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THE DOCTRINE OF DIVISIBLE CONTRACTS.

A very familiar contract, in these days of great commercial enterprises, is one in which the engagement of at least one of the parties is multiple in form. What is the effect of a default in the performance of a single item in such a multiple engagement? May the party not in fault, in the absence of an express condition, repudiate the contract so far as it is unperformed, or is he confined to his remedy in damages for the breach? The question was early discovered by the courts to be a somewhat difficult one, and apparently with the purpose of establishing a guiding rule of construction, an endeavor has been made to classify contracts of this kind as "entire" and "divisible," or "entire" and "severable." That is to say, if the contract in a particular case be construed as entire, the violation by one party of one of the several parts or divisions of his engagement is held to relieve the other party wholly from his engagement under the contract, while if the contract be construed as divisible, the other portions of the contract remain unaffected and the party suffering from the breach is confined to his action for damages.

It is submitted that the adoption of this classification, instead of simplifying the problem, has resulted in considerable mis-

apprehension and confusion. That such has been its effect, however, is not surprising, when we consider the nature of the classification and the method of its application. The principle is fundamental, that whether the party suffering from a breach of contract is justified in refusing further to perform his engagement, or is confined to his action for damages, depends entirely upon the character of the breach. If the term violated is one the performance of which appears to have been regarded by the parties at the time of making the contract as essential to its continued existence as a binding agreement, further performance may legally be refused: if not, the obligation to perform is unaffected. In every case this is the final test, and whatever may be the form of the contract, its application is uniform. To put it briefly, it is not the nature of the *contract*, but the nature of the *breach*, that controls. In some of the leading cases arising under contracts of the class under consideration, this distinction appears to have been kept clearly in mind, and the terms "entire contract" and "divisible contract" to have been used to describe a result rather than a cause. That is to say, if the breach be of an essential term, the contract is entire; if of a non-essential term, the contract is divisible.¹ Even when the terms are used in this sense, the classification is open to criticism. Thus, in two cases, involving contracts almost identical in terms, it may be found that while in one the breach reaches the essence and the contract is therefore entire, in the other the term violated is a non-essential term and the contract is therefore divisible. Indeed, it is quite conceivable that in an action for breach of a non-essential term, a contract might be found to be divisible, and in a subsequent action for breach of a more important provision, the same contract be declared to be entire. This is well illustrated by the English decisions on instalment contracts of sale, to be discussed at some length hereafter. Suffice it to say at this point, that in an action for default in the engagement to *deliver* an instalment, the English courts, in effect, hold such contracts to be entire,² while in an action for default

¹ See *Norrington v. Wright* (1885), 115 U. S. 188.

² *Hoare v. Rennie* (1859), 5 H. & N. 19.

in *payment*, they declare them to be divisible.¹ And such would also be the logical result, even though the same contract were involved in the two actions.

The existing confusion is chiefly attributable, however, to the fact that many judges, apparently misled by the usage to which we have referred, have seemed to think that the cases turn upon the nature of the contract. And inasmuch, for example, as all ordinary instalment contracts for the sale of merchandise are substantially similar in character, it is obvious, they appear to reason, that such contracts cannot in one case be entire and in another divisible, but must always be regarded as belonging either to one class or the other. One of the consequences of this conclusion is that the leading English authorities on instalment contracts are very commonly regarded as being hopelessly in conflict, whereas we shall try to show that the real disagreement among them is very slight. Another consequence is that in many of the cases there appears to be a tendency, more or less clearly evidenced by the language of the opinions, to excuse a party suffering from a breach from further performance, or confine him to his action for damages, as the case may be, not because of the extent of the breach or of the importance in the contemplation of the parties of the term violated, but because the character of that class of contracts, as entire or divisible, has been established by prior authorities.

Aside from the difficulties already mentioned, which possibly are the natural results of the apparently unscientific nature of the classification, there is one of less importance growing out of its nomenclature. The terms "entire" and "divisible," "severable" or "separable," have come to be variously used, and consequently to be more or less indefinite in meaning. Thus they are frequently employed, and with entire propriety, in distinguishing a contract in which full performance is a condition precedent to the payment of any part of the consideration, from one in which part of the consideration accrues upon partial performance. *Baker v. Higgins* (1860), 21 N. Y. 397, affords a good illustration of this usage. In that case, under

¹ *Mersey v. Naylor* (1884), 9 App. Cases 434.

a contract to "deliver 25,000 pale brick for \$3 per M, and 50,000 hard brick at \$4 per M cash," the plaintiff delivered 10,500 hard and 10,500 pale brick and then demanded payment for that quantity. The defendant refused to pay until the entire quantity was delivered, contending that the brick was not to be paid for as delivered, but only upon the complete performance of the contract. This the court held to be the true import of the agreement, saying, "The contract was *entire*, to deliver 75,000 bricks, and the plaintiff was not entitled to pay for any part until the whole was delivered, or until he was ready and offered to deliver the balance."¹ Obviously a contract might be divisible in this use of the terms, while entire in the sense that breach as to one item would excuse further performance by the other party. The same nomenclature is employed again with reference to contracts called in question because of illegality, in which case, of course, the question is rather one of severability of subject-matter than of intention of the parties.² Moreover, the term "divisible contract" is commonly applied to transactions involving several distinct and entirely separate contracts, the courts in some instances making no distinction between such several contracts and a single so-called severable contract,³ and in others regarding all transactions as entire contracts, except those which in reality constitute several distinct and separate agreements.⁴

In view of what has been said, it is ventured to suggest that much might be gained in the direction of simplicity and clearness:

First, by abandoning the use, in this connection, of the terms "entire" and "divisible."

Second, by classifying the contracts under discussion as

¹ See also *Gill v. Johnstown Lumber Co.* (1892), 151 Pa. 534; Note to *Huyett v. Chicago Edison Co.* (1897), 59 Am. St. Rep. 277. The term "apportionable" is used by Parsons in this connection, "divisible" contracts being classified by him as apportionable or unapportionable. See Parsons on Contract (8th Ed.) Vol. 2, p. 637.

² See *Osgood v. Bander* (1888), 75 Iowa 550; *Wooten v. Walters* (1892), 110 N. C. 251; Anson on Contracts (Huffcut's Ed.) pp. 253-5.

³ See *Gerli v. Poidebard Silk Co.* (1895), 57 N. J. L. 432 at 438; Parsons on Contracts (8th Ed.), Vol. 2, p. 634, *note*.

⁴ See *Barrie v. Earle* (1886), 143 Mass. 1.

follows: (a) Unapportioned contract—one in which there is an engagement consisting of several items or divisions for a single and unapportioned consideration. (b) Apportioned contract—one in which there is an engagement consisting of several items or divisions for a single but apportioned consideration.

Third, by strictly confining the use of the foregoing classification to its proper purpose—that of description merely, so that it may be clear in every case, whether of unapportioned or apportioned contract, that the effect of a breach depends not upon the nature of the contract involved, but upon the character of the breach itself.

With these suggestions in mind, we have now to proceed to the examination of some of the adjudged cases. At the beginning, however, it is necessary carefully to distinguish the case of a mere breach of one item from that of a breach accompanied by such conduct on the part of the person committing it as amounts to an abandonment or renunciation of the entire contract. What conduct is sufficient depends in great measure, of course, upon the circumstances of each particular case, the general rule being that the circumstances should be such as to give reasonable ground for believing that the party in default does not intend to go on with the contract.¹ Whether a *refusal* to perform, as distinguished from a mere *failure* to do so, would be sufficient in all cases, may perhaps fairly be doubted. But if such refusal is positive and unqualified, the inference of an intention to renounce would seem to be inevitable.²

It should also be borne in mind that the right to repudiate because of a breach may be lost by waiver. As was pointed out in *Morgan v. McKee* (1874), 77 Pa. 228, the election to repudiate must be promptly communicated, and undue delay

¹ *Withers v. Reynolds* (1831), 2 Barn. & Adol. 882; *Bloomer v. Bernstein* (1874), L. R. 9, C. P. 588; *Otis v. Adams* (1893), 56 N. J. L. 38; *Gerli v. Poidebard Silk Co.* (1895), 57 N. J. L. 290; *Armstrong v. St. Paul Iron Co.* (1891), 48 Minn. 113; *Forsyth v. North Am. Oil Co.* (1866), 53 Pa. 168.

² See *Forsyth v. North Am. Oil Co.* (1866), 53 Pa. 168, and other cases cited above.

must be regarded as a waiver of the right to repudiate and an election to treat the contract as still subsisting.¹

Unapportioned Contracts.—Of this class of contracts, comparatively little need be said. In the case of a contract consisting of a single promise for a single consideration, the two engagements are now generally, though not invariably, construed as dependent, so that a breach by one party excuses performance by the other.² In the case of an engagement consisting of several items, given for an unapportioned consideration, a breach of a single item must be followed by the same result. This for two reasons—first, because it is impossible to separate the portion of the consideration given for the broken item from the portion given for the other items; and second, because the fact that the consideration was not apportioned by the parties to the several items is evidence that they regarded the performance of each and all of the items as essential to the contract. The first of these reasons, although undoubtedly sufficient and indeed the one commonly given, is open to criticism in that it tends to convey the impression that if, conversely, the consideration for the several items be apportioned, the party suffering from the breach is confined to his remedy in damages. This, of course, is not true. The second reason accords perfectly with the general principle governing conditions and warranties, and would therefore seem to be the more satisfactory.

The most interesting and perhaps the most difficult cases of unapportioned contract are those in which the contract is one for the construction of buildings, roads or public works, the contractor to be paid in fixed instalments at stated points in the progress of the work. These contracts have in some instances been regarded as apportioned and decided upon the authority of cases of that class. This is true, for example, of the case of *Bennett v. Shaughnessy* (1889), 6 Utah 273. There, the contract was one whereby the plaintiff agreed to excavate a tunnel twelve hundred feet in length along the

¹ See also *Clark v. Wheeling Steel Works* (1893), 3 U. S. App. 358; *Bollman v. Burt* (1883), 61 Md. 415; *Scott v. Kittanning Coal Co.* (1879), 89 Pa. 231.

² Anson on Contracts (Huffcut's Ed.), p. 362.

vein of certain mining properties of the defendants and to run cross-cuts across the vein at intervals of one hundred feet, the work to be paid for at the rate of twelve dollars per lineal foot for the tunnel and six dollars per foot for cross-cuts. The defendants agreed to pay one thousand dollars on the completion of each one hundred feet of the tunnel, and the balance (two dollars per foot) upon the completion of the entire tunnel; and further to pay five dollars per foot for running the cross-cuts at the time of completing each, and the balance (one dollar per foot) at the completion of the contract. The defendants failed to pay the second instalment of one thousand dollars when due, and plaintiff abandoned the work and brought action to recover for work already done and for materials furnished. The court held, and we believe rightly, that the failure to make partial payment at the time stipulated justified the plaintiff in repudiating the contract. But in the opinion of the court, no distinction is drawn between contracts of this kind and instalment contracts of sale, and the decision appears to rest, at least in part, upon the authority of *Norrington v. Wright*¹ and *Reybold v. Voorhees*,² both of which, as will be seen, are cases of apportioned contracts.

According to the better view, and that which has perhaps been more generally accepted, these so-called construction contracts are ordinarily unapportioned. In nearly all of them, as in that discussed above, the instalments are not in proportion to the work done, a part of the consideration being withheld until the completion of all the work contracted to be performed. It follows that each instalment is not intended to be in payment of any particular portion of the work, but "merely an advance of part payment for the whole, made for the contractor's convenience."³

The distinction, however, is really of little moment, for whether a contract of this kind be regarded as unapportioned or apportioned, the result is the same. The vital question in either case is, as we have tried to point out, does the breach go to the root of the contract? A failure to pay an instal-

¹ 115 U. S. 188.

² 30 Pa. 116.

³ Parsons on Contracts (8th Ed.), Vol. 2, p. 636, *note*.

ment on an ordinary construction contract unquestionably does. Such contracts usually require a considerable period of time and a large expenditure of money in their performance, and it is well known to parties entering into them that the engagement as to payment is of the first importance; that a failure to make a single stipulated payment may seriously embarrass the contractor, if indeed it may not actually force him to discontinue the work. In view of these conditions, it seems perfectly clear that in such contracts it should be presumed that the engagement to pay instalments is, in the contemplation of the parties, a term of such importance that a failure to perform it reaches the very vitals of the contract. So it has been held by the United States Supreme Court, in *Canal Company v. Gordon* (1869), 6 Wall. 561, where the contract was for the construction of a canal. By the terms of the contract, the contractors were to receive monthly payments in a specified way as the work progressed, and it was expressly provided that in case of failure of such partial payments the same should draw interest at a specified rate. Notwithstanding this provision as to interest on delayed payments, the court decided, apparently without hesitation, that a default in payment of one monthly instalment of \$20,000 justified an abandonment of work, and entitled the contractors to recover a fair compensation for all work done up to the time of quitting. Many similar cases have arisen in the State courts, and the decisions, so far as known, are uniformly to the same effect.¹

It should be noticed, in passing, that a construction or building contract may, by reason of some peculiarity, present an

¹ *Bennett v. Shaughnessy* (1889), 6 Utah 273; *Cox v. McLaughlin* (1880), 54 Cal. 605; *Graf v. Cunningham* (1888), 109 N. Y. 369; *Thomas v. Stewart* (1892), 132 N. Y. 580; *Strack v. Hurd* (1891), 41 N. Y. S. R. 777; *Preble v. Bottom* (1855), 27 Vt. 249; *McCullough v. Baker* (1871), 47 Mo. 401; *Bean v. Miller* (1879), 69 Mo. 384; *Mugan v. Regan* (1892), 48 Mo. App. 461; *Dobbins v. Higgins* (1875), 78 Ill. 440; *Geary v. Bangs* (1890), 37 Ill. App. 301; *Shulte v. Hennessy* (1875), 40 Iowa 352; *Phillips &c. Co. v. Seymour* (1875), 91 U. S. 646. See note in 30 L. R. A. at p. 67. Although the distinction is not clearly drawn, the failure to pay would seem, in some of the cases cited, to have amounted to a renunciation.

aspect entirely different from that of the contracts in the cases we have considered. An illustration of this is found in the case of *Broxton v. Nelson* (1898), 103 Ga. 327, where the contract was to construct not one but four houses, the owner agreeing to pay the contractor \$380 for the first house, \$407 for the second, \$476 for the third and \$380 for the fourth, "a total of \$1,643 for the four houses." Of course this is an apportioned contract, and is analogous in principle to contracts for the sale of goods by instalment, to be hereinafter discussed.¹

Apportioned Contracts.—There is a great variety of contracts belonging to this class. Perhaps the clearest type is found in the familiar mercantile contract for the sale of goods, in which it is provided that deliveries and payments are to be made in stated and apportioned instalments. It is to these, therefore, that our attention shall be devoted.

Of the English cases, there are four of particular prominence. In the leading one of *Hoare v. Rennie* (1859), 5 H. & N. 19, the contract was one for the sale of six hundred and sixty-seven 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 June shipment made by the seller was of only twenty tons, and the court held that the failure to ship about one quarter of the iron, as agreed, justified the buyer in refusing to receive the twenty tons shipped and excused him from the obligation to accept the residue of the iron. In the second case, *Simpson v. Crippin* (1872), L. R. 8 Q. B. 14, under a contract to supply from six thousand to eight thousand tons of coal to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyers sent wagons for only one hundred and fifty tons during the first months, and it was held that such failure on the part of the buyer did not give the seller the right to repudiate the entire contract. In the third case, *Honck v. Muller* (1881), L. R. 7, Q. B. D. 92, under a

¹ In *Broxton v. Nelson* (1898), 103 Ga. 327, the contract referred to in the text is said to be "entire." But see *Barnard v. McLeod* (Mich.) 72 N. W. Rep. 24, in which a similar contract appears to be regarded as "severable."

sale of two thousand tons of pig iron, to be delivered to the buyer free on board "in November, or equally over November, December and January next," the buyer failed to take any iron in November and it was held that such failure justified the seller in repudiating the contract and refusing to make any subsequent delivery. In the fourth case, *Mersey Co., v. Naylor* (1884), L. R. 9, App. Cas. 434, the contract was for the sale of five thousand tons of steel to be delivered in monthly instalments of one thousand tons, and the buyers, acting under the erroneous advice of their solicitors, defaulted in the payment for one instalment when due. The court held that such failure to make payment for one instalment did not excuse the seller from proceeding with the delivery of subsequent instalments.

This last-mentioned case is one of great importance, and its doctrine seems to the writer to have been commonly misunderstood. Thus, upon its authority, the English rule has been said to be that a breach of an instalment contract does not excuse performance by the party not in fault, unless such breach is accompanied by conduct amounting to a renunciation.¹ And in support of this conclusion is quoted the language of Lord Chancellor Selbourne,² "You must look at the actual circumstances of the case in order to see whether the 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." Considered apart from its context, this language certainly sustains the conclusion stated above. But the Lord Chancellor continues, "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 show why I cannot adopt

¹ See Burdick on Sales, p. 145; *Blackburn v. Reilly* (1885), 47 N. J. L., 290.

² Pp. 438-9.

Mr. Cohen's (of counsel) argument, as far as it represented the payments by 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. . . . But, quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle, 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." That is to say, a party may be excused from the further performance of his engagement, either by a breach of a condition precedent—an essential term—by the other party, or by the breach of a non-essential term under circumstances indicating a renunciation; and since in this case it is clear that the breach was not of an essential term, the question is: was there a refusal to perform amounting to a renunciation? This, then, we apprehend to be the true doctrine of the case, that a mere failure to pay for an instalment of goods when due, is not a breach of a vital term of the contract, and therefore does not excuse further performance by the other party unless such failure to pay is accompanied by conduct amounting to a renunciation of the entire contract. Such is clearly the import of Lord Blackburn's opinion,¹ and the rather indefinite opinions of Lord Watson² and Lord Bramwell,³ at least contain nothing to the contrary.

In view of these four leading cases, what may be said to be the law in England to-day? Applying the generally accepted classification, it appears that in two cases instalment contracts of sale are held to be entire, while in two other cases they are held to be divisible. Consequently, it has commonly been thought that the decisions discussed are hopelessly in conflict.

¹P. 442.

²P. 445.

³P. 446.

Indeed, in *Honck v. Muller*,¹ the judges themselves declare that they are unable to reconcile *Hoare v. Rennie*² with *Simpson v. Crippin*,³ and the same difficulty seems to have been experienced by Mr. Justice Gray in the leading American case of *Norrington v. Wright*.⁴ Under the application of the suggestions set forth in the first part of this paper, however, the confusion seems almost entirely to disappear. In all of the cases discussed, the contracts in question fall into the class of apportioned contracts, and inquiring in each case whether or not there was a vital breach of the contract, it is found that the English courts have determined that in the absence of evidence showing a different intention a failure to deliver an instalment goes to the essence, while a failure to pay for an instalment does not. The only real conflict is as to whether a failure to *take away* an instalment is a breach going to the essence of the contract, *Simpson v. Crippin*⁵ holding that it does not, and *Honck v. Muller*⁶ holding that it does. And since the latter is the more recent case, it would seem that it must be regarded as overruling the former. That such was in fact considered to be the effect of the decision is evidenced by the opinions of Lord Justices Baggallay and Brett,⁷ as well as by the circumstance that *Simpson v. Crippin*⁸ is entirely ignored by the judges in *Mersey v. Naylor*.⁹

Turning to the decisions in this country, it is found that as in England the existing confusion may be materially diminished by disregarding all attempted distinctions between entire and divisible contracts. With regard to a default in the engagement to deliver instalments, it is almost uniformly held, in accord with the English rule, that such a breach goes to the very life of the contract; that in the absence of evidence

¹ L. R. 7 Q. B. D. 92 (1881).

² 5 H. N. 19 (1859).

³ L. R. 8 Q. B. 14 (1872).

⁴ 115 U. S. 188 (1885).

⁵ L. R. 8 Q. B. 14 (1872).

⁶ L. R. 7 Q. B. D. 92 (1881).

⁷ Pp. 100-5.

⁸ L. R. 8 Q. B. 14 (1872).

⁹ L. R. 9 App. Cas. 434 (1884). See also *King Philip Mills v. Slater* (1878), 12 R. I. 82, at p. 90.

to the contrary it is to be presumed that the parties to a contract for the sale of goods by instalments contemplate the delivery of each instalment according to agreement as a condition precedent to further performance, and consequently that a failure so to deliver gives to the party not in fault the right of repudiating the entire contract.¹

The leading case of *Norrington v. Wright*² is a familiar one. The contract involved was for the sale of five thousand iron rails to be shipped at the rate of about one thousand per month. Only four hundred rails were shipped during the first month, and upon discovery of that fact the buyer notified the seller that he would refuse to accept any further shipments. In an action for breach of the contract by the seller, the Supreme Court sustained the position of the buyer, Mr. Justice Gray reviewing the English authorities and pointing out with perspicuity that in contracts of merchants time is of the essence; that a statement as to time of shipment should be regarded as a condition precedent upon the non-performance of which the party aggrieved may repudiate the contract; and that "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."

There would seem to be no sound reason for distinguishing a breach in the delivery of the first instalment, as happened to be the case in *Norrington v. Wright*,³ from a breach in the delivery of any subsequent instalment, and such is the view subsequently taken by the federal courts.⁴ It may be well

¹ *Norrington v. Wright* (1885), 115 U. S. 188; *Creswell v. Martindale* (1894), 27 U. S. App. 277; *Cleveland Rolling Mill v. Rhodes* (1887), 121 U. S. 255; *Pope v. Porter* (1886), 102 N. Y. 366; *Elting v. Martin* (1874), 5 Daly (N. Y. C. R.), 417; *King Philip Mills v. Slater* (1878), 12 R. I. 82; *Johnson v. Allen* (1884), 78 Ala. 387; *Ballman v. Burt* (1883), 61 Md. 415; *Robson v. Bohn* (1880), 27 Minn. 333; *Roebing v. Lock Stitch Fence Co.* (1888), 28 Ill. App. 184; *Smith v. Keith, etc., Co.* (1889), 36 Mo. App. 567; *Providence Coal Co. v. Coxe* (1896), 19 R. I. 380.

² 115 U. S. 188 (1885).

³ 115 U. S. 188 (1885).

⁴ *Creswell v. Martindale* (1894), 27 U. S. App. 277.

also to note, at this point, that not every act inconsistent with the terms of the agreement—not every trifling departure from the stipulations of the contract as to delivery, would reach the essence of the contract. The breach must be material and substantial. It must be such as to defeat the purpose of the contract, as contemplated by the parties. Thus, in the recent Alabama case of *Worthington v. Given*,¹ the contract requiring the delivery, by instalments of no stipulated quantity, of ore “free from foreign substance,” it was held that the delivery of a small quantity of ore that was not free from foreign substance did not justify a repudiation of the contract.

Of the small minority of cases which, dissenting from the weight of English and American authority, hold that delivery of one instalment is not a term essential to the life of the whole contract,² *Gerli v. Poidebard Silk Co.* (1895), 57 N. J. L. 432, while not the earliest, is perhaps the chief. The contract in this case was for the sale of thirty bales of silk, deliverable ten bales July 20 to 25, ten bales August 15, and ten bales September 1 to 10, each instalment to be paid for sixty days after delivery at \$5.90 per pound. In consequence of the lateness of the crop it was impossible for the sellers to make delivery of the first ten bales within the time specified, and after the expiration of an extension of time the buyer notified the sellers that it cancelled the contract because of the default and would decline to receive any of the merchandise ordered. The court held that the buyer was liable in damages for his refusal to accept the second and third instalments, declaring that in contracts for the sale of goods, to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts, will not discharge the other party from his obligation, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms. In connection with the case, it should

¹ 24 So. Rep. 739 (1898).

² *Blackburn v. Reilly* (1885), 47 N. J. L. 290; *Gerli v. Poidebard Silk Co.* (1895), 57 N. J. L. 432. And see *Myer v. Wheeler* (1884), 65 Iowa 390.

be noted that one of the judges wrote a dissenting opinion of exceptional vigor.¹

In some of the cases which hold that a breach as to one instalment of a contract of sale does not affect the obligation of the parties as to subsequent instalments, the rule is somewhat differently stated. For example, in the Iowa case of *Myer v. Wheeler*,² it is said that "rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole consideration." This has been thought to constitute a different doctrine from that of *Gerli v. Poidebard Silk Co.*³ But it is submitted that the cases are not properly distinguishable. It is obvious that in the case of a contract in which the consideration is exactly apportioned between the several items of the engagement, a breach of one item cannot "go to the whole consideration" in the sense in which the phrase appears to be used by the Iowa court. Therefore, to say that repudiation will not be allowed for a breach unless such breach goes to the whole consideration, is in reality to say that repudiation will not be permitted in any case of apportioned contract.

With regard to the effect of a default in the payment of an instalment, the great preponderance of American authority⁴ supports a conclusion directly opposed to that reached by the English court in *Mersey v. Naylor*.⁵ One of the earliest cases and one which in fact was decided long before *Mersey v. Naylor*, is the Pennsylvania case of *Reybold v. Voorhees* (1858), 30 Pa. 116. There, the contract was for the sale of a crop of peaches, to be delivered from day to day and paid for at the

¹ Van Syckle, J., at p. 437.

² 65 Iowa, 390 (1884).

³ 57 N. J. L. 432 (1895). See Burdick on Sales, p. 146.

⁴ *Reybold v. Voorhees* (1858), 30 Pa. 116; *Rugg v. Moore* (1885), 110 Pa. 236; *Gardner v. Clark* (1860), 21 N. Y. 399; *Barnes v. Deanslow* (1890), 30 N. Y. S. R. 315; *Kokomo Co. v. Inman* (1892), 134 N. Y. 92; *Curtis v. Gibney* (1882), 59 Md. 131; *McGrath v. Gegner* (1893), 77 Md. 331; *Branch v. Palmer* (1880), 65 Ga. 210; *DeLoast v. Smith* (1889), 83 Ga. 665; *Bradley v. King* (1867), 44 Ill. 339; *Hess v. Dawson* (1894), 149 Ill. 138; *Stakes v. Baars* (1882), 18 Fla. 656; *Palmer v. Breen* (1885), 34 Minn. 39.

⁵ L. R. 9 App. Cas. 434 (1884).

end of each week. The seller delivered the peaches, according to agreement, for a week, but at the end of that time neither the buyer nor any one on his behalf appeared at the place of delivery to pay for the peaches. On the following Monday the buyer again failed to appear and the seller thereupon discontinued the delivery, disposing of his peaches elsewhere. The court held the buyer's conduct entirely justifiable, Chief Justice Lowrie, without the guidance of a single authority, sensibly observing, "Neither party has any time to be wasted by the unpunctuality of the other; and neither is required to endure the anxiety of having his summer's success dependent on one who is not careful of his engagement. The success of both parties depends upon the performance of present duty."¹ In other words, the engagement to pay is just as essential as the engagement to deliver, and a breach of the one, as much as a breach of the other, goes to the existence of the whole contract. Of course, in those jurisdictions in which it is held that a failure to deliver a single instalment does not affect the obligation of the contract as to subsequent instalments, a failure to pay is governed by the same rule.²

There seems to be little distinction in principle between a contract for the sale of one kind of merchandise to be delivered and paid for in instalments, and a contract for the sale of several different articles or several kinds or grades of merchandise for an apportioned consideration. The rule governing such a case is very well stated in the early California case of *Norris v. Harris* (1860), 15 Cal. 256, in which the contract in question was one for the sale of slaves and cattle. "A contract, made at the same time, of different articles, at different prices," says the court, "is not an entire contract (*i. e.* a breach as to one article does not excuse performance as to others), unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract and thus have influenced the sale, had such failure been anti-

¹ p. 120.

² *Otis v. Adams* (1893), 56 N. J. L. 38; *Blackburn v. Reilly* (1885), 47 N. J. L. 290. See also *Tucker v. Billings* (1881), 3 Utah 82.

culated." In the application of the rule to a recent case, however, we are constrained to believe that the court fell into error. In the case referred to, *Herzog v. Purdy* (1897), 119 Cal. 99, it appears that the defendant, a butcher, contracted to sell to plaintiff all the hides, calfskins, pelts and tallow of animals to be slaughtered by him during a certain period, the rate of compensation of each article being fixed. The plaintiff refused to take the hides, or at least failed to take them promptly, whereupon defendant declined to deliver the other articles and sold them elsewhere. The court held that the plaintiff might recover damages for failure to deliver the other articles mentioned in the contract, declaring that there was nothing in the case to show that the sale of one item was contingent upon the sale of the others. It would seem, on the contrary, that the express terms of the contract are strongly persuasive to the view that the defendant wished to dispose of all the articles he could not use in his business by a single contract; that a failure to dispose of some of the articles materially affected the object of the contract, and therefore, if it had been anticipated, would have materially influenced the terms of sale.

There are many other interesting cases of apportioned contracts, but inasmuch as the purpose of this paper is accomplished, little would be gained by the discussion of them here. The authorities already considered seem to show clearly that the decision of every case properly turns, not upon the form or nature of the contract, but upon the character of the term violated, as contemplated by the parties to the contract; that the classification of these contracts as entire and divisible has proved unsatisfactory and misleading; and that by avoiding the use of those terms and looking directly and solely to the breach, much of the confusion which has been supposed to exist disappears.

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