Norrington Vs. Wright

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Appellant : Norrington

Respondent : Wright

Judgement :

Norrington v. Wright - 115 U.S. 188 (1885)
U.S. Supreme Court Norrington v. Wright, 115 U.S. 188 (1885)

Norrington v. Wright, 115 U.S. 188 (1885)

Argued January 20-21, 1885

Decided October 26, 1885

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I N ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLLABUS

In a mercantile contract, a statement descriptive of the subject matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.

Under a contract made in Philadelphia, for the sale of

"5,000 tons iron rails, for shipment from a European port or ports at the rate of about 1,000 tons per month, beginning February, 1850, but whole contract to be shipped before August 1, 1880 at $45 per ton of 2,240 lbs, custom house weight, ex ship Philadelphia; settlement cash on presentation of bills accompanied by custom house certificate of weight; sellers not to be compelled to replace any parcel lost after shipment,"

the sellers are bound to ship 1,000 tons in each month from February to June inclusive, except that slight and unimportant deficiencies may be made up in July, and if only 400 tons are shipped in February, and 885 tons in March, and the buyer accepts and pays for the February shipment on its arrival in March at the stipulated

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price and above its market value, and in ignorance that no more has been shipped in February, and is first informed of that fact after the arrival of the March shipments and before accepting or paying for either of them, he may rescind the contract by reason of the failure to ship about 1,000 tons in each of the months of February and March.

This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19, 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for

shipment from a European port or ports at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880 at forty-five dollars ($45.00) per ton of 2240 lbs. custom house weight, ex ship Philadelphia. Settlement, cash, on presentation of bills accompanied by custom house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia."

"Edward J. Etting, Metal Broker"

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails, to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract verbatim. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July shipped the goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants, and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom house certificates of weight, according to the contract, and the defendants' refusal to accept them.

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The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs at the rate of about 1,000 tons a month in March, April, May, June, and July. The defendants pleaded non assumpsit. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, they gave Etting written notice that they should decline to accept the shipments made in March and April because none of them was in accordance with the contract, and in answer to a letter from him of May 16, wrote him on May 17, as follows:

"We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course, we must abide the consequences; but if we are right, you have

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not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we, of course, will avail ourselves of this advantage."

On May 18, Etting wrote to the defendants, insisting on their liability for both past and future shipments and saying, among other things:

"In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month. . . . As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage if you are absolved from the contract, but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19, the defendants replied:

"We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be, and certainly neither the February, March, nor April shipments are within the limits. As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to

give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required. . . . You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not

if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

On June 10, Etting offered to the defendants the alternative of delivering to them one thousand tons strict measure on account of the shipments in April. This offer they immediately declined. On June 15, Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day, the defendants replied that the notification as to April shipments could not be corrected at this late date and after the terms of the contract had long since been broken.

From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended 1st, that under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in anyone month; 2d, that if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of

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the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship

about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them. The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error

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MR. JUSTICE GRAY delivered the opinion of the Court. After stating the facts in the language above reported, he continued:

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident such as the time or place of shipment is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law -- that is to say, a condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness,* 3 B. & S. 751; *Bowes v. Shand,* 2 App.Cas. 455; *Lowber v. Bangs,* 2 Wall. 728; *Davison v. Von Lingen,* 113 U. S. 40 .

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to

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shipping in different months and as to paying for each shipment upon its delivery do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. *Mersey Co. v. Naylor,* 9 App.Cas. 434, 439. The further provision that the sellers shall not be compelled to replace any parcel lost after shipment simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June, inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer in a certain mill -- in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule:

"When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like in such cases is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight."

Brawley v. United States, 96 U. S. 168 , 96 U. S. 171 -172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity

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or to require him to select part out of a greater quantity, and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be

delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron, and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon v. Bertram,* 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases

and as a diversity in the law as administered on the two sides of the Atlantic concerning the interpretation and effect of commercial contracts of this kind is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to, they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare v. Rennie,* 5 H. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron to be shipped from Sweden in June, July, August, and September, and in about equal portions each month at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about twenty tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross-action. But judgment was given for the defendants, Chief Baron POLLOCK saying:

"The defendants refused to accept the first shipment because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract -- they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore,

the pleas are an answer to the action."

5 H. & N. 28. So in *Coddington v. Paleologo,* L.R. 2 Exch. 193, while there was a division of opinion upon the question whether a contract to supply goods, "delivering on April 17, complete 8th May," bound the seller to begin delivering on April 17, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in *Simpson v. Crippin,* L.R. 8 Q.B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only 150 tons during the first month, and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt v. Lawrence,* 1 Q.B.D. 344, in which the contract was for the purchase of 4,500 quarters, ten percent more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of *Bowes v. Shand,* after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q.B.D. 470; 2 Q.B.D. 112; 2 App.Cas. 455.

In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast for this port during the months of March and/or April, 1874, per *Rajah of Cochin.* " The 600 tons filled 8,200 bags, of which 7,120 bags were put on board, and bills of lading signed in February, and for the rest, consisting of 1,030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence

was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April or in one of those months.

In the opinions there delivered, the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said:

"It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance."

2 App.Cas. 463.

"If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning -- it is no observation which can dispose of, or get rid of, or displace, that literal meaning -- to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The nonfulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled."

Pp. 465-466.

"It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular

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damage resulted to them from the rice's not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. . . . The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfillment of the contract."

Pp. 467-468.

Lord Blackburn said:

"If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin.* But the parties have chosen, for reasons best known to themselves, to say we bargain to take rice,

shipped in this particular region at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfillment of that contract, it must be shown not merely that it is equally good, but that it is the same article as they have bargained for; otherwise they are not bound to take it."

2 App.Cas. 480-481.

Soon after that decision of the House of Lords, two cases were determined in the Court of Appeal. In *Reuter v. Sala,* 4 C.P.D. 239, under a contract for the sale of

"about twenty-five tons (more or less) black pepper, October and/or November

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shipment, from Penang to London, the name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading,"

the seller, within the sixty days, declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November and five tons in December, and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Honck v. Muller,* 7 Q.B.D. 92, under a contract for the sale of 2,000 tons of pig-iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January, and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as cancelled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co. v. Naylor,* 9 App.Cas. 434, affirming the judgment of the Court of Appeal in 9 Q.B.D. 648, and following the decision of the Court of Common Pleas in *Freeth v. Burr,* L.R. 9 C.P. 208. But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be

no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first installment.

The Lord Chancellor said:

"The contract is for the purchase of 5,000 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 1,000 tons monthly, commencing January next' -- and as to the time of

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payment -- 'payment net 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 fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel."

9 App.Cas. 439.

Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in *Simpson v. Crippin* and to disparage the decisions in *Hoare v. Rennie* and *Honck v. Muller,* above cited, yet in the House of Lords, *Simpson v. Cripping* was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well and Lord Bramwell, who had delivered the leading

opinion in *Honck v. Muller,* distinguished *Hoare v. Rennie* and *Honck v. Muller* from the case in judgment. 9 App.Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare v. Rennie* and *Coddington v. Paleologo,* as well as in the later cases of *Reuter v. Sala* and *Honck v. Muller,* appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Cripping* and *Brandt v. Lawrence,* and to accord better with the general principles affirmed by the House of Lords in *Bowes v. Shand,* while it in no wise contravenes the decision of that tribunal in *Mersey Co. v. Naylor.*

In this country, there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are *Hill v. Blake,* 97 N.Y. 216, which accords with *Bowes v. Shand* and *King Philip Mills v. Slater,* 12 R.I. 82, which approves and follows *Hoare v. Rennie.* The recent

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cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn v. Bodine,* 60 Penn.St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during the months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan v. McKee,* 77 Penn.St. 228, and in *Scott v. Kittanning Coal Co.,* 89 Penn.St. 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one installment was denied only because that right had been waived, in the one case by unreasonable delay in asserting it and in the other by having accepted, paid for, and used a previous installment of the goods. The decision of the Supreme Judicial Court of Massachusetts in *Winchester v. Newton,* 2 Allen 492, resembles that of the House of Lords in *Mersey Co. v. Naylor.*

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. *See Busk v. Spence,* 4 Camp. 329; *Graves v. Legg,* 9 Exch. 709; *Reuter v. Sala,* above cited.

Judgment affirmed.

THE CHIEF JUSTICE was not present at the argument, and took no part in the decision of this case.