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## CASES JUDICIALLY CONSIDERED

	PAGE
Aikman v. Conway — <i>Considered</i> ... .. (1837) 3 M. & W. 71 ... .. 128	
Applegate v. Moss — <i>Applied</i> ... .. [1971] 1 Q.B. 406 ... .. 227	
Assunzione, The — <i>Applied</i> ... .. [1954] P. 150; [1953] 2 Lloyd's Rep. 716 ... .. 53	
Babbs v. Press — <i>Followed</i> ... .. [1971] 2 Lloyd's Rep. 383; [1971] 3 All E.R. 654 ... .. 62, 65	
Baccus S.R.L. v. Servicio Nacional del Trigo — <i>Applied</i> . [1957] 1 Q.B. 438 ... .. 497	
Barnes v. Addy — <i>Applied</i> ... .. (1874) L.R. 9 Ch. 244 ... .. 73	
Barnett, <i>Ex parte</i> — <i>Considered</i> ... .. (1874) L.R. 9 Ch. 293 ... .. 101	
Barton v. Bank of New South Wales — <i>Considered</i> . (1890) 15 App. Cas. 379 ... .. 547	
Bawden v. The London, Edinburgh & Glasgow Assurance Co. — <i>Considered</i> . [1892] 2 Q.B. 534 ... .. 469	
Bottomley and Another v. Bannister — <i>Overruled</i> . [1932] 1 K.B. 459 ... .. 227	
Braunstein v. Accidental Death Insurance Co. — <i>Applied</i> . (1861) 1 B. & S. 782 ... .. 157	
British Guiana Bank Ltd. v. Official Receiver — <i>Applied</i> . (1911) 27 T.L.R. 454 ... .. 101	
Bute (Marquess of) v. Barclays Bank Ltd. — <i>Considered, applied and explained</i> . [1955] 1 Q.B. 202 ... .. 439	
Campbell, <i>In re. Ex parte Seal</i> — <i>Approved</i> [1911] 2 K.B. 992 ... .. 524	
Canadian and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd. — <i>Applied and explained</i> . [1947] A.C. 46; (1946) 80 Ll.L.Rep. 13 ... .. 439	
Carl Zeiss Stiftung v. Herbert Smith & Co. — <i>Considered</i> . [1969] 2 Ch. 276 ... .. 73	
Charlotte v. Theory and Others — <i>Considered</i> . (1921) 9 Ll.L.Rep. 341 ... .. 375	
Christie v. North British Insurance Co. — <i>Distinguished</i> . (1825) Sh. & D. 519 ... .. 253	
City Equitable Fire Insurance Company Ltd. — <i>Considered</i> . [1930] 2 Ch. 293 ... .. 101	
City Life Assurance Co. Ltd., <i>In re</i> — <i>Considered</i> . [1926] Ch. 191 ... .. 101	
Clarkson v. Modern Foundries Ltd. — <i>Distinguished</i> . [1957] 1 W.L.R. 1210 ... .. 182	
Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Tunis S.A. — <i>Applied</i> . [1971] A.C. 572; [1970] 2 Lloyd's Rep. 99 ... .. 53	

CASES JUDICIALLY CONSIDERED—*continued*

PAGE

Compania Mercantil Argentina v. United States Shipping Board — <i>Applied</i> .	(1924) 131 L.T. 188 ... ..	497
Coulouras v. British General Insurance Co. Ltd. — <i>Not applied</i> .	(1922) 11 Ll.L.Rep. 100 ... ..	331
Crookall v. Vickers-Armstrong Ltd. — <i>Applied</i> .	[1955] 2 All E.R. 12 ... ..	182
Dawney v. Minter and Trollope & Colls Ltd. — <i>Followed</i> .	[1971] 2 Lloyd's Rep. 192; [1971] 1 W.L.R. 1205 ... ..	9
Dawnays Ltd. v. F. G. Minter Ltd. and Trollope and Colls Ltd. — <i>Applied</i> .	[1971] 2 Lloyd's Rep. 192; [1971] 1 W.L.R. 1205 ... ..	528
Deering and Others v. Hyndman — <i>Considered and distinguished</i> .	(1886) 18 L.R. (Ir.) Q.B. 323 ... ..	101
Diamond v. Pearce & Others — <i>Distinguished</i> .	"The Times" Friday, Jan. 14, 1972.	
Donoghue v. Stevenson — <i>Applied</i> ... ..	[1932] A.C. 562 ... ..	227
Dorset Yacht Co. Ltd. v. Home Office — <i>Applied</i> .	[1970] A.C. 1004; [1970] 1 Lloyd's Rep. 453 ... ..	227
East Suffolk Rivers Catchment Board v. Kent and Another — <i>Distinguished</i> .	[1941] A.C. 74 ... ..	227
Empresa Cubana de Fletes v. Lagonisi Shipping Company Ltd. (The <i>Georgios C.</i> ) — <i>Applied</i> .	[1971] 1 Lloyd's Rep. 7 ... ..	18
Enrico Furst & Co. v. W. E. Fischer Ltd — <i>Applied</i> .	[1960] 2 Lloyd's Rep. 340 ... ..	313
Eyles v. Ellis — <i>Applied</i> ... ..	(1827) 4 Bing. 112 ... ..	18
Fitton v. Accidental Death Insurance Co. — <i>Applied</i> .	(1864) 17 C.B.N.S. 122 ... ..	157
Fletcher, <i>Ex parte</i> — <i>Considered</i> ... ..	(1877) 6 Ch.D. 350 ... ..	101
Foley v. Classique Coaches Ltd. — <i>Applied</i> .	[1934] 2 K.B. 1 ... ..	253
Fowkes v. Manchester and London Assurance Association — <i>Applied</i> .	(1863) 3 B. & S. 917 ... ..	157
Glenluce, The — <i>Applied</i> ... ..	(1929) 34 Ll.L.Rep. 407 ... ..	534
Glynn and Others v. Margetson & Co. and Others — <i>Distinguished</i> .	[1893] A.C. 351 ... ..	410
Hadley v. Baxendale — <i>Applied</i> ... ..	(1854) 9 Ex. 341 ... ..	213
Hansen v. Harrold Bros. — <i>Followed</i> ... ..	[1894] 1 Q.B. 612 ... ..	201
Hector Whaling Ltd., <i>In re</i> — <i>Applied</i> ... ..	[1936] Ch. 208 ... ..	139
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. — <i>Applied</i> .	[1962] A.C. 465; [1963] 1 Lloyd's Rep. 485 ... ..	227
Hewitt v. Bonvin — <i>Approved</i> ... ..	[1940] 1 K.B. 188 ... ..	483
Hughes v. Metropolitan Railway Co. — <i>Applied</i> .	(1877) 2 App. Cas. 439 ... ..	313
Ireland v. Livingston — <i>Considered</i> ... ..	(1872) L.R. 5 H.L. 395 ... ..	439
Jefford and Jefford v. Gee — <i>Applied</i> ... ..	[1970] 2 Q.B. 130; [1970] 1 Lloyd's Rep. 107 ... ..	371

CASES JUDICIALLY CONSIDERED—*continued*

PAGE

<i>Kathleen, The</i> — <i>Considered</i> ... ..	(1925) 22 Ll.L.Rep. 80 ... ..	375
<i>La Société du Gaz de Paris v. La Société Anonyme de Navigation, "Les Armateurs Français", Paris</i> — <i>Not applied.</i>	(1925) 23 Ll.L.Rep. 209 ... ..	534
<i>Lawson v. Sherwood</i> — <i>Applied</i> ... ..	(1816) 1 Stark 314 ... ..	128
<i>Leathley v. John Fowler &amp; Co. Ltd.</i> — <i>Followed.</i>	[1946] 2 All E.R. 326 ... ..	122
<i>Leduc &amp; Co. v. Ward and Others</i> — <i>Distinguished.</i>	(1888) 20 Q.B.D. 475 ... ..	410
<i>Lloyd v. Guibert and Others</i> — <i>Applied</i> ...	(1865) L.R. 1 Q.B. 115 ... ..	53
<i>Logan v. Bank of Scotland and Others (No. 2)</i> — <i>Applied.</i>	[1906] 1 K.B. 141 ... ..	534
<i>Low v. Bouverie</i> — <i>Considered, applied and explained.</i>	[1891] 3 Ch. 82 ... ..	439
<i>Lynch v. Thorne</i> — <i>Distinguished</i> ... ..	[1956] 1 W.L.R. 303 ... ..	213
<i>McHenry v. Lewis</i> — <i>Applied</i> ... ..	(1882) 22 Ch.D. 397 ... ..	534
<i>McWilliams v. Sir William Arrol &amp; Co. Ltd.</i> — <i>Applied.</i>	[1962] 1 W.L.R. 295 ... ..	73
<i>Mark Ltd. v. Schield</i> — <i>Applied</i> ... ..	[1972] 1 Lloyd's Rep. 9 ... ..	528
<i>May v. Chidley</i> — <i>Applied</i> ... ..	[1894] 1 Q.B. 451 ... ..	128
<i>Mecca, The</i> — <i>Applied</i> ... ..	[1895] P. 95 ... ..	367
<i>Mellenger v. New Brunswick Development Corporation</i> — <i>Applied.</i>	[1971] 1 W.L.R. 604 ... ..	497
<i>Mersey Steel &amp; Iron Co. Ltd. v. Naylor Benzon &amp; Co.</i> — <i>Considered.</i>	(1884) 9 App. Cas. 434 ... ..	101
<i>Mid-Kent Fruit Factory, In re</i> — <i>Considered</i>	[1896] 1 Ch. 567 ... ..	101
<i>Mighell v. Sultan of Johore</i> — <i>Applied</i> ...	[1894] 1 Q.B. 149 ... ..	497
<i>Missouri Steamship Company, In re</i> — <i>Applied.</i>	(1889) 42 Ch. D. 321 ... ..	53
<i>Monte Urbassa, The</i> — <i>Considered</i> ... ..	[1953] 1 Lloyd's Rep. 587 ... ..	534
<i>Nello Simoni v. A/S M/S Straum</i> — <i>Considered.</i>	(1949) 83 Ll.L.Rep. 157 ... ..	18
<i>Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.</i> — <i>Distinguished.</i>	[1929] 2 K.B. 356; (1928) 32 Ll.L. Rep. 226 ... ..	469
<i>Newton v. Cammell Laird &amp; Co. (Shipbuilders &amp; Engineers) Ltd.</i> — <i>Applied.</i>	[1969] 1 W.L.R. 415 ... ..	182
<i>Norman, The</i> — <i>Followed</i> ... ..	[1960] 1 Lloyd's Rep. 1 ... ..	375
<i>North, In re</i> — <i>Applied</i> ... ..	[1895] 2 Q.B. 264 ... ..	139
<i>Norton's Settlement, In re</i> — <i>Applied</i> ...	[1908] 1 Ch.D. 471 ... ..	534
<i>Notman v. Anchor Assurance Co.</i> — <i>Applied.</i>	(1858) 4 C.B. N.S. 466 ... ..	157
<i>Ocean Tramp Tankers Corporation v. V/O Sovfracht (The Eugenia)</i> — <i>Applied.</i>	[1964] 2 Q.B. 226; [1963] 2 Lloyd's Rep. 381 ... ..	463
<i>Olds Discount Ltd. v. Cohen</i> ... ..	[1938] 3 All E.R. 281 ... ..	547
<i>Olds Discount Ltd. v. Playfair Ltd.</i> — <i>Considered.</i>	[1938] 3 All E.R. 275 ... ..	547
<i>Ormrod v. Crosville Motor Services Ltd.</i> — <i>Considered.</i>	[1953] 1 W.L.R. 1120 ... ..	483

CASES JUDICIALLY CONSIDERED—*continued*

PAGE

Otto v. Bolton and Norris — <i>Overruled</i> ...	[1936] 2 K.B. 46 ...	227
P. & O. v. Shand — <i>Applied</i> ...	(1865) 3 Moore P.C.N.S. 291 ...	53
Pacific Concord, The — <i>Applied</i> ...	[1960] 2 Lloyd's Rep. 270; [1961] 1 W.L.R. 873 ...	149
Parlement Belge, The — <i>Applied</i> ...	(1880) L.R. 5 P.D. 197 ...	497
Panoutsos v. Raymond Hadley Corporation of New York — <i>Applied</i> .	[1917] 2 K.B. 473 ...	313
Peruvian Guano Co. v. Bockwoldt — <i>Applied</i>	(1883) 23 Ch.D. 225 ...	534
Polemis and Another and Furness, Withy & Co. Ltd., <i>In re</i> — <i>Applied</i> .	[1921] 3 K.B. 560; (1921) 8 Ll.L. Rep. 351 ...	458
Pollitt, <i>In re</i> — <i>Considered</i> ...	[1893] 1 Q.B. 175 ...	101
Prenn v. Simmonds — <i>Applied</i> ...	[1971] 1 W.L.R. 1381 ...	253
Robertson v. Fleming et al. — <i>Considered</i> ...	(1861) 4 Macq. 167 ...	227
Rolls Razor Ltd. v. Cox — <i>Considered</i> ...	[1967] 1 Q.B. 552 ...	101
St. Pierre and Others v. South American Stores (Gath and Chaves) Ltd. and Others — <i>Considered</i> .	[1936] 1 K.B. 382 ...	534
Selangor United Rubber Estates Ltd. v. Cradock and Others — <i>Followed</i> .	[1968] 2 Lloyd's Rep. 289; [1968] 1 W.L.R. 1555 ...	73
Smith v. Central Asbestos Co. Ltd. — <i>Considered</i> .	[1971] 2 Lloyd's Rep. 151; [1971] 3 W.L.R. 206 ...	182
Société d'Avances Commerciales (Société Anonyme Egyptienne) v. Merchants' Marine Insurance Co. — <i>Not applied</i> .	(1924) 20 Ll.L.Rep. 140 ...	331
Soya, The — <i>Considered and applied</i> ...	[1956] 1 Lloyd's Rep. 557; [1956] 1 W.L.R. 715 ...	149
Sykes (Wessex) Ltd. v. Fine Fare Ltd. — <i>Applied</i> .	[1967] 1 Lloyd's Rep. 53 ...	253
Tankexpress A/S v. Compagnie Financiere Belge des Petroles S.A. — <i>Applied</i> .	[1949] A.C. 76; (1948) 82 Ll.L.Rep. 43 ...	18
Tersons Ltd. v. Stevenage Development Corporation — <i>Considered</i> .	[1965] 1 Q.B. 37; [1963] 2 Lloyd's Rep. 333 ...	18
Trow v. Ind Coope (West Midlands) Ltd. ...	[1967] 2 Q.B. 899 ...	139
Tsakiroglou & Co. Ltd. v. Noble & Thorl G.m.b.H. — <i>Applied</i> .	[1960] 2 Q.B. 348; [1961] 1 Lloyd's Rep. 239 ...	463
Watkins v. Lindsey & Co. — <i>Considered</i> ...	(1898) 5 Man. 25 ...	101
Yeoman Credit Ltd. v. Gregory — <i>Obiter dicta disapproved</i> .	[1962] 2 Lloyd's Rep. 302 ...	139
Young v. Bristol Aeroplane Company Ltd. — <i>Applied</i> .	[1946] A.C. 163 ...	122

## STATUTES CONSIDERED

	PAGE
UNITED KINGDOM—	
ADMINISTRATION OF JUSTICE ACT, 1956	
Sect. 1 (1) (d) (e) (h) (k) ... ..	342
Sect. 3 (4) ... ..	342
BANKRUPTCY ACT, 1914	
Sect. 31 ... ..	101
BILLS OF EXCHANGE ACT, 1882	
Sect. 45 ... ..	128
Sect. 48 ... ..	128
Sect. 49 (5) (12) (15) ... ..	128
Sect. 55 ... ..	128
COMPANIES ACT, 1948	
Sect. 222 ... ..	297
Sect. 238 ... ..	297
Sect. 317 ... ..	101
COMPANIES ACT, 1967	
Sect. 35 ... ..	297
Sect. 68 ... ..	297
INSURANCE COMPANIES ACT, 1958	
Sect. 13 ... ..	297
Sect. 15 ... ..	297
LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1971	
Sect. 1 (1) ... ..	182
LIMITATION ACT, 1939	
Sect. 2 (1) ... ..	213
Sect. 26 ... ..	213
LIMITATION ACT, 1963	
Sect. 1 (3) ... ..	182
Sect. 1 (3) (a) ... ..	122
Sect. 7 (3) ... ..	122
Sect. 7 (3), (4), (5) ... ..	182
MARINE INSURANCE ACT, 1906	
Sect. 55 (2) (a) ... ..	331
MERCHANT SHIPPING ACT, 1894	
Sect. 503 ... ..	223
Sect. 686 ... ..	371
PILOTAGE ACT, 1913	
Sect. 11 ... ..	62
Sect. 30 ... ..	62, 65
Sect. 32 ... ..	62, 65
PUBLIC HEALTH ACT, 1936	
Sect. 1 (1) ... ..	227
SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925	
Sect. 22 (1) (a) ... ..	342
Sect. 36 ... ..	342
Sect. 37 ... ..	342
Sect. 42 ... ..	342
Sect. 43 ... ..	342
Sect. 225 ... ..	342
WORKMEN'S COMPENSATION ACT, 1925	
Sect. 29 ... ..	122
UNITED STATES—	
CARRIAGE OF GOODS BY SEA ACT, 1936 (46 U.S. Code)	35
Sect. 3 (1) (a) ... ..	385
Sect. 3 (1) (2) (b) ... ..	418
Sect. 3 (8) ... ..	350
Sect. 4 ... ..	418
Sect. 4 (1) ... ..	385
Sect. 4 (5) ... ..	426
FIRE STATUTE ... ..	35

# CONTENTS

NOTE—These Reports should be cited as  
“[1972] 1 Lloyd's Rep.”

	COURT	PAGE
A.C. Israel Cocoa Inc and Another v. Nigerian Produce Marketing Company Ltd. ... ..	[H.L.]	439
Acme Shipping Corporation:—Nippon Yusen Kaisha v. ...	[C.A.]	1
Alachouzos:—Binder v. ... ..	[C.A.]	524
Alan & Co. Ltd. v. El Nasr Export and Import Co. ... ..	[C.A.]	313
<i>Alexandra 1</i> , The ... ..	[C.A.]	399
American Airlines Inc. v. Hope ... ..	[Q.B. (Com. Ct.)]	253
American President Lines Ltd. and Others:—Sears Roebuck & Co. v. ... ..	[U.S. Ct.]	385
American Trading and Production Corporation v. Shell International Marine ... ..	[U.S. Ct.]	463
Astrovlanis Compania Naviera S.A. v. Linard ( <i>The Gold Sky</i> ) ... ..	[C.A.]	331
<i>Atlantic Star</i> , The ... ..	[Q.B. (Adm.)]	534
<i>Atlantic Sun</i> , The ... ..	[Q.B. (Com. Ct.)]	509
Babbs:—Montague v. ... ..	[Q.B. (Div. Ct.)]	65
Banque Sabbag S.A.L. v. Hope. American Airlines Inc. v. Hope ... ..	[Q.B. (Com. Ct.)]	253
Barclays Bank Ltd.:—Karak Rubber Company Ltd. v. ...	[Ch.]	73
Baxter Hoare & Co. Ltd. and Another:—Mayfair Photographic Supplies (London) Ltd. v. ... ..	[Q.B.]	410
Beech:—United Dominions Trust v. ... ..	[Q.B.]	546
<i>Belfri</i> , The ... ..	[Q.B. (Com. Ct.)]	12
Belships Co. Ltd. Skibs A/S v. President of India ( <i>The Belfri</i> )	[Q.B. (Com. Ct.)]	12



CONTENTS—*continued*

	COURT	PAGE
Berry v. Stone Manganese & Marine Ltd. ... ..	[Q.B.]	182
Binder v. Alachouzos ... ..	[C.A.]	524
Birch v. Thomas ... ..	[C.A.]	209
Bognor Regis United Building Company Ltd. and Another:—		
Dutton v. ... ..	[C.A.]	227
Bognor Regis Urban District Council and Another:—		
Dutton v. ... ..	[C.A.]	227
Borough of Wandsworth:—G.K.N. Foundations v. ... ..	[C.A.]	523
British Railways Board:—Knipe v. ... ..	[C.A.]	122
Burden:—Karak Rubber Company Ltd. v. ... ..	[Ch.]	73
Burns:—Meggeson v. ... ..	[M. & C.L. Ct.]	223
Carapanayoti & Co. Ltd. v. Comptoir Commercial Andre & Cie S.A. ... ..	[C.A.]	139
Charalambos N. Pateras, The ... ..	[C.A.]	1
Chemoleum Corp.;—Hellenic Lines Ltd. v. ... ..	[U.S. Ct.]	350
Chow alias Chong:—New India Assurance Co. Ltd. ... ..	[P.C.]	479
Clasen:—D. I. Henry Ltd. v. ... ..	[Q.B. (Com. Ct.)]	392
Coast Lines Ltd. v. Hudig and Veder Chartering N.V. ... ..	[C.A.]	53
Coastal Towing Corp. and Another:—Tenneco Oil Co. ... ..	[U.S. Ct.]	514
Comptoir Commercial Andre & Cie S.A.:—Carapanayoti & Co. Ltd. v. ... ..	[C.A.]	139
Conoco Britannia, The and Other Vessels ... ..	[Q.B. (Adm.)]	342
Cross:—Karak Rubber Company Ltd. v. ... ..	[Ch.]	73
Crouch v. McMillan ... ..	[Q.B. (Div. Ct.)]	62
Drew Brown Ltd. v. The <i>Orient Trader</i> and Owners ... ..	[Can. Ct.]	35
Dutton v. Bognor Regis United Building Company Ltd. and Bognor Regis Urban District Council ... ..	[C.A.]	227
Eaglehill Ltd. v. J. Needham Builders Ltd. ... ..	[C.A.]	128
Effy Shipping Corporation:—Zim Israel Navigation Co. Ltd. v. ... ..	[Q.B. (Com. Ct.)]	18

CONTENTS—*continued*

	COURT	PAGE
<i>Effy</i> , The ... ..	(Com. Ct.)	18
El Nasr Export and Import Co.:—W. J. Alan & Co. Ltd. v.	[C.A.]	313
<i>Elazig</i> , The ... ..	[Q.B. (Adm.)]	355
	[Q.B.]	
Elvapores Inc. and Others:—Georgia-Pacific Corporation v.	[U.S. Ct.]	418
<i>England</i> , The (Owners) and Others:—Rederij Erven H. Groen and Groen v. ... ..	[Q.B. (Adm.)]	375
<i>Esso Brussels</i> , The ... ..	[Q.B. (Adm.)]	286
Evans Products Co. and Others:—Georgia-Pacific Corporation v. ... ..	[U.S. Ct.]	418
Federal Pacific Lakes Line:—Island Yachts Inc. ... ..	[U.S. Ct.]	426
<i>Funabashi</i> , The ... ..	[Q.B. (Adm.)]	371
Fury Shipping Co. Ltd. v. State Trading Corporation of India Ltd. ( <i>The Atlantic Sun</i> ) ... ..	[Q.B. (Com. Ct.)]	509
G. & S. Assured Investment Company Ltd. and Another:—Royal Insurance Company Ltd. v. ... ..	[Ch.]	267
Georgia-Pacific Corporation v. <i>Marilyn L.</i> Elvapores Inc. Evans Products Co. and Retla Steamship Company ( <i>The Marilyn L.</i> ) ... ..	[U.S. Ct.]	418
Gilbart-Smith:—Longmoor (trading as Vendair (London) Ltd.) v. ... ..	[C.A.]	435
G.K.N. Foundations v. Borough of Wandsworth ... ..	[C.A.]	528
<i>Gold Sky</i> , The ... ..	[C.A.]	331
Government of Ceylon and Another:—Sycamore Steamship Co. Ltd. v. ... ..	[Q.B. (Adm.)]	371
Government of Salta and Banco Provincial de Salta:—Swiss Israel Trade Bank v. ... ..	[Q.B.]	497
Groen and Groen v. <i>The England</i> (Owners) and Others ... ..	[Q.B. (Adm.)]	375
Growth and Secured Life Assurance Society Ltd. and Another:—Royal Insurance Company Ltd. v. ... ..	[Ch.]	267
Halesowen Presswork & Assemblies Ltd.:—National Westminster Bank Ltd. v. ... ..	[H.L.]	101
Hellenic Lines Ltd. v. Chemoleum Corp. ... ..	[U.S. Ct.]	350

CONTENTS—*continued*

	COURT	PAGE
Henry Ltd. v. Wilhelm G. Clasen ... ..	[Q.B. (Com. Ct.)]	392
Hobbs, Savill & Co. Ltd. v. The <i>Vasilia</i> (Owners) Albaran Bay Corporation ... ..	[Q.B. (Adm.)]	51
<i>Homer</i> , The ... ..	[Q.B. (Adm.)]	429
Hope:—Banque Sabbag S.A.L. and American Airlines Inc. v.	[Q.B. (Com. Ct.)]	253
Hudig and Veder Chartering N.V.:—Coast Lines Ltd. v. ...	[C.A.]	53
Hull & Humber Cargo Handling Co. Ltd. and Another v. Transport & General Workers' Union and Others ...	[Ch.]	197
Island Yachts Inc. v. Federal Pacific Lakes Line ... ..	[U.S. Ct.]	426
<i>Jan Laurenz</i> , The ... ..	[Q.B. (Adm.)]	404
Karak Rubber Company Ltd. v. Burden. Same v. Cross. Same v. Minorities Trading & Securities Ltd. Same v. Barclays Bank Ltd. Same v. Stanley Stewart Ltd. Same v. Trustee of Property of Burden ... ..	[Ch.]	73
King v. Victor Parsons & Co. ... ..	[Q.B.]	213
Knipe v. British Railways Board ... ..	[C.A.]	122
Launchbury and Others v. Morgans and Others ... ..	[H.L.]	483
Legal and General Assurance Society Ltd.:—S. & M. Hotels Ltd. v. ... ..	[Q.B.]	157
Liberian Transocean Navigation Corporation:—Total Societa Italiana per Azioni v. ... ..	[C.A.]	399
Linard:—Astrovlanis Compania Naviera S.A. v. ... ..	[C.A.]	331
Liverpool Justice <i>Ex parte</i> Molyneux:—The Queen v. ...	[Q.B. (Div.)]	667
Longmoor (trading as Vendair (London) Ltd.) v. Gilbert- Smith and Others ... ..	[C.A.]	435
MacGregor-Comarain Inc.:—National Steel and Shipbuilding Co. v. ... ..	[U.S. Ct.]	385
Mark Ltd. v. Schield ... ..	[C.A.]	9

CONTENTS—*continued*

	COURT	PAGE
<i>Marilyn L.</i> , The ... ..	[U.S. Ct.]	418
<i>Martin (Roof Contractors) Ltd.</i> :— <i>Wills v.</i> ... ..	[Q.B.]	541
<i>Mayfair Photographic Supplies (London) Ltd. v. Baxter Hoare &amp; Co. Ltd. and Stembridge</i> ... ..	[Q.B.]	410
<i>McMillan</i> :— <i>Crouch v.</i> ... ..	[Q.B. (Div. Ct.)]	62
<i>Meggeson v. Burns</i> ... ..	[M. & C.L. Ct.]	223
<i>Meling v. Minos Shipping Co. Ltd. (The Oliva)</i> ... ..	[Q.B. (Com. Ct.)]	458
<i>Mineralimportexport</i> :— <i>Overseas Transportation Company v.</i>	[C.A.]	201
<i>Minories Trading &amp; Securities Ltd.</i> :— <i>Karak Rubber Company Ltd. v.</i> ... ..	[Ch.]	73
<i>Minos Shipping Co. Ltd.</i> :— <i>Meling v.</i> ... ..	[Q.B. (Com. Ct.)]	458
<i>Molyneux. See The Queen v. Liverpool Justices.</i>		
<i>Montague v. Babbs</i> ... ..	[Q.B. (Div. Ct.)]	73
<i>Morgans and Others</i> :— <i>Launchbury and Others v.</i> ... ..	[H.L.]	483
<i>Murray v. Shuter, N. &amp; S. Coaches Ltd. and National Coal Board</i> ... ..	[C.A.]	6
<i>N. &amp; S. Coaches Ltd., Shuter and N.C.B.</i> :— <i>Murray v.</i> ...	[C.A.]	6
<i>National Coal Board, Shuter and N. &amp; S. Coaches Ltd.</i> :— <i>Murray v.</i> ... ..	[C.A.]	6
<i>National Steel and Shipbuilding Co.</i> :— <i>American President Lines Ltd. v.</i> ... ..	[U.S. Ct.]	385
<i>Naxos, The</i> ... ..	[Q.B. (Adm.)]	149
<i>National Westminster Bank Ltd. v. Halesowen Presswork &amp; Assemblies Ltd.</i> ... ..	[H.L.]	101
<i>Needham Builders Ltd.</i> :— <i>Eaglehill Ltd. v.</i> ... ..	[C.A.]	128
<i>New India Assurance Co. Ltd. v. Chow alias Chong</i> ... ..	[P.C.]	479
<i>Nigerian Produce Marketing Company Ltd.</i> :— <i>Woodhouse A.C. Israel Cocoa Ltd. S.A. and Another v.</i> ... ..	[H.L.]	439
<i>Nippon Yusen Kaisha v. Acme Shipping Corporation (The Charalambos N. Pateras)</i> ... ..	[C.A.]	1
<i>Oliva, The</i> ... ..	[Q.B. (Com. Ct.)]	458
<i>Orient Trader, The</i> ... ..	[Can. Ct.]	35

CONTENTS—*continued*

	COURT	PAGE
<i>Orient Trader, The, and Owners:—Drew Brown Ltd. v. ...</i>	[Can. Ct.]	35
<i>Overseas Transportation Company v. Mineralimportexport (The Sinoe) ... ..</i>	[C.A.]	201
<i>Parham Ltd.:—Vaughan v. ... ..</i>	[C.A.]	519
<i>Parsons &amp; Co.:—King v. ... ..</i>	[Q.B.]	213
<i>Practice Direction ... ..</i>	[Ch.]	147
<i>Practice Direction ... ..</i>	[Ch.]	251
<i>Practice Direction ... ..</i>	[Fam. Div.]	310
<i>Practice Direction ... ..</i>	[Fam. Div.]	310
<i>Practice Direction ... ..</i>	[Fam. Div.]	311
<i>Practice Direction ... ..</i>	[Ch.]	397
<i>Practice Direction ... ..</i>	[H.L.]	397
<i>Practice Note ... ..</i>	[Adm.]	518
<i>President Monroe, The ... ..</i>	[U.S. Ct.]	385
<i>President of India:—Belships Co. Ltd. Skibs A/S v. ...</i>	[Q.B. (Com. Ct.)]	12
<i>Queen, The v. Liverpool Justices. Ex parte Molyneux ...</i>	[Q.B. (Div. Ct.)]	367
<i>Reliance Mutual Insurance Society Ltd.:—Stone v. ... ..</i>	[C.A.]	469
<i>Retla Steamship Company and Others:—Georgia-Pacific Corporation v. ... ..</i>	[U.S. Ct.]	418
<i>Royal Insurance Company Ltd. v. G. &amp; S. Assured Investment Company Ltd. and Growth and Secured Life Assurance Society Ltd. ... ..</i>	[Ch.]	267
<i>S. &amp; M. Hotels Ltd. v. Legal and General Assurance Society Ltd. ... ..</i>	[Q.B.]	157
<i>Schild:—Frederick Mark Ltd. v. ... ..</i>	[C.A.]	9
<i>Sears Roebuck &amp; Co. v. American President Lines Ltd. and Others. American President Lines Ltd. v. National Steel and Shipbuilding Co. and Others. National Steel and Shipbuilding Co. v. MacGregor-Comarain Inc. (The President Monroe) ... ..</i>	[U.S. Ct.]	385

CONTENTS—*continued*

	COURT	PAGE
Secrest Machine Corp. v. <i>Tiber</i> (Owners) and Strachan Shipping Co. ... ..	[U.S. Ct.]	352
Shell International Marine Ltd.:—American Trading and Production Corporation v. ... ..	[U.S. Ct.]	463
Shuter, N. & S. Coaches Ltd. and N.C.B.:—Murray v. ...	[C.A.]	6
<i>Sinoe</i> , The ... ..	[C.A.]	201
Stanley Stewart Ltd.:—Karak Rubber Company Ltd. v. ...	[Ch.]	73
Stone Manganese & Marine Ltd.:—Berry v. ... ..	[Q.B.]	182
Stone v. Reliance Mutual Insurance Society Ltd. ... ..	[C.A.]	469
Strachan Shipping Co. and Another:—Secrest Machine Corp. v. ... ..	[U.S. Ct.]	352
Stembridge and Another:—Mayfair Photographic Supplies (London) Ltd. v. ... ..	[Q.B.]	410
Swiss Israel Trade Bank v. Government of Salta and Banco Provincial de Salta ... ..	[Q.B.]	497
Sycamore Steamship Co. Ltd. v. <i>White Mountain</i> (Owners) and Government of Ceylon ( <i>The Funabashi</i> ) ... ..	[Q.B. (Adm.)]	371
Tenneco Oil Co. v. <i>Tug Tony</i> and Coastal Towing Corp. ...	[U.S. Ct.]	514
<i>Tiber</i> (Owners) and Another:—Secrest Machine Corp. v. ...	[U.S. Ct.]	352
Thomas:—Birch v. ... ..	[C.A.]	209
Total Societa Italiana per Azioni v. Liberian Transocean Navigation Corporation ( <i>The Alexandra I</i> ) ... ..	[C.A.]	399
Transport & General Workers' Union and Others:—Hull & Humber Cargo Handling Co. Ltd. and Another v. ...	[Ch.]	197
Trustee of the Property of Burden:—Karak Rubber Company Ltd. v. ... ..	[Ch.]	73
<i>Tug Tony</i> and Coastal Towing Corp.:—Tenneco Oil Co. v. ...	[U.S. Ct.]	514
Union Accident Insurance Co. Ltd. <i>In re</i> ... ..	[Ch.]	297, 340
United Dominions Trust v. Beech ... ..	[Q.B.]	546
<i>Vasilia</i> , The ... ..	[Q.B. (Adm.)]	51
<i>Vasilia</i> , The (Owners) Albaran Bay Corporation:—Hobbs, Savill & Co. Ltd. v. ... ..	[Q.B. (Adm.)]	51
Vaughan v. F. Parham Ltd. ... ..	[C.A.]	519

CONTENTS—*continued*

	COURT	PAGE
<i>Washington Trader</i> , The ... ..	[U.S. Ct.]	463
<i>White Mountain</i> (Owners) and Another:—Sycamore Steamship Co. Ltd. ... ..	[Q.B. (Adm.)]	371
<i>Wills v. T. F. Martin</i> (Roof Contractors) Ltd. ... ..	[Q.B.]	541
<i>Woodhouse A.C. Israel Cocoa Ltd. S.A. and A.C. Israel Cocoa Inc. v. Nigerian Produce Marketing Company Ltd.</i>	[H.L.]	439
 <i>Zim Israel Navigation Co. Ltd. v. Effy Shipping Corporation (The Effy)</i> ... ..	 [Q.B. (Com. Ct.)]	 18

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# LLOYD'S LAW REPORTS

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[1972] VOL. 1]

The "Charalambos N. Pateras"

PART 1

## COURT OF APPEAL

Monday, Oct. 11, 1971

NIPPON YUSEN KAISHA v.  
ACME SHIPPING CORPORATION

(THE "CHARALAMBOS N. PATERAS")

Before Lord DENNING, M.R., Lord  
Justice CAIRNS and Lord Justice  
ROSKILL

**Charter-party — Time charter-party — "Owners not to be responsible . . . for damage or delay whatsoever and howsoever caused" — Master's refusal to enter nominated port of discharge — Additional expenses incurred by time charterers — Hire withheld — Whether shipowners liable for expenses and entitled to hire — "Baltimex 1939" form, clause 13.**

**Arbitration — Award — Motion to set aside — Special case not requested — Charter-party clause not set out in award — Whether Court entitled to look at charter-party — Comments by Roskill, L.J.**

*Where a time charter-party provides that a shipowner is not to be liable "for damage or delay whatsoever and howsoever caused", and the master refuses to enter a port nominated by the charterer, and the charterer incurs additional expenses as a result, the shipowner is not liable to reimburse him, nor is the charterer entitled to withhold hire in respect of the time lost by the master's refusal.*

The claimant charterers chartered the motor vessel *Charalambos N. Pateras* from the respondent owners under a time charter-party in "Baltimex 1939" form which provided (*inter alia*):

13. The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods on board, if such delay or loss has been caused by

want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager. The Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or fault of their servants. The Owners not to be liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour (including the Master, Officers or Crew) whether partial or general.

The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants.

The charterers ordered the master to discharge a part cargo at Ampala, Nicaragua, but he refused to enter that port, and as a result they incurred additional expenses of £4319 11s. and deducted £5037 1s. 2d. from the next instalment of hire on the ground that they were entitled to do so because time had been lost in consequence of his wrongful refusal. A dispute arose and was submitted to arbitration, and the umpire made an award in the following terms:

I award and adjudge

a) that, although the respondents have failed to justify the refusal of the Master to enter the port of Ampala, they have established that they are fully protected by the exemption clause in the charterparty and that therefore the claimants fail in toto and

b) that the claimants must pay to the respondents the amount withheld from hire, £5,037. 1s. 2d., together with interest at the rate of seven per cent per annum from 2nd June 1969 until the date of payment of principal and interest hereunder.

On a motion by the charterers to set aside the award on the ground that it contained an error of law on its face:



[1972] VOL. 1]

## The "Charalambos N. Pateras"

—Held, by MOCATTA, J., that (1) to read the word "damage" in the phrase "nor for damage or delay whatsoever and howsoever caused" in clause 13 as limited to physical damage would be to give it an unjustifiably restricted meaning; and it was wide enough to extend to apply to the charterers' claim for additional expenses, which, accordingly, were irrecoverable.

(2) the charterers' claim to withhold hire fell within the words "delay during the currency of the Charter" in the first sentence or "damage or delay whatsoever and howsoever caused" in the second sentence of clause 13, and therefore could not be maintained.

(3) where there was a loss of use of the vessel by the charterers for which hire had been paid, the appropriate sum was recoverable as damages for breach of contract and not as money had and received.

(4) it was unnecessary to decide whether the owners could defeat a claim framed on the basis of money had and received by reliance upon the protection afforded by clause 13;

(5) no error of law appeared on the face of the award.

Motion dismissed.

On appeal by charterers:

—Held, by C.A. (LORD DENNING, M.R., CAIRNS and ROSKILL, L.J.), that the words "damage or delay whatsoever and howsoever caused" meant damage of any kind whatsoever and included not only physical damage but also financial loss; and that, therefore, the umpire did not make an error of law (see p. 4, cols. 1 and 2; p. 5, col. 1).

Appeal dismissed.

Per ROSKILL, L.J., (at p. 4): For my part I feel somewhat disturbed at the course adopted before Mr. Justice Mocatta in that, notwithstanding the form of the award of the very experienced umpire, it was apparently agreed by Counsel and the learned Judge that the learned Judge might look at clause 13 of the Baltimore charter. The learned Judge, as appears from p. 2 of the transcript, thought it was sufficient for him to look only at that clause. In the event, of course, he was right in that view. But, with great respect to him, it cannot be right in principle for a Court, if it is to look at all at a document which is alleged to be incorporated in an award, to look only at part of that document. The matter, however, goes rather further than that. Mr. MacCrindle referred to the well-known case of *F. R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.*, [1933] A.C. 592, as justifying the Court looking at the whole charter-party including clause 13. The matter was not argued before us at any length, but it seems to me that, having regard to the form of the award, it was extremely

doubtful whether it was proper in the circumstances to look at either the charter-party or that clause at all, particularly having regard to the earlier decision of the Judicial Committee in *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.*, [1923] A.C. 480, and also to the decision of this Court in *D. S. Blaiber & Co. Ltd. v. Leopold Newborne (London) Ltd.*, [1953] 2 Lloyd's Rep. 427. I refer in particular to the judgment of my Lord, then Lord Justice Denning, at p. 429. I only mention this lest otherwise the course adopted in this case should be thought to be the practice of the Commercial Court. What was done here must not become, as it were, the thin end of a judicial wedge, permitting an attack on the sanctity of arbitrators' and umpires' awards, particularly when neither party has seen fit to ask for a special case. It would have been much better, as Mr. Justice Mocatta pointed out, if it had been wished to raise the point of construction of clause 13, that it should be raised by way of a special case stated for the decision of the Court and not *ex post facto*, on a motion to set aside the award, for alleged error of law, a motion which in my judgment fails.

The following cases were referred to in the judgment:

*Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.*, [1933] A.C. 592;

*Blaiber & Co. Ltd. v. Leopold Newborne (London) Ltd.*, (C.A.) [1953] 2 Lloyd's Rep. 427;

*Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.* [1923] A.C. 480; *Istros (Owner) v. F. W. Dahlstrom & Co.*, [1931] 1 K.B. 247; (1930) 38 Ll.L.Rep. 84;

*Louis Dreyfus & Cie v. Parnaso Cia. Naviera S.A. (The Dominator)*, (C.A.) [1959] 1 Q.B. 498; [1959] 1 Lloyd's Rep. 125.

This was an appeal by charterers, Nippon Yusen Kaisha, of Tokyo, from a decision by Mr. Justice Mocatta ([1971] 2 Lloyd's Rep. 42) dismissing their motion to set aside or remit an award by an umpire in a dispute arising out of a Baltimore charter-party between the charterers and Acme Shipping Corporation, the owners of the motor vessel *Charalambos N. Pateras*.

Mr. R. A. MacCrindle, Q.C., and Mr. Alan Pollock (instructed by Messrs. Middleton, Lewis & Co.) for the appellants; Mr. Anthony Evans, Q.C., and Mr. Anthony Colman (instructed by Messrs. William A. Crump & Son) for the respondents.