Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brown v. *Gaudet* (*the Cargo ex "Argos"*), *from the High Court of Admiralty; to be delivered 30th May*, 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS was a cause originally brought in the City of London Court by the Respondent, the owner of the steam-ship "Argos," for freight, demurrage, and expenses in respect of 147 barrels of petroleum shipped by the Appellant to be carried from London to Havre.

Judgment was given for the Plaintiff in the City of London Court for the full amount claimed, 135*l.* 5*s.* 3*d.*, and affirmed on appeal by the Judge of the Admiralty Court, with leave to appeal to Her Majesty in Council.

A statement of agreed facts forms part of the Record, and the following general facts may be collected from it:—

The "Argos" was one of several ships employed by the Plaintiff to trade between London, Havre, and other ports in the North of France. The Defendant, under the name of W. Horner (his trading style being W. H. Brown & Co.), shipped the petroleum in the "Argos" under the following bill of lading:—

"Shipped in good order, and well conditioned, by W. Horner, in and upon the good steam-ship called the 'Argos,' whereof is master for the present voyage Richardson, and now riding at anchor in the river, and bound for Havre, 147 barrels of petroleum.

	Cwts.	Qrs.	lb.
The goods to be taken out within twenty-four hours after arrival, or pay 10*l.* 10*s.* a day demurrage	421	0	9

Being marked and numbered as in the margin, and are to be delivered in the like good order, and well-conditioned, at the aforesaid port of Havre, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, machinery, boilers, steam and steam navigation, of whatever nature or kind soever, excepted, unto order or to their assigns, on paying freight for the said goods at the rate of 20*s.* and 15 per cent. primage per ton gross, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to two bills of lading all of this tenor and date, the one of which bills being accomplished the others to stand void.

"Dated in London, 30th November, 1870.

"Weight and contents unknown. Not accountable for leakage.

"W. J. RICHARDSON."

Washington,
1/147.

	£	*s.*	*d.*
Freight	21	1	3
Primage	3	3	2
	24	4	5

Exchange 25 fr. 40 c.

All goods are subject to a landing charge of 5 per cent. on the amount of freight and primage payable au change de 25 fr. 40 c.

The "Argos" with a general cargo sailed from London on the 6th of December, and arrived in the port of Havre at 10·30 P.M. on the 7th. On the following morning "the authorities of the port of Havre" compelled the master to remove the ship from the harbour in consequence of having petroleum on board, and he then took her to Honfleur and afterwards to Trouville, but was compelled by the authorities, for the same reason, to leave those ports. On the 12th the "Argos" returned to Havre, anchored in the roads, and obtained permission to enter the outer harbour and discharge the petroleum into a vessel or lighter there; and it may be inferred from the statement that the authorities would have required it to be re-shipped in four or five days. On the same day (the 12th) the discharge took place, and the petroleum remained in the harbour under the master's control until the 16th. On that day the "Argos," having discharged the rest of her cargo at the quay, was ready to sail on her return voyage.

During this time the bill of lading had not been presented, nor had any request been made by the Defendant or any holder of it for the delivery of the goods. The master under these circumstance re-shipped the petroleum, which had been lying in the harbour from the 12th to the 16th, and brought it back to London, giving notice to the Defendant of its arrival. It is stated that the port authorities obliged the master to make this re-shipment, which obviously means that they required the petroleum to be taken away from the harbour, either in his own or another ship. It must have been indifferent to them what ship took it away.

On the 16th December, the day the "Argos" sailed from London, the Defendant, without any notice to the Plaintiff, wrote the following letter to M. Genestal, the broker of the ship, at Havre:—

"Monsieur H. Genestal,

"73, Rue d'Orleans, "11, Billiter Square,
"Havre. "6th, December, 1870.

"We beg to inform you that we have shipped upon the steamship "Argos,"

Washington, } 147 barrels of spirit of petroleum,
1/147 } 21,392 kilogrammes,

to order. These spirits are to be sent to Messrs. Tuffieré and Prudhon, at Rouen, and you must not deliver them to any person unless they present the regular bill of lading endorsed by us.

"The freight and other expenses are to be charged on the goods.

"Accept, Monsieur, our salutations.

"W. H. Brown & Co."

This letter did not reach Havre until the 9th.

It was contended for the Plaintiff that by this letter the Defendant constituted Genestal his agent to deal generally with the goods, and that what was done with them at Havre was by his authority as such agent. But, in their Lordships' view, such an agency was not created; in fact, the "Argos" was despatched to Honfleur before Genestal had received the letter.

The first question is, whether the freight was earned. The bill of lading which forms the contract describes the ship as bound "for Havre," and the special and material terms are the following, viz.:— "the goods to be *taken out* within twenty-four hours after arrival, or pay 10*l*. 10*s*. a-day demurrage . . . . and are to be delivered in good order, &c.. at the aforesaid port of Havre . . . on paying freight."

The master, as a rule, is only bound to deliver cargo upon production of the bill of lading; and it is clear that freight may be earned before actual delivery, if the goods have been brought to the port of arrival ready to be delivered according to the bill of lading. The rule was stated in the Judgment of the Court of Common Pleas delivered by Willes, J., in Davis *v.* Oxley (15 C. B. N. S., page 664) as follows:—"The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid, has been

substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods, ready to be delivered to the merchant." Arrival, of course, means "at the destined port," as the next passage of the Judgment explains.

There is no doubt that, in this case, the goods were carried to the destined port, and the question is, whether, when they had been brought to the port, the master was ready to deliver them there, if the merchant had been ready to perform his part of the contract by taking them from the ship.

The express contract of the shipowner is to deliver at the port of Havre; that of the merchant to "take out" the goods there within twenty-four hours after arrival, or pay demurrage. No part of the port being expressly mentioned for discharging there can be no doubt that under usual circumstances the ship ought to have been brought to the place in the port where cargo, such as she carried, is ordinarily discharged. It is stated that "in the ordinary course of business petroleum would be delivered on the quay at Havre, on presentation of the bill of lading." Their Lordships however think that although this may be the ordinary course, and that in the usual state of things in the port, the quay would have been the proper place for the ship to have gone to be discharged, yet that this being an implied duty only, it does not amount to an engagement to go there in all events and under all circumstances. It may be that if the shipowner had expressly agreed to go to the quay, he must have been held to a strict performance of what he had contracted to do; but his express contract is only to deliver in the port of Havre, and what is a compliance with that obligation must depend on and vary with the existing state of things in the port.

The following observations on this subject occur in the Judgment of Tindal, C. J., in the case of Gatliffe *v.* Bourne (4 Bing., N. C. 329):—"But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation of such a mode

of delivery would accommodate itself to the facts of each particular case; and would let in every species of excuse from the strict and literal compliance with the precise terms of the bill of lading, which must necessarily be allowed to prevail with reference to the means and accommodation for landing goods at different places, the time of the arrival and departure of the vessel, the state of the tide and wind, interruptions from accidental causes, and all the other circumstances which belong to each particular port or place of delivery."

The petroleum was not allowed to be discharged at or near the quay, apparently because munitions of war were lying about. But the same impossibility of getting the ship up to it might have arisen, if the quay had been under repair, or the approach to it had been prevented by a wreck. It could not be said that had such accidents happened, the shipowner would not have performed his contract by being ready to discharge in some other convenient part of the port.

It is true that on the first arrival of the "Argos" at Havre she was not permitted to stay anywhere in the port more than a few hours; but on her return, after her ineffectual efforts at other ports, she not only obtained permission to stay in the outer harbour, but to discharge the petroleum there. This outer harbour is within the port, and is, as their Lordships understand, an artificially protected place where goods may be conveniently and safely discharged. The petroleum remained there for at least four days, during which the delivery of it could have been given, being, as their Lordships think, a reasonable time for that purpose; and although the authorities would not allow it to be landed at Havre, the Defendant might undoubtedly have received it, if he had chosen, in the harbour, and given it any other destination he pleased.

But it was further contended for the Defendant, that in order to perform his contract, the master must not only have been ready to deliver in the port, but to land the goods at Havre, or that, at the least, the Defendant, on receiving them, must himself have been able to land them there; and that as this could not be done, the contract became incapable of performance, and dissolved. Their Lordships are not of this opinion. They think the effect of the

stipulation in the bill of lading, "The goods to be taken out within twenty-four hours after arrival, or pay ten guineas a-day demurrage," was to cast upon the Defendant the obligation of taking the goods out of, or at all events from, the ship, that is, from alongside. The engagement of the Defendant to pay demurrage after twenty-four hours clearly implies that the parties contemplated that the ship might be detained by his default to take out the goods, and that it was not intended the master should land or take the risk of landing them. The prohibition to land the petroleum, therefore, did not prevent the Plaintiff from fulfilling his part of the contract.

The note in the margin of the bill of lading relating to a landing charge is probably a printed form, and may mean that goods, if landed, are subject to such a charge; but this general notice cannot control the special terms in the body of the Bill.

In a recent case (Waugh *v.* Morris, L. R. 8 Q. B. 202), a cargo of hay was brought from Trouville to London, under charter and bill of lading which made the hay deliverable at the port of London. There was a stipulation to the effect that the cargo should be brought and taken from the ship alongside. The shipper directed the master to proceed to a particular wharf in Deptford Creek, and the parties contemplated landing the hay there. It turned out that by an Order in Council, under the Cattle Diseases Act, of which they were ignorant, it was made illegal to land in England hay brought from France. After a long delay the shipper received the hay into another ship alongside; and the action was brought against him for demurrage whilst the ship was detained. The defence set up was the illegality of the contract; but Mr. Justice Blackburn in delivering judgment made some observations which bear on the objection relied on in this case, that the contract of the shipowner was not performed because the petroleum could not be landed at Havre. The learned Judge says: "When it turned out that the Defendants had named a place for the performance of the contract where the performance was impossible because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance, by receiving the cargo alongside in

the river without landing at all, was both legal and practicable." Again, "It is a mistake to say the Plaintiff intended that the hay should be landed. He no doubt contemplated that it would be; for except under very unusual circumstances hay is not brought into the Thames for any other object: but all that the shipowner bargained for, and all that he can properly be said to have intended was, that on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship." The learned Judge also says that the "Teutonia," lately decided by this Committee (Law Reports, 4 P. C. Appeals, 172), would have been precisely in point if the order in force had come into operation after the contract instead of before.

In Waugh *v.* Morris the Plaintiff recovered for the detention of his ship, although it was not possible to land the hay anywhere in the port of London. The contract of the shipper in that case does not, in their Lordships' view, substantially differ from the Defendant's in the present.

It was remarked by Mr. Justice Blackburn that the hay might, under some circumstances, have been profitably re-shipped, and it might have so happened in this case with the petroleum. It can scarcely be contended that the master would have been justified, when he found the petroleum could not be landed, in at once leaving the port without waiting a reasonable time to give to the Defendant an opportunity of receiving it there. He might, even if the prohibition had not existed, have desired to send the goods to Rouen or elsewhere by water, instead of landing them. Their Lordships, therefore, think that the means of performing the contract were not exhausted, nor the contract dissolved, when it was found the ship could not be discharged at the quay and the cargo landed; and that they ought to hold that the master being ready and able to give delivery in the harbour, and having kept the goods a reasonable time there for the purpose, the freight has been earned.

It is admitted that both parties, when they made the contract, were ignorant of the prohibition against landing petroleum, and therefore no question of intentional infraction of the law of France arises.

It was contended for the Plaintiff that, as the inability to land arose from the incapacity of the

goods, and not of the ship, the Judgment of Sir William Scott in the "Fortuna" (Edwards, 56) was an authority for declaring the freight to be recoverable, even if the contract of the ship had been to land the goods, or to deliver them on land. But as, in their Lordships' view, that is not the contract, it is unnecessary for them to consider whether the judgment for the Plaintiff could properly rest upon this ground.

The Counsel for the Defendant relied on some of the reasons given by the Judges in Ford and others *v.* Cotesworth and others (L. R. 4 Q. B. 127; 5 id. 544). The action in that case was for detaining the ship, and the Judges were considering whether reasonable diligence had been used by the merchant in unloading the goods. The right to freight did not arise, and the attention of the Judges was directed only to the question whether, under the peculiar circumstances of the case, unreasonable delay in discharging the ship had been established.

The next question to be considered is, whether the Plaintiff is entitled to compensation in the shape of homeward freight for bringing the petroleum back to England. It seems to be a reasonable inference from the facts, that after the four days during which the petroleum had been lying in the harbour had expired, the authorities would not have allowed it to remain there. It was still in the master's possession, and the question is, whether he should have destroyed or saved it. If he was justified in trying to save it, their Lordships think he did the best for the interest of the Defendant in bringing it back to England. Whether he was so justified is the question to be considered.

As pointed out by the Judge of the Admiralty Court, the same kind of question arose in Christy *v.* Row (2 Taunt. 300). In that case Sir James Mansfield says:—"Where a ship is chartered upon one voyage outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision which I have been able to find determines what shall be done in case the voyage is defeated: the books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary;

I do not know that he is bound to do it; and yet, if it were a cargo of cloth or other valuable merchandize, it would be a great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided."

The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined. (Amongst others, Trouson *v.* Dent, 8 Moore P. C. 419. Notara *v.* Henderson, L. R. 7 Q. B. 225. Australasian Navigation Company *v.* Morse, L. R. 4 P. C. A. 222.) It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed, and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing.

Most of the decisions have related to cases where the accident happened before the completion of the voyage, but their Lordships think it ought not to be laid down that all obligation on the part of the master to act for the merchant ceases after a reasonable time for the latter to take delivery of the cargo has expired. It is well established that if the ship has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principles that the expenses properly incurred may be charged to him.

Their Lordships have no doubt that bringing the goods back to England was in fact the best and cheapest way of making them available to the Defendant, and that they were brought back at less

charge in the "Argos" than if they had been sent in another ship.

If the goods had been of a nature which ought to have led the master to know that on their arrival they would not have been worth the expenses incurred in bringing them back, a different question would arise. But, in the present case, their value, of which the Defendant has taken the benefit by asking for and obtaining the goods, far exceeded the cost.

The authority of the master being founded on necessity would not have arisen, if he could have obtained instructions from the Defendant or his assignees. But under the circumstances this was not possible. Indeed this point was not relied on at the bar.

Their Lordships, for the above reasons, are of opinion that the Plaintiff has made out a case for compensation for bringing back the goods to England.

But they think the Plaintiff is not entitled to recover the amount claimed for demurrage and expenses in attempting to enter the ports of Honfleur and Trouville. These efforts may have been made by him in the interest of the cargo as well as the ship; but they were made before the ship was ready to deliver at all in the port of Havre, and the expenses of this deviation and of the return to Havre, after permission had been obtained to discharge there, must be treated as expenses of the voyage, and not as incurred for the benefit of the Defendant.

The charges for the hire of the vessel and of storing the petroleum in her at Havre, after permission had been obtained for its discharge there, stand on different ground. If the ship had then waited in the outer harbour with the petroleum on board, the Defendant would have been liable to pay demurrage at 10*l.* 10*s.* a day. It was obviously, therefore, to his advantage under the circumstances for the master to hire the vessel, and thus relieve him from the heavy demurrage payable for the detention of the ship. The whole expense of this operation appears to be about 15*l.* only.

In the result their Lordships think the Plaintiff is entitled to recover the outward freight, and the charge made for the carriage back to England,

together 48*l.* 8*s.*, and also the 15*l.* for the above expenses at Havre, in all 63*l.* 8*s.*

When their Lordships remitted the cause, after deciding the question of jurisdiction, they were told it had been fully heard by the Judge of the Admiralty Court, and they presumed that the judgment he was prepared to give would be acquiesced in. The Defendant, however, notwithstanding the small amount in dispute, applied for leave to appeal, which was granted only on the ground that questions of law of general importance were involved in the decision. Having failed on these questions he ought, although the Decree will be reduced in amount, to pay the costs of his Appeal.

Their Lordships will humbly advise Her Majesty that, the Judgment given for the Plaintiff ought to be affirmed, except only that the amount thereof should be reduced to 63*l.* 8*s.* The Respondent will have the costs of this Appeal.

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