St. John's Law Review

Volume 22
Number 1 *Volume 22, November 1947, Number 1*

Article 12

July 2013

Contracts--Vendor--Purchaser--Breach by Anticipatory Repudiation (Lang v. Todd, 28 N.W.2d 434 (Neb. 1947))

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CONTRACTS—VENDOR—PURCHASER—BREACH BY ANTICIPATORY REPUDIATION.—Under a contract for the sale of land situated in Nebraska, the purchase price was to be $45,000, payable $2,000 on contract, $43,000 on delivery of title and possession. Two weeks prior to the closing date the vendee unequivocally declared that when the time for performance arrived he would not perform. The day fixed for closing title came and passed with no offer to perform by either party. Three weeks thereafter, the vendee stated that he had reconsidered and offered to tender the full purchase price. The vendor refused to perform and began this action, alleging prior rescission of the contract, to clear the cloud on his title. The defendant counterclaimed for specific performance. *Held,* judgment for the defendant affirmed. A mere statement by a party to an executory contract made prior to the date of performance, to the effect that he cannot and will not perform on the law day or thereafter, does not constitute an abandonment of his right acquired by that contract. The doctrine of anticipatory repudiation does not inure to the benefit of the other contracting party in the absence of an affirmative act of termination made by such party in reliance upon the repudiation. *Lang v. Todd,* — Neb. —, 28 N. W. 2d 434 (1947).

It is well established law in those jurisdictions that follow the doctrine of *Frost v. Knight* [1] and other English cases,[2] that in executory bilateral contracts any voluntary affirmative act which renders substantial performance impossible gives to the injured party a right to immediately bring an action to secure the losses he may sustain by the wrongdoer's breach [3] of contract; [4] however, withdrawal by

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See People v. Ephraim, 77 Cal. App. 29, 245 Pac. 769, 774 (1926); Flynn v. State, 10 Okla. Cr. 41, 133 Pac. 1133 (1913).

[1] L. R. 7 Ex. 111, 112 (1872). Cockburn, C.J., "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it." Another leading case on this subject is Hockster v. De La Tour, 2 El. & Bl. 678, 118 Eng. Rep. 922 (K. B. 1853). This concept of law appeared much earlier in the Codified Civil Law of France. Code Napoleon § 1184 (March 5, 1803).

[2] Braithwaite v. Foreign Hardwood Co., [1905] 2 K. B. 543; British & Bennington, Ltd. v. Northwestern Cachar Tea Co., Ltd., [1923] A. C. 48.

[3] The expression anticipatory breach is elliptical; for there can be no breach until there is an election to treat the repudiation as a breach, a more correct term would be "Breach by Anticipatory Repudiation." *See,* Lord Wrenbury, in Bradley v. Newsom Sons & Co., [1919] A. C. 16, 53; RESTATEMENT, CONTRACTS § 319 (1932).

[4] The theory of the action is based on one of the necessary implied terms in every contract, that each party has the right to the maintenance of the contractual relations up to the time for performance as well as the performance of the contract when due. Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953 (1899). POUND, OUTLINE OF A COURSE IN THE HISTORY AND SYSTEM OF THE COMMON

the repudiator, before an action has been brought, or before some change of position on the part of the aggrieved party in reliance upon the repudiation, nullifies all effects of the repudiation.[5] "An announcement of an intention to break the contract is no more than an offer to rescind." [6] Under this notion, it is not the word of the repudiator that brings the contract to an end, but the election of the other party to treat it as a termination.[7]

The hostility to the acceptance of this doctrine of breach by anticipatory repudiation has been so great, that the doctrine has been applied with constant hesitation and caution. Not only do various jurisdictions reach wholly divergent results, but frequently, even the decisions in the same jurisdiction are difficult, if not impossible to reconcile. In New York the doctrine of anticipatory repudiation seems to be limited to contracts to marry,[8] for personal services,[9] and for the manufacture or sale of goods; [10] but does not apply to unilateral contracts where the only contractual duty to be performed is the payment of money at a future time; [11] or to policies of

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LAW 44, Jural Postulate III (1927). But see Vold, *The Tort Aspect of Anticipatory Repudiation of Contracts,* 41 HARV. L. REV. 340 (1928).

[5] United Press Ass'n v. National Newspaper Ass'n, 237 Fed. 546 (C. C. A. 8th 1916); 13 C. J. § 732 (1917).

[6] Hockster v. De La Tour, 2 El. & Bl. 678, 683, 118 Eng. Rep. 922 (K. B. 1853).

[7] Under the rule laid down in these English cases, a failure to treat anticipatory repudiation as a breach would involve a continuance of the obligations of the contract upon both sides. Thus, the promisee, if this were literally true, could enhance the defendant's damages by a continuation of the contractual obligation, but under the great weight of American and English authority, if the plaintiff elects to wait until the stated time for performance, he will be excused from performance or being ready to perform, but he has no right to continue to perform, if by so doing, damages of the defendant will be enhanced. See WILLISTON, SALES § 589 (2d ed. 1924).

[8] Burtis v. Thompson, 42 N. Y. 246 (1870). Since the abolition of actions for breach of promise in N. Y. (N. Y. CIV. PRAC. ACT § 61a-i) this class of cases had disappeared.

[9] Howard v. Daly, 61 N. Y. 362 (1875).

[10] Nichols v. S. S. Co., 137 N. Y. 471, 33 N. E. 561 (1893); Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436 (1887). In Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584 (1906) the *dicta* of the court indicated that the doctrine would be confined to those above mentioned three classes of contracts. *But see* Brakarsh v. Brown, 162 Misc. 412, 294 N. Y. Supp. 848 (Sup. Ct. 1937), where the court intimated that an action for anticipatory breach of a land contract might have been maintained if the plaintiff had pleaded properly. *See also* Matter of Vaughan, 156 Misc. 577, 282 N. Y. Supp. 214 (Surr. Ct. 1935), *aff'd without opinion,* 248 App. Div. 730, 289 N. Y. Supp. 825 (2d Dep't 1935).

[11] Indian River Corp. v. Manufacturer's Trust, 253 App. Div. 549, 2 N. Y. S. 2d 860 (1st Dep't 1938), where the court held that the doctrine of anticipatory repudiation does not apply to contracts for the payment of money only, installments or otherwise. *See also* Werner v. Werner, 169 App. Div. 9, 154 N. Y. Supp. 570 (1st Dep't 1915), ". . . that the doctrine of anticipatory breach does not apply to a contract to pay money at a future date." The exclusion of these type cases from the doctrine is purely arbitrary and without reason. As was said by Learned Hand, J., in Equitable Trust Co. v. Western Pacific

insurance.[12]

Until the present action, Nebraska had rejected the doctrine in its entirety,[13] holding that, "A mere declaration by a party to a contract that he does not intend to carry out the terms thereof before performance is due will not constitute a breach, so as to authorize the other to at once maintain an action, ..." [14]

In the instant case, the seller on receiving the vendee's notification that he would not perform, had a right to immediately rescind the contract; but in order for that right to ripen into a rescission, he had the affirmative duty to notify the defendant that he had elected to treat the repudiation as a breach and no longer considered himself bound by the contract.[15] The only significance of the vendee's conduct is that it excused a tender of performance on the law day by the vendor.[16] Therefore, the contract was still in existence and it is the law in most jurisdictions that where a contract is made for the sale of real property and the time for closing the transaction is not expressly made of the essence of the contract, and where it does not appear from the contract itself that a short delay would essentially affect the carrying out of the intentions of the parties, a court of equity may compel specific performance although the party asking

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Ry. Co., 244 Fed. 485, 501 (S. D. N. Y. 1917), *aff'd*, 250 Fed. 327 (C. C. A. 2d 1918), ". . . the eventual victory of the doctrine over vigorous attack has not left it scathless . . . . If the doctrine has any limits, they only exclude, and that arbitrarily enough, cases in which at once the promisee has wholly performed, and the promise is only to pay money." But see 5 WILLISTON, CONTRACTS § 1328 (rev. ed. 1937).

[12] Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584 (1906); *see also* Langan v. Supreme Council Am. L. of H., 174 N. Y. 266, 66 N. E. 932 (1903). New Jersey and Wisconsin are two states that allow actions for anticipatory repudiation of insurance contracts. O'Neil v. Supreme Council Am. L. of H., 70 N. J. L. 410, 57 Atl. 463 (1904); Merrick v. Northwestern Nat. Life Ins. Co., 124 Wis. 221, 102 N. W. 593 (1905).

[13] Nebraska and Massachusetts being the only two states that have refused to recognize the doctrine. Carstons v. McDonald, 38 Neb. 853, 57 N. W. 757 (1894); King v. Waterman, 55 Neb. 324, 75 N. W. 830 (1898); Daniels v. Newton, 114 Mass. 530 (1874); Tirrell v. Anderson, 244 Mass. 273, 138 N. E. 569 (1923).

[14] Carstons v. McDonald, 38 Neb. 853, 855, 57 N. W. 757, 759 (1894).

[15] In New York it seems that contractual obligations to be performed in the future cannot be shattered by word. There must be something more, the defendant's words of repudiation must be insistent enough to induce the other, not only to "accept" the breach, but to "act" by changing his position, until then the repudiator may still nullify his action. Gray v. Green, 9 Hun 334 (N. Y. 1876); Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255 (1891); Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436 (1887). In most other states, the words themselves are enough to enable the injured party to declare a breach. *See* Corduan v. McCloud, 87 N. J. L. 143, 93 Atl. 724 (1915); Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981 (1898).

[16] "Even though a party who has renounced his contract changes his mind and desires to carry it out, if he fails to withdraw his renunciation before the time comes for performance, it will excuse the default of the other party." Cermak v. Smolik, 112 Neb. 54, 57, 198 N. W. 562, 564 (1924). 5 WILLISTON, CONTRACTS § 1319 (rev. ed. 1937).

therefore has failed to perform his part by the exact time specified therein.[17]

While there is much confusion in the theoretical discussion of anticipatory breach, and the facts in the instant case may be capable of another interpretation, the holding in the case is merely a reiteration of the law as Bowen, L.J., first expressed it in *Johnstone v. Milling*.[18] "It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract and he can recover upon it as such." [19] This is the rule that is followed in all states that accept the doctrine, and no authority, judicial or extra-judicial, has seriously questioned its substance.

P. T. O'M.

DOMESTIC RELATIONS—DIVORCE—INJUNCTION—FULL FAITH AND CREDIT—COMITY.—The plaintiff, a resident of New York, brings an action for separation against her husband. Her suit is predicated upon the grounds of cruel and inhuman treatment and abandonment. Due to the fact that the defendant husband had instituted an action for divorce in France shortly before the commencement of this action, the plaintiff seeks additional injunctive relief to restrain the defendant from proceeding with his foreign action. The defendant appeared generally. The trial court denied the plaintiff's request for the injunction. The plaintiff appealed. *Held*, there is no need for the injunction as the court here is not concerned with the effect of the divorce decree of sister-state, but that of a foreign nation; therefore the validity of the decree would be governed by principles of comity rather than by the full faith and credit clause of the Federal Constitution. *Gaskell v. Gaskell*, 189 Misc. 504, 72 N. Y. S. 2d 440 (Sup. Ct. 1947).

The plaintiff's application was apparently based upon an extension of the doctrine of full faith and credit. In order to better under-

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[17] POMEROY'S EQUITY JURISPRUDENCE § 1408 (5th ed. 1941).
[18] Johnstone v. Milling, 16 Q. B. D. 460 (1886).
[19] *Id.* at 472, 473.