application to set aside any proceedings for irregularity is allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

20 In *Re Pritchard (Deceased)*, [1963] 1 All E.R. 873, Upjohn, L.J., at p. 881 said:-

"I am not so sure that it is so difficult to draw a line between irregularities, by which I mean defects in procedure which fall within R.S.C., Ord. 70, and true nullities, though
 25 I agree that no precise definition of either is possible".

He commented on the use of the phrase "*ex debito justitiae*" by Lord Greene in *Craig v. Canssen*, [1943] 1 All E.R. 108; [1943] K.B. 256 and after reviewing examples of nullities and irregularities in decided cases, he said at p. 882:-

30 "I do not think that the earlier cases or the later dicta on them prevent me from saying that in my judgment the law when properly understood is that R.S.C., Ord. 70, applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A
 35 fundamental defect will make it a nullity. The court should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of Ord. 70 when justice can be done as a

matter of discretion, still bearing in mind that many cases must be decided in favour of the party entitled to complain of the defect *ex debito justitiae*. _____

The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement".

Is the non-compliance with the filing of an independent application for the release of the arrested ship and cargo and the filing of a proper notice of opposition with affidavit in support, a fundamental defect which renders the proceedings a nullity? Having considered the position in the circumstances of this case, we have come to the conclusion that such non-compliance does not constitute a fundamental defect which made the whole proceedings a nullity and which could not be waived by the subsequent steps taken by the respondents—plaintiffs in the first instance Court. There is no inherent illegality and we treat this as an irregularity and the matter is brought within the ambit of Ord. 70 as being a mere non-compliance with the Rules.

Having regard to all the facts and circumstances of this case relating to the procedural aspect to which reference was made earlier on in this judgment, the notice of opposition accompanied with the sworn affidavits, may well be considered, and we do consider them, as motions within the concept of the relevant Rule for the discharge of the order. Furthermore the non-filing of a separate application is not a nullity but an irregularity which was cured by what followed in these proceedings.

Before leaving the question of procedure, we consider it pertinent to quote the following passage from the judgment in *Wright v. Prescott Urban District Council*, Law Times Reports, Volume 115, p. 772, at pp. 773-774:—

"Every court must have a practice under which those who

5 appeal to it for its assistance, whether professional people or litigants in person, must know how to approach it and how to get the question that they wish to raise decided, and it is in the interest of the Profession, and in the interest of the public, that the rules which are made, with the view in the best possible way of bringing matters before the court, should be adhered to, because, if that were not done, you would have one perpetual confusion".

CARGO:-

10 In the British Shipping Laws, Admiralty Practice, (1964) at p. 30, it is stated:-

15 "The provisions of section 3 of the Administration of Justice Act, 1956, relating to the mode of exercise of Admiralty jurisdiction, may also restrict the plaintiff's choice between the action in rem and the action in personam".

Section 3 reads as follows:-

"3.-(1) Subject to the provisions of the next following section the Admiralty jurisdiction of the High Court — may in all cases be invoked by an action in personam.

20 (2) The Admiralty jurisdiction of the High Court — may in the cases mentioned in paragraphs (a) to (c) and (e) of sub-section (1) of section one of this Act be invoked by an action in rem against the ship or property in question.

25 (3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, the Admiralty jurisdiction of the High Court — may be invoked by an action in rem against that ship, aircraft or property".

30 Thus the invocation of the Admiralty Jurisdiction in rem is governed by various sub-sections of section 3 of the Administration of Justice Act, 1956. Unlike previous statutes, where in the Admiralty Jurisdiction was generally expressed to be invocable in rem, the scheme adopted in section 3 of the 1956 Act is to make distinct and separate provisions applicable to
35 different groups of maritime claims.

Subsection (2) of section 3 applies to the following claims or questions:-

- (a) Any claim to the possession or ownership of a ship or to the ownership of any share therein;
- (b) Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship; 5
- (c) Any claim in respect of a mortgage of or charge on a ship or any share therein;
- (d) Any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty. 10

The above claims generally represent instances of an interest being claimed in a ship or other property and in such circumstances the action in rem represents a particular convenient proceeding by which the res in question may be brought within the custody of the Court. 15

The only limitation expressed in section 3(2) is that the action in rem may only be prosecuted against the "ship or property in question". Subsection (3) is declaratory of the original Admiralty law and, therefore, leaves untouched the right of a maritime lien to pursue an incumbranced res into the hands of a purchaser without notice. 20

A maritime lien is a claim or privilege upon a maritime res to be carried into effect by legal process. 25

Plaintiffs' action against the cargo is based on section 1(1)(g).

The material before the trial Court about the cargo, as set out in the judgment, is the affidavit of Kakopieros and the oral testimony of Robert Anid who stated that he "himself negotiated on behalf of the plaintiffs with defendants No. 3 the sale agreement of T.V. sets, the contract of affreightment of the goods by land from the border of Germany to the port of Ravenna in Italy and also the agreement with the ship-owner, Mr. Shoucry - owner of 'Gloriana' ship - with whom he had 30 35

made an agreement to carry the cargo from Ravenna to Beirut".

5 Mr. D. Demetriades, counsel for the plaintiffs-respondents, in his address admitted that the plaintiffs have no maritime lien on the cargo.

The plaintiffs consequently are not entitled to invoke the Admiralty Jurisdiction of this Court by an action in rem against the cargo. Their claim falls outside the ambit of subsection (3). They have neither a maritime lien nor a charge on the cargo.

10 If it appears that the Court lacked jurisdiction to issue a warrant of arrest or a warrant is issued on insufficient grounds, then such order may be discharged and the property may be released. In view of the above the order against the goods will be discharged. As the security given is in lieu of the res, an order
15 will be made for the discharge of that part of the order of 16.1.80 which affects the cargo.

SHIP -

20 We have referred to section 3 of the Administration of Justice Act, 1956, which confers Admiralty Jurisdiction in rem on this Court.

The Court in dealing with interlocutory applications of this nature is not called upon to decide finally on the rights of the parties.—It is necessary that the Court should be satisfied that there is a question to be tried at the hearing. The Court no
25 doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a question to be tried. It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to
30 decide difficult questions of law which call detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that it aided the Court in
35 doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing. (*American Cyanamid Co. v. Ethicon Ltd.*, (1975) 1 All E.R. 504; *Elias Rigas v. The Ship Baalbeck*, (1973) 1 C.L.R. 159).

In *The St. Elefterio - Schwarz & Co. (Grain), Ltd. v. St. Elefterio ex Arion (Owners)*, (1957) 2 All E.R. 374, Willmer J., said at p.377:-

"If counsel for the defendants is right in saying that a plaintiff has no right to arrest a ship at all, unless he can show in limine a cause of action sustainable in law, what is to happen in a case (and, having regard to the argument I have listened to, this may be just such a case) where the questions of law raised are highly debatable, and questions on which it may be desired to take the opinion of the Court of Appeal or even of the House of Lords? Suppose, for instance, following the argument of counsel for the defendants, that this court comes to the conclusion, on the preliminary argument held at this stage of the action, that the action is not one that is sustainable in law, it will presumably set aside the writ and the warrant of arrest. It is possible (these things have been known to happen) that higher court might take a different view; but in the meantime the ship, which is a foreign ship, has been freed from arrest, has gone, and may never return to this country. It might be that in those circumstances the plaintiffs would have lost their right for ever to entertain proceedings in rem in this country".

The claim of the plaintiffs against the ship is for breach of contract of affreightment and/or for negligence and/or for breach of contract of carriage of goods. There is a bill of lading (exhibit No. 1). There is a factual and legal dispute as to that bill of lading and as to the contract of affreightment. These matters cannot be determined at this stage. They are issues to be tried and determined at the hearing of the case and even on appeal. They come up in due course, when the case is set down for hearing.

We have gone through the affidavits filed in support and in opposition to the sub judice order. There is sufficient material before the Court raising triable issues. The action is one in rem. The plaintiffs are entitled to have the ship arrested as security for their claim, if they succeed, and consequentially to the security given in lieu of the ship - res - to enable the release of the ship and her sailing away.

In view of the foregoing the appeal of the ship is dismissed

with costs. The appeal of the cargo is allowed and the order for arrest is discharged. Respondents to pay the costs of the successful appellant both in this Court and in the first instance Court.

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Appeal of the ship dismissed.

Appeal of the cargo allowed.

Order for costs as above.