Standard Bank of South Africa Ltd Appellant v Efroiken and Newman Respondents
1924 AD 171

Appellate Division, BLOEMFONTEIN --- CAPE TOWN.

1923 October 3, 4. 1924. January 16.

INNES, C.J.; SOLOMON, J.A.; DE VILLIERS, J.A.; KOTZE, J.A. and WESSELS, J.A.

Flynote

Bank. --- Letter of credit. --- Acceptance of drafts. --- Bill of lading. --- Certificate of insurance. --- Lex loci solutionis. --- Lex loci contractus. --- Right to reject documents not of the nature agreed upon. --- Contract. --- Breach.

Headnote

Respondents E and N being about to purchase flour in the United States of America each made a contract in Cape Town with the appellant Bank whereunder the Bank undertook to establish a credit for them with its branch in New York and to honour the seller's drafts upon them at that branch provided that the drafts were accompanied in the case of E. "by bill of lading and insurance policy" for certain flour, c.i.f. Cape Town, and in the case of N. "by full set of shipping documents including marine and war risk policies for merchandise shipped to Cape Town." The respondents on their part undertook to accept the drafts on presentation and to pay them at maturity provided they were accompanied by the abovementioned documents. The sellers, when presenting their drafts at New York, attached to each a through bill of lading and an insurance certificate. These documents were accepted by the Bank and the drafts honoured, but on presentation of the drafts in Cape Town the respondents refused to accept them.

In an action by the Bank for the difference between the amount of the drafts and the price realised from the sale of the flour bought by the respondents, the latter raised the defence that the documents which accompanied the drafts were not the documents for which they had stipulated.

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Held (per DE VILLIERS, J.A. and WESSELS, J.A.), that the dispute between the parties should be decided in accordance with the principles of American law and not in accordance with the law in force in the Cape Province.

Held, further, that the parties by their contract intended that the documents to be supplied by the sellers should be an ocean bill of lading and a marine insurance policy and that, in the absence of proof that under American law or custom the documents supplied were the equivalent of the documents agreed upon, the respondents were entitled to refuse to accept the drafts and that the claim of the Bank should accordingly fail.

The decision of the Cape Provincial Division in *Standard Bank of South Africa Ltd v Efroiken and Newman,* confirmed.

Case Information

Appeal from a decision of the Cape Provincial Division (BENJAMIN, J.).

Plaintiff bank sued defendants Efroiken and Newman to recover in the case of Efroiken the difference between the sums of £8,248 2s. 6d and £3,152 10s. 11d, and in the case of Newman the difference between £2,039 6s. 1d and £1,191 3s. 11d. The larger amount in each case was the sum paid by plaintiff in respect of certain drafts drawn by defendants and dishonoured by them. The smaller amount represented the price obtained by plaintiff from the sale in Cape Town of certain flour bought by defendants in the United States.

The Trial Court entered judgment in each case of absolution from the instance.

Plaintiff appealed.

The facts are stated in the judgment of DE VILLIERS, J.A.

H. G. Mackeurtan, K.C. (with him *R. B. Howes*), for the appellant: The contract to be interpreted is not that between the seller and the purchaser. It is a contract for the establishment of credit, under which the purchaser contemplated a contractual relationship between the bank and the seller in America. The purchaser authorised the bank to enter into a contract with the seller, which was to be performed in America. The case of *The Commissioner of Taxes v William Dunn & Co, Ltd.* 1918 AD 607 is analogous. See *Morgan v Larivière* (L.R. 7 H.L at p. 432); *Banner v Johnston* (L.R. 5 H.L at pp. 166 and 174); Grant's *Law of Banking* (chapter XV: 5th ed., p. 99, and 6th ed., p. 153); *In re Agra and Masterman's Bank, Ex parte Asiatic Co.* (L.R. 2 Ch. App. 391). The bank was liable on the drafts

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presented. See *Scott & Co v Barclay's Bank* (129 L.T.R. 108). The bill of lading and the insurance policy must be interpreted according to the American law because the contract was made and was to be performed wholly in America. The obligation of the purchaser to indemnify the bank was merely subsidiary.

When a contract is to be performed by an agent in another country it must be interpreted according to the law in force in that other country and the interpretation includes the construction of documents. Even if the contract is partly to be performed in one country and partly in another each part must be performed according to the law of the country of performance. See *Chatenay v Brazilian Submarine Telegraph Co, Ltd.* (1891, 1 (4. B. 79). This is so in English law in spite of the strong preference for the *lex loci contractus*. It is entirely in accordance with the law of the Civilians. See Story on *Conflict of Laws* (sec. 280); Dicey's *Conflict of Laws* (2nd ed., p. 563, rule 152, sub-rule 3); Savigny's *Conflict of Laws* (Guthrie's Translation, p. 198, 2nd ed.).

A bill of lading may be a through bill of lading or an ocean bill of lading. The former is also dealt with in English law. See *Stewart v Ryall* (5 CSC 154); *S.A. Breweries v King* (1899, 2 Ch at p. 182).

Where one authorises another to act on his behalf at a particular place or in a particular market he is bound by the usages and customs of that place or market. See Halsbury's *Laws of England* (vol. X, pp. 264 and 267, secs. 486 and 490). See Story's *Conflict of Laws* (sec. 291 as to *Arnott v Redfern* (2 C. & P. 88)); Bowstead on *Agency* (3rd ed., p. 83, art. 39); and *Ireland v Livingston* (L.R. 5 H.L at pp. 404, 405 and 416).

Through bills of lading are dealt with under the head of bills of lading in Halsbury's *Laws of England* (vol. XXVI, p. 233); Scrutton on *Charter Parties and Bills of Lading* (4th ed., art. 22) and Carver's *Carriage by Sea* (5th ed., sec. 107), where the following words are used: "It is now a frequent practice in trades in which goods have to make a transit which is broken into several parts to use 'through bills of lading.' " These words are used in earlier editions and it is therefore clear that the practice is not new.

All the documents tendered fell under the letter of credit in terms of the American law and by usage of bankers, insurers and exporters in New York.

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An insurance certificate is well known in English law. See *Wilson Holgate & Co, Ltd v Belgian Grain and Produce Co, Ltd.* (1920, 2 K.B at p. 7); *Lloyd v Guibert* (L.R. 1 Q.B at p. 121).

Decisions in England do not govern this case, though even in England there is a difference of opinion as to the meaning of the words "bill of lading." See *The Marlborough Hill v Cowan & Sons, Ltd.* (1921, 1 AC 444); Halsbury's *Laws of England* (vol. XXVI, sec. 230); *Diamond Alkali Export Corporation v Fl. Bourgeois* (1921, 3 K.B at pp. 455 and 458).

R. W. Close, K.C. (with him *C. J. Ingram*), for the respondents: The principal contract was the contract of sale and the financing contract was subsidiary.

A c.i.f. contract contemplates an ocean bill of lading. There was no legal *nexus* between the bank and the seller.

No authority can be quoted to show that, when an agent notifies his authority, he can be held liable to a third party. From *Morgan v Larivière* (*supra*) it is clear that, apart from trust or assignment, there can be no such contract. *Banner v Johnston* (*supra*) is inapplicable because there is no statement of the law in

favour of the contract suggested on behalf of the appellant. See *Biddell Bros v E. Clemens Horst & Co.* (1911, 1 KB 214). The contract on the letter of credit is between the seller and buyer.

As to the choice of law, the place of performance is only one of the possible tests. I admit that *Voet* (4.1.29) relying on *Digest* (44.7.21) lays down that a party to a contract will be held to have contracted where the contract is to be performed. But the intention of the parties must be ascertained. See Halsbury's *Laws of England* (vol. VI, secs. 356, 357 and 358). There is considerable conflict in the authorities referred to in Dicey's *Conflict of Laws* (3rd ed., pp. 609-611 and 858). In Story's *Conflict of Laws*, sec. 280 contradicts sec. 270. It is not clear that all the Roman-Dutch authorities rely on the *lex solutionis*. As to *Lloyd v Guibert* (*supra*), see *Jacobs v Credit Lyonnais* (12 Q.B.D at p. 599). See Beal's *Cardinal Rules of Legal Interpretation* (2nd ed., p. 93), and cases there cited.

The law applicable is the law of South Africa because it is the place where the language was used.

As to custom, see *Van Breda v Jacobs* (1921 AD at p 343).

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The same rules apply to trade usage. See *Rodocanachi v Milburn* (18 Q.B.D at p. 73).

The form of certificate of insurance is identical with those criticised in *Ireland v Livingston* (*supra*, at pp. 406 and 407). See *Mambre Saccharine Co. v Corn Products Co.* (1919, 1 KB 198), where the point was taken by counsel. The policy must be one covering the particulars only. See *Wilson Holgate & Co v Belgian Grain Products Co, Ltd.* (*supra*, at pp. 7 and 8), and *Diamond Alkali Export Corporation v Fl. Bourgeois* (91 LJKB 147)

A through bill is not a bill of lading because the goods are not on board.

A certificate of insurance is not a policy. See *Scott v Barclay's Bank, Ltd.* (*supra*) and *The Marlborough Hill v Cowan & Sons* (*supra*).

A document received for shipment is a bill of lading. A through bill of lading is not negotiable. See *Hansson v Hamel & Horley, Ltd.* (1922, 2 AC 36).

As to custom, see Halsbury's *Laws of England* (vol. X, secs. 488, 489 and 491), and *Robertson v Jackson* (2 C.B. at p. 421, and 135 E.R. 1010).

Mackeurtan, K.C., in reply: There was a binding undertaking in America. See *Morgan v Larivière* (*supra*, at p. 439) and *Banner v Johnston* (*supra*, at pp. 172-4); Grant's *Law of Banking* (6th ed., p. 152); and Hart on *Banking* (3rd ed., p. 618).

If the bank had not paid, the seller would have had an action against the bank.

In an obligation under a c.i.f. contract in America shipment means shipment on rail, i.e., from the mill.

As to the argument that a through bill of lading is not negotiable, the only point is that before the ship arrives the bill is not so easily negotiable as an ordinary bill of lading. But that is immaterial.

Secs. 270 and 280 of Story on *Conflict of Laws* are not in conflict with each other. Sec. 280 deals with the case where the place of contract differs from the place of performance.

The English cases under the Marine Insurance Act of 1906 are inapplicable because they are not covered by the Act of 1879 (Cape).

Even in the case of an ocean bill of lading signed by the

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shipper's agent it is open to the shipowner to prove that the goods were never shipped. It is merely a receipt. See Halsbury's *Laws of England* (vol. XXVI, sec. 230).

Freight includes rail charge. See Standard Dictionary.

Close, K.C., added the following authorities: Halsbury's *Laws of England* (vol. X, secs. 469-73 and 492-3).

Cur adv. vult.

Postea (January 16).

Judgment

SOLOMON, J.A.: I agree with my brother DE VILLIERS that this appeal fails, and I propose to state very shortly my reasons for coming to that conclusion. In his argument on behalf of the appellant Mr. *Mackeurtan* very properly impressed upon us the fact that in this case we were concerned not with the principal contract of sale between Efroiken and Igleheart Bros. but with the subsidiary contract between Efroiken and the Standard Bank. Under this contract the bank undertook to establish a credit for Efroiken with its branch in New York, which was to honour Igleheart Bros.'s drafts upon Efroiken to the amount of £8,200, provided that they were "accompanied by bill of lading and insurance policy for Royal Hard first-grade American flour at 15 dollars 75 cents per sack of 196 lbs c.i.f. Cape Town." On the other hand Efroiken undertook with the bank as holders of the drafts to accept on presentation and pay the same at maturity, provided again that these were accompanied by bill of lading and insurance policy. And the sole question in this case is as to the proper construction of the words bill of lading and insurance policy in this contract. Dealing first with the bills of lading, do these words mean ocean bills of lading only, or are they wide enough to include railroad through bills of lading? The answer to that question seems to me to depend entirely upon what the parties themselves meant by those words, and of that I do not think there can be any reasonable doubt. It is a fair presumption that, when Efroiken undertook to accept on presentation and pay at maturity the drafts, if accompanied by bill of lading, both he and the bank used the expression "bill of lading" in the sense in which it is ordinarily understood in South Africa, where the drafts were to be presented to him, that is to say as meaning

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ocean bills of lading. And that presumption is confirmed by the use of the expression c.i.f in the contract; for it is well known that under a c.i.f. contract the seller is bound to tender to the buyer an ocean bill of lading. And if there could possibly be any further doubt in the matter, that would be removed by reference to the correspondence which took place between the Cape Town branch and the New York branch after Efroiken had refused to accept the drafts presented to him by the bank. On the 4th November, 1920, the former telegraphed to the latter: "Referring to our telegram of 29th October, 165 credits issued provided for usual shipping documents which are not attached to drafts . . . You are, therefore, held responsible." To this the New York branch replied: "Igleheart terms credit complied with, through bill of lading under credit calling for shipping documents, credit did not specify ocean bill of lading." This, however, did not satisfy the Cape Town branch, which replied: "Your cable 172 refer to clause 2 circular." The circular referred to is that containing the regulations affecting export commercial credits adopted by the New York Bankers' Commercial Credit Conference of 1920, clause 2 of which provides as follows: "We will interpret the terms documents, shipping documents and words of similar import as comprehending only ocean bills of lading (sailer bills of lading included) and marine and war risks insurance in negotiable form with invoices." A copy of this circular had been sent to the Standard Bank in South Africa, which was therefore well acquainted with the regulations, and would reasonably expect that they would be observed. It cannot, therefore, in my opinion be open to question that when Efroiken undertook to accept the drafts when presented to him, if accompanied by bill of lading, both parties meant by that expression ocean bills of lading, and that they necessarily used the same expression in the same sense, when the bank undertook that its New York branch would honour Igleheart Bros.' drafts if accompanied by bill of lading. If, therefore, the Cape Town branch had had knowledge of the fact that in New York through bills of lading are freely dealt in, it should have instructed its New York branch not to honour Igleheart Bros.' drafts unless accompanied by ocean bills of lading. That they did not do so is probably explained by the fact that these were the only bills of lading that they had in mind at the

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time, and that they assumed that the drafts would be accompanied by such shipping documents. And certainly the circular issued by the New York bankers, to which reference has been made, would have justified such an assumption, for in addition to clause 2 cited above, clause 5a provides that Railroad through bills of lading will not be accepted, except on importations to the Far East *via* Pacific ports unless expressly stipulated." It matters not that according to the evidence taken on commission these regulations merely represent an agreement between banks and have no legal force. The point is that the Cape Town

branch knew of these regulations, and, therefore, probably assumed that the branch in New York would observe them. Otherwise it should have notified that branch not to accept anything but ocean bills of lading. If then both parties to the contract meant by bills of lading ocean bills of lading, and I am satisfied that they did, it follows that Efroiken was legally entitled to refuse to accept the drafts presented to him which were not accompanied by such documents.

On this simple ground I am of opinion that the judgment in the court below was right, and that the appeal fails. Newman's case does not substantially differ from Efroiken's. The main difference is that in his contract it was provided that drafts should be "accompanied by full set of shipping documents including marine and war risk policies," and that the expression c.i.f. does not appear in it. But I am satisfied that in this case also by the words "shipping documents" both parties meant ocean bills of lading, and that being so, Newman was entitled to refuse to accept the drafts which were not accompanied by such documents. In my opinion this appeal also fails.

DE VILLIERS, JA.: Sometime in July, 1920, the respondent Efroiken, of Bellville, near Cape Town, bought from Igleheart Bros., Inc., of Evansville, Indiana, U.S.A, through their agents in Cape Town 200 tons of first grade American flour in bags of 196 lbs, July-August shipment, the terms of the contract being confirmed Banker's Credit, New York, at a price of 15 dollars 75 cents per bag c.i.f. Cape Town.

In order to meet his obligations under this contract, Efroiken on the 21st of that month, through the appellant bank at Bellville,

established a credit with the New York agency of the bank. Igleheart Bros. were authorised by Efroiken to draw upon him to an amount not exceeding in all £8,200 in one or more drafts at 60 days, Efroiken agreeing with all *bona fide* holders of drafts drawn against this credit to accept on presentation and pay the same on maturity.

The drafts were "to be accompanied by bill of lading and insurance policy for Royal Hard First Grade American flour @ 15 dollars 75 cents per sack of 196 lbs c.i.f. Cape Town." The credit was to expire, unless previously cancelled, on September 5th, 1920. The New York agency in due course notified Igleheart Bros that the credit had been established with them and that they would negotiate the drafts if accompanied by a full set of shipping documents. In pursuance of this, Igleheart Bros subsequently drew five drafts at 60 days on Efroiken, in all amounting to £8,246 for 2,615 bags of flour, all of which were between the 24th August and the 8th September, 1920, paid by the New York agency of the bank.

Upon presentation of the drafts to the respondent at Bellville on the 28th September and the 10th October, acceptance was refused. Flour had in the meantime gone down. But the ground upon which the refusal was based was that the drafts were not accompanied by a bill of lading as stipulated in the document of the 21st July. According to the contention of the respondent, the bill of lading contemplated in that document is an ocean bill of lading, whereas the drafts were accompanied by what is known as a through bill of lading. It is common cause that at that time no other objection was taken by the respondent.

But in the course of the hearing of an action brought by the bank against the respondent, as well as a similar action against one Newman, also on appeal before us, a further defence was raised to the effect that neither were the drafts accompanied by an insurance policy as stipulated in the document of the 21st July. In addition to the through bill of lading there was a certificate of insurance.

To complete the statement of facts, most of the flour arrived at the ship from Evansville, 800 miles inland, on the 18th September, 1920, after the drafts had been negotiated by the New York agency. With the exception of 295 bags which arrived in

Cape Town in the "Carlow Castle" about the middle of November, the balance of the flour was shipped in the "Chinese Prince" which sailed from New York on the 10th October, 1920, and arrived at Cape Town on the 9th November. By agreement the flour was ultimately sold for the benefit of all concerned, realising an amount of £3,152 10s 11d. An action was thereupon instituted in the Cape Provincial Division against the respondent for the recovery of the difference between that amount and the sum of £8,246 2s. 6d, which action resulted in a judgment of absolution from the instance being granted with costs. An appeal from

that judgment is now before this Court.

Perhaps it is advisable at this stage to set out the main documents upon which the case turns. The contract between Efroiken and Igleheart Bros is as follows: "Not responsible for delays or non-fulfilment of contract when caused by strikes, Acts of Providence, or other unavoidable causes, or for any claims of any description relating to orders placed through us. All shipments are at consignee's risk.

32, Strand Street,

Cape Town.

Order placed with

WALMISLEY, SEABORN & CO.

as Agents and not as Principals.

By Mr. S. Efroiken, Bellville, nr. Cape Town.

On Account of Messrs. Igleheart Bros., Inc,

Evansville, Indiana, U.S.A.

Terms: Confirmed Bankers' Credit, New York.

QUANTITY.	DESCRIPTION.	PRICE.
200 tons (two hundred tons)	1st grade hard American flour in bags of 196 lbs. July-August shipment.	15 dollars 75 cents per bag c.i.f. Cape Town.

Each item of this Order to be accepted and treated as a separate Contract.

(Above document is endorsed '*Buyer's Copy.*')"

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In how far the bank knew the terms of the contract between Efroiken and Igleheart Bros., apart from the reference to it in what I shall for convenience call the credit note is disputed. The credit note is in the following terms: ---

"£8,200 0s. 0d.

Bellville, C.P.

I hereby authorise Igleheart Bros., Inc, Evansville, Indiana, of to draw upon me on or before the 5th September, 1920, for any sum of money not exceeding in all eight thousand two hundred pounds sterling in one or more drafts at sixty days after sight, in favour of the New York branch of the Standard Bank of South Africa, Limited. And I hereby agree with the Drawers, Endorsers and *bona fide* holders of drafts drawn against this credit to accept on presentation and pay the same at maturity. All Drafts drawn under this Credit to be noted on the back hereof, and to contain the clause 'drawn under your Credit No . . . . . '.

(The following clauses are added in manuscript.)

Drafts to be accompanied by B/L and Insurance Policy for Royal Hard first-grade American flour @ 15 dollars 75 cents per sack of 196 lbs c.i.f. Cape Town.

It is understood that neither you nor your agents are to be required to examine into the correctness of the documents tendered, you and they being hereby authorised to accept such documents as representing goods according to their purport. It is understood and agreed that all risks arising out of, or consequent on, the issue of the aforesaid credit are to be borne by me alone, your bank being held harmless and indemnified by me in respect thereof."

"S. EFROIKEN."

The bank thereupon sent a cablegram to its New York agency

"Advise Igleheart Bros., Inc, Evansville, Bellville Branch issued credit 22nd July, £8,200 with you account S. Efroiken draft at 60 days sight shipment of flour.

Confirmed, July 28th."

On the 30th July the New York agency wrote the following letter to Messrs. Igleheart Bros.: ---

"We beg to inform you that we have to-day received advice

from our Cape Town Branch to the effect that a credit has been opened in your favour, through our Bellville Branch, by S. Efroiken, providing for the negotiation of your sixty days' sight drafts on him to the extent in all of £8,200, for shipment of flour: Drafts are to be marked as being under Bellville Branch letter of credit cabled through Cape Town July 29th, 1920."

"AGENT."

As the New York agency in the letter of credit which was forwarded by mail, was further requested to advise Igleheart, they followed up their previous letter by a letter of the 24th August, 1920: ---

"We beg to inform you that we are in receipt of confirmatory mail advice from our Bellville Branch to the effect that a letter of credit has been opened in your favour by S. Efroiken, providing for the negotiation of your sixty days' sight drafts on him to the extent in all of £8,200 (Eight thousand two hundred pounds). Drafts are to be accompanied by full set of shipping documents, consisting of bills of lading, drawn to order and endorsed in blank, invoices in duplicate for shipment of Royal Hard first-grade American flour @ 15.75 dollars per sack of 196 lbs c.i.f. Cape Town. The shipments must be insured for at least 10 per cent. over the face amount of the drafts and the insurance policies in duplicate must accompany the drafts and other documents. Drafts are to be marked as being drawn under Bellville Branch letter of credit No. 2/1, dated July 21, 1920.

This facility will expire, unless previously cancelled, on September 5, 1920.

This is in confirmation of our letter of July 30th."

"AGENT."

The through bill of lading was in the following terms: ---

"DIRECTOR GENERAL OF RAILROADS.

CHICAGO GREAT WESTERN RAILROAD.

In connection with other carriers on the route.

Received at Leavenworth, Kansas, from Igleheart Bros.: The following property in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, numbered, consigned and destined as indicated below:

Consignee: Order of Igleheart Bros.

Destination: Cape Town, Union of South Africa.

Route: CGW --- Chicago --- Wabash --- Buffalo --- West Shore American and African Line.

Party to be notified: S. Efroiken.

Address: Cape Town, Union of South Africa.

For Export --- Litherage Free --- Steamship Booking No. 6048.

To be carried to the Port (A) of New York, N.Y, and thence by American and African Line to the Port (B), Cape Town, South Africa (or so near thereto as steamer may safely get with liberty to call at any port or

ports in or out of the customary route), and to be there delivered in like good order and condition as above consigned, or to consignee's assigns, or to another carrier on the route to destination if consigned beyond said Port (B) upon payment immediately on discharge of the property, of the freight thereon, at the rate from to of cents, United States gold currency, per one hundred pounds Gross Weight and advanced charges. (Here follows, *inter alia*, the following condition): ---

'I. 3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route nor after said property is ready for delivery to the next carrier or to consignee.'

In Witness whereof, the Agent signing on behalf of the said Chicago Great Western Railway and of the said Ocean Steamship Company, or Ocean Steamer and her owner, severally and not jointly hath affirmed to 12 bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

Dated at St. Joseph, Mo, this 13th day of August, 1920.

C. R. BERRY, A.G.F. Agent.

On behalf of carriers severally, but not jointly.

By S. E. DILLON, C.C."

It should be remarked that there is no "American and African Line" of steamers in existence. What is meant by it is certain four or five independent lines, plying between America and South Africa, who for certain purposes act in concert, calling themselves the Conference Line.

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The following is a specimen of the certificates of insurance which are said to be equivalent to insurance policies and which accompanied the drafts: ---

"CERTIFICATE OF INSURANCE.

UNITED STATES LLOYDS, INC.

Home Office: 3 South William Street, New York.

Appleton & Cox, Attorneys.

$7796.

Chicago, Ill.

August 20, 1920.

We hereby certify, that on the 20th day of August, we the undersigned insured under Policy No. A10787 made for Prindiville & Company Seven thousand seven hundred and ninety-six dollars, on 630 bags wheat flour. Valued at $7087.50.

Per American and African S/S Line at and from Evansville *via* New York to Cape Town, Union of South Africa . . . loss, if any, payable to the order of IGLEHEART BROTHERS endorsed on this Certificate, which, upon said payment, is to be surrendered and assigned without recourse. It is understood and agreed that this Certificate represents and takes the place of the Policy, and conveys all the rights of the Original Policy Holder (for collecting any loss or claim) as fully as if the property were covered by a Special Policy, of the form in use by the undersigned, direct to the Holder of this Certificate, and free from any liability for unpaid premiums. This Certificate is not valid unless countersigned by

PRINDIVILLE & COMPANY,

Chicago, Ill.

Appleton & Cox, Attorneys.

Countersigned by L. A. Kerr."

(Across the face of this document is endorsed the words: ---

"ORIGINAL."

"ORIGINAL and DUPLICATE issued one of which being accomplished the other to stand void.").

As mentioned above, a similar action was also instituted by the bank against Newman, with the same result. As the facts in that appeal are somewhat different from those in the case of Efroiken, I propose to deal with Newman's case separately.

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Dealing first with the case of Efroiken, the question that arises for decision turns upon the meaning of the words "bill of lading" in the credit note. The learned Judge in the court below came to the conclusion that as the credit was negotiated and the acceptance and payment of the bills were to be made within the Union, it was the law here and not that of the United States America which governed the construction of the contract. The rule to be applied is that the *lex loci contractus* governs the nature, the obligations and the interpretation of the contract; the *locus contractus* being the place where the contract was entered into, except where the contract is to be performed elsewhere, in which case the latter place is considered to be the *locus contractus*. That is, broadly speaking, the rule as it has been adopted. At the same time it must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effect are to be governed (*Spurrier v La Cloche*, 1902 AC 446. But that also must not be taken too literally, for, where parties did not give the matter a thought, courts of law have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties. The question was approached in this way by FRY, L.J., in the case of *In re Missouri S.S. Co.* (42 Ch.D. 341): "Looking at the subject matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract?" And the House of Lords dealt with it in *Hamlyn & Co. v Talisker Distillery & Others* 1894 AC 202. In this case the *lex loci solutionis* (the contract was to be performed in Scotland) was considered not to govern, as it was held that the contract clearly showed in the arbitration clause that the parties intended that the English law where it had been entered into was to govern. Lord HERSCHELL, L.C., is reported as follows: "Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention

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that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractor* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the enquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it." Story in his *Conflict of Laws* (par. 272) formulates the rule as follows: "The general rule, then, is that in the interpretation of contracts, the law and custom of the place of the contract are to govern in all cases where the language is not directly expressive of the actual intention of the parties, but it is to be tacitly inferred from the nature, and objects, and occasion of the contract." But he qualifies this in par. 280: --- "The rules already considered, suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." The rule that the *lex loci contractus* governs is derived from the civil law. It is stated in the *Digest* (50.17 lex 34) as follows :-" *Semper in stipulationibus, et in caeteris contractibus id sequimur, quod actum est, aut si non pareat, quid*

actum est, erit consequens, ut id sequamur, quod in regione, in qua actum est, frequentatur." In *Digest* (44.7, *lex* 21) the place of performance is said to be the *locus contractus: --- "Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit."* And again in the law (*Digest* 42.5 *lex* 3): --- *"Aut ubi quisque contraxerit. Contractum autem non utique eo loco intelligitur, quo negotium gestum sit: sed quo solvenda est pecunia."* As Story points out *Sande* (*Op. Comm, de reg jur. lex* 9, p. 20) is of opinion that even where the place of performance is different from the place where the contract was entered into, the latter ought to prevail, but the view of *Sande* has not been adopted (Burge, *Conflict of Laws,* vol. 2, p. 861). The case of *Chatenay v Brazilian Submarine Telegraph Co.* (1891, 1 QBD 79) is a good illustration of how the rule is applied. In that case the plaintiff, a Brazilian subject, executed in Brazil in the Portuguese language a power of attorney to a broker resident in London, to buy and sell shares. The broker accordingly sold certain shares of the plaintiff in the defendant company, and they were registered in the names of the purchasers. The plaintiff claimed a rectification of the register, on the ground that the sale was not authorised by the power of attorney. On the trial of a preliminary issue to determine whether the construction of the power of attorney was to be governed by Brazilian or by English law, the Court of Appeal held that the power was to be governed by English law Lord ESHER, M.R., states the rule to be applied in the following way: --- " If a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly

conceivable that persons should enter into a contract to be carried out in a country contrary, to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to he carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country."

Applying the rule to the case before us, I shall first consider what law governs the contract between Efroiken and Igleheart Bros. Now although this contract, which I shall call the principal contract, was entered into in South Africa, as payment was to be made against shipping documents, it follows that it was to to performed by Igleheart Bros in the United States of America and payment was to be made to them in that country. Under these circumstances I can have no doubt that the principal contract, at all events as regards performance by Igleheart Bros of their obligations under it, the sufficiency or insufficiency of which is the crucial point in the present case, is to be regulated by the law of the United States of America. What is a sufficient bill of lading to entitle Igleheart Bros to payment would therefore, in a dispute between them and Efroiken, have to be decided by the law and custom of the United States. But the evidence for the bank is that under the decisions and law of the United States the obligations of the parties to a letter of credit are not in any way affected by the terms of what I have called the principal contract. Assuming that that is so, and that we are to look only at the credit note, in my opinion exactly the same result follows. From the note we gather that payment has to be made in New York only against receipt of the bill of lading in New York, i.e., performance on the part of the buyer is to take place in New York only against performance on the part of the seller in New York. What would constitute performance would, therefore, in the absence of a clear indication to the contrary, be regulated by the law and custom of the United States. If Igleheart

Bros. are by American law or custom considered to have discharged their obligations to Efroiken by

handing over a through bill of lading with the drafts, could the latter have maintained that the bank was not bound to negotiate the drafts? In my opinion not only would the bank have been justified in paying out but it would have been bound to do so. For the New York Agency of the bank by their letter of the 24th August to Igleheart Bros. undertook to honour any drafts on Efroiken drawn by Igleheart Bros. under their contract with Efroiken, to the extent of £8,200, provided such drafts were accompanied by a full set of shipping documents. And by the acceptance on the part of Igleheart Bros. of this undertaking the New York Agency became bound to negotiate the drafts if accompanied by the proper documents (*Agra and Masterman's Bank*, L.R. 2 Ch. App. 391; *Banner & Young v Johnston*, 1871-72 LR 5 Eng. & Ir. App. 157; *cf. Morgan v Larivière*, 1875, 7 L.R. Eng. & Ir. App. 423). Whether the bank knew the exact terms of the principal contract matters not. Through the reference to it in the credit note the bank knew that payment was to be made only against bill of lading, and that unless a bill of lading was forthcoming such as contemplated in the note --- a bill of lading which constituted performance on the part of the sellers of their obligations --- the latter would not be entitled to payment. I come to the conclusion, therefore, that as the present dispute involves the construction and the obligation of the credit note, in so far as performance of it and of the principal contract to which it was merely auxiliary was to take place in America, it is the law and custom of the United States and not that of the Cape Province which governs.

According to English law a bill of lading, which is included in the class of documents known as documents of title --- the transfer of which forms a good delivery in performance of a contract (Benjamin on *Sale*, 5th ed., p. 741) --- is an acknowledgment by a shipowner, a master or other agent that certain goods have actually been delivered on board a definite vessel. This definition is not peculiar to the English law. Having been derived from the law merchant, bills of lading in that sense are known to all civilised communities. Thus to give but one example, *Van der Linden* (*Koopmans Handboek*, Bk. 4, Ch. 4, sec. 3 --- Juta's translation at p. 435), dealing with the Dutch law on the subject of

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bills of lading, says: "The master gives the shipper a written acknowledgment of the goods loaded on board, containing a statement of the goods, their quantity, makes and numbers, the place of destination, the name of the freighter and often also of the consignee and the freight stipulated for." The Dutch word used by *Van der Linden* for a bill of lading is *cognoscement*, literally an acknowledgment. Benjamin in his book on *Sale* (5th ed., p. 845) deals with the various Acts in England relating to documents of title, and sums up the law on the subject of bills of lading in the following manner: "Bills of lading by the law merchant are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods; divests the vendor's lien; and has now by the Statute just quoted (The Bills of Lading Act, 18 and 19, Vict. C. 111) the further effect of vesting in the vendee all the vendor's rights of action against the shipmaster and owner." In how far exactly this statement of the law would apply in the Cape Province under Act No. 8 of 1879, it is not necessary to determine (cf. *Truter v Joubert's Trustee*, 16 CSC 375). It is sufficient to draw attention to the Act which in a large class of cases makes the law of England the law of the Cape Province, and to point out that a buyer, in a case where the Union is the *locus contractus*, would be entitled to all the benefit of his stipulations in so far as Act No. 8 of 1879 or our common law will assist him. According to English law the transfer of a bill of lading operates as delivery to the buyer of the goods supplied. In the case of *Sanders Bros v Maclean & Co.* (1883, 11 QBD 327), BRETT, M.R., at p. 341, pointed out that delivery of the bill of lading is symbolical delivery of the goods. And in the case of *E. Clemens Horst Co v Biddell Bros.* 1912 AC 18 the House of Lords endorsed this view, holding that the seller was entitled to payment upon his shipping the goods and tendering to the buyer the bill of lading and insurance policy. The tender of the bill of lading is, therefore, a tender of delivery of the goods which discharges the seller and entitles him to receive the purchase price. It is only because the seller has done everything that he had to do under the contract that he is entitled to demand the price.

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The whole question of the sufficiency of a document, not being a bill of lading in the strict sense, and of a certificate of insurance, has been recently dealt with in a masterly judgment by McCARDIE, J., in the *Diamond Alkali Export Corporation v Bourgeois*. In that case the Diamond Alkali Corporation of New York, by a contract dated 7th August, 1920, agreed to sell to Bourgeois of London 50 tons of soda ash for September-October shipment from American shipboard at $4.70 per 100 lbs, c.i.f. Gothenburg. Terms of payment were cash against documents under confirmed banker's credit at London. It was common cause between the parties that English law governed, and the question was whether the bill of lading and certificate of insurance were, together with the invoice for the goods, valid and sufficient to entitle the

sellers to payment of the price. The bill of lading was "received in apparent good order and condition to be transported by the s s. 'Anglia', or failing shipment by said steamer, in or upon a following steamer, instead of 'as shipped per s.s. 'Anglia' '." McCARDIE, J., in a careful review of all the authorities, came to the conclusion that they were not.

In *Wilson Holgate & Co, Ltd v Belgian Grain Co, Ltd.* (1920, 2 KB 1), BAILHACHE, J., had come to the same conclusion, holding that under a c.i.f. contract for the sale of goods, the seller, in the absence of any custom or special stipulation to the contrary, does not perform his obligation of tendering to the buyer along with the other shipping documents a policy of insurance by tendering instead of a proper policy a broker's cover note or a certificate of insurance. "It has been settled," says BAILHACHE, J., at page 7, "at any rate since BLACKBURN, J. delivered his well-known judgment in *Ireland v Livingston* about forty-seven years ago, and it had apparently been settled even earlier, that under a c i f contract for the sale of goods the documents which the seller is bound to tender to the buyer are a bill of lading, an invoice and a policy of insurance, and it is well understood that under a contract of that kind these are the documents which the seller is required to tender." He proceeds to point out that "a certificate of insurance is generally but not always used in a case where the goods which are the subject-matter of the sale are insured by an open or a floating policy, which covers other goods as well as the particular goods in question,

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and is for a larger amount than if it covered these goods only." And although he remarks that American certificates of insurance are accepted in the United Kingdom as policies (a statement which MCCARDIE, J., in the *Diamond Alkali* case questions), he proceeds to point out that a policy must be issued if the buyer requires it. The buyer according to him is entitled to have a document of the very kind which he has agreed to take.

It must be admitted that the decision of the Privy Council in the case of the *Marlborough Hill v Cowan & Sons* (1921, 1 AC 444) goes further. In that case it was held that shipping instruments which are called bills of lading, and known in the commercial world as such, are sometimes framed in the alternative form --- "received for *shipment*" instead of "shipped on board" --- and further with the alternative contract to carry or promise some other vessel to carry instead of the original ship. No doubt the decisions of the Privy Council, even where they are not binding upon this Court, are always entitled to the highest respect. But it is not necessary to consider this case, for, as MCCARDIE, J., points out in the *Diamond Alkali* case, the decision actually turned upon a question of jurisdiction under sec. 6 of the Admiralty Court Act of 1861, and is therefore not in point. As far back as the year 1876, Lord CAIRNS in *Bowes v. Shand* (1876-7, 2 AC 455), in pointing out that merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, remarked that a purchaser is entitled to insist upon the due performance of his contract by the seller, and the seller cannot succeed unless he has tendered the thing which has been contracted for. So where the contract was for 300 tons of rice "to be shipped during the months of March and/or April", and it was proved that all the rice was on board by the end of February, it was held that the contract had not been complied with. I have referred at some length to the English law on the subject because, apart from the fact that it has been incorporated into the law of the Cape Province, it serves to show what principles are involved in the present appeal.

But we have seen that the American law governs in the present instance, not the law of the Cape Province or the English law. Now it has not been contended that a bill of lading in the

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ordinary acceptation of the term, an ocean bill of lading, would not have satisfied the terms of the principal contract. If Igleheart Bros had with the drafts tendered what has for centuries been universally known as a bill of lading, there can be no question that they would have been entitled to demand payment, just as if the goods had been actually delivered to the buyer. In this respect the American law differs in no way from the English law. But now it is sought to take the law a long step further. For it is in effect contended that under a c.i.f. contract a seller is not only absolved from actual delivery of the goods, but he is also absolved from making a symbolical delivery of the goods by handing over the documents of title. The contention comes to this that a seller discharges his obligations under the contract if he produces a receipt, called a through bill of lading, signed by the agents of all the carriers concerned, including the Conference Line, acting in concert on the route, with an undertaking on the part of each to hand over the goods in question to the next carrier, and so on till they are ultimately shipped on a vessel which is not determined at a date which cannot be fixed. Upon the production of such a document, it is contended, the

seller is entitled to payment just as if the goods had actually been delivered to the buyer. Parties are, of course, free to enter into any stipulations they choose, but he who undertakes to prove that, apart from contract, the transfer of such a document is by the law or custom of a particular country equivalent to performance has a heavy *onus* to discharge.

That *onus* has not been discharged in the present case. In the first place, if transfer of a through bill of lading was equivalent to performance according to the law or custom of the United States, one would have expected that some authority to that effect would have been produced. But no authority, either in the shape of judicial decisions or any other kind was quoted. The regulations framed and adopted by the New York Bankers Commercial Credit Conference of 1920 certainly do not support the bank. The conference ruled that, unless expressly stipulated, payment should not be made against a through bill of lading except on exportations to the Far East *via* Pacific ports. Now the regulations have neither the force of law nor of a custom unless it be shown that they are actually observed in practice.

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It is said that up to the passing of the regulations payment against a through bill of lading was always made, but the fact that the conference refused to go so far rather goes to show that where payment was made against a through bill of lading, it was done voluntarily, and not because of any binding trade usage.

Leaving the evidence for the defence and looking merely at the evidence for the bank, Theed, sub-accountant of the New York Agency, was the person who negotiated the drafts. He deposed that he considered that if the bank had refused to discount the drafts the bank would have been liable in damages to Igleheart Bros. But such an opinion without proof is of no value. Streeter, who is with freight brokers and forwarding agents in New Jersey, says it was customary in 1920 to issue through bills of lading from New York to South Africa amongst other places. In his opinion a through bill of lading is a shipping document. But that does not take the case any further. The question is not whether a through bill of lading is sometimes called a shipping document, but whether the document in question answers the description of bill of lading in the sense of a document, the endorsement of which amounts to delivery of the goods. Mayer is to the same effect. Rice, of the firm of attorneys who were acting for the bank before the Commision, states that in his opinion a through bill of lading is a shipping document, but nowhere does he go so far as to say that indorsement of such a bill of lading is performance by the seller of his contract. Nor does the evidence of Lancaster, another lawyer, take the case any further. In his opinion the documents in this case comply with the requirements of the credit. That is all his evidence amounts to, but that is not enough. In the absence of a clear agreement to the effect that the seller discharges his obligations by tendering a through bill of lading, Igleheart Bros could not demand the purchase price either from the buyer or from the New York Agency of the bank until they had either delivered the goods to the buyer or done what is in law considered equivalent to such delivery. Mudie, of the Freight Department of the Union-Castle Company, says they recognise a through bill of lading as a bill of lading, but only when they have received the master's copy, because that shows the goods are actually on board. In the present case the drafts were negotiated in New York long before the goods had

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arrived at the ship. Besides, if the contention of the bank is correct, there would be no necessity to wait for the counterpart, the through bill of lading would have the same force in law as an ordinary bill of lading from the time that it is obtained by the seller. According to Glover, of the firm of Dent & Glover, Ltd., through or export bills of lading are very common with regard to certain commodities: cotton, flour and goods of a perishable nature. Such a bill of lading and an insurance certificate would be accepted in America as against a letter of credit such as this. This evidence does not go far enough, for it has to be proved that in America the bank would by law or custom have been bound to accept these documents. And he admits with Mudie what is important to note, that from America in a very large number of cases the goods go out on a regular ordinary ship's bill of lading. Ritchie, of Thompson, Watson & Co., who represent Lloyds (London) in Cape Town, and are also the agents for Lloyds (America), is to the same effect. Through bills of lading are honoured the same as ocean bills of lading provided, he adds, the goods are on the steamer. They are, according to him, effective documents of title, but only when once the goods are on the ship. The evidence of Hands, a banker, is also to the same effect. In his opinion a through bill of lading is a bill of lading within the meaning of the credit. But the same criticism applies to such an opinion. Short of proof that a through bill of lading is a document of title in America, symbolising the delivery of the goods by the seller to the purchaser, and that payment can therefore be enforced the same as on an ocean bill of lading, the evidence does not take the case any further.

But it was said that in any case the words "bill of lading" are ambiguous, and that as the bank was the agent of the respondent and *bona fide* thought that a through bill of lading would suffice, the respondent is liable, as he should have made his meaning clear. To this it is sufficient to reply that, in the absence of proof that according to American law and custom the tender of a through bill of lading would have satisfied the contract, the words "bill of lading" in the credit note mean an ocean bill of lading as the bank should have known; that there is no ambiguity about them, and that a person who undertakes to present such a document with the draft must present a bill

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of lading proper and not an instrument of an entirely different nature.

An argument was also founded upon the last clause of the credit note to the effect that the bank was not required to examine into the correctness of the documents, and that Efroiken undertook to bear all risks arising out of or consequent on the issue of the credit. This argument was not strenuously advanced, and cannot be supported. The bank was under no obligation to examine into the correctness of the documents, but at least the documents had to answer to the description of bills of lading, which they do not. And that disposes of the argument that this was a risk undertaken by Efroiken, for such a construction would be inconsistent with the stipulation that a bill of lading should accompany the drafts. Under these circumstances it is unnecessary to express any opinion as to the sufficiency or otherwise of the certificate of insurance.

For the above reasons I have come to the conclusion that the judgment of BENJAMIN, J., was right, and that the appeal must be dismissed with costs.

NEWMAN'S CASE.

The case of Newman need not detain us long. It is unnecessary to set forth the full document signed by Newman on 1st July, 1920, applying for a credit to be established on his behalf by the New York Agency of the bank. It proceeds very much on the same lines as the document upon which Efroiken is sued. But it differs in three respects from that document; there is no reference to risk; all that is stipulated is "It is understood that neither you nor your agents are to be required to examine into the correctness of documents tendered, you and they being hereby authorised to accept such documents as representing goods according to their purport." The clause dealing with the documents to accompany the drafts is as follows: "Draft to be accompanied by full set of shipping documents, including marine and war risks policies for merchandise shipped to Cape Town." Finally there was no reference to a c.i.f. contract in the document. A draft for £2,013 for 648 bags of flour was refused on presentation on the ground that the through bill of lading was not a bill of lading proper, and, therefore, not one of the shipping documents contemplated. The flour arrived in New York on the 16th September and came to South Africa in the "Chinese Prince." It was sold

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by consent for whom it may concern for £1,191 3s. 11d, and the claim is for the difference between that amount and the £2,013.

The contention of the bank is that a through bill of lading and a certificate of marine and war risks insurance answered the above description. Newman on the other hand contends that a "full set of shipping documents" includes (1) a bill of lading proper, and (2) a marine policy.

Now the draft had to be accompanied by a full set of shipping documents, which shows that payment was only to be made against performance by the sellers of their contract. It may be readily conceded that the word "shipped" is sometimes loosely used to cover conveyance by rail, but it has not been argued that a full set of shipping documents does not include a bill of lading which, for the reasons given in Efroiken's case, is an ordinary bill of lading. I am of opinion that this appeal must also be dismissed with costs.

WESSELS, J. A.: I agree with the judgment of my brother de Villiers.

The whole of the contract between the bank and Efroiken is set out in the letter of credit of 21st July, 1920.

This letter involves two agreements one between Efroiken and Igleheart and one between Efroiken and the

bank.

1. The first is a mandate to Igleheart Bros. to draw upon Efroiken before 5th September, 1920, drafts up to £8,200 at 60 days after sight in favour of the New York Branch of The Standard Bank of South Africa, being for purchase price of wheat bought from Igleheart Bros.

2. The second is an agreement with the bank as *bona fide* holder of such drafts to pay to the bank at Cape Town.

Both these agreements are subject to the proviso that the drafts are to be accompanied by Ocean Bills of Lading and Marine Insurance Policies for a c.i.f. contract Cape Town.

The mandate was to be carried out in America. It was there that Igleheart Bros was to ship the wheat and it was there that the bill of lading and insurance policies were to be drawn up. If, therefore, ocean bills of lading and insurance policies were unknown in America and if by American law through bills of lading and insurance certificates completely took their place,

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then clearly Igleheart Bros would have done all that in law they were required to do if they attached to their drafts through bills of lading and insurance certificates, for it is a well-known principle of law that if a contract is to be performed in a particular place the parties impliedly agree that the contract is to be performed in accordance with the usages and law of such place. (*Chatenay v Brazilian Submarine Telegraph Co*, 1891 QBD 79). As the contract provides that ocean bills of lading and marine insurance policies such as are usually in c.i.f. contracts are to be attached to the drafts, Efroiken was *prima facie* entitled to refuse payment of the drafts unless they were accompanied by these documents. It therefore became the duty of the bank to prove that in this particular case by American law the usual ocean bills of lading and marine insurance policies could be dispensed with and that the contract would have been sufficiently performed if the drafts were accompanied by American through bills of lading and insurance certificates. The bank must show that whenever it is agreed upon in America that an ocean bill of lading and marine policies are to be provided, American law allows a contracting party to substitute a through bill of lading and an insurance certificate. It is quite clear from the evidence tendered in this case and from American text books that though through bills of lading and certificates of insurance are much used in America, ocean bills of lading and certificates of marine insurance policies are also, not only well-known to American law, but are very prevalent. If therefore both kinds of documents are in use in America it was the duty of Igleheart Bros to procure those documents which were stipulated for in the contract and not to substitute for them documents which in their opinion or in the opinion of commercial men are quite as good. Efroiken is entitled to insist that the contract should be carried out as stipulated and not in accordance with what one contracting party considers an equivalent. (*Diamond Alkali Export Corporation v Bourgeois*, 1921, 3 KB 443; 126 L.T p. 379).

It is only by showing that by American law a contracting party performs his contract if, being required to provide an ocean bill of lading and a marine policy, he substitutes a through bill of lading and an insurance certificate. No American case or text

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book has been cited to us which lays it down that in America a through bill of lading is the same as an ocean bill of lading and can replace it, or that a certificate of insurance is the same as a marine insurance policy. It is not enough to show that some commercial men accept them as equivalents, it must be shown that by American law they are actually regarded as equivalents. As both ocean bills of lading and marine policies are well-known shipping documents according to American law and usage it was the duty of Igleheart Bros to have attached these documents stipulated for in the contract to the drafts and it was incumbent on the bank to see that these documents were attached to the drafts before they were entitled to demand payment from Efroiken. As the drafts were not accompanied by these documents the bank could not compel Efroiken to pay them and therefore the appeal must fail with costs.

Upon the same principles Newman was entitled to demand that a policy of marine insurance should be attached to the drafts before he could be required to pay them. In this case therefore the appeal should also fail with costs.

INNES, C.J., and KOTZE, J.A, concurred.

Appeal accordingly dismissed.

Appellant's Attorneys: *Fairbridge, Arderne & Lawton,* Cape Town; *Kannemeyer & Jeffreys,* Bloemfontein; Respondent's. Attorneys: *Coulter & Co.,* Cape Town.