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SEVERABILITY OF INSTALMENT CONTRACTS

An "entire" contract\(^1\) is said to be one and indivisible while a "severable"\(^2\) contract indicates an entire contract which, based on the apportionability of the items in the promise on the one side to the items in the promise on the other, may for the purposes of justice be severable, or, one really consisting of two or more separate parts equivalent to distinct and independent contracts if the parties so intended. A distinction is sometimes made in case of a "divisible"\(^3\) contract, one involving goods of a uniform nature, but the performance of which is divided by express agreement of the parties.

A change of the common law rule applicable to the right to renounce a contract as where there has been a defective delivery of an instalment of a failure to pay, has been effected by the adoption of Sect. 45 (2) of the Uniform Sales Act.\(^4\) A brief survey will be made of the law of unexpressed conditions in contracts, of the development of the doctrine of recovery after part performance where an entire contract had not been fully performed, and of the cognate doctrine of severability\(^5\) of an entire

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\(^{1}\) An entire contract is one in which all the stipulations are interdependent and material to the whole consideration of the other side, and, in which no one stipulation is to be considered as independent or subsidiary to the others or collateral to the main purpose of the contract. *Hayett and Smith Co. v. Chicago Edison Co.*, 167 Ill. 233, 59 Am. St. Rep. 272 and note.

\(^{2}\) A severable contract is one in its nature and purposes susceptible of division and apportionment, having two or more stipulations in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other nor is it intended by the parties that they shall be. *Los Angeles Gas and Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55.

\(^{3}\) A divisible contract to sell or sale means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation. Sect. 121.76, Uniform Sales Act. (Wis. Stats. 1923.)

\(^{4}\) *Kieckefor Box Co. v. Strange Paper Co.*, 180 Wis. 367, 192 N. W. 145.

\(^{5}\) "The doctrine of severableness, (if I may be allowed to coin a word) in contracts is an innovation of the courts, in the interest of justice, designed to enable one who has partially performed, and is entitled on such partial performance, to something from the other side, to maintain an action in advance of complete performance, as where goods are sold and delivered and paid for in parcels, to enable the seller to recover for the parcels delivered, in advance of completing his undertaking." Butler D. J. in *Norrington v. Wright*, 5 Fed. Rep. 768.

"It is also worthy of remark that, in view of the harshness of the rule which prevents one who has failed to fully perform his contract from recovering anything for part performance, the benefits of which the other party has received, the courts are inclined, whenever they consistently can in cases of this kind, to construe the contract as severable, rather than entire. This works out substantial justice, for it permits the one party to
contract. Lastly will be considered the effect of the last named doctrines on the right to renounce the whole contract because a condition thereof had not been performed, as in case where there has been a defective delivery of an installment in a divisible contract.

The development of the doctrine of severability in contracts will be considered, first, as affecting the right to exact full performance before a liability to pay shall arise, and secondly, as affecting the right to renounce the contract because something has not been done by way of performance.

**RIGHT TO EXACT PERFORMANCE BEFORE A LIABILITY TO PAY SHALL ARISE**

In the early history of the common law theory of contracts, express conditions only were known, such as were found in the language of the parties and which were strictly enforced by the courts.

Mutual promises, unless containing express conditions, were deemed independent. The breach of one promise, though clearly relative to another, could not be pleaded in bar in an action brought for the breach of the latter. The plaintiff, after the invention of the doctrine of the mutual dependency of promise in bilateral executory contracts, was obliged to allege the performance or excuse for non-performance of a condition precedent, or, tender or readiness and willingness to perform concurrently as the case might be, to maintain his action.

The court assumed that such promises were dependent or independent and determined the order of their performance as well, just as the parties would have, had they themselves provided therefor. This was to be determined by the intention of the parties to be found by the interpretation of the whole agreement and the surrounding facts and circumstances of the case rather than by a strict construction of the language used by the parties as in the case of express conditions. To arrive at this intention certain rules were laid down to determine the implied conditions as to possible precedence, concurrency or sequence in time.  

recover for what he has performed, but at the same time permits him to counterclaim or recoup whatever damages he has sustained by the non-performance of other items of the contract.  


Injustice might result, however, if a plaintiff be barred if he fell short of completely performing his promise in all its details precedent to any liability by defendant on his counter promise. Thus, where plaintiff promised to convey a plantation with a stock of negroes thereon, a failure of title as to the negroes was held compensable in damages since it appeared that the plantation had been retained by the defendant. The plantation was of value to defendant as shown by its retention, and the failure of a part of the consideration did not frustrate the main purpose of the contract.\(^6\)

But this rule was not to be applied to compel the defendant to accept less than he bargained for, though the omitted part be compensable in damages. Thus, where a separate valuation of an arbor had been made apart from the land itself, but it appeared that the buyer at all events wanted an estate with an arbor, a tender to convey the land by plaintiff, having wrongfully severed arbor, was not sufficient to support his action.\(^7\)

Nor was this rule to be applied where that which the defendant received would be of doubtful value unless the whole promise be performed. Where plaintiff promised to sell the good will of a school and to let defendant in possession and six months thereafter to convey title to the buildings, the court found that it could not have been the intention of the defendant to purchase the good will and leave the title of the premises in uncertain hands, hence plaintiff could not maintain his action unless he averred full performance of his promise at the stipulated time.\(^8\)

So where parties mutually promised to do a certain thing, but provided that each shall execute a bond to the other to secure penalties for non-performance, it plainly appearing from the facts of the case that the parties' intention was that the execution of the bond was a condition precedent, plaintiff could not main-

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\(^6\) Lord Mansfield: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." Boone v. Eyre, 1 Blackstone, 273, note (a), (1776), 101 Eng. Rep. 100.


tain his action in absence of an allegation that he executed his bond.9

And on the question whether a stipulation for regular attendance at rehearsals prior to an engagement to sing was material it was held that the test whether stipulations as to performance were a vital part of the agreement and a condition precedent was to be found in the intention of the parties.10

Justice then impelled the courts to imply conditions to facilitate pleading as well as to eliminate the hazard of the defendant being subjected to liability before receiving full performance. On the other hand the courts sought to avoid the harshness of express conditions requiring full performance but yet avoid enforcement of contracts in parts where parties evidently intended the contract to be an entirety. The test was adopted that, whether covenants in a promise were dependent and conditions, and whether stipulations as to performance were conditions precedent, depended in each case upon the intention of the parties at the time of the agreement and upon the facts and surrounding circumstances of the case.11

But the courts in the interest of justice relaxed these rules where no express conditions were present. Therefore, although the contract was indivisible: i. e., full performance in part of the promisor of the consideration of the contract, yet if it contained neither expressly nor by strong implication, a condition of full performance precedent to any claim on defendant and was of a uniform nature and thus capable of just apportionment, the court, after the time for performance had expired suffered a recovery in quantum meruit for part performance subject to the deduction of whatever damages the party entitled to claim full performance may have sustained;12 and it was allowed even though defendant

10Bettini v. Gye, 1 Q. B. Div., 183. (1876), Blackburn, J.: "Parties may think some matter apparently of very little importance, 'essential: and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent." See also Reindl v. Heath, 115 Wis. 219, 91 N. W. 734.
11For an elaborate review of the doctrine of dependent and independent covenants, see, West v. Bechtel, 125 Mich. 144, 84 N. W. 69; 51 L. R. A. 791. See also, Woodward on Quasi-contracts, sect. 264 et seg.
12In Booth v. Tyson, 15 Vt. 515, the court said: "Forfeitures are odious, both at law and in equity. Conditions precedent are in the nature
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was ready to receive and demanded full performance.13 Such recovery in quantum meruit was early extended to cases of contracts of work and labor14 and of sale of personalty.

So where by permission of the parties, delivery was made in parcels, the defendant was not allowed to set up non-performance of the entire contract.15 Such acceptance created a debt since there was either expressly or by implication a promise to pay on delivery where the part performance was capable of apportion-

13 By the weight of authority no such recovery is allowed in cases of continuing contracts for personal services, where plaintiff wrongfully terminates contract. Hildebrand v. American Arts Co., 109 Wis. 171, 85 N. W. 268. Cutler v. Powell, 6 T. R. 320, (1795), 6 Eng. Ruling Cases, 627 and note; 101 Eng. Rep. 573. But this rule has been modified somewhat in the cases of building contracts. Hayward v. Leonard, 24 Mass. 180, and note in 19 Am. Dec. 268. "Of course the contract to paint the house was entire, and the general rule applied that for partial performance no recovery could be had. Moritz v. Larsen, 70 Wis. 569, 36 N. W. 331; Widman v. Guy, 104 Wis. 277, 80 N. W. 450. Doubtless it fell within the class of building contracts to which is accorded a certain relaxation of the strict rule above stated, so that a contractor, who, in good faith effort to perform, substantially satisfies his agreement may recover the value to the owner of that which is done although it departs in slight respects from specifications, or, without fault lacks absolute completeness." Dodge J. in Manthey v. Stock, 133 Wis. 107, 113 N. W. 416.

14 Cook v. McCabe, 53 Wis. 250, 10 N. W. 507; cf. Prauch v. Rasmussen, 133 Wis. 181, 113 N. W. 416. But if payment is to be made as building progresses, the contract has been held severable and contractor may recover such installments due though there be an impossibility of complete performance. Siegel Cooper and Co. v. Eaton and Prince Co., 165 Ill. 550, 46 N. E. 449.

A contract for personal services for a fixed period likewise has been held severable where wages are payable ratably at stated times. Tilton v.
ment to the consideration on the other side, and the contract was deemed to have been severed pro tanto.\(^8\)

Originally then, to determine when a covenant in promise was dependent or independent the test of intention of the parties as derived from the nature of the transaction was applied. If a stipulation or item in a promise was independent a failure to perform such was not a bar to an action to recover for performance of the other covenants in the promise, but was compensable in damages. Afterwards to grant relief where part performance of a contract \textit{prima facie} entire, had been accepted, or where part performance was permitted by consent of the parties, express or implied, by analogy, recovery for the part performance so made was allowed, where the consideration was apportionable. Stipulations for performance in parcels, or the acceptance of a part performance easily apportionable became cogent proof of an intention that the transaction was considered to be severable \textit{ab initio}.

The practice of construing contracts as severable: i.e., as so many independent contracts, was crystallized in the rules for construction laid down in \textit{Parsons on Contracts}\(^7\) and predicated on the variety of items embraced. The test of apportionability so that a given contract was held to be really separate, distinct con-

\(^8\) \textit{J. G. Gates L. Co.,} 140 Wis. 197, 121 N. W. 331. See also \textit{Smith v. Davis,} 1 Wis. 447.

When full performance of a contract has been prevented by the wrongful act of the defendant, the plaintiff has the right either to sue for damages or he may disregard the contract, and sue as upon a \textit{quantum meruit} for what he has performed. \textit{U. S. v. Behan,} 110 U. S. 338. \textit{Kearney v. Doyle,} 22 Mich. 294. \textit{Kokomo Strawboard Co. v. Inman,} 134 N. Y. 92. But where plaintiff is in default the recovery in \textit{quantum meruit} cannot be higher than that stipulated. \textit{Bishop v. Price,} 24 Wis. 480.


\(^{11}\) \textit{Ibid.} See \textit{Nat. Knitting Co. v. Bouton,} 141 Wis. 65, 123 N. W. 624.
tracts was freely applied to contracts for sale of personalty. 18 If the transaction was construed as severable, a non-performance of one parcel could not preclude a recovery on one performed, though there was this anomaly that the defendant could deduct the damages suffered by the non-performance of the other contract. If the transaction was construed to be entire, the rule of severability for the purpose of recovery after acceptance of a part performance were still applied. This was equally true in case of a part performance of one parcel in a severable contract. 19

RIGHT TO TERMINATE CONTRACT BECAUSE SOMETHING HAS NOT BEEN DONE

The liability to an action before full performance and after part performance has been considered. A party cannot be compelled to accept a less quantity than he contracted for, or out of time, simply because the seller can show that it is immaterial to the buyer; but if a party accepts such part performance, or accepts performance after the time set therefore, or by his conduct waives such defenses he may have, resistance to a suit is futile. Conversely the party not in default need not abide the time until the other feels inclined to offer performance when once the time therefor has expired. He may elect to sue for damages or renounce the contract. 20

The right to renounce for an unreasonable delay in performance or where one party clearly and unequivocally announces


19 "The referee decided that although there had been only a partial performance of the contract, yet the defendant was liable to pay for the articles delivered under it in such part performance, because they were accepted and used by him. He considered that the deliveries in the months of April, May and June were to be treated as separate contracts. Even if this were so, the vendors did not perform their contract in the respect to the deliveries for the month of April, and the case after all, stands upon a partial performance only. In Denning v. Kemp, 4 Sand. S. C. R. 147, which is cited by the referee, the original contract was void by the Statute of Frauds, and each separate delivery was, therefore, regarded as a separate sale made upon an independent contract. Emott J. in Catlin v. Tobias, 25, N. Y. 217, 84 Am. Dec. 183.

In Tipton v. Feiner, 20 N. Y. 423, the court had held that a contract to deliver a certain number of dressed hogs, and another number of live hogs at different times was severable into two distinct contracts entered into at the same time.

20 Woodman v. Blue Land Co., 125 Wis. 489, 104 N. W. 593.
before the time set for performance that he will not perform is well established. This right to abandon the contract equally exists if there is a failure to perform according to its material provisions and stipulations going to the substance of the contract as where there is a condition precedent. It is generally held, therefore, that where a party by words or by acts clearly evinces an intention not to perform the contract according to its terms, or to be no longer bound, the other party may elect to sue for damages at once, or renounce the entire contract. In the latter case, the theory is that the party in default acting on such expressed intention may assent to his adversary's offer to discontinue the contract, and declare it to be no longer in force.

But the party apparently in default may deny that these acts evince an intention to be no longer bound, or not to perform according to the contract. The question then becomes whether the action of the party in default amounts to an affirmative assertion of an abandonment or to a change in the terms of the contract. If it involves the question of the performance of a condition precedent it would seem to be a question of law for the court if the breach thereof is proven; but if the intent to repudiate must be found as a fact, it is a question of fact for the jury.

As to abandonment by anticipation, or by non-performance at the stipulated time no particular difficulty has been experienced in the rules applicable. But if the defaulting party had once conferred a substantial benefit or had suffered material losses through his part performance a different situation at once arises.

Renunciation denies the existence of the contract. Then if a party cannot resist liability for a benefit received and retained on the ground of non-performance of the entire contract, he conversely cannot terminate the contract and yet retain the benefits received thereunder. So if a party cannot impose the acceptance of a part performance on the other party he cannot rescind the contract in portions.

22 Jung Brewing Co. v. Konrad, 137 Wis. 107, 118 N. W. 548.
Rescission by mutual consent of the parties is favored by the courts, but the exercise of the right to renounce the contract might become an arbitrary one and a cloak for oppression. As in case of a forfeiture, the courts were eager to relieve against an unconscionable exercise of this right.\footnote{Cannon J. in 55 Minn. 457, 57 N. W. 150: “Without attempting to enter into any general investigation of the question, so often discussed, as to when a contract is entire and when it is severable, and without committing ourselves to the length to which the courts have sometimes gone in holding certain executory contracts severable, so as to defeat the right of one party to rescind upon some default of the other party . . . . yet, according to all the authorities, it was not entire, but severable; or, to speak accurately, there were two separate contracts, although made at one and the same time.”}\footnote{“A contract cannot, in general, be rescinded \textit{in toto} by one of the parties, where both of them cannot be placed in the identical situation which they occupied, and cannot stand upon the same terms as those which existed when the contract was made. The most obvious instance of this rule is where one party, by having had possession, etc., has received a partial benefit from the contract. It would be unjust to destroy a contract \textit{in toto} where one party had derived some advantage by the other party having to some extent performed the agreement; in such case the agreement shall stand; the defendant must perform his part thereof, and must seek in a cross action a compensation in damages for the plaintiff’s default. Of late, however, the courts, to prevent unnecessary litigation, have, in many instances, allowed a defendant, in case of a partial failure of consideration . . . instead of bringing a cross-action, to reduce the damages by setting up such partial failure of consideration. . . . And we have seen, that if a vendee receive, and keep after the time for completing the contract, one of several articles, bought together under one contract, he must pay for such article, although he might have refused to take it; for such retention of a part of the goods sold disaffirms the entirety of the contract.” Chitty on Contracts, 7th Am. Ed., (1848), pages 743-4.} Hence if there was a substantial part performance but it was impossible to restore the \textit{status quo}, or the unperformed portion did not go to the whole of the consideration on the other side, the right to renounce was denied and the breach was held to be compensable in damages.\footnote{There was, it seems, a tendency on part of the English courts to exclude the right of renunciation altogether after an acceptance of a part performance. Simpson v. Crippin, 8 Q. B., 14. (1872). See also dissenting opinion of Brett, J., in Reuter v. Sala, 4 C. P. D. 239, 251, (1879); for a general discussion see King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603, (1878), Osgood v. Bander, 75 Ia. 550, 39 N. W. 887.}

An executed contract cannot be rescinded. The right of rescission cannot be exercised where the price of the quantity received and retained is liquidated by the contract. Where then by construction based on the natural severability of the subject-matter and the apportionment of the price the transaction as to one parcel constituted a separate contract and could be deemed to have been
fully executed, rescission was precluded as to that parcel. It was but one step removed to hold that where by the permission of the parties delivery could be made in parcels, payment expressly or by implication to be due on delivery, the contract was severed pro tanto, and relief could be given against the harsh rule that for the breach of an entire contract only one recovery could be had; and so a recovery of damages for the failure to deliver one parcel did not preclude a recovery for breaches as to the remaining parcels. And if these different parcels were separate and independent contracts, the breach of one could be no excuse for the refusal to go on with another and different contract between the same parties.

**Right to Renounce For A Partial Breach**

The courts implied conditions to hold together the promises of the parties so as to prevent subjection to liability before receiving an equivalent of performance, but to avoid injustice by the strict adherence to these rules in their application to entire contracts, modified them in certain cases; they suffered a recovery on the contract where a part performance had been permitted by the terms of the contract, but in quantum meruit where plaintiff was in default as to full performance. The right to exact full performance before a liability to pay shall arise was not affected beyond that.

On the other hand, while the ancient right to renounce a contract where nothing had been done by way of performance was not denied, the courts sought to limit its exercise whenever there had been a part performance giving compensation by way of damages instead. The right to renounce accordingly was denied when the status quo could not be restored, or where the contract, under the test of apportionability of the consideration could be construed to be two or more separate contracts. Likewise the right to renounce was denied where by stipulation for acceptance of a part

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performance the contract under the doctrine of severability could be deemed to have been severed pro tanto.

When commercial dealings assumed unheard of magnitude, certainty of dealing and exact performance as to time became of the essence of the contract. To a merchant having obligated himself to third parties in reliance on the faithful performance of a prior contract, prompt performance became a vital matter and compensation by way of damages of doubtful consolation. If by reason of a prior default he could not perform a later contract entered into in reliance thereon, the other party would often be too eager to seize upon such default as an excuse to conveniently escape an unprofitable obligation.

It was not uncommon to provide by express agreement for delivery in parts. But what before may have been a matter of convenience, in contracts involving large quantities of goods of the same nature, became a matter of necessity. Contracts, then, the performance of which, on both sides, ordinarily was mutual and concurrent, provided for performance progressively giving the seller the right to deliver and to the buyer the right to pay ratably as delivery progressed. In such case the merchant not only ran the hazard of precluding to himself the right of renunciation as to a part performance he might accept in reliance on the remainder being duly delivered, but in addition he might find that he had entered into as many contracts as there were deliveries.

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34 In *Brandt v. Lawrence*, 1 Q. B. D. 344 (1876), there were two contracts for 4,500 qrs. of oats, each shipment by “steamer or steamers” during February. The plaintiff shipped on board one steamer 4,511 qrs. to answer the first contract and 1,139 qrs. to answer in part the second contract. The plaintiff also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment of the first steamer was made in time, but that on the second steamer too late. Held that the defendant was bound to accept the 1,139 qrs. in part performance of the second contract, notwithstanding that the other shipment on account of the second contract was made too late.

In *Reuter v. Sala*, *supra*, there was an agreement to deliver twenty-five tons of pepper within a specified time “in vessel or vessels.” Seller tendered delivery of twenty-five tons in time specified of which only twenty tons complied with the contract as to shipment. Buyer refused to accept. Plaintiff in support of his declaration cited *Brandt v. Lawrence*, *supra*. The court, declining to follow on the ground that in this case the contract was entire since the seller has elected to send cargo in one ship held the defendants were not bound to take any part less than the whole. See also *Gill v. Benjamin*, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 610 and note.
In contracts divisible in performance, the seller would be bound just the same to deliver the full quantity of an instalment at the stipulated time and the buyer would not be obliged to accept a less quantity or accept delivery of an instalment out of time. If then a buyer accept a part performance of an instalment in reliance on the remainder of that instalment being duly delivered but which does not happen though the seller indicates a willingness to make deliveries of the subsequent instalments, can the buyer renounce the entire contract?

Of course, if the contract is apportionable and can be construed to resolve itself into two or more independent contracts as there are deliveries, a defective delivery would be a breach only of such one contract corresponding to an instalment, and the theory of severability should govern only if the status quo cannot be restored to permit recovery since there was no stipulation for acceptance of a part performance of an instalment.

On the other hand if the contract is entire, i.e., indivisible and the stipulations as to delivery and payment are dependent and conditions, an acceptance of a part performance of an instalment in reliance on the remainder being duly delivered can not be deemed a waiver of the performance of such condition. In such case the right to renounce the entire contract should be suspended so long as the benefits received are retained. If, however, the stipulations as to the time of delivery and quantity of an instalment or for payment are independent stipulations, a breach in respect thereto is severable and compensable in damages.

Of course aside from part performance, where there was an absolute failure to deliver or accept the first instalment at all, on principle it would seem that such a failure surely indicates an intention not to perform the entire contract. An application here of the doctrine of severability is unwarranted because, primarily, it was invented to relieve against the harsh requirement of full performance before full liability shall arise. In fact there seems to have been little difficulty experienced in holding that a right to renounce existed in such cases. Likewise where there is a failure to pay for an instalment fully delivered, it would seem to be an indication that the buyer does not intend to perform his contract whatever rights the seller may have.

So where there is a failure to deliver subsequent instalments

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or to pay therefore, that would be an indication of an intention not to go on with the contract and the right to end the contract at once would be clear. But in an early English case\textsuperscript{37} where there was a failure by the buyer to pay for the fourth installment coupled with a declaration that he intended to hold one payment as security, the right to call off the contract was placed on the ground of an attempt to change the nature of the contract by imposing new conditions. A remark was made by a justice that if there had been a mere refusal to pay it would have been otherwise. While the imposing of new conditions was a sufficient indication of an intention to be no longer bound by the contract, yet this remark was of greater influence in later decisions holding that a mere failure to pay on time was not such an imposition of new conditions as to justify the other party to abandon contract.\textsuperscript{38}

As stated before, the true conflict arose over the question whether in case of a partial performance of an instalment there existed a right to renounce the entire contract or whether the breach was compensable in damages for that one instalment only, but not giving a right to renounce performance as to the remaining instalments.\textsuperscript{39}

The early English cases involved defective deliveries of the first instalment by non-delivery of the full amount. A tender of a short quantity by the seller on the first instalment was held to justify the buyer to rescind,\textsuperscript{40} while a refusal by buyer to take the full amount stipulated did not give such a right but was held to be compensable in damages.\textsuperscript{41} A third case held a defective shipment of inferior coal and the detention of buyer's ship was not \textit{prima facie} a defense because not alleged to be material.\textsuperscript{42}

Where the buyer did not take the first of three instalments it was held that the contract formed a continuous system, and a failure by either party in respect to the first instalment vacated the contract as to the remainder on ground that to compel the performance of the remaining instalments would compel a party to perform a contract he never intended.\textsuperscript{43}

\textsuperscript{38} Freeth v. Burr, 9 L. R. C. P. 208, (1874).
\textsuperscript{39} See article "Recission in Divisible Contracts" by R. C. McMurry, counsel for the defendant in Norrington v. Wright, supra, 15 Am. Law Rev. 673, (1881).
\textsuperscript{40} Hoare v. Rennie, 5 H. & N. 19 (exch), (1859).
\textsuperscript{41} Simpson v. Crippin, 8 Q. B. 14, (1872). See note 28, supra.
\textsuperscript{42} Jonassohn v. Young, 4 B. & S. (Q. B.), (1863).
\textsuperscript{43} Honck v. Muller, 7 Q. B. Div. 92, (1881).
The controversy, in England, was finally laid to rest in the House of Lords in a case which did not directly involve the question of a defective delivery of the first instalment. In *Mersey Steel Co. v. Naylor* the buyer did not promptly pay on receipt of the first instalment because, as explained, of hesitation on erroneous grounds of law. It was held that the mere failure to pay for the first instalment did not of itself justify the seller to renounce the entire contract. The court reviewed the subject of cases involving contracts performable in instalments, preferring to abide by the test laid down in a previous case that whether a partial breach justified the renunciation of the entire contract depended upon the actual circumstances of each case whether the conduct of the party is so inconsistent with an intention to be bound any longer by the entire contract.

In this case the following propositions were inferentially approved.

1. That terms as to delivery and payment of instalments do not fall within the rules applicable to condition precedents.

2. That a breach of a material part does not necessarily go to the essence, the question being whether the whole and no less was the essence of the contract.

3. That the rule that in mercantile contracts time is of the essence is not conclusive upon the question whether the time set for delivery of an instalment is a condition precedent.

4. That provisions as to payment to keep pace with deliveries did not split up the contract, and so, the test of apportionability of the consideration was rejected in this class of contracts.

5. That it would not alter the case whether the default was on part of the seller to deliver instalments, subsequent to the first.

As a practical result may be added, the right to renounce became one of intent and as such a question of fact for the jury rather than one of law for the court.

This question was fully reviewed by the Supreme Court of the United States in the case of *Norrington v. Wright*. Here there was a defective delivery by failure to ship the required amount the first month. The buyer learning that the deficiencies could not be made up in the time stipulated for, offered to return that received and declared the contract terminated.

In the District Court, counsel for the plaintiff, the seller,
stressed the fact of part performance and urged the doctrine of separability upon the court, while the counsel for the buyer argued that when a time is fixed for delivery, renunciation is allowed upon default and therefore if the contract remains one, though divisible in performance, the right to renounce should not be denied. The District Court directed a verdict for defendant, holding the contract an entire one, though divisible in performance, and a failure to deliver the instalment completely at stipulated time fatal.

On appeal, the case of Mersey Steel Co. v. Naylor, supra, since decided, was strongly relied on by the plaintiff in addition to argument below. The supreme court after review of the English cases preceding the Mersey Steel case, held that in mercantile contracts the statements descriptive of the subject-matter or of some material incident as time are prima facie conditions precedent upon the non-performance of which the party aggrieved may repudiate the whole contract; hence the buyer was justified in ending the contract.

This case may safely be stated to accord with the Mersey Steel case on the proposition that provisions as to payment to keep pace with delivery did not split up the contract into so many little contracts as there were instalments. The acceptance and reten-

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47 "The right to rescind a contract for non-performance is a remedy as old as the law of contracts itself. Where the contract is entire—indivisible—the right is unquestioned. The undertakings on the one side and on the other are dependent, and performance by the one party cannot be enforced by the other, without performance or a tender of performance on his own part. In the case before us the contract is severable. A 'severable' contract, as the language imports, is a contract liable simply to be severed. In its origin, and till severed, it is entire—a simple bargain or transaction. . . . But this equitable doctrine should not be invoked by one who has failed to perform, for the purpose of defeating the other's right to rescind, and thus to protect himself against the consequences of his own wrong. As against such party it should be treated and enforced as entire. To say, therefore, that the contract is severable does not I repeat, advance the argument. To render the plaintiff's position logical it is necessary to take a step forward, and hold that such a transaction (it would not be accurate in this view to call it a contract) constitutes several distinct independent contracts. Then of course it follows that a failure as respects one of several successive deliveries, affords no right to rescind in regard those yet to be made. And this step, after much apparent doubt and hesitation, the English courts have taken. It was the necessary outgrowth of the decision in Simpson v. Crippin which overruled Hoare v. Rennie. In our own country the cases are inharmonious, and the question unsettled. After a careful examination of what has been said on the subject, I shall not be surprised if the courts here finally adopt the present English rule, and thus substitute compensation in damages for the remedy by recission, to the extent there done." Butler D. J. in 5 Fed. 768, (1881). See also Wolfert v. Caledonia Springs In. Co., 195 N. Y. 118, 88 N. E. 24 and note in 21 L. R. A. (N. S.) 864.
tion of partial performance of one instalment could operate only as a waiver to insist upon the default of the particular instalment as giving a right to end the contract.

These cases differ radically in one respect. *Mersey Steel Co. v. Naylor, supra*, stressed the intention to repudiate the contract, making implied conditions of little or no importance while in the case of *Norrington v. Wright*, material stipulations were held to be conditions precedent, the non-performance of which *prima facie* amounted to a repudiation of the whole contract without regard to the intention of the party in default.

With the decision in the Mersey Steel Co. case and *Norrington v. Wright* the question of whether stipulations providing for payment to keep pace with delivery in parcels, works a severance of the contract was decided in favor of a presumption that instalment contracts remain entire. The doctrine of severability was there limited to its proper sphere in providing relief in cases where manifest injustice might result from the strict requirement of full performance before a liability to pay shall arise, as where there had been an acceptance of a part performance and a retention thereof, or where the *status quo* cannot be restored by giving compensation by way of damages instead. In mercantile contracts, divisible in performance, the doctrine of recovery after a partial performance could thereafter apply only in so far as such was applicable to contracts providing for one delivery, and the right to renounce the entire contract was limited only in cases where the *status quo* could not be restored, or where the breach was of an immaterial or independent stipulation.

But while *Norrington v. Wright, supra*, may be a precedent only for the rule that a failure to deliver first instalment on stipulated time justifies the buyer to renounce, yet the weight of authority in the United States is that payment as stipulated is a material and essential element of the contract. And on principle it would seem that a failure to deliver or pay for a subsequent instalment will yield the same right to renounce the entire contract consistent with the rights acquired by defendant, if any, by an acceptance of his prior part performance.

As an illustration of the practical effect of a sort of a compromise of the doctrine of *Mersey Steel Co. v. Naylor, supra*, and

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49 See note 48 supra.
of Norrington v. Wright, supra, where there was no question of partial performance involved, the case of Gerli v. Poidebard Silk Co. may be cited. In that case there was a failure to deliver the first instalment, a tender of the second late, and a tender of the third on time. The buyer, upon learning that the first could not be delivered, renounced the entire contract and refused to receive subsequent tender of the other instalments. The court held that although the failure to deliver the first instalment may be more persuasive than if the contract had been partially performed, yet that standing alone was insufficient to justify the buyer to renounce, and while the buyer could not be compelled to accept the second instalment tendered late, yet he was bound to take the third delivered on time.

The court stated the true question to be whether on the proper construction of the contract the performance of any particular stipulation by one party is a condition precedent to the continuance of obligation on the other party, and stated this must be logically the question as well with regard to the first stipulation as the subsequent ones. But the court stressed the intention of the defaulting party not to perform the entire contract, as well as the materiality of the failure to deliver the first instalment to the purpose of the entire contract, thus making a double test; (1) as to the materiality of the breach; and (2) whether the seller intended to breach the entire contract.

This double test seems to be the rule in Wisconsin in respect to contracts generally. However when contracts provided for delivery in parcels or instalments or contained separate and distinct items the test of apportionability was freely applied in

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61 In speaking of the right to rescind for failure to deliver if the contract had called for delivery at one time, Van Syckell J. dissenting, said: "In what respect does the case under discussion differ in principle? It is a contract for the delivery of thirty bales, although to be in instalments. It cannot, even plausibly, be contended that the contract is severable or divisible. The bargain was a unit, embracing all the thirty bales, and not three independent contracts for ten bales each. . . . Under the rule on which the judgment below is based, if there is a contract for twelve successive monthly deliveries, the vendor may refuse to make eleven of the deliveries as the due days arrive, and still hold the vendee to the acceptance of the twelfth delivery."

Wisconsin prior to the Uniform Sales Act, and which, it is submitted, produced the same effect.\textsuperscript{53}

**Under the Uniform Sales Act**

The decision of *Mersey Steel Co. v. Naylor*, supra, was incorporated into the English Sale of Goods Act\textsuperscript{54} providing that, where there is a “contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect to one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalment, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.” This seems to be the rule applicable to contracts generally in England.\textsuperscript{55}

In the corresponding section of the Uniform Sales Act the words italicized above have been substituted for by the words “whether the breach is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract or whether the breach is severable, giving a rise to claim for compensation but not to a right to treat the whole contract as broken.”\textsuperscript{56}

The Uniform Sales Act has the additional function of unification of the divergent rules on the subject, and, moreover, different states have varying tests as to how great a default, or what circumstances will justify a renunciation of the whole contract.\textsuperscript{57}

In jurisdictions where stipulations as to time and quantity or payment were *prima facie* conditions and material, a change has been effected in so far that now whether the parties intended such stipulation to be so material as to give, on the breach thereof, a right to renounce the entire contract must first be determined as

\textsuperscript{53}Campbell and Cameron Co. v. Weisse, 121 Wis. 491, 99 N. W. 340. The vendor may enforce payment for the portion delivered although he fails to deliver the balance and buyer may insist upon full performance of the contract in having the quantity purchased delivered, though there be default in payment of the quantity delivered, upon the ground that the payment for such delivery is not a condition precedent to the complete performance of the contract by the seller.


\textsuperscript{55}Halsbury’s Laws of England, 43; supra, note 54.

\textsuperscript{56}Sec. 121.45, Uniform Sales Act (Wis. Stats. 1923).

\textsuperscript{57}Kieckefer Box Co. v. Strange Paper Co., 180 Wis. 367, 193 N. W. 487.
a question of fact.\textsuperscript{58} On the other hand in the states where the intention to repudiate must be found in addition to the fact of materiality of a stipulation the effect would seem to be to eliminate the latter test.\textsuperscript{59}

Of course it is still possible that parties may enter into two or more bargains at the same time.\textsuperscript{60} The fact of the apportionability of the diverse items to the consideration on the other side may be cogent evidence of such an intention. It would seem, however, under the Sales Act, where the goods are to be delivered at stated intervals and payable for upon such delivery, that, \textit{eo nomine}, breaches by way of defective delivery of an installment or neglect or refusal to take delivery or to pay therefore must \textit{prima facie} be determined on the question whether the instant default was, under the facts given, material to the purpose of the entire contract or transaction.\textsuperscript{61}

Materiality connotes the relation of the items or stipulations of the promise on one side, to the whole of the consideration on the other. In modern business dealings the courts are loath to hold one part of the terms deliberately entered into less material than others.\textsuperscript{62} Whether then the parties did or did not intend an installment contract to be subject to unexpressed conditions has also become a question of fact for the court or jury.\textsuperscript{63} Though the rule that in mercantile contracts time is of the essence is being relaxed, yet it cannot be entirely dispensed with. There may still arise a question of a substantial performance of an installment, but now, a failure to perform as agreed must be tested solely by the question whether a breach thereof under the terms of the contract and the circumstances of the case is a material breach of the purpose of the entire contract.\textsuperscript{64} For this, the old cases are still valuable in obtaining favorable instructions to the jury.

\textit{Joseph Witmer,}\textsuperscript{*} '24.

\*Contributor of "The Performance of What One is Already Bound to do as a Consideration in Wisconsin." 6 MARQUETTE LAW REVIEW, 85.

\textsuperscript{58} Helgar Corp. v. Warner's Features, supra.

\textsuperscript{69} Dupont v. United Z. Co., 85 N. J. Law 416, 80 A. 992.

\textsuperscript{60} Ambler v. Sinaiko, 168 Wis. 286, 170 N. W. 270.

\textsuperscript{61} Helgar Corp. v. Warner's Features, supra ("depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties.")

\textsuperscript{62} Lawson on Contracts, sect. 467 et seq.

\textsuperscript{63} Wilbur v. Means, 171 Wis. 406, 177 N. W. 575.

\textsuperscript{64} Kieckefer Box Co. v. Strange P. Co., supra; Chess and Wymond Co. v. La Crosse Box Co., 173 Wis. 382, 181 N. W. 313, (verdict directed); Ambler v. Sinaiko, supra; Uniform Laws Annotated, (Uniform Sales Act, sect. 45.)