[IN THE PRIVY COUNCIL]

1961 *Present :* **Lord Cohen, Lord Denning, Lord Morris of Borth-y-Gest, Lord Guest, and Mr. L. M. D. de Silva**

THE ATTORNEY-GENERAL, Appellant, *and* THE SCINDIA STEAM NAVIGATION CO. LTD., INDIA, Respondent

Privy Council Appeal No. 57 of 1960

S. C. 21—D. C. Colombo, 33028/M

Shipping—Contract for carriage of goods by sea—Bills of lading —Evidential value of statements made therein—Short delivery of a number of bags—Burden of proof—Evidence as to their weight, contents and value—Customs Ordinance (Cap. 185), ss. 30, 31, 40—Boat notes—Evidential value thereof—Indian Carriage of Goods by Sea Act, 1925, Schedule, Article III, Rules 3 and 4.

Three bills of lading, which were all in similar terms and subject to the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act of 1925 and the Schedule thereto, contained respectively the acknowledgments that 2,187 bags, 47,992 bags and 50,473 bags " being marked and numbered as per margin " were shipped from Rangoon to Colombo on the defendant Company's vessel s.s. " Jalaveera ". The total gross and nett weights of the goods were recorded in the margin. There was a condition in the terms :—" Weight, contents and value when shipped unknown ".

In an action instituted by the consignee against the shipowners for the recovery of damages for failure to deliver 235 out of the total 100,652 bags and their contents of rice—

Held, (i) that, though the plaintiff called no evidence from Rangoon, the statements in the bills of lading as to the number of bags shipped formed strong prima facie evidence that the stated number of bags were shipped. Unless the shipowners showed that only some lesser number of bags than that acknowledged in the bills of lading was shipped they would be under obligation to deliver the full number of bags. (For the purpose of proving the short delivery of 235 bags, some 144 boat notes, issued in compliance with the provisions of section 40 of the Customs Ordinance, were produced by the plaintiff, and evidence was given of the tally carried out when the bags were loaded into lighters ex-ship and the further tally by Customs Officers before the bags were put into the warehouse.)

(ii) that, in view of the condition " Weight, contents and value when shipped unknown ", the bills of lading were not even prima facie evidence of the weight or contents or value of the bags. It was for the plaintiff to prove the contents of the bags and the weight of the bags and it was for him to prove his loss by proving what it was that the bags contained and by proving what was the value of what the bags contained.

(iii) that if a certain number of bags has been lost, it could almost necessarily be inferred that the lost bags were bags containing similar goods to those which were not lost.

(iv) that the question of short delivery should be decided not by reference to the times when there were cartages away from the Customs warehouse but by reference to the times of delivery from the ship.

2—J. N. B 1256—2,033 (2/62).

APPEAL from a judgment of the Supreme Court reported in (*1958*) *61 N. L. R. 409.*

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena* and *A. C. de Zoysa*, for the plaintiff-appellant.

Michael Kerr, Q.C., for the defendant-respondent.

Cur. adv. vult.

October 3, 1961. [*Delivered by* LORD MORRIS OF BORTH-Y-GEST]—

The issue which arises in this appeal is whether the appellant (who sues on behalf of the Government of Ceylon) is entitled to recover damages from the respondent Company on the basis that there was a short delivery of certain bags of rice which were alleged to have been shipped on the respondent's vessel s. s. " Jalaveera ". The Government of Ceylon import rice from Burma and in connection with the carriage of such rice the Food Commissioner of Ceylon entered into an agreement (dated the 22nd April, 1953) with a number of shipping lines, collectively called the Conference Lines, of which the respondent Company was one. Pursuant to that agreement the Conference Lines agreed (subject to certain terms as to quantity) to ship the rice which the Government of Ceylon purchased in Burma. The freight to be charged was not to exceed the rate of Rs. 33 per ton of 20 cwt. nett for carriage from any one port of Burma to the port of Galle or Colombo in Ceylon. By clause 6 (1) of the agreement it was provided that "the transport and carriage of each separate cargo of rice shall be governed by the terms and conditions of the bill of lading which the Owners or Agents of the Owners of the carrying vessels shall and are hereby required to issue to the shippers or consignees which shall be deemed to be the contract of carriage in respect of that cargo between the shipper and/or consignee on the one hand and the Owners of the carrying vessels on the other ; provided, however, that the rate or rates of freight charged and entered in the bill of lading shall not be in excess of the rates laid down in Clause 3 ".

Between about the 14th and 17th September, 1953 a number of bags were shipped on the s.s. " Jalaveera " at Rangoon by the State Agricultural Marketing Board of the Union of Burma for carriage to Colombo and delivery to the Director of Food Supplies, Colombo. The Director was an officer of the Government of Ceylon. It was not disputed before their Lordships that the appellant was entitled to sue on behalf of the Government. The goods were shipped under three bills of lading dated respectively the 14th, 16th and 17th September, 1953. The claim which the appellant presented in the action was that 100,652 bags had been taken on board, that the bags contained rice and that there was a failure to

deliver 235 of them. In respect of such failure he claimed damages. The claim succeeded in the District Court of Colombo but the judgment and decree of that Court dated the 6th December, 1956 was set aside by the Supreme Court of Ceylon on the 28th October, 1958. By leave of the Supreme Court this appeal is now brought.

The three bills of lading were all in similar terms. There was a paramount clause the opening words of which were :—" All the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925, and the Schedule thereto are to apply to the contract contained in this bill of lading . . . .". The bills of lading recited that there were shipped in apparent good order and condition certain numbers of packages " being marked and numbered as per margin ". In the first bill of lading the number of packages was given as 2,187 bags, in the second 47,992 bags and in the third 50,473 bags. The total was therefore 100,652 bags. In the margin there were " Particulars declared by Shipper ". There were columns headed " Leading Marks ", " Number of Packages or pieces ", " Description " and " Said to weigh ". On each bill of lading particulars were given. The descriptions which were given recorded that the stated numbers of bags contained " Full Boiled Rice 1953 Crop ". The nett weights of the contents of each group of bags were given. Thus in the first bill of lading the total nett weight of the 2,187 bags was given and the nett weight of each of the 2,187 bags was stated to be 159·74821 lbs. The average nett weight per bag as stated in the three bills was approximately 160 lbs. (The average nett weight per bag on the basis of the average weights stated in the bills of lading was said to be 159·84 lbs.) Each one of the bills of lading recorded in the margin the total gross and nett weights of the goods in respect of which it was issued. Each of the bills of lading further provided :—

" This Bill of Lading is issued subject to the following further conditions :—

NUMBER AND CONTENTS

1. Weight, contents, and value when shipped unknown. The Company is not to be responsible for any loss, damage or delay whatsoever, directly or indirectly resulting from insufficiency of the address, or packing, internal or external; nor for condition of contents of re-shipped or re-exported Goods. "

There was also the following stamped endorsement on each one of the bills of lading :—

" SHIP NOT RESPONSIBLE FOR :—

DAMAGE FROM HEATING AND/OR CAKING OF NEW RICE GRAIN OR BRAN : OBLITERATION OF MARKS, DETERIORATION OF CONTENTS OR STAINING OF BAGS CAUSED BY

THE NATURE OF CONTENTS AND/OR SHORTAGE OF WEIGHT CAUSED BY THE EVAPORATION OF CONTENTS : BURSTING OF BAGS AND LOSS OF CONTENTS.

SHIP NOT RESPONSIBLE FOR WEIGHT OF BAGS ON OUTTURN. "

After the s.s. " Jalaveera " had loaded her cargo at Rangoon she proceeded direct to Colombo. She did not touch at any intermediate port. There was no other cargo than the bags which were shipped by the State Agricultural Marketing Board of Burma. At Colombo the cargo was discharged into lighters and then carried in the lighters to a landing jetty and thence into Customs warehouse. The evidence established that in the transhipment of rice it was a usual occurrence that by the time the cargo arrived in Colombo many of the bags were torn. The bags are stacked in the ship and the pressure of the top ones upon the lower ones causes rice to leak out of the lower ones. As would be expected some of the contents of the bags spilled out into the holds of the ship. The spillages consisted of rice from the bags. The torn bags were repaired before being off-loaded. Other bags (empty ones) were sent on board into which the sweepings were placed which resulted from the spillages. Those bags were specially marked to indicate that they were sweepings bags.

A tally of the numbers of bags was carried out as the cargo was loaded into lighters. Certain " Boat Notes " were prepared showing the numbers of bags that were carried in each lighter. The " Boat Notes " were initialled by someone on behalf of the ship.

It is provided by section 30 of the Customs Ordinance (Volume IV—Legislative Enactments of Ceylon—cap. 185) that the master of every ship arriving in the Island must make a report in accordance with the terms of the section to the Custom House which report must include the marks, numbers and contents of every package or parcel of goods on board and by section 31 the master must at the time of making such report deliver to the Collector of Customs the manifest of the cargo of such ship when a manifest is required and if so required by the Collector the master must produce to him any bills of lading. By section 40 of the Ordinance it is provided that with all goods unladen from any ship there is to be sent with each boat load a boat note specifying the numbers of packages and the marks and numbers or other description thereof and that such boat note is to be furnished and signed by an officer of the ship and, if there is a custom house officer on board, the boat note is to be signed by such officer also. The tindal and owner of the boat into which the goods are laden is held responsible for the due landing and delivery at the custom house of all the goods so laden and specified in the boat note.

The bags that were torn and had been repaired were individually weighed before they were loaded into lighters. In similar manner the bags of sweepings were individually weighed before they were loaded into lighters.

In addition to the tally carried out when the bags were loaded into lighters there was a further tally by Customs officers before the bags were put into the Customs warehouse.

There were produced at the trial some 144 boat notes. They showed that unloading proceeded between the 24th September and the 2nd October, 1953. These boat notes in the aggregate recorded that 100,402 bags had been taken off the ship. They were " said to be " bags of rice. In all but two instances the tally as to the numbers of bags taken off the ship into lighter agreed with the second tally which recorded the numbers of bags landed from the lighters. The boat notes in the aggregate recorded that 100,417 bags had been loaded into warehouse from the lighters. (Boat note No. 138 showed that the tally of the number of bags landed from lighter was 574 as compared with the tally of 563 of the number recorded as having been put on lighter : boat note No. 144 showed that the tally of the number of bags landed was 82 as compared with the tally of 78 of the bags put on lighter.) Taking the corrected figure of 100,417 the result was that 235 fewer bags were landed into warehouse at Colombo than the number of 100,652 which the three bills of lading recorded as having been loaded into the ship at Rangoon. After being landed the bags were fumigated before being put into the Customs warehouse.

The numbers of bags which were landed (100,417) included a total of 541 bags which had been torn and repaired : the total weight of these 541 bags was 500 cwt. 1 qr. 6 lbs. In addition to the 100,417 bags there were also landed into warehouse 287 bags of sweepings. These sweepings in total weighed 263 cwt. 0 qr. 13 lbs.

On the basis of those figures the Director of Food Supplies asserted, by letter dated the 29th October, 1953, that had the 541 bags not been torn they would have contained 772 cwt. 0 qr. 09 lbs. instead of the 500 cwt. 1 qr. 6 lbs. which they actually contained and that there was still a shortage of over 8 cwt. even after taking into account the 263 cwt. 0 qr. 13 lbs. which were contained in the 287 bags of sweepings. By a previous letter dated the 3rd October, 1953 he had stated that a claim for a short discharge of 250 bags of rice would be made.

The evidence established that if a bag which the ship had taken on board was found to have become completely emptied of its contents the empty bag would according to general practice be delivered to the consignee. There would be entries on the boat notes relating to such empty bags. In fact there was no mention of any original bag having been delivered empty to the landing company. If any empty bags

which were sent on to the ship at Colombo in order that they might be used to contain sweepings were not in fact used the practice was to return them and to make entry in respect of them on the boat notes. The last boat note (No. 144) did in fact record the number of empty " sweepings " bags which were returned to the shore.

After the bags were landed into the Customs warehouse they were later delivered into the lorries of the Director of Food Supplies for transport to the Government granaries. These deliveries took place between the 25th September and the 27th October, 1953. At the time of delivery ex-warehouse a tally was made in the presence of a Customs officer. Considerable further spillage took place before the bags left the Customs warehouse. This resulted partly from the fact that more bags became damaged and torn, and partly from the fact that the process of unloading the bags from the ship involved the use of hooks. These hooks caused holes to be made in the bags through which rice leaked out.

The deliveries from the Customs warehouse showed that the number of bags which were delivered was 100,417 and of these the number which (inclusive of the 541 torn and repaired bags taken from the ship) were torn or stitched or had mouths burst was 4,367 : the gross weight of these 4,367 bags was 4,072 cwt. 2 qr. 20 lbs. The deliveries from the Customs warehouse of bags of sweepings reached a total number of 1,804 (being 1,517 more than the 287 bags of sweepings off-loaded from the ship) : the gross weight of these 1,804 bags of sweepings was 2,569 cwt. 0 qr. 6 lbs.

It will be seen that the total gross weight of the 4,367 bags and the 1,804 bags was 6,641 cwt. 2 qr. 6 lbs. After the Director of Food Supplies had asserted his claims against the ship-owners in October, 1953 the agents for the ship-owners stated that that the entire cargo loaded at the port of shipment had been discharged and delivered at Colombo. They further said (by letter dated the 20th November, 1953) :— " We understand that a quantity of as much as cwts. 403–0–18 lbs. was delivered to you as excess sweepings after setting off against shortage in torn and mouth burst bags ex wharf. It will be noted, therefore, that this excess quantity more than covers the weight of the bags alleged to have been short-delivered. " The quantity of 403 cwt. 0 qr. 18 lbs. was calculated as follows. If the 4,367 bags had had a " sound weight " of 160 lbs. per bag the total would have been 6,238 cwt. 2 qr. 8 lbs. The total weights of the 4,367 bags together with the 1,804 bags of sweepings as delivered ex warehouse was 6,641 cwt. 2 qr. 26 lbs. The difference between the 6,641 cwt. 2 qr. 26 lbs. and 6,238 cwt. 2 qr. 8 lbs. was 403 cwt. 0 qr. 18 lbs. and the contention was that such quantity more than accounted for the contents of the 235 bags which were said to have been missing.

On the basis of the facts referred to above the appellant, as plaintiff, commenced proceedings in the District Court of Colombo. By his plaint dated the 31st August, 1954 he claimed that there had been a short

delivery of 235 bags of rice from the ship. The claim was for Rs. 14,279·19 as the full value of the 235 bags of rice and of the freight charges, Customs duty, warehouse rent, harbour dues and insurance. In the answer of the respondent the provisions of the bill of lading were referred to and in addition to pleading certain defences which are not now material it was said that the ship had voyaged from Rangoon to Colombo direct and without touching at any intermediate port and that the entire quantity of goods or cargo on board the ship was discharged at Colombo and that thereupon " in terms of the said Bills of Lading and in law the liability of the Defendant absolutely ceased ". The learned Judge in the District Court held that 100,652 bags of rice had been shipped on board at Rangoon and that delivery was made at Colombo of only 100,417 bags. He held that the bills of lading afforded prima facie evidence (which was subject to being rebutted) of the number of bags of rice that were taken on board the ship. He gave judgment for the amount claimed less a small amount referable to insurance. The plaintiff appellant did not appeal against the deduction when the case went to the Supreme Court and their Lordships have not been concerned with such deduction.

On appeal to the Supreme Court the Order of the learned District Judge was set aside and the action was dismissed. The Supreme Court held that the plaintiff had not established by evidence that the total quantity of rice handed over by the shipper at Rangoon had not been discharged by the carrier at Colombo. The provisions of the bill of lading were referred to and it was held that the plaintiff had to prove by evidence that the shipper had handed to the defendant's ship 100,652 bags of rice each weighing 160 lbs. The judgment proceeded :—" This he cannot do except by calling a witness or witnesses able to speak to that fact. He has failed to do so. In view of the conditions in the bills of lading quoted above he is not entitled to rely on the weight, number and quantity given in them as establishing his claim." The case of the *New Chinese Antimony Company Ltd. v. Ocean Steamship Company Ltd.* [1] was referred to and in the judgment it was further said :—" The burden is on the plaintiff to establish the facts on which he relies to succeed in his case. Apart from the conditions above mentioned there is in the instant case in the defendant's favour the added circumstance that the ship was loaded only with rice consigned to the Director of Food Supplies, Colombo, and that she did not call at any intermediate port before reaching Colombo." It was also pointed out that it had not been contended that any rice was retained in the ship after the unloading at Colombo.

The first question which arises is whether the plaintiff established that 100,652 bags were shipped at Rangoon for delivery to the Director of Food Supplies at Colombo. The onus of proving that fact undoubtedly rested upon the plaintiff. It was forcibly pointed out by the respondent that the plaintiff had chosen to rely for proof solely upon producing the bills of

[1] *(1917) 2 K. B. 664.*

lading and that the plaintiff had not traced the bills of lading to their source or supported them by producing and proving mate's receipts and tallymen's books. The respondent further submitted that the bills of lading did not yield prima facie evidence of the number of bags that had been shipped.

As has been mentioned above the bills of lading applied the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925 and the Schedule thereto. Rules 3 and 4 of Article III of the Schedule to that Act are in the following terms :—

> " 3. After receiving the goods into his charge, the carrier or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—
>
> (*a*) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods start, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained in such a manner as should ordinarily remain legible until the end of the voyage ;
>
> (*b*) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper ;
>
> (*c*) The apparent order and condition of the goods :
>
> Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonably ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.
>
> 4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (*a*), (*b*) and (*c*)."

The respondent submitted, in reliance upon *Canada and Dominion Sugar Company Ltd. v. Canadian National (West Indies) Steamships Ltd.* [1], that there was no evidence that the shipper had made any demand of the nature referred to in Rule 3. While it is to be observed that pursuant to clause 6 (1) of the Conference Lines Agreement, as referred to above, the owners of the carrying vessels were required to issue bills of lading in respect of the separate cargoes of rice the fact in any event is that in the present case three bills of lading were actually issued. They contained respectively the admissions or acknowledgments that 2,187 bags and 47,992 bags and 50,473 bags " being marked and numbered as per margin "

[1] *(1947) A. C. 46.*

were shipped. Their Lordships consider that though these statements in the bills of lading as to the number of bags shipped do not constitute conclusive evidence as against the shipowner they form strong prima facie evidence that the stated numbers of bags were shipped unless it be that there is some provision in the bills of lading which precludes this result. Was there then any such provision in the present case ? There was a condition in the terms :—" Weight, contents and value when shipped unknown ". That meant that in signing a bill of lading acknowledging the receipt of a number of bags there was a disclaimer of knowledge in regard to the weight or contents or value of such bags. There was however no disclaimer as to the numbers of bags. Their Lordships cannot agree with the view expressed in the judgment of the Supreme Court that the conditions in the bills of lading disentitled the plaintiff from relying upon the admissions that bags to the numbers stated in the bills of lading were taken on board.

The present case differs from *New Chinese Antimony Company Ltd. v. Ocean Steamship Company Ltd.* (*supra*). In that case a bill of lading for antimony oxide ore stated that 937 tons had been shipped on board : in the margin was a typewritten clause :—" A quantity said to be 937 tons " and in the body of the bill of lading (printed in ordinary type) was a clause :—" weight, measurement contents and value (except for the purpose of estimating freight) unknown ". It was held that the bill of lading was not even prima facie evidence of the quantity of ore shipped and that in an action against the ship owners for short delivery the onus was upon the plaintiffs of proving that 937 tons had in fact been shipped. (See also *Carig Line Steamship Co. v. North British Storage & Transit Co.*[1]) In *Hogarth Shipping Co. Ltd. v. Blyth, Greene, Jourdain & Co. Ltd.*[2] a captain signed a bill of lading for a specified number of bags of sugar : one of the exceptions and conditions of the bill of lading read " weight, measure, quality, contents and value unknown ". It was held by Lush J. that the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles and not as to their contents.

Even though the plaintiff called no evidence from Rangoon and took the possibly unusual course of depending in the main upon the production of the bills of lading their Lordships conclude that the bills of lading did form strong prima facie evidence that the s.s. " Jalaveera " had received the stated numbers of bags for shipment to Colombo and delivery to the Director of Food Supplies. (See *Smith & Co. v. Bedouin Steam Navigation Company Ltd.*[3]) The shipowners would however be entitled to displace the prima facie evidence of the bills of lading by showing that the goods or some of them were never actually put on board : to do that would require very satisfactory evidence on their part. In his speech in the case last cited Lord Halsbury said (at page 76) " To my mind, the cardinal fact is that the person properly appointed for the purpose of

[1] *(1921) S. C. 114.*

[2] *(1917) 2 K. B. 535.*

[3] *(1896) A. C. 70.*

checking the receipt of the goods has given a receipt in which he has acknowledged, on behalf of the person by whom he was employed, that those goods were received. If that fact is once established, it becomes the duty of those who attempt to get rid of the effect of that fact to give some evidence from which your Lordships should infer that the goods never were on board at all". Unless the shipowners showed that only some lesser number of bags than that acknowledged in the bills of lading was shipped then the shipowners would be under obligation to deliver the full number of bags. (See *Harrowing v. Katz & Co.*[1], *Hain Steamship Co. Ltd. v. Herdman & McDougal*[2] and *Royal Commission on Wheat Supplies v. Ocean Steam Ship Company*[3].)

Though by relying upon the bills of lading the plaintiff presented prima facie evidence that 100,652 bags (marked and numbered as in the margins of the bills) were shipped, the bills of lading were not even prima facie evidence of the weight or contents or value of such bags. This was the result of the incorporation in the bills of lading of the provision above referred to. (See *New Chinese Antimony Company Ltd. v. Ocean Steamship Company Ltd. supra.*) It was for the plaintiff to prove the contents of the bags and the weight of the bags and it was for him to prove his loss by proving what it was that the bags contained and by proving what was the value of what the bags contained. The respondent Company submitted that such proof was lacking. The respondent Company further submitted (*a*) that there was evidence which displaced the prima facie evidence of the shipment of 100,652 bags and which lead to the conclusion that there never were 235 missing bags and (*b*) that if alternatively 100,652 bags were in fact shipped the evidence showed that all the contents of such bags were discharged at Colombo—with the result that the liability of the respondent Company would be limited to the value of 235 emtpy bags.

In support of the respondent Company's submission under (*a*) above it was urged that it was improbable that 235 bags had been put on board at Rangoon and had then been in some manner removed. It was further urged that inasmuch as the ship sailed directly from Rangoon to Colombo and carried no other cargo than was shipped by the State Agricultural Marketing Board Union of Burma and that it was not suggested that any rice was retained in the ship's hold after discharge at Colombo the probabilities were that the number of bags shipped was not 100,652 but 100,417. Their Lordships cannot accept the view that these circumstances are of sufficient weight to displace the prima facie evidence of the shipment of 100,652 bags. Nor do their Lordships consider that any useful purpose would be served by speculating as to possible explanations as to what might have happened. It was for the shipowners to explain away their acknowledgment of the number of bags that they had received.

[1] *10 T. L. R. 400.* [2] *11 Lloyds List 58.*

[3] *11 Lloyds List 123.*

On the basis that 100,652 bags were shipped the evidence clearly established a short-delivery of 235 bags. The result of the double tally at the time of discharge was that it was satisfactorily proved that only 100,417 bags were discharged. It was not contended by Mr. Michael Kerr, appearing for the respondent Company, that the 235 original bags were in fact discharged and were missed in the two tallies at Colombo.

It remains to be considered whether the plaintiff proved the loss that he alleged : linked with the points raised in that issue are those which are involved in the submission of the respondent Company referred to under (*b*) above.

It was for the plaintiff to prove what was in the missing bags. Their Lordships consider that there was abundant evidence that the missing bags contained rice. Before the time of discharge from the ship there had been some escape of contents from many bags. The number was not negligible. It was rice that had come out of the bags. There were sweepings put into 287 bags and all the sweepings consisted of rice. After the cargo was put into the Customs warehouse there was considerable further escape of contents from the bags. In the result there were 1,517 additional bags of sweepings. All the sweepings consisted of rice. Their Lordships conclude that from these circumstances it was a reasonable and proper inference that the bags that were shipped were bags which contained rice.

On the assumption that the bags contained rice the next question is whether there was evidence as to their weight. The provision of the bill of lading which has been quoted above expressly precludes any dependence upon the particulars as to weight which were declared by the shipper. Oral evidence was given at the hearing by a wharf assistant in the Food Commissioner's Department. He had taken test weights of 100 bags. He had taken 100 bags " from here and there as they were unloading the bags into the warehouse ". His tests gave him an average weight of 159·84 lbs. Their Lordships consider that it was a reasonable and proper inference that that was the weight of the bags of rice which were shipped and Mr. Michael Kerr accepted that the bags if full would contain approximately 160 lbs. It may here be noted that the bills of lading acknowledged that the bags were shipped " in apparent good order and condition ".

In this connection reference may again be made to the decision of Lush J. in *Hogarth Shipping Company Ltd. v. Blyth, Greene, Jourdain & Co. Ltd.* (*supra*). In his judgment (see page 542) Lush J. pointed out that if a certain number of bags had been lost and if one had to ascertain what was in the bags that were lost, then as a matter of evidence one would almost necessarily infer that the lost bags were

bags containing similar goods to those which were not lost. The decision of Hill J. in *R. & W. Paul Ltd. v. Pauline*[1] is also of relevance. There the plaintiffs' case was that by a bill of lading the defendants had represented and stated that they had received on board the *Pauline* 37,047 sacks of barley said to weigh a stated amount to be delivered at a safe port in England. The plaintiffs claimed that that quantity was shipped but that in breach of the bill of lading the defendants short-delivered at Ipswich 1,106 sacks. The plaintiffs claimed damages as indorsees of the bill of lading to whom the property in the goods had passed. The defendants asserted that they had never represented or stated as alleged, that the bill of lading contained the words "weight and contents unknown", and that all the cargo was delivered which was in fact shipped. It does not appear to have been in contest that the sacks did contain barley. In dealing with the claim Hill J. said :— "It seems to me that the Bill of Lading coupled with the receipts affords prima facie evidence and that it rests upon the defendants to get rid of that prima facie evidence. In my view they have failed to do so. It is said that to prove the loss of 1,106 bags of barley does not carry the plaintiffs any way unless they can go on and prove the weight that was shipped. I am not at all sure that that is so. Supposing the plaintiffs prove the loss of 1,106 sacks of barley, but are unable to prove the precise weights of the sacks which were lost, because the sacks which were shipped varied in weight, I do not think that that prevents them recovering damages. It only makes it more difficult to compute what damages they have suffered. If that is the true view of the matter, the way I should do it is to take the weight of the sacks shown to have been delivered and upon that make a computation of what weight 1,106 sacks represents . . . there is evidence of 1,106 sacks of barley missing, but I do not know what their weights are, and, therefore, I can only make a rough estimate of the weights and their value. I do not think it right to conclude that because I cannot ascertain the weight I must treat it as negligible and give nothing by way of damages. As a rough and ready way of estimating it I shall take the average weight of the sacks of barley delivered and from that calculate the approximate weight of 1,106 sacks of barley".

In the present case their Lordships consider that it was shown that there was a short delivery of 235 bags and that such bags had been shipped with rice in them and that each had weighed approximately 160 lbs. Subject to a consideration of the submission of the respondent referred to as (*b*) above it would follow that the plaintiff was entitled to the amount awarded to him in the District Court. It was however strongly contended by Mr. Michael Kerr that the evidence established that all the contents of the 100,652 bags were in fact delivered and were received by the Director of Food Supplies. On

[1] *4 Lloyds List Law Reports 221.*

this submission it was said that what must have happened was that the missing 235 bags became completely denuded of their contents but that such contents were in fact delivered and received. If this submission were correct it was said that the damages would only amount to approximately £11, as representing the value of 235 empty bags. The evidence established that if a bag became completely empty the general and normal practice was to deliver that empty bag to the consignee. Any empty bags should have been delivered into the lighters and note should have been made in the boat note in regard to them. It was not disputed that this practice ought to have been followed. No empty bags were in fact delivered and no boat note recorded the receipt of any empty bags. The last of the boat notes did make mention of missing bags by the words " and (250) Bags more in dispute if considered to be delivered ".

This submission now being examined is presented on the basis of the figures concerning the deliveries from the Customs warehouse. It will have been observed that in regard to the discharges from the ship the Director of Food Supplies had pointed out on the 29th October, 1953 that had the 541 torn and repaired bags contained their normal quantity the weight would have been 772 cwt. 0 qr. 09 lbs. whereas the weight actually was 500 cwt. 1 qr. 6 lbs. and that the total quantity (263 cwt. 0 qr. 13 lbs.) in the 287 bags of sweepings fell short of the quantity which would be required to supply the deficiency. The argument advanced on behalf of the respondent relates to the deliveries ex warehouse. The number of torn and repaired bags had by the end of the time of such deliveries reached the total of 4,367 : the number of the bags of sweepings had increased from 287 to 1,804. The argument proceeded as follows :—the contents of the 4,367 bags had they been full (i.e. containing 160 lbs.) together with the contents of 235 bags (containing 160 lbs.) would in total have been 6,574 cwt. 1 qr. 4 lbs. : the actual contents of the 4,367 bags and of the 1,804 bags of sweepings were in total 6,641 cwt. 2 qr. 14 lbs. : therefore it was said that the contents of the 235 bags were in fact all accounted for. The excess of some 67 cwt. (the difference between the 6,641 cwt. and the 6,574 cwt. could it was said be explained as being approximately the gross weight of 4,602 empty bags (i.e. 4,367 + 235). Therefore it was said that the damages should be limited to a sum representing the value of 235 empty bags.

This attractively developed argument depended however for its validity upon the assumption that no rice escaped at all while in warehouse from the 96,050 bags which constituted over and above the 4,367 bags the remainder of the 100,417 bags. Their Lordships cannot think that this assumption is a valid one. The evidence showed that in the process of unloading (as well as of loading) the bags were removed by fixing iron hooks to them : holes were as a result made in the bags through

which rice could escape. The loss of rice would however not necessarily occur immediately. When stacked in the Customs warehouse a great number of the bags would be under the pressure of the weight of other bags upon them and rice would be lost from the bags. Furthermore the evidence showed that small quantities of rice may leak out of bags which nevertheless have all the appearances of sound bags.

Quite apart however from these considerations the question of short delivery falls to be decided not by reference to the times when there were cartages away from the Customs warehouse but by reference to the times of delivery from the ship. If, as their Lordships conclude, the plaintiff sufficiently proved that 100,652 bags were shipped on board the " Jalaveera " and that the bags contained rice and that they weighed approximately 160 lbs. each, the evidence shows that only 100,417 bags were delivered. If it had happened, as might seem surprising, that 235 bags had become completely denuded of their contents it would be singular and would also be quite contrary to practice if none of the empty bags were delivered. Out of the 100,417 bags which were delivered ex ship some 541 of them had lost some of their contents : those bags had been torn and repaired. The contents of the 287 bags of sweepings were not however in the aggregate sufficient to account for the deficiencies of the 541 bags. The contents of 235 bags were not accounted for.

The theory that the contents of 100,652 bags were received from the Customs warehouse seems to their Lordships to be impossible of reconciliation with the ascertained facts (i) that 100,417 bags and no more were discharged from the ship (ii) that the 541 torn and repaired bags contained 500 cwt. 1 qr. 6 lbs. and (iii) that the total sweepings (in the 287 bags) were only 263 cwt. 0 qr. 13 lbs.

Their Lordships would add that the Ships Import Manifest was put in evidence and was part of the material before the Courts below (see section 31 of the Customs Ordinance (*supra*)). Their Lordships have arrived at their conclusions without having regard to the contents of the Manifest : it is abundantly plain however that nothing in the Manifest conflicts with their Lordships' conclusions but rather supports them.

For the reasons which have been given their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the judgment of the District Court should be restored. The respondent Company must pay the costs in the Supreme Court and before their Lordships' Board.

Appeal allowed.