[HIGH COURT OF AUSTRALIA.]

BURNS PHILP AND COMPANY LIMITED . APPELLANT;
DEFENDANT,

AND

GILLESPIE BROTHERS PROPRIETARY LIMITED . . . . . } RESPONDENT;
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1946. *Nov.* 15, 18-20.

MELBOURNE, 1947. *Mar.* 17.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Shipping—Bill of lading—General ship—Consignment of goods—War conditions—Implied terms—Deviation—Abandonment of voyage—Duty of master—Extraordinary emergency—Voluntary act—Communication with shippers—Agency of necessity—General average—Return of goods—Back freight—Payment under duress.

A, under a bill of lading, consigned flour by a general ship owned by B to consignees at Singapore and paid freight thereon in advance to B. Whilst sailing in convoy to Singapore the master was instructed by the commodore of the convoy to proceed to Batavia and not to Singapore. The ship arrived at Batavia on 8th February 1942 and remained there until 21st February. Circumstances over which the master had no control prevented him from discharging the cargo at Batavia a course which, under the bill of lading, he would have been entitled to pursue. On 15th February Singapore was captured by the Japanese and by 19th February the war situation had so deteriorated that the master decided to abandon the voyage in the interests of "the safety of the ship, the cargo and the crew." He went ashore on that day in order to implement his decision and while ashore was ordered by Naval Control to depart in convoy for Freemantle the following afternoon. The master did not communicate with the cargo-owners nor did he seek their instructions. The use of the ship's radio was forbidden and on enquiry the master was erroneously informed by a naval officer that all communications had been taken over by the services and that private messages would not be accepted. After taking on the necessary water the ship left Batavia for a rendezvous with a convoy on 21st February. There being no sign of the convoy the master

decided to "beat it for Australia." The ship arrived safely at Fremantle on 2nd March. B thereupon claimed back freight for the carriage of the flour from Batavia to Fremantle. To obtain delivery of the flour A, under protest, paid half the freight claimed.

The bill of lading, which included special war conditions, made provision to excuse B from all liability in the events which happened and gave B a lien for charges which B might have incurred had the flour been stored or landed. It did not, however, purport to deal with the question whether A should pay back freight, if, through excepted perils, the ship should return to the port of loading and there redeliver the cargo to A.

In an action by A to recover back freight B contended that at all relevant times the master was the agent of necessity of A.

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that the voyage back from Batavia was not undertaken for the purpose of preserving the cargo, but was for the security of the ship and cargo considered as one adventure, and B was therefore not entitled to back freight in respect of the flour and A was accordingly entitled to recover the money so paid under protest.

Cargo ex "Argos," (1873) L.R. 5 P.C. 134 discussed and distinguished.

Decision of the Supreme Court of New South Wales (Full Court): *Gillespie Bros. Pty. Ltd.* v. *Burns Philp & Co. Ltd.*, (1946) 47 S.R. (N.S.W.) 122; 63 W.N. 261, affirmed.

APPEAL from the Supreme Court of New South Wales.

Gillespie Bros. Pty. Ltd. sued Burns Philp & Co. Ltd. for the recovery of a sum of £795 3s. 7d. which the plaintiff had paid to the defendant in order to recover possession of a quantity of flour which had been shipped by the plaintiff upon the ss. *Mangola* under five bills of lading dated 11th December 1941. The bills of lading provided for the delivery of the flour to consignees at Singapore or for transhipment there for further carriage to Penang or Kuala Lumpur. The ship reached Batavia, but returned to Australia to avoid capture or destruction by the Japanese forces. The defendant claimed that it had a lien upon the flour for back freight from Batavia to Australia. The plaintiff paid under protest the amount claimed for back freight and sued the defendant to recover it. The only defence relied upon was that "at all relevant times the master of the ship was" the plaintiff's "agent of necessity." Upon this basis the defendant claimed that it was entitled at least to freight from Batavia to Fremantle (the nearest practicable Australian port) though the flour was in fact brought back to Sydney from Fremantle.

Bills of lading were issued by the defendant in respect of the goods shipped by the plaintiff subject to the exceptions, terms and provisions contained in the bills of lading. Freight was payable in advance at

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the port of loading in cash without deduction vessel or cargo lost or not lost, and was in fact paid in advance. The bills of lading contained many exceptions, terms and provisions but those having a bearing upon this appeal are as follows :—

In the case of the blockade or interdict of the port of discharge, of the goods shipped hereunder or if the entering of or discharging (or continuance of discharging) in such port shall be prohibited or prevented or likely to be delayed by blockade, interdict, quarantine, strikes, lock-outs, labour troubles (whether the Carrier or his servants are parties thereto or not), civil commotions, riot, epidemic, fever or other illness, or any disturbances or any other cause whatsoever beyond the Carrier's control, or shall be considered by the Master (whose decision shall be absolute and binding on all parties) to be unsafe or likely to prejudice the interests of the vessel and/or her cargo whether by delay or otherwise howsoever, then the goods may be at the Carrier's option landed or put into lighters there or at the vessel's most convenient port which shall be selected by the Carrier or his Agents or Master at the expense and risk of the Owners of the goods ; and the Carrier's responsibility shall cease at the vessel's rail when the goods are so discharged, the Carrier, Master or Agents giving immediate notice of such discharge to the Consignee of the goods so far as he is known. Such discharge shall constitute due delivery of the goods under this Bill of Lading and the Owner of the goods shall bear and pay all charges and expenses incurred in consequence of such discharge, including those of transhipment, storage and carriage to intended destination, the Carrier, Master and Agents acting as forwarding agents only after the goods have left the vessel's rail.

In the event of the imminence or existence of any of the following : —War between any nations or civil war : prohibition, restriction or control by any Government of all intercourse, commercial or otherwise, with any country from at or to which the vessel normally proceeds or calls : control or direction by any Government or other Authority of the use or movement of the vessel or the insulated or other space of the vessel : the Carrier and/or his Agent and/or the Master, if he or they consider that the vessel or her Master, Officers, Crew, Passengers or any of them or cargo or any part thereof will be subject to loss, damage, injury, detention or delay in consequence of the said war, civil war, prohibition, restriction, control or direction, may at any time before or after commencement of the voyage alter or vary or depart from the proposed or advertised or agreed or customary route or voyage and/or delay or detain the vessel and/or discharge the cargo (for delivery or storage or transhipment) at or

off any port or ports, place or places without being liable for any loss or damage whatsoever directly or indirectly sustained by the Owner of the goods. If and when the goods are so discharged at such port or ports, place or places they shall be landed or put into crafts or vessels at the expense and risk of the Owner of the goods and the Carrier's responsibility shall cease at the vessel's rail, the Carrier, Master or Agents giving notice of such discharge to the Consignee of the goods so far as he is known. The vessel, in addition to any liberties expressed or implied herein, shall have liberty to comply with any orders or directions as to departure, arrival, route, voyage, ports of call, delay, detention, discharge (for delivery or storage or transhipment), or otherwise howsoever given by any Government or any Department thereof, or any person acting or purporting to act with the authority of any Government or of any Department thereof, or by any Committee or person having under the terms of the War Risks Insurance on the vessel the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions or by reason of the exercise by the Carrier of any other liberty mentioned in this clause anything is done or is not done the same shall be within this contract. Discharge under any liberty mentioned in this clause shall constitute due delivery of the goods under this Bill of Lading and the Owner and/or Consignee of the goods shall bear and pay all charges and expenses resulting from such discharge, and the full freight stipulated herein, if not prepaid, shall on such discharge become immediately due and payable by the Owner and/or Consignee of the goods, and if freight has been prepaid the Carrier shall be entitled to retain the same. The vessel is free to carry contraband, explosives, munitions or warlike stores, and may sail armed or unarmed.

The Bill of Lading was also subject to the following special conditions :—

1. When and so long as a state of war exists between any powers the Shipowner and/or his Agents and/or the Master may at any time whether before or after the commencement of the voyage land and store the goods at the port of shipment or at any other port or place either on shore or afloat at the risk and expense of the Owners of the goods, and in that event neither the Shipper nor the consignee nor the holder of the Bill of Lading shall have any claim against the Shipowner or his Agents or the Master in respect of any loss or damage which he or they may sustain directly or indirectly by reason or in consequence of the exercise by the Shipowner and/or his Agents and/or the Master of any of the powers conferred on him or them by this condition or by reason or in consequence of any damage to

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or diminution in value of the goods arising from the exercise of such powers or any of them. Provided that the Shipowner shall have a lien on the goods for all charges and expenses incurred in or about the landing and/or storage of such goods.

2. When and so long as a state of war exists between any powers the Shipowner and/or his agents and/or the Master may at any time either before or after the commencement of the voyage abandon the voyage in whole or in part or alter or vary the proposed or advertised or agreed route and neither the Shipper nor the Consignee nor the holder of this Bill of Lading shall have any claim against the Shipowner or his agents or the Master for any loss or damage which he may sustain directly or indirectly by reason of such abandonment or change of route or by reason of any damage to or diminution in value of the goods in consequence thereof.

3. With liberty to proceed by any route and either before or after proceeding towards the port of discharge to proceed to and stay at any port or ports once or oftener in any order backwards or forwards although in a contrary direction to or out of or beyond the route to the port of discharge and to return to any port or ports once or oftener in any order backwards or forwards although in a contrary direction to or out of or beyond the route to the said port of discharge for the purpose of loading or discharging passengers, coals or cargo or for any purpose whatsoever ; and all such ports, places and sailings shall be deemed to be included within the intended voyage and it is hereby expressly agreed that the exercise of the aforesaid liberties or any of them shall not constitute a deviation.

4. The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or any department thereof, or any persons acting or purporting to act with the authority of such Government or of any department thereof, or by any Committee or person having, under the terms of the War Risks Insurance on the ship, the right to give such orders or directions, and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.

General average, it was also provided, should be adjusted according to *The York-Anterwerp Rules* 1924. Other relevant provisions of the bills of lading are set out in the judgment of *Latham* C.J. hereunder.

The ss. *Mangola* left Sydney, under the British flag, on 13th December 1941, with a native crew, with the flour specified in the bills of lading and carrying a general cargo for more than one hundred different consignees. It reached Port Moresby in New Guinea. But the Torres Strait route to the East was closed owing to the war with Japan which was proclaimed as from 8th December 1941, and shipping for eastern ports was directed to proceed south and west of Australia in convoy. In accordance with a direction by the naval authorities the ship returned to Sydney and on 19th January 1942, under naval instructions, she left for Fremantle by the route south of Australia. She arrived there, joined a convoy and left for Singapore. But when she reached the Straits of Sunda the master received orders from the commodore of the convoy to proceed to Batavia in Java and not to Singapore. The master obeyed these orders. Whilst en route to Batavia the ship was rammed by another vessel in the convoy and her steering gear was damaged. The damage rendered the ship less manageable than she would otherwise have been and caused the master considerable concern, particularly in view of the fact that the ship was proceeding into, and later lying in, waters where enemy action might reasonably be expected. The ship arrived at Batavia on 8th February 1942 and was directed by an inspection vessel of the Royal Dutch Navy to anchor in the roads three to four miles away from the berthing area but within the limits of the port. On arrival the master sought permission from the naval authorities to berth the ship in order to discharge his cargo and have repairs done to the damaged steering gear, and was informed by these authorities that he would be advised later. Soon after the ship's arrival a Chinese clerk, employed by the defendant's agent in Batavia, came out to the ship and took ashore a copy of the ship's manifest. At this time there were more than one hundred ships in the port. By this date Japanese forces had overrun Malaya and on 15th February 1942 occupied Singapore. Batavia was bombed by the Japanese on two occasions after the arrival there of the ss. *Mangola*. The master remained on board until 19th February, when he went ashore for the first time. Between 8th February and 19th February he was visited on a number of occasions by officers of the Royal Dutch Navy and of the Royal Navy. On at least two occasions he was asked by naval officers who came on board to produce the ship's manifest in order that they might ascertain the nature of his cargo. The last occasion on which this occurred was 18th February. Whenever the naval authorities came to the ship the master pressed them to be allowed to berth in order to discharge his cargo and carry out temporary repairs to the ship. Part of the cargo consisted of blood plasma,

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and he used this fact to press his claim to be given a priority to berth. At all material times labour for unloading was scarce, and whatever was available was concentrated on the discharge of priority cargoes. No vessel was allowed to berth or to unload except on instructions from the naval authorities who were in charge of the port and all shipping in it and of all unloading operations. Each day a conference was held at which representatives of the various shipping agents in Batavia, the Harbour Authority, and the Naval Control Office decided what vessels were to receive priority for berthing and discharging. On 19th February, when it probably became apparent that the Japanese would soon be in control of the Straits of Sunda, thus closing the escape route to all shipping at Batavia, the naval authorities decided to abandon the policy of unloading whatever priority cargo could be unloaded with the available facilities and labour, and to devote every effort to getting the ships away after taking on sufficient water and bunkers to carry them to whatever destination it was decided to send them.

When the master went ashore on 19th February he visited the Naval Control Office, where he was told that the port was to be cleared of shipping in twenty-four hours; that he was to berth the next morning to take on water sufficient for the ship's requirements to Fremantle, and that the ship was to depart in a convoy to Fremantle during the afternoon of 20th February. While at the Naval Control Office he inquired whether he could communicate with Sydney and was told that he could not do so, as the Services had taken over the service and private messages would not be accepted. The use of the ship's wireless, either at sea or in port, was forbidden. Under cross-examination the master said that he was uncertain whether the statement made to him was that he could not communicate because the Services had taken over the service, or whether he was told that he could not communicate because "all the lines were priority for the army and navy," but said that, in effect, which ever phrase was used it conveyed the same meaning to him, namely, that he could not communicate because of the volume of service messages.

After his visit to the Naval Control Office, the master returned to the ship, moved it nearer to the breakwater and, therefore, to the berthing area, and anchored for the night. The pilot was due to come on board early on 20th February to take the ship to berth but he did not arrive until about 11.30 a.m. The result was that the ship was not berthed and ready to water until 1.45 p.m. There was no labour available to assist in preparing to water and the hoses had to be connected by the agent and his clerk, who had come down to the wharf.

The water pressure was low and the rate of watering was therefore slow. When the ship arrived at the berth the master was told by an officer of the Naval Control Office that he was to complete watering the ship and proceed to Fremantle in a convoy leaving at 3 p.m. It was impossible to comply with this instruction and the master so informed the officer. He then went to the Naval Control Office to verify these orders, and was there told that they would not hold up the convoy for him and that he must report next morning for further orders. The ship stayed at the wharf and continued to take on water until she sailed next day.

On the morning of 21st February the master went to the Naval Control Office, but orders were not then ready for him. He returned later in the morning and was directed to take the ship that afternoon to a rendezvous four miles away to join a convoy, which was said to be forming up there at the time, and to proceed to Fremantle. He returned to the ship. The pilot came on board at about 3 p.m. and took the ship out to the breakwater, where he disembarked. The master then proceeded to the rendezvous but found that no other ships were there. By this time there were very few ships—and these mainly damaged and abandoned—left in the port. Without further delay, indeed without stopping the ship, he sailed alone for Fremantle. The ship arrived at Fremantle on 2nd March and left for Sydney on 5th March. During this period no communication was made to the plaintiff by the master or by the defendant, and no opportunity was given to the plaintiff to consider the desirability of unloading the flour at Fremantle. The ship was compelled to return to Fremantle on 7th March in order to have temporary repairs done to the steering gear. It left again on 23rd March and arrived in Sydney on 2nd April.

On 5th March 1942 the defendant advised the plaintiff that its flour was being brought back to Australia and that to obtain delivery it would be necessary for the plaintiff to present the original bills of lading and, in addition to usual charges, pay freight amounting to fifty per cent of the original outward freight. The plaintiff denied the defendant's right to require any such payment, but, to recover possession of its flour, ultimately paid to the defendant, under protest, the sum of £795 3s. 7d. already mentioned. The back freight paid by the plaintiff was in respect of the carriage of the flour from Batavia to Fremantle. The defendant neither claimed nor was paid anything in respect of the carriage of the flour from Fremantle to Sydney.

No argument was addressed to the Court that the voyage to Port Moresby and return to Sydney was not justified by the terms of the

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bills of lading and the circumstances of the case. It was not suggested that the flour should have been landed at Batavia under the liberties contained in the bills of lading. The plaintiff, however, contended that the master should have communicated with the consignors and sought instructions. But the master did not do so and therefore it was contended that no authority to act on behalf of cargo-owners in case of necessity arose.

The judge of first instance, *Owen* J., gave judgment for the plaintiff upon the ground that the master had not in fact acted as the agent of the plaintiff but had only obeyed naval orders. Upon an appeal to the Full Court of the Supreme Court the judgment of *Owen* J. was, by a majority, affirmed: *Gillespie Bros. Pty. Ltd.* v. *Burns Philp & Co. Ltd.* (1).

From that decision the defendant appealed to the High Court.

Wallace K.C. (with him *Warburton*), for the appellant. This is not a case of general average as the fundamental element of sacrifice was absent. The appellant was an agent of necessity; all the elements were present and complied with. The outstanding facts are that the ship did not join a convoy but proceeded back to Australia under its own steam; that the failure to communicate with the consignors was excusable; that the voyage to Fremantle was a reasonably prudent and proper act in the interests of the cargo; that the bill of lading did not provide for the circumstances which occurred and that, in those circumstances, freight was payable by virtue of the principles enunciated in *Cargo ex "Argos"* (2), and *Notara* v. *Henderson* (3). Under the *Sea-Carriage of Goods Act* 1924, and also under the general law, there is a duty on a master to do whatever may be necessary to preserve the cargo when it is in peril. This case is entirely different from a case of general average because there was no voluntary sacrifice of cargo. The shipowner has a duty to deliver the goods in pursuance of the contract with a minimum of delay and deviation. Any delay or deviation should not be unreasonable and it is incumbent upon the shipowner to use his best endeavours to complete the contract (*Wilson* v. *Bank of Victoria* (4)). The contract was frustrated, in the legal sense, but the factual position was that the voyage was abandoned at Batavia upon a decision voluntarily made by the master. The bill of lading was silent on the point of what was to be done on abandonment. In these circumstances the parties had, perforce, to rely upon the general

(1) (1946) 47 S.R. (N.S.W.) 122; 63 W.N. 261.
(2) (1873) L.R. 5 P.C. 134.
(3) (1872) L.R. 7 Q.B. 225.
(4) (1867) L.R. 2 Q.B. 203.

law and the position was then analogous to the position in *Cargo ex "Argos"* (1). If the appellant had abandoned the voyage voluntarily the ordinary law of contracts would have arisen and the owners of the cargo could have elected to treat the contract as at an end and sue the appellant for damages. The appellant is specially protected from that because on abandonment it is not liable to any claims for loss or damage, the freight being payable in advance, cargo or ships lost or not lost. Consideration of fault in the cargo-owner is relevant to the claim for forward freight only, and is irrelevant to the claim for back freight. It is conceded that, under the general law and in the absence of special circumstances, if the contract is completely frustrated through no fault on the part of either party, then forward freight would not be payable, but that does not mean that back freight would not be payable unless a proposition that it was not to be payable could be spelt out of the agreement: See *Cargo ex "Argos"* (2). The position in that case was very similar to the position in this case. In both cases the voyage was permanently finished without any hope of resuming it, therefore there were no contractual obligations or rights between the parties thereafter. The only reason why back freight was not ordered in *Christy* v. *Row* (3) was because the proper parties were not before the Court. Having regard to the fact that the bill of lading made no provision as to the disposal of the goods upon an abandonment, the master was faced with a sudden emergency and he was in a real and genuine dilemma as to what was the best thing to be done in the increasingly difficult and dangerous conditions then prevailing (*Notara* v. *Henderson* (4); *Australasian Steam Navigation Co.* v. *Morse* (5)). See also *Papayanni & Jeromia* v. *Grampian Steamship Co. Ltd.* (6). *Ralli* v. *Troop* (7) is distinguishable. In that case the act was ordered by the control authority not for the purpose of preserving the ship and cargo but to prevent the fire on board from endangering other vessels in port. When freight is payable in advance it is definitely payable in advance and losses fall on the cargo-owner: See *Carver* on *Carriage of Goods by Sea*, 8th ed. (1938),ss. 562-563. The respondent's cargo was preserved from complete destruction, so that, in the circumstances, it is fair and reasonable that back freight on the cargo so preserved should be paid by the respondent to the appellant. A concise and correct exposition of the law on this subject appears in *Barker* v. *Burns Philp & Co. Ltd.* (8). The contract having been

(1) (1873) L.R. 5 P.C. 134.
(2) (1873) L.R. 5 P.C., at pp. 164, 165.
(3) (1808) 1 Taunt. 300 [127 E.R. 849].
(4) (1872) L.R. 7 Q.B. 225.
(5) (1872) L.R. 4 P.C. 222.
(6) (1896) 1 Com. Cas. 448.
(7) (1895) 157 U.S. 386 [39 Law. Ed. 742].
(8) (1944) 45 S.R. (N.S.W.) 1, at pp. 6-10; 61 W.N. 271.

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frustrated there were no contractual rights between the parties, and the master, abandoning the voyage, acted as an agent of necessity thus entitling the appellant to succeed on its claim. Clause 3 (*e*) only applies to a contractual voyage and does not apply where complete frustration has taken place. Even if the contract was not frustrated by the decision of the master, it was frustrated by virtue of naval instructions and the war situation. The reference to the words " deviation " and " delivery " as used in clause 4 are entirely inconsistent with the conception of goods being brought back for permanent re-delivery to a consignor for the reason that deviation *ex hypothesi* is something which takes place during the course of a contractual voyage. If a deviation is forced upon a shipowner there is no liability against him even if the cargo be ruined ; if a deviation is unnecessary or improper or incurred in the interests only of the shipowner then the loss falls upon him. That clause was intended to have operative effect only prior to a complete abandonment of the voyage, or, in other words, it only operated to make what otherwise would not have been a discharge in accordance with the contract a discharge in accordance with the contract, and it only applied where the contract was performed in a different way by reason of some authoritative direction and therefore does not apply where, instead of performing the contract by delivery to consignees, the goods were brought back with the intention of returning them to the consignors. The freight had been earned ; freight was prepayable, it had been paid and was in respect of a contractual voyage, the bringing back of the goods to Fremantle had nothing to do with the earning of freight. If it had been otherwise the appellant may not have been entitled to succeed (*Hingston* v. *Wendt* (1)). The services rendered entitle the appellant to payment of the value of those services to the owners of the cargo.

Weston K.C. (with him *Henchman*), for the respondent. This case comes within clause 3 (*e*) of the bill of lading and the additional clauses 1, 2, and 4. The proper sequence of those additional clauses is 4, 2 and 1. Assuming none of these clauses applies, the parties have intimated in the clearest possible manner that they meant to state in the bill of lading the whole of their rights and obligations. The four endorsed or additional clauses were obviously produced during the war and were inserted in the bill of lading to meet then existing circumstances and were deliberately framed to deal with any exigency which was likely to arise through the war. Clause 2 of the additional clauses endorsed on the bill of lading applies to the facts

(1) (1876) 1 Q.B.D. 367.

of the case and clause 1 shows what should take place when there is an abandonment (*Barker* v. *Burns Philp & Co. Ltd.* (1)). Those clauses cover the position in this case. Even though the voyage was abandoned the contract of affreightment, including all the relevant clauses in the bill of lading, remained in existence. Clause 9 contains an express provision in respect of back freight in certain circumstances. It would be extraordinary that back freight should be earned in circumstances which are not mentioned in the contract at all. There is no warrant for the conclusion that additional clause 4 dealt only with deviations. The bill of lading contains various clauses which indicate the possibility of changes in the voyage and they are all called " the present voyage." The facts bring this case within the opening words of clause 3 (*e*). That clause is not limited to a case of delivery to the consignee but it extends to delivery to the consignor. Clauses 3 (*h*) and 4 to 10 inclusive support the view that the parties did endeavour and intend, and, it is submitted, they succeeded, in exhaustively stating the rights and obligations of the parties under the bill of lading and there is no room for implications of law or for the doctrine of agency of necessity (*Aspdin* v. *Austin* (2)). When the contract deals with the circumstances alleged to give rise to the agency of necessity it is the contractual provision and not either the general or the maritime law which applies (*Jebara* v. *Ottoman Bank* (3) overruled on another point *Ottoman Bank* v. *Jebara* (4)). By the particulars of defence furnished on behalf of the appellant it is limited entirely to the defence of agent of necessity. Assuming agency, it is limited to indemnification as agent, and if no expense, then no indemnity, and in particular, no profit. It is submitted that if it had been intended that the shipowner should have back freight the bill of lading would have so provided. Additional clause 1 in fact applies prescribes and thereby limits the rights. What the master in fact did was what was mentioned in the additional clauses 4 and 2 and it is immaterial whether Fremantle or Sydney was the port of return. Those three additional clauses obviously operated when the contemplated voyage could not take place. That was almost a condition precedent to their operation. The principle of the frustration cases is a principle out of which one may contract and is that if there be an event which would amount to frustration, apart from provisions in the contract, and the contract deals with that event, it may deal with it in such a way as to prevent frustration. It is an implied term of the contract, a necessary matter of implication,

(1) (1944) 45 S.R. (N.S.W.), at pp. 23, 25; 61 W.N. 271.
(2) (1844) 5 Q.B. 671, at pp. 683, 684 [114 E.R. 1402, at p. 1407].
(3) (1927) 2 K.B. 254, at p. 271.
(4) (1928) A.C. 269.

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and one can contract out of it. *Cargo ex "Argos"* (1) turned upon the default of the cargo-owner. The bill of lading there under consideration was very bare and very short and, obviously, allowed an implication and, in that respect, was entirely different from the bill of lading now under consideration. Although the facts of this case may not bring it within the doctrine of agency of necessity an example of the doctrine which was regarded as an extension is shown in *Cargo ex "Argos"* (2). An essential of the agency of necessity is that the agent—the master generally— shall act on behalf of the cargo-owner to bring him into relation with the third person and that he cannot, under that doctrine, as master owing a duty to the shipowner contract with himself as master owing a duty to the cargo-owner. Thus the relation must be an overt act of authority in relation to the third person. The shipowner lost no benefit by the four additional clauses, he got liberties and immunities under those clauses and left the agency of necessity to operate in its proper sphere. The topic of agency of necessity is dealt with in *Carver* on *Carriage of Goods by Sea*, 8th ed. (1938), p. 452, s. 296 ; *Scrutton* on *Charterparties and Bills of Lading*, 9th ed. (1919), pp. 256 et seq., 341, and *Halsbury's Laws of England*, 2nd ed., vol. 1, pp. 207, 208, see also vol. 30, pp. 479-490. *Cargo ex "Argos"* (1) is the only case in English law reported as dealing with back freight. It, however, asserts no ascertainable general principle, but, if it does, the reference to compensation is unintelligible as distinct from a reference to a contract resulting from the master exercising the authority to act in a dual capacity, to act on behalf of the shipowner and the cargo-owner. There is no dicta in *Notara* v. *Henderson* (3) dealing with back freight. The conditions necessary for the existence of an agency of necessity are shown in *Tronson* v. *Dent* (4) ; *Australasian Steam Navigation Co.* v. *Morse* (5) ; *Duranty* v. *Judah Hart & Co.* (6) ; *Wilson* v. *Millar* (7) and *Atlantic Mutual Insurance Co.* v. *Huth* (8). The question of onus is dealt with in *The Bonita* (9). If the master could have communicated with the cargo-owners he was bound to do so (*Australasian Steam Navigation Co.* v. *Morse* (10)).

[DIXON J. referred to *Phelps, James & Co.* v. *Hill* (11).]

Either the master should have landed the goods at Batavia as he was authorized to do under the contract, or he should, while waiting at Batavia, have communicated with the cargo-owners with

(1) (1873) L.R. 5 P.C. 134.
(2) (1873) L.R. 5 P.C., at p. 165.
(3) (1872) L.R. 7 Q.B. 225.
(4) (1853) 8 Moo. P.C. 419, at p. 451 [14 E.R. 159, at p. 171].
(5) (1872) L.R. 4 P.C., at p. 229.
(6) (1863) 2 Moo. P.C. (N.S.) 289 [15 E.R. 911].
(7) (1816) 2 Stark. 1 [171 E.R. 553].
(8) (1880) 16 Ch. D. 474, at p. 481.
(9) (1861) 5 L.T. 141.
(10) (1872) L.R. 4 P.C., at p. 235.
(11) (1891) 1 Q.B. 605.

a view to bringing back the goods to Australia. Agent of necessity means acting with a presumed authority, an authority inferred from services, and there can be no such agency of necessity on behalf of cargo-owners unless there has been communication if it were possible to communicate. An owner must be given an opporunity of deciding how he will deal with his own goods (*Springer* v. *Great Western Railway Co.* (1)). It is part of the master's obligation to protect the goods. It may be that part of his obligation to protect the goods involves that if he takes them back to the home port he does so for the sake of his ship and the goods, and, in such circumstances, back freight would not arise. The master's prime duty is to protect the goods in his ship even if, in discharging that duty, he is compelled to take the goods to another but safer place. If every other condition were consistent with the application of the doctrine of agency of necessity the master would have to exercise his authority on behalf of the cargo-owner. It would not be enough for him to form an intention to do so. A mental decision can be revoked. The authority exists but it does not become effective until exercised : See *Felthouse* v. *Bindley* (2). The claim by the appellant is not a claim for compensation but for profit freight. The master cannot as agent for the cargo-owners make a contract through himself, as agent for the shipowner, with the shipowner. If this case is anything it is a case of general average. Unless the emergency was due to the cargo-owner it must be a case of general average or nothing. The cause of action is misconceived whether it be regarded in a broad aspect or in a particular aspect. War risks are not emergencies within the meaning of the doctrine.

Wallace K.C., in reply. Whether the cargo-owner be at fault or not the duty to preserve the cargo always remains with the master, and, whatever he does, he acts under what is described as an agency of necessity. It is agreed by the parties that this is not a case of general average. There was no extraordinary peril or sacrifice either on the contractual voyage concluded at Batavia, or on the return voyage. *Taylor* v. *Curtis* (3) merely decided that the damage that occurred to the ship's hull was not a voluntary sacrifice but merely resulted fortuitously. A vital ingredient is the absence of voluntary sacrifice or expenditure : *Carver* on *Carriage of Goods by Sea*, 8th ed. (1938), ss. 362 et seq. *Société Nouvelle d'Armement* v. *Spillers & Bakers Ltd.* (4) does not establish any general proposition that acts

(1) (1921) 1 K.B. 257, at p. 267.
(2) (1862) 11 C.B. (N.S.) 869 [142 E.R. 1037].
(3) (1816) 6 Taunt. 608 [128 E.R. 1172].
(4) (1917) 1 K.B. 865.

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done by a master of a ship to escape war perils could not be regarded as done by virtue of an agency of necessity giving rise to a right to general average and the cost must fall on the shipowner. The facts in *Wilson* v. *Bank of Victoria* (1) are clearly distinguishable from the facts in this case in that the expenditure incurred by the ship was admittedly in pursuance of the contractual voyage. The word "compensation" used in *Cargo ex "Argos"* (2) was meant merely as a synonym for reward or payment, as compensation for taking the goods back to England, but it had no technical meaning and was not meant as repayment of out-of-pocket expenses. The principle of law which emerges from *Cargo ex "Argos"* (2) is that where services have been rendered they should, in proper circumstances, be paid for. *Prager* v. *Blatspiel, Stamp & Heacock Ltd.* (3) indicates that the doctrine of agency of necessity has been extended, and in *Jebara* v. *Ottoman Bank* (4) reasons were given why the doctrine should be extended. There is no general legal doctrine that when a contract has been frustrated without fault by either party, one party who may be in a position to do so is under any obligation to expend money or render services to the other party in order to preserve the goods the subject matter of the contract. By reason of the fact that the master there concerned was given a positive order to take the goods on board, *Cargo ex "Argos"* (2) is analogous to this case. The first additional clause in the bill of lading was directed to the temporary storage of goods (*Barker* v. *Burns Philp & Co. Ltd.* (5)). That clause does not refer to abandonment. When the parties intended to deal with abandonment that word was specifically mentioned. The second additional clause merely gives a right without prejudice to the appellant. It gives the appellant a right to abandon and does not purport to deal with rights after abandonment. The third additional clause merely protects the appellant from what might otherwise be regarded as unnecessary and unjustifiable deviation. The fourth additional clause is comparable with clause 3 (*e*). Clause 3 (*e*) meets the Batavia deviation (*Barker* v. *Burns Philp & Co. Ltd.* (5)). It was not intended that that clause should cover a return to the cargo-owner of the goods for his use. Clause 3 (*h*) contemplates abandoning the cargo at some port or ports reached in the course of the voyage to the port of destination. It did not contemplate a new voyage undertaken after the contractual voyage and a landing after the new voyage. This view is supported by the use of the words "arrangement" and "notice to consignee." Clause 9 was

(1) (1867) L.R. 2 Q.B. 203.
(2) (1873) L.R. 5 P.C. 134.
(3) (1924) 1 K.B. 566.
(4) (1927) 2 K.B. 254.
(5) (1944) 45 S.R. (N.S.W.), at p. 17; 61 W.N. 271.

not intended to be an exhaustive code of possibilities in which frustration might occur. No attempt has been made to deal with the position if frustration or abandonment occurred. The bill of lading merely gives additional rights to the shipowner. There was no clause stating that all the rights and obligations obtaining between the parties were set forth in the bill of lading (*Mechanical Horse (Australasia) Pty. Ltd.* v. *City of Broken Hill* (1); *Heimann* v. *Commonwealth* (2)). The statement in *Carver* on *Carriage of Goods by Sea*, 8th ed. (1938), s. 296, does not conclude the matter against the appellant. That statement merely refers to extraordinary expenditure incurred during a voyage to a port of refuge.

Cur. adv. vult.

Prior to the delivering of judgment *Owen* J. brought under the notice of the members of the Court and also the senior counsel for the parties, the case of *Athel Line Ltd.* v. *Liverpool and London War Risks Insurance Association Ltd.* (3), and written submissions thereon were made by counsel.

1947, Mar. 17.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff, Gillespie Bros. Pty. Ltd. (respondent in this appeal) sued the appellant, Burns Philp & Co. Ltd. for the recovery of a sum of £795 3s. 7d. which the plaintiff had paid to the defendant in order to recover possession of a quantity of flour which had been shipped by the plaintiff upon the ss. *Mangola* under five bills of lading dated 11th December 1941. The bills of lading provided for the delivery of the flour to consignees at Singapore or for transhipment there for further carriage to Penang or Kuala Lumpur. The ship reached Batavia, but returned to Australia to avoid capture or destruction by the Japanese forces. The defendant shipping company claimed that it had a lien upon the flour for back freight from Batavia to Australia. The plaintiff paid under protest the amount claimed for back freight and sued the defendant to recover it. The only defence relied upon was that " at all relevant times the master of the ship was the plaintiff's agent of necessity," that as such he had both the authority and the duty to preserve the flour from loss or destruction, and that he did the only reasonable and proper thing in the interests of the plaintiff in bringing the flour back to Australia. Upon this basis the shipping company claimed

(1) (1941) 41 S.R. (N.S.W.) 135; 58 W.N. 97.
(2) (1938) 38 S.R. (N.S.W.) 691; 55 W.N. 235.
(3) (1944) K.B. 87.

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that it was entitled at least to freight from Batavia to Fremantle (the nearest practicable Australian port) though the flour was in fact brought back to Sydney from Fremantle. The shipping company relied upon the case of *Cargo ex "Argos"* (1).

The plaintiff denied that the shipping company had any right to any payment. In the first place it was contended for the plaintiff that in the circumstances there was no right to a contribution by way of general average because there was no voluntary and extraordinary sacrifice in the common interest. This contention was not disputed by counsel for the defendant, who did not seek to make any case based upon the law of general average. It was held in the Supreme Court that no general average contribution was payable. It is unnecessary to refer further to this aspect of the case. Secondly, it was contended for the plaintiff that the bills of lading (which were all in the same form) expressly provided for the circumstances which had occurred at Batavia, and that those provisions gave no right to back freight. In the third place, the plaintiff denied the applicability of the principles laid down in *Cargo ex "Argos"* (1).

There has been previous litigation in connection with a claim for back freight in the case of other goods shipped under identical bills of lading on this voyage of the ss. *Mangola* : See *Barker* v. *Burns Philp & Co. Ltd.* (2). In that case it was held upon appeal to the Supreme Court that the shipping company was not entitled to claim back freight for the reason, per *Jordan* C.J., that the master of the ship had failed to communicate with the owners of the goods to obtain instructions from them as to the disposal of the goods and because if the master had used a higher degree of diligence he would have been able to obtain such instructions ; and, per *Street* J., because the clauses of the bill of lading expressly provided for the events which had happened and did not contain any provision authorizing the demand for back freight. *Davidson* J. dissented. In the present case the evidence, though more detailed, was in substance the same as in the earlier case, but further evidence was given with respect to the possibilities of communication with the owners of the goods. *Owen* J. held that, at the stage when the master had to decide whether he would return to Australia or adopt some other course of action, communication would have been completely useless. Upon appeal *Jordan* C.J., upon consideration of the further evidence, was of opinion that it was ludicrous to suggest that the master should have refrained from running for shelter until he had communicated with the owners of the goods and ascertained their wishes.

(1) (1873) L.R. 5 P.C. 134. (2) (1944) 45 S.R. (N.S.W.) 1 ; 61 W.N. 271.

In the present case *Owen* J., the learned trial judge, gave judgment for the plaintiff upon the ground that the master of the ship had not in fact acted as the agent of the plaintiff, but had only obeyed naval orders. Upon appeal to the Supreme Court the judgment of *Owen* J. was affirmed. *Jordan* C.J. held that the provisions of the bills of lading expressly covered the emergency which arose at Batavia and that they gave no right to the shipowner to charge back freight. *Street* J. agreed with *Jordan* C.J. *Davidson* J. dissented, holding that the provisions of the bills of lading upon which the other learned judges relied applied only to the contractual voyage, and that they had no application after that voyage had been abandoned. He held that *Cargo ex "Argos"* (1) applied and that back freight was properly claimed by the defendant, so that the plaintiff had no right to recover the sum paid in order to regain possession of the flour.

The plaintiff company was one of about one hundred consignors of goods shipped on the ss. *Mangola*, a vessel belonging to the defendant company. The bills of lading provided that freight was payable in advance, vessel or cargo lost or not lost. Freight on the plaintiff's flour was paid in advance. The ss. *Mangola* left Sydney on 8th December 1941 upon the voyage to Singapore. On 7th December the war with Japan had commenced. The vessel travelled as far as Port Moresby but was recalled by the naval authorities and went to the Netherlands East Indies in convoy from Fremantle. The vessel reached the Sunda Straits and then, instead of going to Singapore, proceeded under naval orders to Batavia. Reaching Batavia on 8th February, the ship remained there until 21st February. Singapore, the port of destination, was surrendered to Japanese forces on 15th February. The learned trial judge found as a fact that from 8th to 19th February the master of the ship was of opinion (and not unreasonably) that it would perhaps be possible to discharge the cargo at Batavia. It is not disputed that he had a right to do this under the bills of lading, and to do it without any further authority from the cargo-owners. Thus there was no necessity, from any point of view, to communicate with the cargo-owners before 19th February. While the ship was lying at Batavia, however, Batavia was bombed and the Japanese forces were rapidly advancing. On 19th February the master decided that it would be impossible to discharge the cargo. Wharf labour was not available. "Naval Control" authorities ordered him to return to Australia and to join a convoy to leave for Australia on 20th February. Delay in obtaining necessary water in the disturbed and chaotic condition

(1) (1873) L.R. 5 P.C. 134.

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of affairs at Batavia produced the result that the ship missed the convoy and the master set out for Fremantle and succeeded in getting there. From Fremantle the ship proceeded to Sydney. When the plaintiffs claimed their goods at Sydney they were required to pay the sum sued for in this action before the goods were delivered to them.

Two substantial questions arise. The first is whether the clauses of the bills of lading deal with the circumstances which happened. If they do, then the rights of the parties are determined by the contracts which they made and no further question arises. Secondly, if the clauses of the bills of lading do not apply to those circumstances, what is the precise rule laid down in *Cargo ex "Argos"* (1), and can the shipping company bring itself within that rule ?

The answer to the first question necessitates an examination of the terms of the bills of lading. I approach the question of the applicability of the various clauses of the bills of lading upon the footing that, from and after 19th February, the position at Batavia was such that it had become impossible, owing to causes not involving any default on the part of the shipowner, to pursue the contractual voyage and that the master abandoned and was entitled to abandon any endeavour to complete that voyage.

The bills of lading contain a large number of provisions, many of them overlapping, together with four additional provisions which are on slips of paper gummed on to the bills. Reference was made in argument to many of these provisions, but the decision of the majority in the Supreme Court was based upon clause 3 (*h*) of the bill of lading and additional clause 4.

Clause 3 (*h*) is a lengthy provision which is prefaced by a reference to various events, including war between any nations and control or direction by any government or other authority of the use or movement of the vessel. At the relevant time there was war between nations, and that was a war which directly affected the possibility of carrying out the obligations of the shipowner under the bill of lading. Further, the ship, when at Batavia, was under the control or direction of the naval authorities of the British and Dutch Governments. Clause 3 (*h*) provides that in the event of the imminence or existence of any of the specified events the carrier or master, if he considers "that the vessel or her Master, . . . or cargo . . . will be subject to loss, damage, injury, detention or delay in consequence of the said war . . . control or direction, may at any time, . . . alter or vary or depart from the proposed or advertised or agreed or customary route or voyage and/or delay

(1) (1873) L.R. 5 P.C. 134.

or detain the vessel and/or discharge the cargo . . . at or off any port or ports, . . . without being liable for any loss or damage whatsoever directly or indirectly sustained by the Owner of the goods." The clause provides that if the goods are so discharged they shall be landed at the expense and risk of the owner, and that the responsibility of the carrier shall cease at the vessel's rail. The clause also provides that the vessel shall have liberty to comply with any orders or directions as to departure, arrival, route, voyage &c. or otherwise howsoever given by any government or any department thereof having under the terms of the war-risk insurance on the vessel the right to give such orders or directions, and that if by reason of or in compliance with any such orders or directions or by reason of the exercise by the carrier of any other liberty mentioned in the clause anything is done or is not done the same shall be within the contract. It is also provided that discharge under the liberty mentioned in the clause shall constitute due delivery of the goods under the bill of lading, and that the owner and/or consignee of the goods shall bear and pay all charges and expenses resulting from such discharge and that the full freight stipulated therein if not prepaid, shall on such discharge become immediately due and payable, and that if freight has been prepaid the carrier shall be entitled to retain the same.

The effect of this clause is to give to the shipowner and the master of the vessel the right, if any of the events mentioned in the clause happen, to discharge the cargo at a port other than the port of destination according to the bill of lading. The clause relieves the carrier of any liability for damage by reason of the carrier taking advantage of the clause and secures the carrier against any claim for repayment of prepaid freight. If the flour had been discharged at Batavia this clause would have protected the shipowner from any liability for loss owing to such discharge. I agree with *Davidson* J. that this clause is intended to deal only with the contractual voyage, and that it does not cover a case such as the present where the contractual voyage is completely abandoned. The clause enables the shipowner to vary the method of performance of the contract in the circumstances mentioned in the clause, and is directed to the continued performance of the contract, though in a modified manner.

Clause 4 of the additional clauses is as follows :—" The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or any department thereof, or any persons acting or purporting to act with the authority of such Government

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or of any department thereof, or by any Committee or person having, under the terms of the War Risks Insurance on the ship, the right to give such orders or directions, and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly." The only effect of this clause, in my opinion, is to prevent changes of route, stoppage, destination and delivery, where made under the authority mentioned in the clause, from being deviations which would, apart from the clause, be breaches of contract. In my opinion the clause has no application to a case where the voyage has been abandoned.

For the same reason I am of opinion that clause 3 (*e*) (which was relied upon by the plaintiff in this Court) does not provide an answer to the claim for back freight. Under this clause in the event of any "disturbances or any other cause whatsoever beyond the Carrier's control" if the master considers it to be unsafe or likely to prejudice the interests of the vessel or her cargo to land the goods, then the goods may at the carrier's option be landed or put into lighters there or at the vessel's most convenient port. If this is done the carrier is to give notice of discharge to the consignee. It is provided that such discharge shall constitute due delivery of the goods under the bill of lading and that the owner of the goods shall bear and pay all charges and expenses incurred in consequence of such discharge, including those of transhipment, storage and carriage to intended destination, the "Carrier, Master and Agents acting as forwarding agents only after the goods have left the vessel's rail." The terms of this clause (especially the provision requiring notice to the consignee), show that it is intended to provide for the forward voyage to the consignee, and that it has no application in a case where that voyage is justifiably abandoned and where there is no longer any intention to deliver to the consignee. Thus I agree with the view of *Davidson* J. in *Barker's Case* (1) and in this case as to the limited application of the clauses of the bills of lading and with what *Jordan* C.J. said in *Barker's Case* (2) as to clauses 3 (*e*) and 3 (*h*): "These, I think, contemplate the landing of the cargo at some port or ports reached in the course of the voyage to the port of destination, a landing which is agreed to constitute due delivery under the bill. They do not contemplate a new voyage undertaken after the abandonment of the contract voyage, and a landing after the new voyage."

(1) (1944) 45 S.R. (N.S.W.), at pp. 19, 22; 61 W.N. 271.

(2) (1944) 45 S.R. (N.S.W.), at p. 17; 61 W.N. 276.

Various other clauses were relied upon, more or less, by the respondent. As is usual in bills of lading, they are intended to excuse the shipowner from liability or to extend his rights. Thus additional clause 1, applying when a state of war exists, enables the shipowner to land and store the goods at any port at the risk and expense of the owners of the goods, and gives the shipowner a lien on the goods for charges and expenses incurred in landing and storage. It does not contain any provision for the payment of extra freight. This clause simply gives an additional right to the shipowner which is not in question in this case. It does not deal with any costs of carrying the goods and leaves untouched the question of liability for freight upon an uncontemplated return voyage. Additional clause 3 provides for variation of route to port of discharge—which is a very different thing from complete abandonment of the voyage to that port.

Clause 9 contains many provisions relating to delay or default of the consignee in taking delivery and to payment of demurrage. It provides *inter alia* that if necessary Customs papers are not duly lodged or if importation of the goods is prohibited the carrier may return the goods to the port of shipment at the risk and expense of the owner " who shall pay all freights and/or forwarding expenses thereon." It was not suggested that the clause applies to the circumstances of this case. But it was argued for the plaintiff that the clause is an express provision for the payment of back freight in the particular circumstances specified, and that it excludes any implication of a promise to pay back freight in any other circumstances. But this express provision for payment of back freight in a case in which it would not otherwise be payable, either by reason of any terms of the contract between the parties or under any rule of law, has no relevance to the question whether there is a rule of law, not depending upon any agreement (express or implied) of the parties, but upon the necessity of the case, that back freight shall be payable where the shipowner saves the goods for the owner by returning them to him when delivery to the consignee has become impossible without default by any party.

There is, however, a clause which expressly applies to the case of abandonment of the voyage. It is additional clause 2 and is as follows :—" When and so long as a state of war exists between any powers the Shipowner and/or his agents and/or the Master may at any time either before or after the commencement of the voyage abandon the voyage in whole or in part or alter or vary the proposed or advertised or agreed route and neither the Shipper nor the Consignee nor the holder of this Bill of Lading shall have any claim

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against the Shipowner or his agents or the Master for any loss or damage which he may sustain directly or indirectly by reason of such abandonment or change of route or by reason of any damage to or diminution in value of the goods in consequence thereof."

This clause, in the circumstances which happened, gave the master the right to abandon the voyage, as he did in fact abandon it, at Batavia, and protected the shipowner against any claim for damages on that account. The plaintiff contends that this provision is exhaustive and that as it makes no provision for back freight in the case of abandonment of the voyage, there can be no right to back freight after such an abandonment. But it cannot be successfully contended that, after a justifiable abandonment of the voyage, there are no rules of law applying to the relations of the parties. For example, the law of general average would apply if, after such an abandonment, circumstances of emergency arose which involved a voluntary sacrifice of some of the cargo in the common interest. The defendant contends that the position which existed at Batavia was such as to bring into operation another rule of law which entitled the defendant to charge back freight to Australia. The next question, therefore, is whether there is, as contended for by the defendant, a principle of law which entitled, and possibly required, the master to bring the flour back to Australia, and imposed upon the owner of the flour a liability to pay for the service so rendered to him, with the result that the flour became subject to a lien for back freight.

The defendant relies upon *Cargo ex "Argos"* (1). In that case a shipowner made claims for, *inter alia*, freight claimed to be due under a bill of lading and also for back freight. The ship left London for Havre with a general cargo. Under a bill of lading the plaintiff undertook to deliver the defendant's petroleum at Havre, the petroleum to be taken out by the defendant within twenty-four hours after arriving at Havre. The Franco-German war interfered with normal conditions. After abortive endeavours to land the petroleum elsewhere (in relation to which a claim for demurrage was rejected by the court) it was put into lighters in the outer port, but the port authorities refused to allow it to remain anywhere in the port. The master of the ship reshipped the petroleum and took it back to London. It was held that the shipowner was entitled to the payment of back freight for the service rendered to the owner of the goods in carrying the goods to London. There was also a controversy between the parties as to whether the plaintiff was entitled under the bill of lading to be paid forward freight for carriage to Havre. The observations of their Lordships of the Privy Council upon this part of the case

(1) (1873) L.R. 5 P.C. 134.

(which involved references to default of the defendant in not being ready to take delivery at Havre) have no bearing upon the question which arises in the present case. What was said, however, about the claim for back freight is very relevant to the present case.

The question which was considered by their Lordships was " whether the Plaintiff is entitled to compensation in the shape of homeward freight for bringing the petroleum back to England. . . . 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 " (1). The defendant contends that in the present case the real question which arises is whether the master was justified in trying to save the flour and whether he did the best for the interest of the owner of the flour in bringing it back to Australia.

Their Lordships refer to *Christy* v. *Row* (2) in which it was said that up to the time when that case was decided there had been no decision determining what should be done in case the voyage was defeated—" The natural justice of the matter seems obvious ; that a master should do that which a wise and 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 " (1). Consideration is then given to the nature and scope of the duty of the master " as agent of the merchant." Their Lordships referred to the cases of *Tronson* v. *Dent* (3) ; *Notara* v. *Henderson* (4) and *Australasian Steam Navigation Co.* v. *Morse* (5), and said :—" 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. . . . 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 " (6). It was added that

(1) (1873) L.R. 5 P.C., at p. 164.
(2) (1808) 1 Taunt. 300 [127 E.R. 849].
(3) (1853) 8 Moo. P.C. 419 [14 E.R. 159].
(4) (1872) L.R. 7 Q.B. 225.
(5) (1872) L.R. 4 P.C. 222.
(6) (1873) L.R. 5 P.C., at p. 165.

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their Lordships had 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. Accordingly, it was held that the plaintiff had " made out a case for compensation for bringing back the goods to England " (1).

The defendant contends that this decision, which is of the highest authority, concludes the case in its favour. In my opinion this contention is well founded. The findings of fact, which there is undoubtedly evidence to support, show that up to 19th February the master still hoped that he would be able to land the goods at Batavia. If he had so landed them he would have performed the obligations of the shipowner under the bill of lading. Accordingly up to 19th February no necessity arose for communicating with the owners of the goods. In *Cargo ex "Argos"* (2) it was said :— " 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 " (3). That was the position at Batavia from 19th February to 21st February, when the master left Batavia for Australia. It would have been quite useless (even if it had then been possible) to communicate with the one hundred consignors in Australia and it was obviously impossible to communicate with the consignees in Singapore, Penang and Kuala Lumpur.

In my opinion what is said in *Cargo ex "Argos"* (2) shows that there is no absolute duty resting upon the master of a vessel in all cases to communicate with the owners of goods before he takes action in the interests of the owners of the goods to save the goods from loss or destruction. When he can communicate and does communicate and receives instructions which he obeys, no question of agency of necessity arises. In such a case the master has express authority and the ordinary law of agency applies. The doctrine of agency of necessity becomes relevant only where no authority is conferred by the terms of the contract (express or implied) or by subsequent instructions to do the act in relation to the goods which comes into question. The object of communication is to obtain express authority.

Whether there should be such a communication depends altogether upon the circumstances of the case (*Droege* v. *Suart* (4)). When the master was asked by the learned trial judge :—" Why did you take

(1) (1873) L.R. 5 P.C., at p. 166.
(2) (1873) L.R. 5 P.C. 134.
(3) (1873) L.R. 5 P.C., at pp. 165, 166.
(4) (1869) L.R. 2 P.C. 505, at p. 513.

no action in the way of sending a communication to Sydney about the cargo ? " he replied :—" Because I could see that it would be useless to do so, that there was no time for a cable to go down and for over 100 shippers to be notified and get their opinions, and then send them back to Batavia, and even if they all said the same thing, to try and pick out their various cargoes from the ship. It was an utter impossibility. Therefore I did not think it important enough to carry on any further worrying about the cable." The answer of the master to his Honour's question was obviously justified by the facts, and it shows that it would not have been reasonable for him to imperil both ship and cargo by waiting at Batavia, after he was in a position to escape on 21st February, in the hope of obtaining some instructions from some or all of the cargo-owners in Sydney. The master took the only reasonable and prudent course in getting away from Batavia to Australia. He had naval orders to wait for a convoy but owing to delay in obtaining water he missed the convoy and, as he wrote in his diary, " My orders were to wait outside for the formation of a convoy but the Japs were too close and there was no sign of any escort so I took the matter into my own hands and beat it for Australia."

It is argued for the plaintiff that the decision in *Cargo ex "Argos"* (1) only entitled the shipowner at the most to recoupment of out-of-pocket expenses incurred in bringing the goods back and that where the vessel would in any event have made the backward voyage there can be no claim against cargo-owners in any circumstances for back freight because the cost of bringing the ship back would have been incurred independently of any consideration of the interests of the cargo-owners. But in *Cargo ex "Argos"* (1) no extra expense was incurred in the return of the ship to England, and what the plaintiff was held entitled to recover was not some sum for special expenditure in respect of the cargo (there was no evidence of any such expenditure), but what is described in the report (2) as " compensation in the shape of homeward freight " and judgment was given for an amount as back freight.

In the Full Court the view of the learned judges who constituted the majority that the case was expressly covered by the clauses of the bill of lading made it unnecessary for them to consider the applicability of the rule laid down in *Cargo ex "Argos"* (1). The learned trial judge was of opinion that that rule was excluded because the master acted under naval orders in leaving Batavia and therefore did not act as agent for the plaintiff or other cargo-owners. In *Athel Line Ltd.* v. *Liverpool and London War Risks Insurance*

(1) (1873) L.R. 5 P.C. 134. (2) (1873) L.R. 5 P.C. at p. 164.

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Association Ltd. (1), a vessel which started a voyage in time of war in a naval convoy turned back under naval orders and accordingly additional expenditure in fuel and stores &c. was incurred. A claim for general average was made under rule A of *The York-Antwerp Rules* 1924 as for an " extraordinary . . . expenditure . . . intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure." It was held by *Tucker* J. that this rule did not apply in a case where there was what was described as " blind and unreasoning obedience " (2) of a subordinate to the lawful orders of a superior authority. The rule envisaged " the exercise by someone of his reasoning powers and discretion applied to a particular problem with freedom of choice to decide to act in one out of two or more possible ways " (2). It was pointed out that the master of the ship simply obeyed an order, knowing nothing of the reasons for it and with no means of assessing the risk involved in continuing the voyage. The learned trial judge has applied similar reasoning in the present case. But the present case is, in my opinion, different in material respects. In the first place, no question of general average contribution arises—the claim of the shipping company for back freight is a claim for payment for services rendered and is entirely different from a claim for a general average contribution, which is based upon sharing among a number of persons the burden of a loss suffered in the common interest. In the second place, the master did not, blindly and in an unreasoning manner, or, indeed, at all, obey the order of a superior. He was directed to join a convoy. Owing to no fault on his part, he missed the convoy. He then had to take the responsibility of making a decision. He made up his own mind to " beat it for Australia."

It was argued that the master did not have in his mind the intention of acting as agent for the cargo-owners as his principals, and that therefore no claim can be made upon the basis of agency of necessity. Upon this contention I make two observations. In the first place the master gave evidence that in deciding to return to Australia without unloading the cargo he had regard to " the safety of the ship, the cargo and the crew." In the second place, though I agree that there was no evidence that he consciously and expressly decided to act as the agent of the plaintiff in returning to Australia, in my opinion this circumstance is not sufficient to exclude the application of the doctrine of agency of necessity. The master in acting as he did was acting in the interests of the ship and cargo. Doubtless he did not consciously determine to act as agent for each of the one

(1) (1944) K.B. 87.

(2) (1944) K.B., at p. 94.

hundred or more consignors. But the phrase " agent of necessity " is, in my opinion, only a convenient expression used in rationalizing to some extent the rights and obligations which are created in certain circumstances of emergency. It is a " shorthand " method of saying that such circumstances may create an authority to act in relation to the property of another person or to impose a liability upon him which would not exist in ordinary circumstances. Thus in some circumstances a wife may be an agent of necessity to pledge her husband's credit for necessaries. She may have no express authority to bind him, and the husband may even expressly repudiate her authority. But he cannot effectively do so. The authority is said to be irrevocable—see cases in *Halsbury's Laws of England*, 2nd ed. vol. 16, p. 700. In such a case there is no express or implied agreement that the wife shall be the agent of the husband. The phrases of the law of agency are used to describe, not the means of constituting the relationship which enables the wife to create a liability in the husband, but the result which follows from the marital relationship in certain circumstances of necessity. The so-called agency arises as what has been described an irrebuttable presumption of law—see *Bowstead* on *Agency*, 8th ed. (1932), art. 15, pp. 31, 32. Agency of necessity arises from action in circumstances of necessity and not from any real or presumed agreement between the person who becomes an " agent of necessity " and the person in whose interest he has acted. In the case of masters of ships, the rule is, as stated by their Lordships in *Cargo ex "Argos"* (1), that in circumstances where the cargo will be lost or destroyed unless some exceptional action is taken, there is not merely a power given but a duty is cast on the master to act for the safety of the cargo in such manner as may be best under the circumstances. If he does so act, then the shipowner is entitled to be paid a reasonable remuneration for the services rendered. This rule is part of " the law of the ocean " (a phrase used in *Burton & Co.* v. *English* (2), in relation to general average) : it is based upon necessity, and is not part of the law of contract.

The master of a ship in a distant port may be faced with all kinds of emergencies. He may have to consider, for example, whether, in order to prevent loss of perishable goods he should sell them (*Acatos* v. *Burns* (3)) or whether in order to effect necessary repairs to the ship (*Hopper* v. *Burness* (4) ; *The " Copenhagen "* (5) ; *The " Gratitudine "* (6)), or to salvage the ship (*Hingston* v. *Wendt* (7))

(1) (1873) L.R. 5 P.C. 134.
(2) (1883) 12 Q.B.D. 218, at pp. 220, 221, 223.
(3) (1878) 3 Ex. D. 282, at p. 290.
(4) (1876) 1 C.P.D. 137.
(5) (1799) 1 C. Rob. 289 [165 E.R. 180].
(6) (1801) 3 C. Rob. 240 [165 E.R. 450].
(7) (1876) 1 Q.B.D. 367.

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he should sell or hypothecate the cargo. In such a case, if possible, he should communicate with the owners of the cargo. But it may be absolutely necessary for him to act at once without waiting for instructions. Further, where the ship is a general ship, as is most frequently the case today, the instructions of the owners of cargo may differ, and some owners may give no instructions. It has not yet been decided that the master becomes legally paralysed in such a case, or that he can act to meet the emergency only on the footing that the shipowner will be liable in damages for breach of contract or for conversion of the cargo. In my opinion the real rule is that in circumstances of demonstrated emergency the master of a ship is entitled and, indeed, bound to adopt a reasonable and prudent course for the purpose of securing the safety of ship and cargo. One element to be considered in determining whether he has adopted a prudent and reasonable course is whether it was practicable to communicate with owners of the cargo in order to obtain their views. But the responsibility for action must rest upon the master. This must be the rule, because he may receive varying instructions, which cannot all possibly be carried out. If, in such an emergency, he acts prudently and reasonably in bringing the cargo to a port in the country whence it was despatched, then *Cargo ex "Argos"* (1) shows that the shipowner is entitled to claim remuneration for the services so rendered to the owner of the cargo.

I summarize my opinion in the following terms:—When an emergency threatening the loss or destruction of cargo occurs, and no term of the contract is applicable to the circumstances, there are three possible views of the position of the master of the ship—(1) The master has no right (and *a fortiori* no duty) to do anything with respect to the cargo unless it is required or at least authorized by some provision, express or implied, to be found in the terms of the contract between the shipowner and the cargo-owner, or is justifiable under authority subsequently given (e.g. in reply to a communication from the master to a cargo-owner asking for instructions): (2) the master is entitled, but not bound, to take any reasonable and prudent, though uncovenanted, action in order to preserve the cargo: (3) the master is under a duty to act in the interest of the cargo-owner and therefore to take active steps to preserve the cargo. If he does not so act, the shipowner will be liable in damages.

(1) The first proposition cannot be supported. It is inconsistent with many cases in which it has been held that the master is subject to a duty to preserve the cargo and, in case of necessity, to do things for which the contract makes no provision: See the cases cited in

(1) (1873) L.R. 5 P.C. 134.

Halsbury's Laws of England, 2nd ed. vol. 30, pp. 479 et seq., and, in particular, *Notara* v. *Henderson* (1).

(2) The second proposition denies the existence of any duty on the part of the master to the cargo-owner except such as the contract creates by its terms as a matter of agreement between the parties. Upon this view the cargo-owner would have no cause of complaint if the master without any breach of any of the terms of the contract did nothing to preserve the cargo in circumstances of emergency. This proposition is also inconsistent with the cases to which reference has just been made.

(3) If propositions Nos. 1 and 2 are rejected (as in my opinion they should be) then proposition No. 3 must be accepted. Upon this view there is a duty arising from necessity and created by law, not by agreement of the parties, to act reasonably and prudently in the interests of the cargo-owner in an emergency which threatens the loss or destruction of the cargo, even though the contract makes no provision dealing with such a case. If, in the present case, the application of the law of general average is excluded for the reason stated (namely that the bringing back of the goods of a particular cargo-owner cannot be described as involving extraordinary expenditure or sacrifice of a particular interest made in the common interest) then the result is that, either the shipowner is bound to bring the goods back for nothing, or the cargo-owner must pay for the services rendered. *Cargo ex "Argos"* (2) adopts the latter alternative in deciding that the cargo-owner must pay the shipowner a remuneration for services so rendered in order to preserve his goods.

It was suggested in argument that the master ought to have taken the ship to Colombo or Durban or some other port in the Indian Ocean. It is sufficient to say that no evidence whatever was adduced to show that this course would or could have been adopted by any reasonable and responsible master of a ship at Batavia at a time when the Japanese forces had captured Singapore and the whole of Malaya, were in Sumatra, and were landing or about to land in Java.

In my opinion the defendant shipping company has shown that it was entitled to claim back freight for bringing the goods back to an Australian port. The nearest practicable port was Fremantle, and it is not suggested that the charge made for carriage to Fremantle was excessive. In my opinion, therefore, the appeal should be allowed, the judgment of the Supreme Court set aside and the action dismissed.

(1) (1872) L.R. 7 Q.B. 225.

(2) (1873) L.R. 5 P.C. 134.

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RICH J. The question which has been argued in the present appeal is whether a shipping company is entitled to receive from a consignor moneys which it claims in the name of "back freight." This was the basis of the claim as presented to the learned judge of first instance. In giving judgment for the consignor, his Honour threw out the suggestion that, although the shipping company was not, in his opinion, entitled to the freight claimed, it might be entitled to something in respect of a general average contribution. Before the Supreme Court, the question of general average appears to have been raised and to some extent argued on behalf of the shipowner; but in this Court it has been conceded that nothing done by the master can be regarded as an extraordinary sacrifice made by him in the common interest of ship and cargo, and that, therefore, if the shipowner is entitled to anything, it is to freight.

The ship was a general ship carrying goods for about one hundred consignors from Sydney to Singapore under bills of lading, entered into after the declaration of war with Japan, and providing for payment of freight in advance. Whilst proceeding in convoy to Singapore, she was directed by the Commodore to go to Batavia instead, and she arrived there on 8th February 1942. She was prevented, by circumstances over which she had no control, from discharging her cargo there, as she would have been entitled to do under the special provisions of the bill of lading. After the fall of Singapore on 15th February, the master decided to abandon the voyage and return to Australia, in the interests of "the safety of the ship, the cargo and the crew." On the same day he received instructions from the naval authorities to return in convoy to Fremantle. Being delayed through watering, he was unable to pick up a convoy; but succeeded in reaching Fremantle *solus*. It is in respect of this voyage from Batavia to Fremantle that the shipowner claims to be entitled to receive additional freight from the consignor. The claim was unsuccessful in the Supreme Court, and it is against the decision of that Court that the present appeal has been brought.

In a previous action in the Supreme Court by another consignor involving the same question, the shipowner had been unsuccessful (*Barker* v. *Burns Philp & Co. Ltd.* (1)); but the relevant facts were, in that case, so imperfectly presented to the Supreme Court, that nothing decided in it throws any light upon the questions involved in the present appeal. These are two, (1) is the point concluded by the express terms of the bill of lading? (2) If not, what is the result of the application of general maritime law to the facts now in evidence?

(1) (1944) 45 S.R. (N.S.W.) 1; 61 W.N. 271.

As regards the first of these questions, there is nothing in the bill of lading to entitle the shipping company to the additional freight which it claims, and, in view of the conclusion at which I have arrived upon the second question, it is unnecessary for me to consider whether there is anything in it which precludes the company from making good its claim.

The authority chiefly relied upon for the appellant shipowner is *Cargo ex "Argos"* (1), and it has been in effect contended that that case decides that if, for any reason other than his own fault, a master is prevented from discharging goods at their stipulated port of destination, he may return them to the port from which they were consigned, and the consignor thereupon becomes liable to pay additional freight, called "back freight," for the return voyage: at any rate, this is so, it is said, unless the goods are not worth the additional freight. In my opinion, there is no such general rule, and the *"Argos" Case* (1) does not so decide. It is an authority —a very high authority— upon its particular facts; but, if I may be pardoned for repeating the now trite observation of Lord *Halsbury* in *Quinn* v. *Leathem* (2), the judgment, like every other judgment, "must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

In the *"Argos" Case* (1) the relevant facts were as follow. A French firm in France ordered from a merchant in England two hundred barrels of petroleum to be delivered f.o.b. in London and sent to Havre. The English merchant delivered the goods to the ship *Argos*, a general ship, for delivery at Havre, and obtained a bill of lading in his own name. It would appear that he indorsed it to the French firm and sent it to them; and he also informed their agent at Havre, telling him that "the freight and other expenses are to be charged on the goods." The French authorities at Havre refused to allow the ship to discharge the petroleum there, whereupon, apparently at the suggestion of the Havre agent of the French buyers, the ship went first to Honfleur and then to Trouville in a vain attempt to have it discharged at one or the other. The ship returned to Havre, discharged the petroleum into a lighter in the outer harbour, where it remained for four days, entered the inner harbour, discharged the rest of her cargo, took in fresh cargo, and then reshipped the petroleum under orders of the port authorities and took it back to London. At none of the French ports was the

(1) (1873) L.R. 5 P.C. 134. (2) (1901) A.C. 495, at p. 506.

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bill of lading presented to the *Argos*. In these circumstances, the shipowner claimed from the English merchant, *inter alia*, £24 4s. 5d. for return freight from Havre to London. The shipowner had had no dealings with anyone except the English merchant; and, as between him and the merchant, it was the latter's responsibility that Havre had been chosen as the port of delivery, and it was for him to see that the goods could be, and were, unloaded there. There was nothing to prevent the unloading there of ordinary goods; but the port authorities refused to allow the discharge of goods of the class to which the English merchant's belonged. At no time was the ship in danger. The master's problem was, what to do with the goods. They were worth very much more than the cost of taking them back to the merchant. In these circumstances, it was his right and his duty to preserve them for the merchant; and taking them back to the port from which they were consigned was a reasonable way of doing so.

It was held by their Lordships:—

(1) that according to the terms of the bill of lading the duty of the ship was to deliver the petroleum at the port of Havre, not to unload it there, and of the English merchant to take out the goods there;

(2) that by delivering it to the outer harbour, and letting it lie on a lighter there for four days, the ship had, in the circumstances, sufficiently performed its part of the contract;

(3) that the English merchant had made default in not causing it to be received there;

(4) that, notwithstanding the ship's fulfilment of the contract of carriage and the merchant's default, the petroleum remained in the possession of the master of the ship, that it was within his implied agency to preserve it for the English merchant, and that the best and cheapest way of doing so was to bring it back to him in the ship;

(5) that the shipowner was therefore entitled to compensation for bringing the petroleum back to England in an amount equal to the outward freight;

(6) but that he was not entitled to recover anything in respect of the ship's attempts to enter Honfleur and Trouville, because, although "these efforts may have been made by him in the interest of the cargo as well as the ship," they "must be treated as expenses of the voyage and not as incurred for the benefit of the defendant" (the English merchant).

In my opinion, the appellant in the present case gets no assistance from the "*Argos*" *Case* (1) which lays down no general principle

(1) (1873) L.R. 5 P.C. 134.

establishing or regulating rights to " back freight," but is a decision upon particular facts. Indeed, so far as it is relevant, it is destructive of its case. Upon the facts in evidence, the respondent consignor was in no respect in default ; the ship's voyage from Batavia back to Fremantle was not undertaken for the purpose of preserving cargo which, through default of the consignor, or inherent vice, or for some other reason special to the cargo, was in jeopardy, but was a precipitate flight from enemy capture of a ship which is not shown to have had any alternative to keeping the cargo on board.

In my opinion, in this state of facts, the shipowner is not entitled to any additional remuneration in the name of freight, or in any other character, for having brought the cargo as well as the ship back to Fremantle ; and hence the claim to " back freight," which is the only claim which is now being preferred, fails.

The appeal should be dismissed with costs.

STARKE J. This is an appeal from a judgment of the Supreme Court of New South Wales *in banc* dismissing an appeal from the judgment of a judge sitting without a jury in a commercial cause whereby it was directed that a verdict be entered for the respondent for £795 3s. 7d. and judgment accordingly. This sum represents what has been called " back freight " paid by the respondent to the appellant under protest in respect of flour shipped by the respondent on the appellant's ss. *Mangola* for Eastern ports which was not delivered but brought back to Australia from Batavia. The respondent shipped at Sydney flour to Eastern ports Singapore and Penang and for Kuala Lumpur on the appellant's ss. *Mangola*. She was a general ship and carried a miscellaneous cargo for more than one hundred consignors.

Bills of lading were issued by the appellant in respect of the goods shipped by the respondent subject to the exceptions, terms and provisions contained in the bills of lading. Freight was payable in advance at the port of loading in cash without deduction vessel or cargo lost or not lost and was in fact paid in advance. The bills of lading contained many exceptions, terms and provisions but those having a bearing upon this appeal may be summarized. Authority was given in the event of the imminence or existence of war between any nation or control by any Government or other authority of the use or movement of the ship, for the appellant its agent or master if it or he considered that the vessel or cargo would be subject to loss, damage, detention or delay in consequence of said war, control or direction to alter the route of the voyage, delay or detain the vessel or discharge the cargo at any port or ports without being

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liable for any loss or damage whatsoever sustained by the owner of the goods.

And in addition the ship was at liberty to comply with any orders or directions as to departure, arrival, route, voyage, ports of call, delay, detention, discharge or otherwise howsoever given by any Government or any person acting or purporting to act with the authority of any Government. Discharge under the liberty mentioned constituted delivery under the bills of lading and the owners of the goods were to bear and pay all charges and expenses resulting from such discharge and full freight, if not prepaid, should be immediately payable and if freight prepaid the appellant should be entitled to retain the same.

Authority was also given when and so long as a state of war existed between any power for the appellant, its agents or master, at any time to land and store the goods at the port of shipment or any other port or place at the risk and expense of the owners of the goods.

Likewise when and so long as a state of war existed the appellant, its agents or master might at any time before or after the commencement of the voyage abandon the voyage in whole or in part or alter or vary the proposed advertized or agreed route without liability to the shipper or any consignee.

And liberty was given to proceed by any route either before or after proceeding to the port of discharge, to proceed and stay at any port or ports backwards or forwards, to return to any port or ports once or oftener in any order backwards or forwards although in a contrary direction to or beyond the route of the port of discharge for the purpose of loading or discharging passengers coals or cargo or for any purpose whatsoever.

Liberty was also given for the ship to comply with any orders or directions as to departure, arrival, route, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the nation under whose flag the ship sailed or any person acting or purporting to act with the authority of such Government or person: under the terms of the War Risks Insurance on the ship the right to give such orders or directions and the compliance with such orders or directions shall not be deemed a deviation.

General average, it was also provided, should be adjusted according to *The York-Antwerp Rules* 1924.

The ss. *Mangola* left Sydney on 13th December 1941 with the flour specified in the bills of lading and reached Port Moresby in New Guinea. But the Torres Strait route to the East was closed owing to the war with Japan which was proclaimed as from 8th December

1941, and shipping for Eastern ports was directed to proceed south and west of Australia in convoy. The ship returned to Sydney and on 19th January 1942 left for Fremantle by the route south of Australia. She arrived there, joined a convoy and left for Singapore. But when she reached the Straits of Sunda the master received orders from the Commodore of the convoy to proceed to Batavia in Java and not to Singapore. The ship obeyed those orders, reached Batavia on 8th February 1942 and anchored in the roads according to direction of the Dutch naval authorities at the port from three to three and one-half miles from the berthing area to await orders. By this time Japanese forces had overrun Malaya and Penang and Kuala Lumpur and on 15th February 1942 occupied Singapore. Batavia was bombed by the Japanese on two occasions after the arrival there of the ss. *Mangola*.

About 19th February 1942 the Naval Control at Batavia required all ships to leave Batavia as quickly as possible. On 20th February 1942 the *Mangola* was allowed to berth for the purpose of taking in fresh water but was directed to depart the same afternoon in convoy for Fremantle. She could not water in time and the Naval Control declined to hold the convoy for her. On the afternoon of the next day, the 21st, the ship departed and proceeded to the rendezvous of the convoy for Fremantle, some four miles away. No convoy could be found but the ship nevertheless proceeded without convoy direct to Fremantle, where she arrived on 2nd March and some necessary repairs were done. The ship finally left Fremantle on 23rd March 1942 for Sydney and arrived there on 2nd April 1942.

On 5th March 1942 the appellant advised the respondent that its flour was being brought back to Australia and that to obtain delivery it would be necessary for it to present the original bills of lading and in addition to usual charges pay freight amounting to fifty per cent of original outward freight. The respondent denied the appellant's right to require any such payment but to recover possession of its flour ultimately paid to the appellant, under protest, the sum of £795 3s. 7d. already mentioned, the sum it claimed in this action.

It is observed that the " back freight " paid by the respondent was in respect of the carriage of the flour from Batavia to Fremantle.

The appellant has not claimed nor been paid anything in respect of the carriage of the flour from Fremantle to Sydney and the Court is not therefore concerned with that part of the carriage of the flour.

Some other matters may also be mentioned in order to clear the ground.

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The voyage to Port Moresby and return to Sydney appears to be justified by the terms of the bills of lading and the circumstances of the case : at all events the Court heard no argument to the contrary. It was not suggested that the flour should have been landed in Batavia under the liberties contained in the bills of lading, and indeed, it was impracticable in the circumstances to land it there and would in any case have been a most imprudent act involving, in all probability, its capture or destruction.

The respondent, however, contends that the ship should have communicated with the consignors and sought instructions. But the master did not do so and therefore it is contended that no authority to act on behalf of cargo-owners in case of necessity arose.

The trial judge was satisfied that the Naval Control authorities informed the master of the ship that he could not communicate with Sydney because of the volume of service messages and also that the master did not act unreasonably in not pursuing further his inquiry as to the possibility of communicating with Sydney. Further it must be remembered that the Japanese were fast advancing, that the *Mangola* was a general ship and there were many cargo-owners. Circumstances were changing from day to day, even from hour to hour, and immediate and urgent decisions were necessary. The contention of the respondent was therefore rightly rejected.

General average and particular average in respect of the flour can be put on one side. No such claim was made in the writ or at the trial, and such a claim was rightly, I think, disclaimed in argument.

According to *The York-Antwerp Rules* 1924, there is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure. If a ship and her powers be only used in the ordinary way in which a ship and her powers are to be used then it cannot be brought within the doctrine of general average (*The Bona* (1) ; *The York-Antwerp Rules* 1924, rules VI., VII.).

In *Taylor* v. *Curtis* (2), a ship which had been provided with guns and ammunition to resist an enemy was attacked by a privateer which was beaten off after a severe engagement. The ship sustained damage to her hull and other losses were also sustained.

A claim for a general average loss was rejected. *Gibbs* C.J. said (3) that the measure of resisting the privateer was for the general

(1) (1895) P. 125, at pp. 130, 139.
(2) (1816) 6 Taunt. 608 [128 E.R. 1172].
(3) (1816) 6 Taunt., at p. 625 [128 E.R., at p. 1178].

benefit, but it was part of the adventure. No particular part of the property was sacrificed for the protection of the rest. "The losses fell where the fortune of war cast them, and there, it seems to me, they ought to rest."

Lowndes on the *Law of General Average*, 6th ed. (1922), pp. 118-119 says the decision has been much questioned but it was cited without dissent in *The Bona* (1).

Athel Line Ltd. v. *Liverpool and London War Risks Insurance Association Ltd.* (2), to which we have been referred since the argument deals with the construction of the *York-Antwerp Rules* already mentioned but is not particularly relevant to a case in which there is no claim for a general average loss, and in which it is rightly conceded, that the loss cannot be treated as a general average loss.

Particular average is not an accurate expression, but it is damage incurred by or for one part of the concern which that part must bear alone (*The "Copenhagen"* (3)) but it does not include any expense or charge incurred in recovering or preserving the subject matter which are termed particular charges. The terms are defined for the purpose of marine insurance in the *Marine Insurance Act* 1909.

The appellant's claim cannot be regarded as a particular average loss for its freight was prepaid and not lost (cf. *Lowndes* on the *Law of General Average*, 6th ed. (1922), p. 348.)

The appellant's case may now be considered.

It is excused, no doubt, from discharging the flour at the ports named in the bills of lading owing to the war with Japan, and the overrunning of those ports by the Japanese forces. The appellant either abandoned the voyage pursuant to the terms of the bills of lading or its obligations were discharged by supervening impossibility or the frustration of the contract of carriage.

It does not appear to me material whether the voyage was abandoned by the direction of the naval authorities at Batavia or was the willing act of the master. It was in fact abandoned with the concurrence of the master because the voyage was no longer practicable or possible owing to the advancing Japanese forces.

But the freight paid in advance was at the risk of the consignors and is not recoverable although the voyage was abandoned or the performance of the contract of carriage was frustrated (*Byrne* v. *Schiller* (4); *St. Enoch Shipping Co. Ltd.* v. *Phosphate Mining Co.* (5)). Nevertheless a duty was cast on the master of the ship to act for the safety of the cargo in such manner as might be best under the circumstances in which it was placed (*Cargo ex "Argos"* (6)).

(1) (1895) P., at p. 131.
(2) (1944) K.B. 87.
(3) (1799) 1 C. Rob. 289 [165 E.R. 180].
(4) (1871) L.R. 6 Ex. 319.
(5) (1916) 2 K.B. 624.
(6) (1873) L.R. 5 P.C., at p. 165.

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It would have been wrong for the master to throw it overboard and he could not sell or land it owing to the action of the Naval Control at Batavia and the rapid advance of the Japanese forces.

All that remained for the master was to leave Batavia hurriedly for some safe port in order to avoid the destruction or capture of the ship and cargo. The master accordingly sailed for Fremantle. It was a wise and prudent course and the most convenient for all concerned. In addition it was in accordance with naval directions.

The appellant insists that, acting in this manner for the benefit of all concerned, it had a correlative right to charge the consignors, and the respondent in particular, the "back freight" which it claimed and was paid under protest. The argument is thus expressed in *Maclachlan's Law of Merchant Shipping*, 5th ed. (1911), p. 494: "It may be that circumstances may impose a duty on the master with regard to the cargo after and beyond the natural termination of the voyage. For if he is not allowed to land the cargo at the place of destination, or, if having landed it there, he is obliged by the authorities there to reship it, he cannot throw it into the sea; he is obliged to do the best for it with a view to the freighter's interest, even to the bringing of it back to the port of loading; but the law will in such circumstances take care that he is rewarded for this additional trouble." And see also *Scrutton* on *Charterparties and Bills of Lading*, 13th ed. (1931), art. 138: *Cargo ex "Argos"* (1).

But this right, "back freight" as it is called, depends in maritime law upon the circumstances of the case. In *Cargo ex "Argos"* (1) the goods were carried to the destined port and the ship was ready to deliver them if the merchant (defendant) had been ready to perform his part of the contract by taking them from the ship. But he did not do so nor give any other destination for the goods (2). In the circumstances of that case the best and cheapest way of making the goods available to the merchant (the defendant) was bringing the goods back to England. And in these circumstances the Judicial Committee were of opinion that the carrier was entitled to compensation. But that is not this case.

Again where a shipowner is prevented by damage to ship or cargo from reaching the port of destination then the master must act for the best, if he cannot consult the cargo-owner, and deal with the cargo in the owner's interest at the owner's expense (cf. *Notara* v. *Henderson* (3)).

Thus the shipowner or the master of the ship might in these circumstances legitimately sell the goods or land and warehouse or tranship them.

(1) (1873) L.R. 5 P.C. 134.
(2) (1873) L.R. 5 P.C., at pp. 159, 161.
(3) (1872) L.R. 7 Q.B. 225.

But that is not this case. The ship in this case went into Batavia under naval orders for safety and departed also under naval orders to avoid destruction or capture of the ship and cargo. Had the ship been attacked at sea and to escape returned to Australia with her cargo the extra costs thus incurred must have fallen " where the fortune of war cast them " for such costs could not be made good as a general average loss. And there is no express provision in the bills of lading which entitles the appellant to " back freight " in these circumstances or to any compensation for bringing the goods back to Australia.

The voyage from Batavia to Fremantle was as much for the benefit of the ship as the cargo. It was the duty of the master to protect his cargo as well as his ship from destruction and capture and to use his ship in the only way that could protect both ship and cargo in the circumstances of this case, namely in seeking safety.

That duty so far as the cargo was concerned arose from the relationship of the ship and her owners and the consignors created by the contract of carriage.

The return to Fremantle was as I have said a wise and prudent course and the course most convenient for all concerned.

And if an average loss cannot be established then the shipowner cannot claim " back freight " or any other compensation for bringing his ship and cargo safely back to port in pursuance of his duty and especially the duty cast upon the shipowner and master to act for the safety of the ship and cargo.

The loss or expense in so doing was not incurred specially on account of the cargo. It was a risk of the shipowner's just as the prepaid freight was a risk of the consignors.

Accordingly this appeal should be dismissed.

DIXON J. The question for decision is whether the owner of a ship, at the time unrequisitioned, is entitled to " back freight " in respect of the carriage of cargo from Batavia, whence the ship sailed on 21st February 1942, to Fremantle, where she arrived on 2nd March. The ship turned back from Batavia, which she had reached on 8th February in the prosecution of a voyage to Singapore. She was a general cargo ship carrying cargo consigned from Sydney to Singapore for delivery there or transhipment to Malayan ports. Originally she had attempted to reach Singapore east about but the Naval authorities had sent her back from Port Moresby. She sailed a second time from Sydney with her cargo for Singapore, on this occasion going west about. At Fremantle she joined a convoy. When the ship reached the Straits of Sunda she received instructions,

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through the Commodore of the convoy, to proceed to Batavia instead of to Singapore. At Batavia, under naval directions, she anchored out in the roads. Singapore was occupied by the Japanese on 15th February, Batavia, which was bombed twice before the ship left, was actually entered by the Japanese within a few days and the battle of the Java Sea was fought on 27th February 1942. There had been some intention of discharging the ship at Batavia but no shore labour was available and, on 20th February, under naval instructions, she was berthed to take fresh water and then she was ordered to stand in the stream and await the forming of a convoy for Fremantle. After waiting there some hours without any sign of a convoy, her master determined to sail unconvoyed for Fremantle, which port she safely made. Her departure from Batavia was in fact a flight from the enemy and her voyage to Fremantle a successful escape. From Fremantle she proceeded to Sydney her port of loading and she there discharged her cargo and restored it to the consignors. Her owners, however, limit the claim for back freight to the voyage back to Fremantle conceiving that, owing to their not having consulted the consignors before leaving that port, they cannot succeed as to the freight thence to Sydney.

The outward freight from Sydney to Singapore was, under the terms of the bills of lading, due and payable by the shipper at the port of loading in cash without deduction, vessel or cargo lost or not lost. It was in fact duly paid. Consequently no claim can be made by the shippers or cargo owners for the return of the freight for the contract voyage. It is freight which the shipowners are entitled to keep, notwithstanding that the voyage was not completed.

The clauses of the bill of lading, including conditions attached by slip, made ample provision to excuse the shipowner from all liability in such events as happened and to give him a lien for charges that he might incur if he stored or landed the goods. But they do not purport to deal with the question whether the consignor or cargo owner should pay or bear back freight, if, through excepted perils, the ship should return to the port of loading and there redeliver her cargo to the consignors. Indeed I am disposed to agree in the view adopted by *Davidson* J. that the material clauses of the bill of lading are concerned with the outward voyage, deviations and variations and the like due to war or to the exercise of authority by naval military or civil power and the discharge of the cargo at some intermediate or substituted port as a fulfilment of the contract of carriage.

But, in considering whether the law gives the shipowner a right to back freight in the circumstances of this case, it is not without significance that, were it not for the specific provisions I have

mentioned with reference to prepayment of freight, that is to say if there were but a simple contract to pay freight, the outward freight could neither be retained nor recovered by the shipowner nor would there be any liability upon the cargo owner for any forward freight *pro rata itineris peracti* (*Liddard* v. *Lopes* (1); *Castel & Latta* v. *Trechman* (2); *St. Enoch Shipping Co. Ltd.* v. *Phosphate Mining Co.* (3)).

The claim that the shipowner is entitled to back freight for carrying the goods to safety in Fremantle is not of course placed on contract. The claim is rested on the general maritime law, which, it is said, confers a right to a proper recompense for the services rendered to the cargo by the ship. More specifically, the foundation of the right claimed for the shipowners was said to lie in the authority by the master in such an emergency to act in the preservation of the cargo on behalf of the cargo owners, that is to say to his position as an agent of necessity. The argument is that it was really in the exercise of this authority that the master carried the goods in his ship to a place of safety; the right to be recompensed or indemnified formed a consequence.

Before dealing with this more specific basis of the claim, it may be remarked that no support can, I believe, be found in the general maritime law for the proposition that if, after the frustration by an excepted cause of the outward voyage for which the affreightment was made, the ship returns with her cargo to the port of loading, she is entitled to freight in respect of the homeward carriage. In the course of his judgment in *The Teutonia* (4), Sir *Robert Phillimore* said that the general maritime law on the somewhat different subject then before him was laid down in the well-known French ordonnance and he proceeded to quote from the ordinance of 1681 adopted by Louis XIV— a clause which in an early edition of his work Lord *Tenterden* had translated thus:—"If it happen that commerce be prohibited with the country, to which a ship is in the course of sailing (en route), and the ship be obliged to return with its lading, there shall be due only the freight outward, although the ship be hired out and home." *Abbott, Merchant Shipping* 6th ed. (1840), p. 377. Sir *Robert Phillimore* then goes on to quote from or refer to the commentaries of *Valin*, *Emérigon*, *Pothier* and *Boulay-Paty*, and to an early judgment of the Supreme Court of Pennsylvania, viz. *Morgan* v. *Insurance Co. of North America* (5). For the most part he sets

(1) (1809) 10 East. 526 [103 E.R. 875].
(2) (1884) 1 Cab. & El. 276.
(3) (1916) 2 K.B. 624.
(4) (1871) L.R. 3 Adm. & Eccl. 394, at p. 421; affirmed (1872) L.R. 4 P.C. 171.
(5) (1806) 4 Dallas 455 [1 Law. Ed. 907].

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out the material passages and it is unnecessary to repeat them. But it may be useful to add to the learned judge's references the observations made by Pardessus, "Si" le voyage commencé est rompu "par force majeure, chacun des contractants ne peut etre obligé d'exécuter un engagement qu'il ne tient pas à lui de remplir, et la nature de l'accident détermine l'application de cette régle. Ainsi lorsque le voyage est rompu par interdiction de commerce, et que le capitaine, suivant les instructions qu'il a recues, revient au lieu de son départ, le fret n'est dû que pour l'aller, quand même le navire aurait été frété tout a la fois pour l'aller et le retour. Peu importerait, dans ce cas, que le fret d'aller fût moindre ou supérieur à celui de retour : les contractants sont présumés avoir voulu courir la chance de perte ou de gain, que la rupture forcée du voyage pouvait amener, et en avoir calculé toutes les conséquences." *Cours de Droit Commercial*, (vol. 2 p. 272 6th ed. (1856)) Partie IV., Titre IV., Ch. II., s. 713. This, however, is a very general way of regarding the question. The shipowner's argument takes for its foundation a principle, the application of which must always depend upon particularity in examining the facts. The principle is a consequence of the position of the master who represents the shipowner but has charge of the goods under affreightment for the joint benefit of the shipowner and the cargo owner or shipper, and, as bailee, is under a duty to take care of the goods and preserve them not merely during the ordinary incidents of the voyage but where by reason of the exceptions of the bill of lading there is no original liability : See per *Willes* J. in *Notara* v. *Henderson* (1). The masters' so called agency of necessity is a corollary or complement of this obligation. Lord *Stowell* in *The* "*Gratitudine*" (2) said:—"Though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care." After giving illustrations from the incidents to which maritime commerce of that period was liable, jettison, ransom, sale of perishable cargo in a port of refuge, he says :—"In all these cases, the character of agent respecting the cargo is thrown upon the master, by the policy of the law, acting on the necessity of the circumstances in which he is placed." (3). A variety of cases has since illustrated the application

(1) (1872) L.R. 7 Q.B., at pp. 233, 235.
(2) (1801) 3 C. Rob. 240, at pp. 257, 258 [165 E.R. 450, at p. 456].
(3) (1801) 3 C. Rob., at p. 260 [165 E.R., at p. 457].

of these principles, but, in a matter of this kind, there is no advantage in going beyond the broad statement of doctrine of Lord *Stowell*. As the facilities of communication have increased the occasions for invoking the master's implied authority of necessity have continually diminished. For his authority cannot arise where the actual instructions of the cargo owner or owners may be obtained by some reasonably practicable means. In the present case an issue which the cargo owner fought was whether the master might not have communicated with the consignors with a view to obtaining their directions. I do not think it necessary to say more upon that issue than that, although in fact messages might have been got through from Batavia to Sydney and replies received, yet in face of all the difficulties it was not a reasonable or even a sensible course to take to attempt to obtain the instructions of a body of consignors, a hundred in number, considering what choices were open depended on a rapidly deteriorating military situation and, subject to what that situation allowed, what would be done with the cargo must necessarily depend on the naval directions received by the master.

What appears to me to be the real question in the case, is whether the principles that are invoked have any application to give a right of remuneration to the shipowner where no outlay or detriment is specifically incurred or act specifically done with reference to the particular goods in the exercise of the supposed authority arising from necessity, but the ship and the cargo are dealt with as one venture; in other words where there is no particular average loss. "The cargo owner is only bound to repay expenses which have been incurred specially for the benefit of his goods. Expenditure on behalf of the adventure generally, as for example, in putting into a port of refuge, can only be charged to him as a matter for general average contribution." *Carver* on *Carriage of Goods by Sea*, 8th ed. (1938), s. 296. To my mind the claim wears the appearance of an attempt to extend the operation of the law of general average or, if you like, to obtain a new right of recovery on principles belonging to general average in a case which those principles have never been considered to cover. It is apparent that a distinction must exist between, on the one hand, the master's authority in case of emergent necessity to saddle the cargo or cargo owner with the cost of exertions specifically made in the interest of the goods, and, on the other hand, the legal situation arising when, to escape a hazard common to ship and cargo, the master adopts measures involving an unusual or unexpected loss sacrifice or expenditure on the part of the shipowner.

Of the decided cases but two have any direct reference to the kind of claim now before us and in one of them the reference is only in

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an *obiter dictum*. A rather full examination of each of the two cases is in any event desirable, but it happens that such an examination will illustrate the distinction to which I have referred.

The *obiter dictum* is that of Sir *James Mansfield* C.J. and it occurs in *Christy* v. *Row* (1). Its true meaning and effect cannot be seen without an understanding of the facts and the issues to which they gave rise. The case arose out of the French war with Prussia of October 1806. Under freight charter to the defendants the *True Briton* sailed on 13th October 1806 for Hamburg with a cargo of coals consisting of seventeen keels, or about three hundred and sixty tons. Under the terms of the charter party her lay days for discharge were to be one working day per keel and demurrage was to be at the rate of £5 a day, the defendants were to pay freight at £20 per keel on delivery of the cargo and also two full third parts of all pilotage and port charges which might be incurred during the voyage. The coals were consigned to Ross and Schleiden, merchants at Hamburg, and the master, who sued as plaintiff, issued a bill of lading by which the coals were to be delivered there to that firm or their assigns, they paying freight for the same. Two days' demurrage had been incurred in loading and by a memorandum endorsed on the charter the defendants required Ross and Schleiden to pay this amount. The ship was off Cuxhaven at the mouth of the Elbe on 8th November, but there she was directed by officers of the Royal Navy not to proceed up the Elbe to Hamburg because French forces were approaching that city. The master notified Ross and Schleiden of his arrival and they in answer directed him to sail up as far as Gluckstadt, where they would send lighters, that place being presumably thirty miles or so down the Elbe from Hamburg. The *True Briton* arrived on 12th November at Gluckstadt and there she discharged seven keels or so of coal into lighters provided by the consignees and at a rate of discharge which would have enabled her by 21st November to deliver her whole cargo had there been sufficient lighters. On 21st November, however, the French forces entered Hamburg and the officers of the Royal Navy thereupon directed the master of the *True Briton* to go back to Cuxhaven, where he received instructions to return to England with the rest of his cargo, that is ten keels of coal.

The plaintiff's declaration averred that he remained at Cuxhaven until 25th November with the will and intent to have delivered the residue of the cargo, but that the defendant and his assigns neither sent any craft nor in any manner received the residue of the cargo. On 26th November, which was said to be only fifteen working days

(1) (1808) 1 Taunt. 300 [127 E.R. 849].

of her first arrival on 8th November at Cuxhaven, the ship sailed thence for Shields where she arrived on 1st December. On being informed of the facts, the defendants refused to receive the residue of the cargo and told the master that he could proceed in the disposal of the coals as he thought proper. He unloaded them at a wharf in Shields on 4th February 1807 and notified the defendants that he had done so. The master then sued the defendants upon the charter party for :—(1) the full forward freight on the seventeen keels of coal at £20 a keel, viz. £340 ; (2) two-third full parts of the pilot and port charges for which the plaintiff had paid £32 12s. 5d. ; (3) £355 for demurrage at £5 for seventy-one days, a period calculated, I imagine, from and inclusive of the fifteenth working day from the original arrival at Cuxhaven till the discharge of the cargo at Shields ; (4) £10 for two days demurrage before the original departure of the ship from Shields for Hamburg. At the trial a verdict was found for the plaintiff for (1) £140 for forward freight, that is freight for only seven keels of coal delivered into lighters at Gluckstadt ; (2) £20 as two-thirds of the pilotage and wharf dues, some part of the charges being said to be unreasonable ; (3) £70 compensation at £5 a day (in the nature of demurrage) for the use of the ship at Shields upon her return for fourteen days until the plaintiff could have obtained a place to receive the coals ; (4) the two days demurrage before sailing from Shields, about which no further separate question was raised. The plaintiff obtained a rule nisi to increase this verdict by £200, being the forward freight for the remaining ten keels of coal carried to Gluckstadt but not discharged. This rule was discharged. The defendants obtained a rule nisi for a nonsuit or alternatively for the deduction from the verdict of each of the several constituent amounts of which it was composed. Upon this rule the verdict was reduced by the £70 compensation awarded for the fourteen days of the delay in discharge at Shields. As to the other three constituent items the defendants' rule was discharged. It was conceded for the defendants that the exception of restraints of princes in the charter party protected the plaintiff as carrier from liability for failing to complete the chartered voyage, but it was contended that that did not enable him to recover freight without completing the voyage. The contention was met in respect only of the seven keels delivered into lighters at Gluckstadt. It was met by the fact that the delivery at Gluckstadt had been made at the direction of the consignees who had thus accepted delivery of the seven keels. As to the rest the contention prevailed. The two-thirds portion of the pilotage was held to follow because it could not be divided between the seven keels delivered and the ten brought back ; had the cargo consisted

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of seven keels only the same pilotage and port charges must have been paid. In the course of arguing for the full freight on the outward voyage the plaintiff's counsel, for some reason that is not apparent, urged as an alternative that the plaintiff was entitled to back freight upon the ten keels brought back to Shields, though it was not the subject of any count in his declaration and formed no part of the verdict. He said :—" But if the Plaintiff is not entitled to recover the outward freight, he is nevertheless entitled to freight homewards, for having brought the goods back. If the master, having done all in his power to effect the voyage, upon the delivery being frustrated, in the exercise of his best judgment for the benefit of the owner, brings back the goods, the owner must not enjoy his option to receive or reject them, without paying the master an equivalent for his labour, wages, and expenses ; the measure of that equivalent is ascertained, by the agreement for the freight outwards. If the owner may refuse payment, there is no mutuality ; for it is clear that although the Plaintiff was prevented from delivering more of the coals, he would not therefore have been justified in immediately throwing the residue overboard ; but if he had so done, he would have been liable to an action. The value of the goods is immaterial. If the master might cast away coals, he might in the like circumstances equally cast away cochineal, or diamonds." (1) The ground upon which the defendants' counsel attacked the award by the jury of fourteen days demurrage at Shields was that the consignees and not the consignors were then the owners of the cargo and apparently he used the same ground as an answer to the alternative claim for back freight set up in argument. It appeared only inferentially or presumptively that the property in the coals had passed to Ross and Schleiden. It was as a result of these contentions that Sir *James Mansfield* made the observations by the way which have a bearing upon the question before us. He said :—" With regard to the demurrage after the ships return home, in some situations of events that point would be doubtful. 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 wise and 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

(1) (1808) 1 Taunt., at p. 308 [127 E.R., at p. 852].

would be of 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. But in this case the Plaintiff labours under a further difficulty, that we do not know how the dealings stand between the Defendant, and Ross and Schleiden. There may have been an absolute sale, and the property may no longer continue in the Defendant. Or the coals may have been consigned to be sold on commission by Ross and Schleiden as agents. But upon reading the bill of sale," (*quaere* lading) " which contains a general consignment, we must presume that the goods were absolutely sold to Ross and Schleiden, and that the property therefore is in them. If that is the case, all that has been done for the preservation of the cargo, has been done, not for Row, but for the benefit of Ross and Schleiden, and if any liability is raised by implication of law, the right of action is against them. The Plaintiff therefore is not entitled to recover this sum of £70 for demurrage " (1). Then, after speaking of another point, the learned Chief Justice said :—" I have said nothing as to the claim for freight back, nor could it be recovered in this action, as the declaration contains no demand adapted to it ; but it probably would stand upon the same ground as to the right to the demurrage claimed after the ship's return " (2).

It may perhaps appear that Sir *James Mansfield's dictum* is a clear expression of opinion in favour of the shipowner's contention in the present case, that is assuming the property in the goods shipped remained in the consignors. But it must be remembered that under the directions of the cargo owners the ship had reached the substituted port or point of discharge and there had delivered part of the cargo to the consignees ; that, although she had left that place under Naval directions, she proceeded to Cuxhaven where, according to the allegation, she was prepared to discharge the rest of her cargo had the cargo owners been ready to receive it. It was an emergency of which the latter were fully cognizant and they had up to a point co-operated in attempting to meet it. It was open to the master to dispose of the cargo by putting it ashore at Cuxhaven at their risk. The master was, therefore, in a position of making a definite decision as to the manner of disposing of the cargo and the question arose from the necessity of his moving down the river from the directed point of discharge to another possible point of discharge. His ship was in no immediate peril and he was not obliged to pursue a course in which the safety of the cargo and the ship was one. It would seem, however, that the naval instructions when he received them

(1) (1808) 1 Taunt., at p. 315 [127 E.R., at p. 855].

(2) (1808) 1 Taunt., at p. 316 [127 E.R., at p. 855].

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were to take back his cargo as well as his ship. This raises another point about the decision. For in reference to general average *Tucker* J. has held that mere obedience to naval orders is not an exercise of the master's authority so as to amount to a general average act: *Athel Line Ltd.* v. *Liverpool and London War Risks Insurance Association Ltd.* (1), cf. *Lowndes* on the *Law of General Average*, 5th ed. (1912), Ch. 2 s. 6a, p. 48; *Carver* on *Carriage of Goods by Sea*, 8th ed. (1938), s. 374a. It is perhaps proper to add also that the view that it is not the party to the contract of carriage but the cargo owner for the time being who is liable to reimburse the shipowner for expenses incurred for the benefit of the goods has been criticized as at variance with the contractual basis of the shipper's right: *Carver* on *Carriage of Goods by Sea*, 8th ed. (1938), s. 296, citing by way of comparison *Scaife* v. *Tobin* (2).

The second of the two cases is *Cargo ex "Argos"* (3). The cause was a suit in admiralty in rem against one hundred and forty seven barrels of petroleum which had been landed in London from the ss. *Argos* after her arrival on 19th December 1870 back from a voyage to Le Havre made in the later phase of the Franco-Prussian War. The ship had carried the barrels to Le Havre and back. They had been shipped by a British merchant, who after the goods had been seized in the suit put in bail, obtained their release and entered an appearance, thus becoming the defendant. The claim included outward freight, back freight and certain lighterage and other expenses incurred at Le Havre in an effort to land the goods or deliver them and certain expenses incurred, it was said, for a like end at Honfleur and Trouville, ports which are close to Le Havre on the other side of the Baie de la Seine. In the bill of lading which was made out in a name used by the defendant the barrels of petroleum had been consigned to the shippers order or to their assigns. The defendant had actually shipped the petroleum in part fulfilment of an order given by a merchant at Rouen, which the Germans had not then occupied, for two hundred barrels to be delivered f.o.b. consigned to Le Havre as soon as possible. Before the ship sailed for Le Havre the defendant obtained from the plaintiff the name of the ship's agent at that port and wrote to him giving him instructions that the goods were to be sent to the merchant at Rouen who must present the endorsed bill of lading and that the freight and other expenses were to be charged to the goods. The ship arrived at Le Havre on 9th December 1870. In the meantime, on 6th December, the Germans had entered Rouen and the ship's agent had not received any

(1) (1944) K.B. 87.
(2) (1832) 3 B & Ad. 522 [110 E.R. 189].
(3) (1873) L.R. 5 P.C. 134.

directions or communication from the purchaser of the goods. The French were importing war material through the harbour of Le Havre and the landing of such inflammable cargo as petroleum had been forbidden and even the presence at the quay of a ship containing petroleum was not permitted. There was reason to believe, however, that the petroleum might be put ashore at Honfleur or Trouville, where it might be possible to place the barrels in the custody of a judicial sequestration for delivery in exchange for the endorsed bill of lading and freight. The *Argos* had other cargo for Le Havre, but she could not discharge it there without first ridding herself of the petroleum. At the instance of the agent she, therefore, went over first to Honfleur and then to Trouville in the hope of doing so, but without success. At length on 12th December 1870 the agent, on behalf of the ship, hired a lighter into which the petroleum was transhipped in the outer harbour to be held while the *Argos* entered the dock, discharged her outward cargo and shipped a fresh cargo for London. The port authorities required her to reship the petroleum from the lighter before sailing for London and this she did. On her arrival in London, her agents there notified the merchants who had shipped the one hundred and forty seven barrels of petroleum to Le Havre and, after some correspondence with them, the ship landed the goods and the shipowner proceeded against them in rem as already stated. Apart from statute, admiralty jurisdiction does not cover claims arising from charter parties, bills of lading or other agreements for the sea carriage of goods or the use of ships and *The Admiralty Court Act* 1861 (Imp.), s. 6 extended the jurisdiction in the case of such claims only to the case of claims for loss or damage made by cargo owners, consignees or assignees of goods carried into the jurisdiction by ships whose owners were not domiciled within the jurisdiction: Cf. *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1) and *Rosenfeld Hillas & Co. Pty. Ltd.* v. *The Fort Laramie* (2). But the plaintiff proceeded in the City of London Court and availed himself of the admiralty jurisdiction conferred upon the County Courts, which, by s. 2 of 32 & 33 Vict. c. 51, includes authority to try and determine a cause as to any claim arising out of any agreement made in relation to the carriage of goods in any ship, subject to certain limitations depending on the amount of the claim. This was held to extend the jurisdiction in admiralty (3). The merits of the cause then came before Sir *Robert Phillimore* on appeal from the City of London Court. That learned judge decided that the plaintiff

(1) (1924) 34 C.L.R. 420.
(2) (1922) 31 C.L.R. 56; (1923) 32 C.L.R. 25.
(3) (1873) L.R. 5 P.C., at pp. 145-155.

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was entitled to outward freight because the ship had performed her contract of carriage, at all events when the goods were placed in the lighter ; that he was entitled to the return freight because the master was compelled to receive the barrels of petroleum on board again and was bound as agent of necessity to do the best he could for their safety, which was to bring them back to London, or alternatively, if he was not so bound, he could claim a lien on goods he had voluntarily preserved for the expenses of their preservation ; and that the hire of the lighter and the other expenses at Le Havre and the expenses at Honfleur and Trouville were also recoverable. From this decision the defendants appealed to the Privy Council. The judgment of their Lordships was delivered by Sir *Montague Smith*. As to the outward freight, it was held that it was recoverable because in the circumstances prevailing at Le Havre readiness on the part of the carrier to deliver the petroleum in the outer harbour was enough, it being part of the harbour of Le Havre, and because, inasmuch as the master had been ready and able to give delivery in the harbour and had kept the goods there a reasonable time for the purpose, the freight had been earned. It will be noticed that this ground implies that the continuance of the goods in the master's possession was the consequence of the default of the consignee in taking delivery or, at all events, of his failure to take it (1). As to the charges for hiring the lighter and transhipping the goods thereto and therefrom, these also were held to be recoverable on the ground that they were reasonable operations for the disposal of the goods and the avoidance of demurrage. But the Board considered that the plaintiff was not entitled to the demurrage claimed or the other expenses incurred at Le Havre and the expenses incurred by the master in attempting to enter the ports of Honfleur and Trouville. The reasons given for so holding must be noticed because, when contrasted with the reasoning adopted with reference to the return freight, they illustrate the distinction upon which I think our decision in the present case should turn, namely the difference between expenditure on behalf of the venture generally and that specifically incurred for the benefit of the goods. The reasons were expressed thus :—" These efforts " (i.e. those represented by the delay for which demurrage was claimed and by the expenses in question) " 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

(1) (1873) L.R. 5 P.C., at pp. 161, 163.

obtained to discharge there, must be treated as expenses of the voyage, and not as incurred for the benefit of the Defendant " (1).

The plaintiff was held to be entitled to " compensation in the shape of homeward freight for bringing the petroleum back to England " (2). The ground for so deciding involved more than one step. First, it was held " 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." (3). In so holding, the Board confirmed the view suggested by Sir *James Mansfield* C.J., whose observations were quoted with evident approval. Secondly, it was held that as a correlative right the master is entitled to charge the cargo owner with the expenses properly incurred in so acting (3). Thirdly, the duty to care for the goods subsists though a reasonable time for the consignee to take delivery has expired. Fourthly, as a result the master had authority, in the absence of advices, to carry or to send the goods, which could neither be landed or left where they were (in a lighter), to such other place as in his judgment prudently exercised appeared to be most convenient to the owner (3). Fifthly, to bring them back in the same ship was less costly than to send them in another and was the best and cheapest way of making them available to the owner (3). As to this, it will be noticed that it is assumed that the defendant remained the owner, though there was much in the facts to suggest that the merchant at Rouen had purchased the goods and obtained the indorsed bill of lading. Sixthly, the master could not in fact have obtained instructions from the defendant or his assignees. " The authority of the master being founded on necessity would not have arisen, if he could have obtained instructions from " (4) them. Seventhly, the value of the goods in England was greater than the expenses involved in returning them. On this point the following observations have been made in an American case relating to the river trade and laying down the duty of the master when the consignee will not receive delivery of the goods and indicating the circumstances in which he can recover freight both ways. " The principle upon which the carrier's duty is based, in the event of a refusal of the consignee to receive the goods, is simply to regard himself as an agent for the owners, and as such, invested with authority to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to himself for his freight and charges. . . . It

(1) (1873) L.R. 5 P.C., at p. 166.
(2) (1873) L.R. 5 P.C., at p. 164.
(3) (1873) L.R. 5 P.C., at p. 165.
(4) (1873) L.R. 5 P.C., at pp. 165-166.

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is quite manifest that if the master lands the goods at the nearest or most convenient port above or below the point of consignment where warehouses and responsible agents may be found, and apprises the owners of what has been done, he had discharged his duty, and will not be held responsible for losses, if any should happen. This would undoubtedly be the law where the cost of transportation entered very largely into the value of the goods at the place of their destination, and where, as a matter of course, the property would be more valuable to the owner at that place than at the place from which they were shipped. If the goods consisted of a package of jewels, or of a box of costly articles, whose value was great in proportion to the cost of transportation, it might reasonably be inferred that the refusal of the particular consignee to whom they were forwarded to receive them would justify, and perhaps require, the carrier to return them to the consignor. Such course would be justified on the same principle which would authorize the carrier to leave goods of another description in a warehouse at the port of destination, or the port nearest thereto where warehouses could be found. In both cases it is consulting the apparent interest of the owners, and at the same time securing the claim of the carrier for his freight." *Steamboat Keystone* v. *Moies* (1).

The foregoing steps all show that their Lordships were not dealing with measures taken in the interests of the entire adventure, but were contemplating the duties of the master representing the shipowner and his consequential rights in relation to goods forming part of the cargo, considered independently, when a situation arises calling for the exercise of some authority to act in relation to them specially and specifically.

The *Argos* herself was not in jeopardy. Apart from the neutral character of the ship, as a matter of history the French fleet protected the sea routes and the advance of the French land forces upon Amiens drew off the Prussian army threatening Le Havre. The whole problem was what a general ship was to do with goods considered dangerous by the port authorities. Except that the presence in the port of materials of war formed the reason why the authorities forbad the landing of the goods, in no way was the problem one of war or of danger to ship or goods from any other source. It was nothing but a question of how to dispose of goods which would not be received ashore. The situation would have been the same had the prohibition been a measure of quarantine or an economic measure. Further, the contract voyage had been executed and the duty of the carrier performed. The master's agency of necessity

(1) (1859) 28 Missouri 243; 75 Am. Dec. 123, at pp. 124, 125.

arose from the compulsory continuance of his possession and control of the goods after the close of the adventure. The question at issue would hardly have been different if the shipowner had found it possible to store the goods at Trouville upon premises of his own and had claimed storage. *Cargo ex "Argos"* (1) is, in other words, a decision settling the principles which apply to expenses specificially incurred or services specifically rendered in relation to goods in the course of fulfilling the duty of care for them that arises from control and possession when the control and possession have been acquired under a contract of affreightment. It is a circumstance of more than mere interest that the "back freight" was awarded in a jurisdiction confined, in such a matter, to claims arising out of agreements made in relation to the carriage of goods in any ship. For it would appear to imply that the agency of necessity is the product of the contract of carriage, at all events in the sense that it arises out of the relationship thereby established. But, however this may be, both *Christy* v. *Row* (2) and *Cargo ex "Argos"* (1) are, in my opinion, authorities only upon the rights arising from a course pursued by the master as agent for the owners of the cargo and not on behalf of all concerned. This is true also of passages in text books referring to back freight, such, for instance, as that contained in art. 138 of *Scrutton* on *Charter Parties and Bills of Lading* 13th ed. (1931); cf. *Halsbury's Laws of England*, 2nd ed., vol. 30, p. 488 and p. 549.

The distinction between the two situations may not always be easy to apply and that is a reason why it appears to me, as I have already said, that the contention advanced here for the shipowner must depend for its application upon particularity in examining the facts. The distinction corresponds, however, to the distinction between particular and general averages. In the present instance, there is no difficulty in applying it. For once the idea of discharging the cargo at Batavia was given up, nothing remained but to act for all concerned so that the ship should not fall into the hands of the enemy or be bombed. What course to take was up to a point to be decided by Naval Control. The point up to which the decision rested with Naval Control turned out to be the rendezvous of the convoy for the forming of which the master did not wait. But in a choice between returning to Fremantle or attempting to make Colombo, for example, or a port on the East African coast, Naval Control and not the master would have made the decision so long as Naval Control was in communication with the master. But by

(1) (1873) L.R. 5 P.C. 134.

(2) (1808) 1 Taunt. 300 [127 E.R. 849].

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whomsoever the decision might be given it must in the circumstances have been directed to the ship and cargo as an entity, to "the adventure," adventure not in the sense, of course, of the contract voyage, but in the sense of the interests afloat in the ship considered as a unit under the master's command.

In such a case the question whether something voluntarily done in an emergency at the expense of one of those interests for the benefit of all is to be the subject of any and what recompense reimbursement or contribution is a matter to be determined by the law of general average. Were it otherwise, an unjust result might well ensue. Take some of the circumstances of the case before us as an example. The first attempt to reach Singapore east about and failure to claim back freight beyond Fremantle give the result of the shipowner's contention a less remunerative aspect than it would otherwise bear. But if these elements were out of the case, the claim would be seen as one which might well turn what began as a flight to ensure the safety of the ship from the advancing enemy into a very profitable commercial operation. For, if the shipowner recovered back freight from Batavia to Sydney at prevailing rates upon the whole cargo, it would be surprising if it were not a most profitable transaction for the ship. In other words, the ship would not only be brought to safety at the expense of the cargo owners, but would be rewarded with a profit. Moreover, this would be so although for anything that appears it may have been an actual advantage to her to be loaded as she was and she could not have afforded to put her cargo over the side lest she should lose her trim and speed.

The considerations which I have set out appear to me to point to the conclusion that this is not a case in which the master by exertions on behalf of the cargo earned back freight for his ship, but is a case in which the master adopted a course for the security of the ship and cargo considered as one adventure. This means that the ship is not entitled to a contribution unless under the law and practice of general average. But, as counsel for both parties united in telling us, the voyage from Batavia to Fremantle did not, under that law or practice, give the shipowners any right to a general average contribution from cargo. The reason is that it involved no voluntary sacrifice or extraordinary expenditure. There was no general average sacrifice ; no intentionally abnormal use of the ship. (Cf. *Halsbury's Laws of England*, 2nd ed., vol. 30, s. 754, p. 597). The voyage was undertaken in the midst of war and in contemplation of the conditions of a naval war. Because of danger from an excepted peril which had rendered her voyage impossible, she abandoned it

and returned to her port of loading. That is not regarded as a general average act. However, the question does not arise; for no claim for a general average contribution was made by the shipowners.

For the reasons I have stated above, I think that the shipowners were not entitled to "back freight" and that the appeal should be dismissed with costs.

McTIERNAN J. I agree with the reasons for judgment of my brother *Dixon*. The appeal should be dismissed.

McTiernan J.

Appeal dismissed with costs.

Solicitors for the appellant, *Ebsworth & Ebsworth.*
Solicitors for the respondent, *Stephen, Jaques & Stephen.*

J. B.