

Michigan Law Review

Volume 44 | Issue 1

1945

CONTRACTS-ANTICIPATORY BREACH OF A UNILATERAL OBLIGATION TO PAY MONEY

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Recommended Citation

George Brody, *CONTRACTS-ANTICIPATORY BREACH OF A UNILATERAL OBLIGATION TO PAY MONEY*, 44 MICH. L. REV. 163 (1945).

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RECENT DECISIONS

This section is divided into two parts: notes and abstracts. The abstracts consist merely of summaries of the facts and holdings of recent cases and are distinguished from the notes by the absence of discussion.

NOTES

CONTRACTS—ANTICIPATORY BREACH OF A UNILATERAL OBLIGATION TO PAY MONEY—Plaintiff, a real estate broker, was employed by defendant under a contract to negotiate the purchase of tracts of land. By the terms of the contract, plaintiff's commission was not to be paid until defendant accepted title to the land purchased. A sale of land for defendant was consummated by plaintiff but defendant, before accepting title, denied the existence of any contractual obligation to plaintiff for his services. Plaintiff brought suit for his commission. *Held*, there can be no recovery on a unilateral obligation to pay money before time for payment has arrived. The anticipatory breach doctrine is applicable only in cases where, at the time of repudiation, the contract has mutually dependent, executory covenants. *Brown Paper Mill Co. v. Irvin*, (C.C.A. 8th, 1944) 146 F. (2d) 232.

In *Hochster v. De la Tour*¹ the English court in confusing a distinction between giving the plaintiff an excuse for the non-performance of his obligations and an immediate right of action was led to adopt the doctrine of anticipatory breach. Although American courts later recognized that defendant's repudiation gave plaintiff this excuse for non-performance, they still permitted him, at his election, to maintain immediate action upon the contract.² While courts generally have accepted the doctrine in cases of executory, bi-lateral contracts having dependent promises,³ they have not done so in cases where the only contractual obligation is defendant's promise to pay money at a future

¹ 2 El. & Bl. 678, 118 Eng. Rep. 922 (1853). The court, in substance, implies that it reached its conclusion for the reason that it saw no other way to protect plaintiff. But see *Ripley v. McClure*, 4 Exch. 345, 154 Eng. Rep. 1245 (1849) decided before *Hochster v. De la Tour*, where the court recognized that a repudiation by defendant can be a defense to plaintiff.

See generally 5 WILLISTON, CONTRACTS, rev. ed., §§ 1313, 1315 (1937).

² *Roehm v. Horst*, 178 U.S. 1, 20 S.Ct. 780 (1900). *Bu-Vi-Bar Petroleum Corp. v. Krow*, (C.C.A. 10th, 1930) 40 F. (2d) 488.

³ But see *Daniels v. Newton*, 114 Mass. 530 (1874) where the court says, "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." For an attack on this doctrine see Williston, "Repudiation of Contracts," 14 HARV. L. REV. 317 and 421 (1901).

But see Vold, "The Tort Aspects of Anticipatory Repudiation of Contracts," 41 HARV. L. REV. 340 (1928) for a vigorous and many-sided defense of the doctrine and for a detailed consideration of the varied criticism of the doctrine. And note page 354, where the author, arguing by analogy, suggests that an action for anticipatory breach can be supported on the same ground as a tort action for impairment of a contract right and cites *Lumley v. Gye*, 2 El. and Bl. 216, 118 Eng. Rep. 749 (1853) for tort principle. See also Ballantine, "Anticipatory Breach and the Enforcement of Contractual Duties," 22 MICH. L. REV. 329 (1924).

time.⁴ The reason for this distinction is difficult to see.⁵ In fact, it has been pointed out that it is in this type of case that the plaintiff really needs the prompt aid of the courts.⁶ But, despite persistent criticism, the attitude of the courts, with little exception, has remained steadfast. There has been some opinion to the contrary.⁷ However, aside from the question of the necessity of the doctrine in any case and the justifiability of the distinction that the courts have set up, needless confusion can be avoided if the courts will abstain from talking anticipatory breach in cases which should be decided on other grounds. If there has been a present breach by defendant followed by his repudiation⁸ of his remaining obligation, it seems that the court is faced with a problem of the measure of recovery of damages and not with a matter of anticipatory breach. And there is sufficient authority to justify the recovery of future damages in this type of situation.⁹ In fact, the plaintiff may be said to have but one cause of action and

⁴ *CONTRACTS RESTATEMENT*, § 318 (1932) adopts the view that no action can be brought for the repudiation of a unilateral future obligation making no distinction between unilateral obligation to pay money and other obligations, but see 105 A.L.R. 460 (1936) where the author analyzes a group of cases and concludes that courts apparently deny recovery on this doctrine as a rule only in cases of money contracts.

⁵ Limiting the doctrine to executory contracts may be nothing more than an expression of the consistent desire of the courts, generally, to confine a doctrine to the type of situation responsible for its birth.

⁶ Grismore, 31 MICH. L. REV. 526 (1933); also see 37 MICH. L. REV. 1138 (1939)

⁷ Pollack v. Pollack, (Tex. App. 1932) 46 S.W. (2d) 292 at 293, where a court says, "The doctrine which excepts contracts fully performed by one side from the general rule [i.e. the rule of anticipatory breach] is purely arbitrary, and without foundation in any logical reason." This was not necessary for the decision, for the court found that defendant's obligation pure and simple. This dictum again cited in Universal Life and Accident Insurance Co. v. Sanders, 129 Texas 344, 102 S.W. (2d) 405 (1937) as law in Texas.

See also Moore v. Security Trust and Life Insurance Co., (C.C.A. 8th, 1909) 168 F. 496 at 505, dissenting opinion, "I perceive no reason for believing that the plaintiffs, by reason of having performed their part of the contract, are in a less favorable position than if the contract was still executory as to them." See also Equitable Trust Co. v. Western Pacific Ry. Co., (D.C.N.Y. 1917) 244 F. 485 at 501 and 502.

⁸ See 5 WILLISTON, *CONTRACTS*, rev. ed., § 1466 (1937) as to what action on the part of the defendant is sufficient or necessary to constitute repudiation.

⁹ 5 WILLISTON, *CONTRACTS*, rev. ed., § 1317 (1937). McCORMICK, *DAMAGES*, § 144 (1935). In Sagamore Corp. v. Willcutt, 120 Conn. 315 at 320, 180 A. 464 (1935) the court said, "When . . . a partial breach [of a contract] is accompanied or followed by a repudiation of the entire contract, the promisee may treat it as a total breach." In Pollack v. Pollack, (Tex. App. 1932) 46 S.W. (2d) 292 at 292, after deciding that there was a present breach plus repudiation, the court continues, plaintiff "is entitled in one suit to receive in damages the present value of all that he would have received if the contract had been performed, and he is not compelled to resort to repeated suits to recover the monthly payments." See also Viglas v. New York Life Ins. Co., (C.C.A. 1st, 1935) 78 F. (2d) 829. And see Aetna Life Ins. Co. v. Phifer, 160 Ark. 98, 254 S.W. 335 (1923). Equitable Life Assurance Society v. Pool, 189 Ark. 101, 71 S.W. (2d) 455 (1934) which have been cited erroneously at times to support contention that courts permitted recovery for a unilateral obligation to pay

run afoul of the rule prohibiting the splitting of a cause of action if he attempts to bring successive suits as performance by defendant matures.¹⁰ Such an approach would also obviate the necessity of interpreting what apparently are unilateral into executory contracts, in order to give the plaintiff a cause of action.¹¹ And when the facts show that the defendant is merely controverting the interpretation of the contract or denying in "good faith" the existence of the contract, it seems manifestly oppressive and unjust to talk of anticipatory breach.¹² It is submitted that the principal case is correctly decided but that the court should have rested the decision on the fact that there was no repudiation of the contract,¹³ rather than on the doctrine of anticipatory breach.

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money but the court in the principal case correctly points out that these cases dealt with the present breach plus repudiation. The court in the principal case implies that it would permit recovery of future damages in such a case.

¹⁰ *Pakas v. Hollingshead*, 184 N.Y. 211, 77 N.E. 40 (1916). Contra, *Barron G. Collier, Inc. v. Rawson*, 202 Iowa 1159, 211 N.W. 704 (1927).

¹¹ *Federal Life Ins. Co. v. Rascoe*, (C.C.A. 6th, 1926) 12 F. (2d) 693 where the court declares that there is not an unconditional promise to pay money where plaintiff has to submit her person to a physical examination every 30 days and send a report of the examination to the company. This approach was vigorously criticized in *Kitchart v. Metropolitan Life Ins. Co.*, (D.C.Mo. 1932) 1 F. Supp. 719. See also *Cobb v. Pacific Mutual Life Ins. Co. of California*, 4 Cal. (2d) 565 at 573, 51 P. (2d) 84 (1935) where the court said, "The fact that he was required or requested to submit to reasonable future medical examinations or furnish an occasional health report is too trivial and inconsequential to be regarded as an unperformed obligation on the part of the insured."

¹² In *Kimmel v. Missouri State Life Ins. Co.*, (C.C.A. 10th, 1934) 71 F. (2d) 921, it was said, "An offer to perform in accordance with the promisor's interpretation of the contract although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach. . . . 'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. . . . It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation.'" *Cobb v. Pacific Mutual Life Ins. Co. of California*, 4 Cal. (2d) 565, 51 P. (2d) 84 (1935).

¹³ The court in the principal case clearly states, at p. 232, "There is no evidence of default in, or refusal of, performance of the purchase contract by either party to it. . . . the most that can be said for appellee, at time of trial, is that appellant had denied the existence of the contract. . . ."