[HOUSE OF LORDS.]

H. L. (E.) 1884 March 28.

THE MERSEY STEEL AND IRON CO. (LIMITED) . . . . . } APPELLANTS;

AND

NAYLOR, BENZON & Co. . . . . RESPONDENTS.

Sale of Goods—Contract for Delivery of Goods by Instalments—Contract, Rescission or Repudiation of—Company, Winding-up of—Set-off of unliquidated Damages against Claim of Company in Winding-up—Counter-claim—Judicature Act 1875 (38 & 39 *Vict. c.* 77) *s.* 10—*Order* XIX. *r.* 3.

The respondents bought from the appellant company 5000 tons of steel of the company's make, to be delivered 1000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On the 2nd of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents bonâ fide, under the erroneous advice of their solicitor that they could not without leave of the Court safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the Court, which they asked the company to obtain. On the 10th of February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th of February an order was made to wind up the company by the Court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery:—

Held, affirming the decision of the Court of Appeal, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; that the respondents had not, by postponing payment under erroneous advice, acted so as to shew an intention to repudiate the contract, or so as to release the company from further performance.

That s. 10 of the Judicature Act, 1875, imported into the winding-up of

companies the rules as to set-off in bankruptcy; that the respondents were entitled, after the winding-up order was made, to set off damages for non-delivery against the payments due from them, and to counter-claim for damages in this action.

APPEAL from an order (dated June 13, 1882) of the Court of Appeal (Jessel M.R. Lindley and Bowen L.JJ.) reversing an order of Lord Coleridge C.J. The facts are fully set out in the report of the decisions below (1). All the facts material to the present report are stated in the head-note. It may be added that the referee having found that the damages due to the defendants for non-delivery amounted to £1723, being in excess of the £1713 admitted to be due to the plaintiffs for the price of the steel delivered, the Court of Appeal by an order dated the 13th of April 1883 gave judgment for the defendants with costs. The plaintiffs appealed from this order also.

March 27, 28. *A. Cohen* Q.C. and *French* (*C. Russell* Q.C. with them) for the appellants:—

As to the first point, the rights of the parties upon the contract, the Court of Appeal did not apply the true principle for the determination of a case like the present. A contract of the kind now sued on is made on the assumption that the parcel already delivered will be paid for punctually and in time to put the manufacturer in funds to provide for the manufacture and delivery of the next parcel. If either party to such a contract breaks it in a material part the other is absolved from performing his part: *Hoare* v. *Rennie* (2); *Honck* v. *Muller* (3). Payment for one parcel is a condition precedent to the delivery of the next. If the purchaser is solvent he ought to pay: if insolvent it is unjust that he should have delivery; and the seller is justified in refusing to deliver: *Turnbull* v. *McLean* (4). The question which must be decided here was left open by Patteson J. in *Withers* v. *Reynolds* (5). The Court of Appeal proceeded on the ground that in order to set free the vendor the purchaser must evince an intention not to perform the rest of the contract. That cannot be; it is enough if

(1) 9 Q. B. D. 648.
(2) 5 H. & N. 19.
(3) 7 Q. B. D. 92.
(4) 1 Court Sess. Cas. (4th Ser.) 730.
(5) 2 B. & Ad. 882, 885.

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one party refuses to perform any material part: in other words if the contract originally made is substantially different from the contract which the purchaser seeks to enforce upon the vendor. The law gives no damages or remedy for the breach of a contract to pay money: not even interest unless stipulated or recoverable under the statute: therefore the Courts should be slow to compel the vendor to deliver without payment. Up to the 15th of February the respondents declined to pay, under a mistaken notion that the appellants could not give a discharge: after that date they refused to pay because they claimed to deduct unliquidated damages: they had no right thus to take the law into their own hands. Though not so expressed, payment is implied as a condition precedent; see notes to *Pordage* v. *Cole* (1); *Graves* v. *Legg* (2); *Coddington* v. *Paleologo* (3); *Bradford* v. *Williams* (4), per Martin B. The rule in equity that time is not of the essence of the contract does not apply in mercantile contracts: *Reuter* v. *Sala* (5), per Cotton L.J. *Freeth* v. *Burr* (6) was wrongly decided; but if right is distinguishable.

As to the second point, the respondents had no right of set-off. Before the Judicature Act it will be admitted that there could be no set-off of unliquidated damages against a company being wound up, and the only question is whether s. 10 of the Judicature Act 1875, has the effect of importing into a winding-up the rules of set-off contained in s. 39 of the Bankruptcy Act 1869. There is no decision on the point except the one under appeal, but on principle the answer to that question should be in the negative. It has been held that s. 87 of the Bankruptcy Act 1869 is not imported into a winding-up: *In re Withernsea Brickworks* (7); nor s. 32: *In re Albion Steel and Wire Company* (8); nor s. 34: *Thomas* v. *Patent Lionite Company* (9). The more reasonable construction of s. 10 is that it imports only those portions of bankruptcy laws and rules which are expressly mentioned.

(1) 1 Wms. Saund. 548 (ed. 1871).
(2) 9 Ex. 709.
(3) Law Rep. 2 Ex. 193.
(4) Law Rep. 7 Ex. 259.
(5) 4 C. P. D. 239, 249.
(6) Law Rep. 9 C. P. 208.
(7) 16 Ch. D. 337.
(8) 7 Ch. D. 547.
(9) 17 Ch. D. 250.

Sir *F. Herschell* S.G. (*Bigham* Q.C. with him) for the respondents, was directed to confine his argument to the question upon the right of set-off.

The bankruptcy rules as to set-off are clearly imported into a winding-up by the very words in s. 10, "the same rules shall prevail and be observed as to debts and liabilities provable as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." If the right of set-off is not imported a different "debt" will be provable in equity to that provable in bankruptcy. To this effect is the dictum of Bacon V.C. in *In re Compagnie Générale de Bellegarde* (1).

EARL OF SELBORNE L.C.:—

My Lords, in this case I will deal first with the last point which has been argued, and it appears to me that it lies within a very narrow compass. The Act of 1875 has said that for certain purposes "the same rules shall prevail and be observed" in winding up under the Companies Acts "as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt," and I cannot help pausing to observe upon what is a little remarkable in that enactment. It is not the rules that *were* in force when the Act of 1875 was passed, but the rules which "*may be* in force for the time being;" marking very strongly the principle on which the legislature in this enactment proceeded, namely, that they treated the cases as in pari materiâ, governed, as the former clearly are, by the same principles which govern the law of insolvency or bankruptcy; that it was safe not only to apply the then existing rules upon that subject but to apply them with any future addition or alteration which in legislation as to bankruptcy might be thought fit. That I think very distinctly confirms the weight which otherwise might be due to a consideration of the principle and reason of the enactment. But I do not think that any aid from that consideration is really necessary, because we find that among the rules which are to be imported from bankruptcy there are included the rules "as to debts and liabilities provable." Is not

(1) 4 Ch. D. 475.

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the rule in question one as to debts and liabilities provable? It occurs in that division of the Bankruptcy Act 1869 which is under the sub-heading, "Payment of debts and distribution of assets." The 1st section under that head is one which, following a series of earlier statutes, makes demands in the nature of unliquidated damages, arising by reason of contract, provable in bankruptcy, and similar demands which do not so arise and which are not of that nature not provable. The Act defines what are to be proved—all debts and liabilities and obligations except certain things which are excepted—there are two or three clauses dealing with special matters, and we then come to the 39th, which occurs under the same division of the statute. "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, *and no more*, shall be claimed or paid on either side respectively." Your Lordships observe that it is not that it *may be*—it is not a thing which is optional, but it is a positive, absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account; that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy. That being so, how is it possible to say that this is not a rule, both within the general spirit and intention of the section and within the express words "as to debts and liabilities provable"? I do not think it necessary to say more upon that subject.

Upon the other point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (1), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the

(1) Law Rep. 9 C. P. 208.

one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to shew why I cannot adopt Mr. Cohen's argument, as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so, of course there would be an end of the case; but to me it is plain beyond the possibility of controversy, that upon the proper construction of this contract it is not and cannot be a condition precedent. The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, "Delivery 1000 tons monthly commencing January next;" and as to the time of payment, "Payment nett cash within three days after receipt of shipping documents;" but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel.

But, quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle,

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that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion? Now the facts relied upon, without reading all the evidence, are these. The company at the time when the money was about to become payable for the steel actually delivered fell into difficulties, and a petition was presented against them. There was a section in the Companies Act 1862, (sect. 153), which appeared to the advisers of the purchasers to admit of the construction, that until in those circumstances the petition was disposed of by an order for the company to be wound up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did, evidently bonâ fide, because they doubted, on the advice of their solicitor, whether that section of the Act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which according to the advice they received they supposed to exist, namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due; and of course until there is a legal personal representative of that person no receipt can be given for the money. By the Act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation.

I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On the 10th of February, which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (being so far correct and thinking rightly) that the objection was not well founded in law; and they added, "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part and as releasing us from any further obligations on our part." I think that they were wrong in that conclusion; and that there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it a refusal—of such a demur, such a delay or postponement, under those circumstances.

The company, until they were wound up, never receded from that position which they took up on the 10th of February 1881; and it appears to me to be clear that the liquidator adopted it, and never departed from it; and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending and before the winding-up order was made, was adhered to after the winding-up order was made, on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon the 17th of February 1881, after the making of the winding-up order, they state that there are instalments which ought to have been delivered but which have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them; and, according to the view which

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has been taken in the Court of Appeal of the effect of the 10th section of the Act of 1875, and in which view I believe your Lordships agree, that was the right way of looking at the matter. Then the respondents go on to say, that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced—a perfectly reasonable, defensible, and justifiable proposal. And the solicitor who writes the letter adds, "Or I think it probable that my clients would consent to accept delivery now and waive the damages," a thing which in a later letter they express their willingness to do. In my judgment, they have not in any portion of the proceeding acted so as to shew an intention to renounce or to repudiate the contract, or to fail in its performance on their part.

Therefore I think that the judgment of the Court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

LORD BLACKBURN:—

My Lords, I am of the same opinion. On the effect of the 10th section of the Act of 1875, I will only say that I perfectly agree with what the Court below have said and with what has been said by the Lord Chancellor.

As to the first point, I myself have no doubt that *Withers* v. *Reynolds* (1) correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract I will not perform mine" (in *Withers* v. *Reynolds* (1) it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say, "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it,

(1) 2 B. & Ad. 882.

but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract." That was settled in *Hochster* v. *De La Tour* (1) in the Queen's Bench and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived.

That is the law as laid down in *Withers* v. *Reynolds* (2). That is, I will not say the only ground of defence, but a sufficient ground of defence. In *Freeth* v. *Burr* (3) it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at it is to me clear that that is not so. So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, "Because we have power to do wrong we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a bonâ fide statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of *Withers* v. *Reynolds* (2) and *Freeth* v. *Burr* (3), and consequently, as I understand it, Lord Coleridge made a mistake in the ground on which he went. The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole* (4)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my

(1) 2 E. & B. 678.
(2) 2 B. & Ad. 882.
(3) Law Rep. 9 C. P. 208.
(4) 1 Wms. Saund. 548 (ed. 1871).

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part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." But Mr. Cohen contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract. With regard to the case of *Hoare* v. *Rennie* (1) it has been said that the Chief Baron there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that when in the present case the January shipment had not been made, and the company could only deliver part of the quantity, it went to the essence of the contract. The question depends upon whether the whole and no less is the essence of it. And again in *Honck* v. *Muller* (2), which has been referred to, it is expressly and pointedly shewn that that was the ground taken, and the noble and learned Lord opposite (Lord Bramwell) stated that in his opinion the contract of the one party was to deliver and of the other to take 2000 tons of iron, and that inasmuch as it was to be by three instalments and the first was gone and there never could be more than

(1) 5 H. & N. 19. (2) 7 Q. B. D. 92.

two-thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two-thirds when the plaintiff required the two-thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. The present Master of the Rolls seems, if I understand him rightly, to have thought that that was not the true construction of the contract —whether it was or not I do not express any opinion, except to point out that whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract; and that being so, these cases have really no bearing upon the matter.

The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterwards to be a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.

LORD WATSON:—

My Lords, I am of the same opinion. I think it would be impossible for your Lordships to sustain the appeal unless your Lordships are prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside. I think the correspondence shews that the delay in making payment of that part of the contract price which ought to have been paid on the 5th of February, was due to these two causes; in the first place, a very natural desire on the part of the purchasers to see that they were safe against being called upon to make second payment of the price, and in the second place an obvious desire on the part of the sellers to get rid of the contract altogether. There was no controversy as to the terms of the contract. There was no unwillingness on the part of the respondents to pay the price due under the contract, except for the circumstance that there had been a change in the constitution of the company, because they had gone into liquidation on the 2nd of February, and the respondents' firm were

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advised by their law agent that they were not in safety to pay until the liquidator was appointed.

That brings us down to the 15th of February. At that date this had taken place, the company had given notice on the 10th of February of their resolution to repudiate the contract in consequence of the failure of the respondents to pay, and to that repudiation the liquidator I think consistently adhered. In these circumstances it appears to me that the judgment appealed from must be affirmed.

LORD BRAMWELL:—

My Lords, I am of the same opinion, and shall say but very few words. My Lord Coleridge says that the defendants, the now respondents, positively refused to pay for the iron already delivered, and for all which might be subsequently delivered. Now whether, if they had positively refused to pay for that already delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it is not necessary for me to say at the present moment. I do not say that it would not; but if they had positively refused to pay for all which might be subsequently delivered, it would undoubtedly be an answer upon the authority of *Withers* v. *Reynolds* (1), and the reasoning which you have heard. But I really cannot, with great submission to the noble Lord, find any evidence of that, and Mr. Cohen certainly did not attempt to prove it: but he set up a new ground, which was that the payment of the debt due was a condition precedent to the further performance of the agreement, with which I cannot at all agree.

I have just one other word to say. I cannot tell why *Honck* v. *Muller* (2) and *Hoare* v. *Rennie* (3) should be brought forward upon this occasion. I do not think that I said in *Honck* v. *Muller* (2) what Sir George Jessel (4) supposed me to have said, namely that "in no case where the contract has been part performed could one party rely on the refusal of the other to go on." If I did say so I recall it, because I do not think so; it depends on the nature of the contract and the circumstances of the case.

(1) 2 B. & Ad. 882.
(2) 7 Q. B. D. 92.
(3) 5 H. & N. 19.
(4) 9 Q. B. D. 658.

What I was busy upon in that case was in shewing that there had been no performance at all there, and that in truth what the plaintiff was seeking to do was to make the defendant accept the performance of something entirely different from what had been agreed upon, and I think in that opinion I was right. But what has that to do with this case? Suppose I was wrong, what then? Suppose *Honck* v. *Muller* (1) was wrongly decided, how does it bear upon this case? Not in the least. Nor indeed does the case of *Hoare* v. *Rennie* (2), which, in my opinion, was decided upon the considerations which I have mentioned and which I think should be supported.

LORD FITZGERALD:—

My Lords, I concur.

Orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 28th March 1884.

Solicitors for appellant: *W. W. Wynne & Son for Simpson & North, Liverpool.*

Solicitor for respondents: *Clements.*

(1) 7 Q. B. D. 92.

(2) 5 H. & N. 19.