ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

THE BOMBAY AND AFRICA STEAM NAVIGATION CO., LTD., (APPELLANTS AND DEFENDANTS) *v.* HAJI AZUM GULAM HUSSEIN (RESPONDENTS AND PLAINTIFFS).*

1916. *January* 24.

Charter-party–Bills of lading–Where charter-party and bills of lading conflict the prevailing contract is the charter-party—Stevedores though named by the charterers are the agents of shipowners and not of the charterers—Dunnage, improper and insufficient–Shipowners' ordinary liability for bad stowage and insufficient dunnage—Shipowners' specific liability for shortage and sweepings under the charter-party.

The plaintiffs chartered the defendant Company's Steamer 'Abydos' for the carriage of cargo of rice in bags from Akyab, a seaport in Burma, to Bombay. The plaintiffs under the charter-party were empowered to sublet the whole or part of the cargo, and they sublet about one-fourth of the cargo space to other shippers. The charter-party expressly provided *inter alia*, that "nothing herein contained shall exempt the shipowners from liability, to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage," that "the charterer's stevedores at loading port to be employed at market rate but not exceeding owner's contract rate," that "all mats and requisite dunnage to be provided by the steamer," that "all sweepings to be delivered to the charterers at port of discharge" and that, "the steamer to be responsible for any proved shortage." The bills of lading contained a special exception that the ship was "not responsible for loss or damage caused by insufficient packing, torn, mended, or chafed, weak or fragile bags and bagging wrappers not for usual and reasonable wear and tear of packages." During the voyage the ship experienced heavy weather for at least two days and throughout encountered average monsoon weather with south-westerly squall. On the cargo being unloaded at Bombay, it was found that 710 bags of the plaintiffs were damaged, that there was a shortage to the extent of 400 cwts. and that the sweepings collected amounted on the whole to about 576 cwts. On the evidence adduced in the case it was found that the damage was to a certain extent caused by improper laying of the dunnage at the port of loading. The plaintiffs sued in respect of (1) damage, (2) shortage and (3) sweepings. The defendants contended that the loading and stowage of the cargo as well as the laying of the dunnage was within the discretion and control of the stevedore as the plaintiffs' agent and

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not as the defendants' agent, and that in respect of shortage their liability was excluded by the bills of lading.

Held, (1) that the shipowners would be *prima facie* liable for the damage caused by bad stowage or improper or insufficient dunnage and that their liability would not be modified by a clause in the charter-party empowering the charterers to name the stevedores, as the stevedores were the agents and paid servants of the shipowners for the purpose of discharging the duty of the shipowners in loading the cargo;

Harris v. *Best, Ryley and Co.*,[1] followed;

(2) that the defendants were liable in respect of the shortage as the prevailing contract between the shipowner and the charterer was the charter-party and not the bill of lading;

(3) the plaintiffs were entitled to claim the value of the sweepings as specific provision was made in that behalf in the charter-party.

SUIT on a charter-party.

On the 14th June 1913, the plaintiffs, Haji Azum Gulam Hussein, a firm, chartered the S. S. Abydos, a steamer belonging to the defendants, the Bombay and Africa Steam Navigation Company, Limited, for the carriage of a cargo of rice in bags from Akyab to Bombay. The material clauses of the charter-party were as follows:—

The said steamer being tight, staunch and strong and in every way fitted for the voyage shall proceed to Akyab or so near thereunto as she can safely get lying always afloat and there receive on board from the said charterers or their order a full and complete cargo of rice in bags which the said charterers bind themselves to ship or cause to ship not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, coals, machinery and furniture and that the said steamer being so loaded shall with such cargo proceed under steam to Bombay direct or so near thereunto as she may safely get on first arrival without breaking bulk so as to be always afloat and there deliver her cargo agreeably to bills of lading and so end the voyage.

The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and robbers, arrests and restraints of princes, rulers and people, and other accidents of navigation excepted; strandings jettison explosion and collisions, bursting of boilers or machinery, breakage of shaft and all losses and damage caused thereby are also excepted (even when occasioned by negligence,

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default or error in judgment of pilots, master, mariners or other servants of the shipowners), but nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage by improper or insufficient dunnage or ventilation or by improper opening of valve, sluices and ports or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage but any latent defects in the hull, boilers and machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners or any of them or of the ship's husband or manager, steamer having liberty to tow and be towed and to deviate for the purpose of saving life and property without being liable for the consequences arising therefrom and to call at the usual coaling stations.

The cargo to be brought to and taken from steamer's tackles at the risk and expense of the charterer and consignees thereof. Cargo to be taken delivery of at Bombay as fast as steamer can put out, otherwise the Captain to be at liberty to land the same at the expense and risk of the charterers and, or, consignees.

The Captain if required to sign bills of lading at any rate of freight without prejudice to this charter-party provided that the freight secured by bills of lading already signed and by those tendered for signature shall in the aggregate fully cover the amount due per charter-party. Charterers to have the option of underletting part or the whole of the vessel.

All questions of average to be settled according to York-Antwerp Rules, 1890.

All sweepings to be delivered to the charterers at port of discharge.

The steamer to be responsible for any proved shortage.

It is understood that the steamer has no right to engage cargo from other shippers for the port named above or for any ports from Akyab.

Charterers' stevedores at loading port to be employed at current market rate but not exceeding owners' contract rate.

All mats and requisite dunnage to be provided by the steamer.

No hooks to be used in receiving, loading, stowing and delivering the cargo and no bags to be cut.

The plaintiffs being empowered to sublet the whole or part of the cargo space did sublet roughly one-fourth to Gulam Mahomed Ajum. The plaintiffs shipped on board the steamer at Akyab 3,000 tons of rice belonging to them, and other quantities of rice belonging to other consignees as provided in the said charter-party.

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The plaintiffs named the stevedores at the port of loading who worked with the requisite dunnage supplied by the shipowners.

Bills of lading were issued and signed by the master of the steamer.

The following were the conditions stated therein.

Any claim for short delivery of or damage done to goods, and all claims whatsoever to be made in writing only and not orally at the port of discharge and at no other port, within one month of date of steamer's arrival at port of consignment.

No claim for damage will be admitted unless notified in writing before the goods are removed.

The bills of lading further provided for certain exceptions in favour of the shipowners. The material exceptions were as follows :—

"24. The Company shall not be responsible for loss or damage of any kind which may result directly or indirectly from the above causes or any of them and the goods shall throughout be at the shipper's or consignee's risk. Delivery by the Company of packages externally in good condition as received shall be conclusive evidence of delivery of full weight and contents.

"25. In case of any vessel being chartered, if any term or terms of the charter-party is or are in conflict with those of this bill of lading, the terms of the bill of lading shall prevail notwithstanding any thing to the contrary in the charter-party.

"28. The ship is not responsible for loss or damage caused by insufficient packing, torn, mended, chafed, weak or fragile bags and bagging wrappers not for usual and reasonable wear and tear of packages."

The steamer sailed from Akyab on the 2nd July 1913 making port in Bombay on the 16th of the same month. During the voyage she experienced heavy weather for at least two days and throughout encountered average monsoon weather with south-westerly swell.

On the cargo being unloaded, it was found that some 710 bags belonging to the plaintiffs were damaged ; that there was a shortage to the extent of 20 tons and 23 lbs.

and that the sweepings collected amounted on the whole to practically about the same weight. It was in respect of (1) damage assessed at Rs. 3,552-8-0, (2) shortage assessed at Rs. 2,408 and (3) sweepings assessed at Rs. 1,992, that the plaintiffs made the present claim. The plaintiffs alleged that the said damage and shortage were caused by improper and insufficient dunnage and owing to the said steamer not being in a proper condition and seaworthy for carrying the said cargo. They summarised their cause of action as follows :—

> "The rivets of the watering angle bar were in an unfit state and allowed sea water to enter the said steamer and damage the said rice. The bags of rice were improperly and negligently stowed in contact with the deck and other parts of the said steamer. The cargo ports were in an unfit state and leaking. No proper precautions were taken to properly dunnage the steamer and cargo. The dunnage was also insufficient in quantity and defective in quality by reason whereof sea water came into contact with the rice and damaged the same."

The defendants pleaded that under the terms of the charter-party the plaintiffs were not entitled to any compensation for shortage of contents, nor for damage done to the rice which was however due to the perils of the sea. They further denied the various allegations upon which the plaintiffs based their cause of action. In respect of the sweepings the defendants contended that the same were according to custom to be apportioned between the charterer and other consignees in proportion to the extent of their cargoes, and that they had offered to hand over the sweepings to the plaintiffs on plaintiffs indemnifying the defendants against claim of other consignees to the same. The suit was heard by his Lordship Beaman J. who held in favour of the plaintiffs on all the three heads. Under the head of damage the learned Judge awarded to the plaintiffs Rs. 750, the claim for shortage was allowed in the sum of Rs. 2,336, and the value of the sweepings was assessed at Rs. 1,986.

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The material portions of his Lordship's judgment were as follows :—

"It was contested *in limine* on the ground that there were two terms inserted in the bills of lading under which notice had to be given in writing of any claim for damage or shortage and that such claims must be made within one month. I am not particular to state the terms precisely because, as I shall presently show, the defendants' contention is entirely unsustainable. It is admitted that the plaintiffs did not comply with the conditions of those two terms in the bills of lading. It was, therefore, argued that their suit must fail. I should have thought that the proposition was almost too clear to admit of argument that where there is a charter-party, the rights of the charterer and the ship-owner are governed by that and by that alone. It is in effect the complete contract between them and their legal relations fall to be adjusted and determined under it and it alone. The defendants appear to rely upon one term in the charter-party which refers to bills of lading, but on reading that it is perfectly clear that when the words "agreeably to the bills of lading" are used, all that is meant is that for the limited purpose of that clause the facts set forth in the bills of lading as to quantity, quality, or weight of the goods shipped are to be the determining factor. In all other respects the bills of lading as between the charterer and the ship-owner never could be, I should have thought, more than mere receipts. I say that that proposition would certainly have appeared to me beyond reasonable argument even had there been no authority and I confess I am a little surprised to find so much authority on the point in the English case law. I shall do no more than refer *nominatim* to some of the leading cases upon which what I have just stated to be the law was settled and has ever since been firmly established in the English

Courts. Such cases are *Rodocanachi* v. *Milburn*;[1] *Sewell* v. *Burdick*;[2] *Gledstanes* v. *Allen*;[3] *Hansen* v. *Harrold Brothers*[4] and *Leduc* v. *Ward*[5].

Proceeding on that footing I come to consider the claims brought by the plaintiffs in respect of the three heads, for each of which he claims money compensation. And, first, of the damages. These are said to have been caused by the unseaworthiness of the vessel in the first place, and in the next by improper or insufficient dunnage. It was strenuously argued on behalf of the defendants that so far as the dunnage was concerned they could not be held responsible because it was a term in the charter-party that the charterer was to name his own stevedore and having so named him, the loading and stowage of the cargo, including of course the laying and quantity of the dunnage to be used was within the discretion and control of the stevedore as the plaintiffs' and not as the defendants' agents. In support of that proposition the Court was referred to the cases of *Blakie* v. *Stembridge*[6] and *The Catherine Chalmers*.[7] The law laid down by Willes J. in the trial Court in the case of *Blakie* v. *Stembridge*[6] very clearly occasioned considerable doubt and although the decision was confirmed on appeal, the appeal Court confined itself to a single narrow ground which has nothing to do with the point I am here considering. The decision of Sir Robert Phillimore in *The Catharine Chalmers*[7] has been declared by so eminent an authority as Scrutton, L. J., though as a text book writer and not as a Judge, to have been clearly wrong. Everything really turns in such a case upon the wording of the contract between the charterer and the shipowner. This comes out very

(1) (1886) 18 Q. B. D. 67.
(2) (1884) 10 App. Cas. 74.
(3) (1852) 12 C. B. 202.
(4) [1894] 1 Q. B. 612.
(5) (1888) 20 Q. B. D. 475.
(6) (1859) 28 L. J. C. P. 329.
(7) (1874) 32 L. T. N. S. 847.

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clearly in such cases as *Harris* v. *Best, Ryley & Co.*,[1] where the facts and the language were practically identical with the facts and language in the case before me. What is agreed between the parties is that the charterer shall nominate a stevedore, that is to say, the charterer's stevedore is to be employed. The parties further agreed that the stevedore was to be paid not by the plaintiffs but by the defendants and this in fact was done. What happened at Akyab was what actually happens in such cases, the plaintiffs' agent making anticipatory disbursements for the ship's use and such disbursements afterwards having been certified to have been proper by the Captain, their sum with details was forwarded to the plaintiffs, who recovered it from the freight due to the defendant Company; but the chief item was the stevedore's fees amounting to some Rs. 1,600. Thus, we find that, taking the charter-party as a whole, the agreement between the plaintiffs and the defendants was that the plaintiff's stevedore, that is to say, the stevedore named by the plaintiffs, was to be employed and paid for by the defendants. And that was exactly the case in *Harris* v. *Best, Ryley & Co.*[1] This is, as is well known in Commercial Courts, a common usage, the object of it being to satisfy the plaintiffs, that a responsible and competent agency was being used. But it is perfectly clear that unless there is a further term of a special kind authorising the plaintiffs to employ and pay for the stevedoring and so either directly or by implication making them responsible, the ordinary responsibility will not be shifted from the shipowner to the charterer. The ordinary responsibility, I say, because it is clearly the shipowner's duty to superintend the proper stowage and dunnage of any cargo and although a stevedore may be employed either by the consignor or by the shipowner himself the work of that stevedore

(1) (1892) 68 L. T. 76.

must be carried out under the control and orders of the shipmaster and his officers. They and they alone know best how cargo should be loaded in their own vessel so as to ensure the safety of the vessel itself as well as that of the cargo ; and their knowledge of the conditions under which the voyage is likely to be performed and the qualities of the carrying vessel, render them the best and most competent judges both of the quality and the quantity of the dunnage and the manner in which it ought to be laid. There appears to me really to be no doubt at all in law upon this question and I have no hesitation in holding that on the terms of this charter-party the employment of a stevedore named by the plaintiffs at Akyab has not in any way relieved the owners of the responsibility directly cast upon them by the charter-party itself.

It is to be noted that there is a clause in this charter-party which expressly lays it down that nothing herein contained, that is to say, in the foregoing parts of that article is to exempt the ship from liability for bad stowage or improper and insufficient dunnage. It is inconceivable, I think, that such a clause should have been left in the charter-party had it been the intention of the parties to it to exempt the shipowners from all liability in this respect under clause 20. And I take it that the effect of that clause goes no further than to authorise the plaintiffs to nominate the stevedore, provided that that stevedore's remuneration be at the market rate and does not exceed the owner's contract rate.

I will now deal with the charter-party on the footing of its being a document couched in ordinary language used in the ordinary sense and presumably meaning what it says. And, first, as to sweepings. Here the contract between the parties is contained in a single clause absolutely unqualified. The charterer is to have all the sweepings. It has been contended on behalf of

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the defendants that this is manifestly inequitable. In view of the charterer's option to sublet the whole or any part of the steamer, it might well have happened that they should have sublet the whole of it, in which case it was argued, surely the sweepings should have been restored to the consignees and the plaintiffs could have no possible equitable claim to them. I do not think that there is any room for the introduction of supposed equitable considerations on a point so plain. It is very easily to be understood why a term of this sort should find a place in the charter-party. The charterer guarantees a full freight to the shipowner, and should he fail to secure it he will have to pay the shipowner dead freight. It is a very profitable contract as a rule to the shipowner, and nothing is so natural as that a businessman should throw in one of his perquisites against such payments. For there is no doubt that in the absence of a charter-party, the shipowners would have been entitled to all sweepings. Here what they do is to surrender that perquisite to the shippers doubtless in consideration of being relieved from the trouble of finding cargo; and when we reflect upon the insignificant proportion ordinarily borne by the sweepings to the whole cargo, it will certainly seem to be a reasonable condition in the present case where I think the sweepings amounted to more than usual, they came to just about four-seventh per cent. of the whole cargo. The total number of bags filled with sweepings is 328 against some 56,000; and those sweepings would naturally, in the ordinary course, be considerably depreciated in value. Here we find that they were actually sold for about Rs. 2,000 roughly. So that I cannot see that there is anything inequitable, anything in the nature of that monstrous injustice which was alleged against this clause by the defendants' learned counsel, if we give it its natural and ordinary meaning quite irrespective of any other

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clause in the charter-party. I cannot believe for a moment that the defendants' first contention upon this point would be sustained in any Commercial Court. The next contention is that the sweepings, although by the charter-party unqualifiedly made the property of the charterers, were meant to be distributed proportionately between all the shippers. Thus, assuming that the charterers had sublet four-fifths of the cargo-space and the sweepings here had been exactly what they were according to the defendants' contention, the charterers would have only been entitled to one-fifth of the 328 bags of the sweepings. But the charter-party says in the plainest possible language that all of them are to be delivered to them. I have entertained no doubt from the first but that the defendants exceeded their right in making themselves the judge of the true meaning of this clause and in withholding from the plaintiffs what they considered to be the proportion of these sweepings or their money value and paying that over to the other consignee, Gulam Azum. In this connection I should mention that the freighter, Gulam Azum, claimed under the bills of lading since, of course, he has no right under the charter-party for the shortage found proved in respect of his part of the cargo. This suit was brought in the Small Causes Court and I understand the defendants to say that they settled it. At any rate they appear to have paid the plaintiffs there out of the sale-proceeds of the sweepings. And here too I should not omit to mention that the defendants offered to give the plaintiffs all the sweepings if the plaintiffs would indemnify them against claims on that account at the hands of other consignees. This the plaintiffs very naturally, and, in my opinion, very rightly, refused to do. I do not find a word in the bills of lading entitling any of the consignees

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to the sweepings. They had no right whatever, in my view of the law and the law existing between the charterers and the shipowners, to one ounce of these sweepings; but under the bills of lading and under the common law they were certainly entitled to recover shortage if they could prove shortage against the shipowners; and this is exactly what the only subfreighter of this ship has done. The defendants thus having been obliged to pay to him the money equivalent of proved shortage on his bags, wanted to set against it a proportionate quantity of the sweepings and then merely hand over to the plaintiffs the balance. In my opinion, this was a totally unwarranted attitude. I have no hesitation whatever in finding that the plaintiffs were entitled under the charter-party to all the sweepings.

I come now to the connected point whether they are also entitled to proved shortage, and I think that it follows from what I have been just saying that they are. Shortage and sweepings are two totally different things. It is quite true, as Mr. Jinnah pointed out, that the shortage in this case corresponds almost exactly with the amount of the sweepings tendered by the defendants to the plaintiffs. But, in the first place, those were not all the sweepings and, therefore, the plaintiffs were not bound to accept them, and, in the second place, though the sweepings may have corresponded almost exactly in quantity with the shortage, it does not follow that they were its equivalent in quality. And let us now look to such a case as I have suggested that the charterer had sublet four-fifths of the steamer. It remains as clear as ever that he will be entitled to all the sweepings on the ship. The other consignee would as clearly be entitled to claim shortage and would obtain it. In that character I cannot see why the charterer himself should not be entitled to

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the same benefit. It is expressly stipulated that he shall be. All proved shortage is to be made good by the shipowner ; and the attempt to set off against that the sweepings which are by an entirely separate and unqualified clause made over to the plaintiffs, appears to me to be putting an unnatural and strained meaning upon the charter-party, that is, upon a charter-party which, on its face, is quite simple, natural and intelligible. Nor do I agree with Mr. Jinnah that this imposes any hardship upon the defendants beyond what might have been within the contemplation of the parties when they made the charter-party. These are clauses so simple that men engaged in business, as the plaintiffs and defendants are, must have been perfectly aware of their probable extent and operation. And it appears to me that in dealing with a contract of this kind, the Courts have no right to go out of their way to indulge in fanciful reasons for modifying what has been plainly agreed upon by the parties themselves. On a first view, as stated by Mr. Jinnah with his customary clearness, it may appear to be rather hard upon the defendants that they should give up the sweepings and also pay for the shortage, which had been caused by the subtraction of the sweepings from the bags ; but this is exactly what the parties contracted to have done. And having regard to the average loss of this kind I suppose it was equally within the contemplation of the parties that whatever the plaintiffs might gain under these two heads, this would still leave the shipowners a very profitable bargain. That is, at any rate, how I read the contract after having given it my most careful consideration for many days, and also having given equally careful consideration to the arguments advanced on behalf of the defendants by Mr. Jinnah.

The defendants appealed.

Jinnah and *Davar*, for the appellants.

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Kanga and *Moos*, for the respondents.

Jinnah :—The stevedore was the charterer's agent. The negligence if any was that of the charterer's agent. The shipowners could not be liable especially when they are bound to employ the stevedores named by the charterer: see *Blakie* v. *Stembridge* [1]; *The Catharine Chalmers* [2]; *Harris* v. *Best, Ryley & Co.* [3] The plaintiffs can get either the sweepings or the shortage but not both.

The respondents were not called upon.

SCOTT, C. J. :—This is an appeal from the judgment of Mr. Justice Beaman in a suit in which the plaintiffs are the charterers and the defendants are the owners of the steamer "Abydos" which was chartered to carry a cargo of rice from Burma to Bombay. In the main there are two questions which have to be decided. The first is the question of dunnage and the alleged damage caused by insufficient or improper laying of dunnage, and the other is the question of the shortage and sweepings.

Dealing, first, with the question of dunnage, the charter-party provides: "nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or certain other specific causes," and at the end of the charter-party it is expressly provided that the charterers' stevedores at the loading port are to be employed at current market rates but not exceeding the owners' contract rate, and all mats and requisite dunnage to be provided by the steamer.

The question is, in the first place, as a matter of law, who is to be responsible for improper or insufficient

(1) (1859) 28 L. J. C. P. 329.

(2) (1874) 32 L. T. N. S. 847.

(3) (1892) 68 L. T. 76.

dunnage for the protection of the cargo upon the voyage. Apart from the concluding clauses of the charter-party to which I have just referred, there can be little doubt that the shipowners would be liable to pay for the damage to cargo occasioned by bad stowage or improper or insufficient dunnage, and the question is whether their *prima facie* liability has been modified by the clause as to the charterers' stevedores at the loading port who are to be employed at rates not exceeding the owners' contract rate.

The learned Judge upon the authority of *Harris* v. *Best, Ryley & Co.*[1] has come to the conclusion that upon the terms of the charter-party stevedores chosen by the charterers were to be the agents and paid servants of the shipowners for the purpose of discharging the duty of the shipowners in loading the cargo and in this conclusion we agree.

The question of fact remains whether the damage was or was not caused by improper laying of dunnage as found by the learned Judge. Now upon that question there is conflicting evidence of two marine surveyors, and we also have the evidence of the Parsi purser of the ship who only speaks as to the cargo stowed under his personal supervision. The learned Judge has come to the conclusion that damage to a certain specified extent was caused by the improper laying of the dunnage at the port of loading, and after considering the evidence and the arguments of the learned counsel for the appellants, we have come to the conclusion that the learned Judge is right. Therefore, with regard to the dunnage the appeal fails.

The remaining question regarding shortage and sweepings is not so simple. The facts are that rice was shipped at the port of loading not only by the charterers

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but by other shippers to whom the charterers in pursuance of the terms of the charter-party to that effect leased out a portion of the cargo space. The rice shipped was mostly Nakranji rice shipped F. O. B. at the rate of Rs. 7-15-6 per bag while a certain portion of the rice shipped was Larool rice shipped F. O. B. at the rate of Rs. 6-15-0 per bag. The bags of rice shipped by the charterers which, as the bills of lading state, were in apparently good order and condition and which were to be delivered subject to the exceptions and conditions specified in the like good order and condition from the ship's tackles, showed upon discharge at the port of destination a shortage amounting to between 383 cwts. and 400 cwts. The sweepings of rice lying loose in the ship after discharge amounted to about 575 cwts., and it is, therefore, obvious that a certain portion of the sweepings cannot have escaped from the bags shipped by the charterers and must be attributable to other bags shipped by persons to whom the charterers had let cargo space. The bills of lading contain two provisions which are material. The first is the general exception which includes, among other conditions, insufficiency of wrappers and package and all injury to the same and all damage arising from other goods by stowage. There is also a special condition that the ship is not responsible for loss or damage caused by insufficient packing, torn, mended, chafed, weak or fragile bags and bagging wrappers not for usual and reasonable wear and tear of packages.

If, therefore, the bills of lading were the only test of the liability of the shipowners, it can hardly be doubted that on proved facts the shipowners would not be liable to any shippers in respect of shortage occasioned by an escape from the bags. But the prevailing contract, where there is a conflict of provisions, as between the shipowner and the charterer, is, it is

conceded by counsel for the appellants, the charter-party.

The charter-party has two provisions which are relevant to the question. It provides that the steamer is to be responsible for any proved shortage. We take the proved shortage to be 383 to 400 cwts., and apparently at the trial it was stated that it might be taken to be 400 cwts. The charter-party also provides that all sweepings are to be delivered to the charterers at the port of discharge and, therefore, although the shipowners might, as against the shippers who could only rely on the bills of lading, appeal to exception 28 to absolve themselves from liability for shortage, they could not successfully plead it as against the charterers in respect of the goods shipped by them, for by the charter-party they are to be responsible for any proved shortage.

It is contended that if both the provisions of the charter-party are applied in favour of the charterers as was done in the lower Court the result is that the charterers in effect are paid twice over. First of all, they get the value of all the sweepings in the steamer, and, secondly, they get the value of the goods found short. The argument was that the shipowners ought to be allowed to collect the sweepings and when it is found that certain bags do not contain the quantity shipped they should be allowed to allocate to the bags which contain a short quantity a proportionate part of the sweepings collected and in this way justice would be done. Manifestly, however, such a procedure would give rise to great difficulties in any case where sweepings were not of one quality of rice and where they were not, as in almost every case they could not be, uncontaminated or deteriorated by lying on the deck during the voyage. Therefore, a rough and ready

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arrangement appears to have been made in the charter-party that all sweepings are to be delivered to the charterers at the port of discharge. That is the agreement and if the argument on behalf of the appellants were correct, the shipowners would be allowed to say: "We will not deliver all the sweepings as we have agreed to deliver them, but we will only deliver a proportionate part of the sweepings, namely, 400 cwts., and the other sweepings we will appropriate for compensation to the other shipowners, and we will not be responsible to you as we have agreed in the charter-party for any proved shortage, because we will have made up the shortage by sweepings." The answer is that that is not the contract.

It appears to us for that reason that the learned Judge is right and that the judgment of the Court below must be affirmed and the appeal dismissed with costs.

Solicitors for appellants: Messrs. *Matubhai, Jamietram, Madan & Co.*

Solicitors for respondents: Messrs. *Daphtary, Fareira & Divan.*

Appeal dismissed.

G. G. N.