1989 August 3

(STYLIANIDES, J.)

NORDIC BANK PLC OF NORDIC BANK HOUSE,

*Plaintiffs,*

v.

THE SHIP «SEAGULL» NOW LYING AT LIMASSOL PORT,

*Defendant.*

*(Admiralty Action No. 358/84).*

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*Admiralty — Proceeds of sale of ship arrested and sold by the Court — The fund is under the control of the Court and not of any particular Judge thereof.*

*Admiralty — Practice — Proceeds of sale of ship arrested and sold by order of the Court — Application for the determination of the order of priorities in distributing the fund — Whether such an application should be made in the action, in which the ship had been arrested and the order for sale was issued — Question determined in the negative — Such application or motion may be made in any proceedings — Notice of the application should be given to all those who entered a caveat and to others as the Court may direct.*

*Admiralty — Conflict of Laws — Order of priorities among claims against the ship or the proceeds of her sale — Governed by the lex fori — The Court, however, will look at the law governing the substantive right in order to determine its nature.*

*Admiralty — Conflict of laws — Order of priorities among claims against the ship or the proceeds of her sale — The International Brussels Convention 1926 — It is not binding on this Court, because it was not part of the Cyprus or English Law on the day preceding Independence day and it was never ratified under Art. 169 of the Constitution.*

*Admiralty — Mortgages — Foreign mortgage — Need not and, indeed, cannot be registered in Cyprus.*

*Admiralty — Mortgages — Priority between a mortgagee and a possessory lien — The right of the former is deferred to the right of the latter.*

*Admiralty — Possessory liens — Definition of — Actual possession of the ship until claimant's demands are met or until her surrender to the Marshal under an order of the Court is a necessary prerequisite for its existence — The Master and crew as regards their wages until surrender, the captain for his disbursement and repairers for their remuneration and disbursements have such a lien — The lien is not transferable — Payment of claims covered by the lien does not entitle the payer to the lien, unless it was authorized or approved by the Court.*

*Admiralty — Maritime liens — Cargo claims do not carry a maritime lien and rank in priority after all mortgage claims.*

The ship «SEAGULL» was arrested in action 357/84. Following judgment the ship was sold and the proceeds lodged in Court. Caveats were entered against the release of the proceeds.

This application for determining the order of priorities in the distribution of such proceeds was filed by the plaintiffs (judgment creditors) in this action 358/84.

The applicants were mortgagees of the ship. The ship carried the Greek flag and the mortgage was duly registered in Greece.

The judgment-creditors in action 357/84 (Claimants 357) obtained in that action judgment in respect of monies which they had paid under a management agreement for goods and materials supplied to the ship and for her operation and maintenance, for repairs and equipment thereof, payment of charges, dues, crew wages and emoluments and other disbursements in connection with the operation of the ship.

The judgment-creditors in action 114/85 (claimants 114) obtained in that action judgment for loss by short-landing of cargo.

Claimants raised the objection that the proceeds of sale of the said ship are under the control of the Judge who issued the order for her sale and that the application should have been made in the action, in which the ship had been arrested and sold.

Claimants 357 claimed priority on the ground that by the payments, which they effected, they had stepped into the shoes of the crew, the repairers and those who have paid the disbursements and, thus, they acquired a possessory lien. This claim raised the issue of what is and how a possessory lien is acquired and retained and

whether it is transferable (without assignment) The evidence adduced established that these claimants had never had the ship in their possession and that the Management agreement, which they invoked, had been terminated some time before the ship's arrest. Claimants 114 invoked the International Brussels Convention, 1926, in virtue whereof their claim ranked in priority to the mortage claims of the applicants and submitted that under Greek Law preferred mortgages rank after the privileged claims covered by Art. 2 of such Convention. Thus, the issue was raised whether the Convention is part of the Law of Cyprus; and, moreover, it became necessary to determine the question which law governs the order of priorities.

The legal principles expounded by the Court in determining the aforesaid issues appear sufficiently in the hereinabove headnote. The application of such principles to the facts of this case lead the Court to the conclusion that the applicants ranked in priority vis a vis the other two claimants. As the fund was not sufficient to satisfy in toto applicants' mortage, there was no need to determine the priority as between claimants 357 and 114.

*Order accordingly.*
*No order as to costs.*

*Cases reffered to:*

*The Eva* [1921] P. 454;

*The Africano* [1894] P. 141;

*The Optima* [1905] 74 2 L.J.R. 94;

*«Rana»* [1921] 8 Ll.L.R. 369;

*Don v. Lippmann* (1837) 5 Cl. & F.1, 7 E.R. 303;

*The Milford* (1858) Swa 362;

*The Tagus* [1903] P. 44;

*The Colorado* [1923] P. 102;

*The Zigurds* [1932] P. 113;

*Commercial Bank v. Ship «Pegasos III»* (1978) 1 C.L.R. 597;

*Williams v. Allsup* (1861) 19 C.B. (N.S.) 417, 142 E.R. 514;

*The Lyons* (1887) 6 Asp. Mar Law Cas. 199;

*The Tergeste* [1903] P. 26;

*The Petone* [1917] P. 198;

*The «Leoborg* (No. 2) [1964] 1 Ll.L.R. 380,

*The «Louisa»*, 166 E R. 900;

*The James W. Elwell* [1921] P. 351;

*The Berostar* [1970] 2 Lloyd's Rep. 403;

*The Vasillia* [1972] 1 Lloyd's Rep 51.

**Application.**

Application for an order of the Court determining the priorities to the several claimants against the proceeds of sale of the defendant ship «Seagull» lodged in Court.

*L. Papaphilippou*, for plaintiffs in Action No. 357/84.

*A. Skordis*, for plaintiffs in Action No. 114/85.

*Cur. adv. vult.*

STYLIANIDES J. read the following decision. By this application the applicants - Nordic Bank Plc - seek:

A. An order of the Court determining the priorities to the several claimants against the proceeds of sale of the defendant ship - «SEAGULL», lodged in Court.

B. An order for payment out in the following order:

(a) Marshal's expenses.

(b) Legal costs up to and including appraisement and sale to the plaintiffs in Action No. 357/84, to be assessed by the Registrar.

(c) To the applicants

(i) The amounts of US$53,689.05 and CY£1,050 paid by the applicants pursuant to the order of the Court dated 27th November, 1984.

(ii) The amount of US$23,850. paid by the applicants in settlement of Admiralty Actions 370/84 and 374/84, pursuant to the order of the Court, dated 20th March, 1985; and

(d) Any balance in Court to the applicants towards their judgment debt and costs in this action. Action No. 358/84.

This application was served on the plaintiffs in Actions Nos. 357/84, 370/84, 374/84 and 114/85 at their addresses for service.

There is no quarrel as to Marshal's expenses or the costs of the appraisement and sale in Action No. 357/84.

The Court on 27th November, 1984, authorized the applicants to negotiate, agree and pay wages and other emoluments of the master and members of the crew of the ship «SEAGULL», then lying at the port of Limassol and that any money so paid by the applicants to be claimed by them as money expended in protecting and/or maintaining and/or enforcing their security under the mortgage in their favour and same to be afforded priority in the distribution of the eventual proceeds of sale of the defendant ship.

On 20th March, 1985, the Court authorized the same applicants to negotiate, settle and discharge the claims of the master and the crew and the emoluments by way of contributions due to the «Naftikon Apomachikon Tamion» («Ναυτικόν Απομαχικόν Ταμείον»), for the respective period during which each of the said master and members of the crew were serving on the defendant vessel, raised in Actions Nos. 370/84 and 374/84, having served from 28th February, 1984 to 12th July, 1984 and from 12th July, 1984, until the sale of the vessel, and that priority be afforded in the distribution of the proceeds of the sale of the defendant ship as the claim for wages and other emoluments of the plaintiffs in the aforesaid actions, as if judgments for such wages and emoluments had been obtained against the defendant vessel by the said plaintiffs and crew.

Claimants Marine Managers Ltd. plaintiffs in Action No. 357/84 - against the ship and claimants Office National D' Importation De Commercialisation DU R12 Onicor, of Moroni Commoros Islands - plaintiffs in Action No. 114/85 against the proceeds of the sale of the ship opposed this application.

Both claimants obtained judgment by default in their respective cases.

In the course of the hearing it was conceded by the said two claimants - to be referred as claimants 357 and claimants 114 - that the Marshal's expenses, the legal costs of plaintiffs in Action No. 357/84, up to and including the sale, and the amounts paid in settlement of the actions 370/84 and 374/84, pursuant to orders of the Court dated 27th November, 1984, and 20th March, 1985, rank in priority.

The dispute, thus, was limited to the priorities for the balance.

The ship «SEAGULL» was arrested at the port of Limassol in virtue of a warrant of arrest, issued on 21st November, 1984, on the application of the claimants 357.

On 22nd November, 1984, Action No. 358/84 was filed by the applicants.

On 28th December, 1984, judgments by default were issued against the ship in favour of claimants 357 for US$722,499.93 with interest at 9% and costs to be assessed by the Registrar and in favour of the present applicants for US dollars totalling 1,476,267.68, plus interest as from 20th November, 1984, and costs.

On the following day, the judgment creditors - claimants 357, applied ex parte for appraisement and sale of the ship and, on completion of the sale, payment of the proceeds into Court.

The ship was finally sold on 4th March, 1985, at US $730,000.- and the amount was paid into Court. Caveats were entered against the release/payment out of the aforesaid proceeds.

Thereafter this application was filed in Admiralty Action 358/84.

The claimants - opponents raised the following objections:-

1. This Court cannot entertain this application made in Action No. 358/84, as the ship was arrested, appraised and sold in Action No. 357/84 and that the proper course was to file the application in Admiralty Action No. 357/84.

2. Claimants 114 submitted that, in virtue of the provisions of «The International Convention for the Unification of Certain Rules of Law Relating to Maritime Mortgages and Liens», commonly know as the «International Brussels Convention of 1926», their claim - being for loss by short landing of cargo - ranks in precedence to the mortgage claim of the applicants. Article 2(4) of the said Convention creates Maritime Lien for loss of cargo and Article 3 provides that mortgages rank in after the said lien.

3. In accordance with the Ministerial Decision No. 54123/80 for the registration of the ship in Greece, published in the Greek Gazette, No. 1179, dated 21st November, 1980, issued pursuant to the Greek Law, that governs the registration and the status of the ship, preferred mortgages rank after the privileged claims

specified in Article 2 of the aforesaid International Brussels Convention and, therefore, claimants 114 rank in priority over the applicants, whose claim is based on foreign mortgage. This is based on the Greek Law, which is applicable in the present proceedings, as the ship was registered in Greece.

4. The claim of the applicants was based on a foreign mortgage, not registered in Cyprus, and, therefore, it might be considered only as an equitable mortgage, which has no priority.

5. Marine Managers Ltd. - claimants 357 - contended, further, that the judgment in their favour was given in respect of a claim for disbursements and payments for goods and materials supplied to the ship and for her operation and maintenance, for repairs and equipment thereof, payment of charges, dues, crew wages and emoluments and other disbursements in connection with the operation of the ship, on the basis of a Management Agreement, dated 15th March, 1982, a photo copy of which was produced and, therefore, they are entitled to step into the shoes of the crew, the repairers and of those who made the disbursements.

6. Lastly, claimants 357 had a possessory lien on the ship, which they never abandoned until delivery of her to the Admiralty Marshal. Such possessory lien ranks in priority to applicants' claim.

It was strenuously argued that, as the ship was arrested, appraised and sold in Action No. 357/84, no order can be made in any other action for payment out. In support reference was made to Rules 65, 67, 70, 74-77 of the Rules of the Supreme Court of Cyprus in its Admiralty Juristiction (the «Rules») and the case of *The Eva* [1921] P. 454.

Rules 65, 67, 70 relate to caveats.

Rules 74-77 govern appraisement and sale of property under the arrest of the Court and payment of the gross proceeds of the sale upon completion thereof into Court.

Counsel for the applicants, on the other hand, referred to Rules 111, 112 and 113, governing payment out of Court.

Rule 111 entitles any person desiring the payment out to him of moneys in Court to apply to the Court or Judge for an order directing the moneys in Court to be paid to him.

Rule 112 provides that such application may be made without notice to any party or person, but the Court or Judge may require notice of the application to be served on any party or person.

And Rule 113 empowers the Judge or Court to direct evidence to be adduced, as it shall think fit, as to the right of the person making the application to the moneys in Court, and make such an order on the application as shall seem just.

In *The Eva* case, (supra) Hill J. in the course of his Judgment said about the practice to be followed (p. 455):-

> «In order that the practice of the Court, which has become a little lax, may be put into proper form I think it well to state that when any party has obtained judgment in a default action he is entitled to move for payment out, but he must give notice of that motion to any persons who have intervened or entered caveats against payment out. If that procedure is strictly followed he is not under any obligation to give notice to any other persons. If any other claimants against the fund want to be in a position to resist an order for payment out they must, to entitle them to be heard, intervene or enter caveats. Unless that practice is followed, a party who is going to move the Court for payment out has no means of making sure that he has brought before the Court all the persons entitled to be heard».

This carries no further the submission of the opponents.

It was further argued that the case in which the sale takes place is dealt with by one Judge and the proceeds are under his control; if application for priorities and for payment out is made in another case, which is being, or may be dealt with by another Judge, who has no control of the money, this second Judge has no power over the fund.

I see no merit, whatsoever, in this argument.

The proceeds of a sale constitute a fund. The arrest enables the Court to keep the property as security. This does not at all imply that the Court holds the property only for that plaintiff or for that plaintiff in priority to others of the same class. The true view is that the Court holds the property, not only for the first plaintiff, but, also, for at least all creditors and it is upon the Court to decide payment out and to determine the priorities in distribution. (*The Africano* [1894] P. 141).

In *The Optima* (1905), 74, 2, L J R 94, at p 96 it was said -

«Where the proceedings are in rem against the property, and the property has been arrested and sold by the Court, it is true that - the Court having the proceeds in its hands, and having freed the property by virtue of the sale from all liens and claims against it in the hands of the purchasers, who take it by virtue of the title conferred by the Court - the Court retains the proceeds to answer certain claims which might have been made against the property»

This Court is vested with jurisdiction under section 19 of the Courts of Justice Law, 1960 (Law No 14/60), to determine questions of priorities, as the Administration of Justice Act, 1956, section (3)(7) gave the High Court in England, sitting in Admiralty, jurisdiction to determine question of title to the proceeds of sale of a ship by order of the Court The jurisdiction is vested in the Court and may be exercised, in virtue of the provision of section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No 33/64), in the first instance by any Judge or Judges The payment after the sale is made out on the order of the Court or a Judge. The Rules, to which reference was made, do not restrict the exercise of the jurisdiction for determination of priorities to an application in the action in which the ship was appraised and sold

In the «*Rana*» [1921] 8 Ll L R 369, the ship was actually arrested in an action by Messrs Charles Young for necessaries, the order for appraisement and sale was made in another action by Mr Polites, whose claim was in respect of moneys he paid for necessaries and to the crew, and the motion for determination of priorities on the fund in Court was made and decided in a third action, that of the first mortgagees, after notice to all concerned

The fund, which is the result of the sale, represents the res It is under the control of the Court and, as the priorities are in general reserved, the Court directs payment of claimants in order of priority in an application or motion made in any proceedings, provided that notices thereof are given, as provided in the Rules, or directed by the Court At the hearing of such motion any other party may be heard in opposition, provided that he has either entered a caveat against release/payment out, or has intervened in the action in which the motion is brought on for hearing

The first ground fails

The judgment for the applicants was given on a claim based on a foreign mortgage.

The judgment in Action No. 114/85 was in respect of loss or short landing of cargo in 1982.

The submission of counsel for claimants 114 raises the question of the law to be applied. It has to be determined whether the lex fori, or the lex loci, the Law of the Flag applies.

In *Don v. Lippmann* (1837) 5 Cl. & F.1, 7 E.R. 303, Lord Broughan stated that «whatever relates to the remedy to be enforced, must be determined by the lex fori».

In *The Milford* (1858) Swa. 362, 366, where an American master of an American ship claimed in England a lien on the freight for his wages, Dr. Lushington declined to consider whether by United States Law he had no such lien, but applied the lex fori, saying: «the proceeding originated in this country; it is a question of remedy, not of a contract at all».

In *The Tagus* [1903] P. 44, the claim of the foreign master of an Argentine vessel in an English port, consisted of -

1. Wages as supercargo, and afterwards as master,

2. Disbursements whilst acting as supercargo, and afterwards as master.

On the question of priority as against a mortgagee intervening, Phillimore, J., adopted the principle laid down in *The Milford* and held that the question was one of remedy, and, therefore, the lex fori applied with regard to property which was within the English jurisdiction.

In *The Colorado* [1923] P. 102, a French ship was arrested and sold in England in an action for necessary repairs effected in Great Britain. There were claims in respect of the wages of the master and crew, disbursements of the master and repatriation of master and crew. There was a claim by a French mortgagee. The Court was moved on behalf of the repairer for payment out, subject to the admiralty preferential claims of the master and crew as merchant land holders. The question for decision was whether the repairers or the mortgagees, subject as aforesaid, had priority as between themselves. It was held that the question of priorities was governed by the lex fori, but that the nature of the right conferred

by French Law on Mortgagees must be considered; when the nature of the right was ascertained, English Law must be applied in placing such a right in its proper place in the English Law of priorities. Atkin, L.J., said at p. 110:-

«...; but to ascertain the remedies which the Court will give to enforce the rights we have to look to the law of this country, the lex fori.

Now when an action in rem has been brought in these Courts in respect of a ship, the Court by its decree controls the money which represents the res as the result of sale or bail, and directs payment to be made to such claimants as prove their claims in the order of priority directed by the Court. To give the necessary directions the Court may have to consider foreign law in order to ascertain whether the claimant has any and what right in respect of the res at all».

And at p. 111:-

«I think it follows that prima facie, when the Court is ordering that payment should be made to claimants in a particular order, it is merely awarding a remedy, and therefore will apply the lex fori. But, as I have said, it must first ascertain whether there is any claim at all. Now, when a claimant comes forward alleging that he holds a right given to him by agreement, which is something other than a maritime lien, he must prove what that right is by the law of the place of the contract».

In *The Zigurds* [1932] P. 113, at pp. 121-122 it was said:-

«The first answer to his contention was of course that German law has nothing to do with questions of priority in this country, which are determined according to the lex fori only, and although he covered much ground in his efforts to distinguish the present case from the general rule over some of which I propose to follow his argument, I am of opinion that this is the last answer, as it is the first, to the proposition for which he contended»

At pp. 125-126:-

«Mr. Atkins for the mortgagee claims *The Colorado* as an authority in his favour. It certainly is so to this extent, that it is only one more of the long line of authorities which have

established that the English Courts will look to English law and English law only for the purpose of ranking competing claims against a ship or its proceeds. Because in *The Colorado* case the Court, in special circumstances, first turned aside to look at a foreign law, in order to obtain light concerning the legal character of a foreign instrument, I do not think that the case can be claimed as an authority for the introduction of any foreign law which any party chooses to adduce in order to qualify and alter the English rules of ranking. Indeed it is noteworthy that both Hill J. and the Court of Appeal declined to take any note of the French law in the matter outside of the instruction which they derived from the evidence as to the nature of a French 'hypotheque'. Once they were clear as to what it was, they returned at once to the English law to decide the order of its ranking».

(See, also, *Commercial Bank v Ship «Pegasos III»* (1978) 1 C.L.R. 597, pp. 607-608).

The proper law for the determination of priorities is the law of this country, the lex fori. The law applicable in this country is the Constitution, the Statutes Law of Cyprus, the English Law in its Admiralty Jurisdiction on the date preceding Independence Day and any Acts of the Imperial Parliament, the operation of which was extended during the Colonial Rule to this country.

The International Brussels Convention 1926 was not part of the English Law before Independence Day. It was not ratified and its operation was not extended to the colony of Cyprus by the Imperial Government during the Colonial Rule, so as by succession of state to continue to be in operation. It has not been ratified by the Republic of Cyprus, in accordance with the provision of Article 169.3 of our Constitution and is not binding upon this Court.

Under our law cargo claims carry no maritime lien and rank in priority after all mortgage claims.

Foreign mortgages need not and indeed there is no statutory provision or machinery for their registration in Cyprus.

The claim of the applicants is based on First Preferred Mortgage on the ship «SEAGULL», dated 25th February, 1982, duly registered against her in the Ship's Register in Peraeus.

On the authority of *The Colorado* case (supra), if it is necessary to determine the nature of the right created under this mortgage, the Court may look to the Law of the Contract, but there is no need in this case.

The applicants - mortgagees rank in priority to the claimants 114.

A possessory lien has priority over a mortgage, even in relation to a mortgage executed before the assumption of possession - (Williams v. Allsup (1861) 19 C.B. (N.S.) 417, 142 E.R. 514). In the instance of a mortgage the possessory lienee does not take the res cum onere. Where however possession is given up the security of the common law lien is lost and the mortgage prevails - (*The Lyons* (1887) 6 Asp. Mar. Law Cas. 199; 57 L.T. 818).

Claimants 357 - Marine Managers Ltd. - contend that they have a possessory lien, as the judgment was given in respect of claims for disbursements and payments for goods and materials supplied to the ship and for her operation and maintenance, for repairs to the ship and for her operation and maintenance, for repairs and equipment thereof, payment of charges, dues, crew wages an emoluments and other disbursements in connection with the operation of the said ship. They, further, claim precedence to the mortgagees, especially for the part of their claim which refers to crew wages and repairs.

All payments and disbursements were effected on the basis of the Management Agreement, dated 15th March, 1982, photo copy of which was produced in these proceedings and in case No. 357/84, in which judgment by default was obtained.

The essential element of possessory lien is actual possession of the ship until possessor's demands have been met, or she is surrendered to the Marshal under an order of the Court. The master and crew have a possessory lien and are entitled to priority for their wages up to the date of surrender; also, the captain's disbursements. Those items, therefore, are in the first instance to be paid out of the fund in Court.

In *The Tergeste* [1903] P. 26, Phillimore J. said at p. 33:-

> «It is said that they had no possessory lien, because the master and crew were on board; if that were the rule a great number of shipwrights' liens would be disturbed. That man

has a lien who has such control of the chattel as prevents it being taken away from his possession. He may admit other persons or workmen to access to the chattel, and other tradesmen may claim a possessory lien over the chattel or part of it, but if it cannot be got out of the dock or yard without the consent of the owner of the dock or yard, the owner of the dock will have a possessory lien, though perhaps not the only one, on the chattel, which he can enforce, and which the Court has taken upon itself to enforce for him as against subsequent claims. I have no doubt in this case that Rait & Gardiner had an ample possessory lien».

And at p. 34:-

«In my judgment Messrs. Rait & Gardiner had here a possessory lien for the work which they had done, though they had not finished all the work. They might have asked for payment on account, as they were entitled to do. They have a possessory lien on all the work they have done, and that lien takes precedence of any claim, even a maritime lien, which has accrued since the ship first came into the possession of Messrs. Rait & Gardiner».

Payment of the wages of the crew and the master and disbursements incurred by the master and of repairers does not by itself entitle the payer to the possessory lien. The lien, thus, is not transferable.

In *The Petone* [1917] P. 198, Mr. Justice Hill, after reviewing the authorities is reported at p. 208:-

«These, I believe, are the cases. For the view of the more modern text-writers I may refer to the 13th edition of Abbott, p. 883, the 14th edition, p. 1035, and vol. 26 of Halisbury's Laws of England, p. 625. They treat maritime liens, other than liens for bottomry, as not transferable.

In my view the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and has his lien, whether it be regarded as a general doctrine or as applied to wages only.

I say nothing about contractual assignments of debts or claims supported by maritime liens. It is not necessary to

consider how far such an assignment carries with it in all cases the maritime lien; it does so in the case of bottomry; whether it does so in any other cases it is not necessary to express an opinion. In the present case there is no question of assignment. The plaintiffs paid the wages and/or disbursements. The master and crew have been paid and their debts satisfied. They assigned nothing to the plaintiffs. The plaintiffs do not claim as their assignees but in their own right as having paid the men off».

The same principle was reiterated and applied in *The «Leoborg» (No. 2)* [1964] 1 Ll. L.R. 380. (See, also, The *«Rana»* case (supra); Thomas Maritime Liens, paragraphs 472, 476 and 477.

In *«The Louisa»* 166 E.R. 900, repayment advances made to salvors were refused.

Only when payments are authorized or approved by the Court, the payor enjoys the benefit of the privileges enjoyed by the payees - (*The James W. Elwell* [1921] P. 351, 357; *The Berostar* [1970] 2 Lloyd's Rep. 403; *The Vasilia* [1972] 1 Lloyd's Rep. 51).

The payments by the claimants 357 were made under a Management Agreement reads:-

«10. As between the parties hereto any superintendent, master, officer or crew member employed on the ship or in connection with the provisions of the services hereby contracted for shall be deemed to be the servant of the Owners ...»

I went through the whole Management Agreement and I paid particular attention to clauses 3, 4, 7, 8 and 10, as well as the affidavit of Mr. Christofides, filed in support of the opposition.

The payments were made as part of their management services or duty. They were neither crew nor repairers. There is an undertaking in clauses 7 and 8 by the owners that they would remunerate and reimburse the Managers for all their payments and services which are particularized in the said paragraphs.

There is nothing establishing or even indicating that the vessel was ever in the possession of claimants 357.

It was deposed on oath by counsel for the applicants that the Management Agreement was broken in October 1984, whilst the

ship was at Iskenderum, and claimants 357 abandoned and/or ceased to manage this vessel ever since and lost any possessory lien which might have pre-existed. This was not contradicted by the claimants 357.

Before concluding, I wish to state that in the rule of priorities, there would appear to be no immutable rules of law, but only a number of guiding principles, which, however, the Courts follow for purpose of justice and equity.

To sum up, the proceeds of the sale of a ship constitute the fund which represents the res. The Court holds it for all the creditors and it is upon the Court to decide payment out and to determine the priorities in distribution. The fund is under the control of the Court and not any Judge thereof. The order of payment of claimants and the order of priority is made in an application or motion made in any proceedings, not necessarily in the action in which the ship was appraised and sold, provided that notices are given as required by the Rules, or directed by the Court.

The proper law for the determination of ranking competing claims against the ship or her proceeds is the lex fori. The National Brussels Convention, 1926 is not part of our law and is not binding upon this Court. Under our law cargo claims carry no maritime lien and rank in priority after all mortgage claims. Foreign nortgages need not, and there is no statutory provision or machinery for their registration in this country. The rights of the mortgagees are deferred to those all persons having possessory lien.

The essential element of possessory lien is actually possession of the ship until possessor's demands have been met, or she is surrendered to the Marshal under an order of the Court. The master and crew have a possessory lien and are entitled to priority for their wages up to the date of surrender; also the captain's disbursements and repairers' remunerations and disbursements.

Possessory lien is not transferable and payment of wages of the crew and the master and disbursements incurred by the master do not entitle the payer to the possessory lien, unless such payment is authorized or approved by the Court. The payor is not, without authority or approval of the Court, entitled, by payment alone, to the privileges of a possessory lien.

In the present case the judgment in favour of the applicants was based on a First Preferred Mortgage duly registered in Peraeus.

The claim of applicants 114 is for loss or short landing of cargo. The mortgage has precedence over a cargo.

Claimants 357 made payments under a Management Agreement. Such payments, having regard to the terms and conditions of the Agreement, did not give rise to a possessory lien. There is nothing establishing or indicating that the vessel was ever in the possession of these claimants.

Furthermore, the statement in the affidavit of counsel for the applicants that the Management Agreement was broken in October, 1984, whilst the ship was at Iskenderum and claimants ceased to manage this vessel ever since, was not contradicted in any way.

These claimants had no possessory lien at the material time, or indeed at any time.

For all the foregoing reasons, I have come to the conclusion that the order of priorities is as follows:-

(a) Marshal's expenses.

(b) Legal costs up to and including appraisement and sale to the plaintiffs in Action No. 357/84, to be assessed by the Registrar.

(c) To the applicants -

(i) The amounts of US $53,689.05 and CY £1,050.- paid by the applicants pursuant to the order of the Court dated 27th November, 1984.

(ii) The amount of US $23,850.- paid by the applicants in settlement of Admiralty Actions 370/84 and 374/84, pursuant to the order of the Court, dated 20th March, 1985; and

(d) Any balance in Court to the applicants towards their judgment debt and costs in this action, Action No. 358/84.

As the fund is not sufficient to meet the judgment debt under the mortgage of the applicants, I need not decide the precedence between the claimants 357 and claimants 114.

Order is made for payment out of the fund in Court and proceeds of sale of ship «SEAGULL» according to the aforesaid order of priorities. No order as to costs.

*Order of priorities as above with no order as to costs.*