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Ex parte Belsham and since the issues were different from the issues arising in the present case it is undesirable to say anything about them. The result in *Ex parte Customs and Excise Commissioners* [1993] 1 W.L.R. 764 and in *Ex parte Spens*, *The Times*, 31 December 1992, may or may not be justified on other grounds; it was not justified on the basis of the reasoning in *Ex parte Randle* and *Ex parte Belsham*.

The appeal in my view should be allowed and the question certified be answered on the basis that "a decision of a Crown Court judge that the whole or part of an indictment should be stayed as an abuse of process cannot be the subject of judicial review." The appellants' costs to be paid out of central funds.

Appeal allowed.
Appellants' costs in House of Lords out of central funds.

Solicitors: Sharpe Pritchard for Walter Wolfson & Co., Manchester; Crown Prosecution Service, Headquarters.

M. G.

[CHIEF OF APPEAL]

THE BAZIAS 3
THE BAZIAS 4

1992 Oct. 7, 8

Lloyd, Ralph Gibson and Hanger-Sloss J., JJ.

Admiralty Arrest of ship—Application to arrest—Charterers arresting ships to provide security for arbitration proceedings—Shipowners seeking stay of action and release of ships—Shipowners not having means to provide alternative security—Whether discretion to release ships—Civil Jurisdiction and Judgments Act 1982 (c. 27), s. 26—Ships' Names—Bazias 3—Bazias 4

The defendant shipowners chartered two vessels to the plaintiff charterers, each charterparty containing an arbitration clause. The charterers in time chartered the vessels to freighters, who employed them on a cross-channel freight service. A dispute having arisen between the shipowners and the charterers, the shipowners withdrew both vessels and commenced arbitration proceedings against the charterers, who served a defence and counterclaim in the arbitration. As a result the time charters to the freighters were terminated. Meanwhile the shipowners entered into new charters of the vessels to the freighters. In pursuance of their counterclaim in the arbitration the charterers commenced proceedings in rem against the vessels, which were

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arrested. The shipowners, who were unable to provide alternative security to cover the amount of the charterers' counterclaim, but who claimed that they would be able to satisfy any arbitration award made against them, sought a stay of the Admiralty proceedings under section 1 of the Arbitration Act 1975 and an order setting aside the warrant of arrest. Saville J. made no order on the motion to stay, holding that the vessels should remain under arrest but should be at liberty to operate out of the jurisdiction against undertakings given by the shipowners and the freighters, who had intervened in the proceedings. Sheen J. varied that order so as to require the vessels to return to or remain within the jurisdiction.

On appeal by the shipowners and the freighters against both orders—

Held, varying the first order and dismissing the appeals against the second, that, where property had been arrested in Admiralty proceedings which were subsequently stayed or dismissed on the ground that the dispute should be submitted to arbitration, the court's discretion in relation to the arrested property under section 26 of the Civil Jurisdiction and Judgments Act 1982 was not confined to requiring its retention as security for the satisfaction of the arbitrator's award or making the stay or dismissal conditional on the provision of equivalent security; that normally the property should be released from arrest only on provision of equivalent security sufficient to cover the claim, plus interest and costs, on the claimant's reasonably arguable best case; that neither the shipowners' difficulties in finding and providing alternative security nor the inconvenience which maintaining the arrest would cause to the freighters and their passengers was a ground for departing from the usual practice; that it was not the practice in Admiralty actions to require the plaintiff to give a cross-undertaking in damages; and that, accordingly, although the action would be stayed pursuant to section 1 of the Act of 1975, the vessels would remain under arrest until further order of the Admiralty Court (post, pp. 800b-c, e-g, h-801c, d-e).

Dicta of Brandon J. in *The Monchanthy* [1971] 1 Lloyd's Rep. 37, 44, approved.

The Rena K [1979] Q.B. 377 and *The Tivoli* [1984] Q.B. 838, C.A. considered.

Decision of Saville J. varied.
Decision of Sheen J. affirmed.

The following cases are referred to in the judgment of Lloyd L.J.:

- Andria now renamed Varso, The* [1984] Q.B. 471; [1984] 2 W.L.R. 570; [1984] 1 All E.R. 1126, C.A.
- 3200 bantley, The* [1971] 1 Lloyd's Rep. 37
- Rena K, The* [1979] Q.B. 377; [1978] 3 W.L.R. 431; [1979] 1 All E.R. 397
- Tivoli, The* [1984] Q.B. 838; [1984] 3 W.L.R. 231; [1984] 2 All E.R. 545, C.A.

The following additional cases were cited in argument:

- Alford v. The Ship Amanda N* (1989) 90 A.L.J. 391
- Cap Bon, The* [1967] 1 Lloyd's Rep. 543
- Navigant, The* [1968] Q.B. 183; [1968] 2 W.L.R. 338; [1968] 2 All E.R. 531
- Northsea Maritime Corporation v. Consulex Ltd* [1987] A.C. 460; [1986]

The following additional cases, although not cited, were referred to in the skeleton arguments:

- APJ Shalin, The [1991] 2 Lloyd's Rep. 62*
- Walter D. Waller, The [1893] P. 202*

INTERLOCUTORY APPEALS from Saville J. and Sheen J.

By writs issued on September 1992 the plaintiff charterers, Greenmar Navigation Ltd., commenced proceedings in rem against the vessels *Bazias 3* and *Bazias 4* to obtain security for their counterclaim in arbitration proceedings against the defendant owners of the vessels, Ronline Shipping Co. On 28 September the vessels were arrested. On 29 September Saville J., after intervention of the freighters, Sally Line Ltd., ordered that the vessels should remain under arrest but that the freighters should be at liberty to operate the vessels out of the jurisdiction. On 5 October Sheen J. varied Saville J.'s order so as to remove the permission for the vessels to operate out of the jurisdiction.

By a notice of appeal dated 7 October 1992 the defendants appealed against the order of Saville J., seeking, inter alia, an order granting them a stay of proceedings under section 1 of the Arbitration Act 1975 and release of the vessels on the grounds that the judge (1) having decided in the exercise of his discretion to permit the freighters to continue to operate the vessels out of the jurisdiction, should have released the vessels from arrest upon the freighters and defendants giving the undertakings set out in his order; and (2) had erred in law in not granting the defendants' application for a stay of the Admiralty proceedings pursuant to section 1 of the Arbitration Act 1975 and in not, on that application, declining to make any order that the vessels arrested be retained as security for the satisfaction of any arbitration awards obtained by the plaintiffs pursuant to section 26 of the Civil Jurisdiction and Judgments Act 1982. The freighters appealed on the same grounds and on the further ground that the judge had erred in law in not releasing the vessels from arrest upon the freighters' application pursuant to R.S.C., Ord. 75, rr. 17 or 13(4) or pursuant to the inherent jurisdiction of the Admiralty Court.

By a notice of appeal dated 7 October 1992 the defendants appealed against the order of Sheen J. on the grounds that the judge had erred in law (1) in varying Saville J.'s order without having heard full argument from all parties on the plaintiffs' application to vary or discharge the order, as to whether and, if so, in what respects that order should be varied; and (2) in that, by varying that order, he had purported to exercise in a different manner a discretion which had been exercised on the same facts by Saville J. The freighters also appealed on the same grounds.

The facts are stated in the judgment of Lloyd L.J.

- Stephen Males* for the defendants
- Stewart Boyd Q.C.* and *Julian Flery* for the freighters.
- Belinda Bucknall Q.C.* and *Charles Hudson-Cave* for the plaintiffs.

LLOYD L.J. The defendants, Ronline Shipping Co. are a state

Court of Appeal in a judgment of Robert Goff L.J. in *The Tivoli* [1984]

November 1990. The charters were in identical terms. Both contained an arbitration clause.

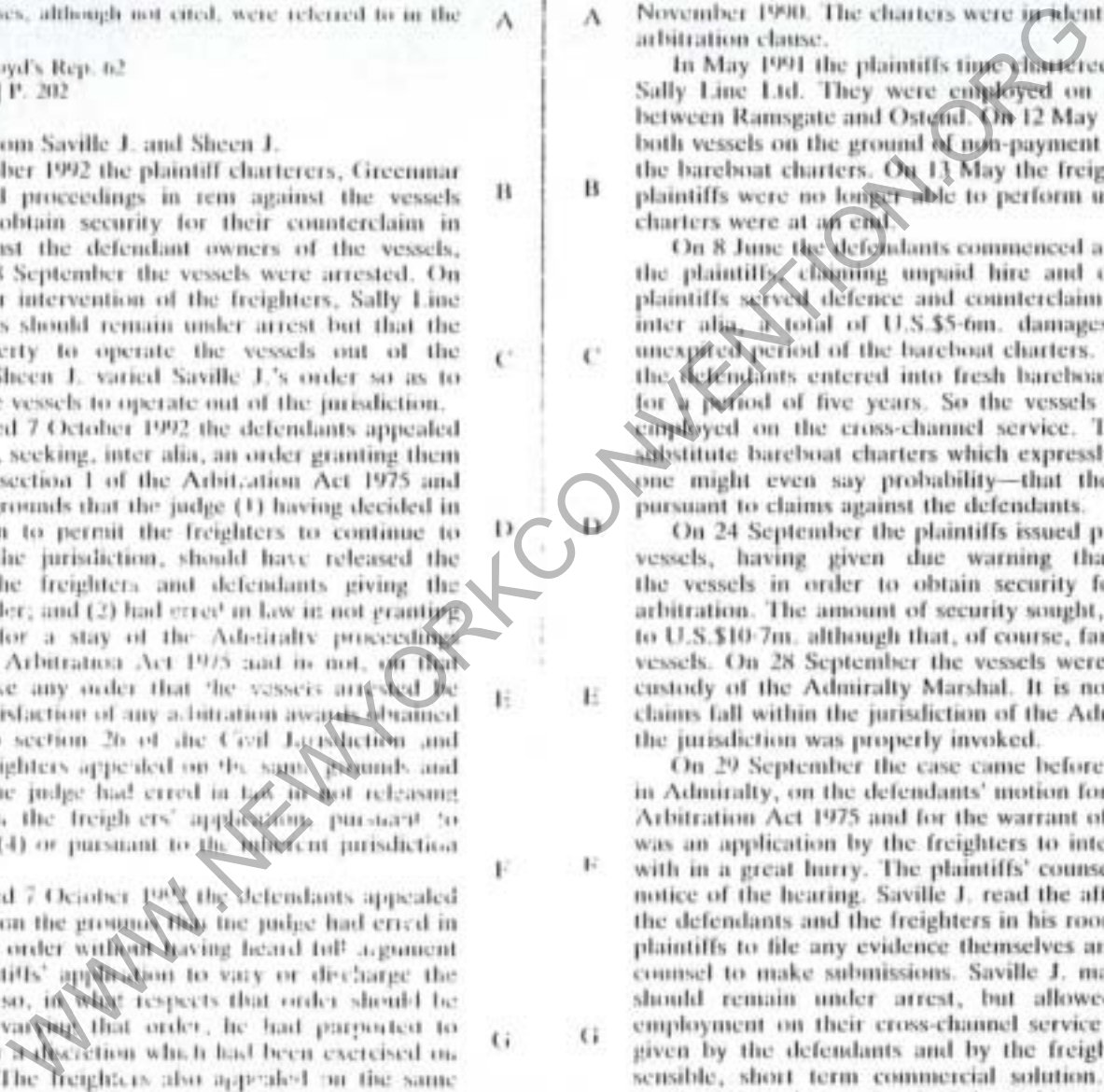
In May 1991 the plaintiffs time chartered the vessels to the freighters, Sally Line Ltd. They were employed on a cross-channel ferry service between Ramsgate and Ostend. On 12 May 1992 the defendants withdrew both vessels on the ground of non-payment of hire and other breaches of the bareboat charters. On 13 May the freighters gave notice that, as the plaintiffs were no longer able to perform under the time charters, those charters were at an end.

On 8 June the defendants commenced arbitration proceedings against the plaintiffs claiming unpaid hire and damages. On 25 August the plaintiffs served defence and counterclaim in the arbitration, claiming, inter alia, a total of U.S.\$5.6m. damages for loss of profit over the unexpired period of the bareboat charters. Meanwhile, on 12 June 1992, the defendants entered into fresh bareboat charters with the freighters for a period of five years. So the vessels were able to continue to be employed on the cross-channel service. There were provisions in the substitute bareboat charters which expressly recognised the possibility—one might even say probability—that the vessels would be arrested pursuant to claims against the defendants.

On 24 September the plaintiffs issued proceedings in rem against the vessels, having given due warning that they intended to arrest the vessels in order to obtain security for their counterclaim in the arbitration. The amount of security sought, including interest, amounted to U.S.\$10.7m. although that, of course, far exceeds the value of the two vessels. On 28 September the vessels were arrested and taken into the custody of the Admiralty Marshal. It is not disputed that the plaintiffs' claims fall within the jurisdiction of the Admiralty Court in rem and that the jurisdiction was properly invoked.

On 29 September the case came before Saville J., as vacation judge in Admiralty, on the defendants' motion for a stay under section 1 of the Arbitration Act 1975 and for the warrant of arrest to be set aside. There was an application by the freighters to intervene. The matter was dealt with in a great hurry. The plaintiffs' counsel was given only 20 minutes' notice of the hearing. Saville J. read the affidavits prepared on behalf of the defendants and the freighters in his room. There was no time for the plaintiffs to file any evidence themselves and scarcely any time for their counsel to make submissions. Saville J. made an order that the vessels should remain under arrest, but allowed them to return to their employment on their cross-channel service against certain undertakings given by the defendants and by the freighters. He describes this as a sensible, short term commercial solution. He did not deal with the application under section 1 of the Arbitration Act 1975. Regrettably, he gave no judgment, formal or informal. He did not identify the source of his discretion or explain why he was exercising it in the way that is now common ground that the order made by the judge was a contradiction in terms. There is no way in which the vessels could remain within the custody of the Admiralty Marshal, as required by the judge, and yet be allowed to trade outside the jurisdiction.

On Monday 5 October Sheen J. made an order resubstituting the



it may attach such conditions to the order as links fit, in particular conditions with respect to the institution or prosecution of the relevant arbitration or legal proceedings. (3) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order made by a court under subsection (1) as would apply if it were held for the purposes of proceedings in that court."

The burden of the argument on this part of the case fell largely on Mr. Boyd. His first argument was that the section does not in terms confine the court to one or other of the two alternatives. The court is not bound to make an order under paragraph (a) or paragraph (b). It may take a third course; it may make an order releasing the vessel without equivalent security. I agree with Mr. Boyd's first submission, which was not seriously disputed by Miss Bucknall.

The real question turns on what I would call the "width" of the residual discretion. Mr. Boyd argues that section 26 preserves the pre-existing discretion in arbitration cases, and the way it was exercised, since there is nothing in the section to take it away. The section enables the court to order the vessel to be retained as security to enforce the arbitration award, or the foreign judgment, which could not be done before, but it does not affect the circumstances in which such an order will be made. It is at this point that I part company from Mr. Boyd.

The reason for the wider discretion in arbitration cases was, as I see it, an inevitable consequence of the security afforded by in rem proceedings not being available to enforce an award and only being available in respect of the in rem proceedings. Once that distinction had gone—as it did with the advent of section 26—the need and the occasion for the wider discretion disappeared. It seems to me that Miss Bucknall is right in her essential submission that the purpose of section 26 was to assimilate the three classes of claim in all respects and that there is nothing in the language of section 26 nor in the case decided immediately before the section came into effect—namely, *The Andon* [1984] Q.B. 477 and *The Tivoli* [1984] Q.B. 838, to which I have already referred, which is inconsistent with that submission. If that is right, then it is accepted by Mr. Boyd and by Mr. Males on behalf of the defendants, that on an application for release under Ord. 75 (1) the usual practice has always been that the vessel will only be released on the provision of sufficient security to cover the amount of the claim, plus interest and costs, on the basis of the plaintiffs' reasonably arguable best case. The authority for that is *The Moschamthy* [1971] 1 Lloyd's Rep. 37, 44.

None of the matters relied on by the defendants and in particular, of course, their ability to meet any award that may be made against them, takes this out of the usual run of cases, or justifies anything other than the usual order.

Mr. Males further argues that it is quite simply impossible for the defendants to find liquid resources in time to enable them to put up security. In that connection he relies on paragraph 16 of an affidavit sworn by Mr. Stockwood, and on a further affidavit, which we allowed to be put before us, in which he explains in greater detail the financial

the inconvenience to the freighters and their passengers, are not grounds which persuade me to depart in this case from making the usual order.

Mr. Boyd argued that we should exercise our power under section 26(2) of the Act of 1982 to order the plaintiffs to give a cross-undertaking in damages in case the arrest turns out to have been unjustified—by which he means if the plaintiffs' counterclaim in the arbitration fails in toto. He put forward reasons why we should make that order in the present case. But, as he accepts, this has never been the practice in Admiralty actions and I do not regard this case as being one in which we can introduce so far-reaching a change in the practice for the first time.

I would therefore, in conclusion, grant a stay of the action pursuant to section 1 of the Act of 1975, being the assumption on which I have so far proceeded. I would vary the order made by Saville J. and dismiss the appeal from the decision of Sheen J., the effect of that being that the two vessels will remain under arrest until further order of the Admiralty Court.

RALPH GIBSON L.J. Saville J. on 29 September, in circumstances of great urgency, devised an order as a temporary solution which appeared to be a short-term commercial arrangement and which gave substantial protection to the plaintiffs' position. It seemed to me that there was, and is, much to be said for that solution upon the facts of this case in fairness to all parties. It has however become clear to me that, without departing from established practice, that solution was not open to the judge.

I agree for the reasons given by Lloyd L.J. that it has not been established in this case that the court would be justified in departing from that practice. I agree with the order proposed by him.

BUTLER-STOSS L.J. I also agree.

*Appeal from Saville J. allowed.
Appeal from Sheen J. dismissed with costs.
Leave to appeal refused.*

Solicitors: Sinclair Roche & Temperley; Stephenson Harwood; Herbert Smith.

[Reported by CHRISTOPHER CHAMBERS ESQ., BARRISTER]

ADMIRALTY PROCEEDINGS

This paragraph shall not apply to applications for release of any property.

(4) The district registrar by whom any order under paragraph (3) is made shall cause a copy of the order to be sent to the marshal.

R. S. C. (Revision) 1966, reproducing O. 75, r. 22, of R. S. C. (Revision) 1962.

75/12/1

Property not under arrest.—If a ship under arrest is being adversely affected by property on board (*e.g.*, perishables) which is not under arrest, an order, if granted, may include an order for sale of that property.

Practice.—Applications are usually made to the Admiralty Registrar or District Registrar.

As to the practice to be followed by the Marshal when a ship is under arrest and a harbour or dock authority claims or purports to exercise a statutory power of detention or sale in respect of unpaid dock dues, see *The Queen of the South* [1968] P. 449; [1968] 2 W.L.R. 973; [1968] 1 Lloyd's Rep. 182.

As to applications to discharge cargo where ship or cargo is under arrest see Admiralty Registrar's *Practice Direction* No. 3, Vol. 2, para. 1056, *infra*.

Release of property under arrest (O. 75, r. 13).

75/13

13.—(1) Except where property arrested in pursuance of a warrant of arrest is sold under an order of the Court, property which has been so arrested shall only be released under the authority of an instrument of release (in this rule referred to as a "release"), in Form No. 7 in Appendix B, issued out of the registry or, where the action in which the warrant was issued is proceeding in a district registry, out of that registry.

(2) A party at whose instance any property was arrested may, before an appearance is entered in the action, file a notice withdrawing the warrant of arrest and, if he does so, a release shall, subject to paragraphs (3) and (6), be issued with respect to that property.

(3) Unless the Court otherwise orders, a release shall not be issued with respect to property as to which a caveat against release is in force.

(4) A release may be issued at the instance of a party interested in the property under arrest if the Court so orders, or, subject to paragraph (3), if all the other parties to the action in which the warrant of arrest was issued consent.

(5) Where a release is to issue out of a district registry the registrar of that registry shall, before issuing it, procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against release in force as to the property in question.

(6) Before a release is issued the party entitled to its issue must—

(a) if there is a caveat against release in force as to the property in question, give notice to the party at whose instance it was entered or his solicitor requiring the caveat to be withdrawn, and

(b) file a praecipe in Form No. 8 in Appendix B requesting issue of a release.

(7) Before property under arrest is released in compliance with a release issued under this rule, the party at whose instance it was issued must, in accordance with the directions of the marshal or, where the action is proceeding in a district registry, the registrar of that registry, either—

- (a) pay the fees of the marshal already incurred and lodge in the marshal's office or the district registry, as the case may be, an undertaking to pay on demand the other fees and expenses in connection with the arrest of the property and the care and custody of it while under arrest and of its release, or
- (b) lodge in the marshal's office or district registry an undertaking to pay on demand all such fees and expenses, whether incurred or to be incurred.
- (8) The Court, on the application of any party who objects to directions given to him by the marshal under paragraph (7), may vary or revoke the directions.

75/13/1

R. S. C. (Revision) 1965, which reproduces, with formal amendments, O. 75, r. 13, of R. S. C. (Revision) 1962; the latter reproduced, with amendments, the old O. 29, rr. 1, 2, 6, 7 and 9.

Amended by R.S.C. (Amendment No. 2) 1974 (S.I. 1974 No. 1116).

Para. (2) "... notice withdrawing the warrant. . ."—If the plaintiff's solicitors obtain the release of the vessel arrested at the plaintiff's instance before the defendant enters an appearance and give notice that the plaintiff withdraws his action, the defendant cannot proceed with a counterclaim, notwithstanding O. 15, r. 2, and cannot obtain an order for the plaintiff in the discontinued action to file a preliminary act (*The Selybia* [1910] P. 26; *The Abodi Mendi* [1939] P. 178 at p. 196). If after the entry of an appearance the plaintiff wishes to obtain the release of property arrested at his instance, he must obtain the written consent of the defendant's solicitors thereto and must file the consent in the registry.

Para. (3) "... caveat against release. . ."—See O. 75, r. 14.

Para. (7).—See also O. 75, r. 23A.

75/13/2

Release of property in usual case.—The owner may obtain the consent of the arresting party to the issue of a release by giving bail to his satisfaction, or the arresting party may agree to withdraw his warrant before bail is given on the strength of an undertaking to enter an appearance and give bail. As to bail (which is given to the court) see r. 16, *infra*. An alternative to bail is payment into court of an equivalent amount.

Bail, or payment into court in lieu of bail, is rare, for in almost all cases the arresting party is satisfied with a guarantee or undertaking given out of court by, e.g. a bank or insurance company, although it seems an arresting party is entitled to insist on bail or payment into court.

The arresting party is "entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case." *The Moscanthy* [1971] 1 Lloyd's Rep. 37 at p. 44. Where the right to limit liability under the Merchant Shipping Acts is not disputed it seems that the proper amount is the limitation figure with interest and costs. It seems also that in no case can the amount exceed the value of the *res*. See *The Charlotte* [1920] P. 73. Where there is a dispute as to the amount of security to be provided, whether by bail or otherwise, an application can be made to the court to determine the amount. See, for example, *The Moscanthy*, *supra*. The application should normally be made to the registrar by summons in the action asking for the release of the property upon provision of security for a stated amount. Where bail has been provided in an excessive amount, e.g. in order to obtain the prompt release of the property, an application may be made to the court for "moderation" of bail.

As to the sufficiency of securities to a bail bond see r. 16, *infra*.

It is, of course, always open to a party not to provide security and to allow his property to remain under arrest.

A party demanding excessive bail may have to pay (1) the costs of a successful application to reduce the amount of that bail and (2) the expense of providing the excess (not exceeding £1 per cent.: R. S. C., O. 62, App. 2, Pt. IX, Note to items 93 and 94). Further as to bail or other security and release see *British Shipping Laws*, Vol. 1. The power to exact security must not be used oppressively; where there is a genuine dispute or discussion about the appropriate amount, the party seeking security ought to put his cards on the table and explain to the other party or his solicitor the grounds on which he claims to exercise this strong power: *The Moscanthy* [1971] 1 Lloyd's Rep. 37, at pp. 46-47.

ADMIRALTY PROCEEDINGS

In salvage actions the value of the property under arrest should be agreed between the parties before the property is released or an affidavit of value should be filed. In the case of an agreement this should be in writing and should be filed under O. 75, r. 35. Where an affidavit of value is necessary it should if possible be made by some person acquainted with the ship (*The Orangemoor* (1915) 31 T.L.R. 190). An affidavit is also required, in the absence of consent, in the case of cargo which is arrested for freight only. As to computation of freight for these purposes, see *The Leo* (1902) Lush. 444; *The Norway* (1864) Br. & L. 377. If the arresting party is in disagreement with the amount shown in the affidavit he may apply for an appraisal. If he does not make such an application the value shown in the affidavit is as a rule binding (*The Hanna* (1878) 3 Asp. 603) but a bona fide mistake in an affidavit will be rectified on application to the Court even after decree (*The James Armstrong* (1875) L.R. 4 A. & E. 360; 3 Asp. 46). An appraisal is conclusive unless the circumstances are extraordinary and immediate steps are taken to set it aside (*The Cargo ex Venus* (1866) L.R. 1 A. & E. 60; *The Georg* [1894] P. 330; *The Hohenzollern* [1906] P. 330).

A release obtained in the Admiralty registry must be left there and the necessary action by the marshal will follow when the usual undertaking has been given. In district registry cases, however, the release is either sent by post by the district registry or the solicitors obtaining the release to H.M. Customs at the port where the property is under arrest, or it may be taken to the appropriate office of H.M. Customs by the solicitors obtaining the release.

75/13/3

Release when action stayed.—See *The Golden Trader* [1974] 1 Lloyd's Rep. 378.

Release pursuant to Merchant Shipping (Liability of Shipowners and Others) Act 1958.—Section 5 provides that the Court may, and in certain circumstances must, order the release of a ship or other property which has been arrested, or the security given to prevent, or obtain release from, arrest. See also *The Putbus* [1949] P. 196; [1949] All E.R. 676; [1949] 1 Lloyd's Rep. 253, C.A.

75/13/4

Caveat against release and payment (O. 75, r. 14).

14.—(1) A person who desires to prevent the release of any property under arrest in an action *in rem* and the payment out of court of any money in court representing the proceeds of sale of that property must file in the registry a praecipe in Form No. 9 in Appendix B, and on the filing of the praecipe a caveat against the issue of a release with respect to that property and the payment out of court of that money shall be entered in the caveat book.

75/14

(2) Where the release of any property under arrest is delayed by the entry of a caveat under this rule, any person having an interest in that property may apply to the Court by motion for an order requiring the person who procured the entry of the caveat to pay to the applicant damages in respect of the loss suffered by the applicant by reason of the delay, and the Court, unless it is satisfied that the person procuring the entry of the caveat had a good and sufficient reason for so doing, may make an order accordingly.

R. S. C. (Revision) 1965; reproduces, with formal amendment, O. 75, r. 14, of R. S. C. (Revision) 1962, which reproduced, with amendments, the old O. 29, rr. 8, 10.

75/14/1

General note.—A caveat under this Rule may be entered by any person, whether he has begun an action against the property under arrest (or the proceeds of sale) or not. A caveator whose claim carries no maritime lien should consider the desirability of issuing a writ *in rem* in addition to entering a caveat because, if the *res* is sold by the owner while under arrest, the plaintiff's remedy against that *res* will be lost, though he may in some circumstances be able to proceed in an action against a "sister ship." See the A.J. Act 1956, s. 3 (4). The effect of entering a caveat is to prevent the release of the property or payment out of the proceeds of sale without the consent of the caveator or order of the Court. See O. 75, r. 13 (3) and (5) and r. 24. A party applying for an order for release or payment out notwithstanding the existence of a caveat, should serve the summons or notice of motion on any caveators.

Use of the caveat procedure normally makes it unnecessary for a plaintiff in an