BREACH OF ONE INSTALLMENT OF A DIVISIBLE CONTRACT.

It would be difficult to find any point in commercial law as to which the decisions are so conflicting, uncertain, and unsatisfactory, as the right of a party to a contract to treat a breach of one installment thereof as terminating the contract, and freeing him from his further obligations thereunder.[1]

This uncertainty resulted not from an absence but rather from an excess of judicial discussions and opinions upon the subject. It is a subject obscure, less by reason of its inherent difficulty, than from the accumulation of learning upon the subject. It is submitted that much of this confusion has resulted from ascribing an unnecessary, undue and unwarranted effect to the form of the contract—from treating such contracts as things apart from ordinary commercial contracts, and from their form not amenable to the fundamental rules of law governing such contracts.

Three primary questions present themselves: (1) What is meant by the word "divisible" as properly applied to mercantile contracts?

2. What are the fundamental rules of law to which all commercial contracts are subject, unless from their form divisible contracts are an exception?

3. How far does the divisible form of such contracts require a modification of these rules?

This article deals with contracts divisible in the primary sense of the word, *i. e.*, one in which a merchant undertakes to deliver merchandise of a certain amount during a certain time, the deliveries to be made by installments, each of a definite amount, deliverable at or within a definite time, and

[1] This is generally spoken of as the right to rescind. The word would appear inaccurate as indicating a mutual agreement to abrogate the contract. See Lord Bramwell, in Honck *v.* Muller, L. R. 7 Q. B. D. 99. "The party to a contract so broken has the right, not to rescind the contract, for rescission is the act of both parties, but a right to declare he will not perform a part only of his contract."

each installment to earn a proportionate payment upon its delivery. The contract is entire, in the sense that it is one contract for the entire amount. No one installment is sold by itself, but only as a part of the whole; no payment is made save as a step towards the payment of the whole. Such a contract is not a divided contract; it is not a group of contracts as to each installment, each to be performed without relation to each other, and only included in the one instrument for the sake of convenience.

It is, however, divisible—liable to be divided—though until so severed it is entire; each portion when performed, as required by the contract, is severed by its execution from the residue still remaining unperformed and executory. The rights of both parties as to that part are then fixed and cannot be affected by any future breach, by any thing subsequently done, or left undone. Each part as executed is, as it were, sloughed off from the still living executory contract.[1]

And this because from the form of the contract, from the usual clauses and terms of such contracts, such appears to be the intent of the parties, an intent easily discerned by the application of the ordinary rules of construction common to all commercial contracts.

There is another and secondary use of the term as denoting contracts where the performance on one or both sides is to be entire, but where the compensation is computed not as a lump sum, but by the unit of the thing sold, as at so much a ton of coal or iron, bushel of wheat, etc. Such contracts are not divisible in the true sense at all. They would perhaps be best termed apportional contracts. The only effect of such mode of computing the consideration is to furnish a convenient standard for the ascertainment of the value of an imperfect performance accepted and retained.[2]

[1] Finch, J., in Pope *v.* Porter, 102 N. Y., 366. "The contract is *divisible in the sense in which that word is applied to cases of a particular character and depending upon particular circumstances.* If the plaintiff had completed the March delivery, and the defendant had accepted it, they would be bound to pay for it, irrespective of any *possible* or *actual* default thereafter as to the April delivery. But this is because of a part delivery on one side and part performance on the other, which is in accordance *with the contract and permitted by its terms.*"

[2] It is the purpose of this article to treat only of divisible contracts in the

All commercial contracts may be said to be subject to certain fundamental rules, which are modified only within very narrow limits, and then only where the subject matter or the form of the contract renders such modification absolutely necessary.

1. All stipulations in mercantile contracts upon either side, as to time and mode of performance, are to be regarded as material and essential. Merchants are supposed to be capable of managing their own affairs, and are to be regarded as the best judges of what they wish to obtain.

The Court will not inquire why the stipulation is inserted, or how far à failure to comply with it will affect the value of the performance tendered. It is enough that it is inserted, its presence proves it to be essential. It is not a question for the Court "whether there is a contract which bears upon its face 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 attach no importance." (Cairns, L. C.; *Bowes* v. *Shand,* L. R., 2 App. Cases, p. 463.)

2. A full and exact performance in accordance with the terms of the contract must be tendered before there is any obligation to accept such tender. The Court will not consider the relative value of the thing offered and that stipulated for. It will not balance the benefits to the one against the losses of the other. Certainty is the one great essential; each party must know, and know from an inspection of the contract itself, what he must offer, and what he is bound to accept. The Court will not consider the hardship of allowing a slight divergence to vitiate the tender of an apparently substantial performance. The loss to the one, by holding the tender bad, may be out of all proportion to the damage done the other by the divergence; but this is a matter for the parties to consider, when they insert the stipulations,

primary meaning of the word. It is as to the rights of a party to such a contract upon a breach by the other, as to one delivery or payment, that so much doubt has arisen, and so many conflicting decisions have been rendered, and opinions expressed by the most learned judges.

not for the Courts to remedy afterwards. It is not for the Courts to protect the parties from the results of improvident contracts, but to enforce strictly obligations assumed by themselves, not imposed by any policy of law. So in *Bowes* v. *Shand,* supra, where there was a contract to deliver a cargo of rice, to be shipped during the months of March and April, the purchaser was *held* entitled to refuse the entire cargo, because a part had been put on board during February, though there was evidence that rice shipped in February would be the same spring crop, and quite as good as rice shipped in March and April.

Certainty in all cases is of more moment than abstract justice in individual instances. "It is no answer to that literal meaning (*that the rice must be shipped in March and April*) 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. The non-fulfillment of a term in a 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 in a contract should not be fulfilled."

Lord Cairns in *Bowes* v. *Shands,* p. 463.[1] He then goes on to repudiate the idea that a cross action for damages would be a sufficient protection to the rights of a purchaser, and says: "The plaintiff has not launched his case until he has shown that he has tendered the thing contracted for.

Of course no tender need be made unless such tender is a condition precedent to the plaintiff's right to call upon the defendant for the performance of his contract.

What then is meant by the term *condition precedent?*

The whole theory of contracts, not under seal, rests upon the doctrine of consideration—a promise is not binding unless found upon a consideration. It need not be performed until the consideration bargained for has been obtained.

The notes to *Pordage* v. *Cole,* 1 Wm. Saunders, 326—which is the basis of all the learning upon the subject of condition precedent—laid down five rules, three of which,

[1] This case is followed by the S. C. of the U. S. in Filley *v.* Pope, 115 U. S. 213, and cited, with strong approval, and used as the basis of decision in Norrington *v.* Wright, 115 U. S. 188.

first, second and fifth, deal with the true question of condition precedent; they lay down rules whereby the Courts may ascertain what the parties intended shall be the consideration for their respective promises. If A agrees to perform his share before the time when B is called upon to perform his, the performance by A of such share is the consideration upon which B agrees to perform his, whereas A agrees to perform upon the consideration that B has promised to perform his share. But in either case the party is entitled to his consideration before he need carry out his promise.

If it be the performance, on the other's part, such performance must be tendered. If it be a promise he has received his consideration if the other party has not repudiated such promise, or put it out of his power to perform it. If he has repudiated it the consideration falls. (See case of *Hochster* v. *De La Tour,* L. R., 2 Ex. 111.)

So if he has put it out of his power to perform it (*Planchè* v. *Coltern,* 8 Bing. 14). In no case can either party be called upon to perform his part when he has obtained nothing but a right of action for damages for a promise already broken. If the two promises are to be performed at the same time neither party is supposed to have relied for his consideration upon the promise of the other. The consideration for each promise is the performance by the other. The performance by both are concurrent conditions to the right of either to demand a performance.

This, then, is the third fundamental rule—a rule of all contracts, not merely of those merchants. No man can be asked to perform his promise till he has obtained the consideration he has bargained to receive in return for his performance.

The third and fourth rules in the notes to *Pordage* v. *Cole* deal not with the intention of the parties at the time of entering into a contract, but with the effect thereon of a subsequent acceptance, and retention of a performance, not exactly in accordance therewith, but which is none the less a substantial performance.

These rules are deduced from the opinion of Lord Mansfield in the case of *Boone* v. *Eyre,* cited in *St. Albans* v. *Shore:* 1 H. Blackstone 273; n. a.

Lord Mansfield's language is as follows: "Where mutual covenants go to the whole of the consideration they are mutual conditions, the one precedent to the other. Where they go to a part only, where the breach may be paid for in damages, the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."

While this language might appear broad enough to include both executory and executed contracts, as a matter of fact the contract had, in this case, been in part executed. An estate in the West Indies had been conveyed—the defendant was endeavoring to escape payment by alleging the failure to transfer all the slaves promised to be delivered.

And in *Campbell* v. *Jones,* 6 Term, Rep. 570, where the case of *Boone* v. *Eyre* is cited, Ashhurst, J., is quoted as saying in that case: "There is a difference between executed and executory covenants. Here the covenant was executed in part, and the defendant ought not to keep the estate (without payment), because the plaintiff has not the title to a few negroes."

So we find Mr. Sergeant Williams, further on in his note, stating that it seems that "it must appear on the record that the consideration was in part executed."

So in all cases in which *Boone* v. *Eyre* has been followed. It has been applied simply to relax the rigor of the old rule that until everything was strictly performed under the contract, there was no right to compensation, even though the substantial portion of the contract had been performed on the one side and accepted and retained on the other. It has never been extended, where the performance is to be entire, and there is no apportionment of the payments, to enable a party to substitute for a tender according to the terms of his contract, one which is substantially similar.

In *St. Albans* v. *Shore,* 1 H. Blackstone, the defendant was held entitled to refuse to accept title to land though the title was good, because the plaintiff had cut down the timber upon it, he having covenanted to convey it with timber thereon.

The Court, while approving *Boone* v. *Eyre,* refused to consider whether the timber was the main inducement for the purchase, whether, in other words, an inability to deliver

the timber went to the whole of the consideration, or could be compensated in damages.

Lord Ellenborough saying, "This is not a case where one party has performed his part;" and in the case of *Ellen* v. *Topp*, 6 Excheq. 444. the Court expressly repudiated any idea that the doctrine of substantial performance could apply to an executory contract.

There, the father having bound his son as an apprentice to learn three trades, refused to pay the penalty for his son failing so to serve, because the plaintiff had, by retiring from one of them, disabled himself from teaching all he agreed to teach.

Pollock, C. B., in regard to *Boone* v. *Eyre*, said: "It is remarkable under this rule the construction of the instrument may be varied by matter *ex. post facto*, and that which is a condition precedent, while the contract is executory, may cease to be so by the subsequent act of the party in receiving less." [1]

The doctrine of *Boone* v. *Eyre*, then, properly understood, has no relation to executory contracts. It announces no principle of law which in any way makes the Court the judge as to whether a party to a contract need accept less than he bargained for. The parties themselves, in a mercantile contract, are the only judges as to the materiality of their stipulations. Their insertion of a stipulation as to the time and mode of performance, quantity or quality, is conclusive proof that they do regard it as material. Nor can the Courts force upon them the duty to accept anything differing in the most minute detail from that which they

[1] It is suggested that much confusion could have been avoided by adopting the principle stated by Baron Parke in Mundell *v.* Steele, 8 Mees & Welsh 882, "where a contract is made for the purchase of a chattel manufactured in a particular manner, when the party may refuse to receive it, or return it within a reasonable time, if the article is not such as bargained for—the acceptance or non-return of the article affords evidence of a new contract on a *quantum valebet.*"

Thus the right to compensation would have been placed beyond dispute, upon the retention of the benefit conferred by an imperfect performance—and no one could have for an instant been misled into the idea that the Court should have the power to force upon a man the necessity of accepting that which he never agreed to accept, because the Court might consider that what was offered might be of some substantial benefit to him of the kind desired.

have contracted for; but if they do accept less, knowing they will never obtain all; or if having accepted a part, in the hope of obtaining the rest, they retain that part, after knowledge obtained that such hope is groundless, they by this subsequent acceptance or retention of the benefit of a partial performance, waive the necessity of a full performance as a pre-requisite to recovery.

They have, by their subsequent act, announced that whatever might have been the intention at the time of making the contract, they now consider that an exact performance is not material, but may be compensated in damages. Though they might refuse the tender as imperfect, they may not retain the benefit thereof, and allege as a reason for refusal to pay part a failure to comply with the exact terms of the contract, when by their very act of acceptance and retention, with full knowledge of its imperfection, they have shown they do not regard all the stipulations as of essential importance.

No party to a contract can be forced to perform it unless he receives consideration for his promise; but if he choose subsequently to accept in lieu of that consideration something different, he must still carry out his agreement.

So here, while the original consideration is the tender of a full performance, he by accepting less substitutes therefor that smaller performance, together with a right of action, for the difference.

The one great basic principle underlying all these rules is that it is the duty of the Court to ascertain from the contract itself the intention of the parties at the time they enter into the contract, and to give effect thereto to enforce such obligations as the parties have intended to assume to protect such rights as they have bargained to obtain. There can be no hardship in enforcing strictly to the letter contractual obligations which are not, as are the obligations of criminal law and the law of forts, imposed upon all persons without their consent for the protection of the good order of the community, and so are to be extended no further than is necessary for such purpose, but which are assumed by the parties by their own consent, voluntarily, with their eyes open to the consequences, and for what they at the time at least consider for their mutual benefit.

The effect of a breach in all contracts where the performance is undivided, is to be determined according to what the contract itself shows that the parties have intended to be the obligations assumed, and the consideration therefor agreed upon—not upon the circumstances surrounding the breach, nor the intention of the party committing it at the time he violates his agreement, no matter how hard his position, how excellent his motive, how sincerely he desires and intends to remedy his defaults as fully and as soon as possible, if he had failed to offer that which the contract shows the other intended to be agreed consideration, he cannot call upon that other to fulfil his portion of the contract.

It is only where the party not in default has accepted and retained a defective performance, and so waived the breach, that the effect of such a breach can be altered by matter subsequent to the making of the contract. No party to a contract can compel the other to accept less than he bargained for, but the other can, by accepting less, waive his right to treat the breach as a termination of the contract.

Such being the rules applicable to all commercial contracts, where the performance is by one act, what effect has been given to the division of performance as modifying them?

The English cases are typical and embodying all the difference of opinion on the subject. In them three divergent positions have been taken upon the question.

That taken by Pollock, C. B., in *Hoare* v. *Rennie,* 5 H. & N. 19, and followed in *Honck* v. *Muller,* L. R., 7 Q. B. D. 92, that the stipulations as to division of performance on both sides, do not split the contract into so many contracts as there are installments; but are stipulations as to time and mode of performance of an entire contract, which must be strictly complied with; and that a breach of such a stipulation as to any one installment is a breach of the whole, and terminates so much of the contract as remains executory.[1]

[1] Bramwell, L. J., in Honck *v.* Muller: "The mere fact that the performance was divided did not entitle the purchaser who had agreed to accept and pay for 2000 tons of iron, to compel the seller to do what he never agreed to do—deliver 1333 tons of iron, and accept two-thirds of the price, and a right

In *Honck* v. *Muller,* Lord Bramwell rather elaborates this view, but unfortunately injures his position by a dictum, which he afterwards repudiated in *Mersey* v. *Naylor,* to the effect that where a part had been performed in accordance with the strict terms of the contract, no subsequent breach could terminate the contract. This is in effect a too broad statement of a doctrine properly applied in *Brandt* v. *Lawrence,* L. R., 1 Q. B. D. 344, that where one installment has been performed under an unbroken contract, and as a step to the orderly performance thereof, the right to compensation therefor becomes fixed and vested, and cannot be divested or affected by any subsequent default on either side. The part executed has been severed by performance from the executory residue.

This is but giving effect to the intention of the parties as shown by the order of performance provided in the contract. They agree that as each part as performed on one side, it shall be met by a proportionate part performance on the other, in advance of any possibility of knowing it all will ever be completed. So that the consideration for each part performance is an orderly performance of the contract up to that point, and for the future a contract still executory and still unrepudiated.[1]

The second is that taken by Lord Blackburn in *Simpson* v. *Crippen,* L. R., 8 Q. B. 14, and followed and put upon perhaps more logical grounds by Brett, L. J. (afterwards Lord Esher) in his dissenting opinion in *Honck* v. *Muller,* supra, that a breach as to any one installment will not entitle

of action for the remaining one-third." It is to be noted that the default here is not in a failure to deliver according to contract, but to accept and pay. The whole of this opinion is most instructive. He also gives a homely but striking example. "Suppose a man orders a suit of clothes, the price being £7, four for the coat, two for the trousers, and one for the waistcoat. Can he be made to take the coat alone, whether they are all to be delivered together, or the trousers and waistcoat first?"

[1] Of course, a perfect delivery of one installment, accompanied by a repudiation of the residue, would not have to be accepted, for such repudiation would destroy a part of the consideration, *i. e.*, that the part performance shall be offered as a step to performance of the whole. If it is so offered, it must be paid for and the party must trust to their rights under an unrepudiated contract for the completion thereof. He, however, is not bound to accept any one portion standing by itself.

the party aggrieved to terminate the contract, unless the breach cannot be compensated in damages, citing notes to *Pordage* v. *Cole.*

Evidently he had in mind the doctrine of *Boone* v. *Eyre,* which, as has been seen, has application only to prevent the retention of a substantial but inaccurate performance without payment, and has no effect to enforce the acceptance by a party to an executory contract of a part only of the agreed consideration, because the Court might happen to think that what is offered, plus damages, might be of equal benefit to him. He is entitled to the thing agreed upon, and cannot be forced to accept anything else, though as good or even better in the opinion of the Court.

Of course, the division of performance renders it easier to compute the damages for a breach of any one portion, but so does the apportionment of price in a contract to deliver one hundred tons of coal at so much a ton, and who would argue that therefore the purchaser must accept fifty tons and damages for the non-delivery of the rest?

If he does accept it, such apportionment of price aids in ascertaining the value of the part performance, but it cannot compel him to accept what he never agreed to buy. Lord Blackburn's view can be supported, either upon the theory that the contract is in fact not one contract, each part having relation to and depending upon every other, but a group of independent contracts, the performance or non-performance of any one having no effect on any other, but entitling the party aggrieved to damage; or, upon the theory which is in effect much the same advanced by Brett, L. J., in *Honck* v. *Muller,* that while the contract is entire, by the division of performance, the parties have expressed their intention that an action for damages shall be sufficient remedy for a breach of any one installment. These theories are at least intelligible, but it is submitted that the most casual consideration will show them to be erroneous. There are so many and sufficient reasons for the division of performance, so many and valuable objects to be attained thereby that it would seem a mere perversion of reasoning to hold that merchants had adopted such a form for the express purpose of waiving one of the most valuable rights which parties to a contract

can possess—that of going elsewhere to get what they find it impossible to obtain under the contract.

A form of contract apparently particularly appropriate to secure to a purchaser a constant regular supply of goods, without having to purchase and pay for all at once, or to provide a seller, a certain dependable market is construed to amount to an agreement, that both of these are utterly immaterial, and that the parties will willingly buy or sell whatever part the other will deliver, or accept and sue for damages for the rest.

Surely this is not ascertaining and giving effect to the intent of the parties as evidenced by the contract, but an attempt by overlooking the obvious objects of such a form of contract to torture it into an expression of an intention, which will support a view of the law which most nearly accords with the sense of abstract justice of a judge, always perhaps a trifle too susceptible to the hardships, real or imaginary, of individual suitors.

While Lord Justice Brett's theory is open to the criticism that he overlooks the obvious object of this form of contract, in order to extract from it an intention of the parties, which while it defeats the apparent object of this form of contract, seems best designed to effect, will support his view of the justice of the case, it allows the rights of the parties to be governed by their intention so discovered.

The third position taken, on the contrary, ignores the intention of the parties at the time of contracting, and determines the effect of a breach of one installment according to the defaulting party's intention to perform the residue, and to substantially atone for the breach, such intention being evidenced by the circumstances surrounding the breach. Such is the position taken by Lord Coleridge in *Freek* v. *Burr,* L. R., 9 C. P. 208, L. J. Brett, in *Bloomer* v. *Bernstein,* L. R., 9 C P. 558, and possibly by the House of Lords in *Mersey* v. *Naylor,* though the circumstances were so peculiar, and the opinions so inconclusive that it is hardly safe to trust that case as authority beyond its own facts.

Under this rule, the question which must be determined is, Has the party by his default intimated an intention to

refuse to substantially perform the contract as entered into, and so to abandon it, and has the other party accepted such intimation as terminating the contract? In other words, a true rescission by mutual consent, evidenced on the one side by the circumstances and quality of the default, and by the refusal of the other party to continue bound.

The question involves two distinct and most difficult issues of fact. First. Notwithstanding the breach, can the contract still be performed substantially as agreed? Second. From the conduct of the party in default, can there be gathered an intimation of an intention not to make such a substantial performance to perform the residue, and to atone for the breach by as full a performance of the part broken as is still possible?

This rule is open to grave criticism. First. It violates the rule that a party to a contract need only accept that which he bargained for—by applying to executory contracts the doctrine of substantial performance, only applicable to contracts executed, when as in *Boone* v. *Eyre* a substantial performance has been accepted and retained.

Second. It gives effect not to the intention of the parties as evidenced by the contract, but to the intention of a party in default to atone for his breach as evidenced by his acts and declaration at the time of the breach, and the circumstances attending it.

The rule in *Freeth* v. *Burr* has, it is submitted, been much misunderstood. It is often taken to be that a default as to any one installment will not terminate the residue of the contract unless it indicates an intention to refuse to perform the residue.

Such a reading of this case makes the contract not divisible, but a group of separate contracts, a breach of any one of which affects any other only, when attended by circumstances amounting to a repudiation, a breach by anticipation of the others. However, the facts were that the seller having been dilatory in his deliveries of one installment, the purchaser assumed the right to retain the money due thereon, to secure himself against further delays. He did not refuse to pay for the installment eventually; in fact, he announced his intention finally to pay all due, under the whole

contract, less damages for delay in deliveries. And Coleridge, J., *held* that the question to be left to the jury was whether the failure to pay evidenced an intention to abandon and altogether refuse performance *of the contract,* "to no longer be bound by the contract," not, it is to be noted, of "the residue of the contract." And he distinguished the case of *Hoare* v. *Reunie* on the ground that there the Court must have *held* that the failure to perform the one installment entirely destroyed the whole object of the contract; and so, since a substantial performance of the contract as a whole had become impossible the breach evidenced an intention to abandon the contract as entered into, and to renounce all rights under it.[1]

So in *Bloomer* v. *Bernstein,* L. R., 9 C. P. 588, the purchaser having failed to pay a bill of lading for one installment, the seller refused to continue to deliver. Mr. Justice Brett left to the jury the question whether he would have been able to pay at any time during the continuation of the contract, for the bill of lading, unpaid for; not whether he would pay for the other bills of lading when presented, after each future delivery, leaving the seller to an action for damages, for his remedy for the existing failure to pay; and this was by the Court above *held* a proper direction.

So in *ex parte* Chalmer, L. R., 8 Ch. App. 289, the buyer of goods on credit having become insolvent, and one installment being unpaid for, had no right to demand future deliveries without tendering the price of them in cash, and also the price of the delivery still unpaid for. And lastly, it offends against the whole theory of Commercial Contract Law—a theory based on the necessities of mercantile life, which is that the highest essential is certainly as to contractual rights and obligations, that the contract shall itself show with certainty what each party is bound to do thereunder.

According to this rule a party against whom a default has

[1]As a matter of fact this was just what the Court in that case refused to even discuss. They held it immaterial whether the default defeats the object of the contract, or rendered a substantial performance impossible; it was not in accordance with the contract, therefore there could never be a tender under its terms which alone the purchaser had agreed to accept.

been committed as to any one installment, has no other standard by which to measure his rights save a prognosis of the decision of Court and jury as to two most difficult questions of fact. The defaulter's intention to abandon the contract evidenced by the circumstances of the breach, and the possibility of a substantial performance, notwithstanding the breach.

How difficult this is, is best shown by this: that in *Mersey* v. *Naylor,* Lord Coleridge, who himself was the father of the rule, was reversed by two higher Courts as to these questions of fact. How can a merchant be required to more accurately solve such questions than a judge of such great reputation and familiarity with such points?

Such are the decisions prior to *Mersey* v. *Naylor,* L. R., 9 App. Cas. 434, decided by the House of Lords, and so binding authority upon all points directly decided thereon.

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(*To be concluded in next issue.*)