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Anticipatory Breach of Contract -- Effects of Repudiation

Lawrence J. Meyer

except as their rights are modified by their peculiar contracts, are protected by law as other seamen . . . ."[210]

In summary, then, a lay fisherman engaged in the business of commercial fishing on navigable waters is enough of a seaman to entitle him, in case of injury or sickness in the service of his vessel, to his wages according to the contract.[211] He is entitled to the benefits of maintenance and cure.[212] His rights are enforceable in admiralty like any other seaman's rights.[213] He is a ward of the admiralty court.[214] He is a seaman in practically every respect except that of a secured periodic wages and statutory enactments listed *supra*.

Conclusion

This lay plan which once dominated the shipping empire has now been relegated to the relatively small sphere of fishing. Although thousands of ships and fishermen are still affected by these lay principles there seems to be very little recent adjudication on the subject. The existing litigation, and the rules thereby promulgated, are largely of sparse and ancient vintage.

We submit this comment in the hope that it will, in some degree, systematize and clarify a rather complex and neglected field.

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ANTICIPATORY BREACH OF CONTRACT—EFFECTS OF REPUDIATION

Introduction

> The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for compensation in damages by the man whom he has injured.[1]

One phase of contract law that has plagued the courts of both England and the United States for the last century is the doctrine of anticipatory breach. The problem involved is one of importance because where the theory has been accepted and applied, there has been an enlargement of the contractual obligation.[2] The rights of parties are affected by such a condition. Upon invocation, the doctrine causes a party to be held liable

210. *See* The Montague, 53 F. Supp. 548, 549 (W.D. Wash. 1943).
211. The Montague, 53 F. Supp. 548 (W.D. Wash. 1943).
212. See *Maintenance and cure, supra.*
213. The Montague, 53 F. Supp. 548 (W.D. Wash. 1943).
214. Harden v. Gordon, 11 Fed. Cas. 480, No. 6,047 (C.C.D. Me. 1823).
215. See note 26 *supra.*

1. Hochster v. De La Tour, 2 El. & Bl., 683, 118 Eng. Rep. 922, 927 (Q. B. 1853).
2. 5 Williston, Contracts § 1321 (Rev. Ed. 1937).

on a promise he never made.[3] Since the promisor only promised to do something at a future time, should strict legal principles be relaxed in order to hold him liable on a contract because of his action before that time arrives? The purpose of this comment will be to determine by which means that obligation has been expanded—both generally, and in Florida specifically—and what effect it has had upon our system of jurisprudence.

Strictly construed, an anticipatory breach is one committed before the time of performance has arrived.[4] In order for the adverse party to treat the renunciation as a total breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and it must be distinct, unequivocal and absolute.[5] An actual breach of contract, on the other hand, consists of a failure, without legal excuse, to perform any promise which forms the whole or part of a contract which is no longer executory.[6] An anticipatory breach occurs when there is a repudiation of an existing executory contract yet to be performed by either party. In the event one of the parties does perform, no matter the extent of such performance, the breach is said to be actual rather than anticipatory. This innovation (the doctrine of anticipatory breach) in the common law was introduced in 1853 by a famous English case, *Hochster v. De La Tour*.[7] An action was brought for breach of a personal service contract by the employee. While the agreement was wholly executory, the employer renounced his promise. It was held that the action was properly and not prematurely brought. The reasoning behind the decision was that an unfortunate situation would have arisen if the employee, as a condition precedent to a right of action, would have to decline other employment and hold himself ready to perform his promise until the commencement date of the contract.[8]

It would seem that a later English decision, allowing suit for total breach because of a repudiation, found footing upon firmer ground by reasoning that there is an implied promise to keep the contract open as subsisting and effective until the moment of performance.[9]

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3. *Ibid.*

4. New York Life Ins. Co. v. Viglas, 297 U.S. 672 (1936); See 5 WILLISTON, CONTRACTS § 1296 (Rev. Ed. 1937).

5. Roehm v. Horst, 178 U.S. 1 (1900); Dingley v. Oler, 117 U.S. 49 (1886).

6. 5 WILLISTON, CONTRACTS § 1288 (Rev. Ed. 1937). In order to cover the case of anticipatory breach, the somewhat wider definition is given in RESTATEMENT, CONTRACTS § 312 (1932) (" . . . non-performance of any contractual duty of immediate performance.").

7. 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).

8. *Ibid.* The court's reasoning was based upon two earlier English cases, Caines v. Smith, 15 M. & W. 189, 153 Eng. Rep. 816 (1846), where the defendant's promise was alleged to be simply to marry the plantiff, and Short v. Stone, 8 Q.B. 358, 115 Eng. Rep. 911 (1846), where the defendant was to marry her within a reasonable time next after he should thereunto be requested. The two cases did not profess to establish any general doctrine that a contract could be broken before the time for its performance, but they gave rise to the court's conception that either the plaintiff have an immediate right of action or he would have none. See 5 WILLISTON, CONTRACTS § 1313 (Rev. Ed. 1937).

9. Frost v. Knight, L.R. 7 Ex. 111 (1872).

The doctrine announced in the above case became the settled law in England regarding contracts for services, for marriage and for the manufacture of goods.[10] As will be observed presently, the majority of the courts of the United States reacted similarly.

At this point, it might be helpful to note that the doctrine of anticipatory breach does not apply to holders of promissory notes, bills of exchange or bonds.[11]

In the case of an ordinary money contract, such as a promissory note, or a bond, the *consideration* has passed; there are no mutual obligations.[12]

The law is settled also in regard to unilateral contracts.[13] ". . . The doctrine of anticipatory breach has in general no application to unilateral contracts, and particularly to such contracts for the payment of money only . . . ."[14]

There is a split of authority in applying the doctrine to contracts for the *use* of land. In view of the contingent character of rent, as an obligation not owing in the present but payable in the future, it has generally been stated that there can be no such thing as an anticipatory breach of a lease.[15] The theory upon which this contention rests is apparently that application of the doctrine would render enforceable, claims for rent as an obligation absolutely owing which obligation might never come into existence.[16]

The opposite view has been taken, however, allowing the lessor to recover damages in advance.[17] The damages have been for the total breach where the lessee has repudiated.[18] In most cases (though not in all) the damages have been measured by the difference between the rent

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10. Frost v. Knight, L.R. 7 Ex. 111 (1872); Johnstone v. Milling, 16 Q.B.D. 460 (1886); Synge v. Synge, 1 Q.B. 466 (1894).

11. Roehm v. Horst, 178 U.S. 1 (1900); Greenway v. Gaither, 10 Fed. Cas. 1180. No. 5,788 (C.C.D. Md. 1853). *But cf.* New York Life Ins. Co. v. Viglas, 297 U.S. 672 (1936). See Washington County v. Williams, 111 Fed. 801 (8th Cir. 1901), which was an extension of the Roehm holding; the case went too far, stating that Roehm v. Horst stood for the proposition that the doctrine of anticipatory breach was not applicable to a contract to pay money in the future.

12. Roehm v. Horst, 178 U. S. 1, 8 (1900).

13. Roehm v. Horst, 178 U.S. 1 (1900); Nichols v. Scranton Steel Co., 137 N.Y. 471, 33 N.E. 561 (1893). See 5 WILLISTON, CONTRACTS § 1328 (Rev. Ed. 1937); Note *Anticipatory Breach of Unilateral Contracts*, 4 OKLA. L. REV. 112 (1951).

14. Smyth v. United States, 302 U.S. 333 (1937).

15. People *ex rel.* Nelson v. West Town State Bank, 373 Ill. 106, 25 N.E.2d 509 (1940); Cooper v. Casco Mercantile Trust Co., 134 Me. 372, 186 Atl. 885 (1936); Wood v. Partridge, 11 Mass. 448 (1914).

16. People *ex rel.* Nelson v. West Town State Bank, 373 Ill. 106, 25 N.E.2d 509 (1940); *cf.* Moses v. Antuono, 56 Fla. 499, 500, 47 So. 925, 926 (1908), where it appears that Florida follows the theory that in leases there is an *actual* breach once the contract has been executed but prior to the time of performance.

17. Hawkinson v. Johnston, 122 F.2d 724 (8th Cir.), *cert. denied*, 314 U.S. 694 (1941). *But cf.* Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 Atl. 464 (1935), where it is stated that there was, in fact, an actual breach.

18. Arden Hotel Co. v. Mills, 20 Manitoba L.R. 14 (1910); *cf.* Wilson v. National Ref. Co., 126 Kan. 139, 266 Pac. 941 (1928).

reserved in the lease for the unexpired term and the reasonable rental value of such term.[19]

Where the doctrine is recognized, its application is normally confined to contracts which contain *mutually* executory terms.[20] It has no application to a contract in which the complaining party has fully performed.[21]

The foregoing is typical of most authorities. However, the view that the full performance of a contract by the complaining party does not prevent his recovery upon the doctrine has received some support.[22] This might very easily be the result of the court's failure to distinguish between an actual and an anticipatory breach, evidenced by the case of *Pollack v. Pollack*.[23] The court stated the principle: ". . . even though one side of the contract was fully performed, if a promisor breached (by repudiation) he would be breaching the contract just as effectively as if both sides remained to be performed . . . ."[24]

The doctrine of anticipatory breach should not have been applied since there was merely a question of the extent of an *actual* breach and not a question concerning the type of breach that occurred.

Naturally, in all instances where the action of breach of contract lies for anticipatory repudiation, there must be an *election* by the injured party to treat the contract as broken.[25] If the injured party does not elect, then, so far as that particular repudiation is concerned, the contract remains in effect for the benefit of both parties.[26]

Many vexatious problems were to arise in the growth of the doctrine. Strangely enough, however, the problem child *i.e., what shall constitute the breach or repudiation*, came into existence with the features of a cherub. Under *Hochster v. De La Tour*,[27] an absolute *refusal* was deemed all that was necessary to institute the action. Although the *Hochster* decision, as was stated previously, was enunciated in 1853, the United States Supreme Court did not entertain the question until 1900.[28] The

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19. Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614 (1927); *cf.* Marathon Oil Co. v. Edwards, 96 S.W.2d 551 (Tex. Civ. App. 1936).

20. Central Trust Co. of Illinois v. Chicago Auditorium Ass'n., 240 U.S. 581 (1916); Roehm v. Horst, 178 U.S. 1 (1900); Brimmer v. Union Oil Co., 81 F.2d 437 (10th Cir. 1936); See 3 WILLISTON, CONTRACTS § 1296 (Rev. Ed. 1937).

21. Brimmer v. Union Oil Co., 81 F.2d 440 (10th Cir. 1936).

22. Equitable Trust Co. v. Western Pac. Ry., 244 F. 485 (S.D.N.Y. 1917); *cf.* Magnusen v. Klemp, 339 Ill. App. 179, 89 N.E.2d 533 (1949). *See* Federal Life Ins. Co. v. Rascoe, 12 F.2d 697, 701 (6th Cir. 1926) (dissenting opinion).

23. 39 S.W.2d 853 (Tex. Com. App. 1931).

24. *Id.* at 855.

25. Remy v. Olds, 88 Cal. 537, 26 Pac. 355 (1891); Carlisle v. Green, 131 S.W. 1140 (Tex. Civ. App. 1910); *cf.* Bu-Vi-Bar Petroleum Corp. v. Krow, 40 F.2d 488 (10th Cir. 1930); Independent Milling Co. v. Howe Scale Co. of Illinois, 105 Kan. 87, 181 Pac. 554 (1919).

26. Carlisle v. Green, 131 S.W. 1140 (Tex. Civ. App. 1910). *But cf.* Kuhlman v. Wieben, 129 Iowa 188, 105 N.W. 445 (1905).

27. 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).

28. Roehm v. Horst, 178 U.S. 1 (1900).

majority of the state courts, however, whenever the question did arise, adopted the English rule.[29]

Judge Wells, in *Daniels v. Newton*,[30] expressed opposition to the rule in *Hochster v. De La Tour*[31]:

> An executory contract ordinarly confers no title or interest in the subject matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of rights, nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under such conditions such that he is or might be entitled to require performance . . . .[32]

In addition he stated:

> . . . The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury and not anticipated injury is the ground of legal recovery . . . .[33]

And in final condemnation:

> . . . Throughout the whole discussion in *Hochster v. De La Tour* . . . the question as to what conduct of the defendant will relieve the plaintiff from the necessity of showing readiness and an offer to perform at the day, in order to make out a breach by the other, appears to us to be confounded with that of the plaintiff's cause of action; or rather, the question, in what consists the plaintiff's cause of action, is lost sight of; the court is dealing only with the conduct of the defendant in repudiating the obligations of his contract . . . .[34]

Another of the judge's contentions was that the application of the rule in the case would necessitate the adoption of the doctrine to bonds, notes and bills of exchange. The reason that this hypothesis is fallacious has already been stated.

Stanford v. McGill[35] also expressed the minority renunciation rule until overruled by *Hart-Parr Co. v. Finley*[36] in 1915. The court felt disposed to go along with the majority rule and stated:

> When *Stanford v. McGill* was decided there may have been some doubt about what the trend of authority might be in the future, but the contrary rule has been unanimously followed, and the

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29. By 1915, Massachusetts, Nebraska and North Dakota were the only states diametrically opposed to the doctrine. See Note, *A Century Without Anticipatory Breach in Massachusetts*, 31 B.U.L. Rev. 505 (1951).
30. 114 Mass. 530 (1874).
31. 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).
32. Daniels v. Newton, 114 Mass. 530, 533 (1874).
33. *Id.* at 539.
34. *Ibid.*
35. 6 N.D. 536, 72 N.W. 938 (1897).
36. 31 N.D. 130, 153 N.W. 137 (1915).

> law generally applicable to executory sale contracts settled in harmony therewith . . . no harm can come from harmonizing the law in this jurisdiction with that generally prevailing . . . .[37]

Before we examine the Florida view, the thorn in the heels of the majority, it would seem advisable to peruse the treatment other jurisdictions have given to renunciation and repudiation. Different jurisdictions fail to appreciate the pronounced distinction between a verbal repudiation and a renunciation by means of a positive act, which, however, is relatively minor, compared to the overall problem. Generally, a repudiation or renunciation has amounted to a positive statement by the promisor that he will not[38] or cannot[39] perform.

> An unqualified and positive refusal to perform a contract, though the performance thereof is yet not due, may, if the renunciation goes to the whole contract, be treated as a complete breach which will entitle the injured party to bring his action at once . . . .[40]

It has amounted also to a positive act resultant in his non-performance; *i.e.*, such as transferring the property involved in the contract to a third party prior to date of performance.[41]

> Where a vendor, who has contracted to convey land upon the payment of certain amounts, before the time for payment arrives, notifies the purchaser that he will not carry out the contract, and sells the same land to a third party, he thereby breaches the contract, and the purchaser may immediately sue for breach thereof . . . .[42]

In addition, rendering the performance impossible by becoming bankrupt, has been held a renunciation.[43]

As can be readily observed, renunciation is to a great degree a question of fact and each case must rest separately upon its merits.

The Rule in Florida

The leading case on anticipatory breach in Florida is *Slaughter v. Barnett*,[44] where an action was brought by the vendee upon the vendor's statement to the effect that he would not perform his promise to sell a parcel of land. The Court determined that a mere *announcement* of inability or lack of desire to perform was not sufficient to constitute a breach of contract. The act amounting to a repudiation must "distinctly, unequivocally and absolutely" appear.[45] It was necessary for the breach to be accompanied by some act amounting, in substance, to an *actual* breach.[46] Under this reasoning, the purchaser (vendee) could not treat

37. Hart-Parr Co. v. Finley, 31 N.D. 130, 133, 153 N.W. 137, 140 (1915).
38. Roehm v. Horst, 178 U.S. 1 (1900).
39. Stanley v. Anthony Farms, 93 Fla. 295, 112 So. 57 (1927).
40. Roehm v. Horst, 178 U.S. 1, 9 (1900).
41. Pearce v. Hubbard, 223 Ala. 231, 135 So. 179 (1931).
42. *Id.* at 180.
43. Central Trust Co. v. Chicago Auditorium Ass'n., 240 U.S. 581 (1916).
44. 114 Fla. 352, 154 So. 134 (1934). *See* Croker v. Powell, 115 Fla. 733, 156 So. 146 (1934) (citing principal case).
45. Slaughter v. Barnett, 114 Fla. 352, 356, 154 So. 134, 138 (1934).
46. *Ibid.*

the contract as breached in toto, and bring his action immediately for damages on a total breach. The foregoing case created a rift among the authorities on the question of whether or not the doctrine of anticipatory breach is recognized in Florida.[47]

The Florida Court, in sustaining its position, maintained that the United States Supreme Court never recognized anticipatory breach. (Citing *Dingley v. Oler*[48]). This was by no means accurate, however, because 14 years after the decision cited of the highest Court, and 34 years before the *Slaughter* case, the United States Supreme Court, in *Roehn v. Horst*,[49] joined other authorities in the Western World by recognizing and sanctioning this doctrine.

The *Slaughter* case was the result of an accretion of rules laid down under a variety of factual situations in Florida. Often, in this jurisdiction as well as in many others, anticipatory and actual breach have been confused. From an observation of the cases it seems that many times the courts fall into the pitfall of failing to distinguish between anticipatory breach and the extent of damages incurred as the result of an actual breach.[50] In *Dingley v. Oler*,[51] the complaining party had completely performed, and though the case was reversed on other grounds it shows how little attention might be given to the doctrine when necessity and convenience dictate. However, Florida's Supreme Court satisfactorily distinguished between the two concepts from the onset. Where the contract had been partially performed, it was decided that *Hochster v. De La Tour*[52] was not controlling. The next rule invoked concerned verbal repudiation prior to the time fixed for performance,[53] the one ultimately adopted in the *Slaughter* case. Shortly thereafter, however, verbal repudiation plus disposal of the property involved did amount to sufficient repudiation.[54] The two foregoing cases, *Hall v. Northern and Southern Co.*,[55] and *Stanley v. Anthony Farms*[56] are distinguishable upon the facts, however. In the *Hall* case there was a clause within the contract which was relied upon to prevent the repudiation from being considered "unequivocal." Insufficient title, which made performance impossible,[57] was a sufficient repudiation, and bad faith on the part of the vendor caused the bending of a general rule of damages.[58] At one stage a mere

47. 5 WILLISTON, CONTRACTS § 1316 (Rev. Ed. 1937); 6 GRISMORE, CONTRACTS § 287 (2d. ed. 1947); 4 CORBIN, CONTRACTS § 959 (1951).
48. 117 U.S. 490 (1886).
49. 178 U.S. 1 (1900).
50. Dingley v. Oler, 117 U.S. 490 (1886); See 3 WILLISTON, CONTRACTS § 1317 page 2367 (Rev. Ed. 1937).
51. 117 U.S. 490 (1886).
52. 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).
53. Hall v. Northern and Southern Co., 55 Fla. 235, 46 So. 178 (1908).
54. Stanley v. Anthony Farms, 93 Fla. 295, 112 So. 57 (1927).
55. 55 Fla. 235, 46 So. 178 (1908).
56. 93 Fla. 295, 112 So. 57 (1927).
57. Thomas v. Walden, 57 Fla. 234, 48 So. 746 (1909); Duval Investment Co. v. Stockton, 54 Fla. 296, 45 So. 497 (1907).

verbal repudiation was sufficient to invoke the doctrine of anticipatory breach,[59] but the rule was extinguished with the birth of the *Slaughter* decision. Since that time, regardless of the renunciation, the same requirements have been specified, although the Court has inferred that the doctrine is recognized in Florida.[60]

Conclusion

The practical convenience of the doctrine has been the most significant reason for its almost universal acceptance—the ability of the plaintiff to dispose of his action (as long as it is certain he is to have an action) at once. The fact that the doctrine has enlarged the obligation of the law of contracts, however, is also to be considered.[61] The writer would favor the Florida view if the promisee never changed his position between the time of repudiation and the date of performance. This, however, is very seldom the situation, and when the promisor's wrongful action has placed the promisee at a disadvantage, there should be a method of correcting the wrong. Also, as was stated previously, since the breach is determined by facts involved in each particular case, if a contract were not to be performed until a distant date, bringing rules of evidence into play to determine the extent of the renunciation might easily lend itself to great difficulty. To expedite progress, our laws should stay in step with the needs of commerce. The doctrine of anticipatory breach can and does enhance contract law. Even though the doctrine also enlarges contract obligations, the quick settlement of disputes nullifies the deleterious effect of that enlargement.

Lawrence J. Meyer

ESCROW AGREEMENTS

Elements of an Escrow

Although escrows play an important part in modern legal affairs, comparatively little litigation has arisen on the point. The attributes of an escrow were established early at English common law, and have been relatively unchanged by the passage of time.

An escrow has been technically defined as an instrument which by its terms, imports a legal obligation, and which is deposited by the grantor with a third party to be kept by the depositary until the performance of a condition, or the happening of a certain event; and then to be delivered to the grantee.[1] While the term escrow originally applied only to real estate

58. Key v. Alexander, 91 Fla. 975, 108 So. 883 (1926); *cf.* Liberis v. Carmeris, 107 Fla. 352, 146 So. 220 (1932).
59. Behrman v. Max, 102 Fla. 1094, 137 So. 120 (1931).
60. Gilliland v. Mercantile Investment and Holding Co., 147 Fla. 613, 3 So.2d 148 (1941).
61. 5 Williston, Contracts § 1321 (Rev. Ed. 1937).

1. Love v. Brown Development Co. of Mich., 100 Fla. 1373, 131 So. 144 (1930).