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REPUDIATION OF CONTRACT–THE POST-*RESTATEMENT* CASES

ARTHUR ANDERSON

THE STATEMENT is sometimes seen in the books that a repudiation of a contract entitles the injured party to take one of three courses of action, namely, (1) he may sue at once for anticipatory breach, or (2) he may "rescind" and sue for restitution, or (3) he may "refuse to accept" the repudiation, thereby "keeping the contract alive for the benefit of both parties," and postpone any action for damages until the date fixed for performance.

A study of the reported cases decided in the United States since the *Restatement of Contracts* was promulgated in 1932, which were concerned with the repudiation of a contract, shows, however, that the consequences of a repudiation are far more extensive than the list of three courses of action suggests.

I. THE NATURE OF A REPUDIATION

A repudiation of a contract is a manifestation by a promisor that he wilfully is going to commit a breach of the contract in the future. This manifestation usually is by spoken or written words, but may be made by other conduct; it usually is addressed to the promisee but may be made to a third party beneficiary or to an assignee of the promisee.[1] It is grammatically in the future tense and may be viewed as a non-binding promise to break the contract. A promisor who has already fully performed is incapable of repudiating.[2]

[1] Bonde v. Weber, 6 Ill. 2d 365, 128 N.E. 2d 883 (1955) (repudiation was made to assignees); Rest., Contracts § 318, Comment f (1932).

[2] Minez v. Cosmocolor Corp., 126 N.J. Eq. 544, 545, 10 A. 2d 464, 465 (1940) ("The basis of the counterclaim is the assertion that complainant repudiated his agreement. . . .

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No case is known of a repudiation of so trifling a part of a contract that the repudiation amounted only to a prospective immaterial breach. The element of wilfulness is strongly influential in determining the materiality of any breach. It accordingly will be taken for granted that a repudiation constitutes a prospective material breach.

Whether the speaker's words or conduct are a repudiation depends not upon his subjective state of mind but rather upon his objective manifestations:

> It was error for the court to charge in effect that defendants' intention would control in determining whether there was an anticipatory breach. . . . Not defendants' intention, but their words and acts communicated to plaintiff, should control.[3]

The breaking of a contract is "an unlawful act,"[4] and so also is a repudiation. Just as a party has no "right" to break, so he has no "right" to repudiate, a contract. The view expressed by one court that, "This was an executory contract. The defendant had the right to repudiate it . . . being subject to the consequent damages,"[5] must be considered unsound. The severe consequences, which will be seen usually to follow a repudiation, show that a repudiator is no favorite of the law. In a notable case, the court commented upon the repudiator's character:

> It is to be observed in passing that the court views with suspicion the testimony of the defendant. He is not an unwary man to be taken in by the machinations of designing cannery agents and representatives. His background evidences a wily appreciation of business relationships in a variety of forms. Former waiter, dealer in rugs, with an instinct for a sharp transaction, he gives the obvious impression of a man who . . . preferring to gamble as it were, upon the tenuous possibility of greater prices, refuses to conform to the terms of a contract openly and legally binding upon him.[6]

After a careful search among the post-*Restatement* American cases, it is believed correct to say that in every instance, where a court has said that a promisor has repudiated, it has also appeared that the

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However . . . complainant could not effectively have repudiated his agreement. . . . Complainant had already completely carried out his contract by the execution of the assignment and his obligation to defendant thereupon ceased").

[3] Forward Publications, Inc. v. International Pictures, Inc., 277 App. Div. 846, 98 N.Y.S. 2d 139, 140 (1st Dep't, 1950).

[4] Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate and Trust Agencies (1927), Limited, [1938] A.C. 624 (P.C.), noted in 55 L.Q.Rev. 1 (1939).

[5] Western Advertising Co. v. Midwest Laundries, Inc., 61 S.W. 2d 251, 253 (St. Louis Ct. App., 1933).

[6] Hunt Foods, Inc. v. O'Disho, 98 F. Supp. 267, 270 (N.D. Calif., 1951).

promisor's proposed non-performance was wilful. In other words, it is believed to be the law in the United States that wilfulness is an indispensable element in a repudiation. This is the basis for an earlier statement that a repudiation is a manifestation by a promisor that he wilfully is going to commit a breach of the contract in the future.

II. WHAT FACTS CONSTITUTE A REPUDIATION

A repudiation requires an affirmative disavowal of the contract and, therefore, the mere silence of an employer when asked about unpaid salary,[7] and the mere inaction of a promisor who had failed for six years to perform his promise to execute a will containing a specified bequest,[8] were held properly not to be repudiations.

The kind of repudiation which occurs most frequently is simply a statement or a writing to the effect that the speaker is not going to perform as promised, and a court seldom has any difficulty in characterizing such a statement or writing as a repudiation. A startling exception appears, however, in a recent Oklahoma case,[9] where a buyer of nuts and bolts wrote to the seller a letter concluding as follows:

> The Oklahoma Tax Commission does not expect to use any nuts and bolts such as those described in the instrument above referred to [the contract] and will not accept delivery of such from you.
>
> This is written to you so that you may take such steps as you deem advisable to protect any interest you may consider you have in the matter.

The foregoing seems to be as clear and definite a repudiation as would likely be seen in modern business correspondence, but the court, relying mainly upon language from *Corpus Juris* and an 1872 United States Supreme Court quotation from Benjamin on *Sales*, said:

> We deem it to be too manifest to require any discussion that the letter, in contemplation of law, is insufficient to constitute a repudiation.

A less common but equally effective type of repudiation is a denial that a contract exists,[10] or that an option is still open.[11] On the other hand, no repudiation is found in a party's questioning the validity of an agreement so long as he does not threaten to discontinue his per-

[7] Shaughnessy v. D'Antoni, 100 F. 2d 422 (C.C.A. 5th, 1938).

[8] Harmon v. Aughtry, 226 S.C. 371, 85 S.E. 2d 284 (1955).

[9] Oklahoma Tax Commission v. Fortinberry Co., 201 Okla. 537, 207 P. 2d 301 (1949).

[10] Compania Engraw Commercial E. Industrial S. A. v. Schenley Distillers Corp., 181 F. 2d 876 (C.A. 9th, 1950). Accord: Eugene B. Smith & Co. v. Russek, 212 F. 2d 338 (C.A. 5th, 1954).

[11] Raffensperger v. Van Kooy, 260 Wis. 589, 51 N.W. 2d 488 (1952).

formance thereunder,[12] nor in his suggestion that the other party consent to a mutual rescission of the contract,[13] nor in his request in good faith that the other party help him to get materials needed for the performance of the contract,[14] nor in his making an honest and not unreasonable contention that a clause in the contract had operated to discharge it.[15] The line, between a denial that a contract exists and a contention that a clause in the contract had operated to discharge it, is obviously faint, but there probably will be no great difficulty in deciding that the speaker did or did not manifest a wilful intention not to perform.

Another manner of repudiation is by making an unwarranted demand and at the same time asserting that no further performance will be rendered unless the other party complies with the demand. For example, a builder declares that he will build no more unless the owner makes payments earlier than required by the contract,[16] or a printer announces that he will stop work unless the customer makes a new contract with him at a higher price,[17] or a seller of goods states that he will deliver the goods only at a price higher than that named in the contract,[18] or a seller of land demands payment of a part of the price before it is due,[19] or a seller of land insists that the buyer sign a "property management agreement" not mentioned in the contract,[20] or a buyer of land insists that the seller give an assurance that the present method of sewage disposal will continue to be permissible,[21] or a buyer of land raises sham objections to the seller's title,[22] or a dry well contributor states that he will not make his $25,000 payment unless the well owner makes certain unnecessary tests of the well at a cost of

[12] Eisenberg v. Rodless Decorations, Inc., 106 N.Y.S. 2d 822 (S.Ct. N.Y. County, 1951).

[13] Wonalancet Co. v. Banfield, 116 Conn. 582, 165 Atl. 785 (1933).

[14] McCloskey & Co. v. Minweld Steel Co., 220 F. 2d 101 (C.A. 3rd, 1955).

[15] Preston v. Love, 240 S.W. 2d 486 (Civ. App. Tex., 1951).

[16] Nevins v. Ward, 320 Mass. 70, 67 N.E. 2d 673 (1946).

[17] Steinberg Press, Inc. v. Charles Henry Publications, Inc., 68 N.Y.S. 2d 793 (S. Ct., 1947).

[18] Kentucky Natural Gas Corp. v. Indiana Gas & Chemical Corp., 129 F. 2d 17 (C.C.A. 7th, 1942), cert. denied 317 U.S. 678; Vermillion v. Marvel Merchandising Co., 314 Ky. 196, 234 S.W. 2d 673 (1950); Swartz v. Lieberman, 323 Mass. 109, 80 N.E. 2d 5 (1948).

[19] Menako v. Kassien, 265 Wis. 269, 61 N.W. 2d 332 (1953); cf. Tancred v. Beppler, 15 N.J. Super. 394, 83 A. 2d 470 (1951).

[20] Johnson v. Goldberg, 130 Cal.App. 2d 571, 279 P. 2d 131 (1955).

[21] Helfgott v. LaBar, 30 North.Co.Rep. 100 (Pa., 1945).

[22] Ashkenazy v. R. M. Bradley & Co., 328 Mass. 242, 103 N.E. 2d 251 (1952).

$75,000.[23] Each such statement is a repudiation, since the speaker is manifesting that he will not perform the contract as made.

Whether a declaration of impossibility is a repudiation should be mentioned. The *Restatement* provides that a statement, made "without justification" to the effect that "the promisor will not or cannot substantially perform his contractual duties," is a repudiation.[24] To the extent that this language suggests that a good faith declaration of impossibility is a repudiation, it appears to be inaccurate. If the impossibility is of a type which discharges the promisor's duty (destruction of the subject matter, death or illness, local law),[25] a declaration of impossibility is not "without justification" and hence not a repudiation. If the impossibility is of a type which does not discharge the promisor (for example, subjective impossibility and impossibility by foreign law),[26] the essential element of wilfulness is missing and hence the declaration is not a repudiation. It is accordingly suggested that the foregoing provision be read with the limitation that a good faith declaration of impossibility is not a repudiation.

The typical denial of liability by an insurance company, on the ground of fraud, misrepresentation, non-payment of premiums, failure to file proofs, or nonexistence of disability, is not a disavowal or denunciation of the policy and not a repudiation of the contract.[27] The exceptional case of a repudiation by an insurance company can occur, of course, as where a mutual assessment life insurance company increased the annual premium from $73.06 to $398.26,[28] and where a

[23] Humphrey v. Placid Oil Co., 142 F. Supp. 246 (E. D. Tex., 1956).

[24] Rest., Contracts § 318 (a) (1932).

[25] Ibid., at §§ 460, 459, 458.

[26] Ibid., at § 455 as to subjective impossibility; as to impossibility by foreign law, Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft, 15 F. Supp. 927 (S. D. N.Y., 1936), aff'd on opinion below 84 F. 2d 993 (C.C.A. 2d), cert. denied 299 U.S. 585. But cf. Brooks v. Yawkey, 200 F. 2d 663 (C.A. 1st, 1953).

[27] New York Life Insurance Co. v. Viglas, 297 U.S. 672 (1936) (Cardozo, J., said at page 676: "Repudiation there was none as the term is known to the law. Petitioner did not disclaim the intention or the duty to shape its conduct in accordance with the provisions of the contract. Far from repudiating those provisions, it appealed to their authority and endeavored to apply them."); Mobley v. New York Life Insurance Co., 295 U.S. 632 (1935); Kimel v. Missouri State Life Insurance Co., 71 F. 2d 921 (C.C.A. 10th, 1934).

[28] National Life Co. v. Wolverton, 163 S.W. 2d 654 (Civ. App. Tex., 1942) (page 656: "An unauthorized attempt on its part to arbitrarily increase the assessments . . . constituted a repudiation. . . ."). Accord: Kentucky Home Mutual Life Insurance Co. v. Duling, 190 F. 2d 797 (C.A. 6th, 1951) (company changed plan of computing premiums from the step rate basis to the attained age basis); Kentucky Home Mutual Life Insurance Co. v. Rogers, 196 Tenn. 641, 270 S.W. 2d 188 (1954).

company took the policy from the insured and declared that it would accept no more premiums and would pay no more sick benefits.[29]

The foregoing repudiations have been by written or spoken words, but repudiation also may be by conduct. The most common example is the case where a party, who has contracted to convey certain lands or goods to the plaintiff, instead conveys the property to a third person.[30] As the *Restatement* says, "the action of the seller not only creates a probable inability to perform but is also a manifestation of an intention not to perform."[31]

A will does not transfer property until death, but it has been said in an obiter dictum that the mere making of a will is a repudiation if it disposes of property contrary to the maker's contractual promises.[32] Usually a conveyance to a third person has no meaning except a repudiation, but it is of course possible for a different explanation to exist. For instance, where the title was conveyed to a corporation at the time and apparently as a part of a refinancing arrangement, and the corporation thereafter offered and stood ready to convey a good title to the buyer, the court properly held, in effect, that there was no repudiation.[33]

Intention not to perform can, of course, be manifested by conduct of various kinds. In a notable case,[34] the sellers of land including a house promised to convey title and possession as soon as they "have found a suitable place to live." The sellers apparently looked unsuccessfully for over two years, but then they began to make permanent improvements upon the premises which they had contracted to sell. This conduct stirred the buyers for they immediately sued for spe-

[29] Universal Life & Accident Ins. Co. v. Shaw, 139 Tex. 434, 163 S.W. 2d 376 (1942). Accord: Life & Casualty Ins. Co. of Tennessee v. Baber, 168 Tenn. 347, 79 S.W. 2d 36 (1935).

[30] Saliba v. Brackin, 260 Ala. 103, 69 So. 2d 267 (1953); Nelson v. Fernando Nelson & Sons, 5 Cal. 2d 511, 55 P. 2d 859 (1936); Crane v. East Side Canal & Irrigation Co., 6 Cal. App. 2d 361, 44 P. 2d 455 (1935); Mitchell v. Aimo, 124 Cal. App. 508, 12 P. 2d 1063 (1932); Johnson v. Starr, 321 Mass. 566, 74 N.E. 2d 137 (1947); Trisch v. Fairman, 334 Mich. 432, 54 N.W. 2d 621 (1952); In re Vaughn's Estate, 156 N.Y. Misc. 577, 282 N.Y. Supp. 214 (Surr. Ct., 1935), aff'd 248 App. Div. 730, 289 N.Y. Supp. 825 (2d Dep't, 1936); Pappas v. Crist, 223 N.C. 265, 25 S.E. 2d 850 (1943); Dillard v. Ceaser, 206 Okla. 304, 243 P. 2d 356 (1952); Slaughter v. Roark, 244 S.W. 2d 698 (Civ. App. Tex., 1951). See Brimmer v. Union Oil Co., 81 F. 2d 437 (C.C.A. 10th, 1936), cert. denied 298 U.S. 668; Van Meter v. Norris, 318 Pa. 137, 177 Atl. 799 (1935).

[31] Rest., Contracts § 284, Comment a (1932).

[32] Matheson v. Gullickson, 222 Minn. 369, 24 N.W. 2d 704 (1946).

[33] Bruffy v. Baker, 69 App. D.C. 266, 100 F. 2d 439 (1938).

[34] Glover v. Grubbs, 367 Pa. 257, 80 A. 2d 75 (1951).

cific performance. The court described the sellers' conduct as an "obvious and express repudiation of the agreement,"[35] and granted the relief as sought. A seller of land may repudiate by returning the buyer's earnest money check,[36] and a buyer may do so by stopping payment thereon.[37] A seller of land or goods likewise may repudiate by wrongfully retaking or attempting to retake possession of the property.[38]

Another form of repudiation by conduct is by disabling oneself from rendering the required performance. This is seen clearly in a case where the plaintiff, who had just bought a sewer pipe factory, hired the defendant as his exclusive agent to sell pipe. Before plaintiff's factory was ready to operate, defendant bought a sewer pipe factory of his own. Defendant thereafter could be expected to steer the most desirable business to his own factory and the small-profit and poor-credit-risk business to plaintiff's: a manifestation of intention by defendant not to perform for plaintiff as a proper exclusive selling agent.[39] In a dramatic case, Braddock had a contract to box Schmeling on June 3, and later made a contract to box Joe Louis on June 22. The court said in a dictum: "There was practical repudiation for the reason that a heavyweight boxer, through sheer physical limitations, cannot engage in two major contests involving the title of World's Heavyweight Champion within nineteen days."[40] Complete disability to perform was achieved by a corporate lessee of land under a 99 year lease when it voluntarily caused its own dissolution,[41] and practically complete disability occurred when a seller of land at the price of $137,000, mortgaged this and other land for a total of $500,000.[42]

By way of summary, it may be said that a repudiation of a contract is a manifestation by a promisor by words or conduct that he wilfully is going to commit a breach of the contract in the future. There usually is little difficulty in deciding whether particular words or conduct are a repudiation and that decision accordingly is usually the lesser prob-

35 Ibid., at 259 and 76.

36 Allardice v. McCain, 375 Pa. 528, 101 A. 2d 385 (1953).

37 Duke v. Wasserman, 191 N.Y. Misc. 849, 79 N.Y.S. 2d 582 (Sup. Ct., 1948); Tudesco v. Wilson, 163 Pa. Super. 352, 60 A. 2d 388 (1948).

38 Carl v. McDonald, 60 Ariz. 170, 133 P. 2d 1013 (1943); Bonde v. Weber, 6 Ill. 2d 365, 128 N.E. 2d 883 (1955); Bean v. Hallett, 40 Wash. 2d 70, 240 P. 2d 931 (1952).

39 W. H. Kirkland Co. v. King, 248 Ala. 643, 29 So. 2d 141 (1947).

40 Madison Square Garden Corp. v. Braddock, 90 F. 2d 924, 926 (C.C.A. 3rd, 1937).

41 South Main Akron, Inc. v. Lynn Realty, Inc., 106 N.E. 2d 325 (Ohio App., 1951).

42 Miswald-Wilde Co. v. Armory Realty Co., 210 Wis. 53, 243 N.W. 492 (1932).

lem in a repudiation case. The more important problem, ordinarily, is the matter which will now be taken up, namely, the consequences of a repudiation.

III. THE CONSEQUENCES OF A REPUDIATION

1. *The injured party may sue for damages at once under the doctrine of anticipatory breach.*—The most familiar consequence of a repudiation of a contract is that the doctrine of anticipatory breach now becomes applicable and permits the injured party to sue immediately for breach of contract,[43] using, under common law pleading, the action of special assumpsit. This form of action had originated in connection with, and until 1853 had been restricted to, cases of actual breach of promise, but in that year, in the case of *Hochster v. De La Tour*,[44] the plaintiff recovered judgment in a suit filed on May 22, although the defendant's performance was not to begin until June 1. Williston has shown the unsoundness of that decision at the time it was rendered,[45] and at the present time the principal argument in its support is that it is a great convenience to the injured party to be allowed to sue at once. This convenience may be offset, however, by the inconvenience and injustice to the repudiator in being sued for breach of contract before he has committed one, by the illogic of allowing a remedy where theory says that no actionable wrong has occurred, and by the practical difficulties encountered in attempting to determine the amount of the injured party's damages. The view, that a contract contains some kind of a promise not to disturb the relation and that this promise is broken by a repudiation, is believed to be fallacious: such a promise does not exist in common understand-

[43] Bercut v. Park, Benziger & Co., 150 F. 2d 731 (C.C.A. 9th, 1945); Nelson v. Fernando Nelson & Sons, 5 Cal. 2d 511, 55 P. 2d 859 (1936); Crown Products Co. v. California Food Products Corp., 77 Cal. App. 2d 543, 175 P. 2d 861 (1947); Crane v. East Side Canal & Irrigation Co., 6 Cal. App. 2d 361, 44 P. 2d 455 (1935); Parker v. King, 68 Ga. App. 672, 23 S.E. 2d 575 (1942); Pappas v. Crist, 223 N.C. 265, 25 S.E. 2d 850 (1943); Gilmore v. American Gas Machine Co., 129 N.E. 2d 93 (C.P. Ohio, 1952); Benedict v. Harris, 158 Ore. 613, 77 P. 2d 442 (1938); Tudesco v. Wilson, 163 Pa. Super. 352, 60 A. 2d 388 (1948); Kentucky Home Mutual Life Insurance Co. v. Rogers, 196 Tenn. 641, 270 S.W. 2d 188 (1954); Life & Casualty Insurance Co. v. Baber, 168 Tenn. 347, 79 S.W. 2d 36 (1935). See Barnebey v. Barron G. Collier, Inc., 65 F. 2d 864 (C.C.A. 8th, 1933); Perry v. Shaw, 152 Fla. 765, 13 So. 2d 811 (1943); Gilliland v. Mercantile Investment & Holding Co., 147 Fla. 613, 3 So. 2d 148 (1941); Lang v. Todd, 148 Neb. 726, 28 N.W. 2d 434 (1947); Harmon v. Aughtry, 226 S.C. 371, 85 S.E. 2d 284 (1955).

[44] 2 E. & B. 678 (Q.B., 1853).

[45] 5 Williston, Contracts §§ 1313-1321 (rev. ed., 1937).

ing,[46] and, if it did, there would be no need for a doctrine of anticipatory breach. Two facts persist which must constantly raise a doubt whether *Hochster v. De La Tour* was correctly decided: first, the doctrine still is restricted to the original fact situation of a bilateral contract executory on both sides, and, second, the Supreme Judicial Court of Massachusetts steadfastly maintains that the doctrine is not the law in that Commonwealth.[47] This does not mean that repudiations do not occur in Massachusetts or that a repudiation has no legal effect there, but only that no action for breach of contract will lie before the date for performance. Six notable cases involving repudiation have come up in Massachusetts in the last fourteen years, and it would be hard to show that the unavailability of the doctrine of anticipatory breach hampered the Court in its adjudging of them.[48]

The doctrine is believed to be the law in all other American jurisdictions, with Maine in doubt.[49] Florida and Nebraska joined the majority in recent years.[50]

It is well established that an action for anticipatory breach will lie only if the situation is as it was in *Hochster v. De La Tour:* the contract must be bilateral and still executory on both sides.[51] This means that if the innocent party has not fully performed he is given an im-

[46] Such a subsidiary promise is conceded to exist, however, in an engagement to marry. Rest., Contracts, § 318, Illustration 7.

[47] Nevins v. Ward, 320 Mass. 70, 73, 67 N.E. 2d 673, 675 (1946) ("This principle [that the innocent party may rescind] must not be confused with the doctrine of recovery for anticipatory breach, rejected in this Commonwealth . . .").

[48] Ashkenazy v. R. M. Bradley & Co., 328 Mass. 242, 103 N.E. 2d 251 (1952); Schilling v. Levin, 328 Mass. 2, 101 N.E. 2d 360 (1951); Sennott v. Cobb's Pedigreed Chicks, Inc., 324 Mass. 9, 84 N.E. 2d 466 (1949); Johnson v. Starr, 321 Mass. 566, 74 N.E. 2d 137 (1947); Nevins v. Ward, 320 Mass. 70, 67 N.E. 2d 673 (1946); Carrig v. Gilbert-Varker Corp., 314 Mass. 351, 50 N.E. 2d 59 (1943).

[49] 5 Williston, Contracts § 1314 note 6 (rev. ed., 1937).

[50] See Perry v. Shaw, 152 Fla. 765, 13 So. 2d 811 (1943); Gilliland v. Mercantile Investment & Holding Co., 147 Fla. 613, 3 So. 2d 148 (1941); Lang v. Todd, 148 Neb. 726, 28 N.W. 2d 434 (1947).

[51] City of Hampton v. United States, 218 F. 2d 401 (C.A. 4th, 1955); Brown Paper Mill Co. v. Irvin, 146 F. 2d 232 (C.C.A. 8th, 1944); Brimmer v. Union Oil Co. of California, 81 F. 2d 437 (C.C.A. 10th, 1936), cert. denied 298 U.S. 668; Mannheimer v. Nederlandsche Amerikaansche Stoomvaart Maatschappij, 6 F. Supp. 564 (S.D. N.Y., 1934); Sheketoff v. Prevedine, 133 Conn. 389, 51 A. 2d 922 (1947); Mabery v. Western Casualty & Surety Co., 173 Kan. 586, 250 P. 2d 824 (1952); Upham v. Shattuck, 151 Kan. 966, 101 P. 2d 901 (1940); Nolan Motors, Inc. v. Charbonneau, 8 N.Y.S. 2d 913 (S.Ct., 1938). See Operators' Oil Co. v. Barbre, 65 F. 2d 857 (C.C.A. 10th, 1933); Douglas v. Quick, 5 Conn. Supp. 128 (1937); Indian River Islands Corp. v. Manufacturers Trust Co., 253 App. Div. 549, 2 N.Y.S. 2d 860 (1st Dep't, 1938). Contra: Pollack v. Pollack, 46 S.W. 2d 292 (Comm. App. Tex., 1932).

mediate cause of action for anticipatory breach, but if he has fully performed he must delay suit until the date for performance. In neither case can he accelerate money payments, but in the former case he has an immediate action for damages for breach of contract and can recover, in substance, the value of the contract, even though the repudiator's principal promise is to make money payments.[52] In other words, a party who has not performed in full has a legal right which a full performer does not. Only one judicial suggestion, that the law of anticipatory breach should be extended to the full performance cases, has been seen.[53]

The problem has arisen also in the case of a repudiation of a lease. A lease is probably more a conveyance of land than a contract, but viewed as a contract, its main features are the tenant's promise to pay rent in exchange for the landlord's act of conveying an estate in land. In this aspect, the landlord fully performs at the outset, the doctrine of anticipatory breach is not applicable, and a repudiating tenant is liable only for the rent due at the time of filing suit.[54] In the famous case of *Hawkinson v. Johnston*, however, the court said that the landlord's covenant of quiet enjoyment rendered the lease bilateral and executory on both sides.[55]

2. *The injured party may be given equitable relief.*—The peculiarity of *Hochster v. De La Tour* was that the injured party was permitted to maintain a premature action for damages for breach of contract. In some recent cases, however, the injured party has instead filed a suit for specific performance—after the repudiation and before the date fixed for performance—and has been awarded a decree that the defendant must perform on the due date. (No case has been seen where performance before the due date was decreed.) Examples of such decrees are: a repudiating seller of land was ordered to convey when the date fixed for conveyance should arrive,[56] a peach farmer,

[52] In Hochster v. De La Tour, 2 E.&B. 678 (Q.B., 1853), the defendant's principal promise was to pay money, but the plaintiff had a cause of action for damages.

[53] Pollack v. Pollack, 46 S.W. 2d 292 (Comm. App. Tex., 1932).

[54] Landlord recovered only the rent due at time of filing suit: Williams v. Aeroland Oil Co., 155 Fla. 114, 20 So. 2d 346 (1944); Jordon v. Nickell, 253 S.W. 2d 237 (Ky., 1952). See: Cerruti v. Burdick, 130 Conn. 284, 33 A. 2d 333 (1943); Marshall v. Fraser, 258 S.W. 2d 12 (Ky., 1953). Contra, allowing recovery of rent due after date of filing suit: Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 Atl. 464 (1935) (the court cited Rest., Contracts § 316 (1932), but its opinion does not conform thereto); Galvin v. Lovell, 257 Wis. 82, 42 N.W. 2d 456 (1950).

[55] 122 F. 2d 724 (C.C.A. 8th, 1941), cert. denied 314 U.S. 694.

[56] Bonde v. Weber, 6 Ill. 2d 365, 128 N.E. 2d 883 (1955). Accord: Saliba v. Brackin,

who had contracted to sell his peaches to plaintiff for five years and who repudiated after two years, was ordered to deliver his peaches to plaintiff for the following three years,[57] and a plaintiff in a tort case, who made and later repudiated an accord, had his tort case dismissed by the court and was ordered to perform specifically the accord.[58] Some reason exists for believing that the remedies of injunction,[59] appointment of a receiver,[60] and equitable lien,[61] are also obtainable by the injured party.

3. *The injured party may be given a declaratory judgment.*— Another possible remedy for a repudiation of a contract, far removed in legal theory from an action in special assumpsit for damages, is a proceeding for a declaratory judgment under the Federal Declaratory Judgment Act[62] or under the Uniform Declaratory Judgments Act.

The Federal Act was employed in a 1940 case, where a joint venture had produced nothing but losses and the defendant had denied all liability, "in effect repudiating the entire contract." The plaintiff filed an action for a declaration that the contract was valid, and the court overruled the defendant's motion to dismiss, saying that the procedure was a proper one.[63]

The Uniform Act was relied upon in a 1954 case in a state court, where again there was a repudiation of a contract for carrying on a joint venture. The court, two justices dissenting, held that the procedure was proper and that the plaintiff was entitled to restitution for moneys expended and services rendered, the amount to be determined in supplementary proceedings.[64]

The Uniform Declaratory Judgments Act, § 3, provides that, "A

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260 Ala. 103, 69 So. 2d 267 (1953); Glover v. Grubbs, 367 Pa. 257, 80 A. 2d 75 (1951). Contra: Ehrlich v. Teague, 209 Ga. 164, 71 S.E. 2d 232 (1952), criticized 5 Corbin, Contracts § 1141, pocket part, note 32, 33 (1951).

[57] Hunt Foods, Inc. v. O'Disho, 98 F. Supp. 267 (N.D. Calif., 1951).

[58] Landau v. St. Louis Public Service Co., 364 Mo. 1134, 273 S.W. 2d 255 (1954).

[59] Eastwood v. Eastwood, 167 Kan. 471, 207 P. 2d 393 (1949). But cf. Tompkins v. Hoge, 114 Cal. App. 2d 257, 250 P. 2d 174 (1952).

[60] See South Main Akron, Inc. v. Lynn Realty, Inc., 106 N.E. 2d 325 (Ohio App., 1951).

[61] Tancred v. Beppler, 15 N.J. Super. 394, 83 A. 2d 470 (1951).

[62] 68 Stat. 890 (1954) as amended, 28 U.S.C.A. § 2201 (1955): "In a case of actual controversy . . . any court . . . upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . . Any such declaration shall have the force and effect of a final judgment. . . ."

[63] Dunleer Co. v. Minter Homes Corp., 33 F. Supp. 242 (S.D. W.Va., 1940).

[64] West v. Peoples First National Bank & Trust Co., 378 Pa. 275, 106 A. 2d 427 (1954). Accord: W. H. Kirkland Co. v. King, 248 Ala. 643, 29 So. 2d 141 (1947).

contract may be construed either before or after there has been a breach thereof." This section seems expressly to authorize a declaratory judgment after a repudiation, but no case applying it to a repudiation of a contract has been seen.

4. *The repudiation will be nullified if the repudiator retracts it.*—A retraction is the converse of a repudiation: it is a manifestation by the promisor that he will perform his promise when the due date arrives. It usually is in the form of spoken or written words to the effect that the promisor will perform as promised,[65] but it may consist instead of regaining title to essential property,[66] or of making a new agreement with the promisee for a later performance date,[67] or, as occurred in one case, of rendering full performance of the repudiated promise.[68]

It appears to be true that such a retraction completely nullifies the repudiation and fully restores the repudiator's rights under the contract—even to the extent of now permitting him lawfully to terminate the contract by using a 90-day cancellation clause contained therein.[69] For a retraction to be operative, it must be communicated to the injured party before he has materially changed his position,[70] or has filed suit on the basis of the repudiation.[71] A retraction thereafter is believed to have no legal effect.

An insincere or pretended retraction, that is, a retraction made without an intent manifested in good faith actually to perform the contract as made, is no retraction at all. For example, in a case previously mentioned, the plaintiff, who had just bought a sewer pipe fac-

[65] Refrigeradora Del Noroeste, S.A. v. Appelbaum, 138 F. Supp. 354 (N.D. Ill., 1956); Lang v. Todd, 148 Neb. 726, 28 N.W. 2d 434 (1947); Peeler v. Tarola Motor Car Co., 170 Ore. 600, 134 P. 2d 105 (1943); Bayley v. Lewis, 39 Wash. 2d 464, 236 P. 2d 350 (1951); Walker v. Herke, 20 Wash. 2d 239, 147 P. 2d 255 (1944); Kentucky Natural Gas Corp. v. Indiana Gas & Chemical Corp., 129 F. 2d 17 (C.C.A. 7th, 1942), cert. denied 317 U.S. 678 (semble).

[66] In re Vaughn's Estate, 156 N.Y. Misc. 577, 282 N.Y. Supp. 214 (Surr. Ct., 1935), aff'd 248 App. Div. 730, 289 N.Y. Supp. 825 (2d Dep't, 1936).

[67] Wells v. Lee Builders, Inc., 99 A. 2d 620 (Del., 1953).

[68] Ford v. Thomas D. Mackey Co., 70 S.W. 2d 1021 (Civ. App. Tex., 1934).

[69] Peeler v. Tarola Motor Car Co., 170 Ore. 600, 134 P. 2d 105 (1943). Accord: Refrigeradora Del Noroeste, S.A. v. Appelbaum, 138 F. Supp. 354 (N.D. Ill., 1956).

[70] United States v. Seacoast Gas Co., 204 F. 2d 709 (C.A. 5th, 1953), cert. denied 346 U.S. 866 (injured buyer changed position by making a contract with another seller); Freedman v. Rector, etc., 37 Cal. 2d 16, 230 P. 2d 629 (1951) (injured seller changed position by selling the property to another); Nemanick v. Christensen, 87 Cal. App. 2d 844, 197 P. 2d 785 (1948); see Helfgott v. LaBar, 30 North. Co. Rep. 100 (Pa., 1945).

[71] Crown Products Co. v. California Food Products Corp., 77 Cal. App. 2d 543, 175 P. 2d 861 (1947); Gilmore v. American Gas Machine Co., 129 N.E. 2d 93 (C.P. Ohio, 1952).

tory, hired the defendant as his exclusive agent to sell pipe. Defendant's repudiation took the form of a purchase of a sewer pipe factory of his own. After plaintiff had filed a petition for a declaratory judgment, defendant transferred his interest in the factory to his son-in-law. The court held that this transfer was ineffective as a retraction, saying:

> The disposition he made was open to serious contention that it was only colorable. The sale was to his son-in-law. . . . The human influences which are influential in such matters remained as before.[72]

In another case, the injured party suspected that the retraction was insincere, and accordingly stated that he would hold as security for the repudiator-retractor's future performance the sum of about $200,000, this being the purchase price of goods previously delivered by the repudiator to the injured party. The original repudiator thereupon brought action for the $200,000, claiming that now the original injured party was in default, and, since the retraction was not proven to be in bad faith, the court entered judgment for the original repudiator for $200,000, being the entire purchase price of the goods it had delivered, and also held that it was not liable in damages for failing to deliver any more.[73] From the outcome of this case, it would seem to be advantageous for the injured party to file suit for anticipatory breach or make a material change of position as soon as a repudiation occurs: in this way he will avoid having to contend with a possibly insincere or pretended retraction.

5. *The duties of both parties under the contract may become discharged by a rescission by partially reluctant mutual assent.*—A repudiation includes a manifestation that the repudiator desires to end the contract, and may be viewed as a proposal to rescind the contract by mutual assent. The injured party may refuse to agree and the contract will not be discharged.[74] On the other hand, the injured party may give a fairly amicable though reluctant assent,[75] or he may make a possibly angry assent in the form of a vigorous declaration that the contract is terminated,[76] or he may indicate by conduct that he con-

[72] W. H. Kirkland Co. v. King, 248 Ala. 643, 647, 29 So. 2d 141, 144 (1947).

[73] Refrigeradora Del Noroeste, S.A. v. Appelbaum, 138 F. Supp. 354 (N.D., Ill., 1956).

[74] Allardice v. McCain, 375 Pa. 528, 101 A. 2d 385 (1953).

[75] Guill v. Pugh, 311 Ky. 90, 223 S.W. 2d 574 (1949); Harris v. Kirshner, 194 Md. 139, 70 A. 2d 47 (1949); Gibula v. Sause, 173 Md. 87, 194 Atl. 826 (1937).

[76] Fenwal, Inc. v. Montgomery, 193 F. 2d 404 (C.A. 9th, 1951); W. H. Kirkland Co. v. King, 248 Ala. 643, 29 So. 2d 141 (1947); San Gabriel Valley Readi-Mixt v. Casillas, 298 P. 2d 76 (Dist. Ct. App. Cal., 1956); Hladik v. Noe, 214 Iowa 854, 243 N.W. 180 (1932); Ratcliffe v. Union Oil Co., 159 Ore. 221, 77 P. 2d 136 (1938).

siders the contract at an end:[77] in either case a rescission by mutual assent has occurred and the contract is discharged.[78] An action on the contract filed thereafter by the repudiator will fail,[79] and a proceeding by the injured party to establish his contention that the contract is discharged will succeed.[80]

6. *If the contract is so discharged by a rescission by partially reluctant mutual assent, restitution for benefits conferred may be obtained by the injured party and possibly by the repudiator.*—Upon the discharge of the contract by a rescission by partially reluctant mutual assent as aforesaid, and to prevent unjust enrichment, the injured party is entitled to restitution for any benefits previously conferred by him upon the repudiator. They would consist, for example, of payments on account of a purchase price,[81] or of services rendered,[82] or of property delivered,[83] by the injured party before the repudiation. The injured party is entitled to the net value of the benefits conferred by him, meaning that benefits received by him will be deducted.[84] It should be observed that a repudiation has this consequence

[77] Carl v. McDonald, 60 Ariz. 170, 133 P. 2d 1013 (1943); Alder v. Drudis, 30 Cal. 2d 372, 182 P. 2d 195 (1947); Mitchell v. Aimo, 124 Cal. App. 508, 12 P. 2d 1063 (1932); Givens v. Vaughn-Griffin Packing Co., 146 Fla. 575, 1 So. 2d 714 (1941); Danico v. Ford, 230 Iowa 1237, 300 N.W. 547 (1941); Johnson v. Starr, 321 Mass. 566, 74 N.E. 2d 137 (1947); Trisch v. Fairman, 334 Mich. 432, 54 N.W. 2d 621 (1952); Tancred v. Beppler, 15 N.J. Super. 394, 83 A. 2d 470 (1951); Smith v. Long, 183 Okla. 441, 83 P. 2d 167 (1938); Swick v. Mueller, 193 Ore. 668, 238 P. 2d 717 (1951); West v. Peoples First National Bank & Trust Co., 378 Pa. 275, 106 A. 2d 427 (1954); Bean v. Hallett, 40 Wash. 2d 70, 240 P. 2d 931 (1952); Menako v. Kassien, 265 Wis. 269, 61 N.W. 2d 332 (1953). See Paul v. Flannery, 128 N.J.L. 438, 26 A. 553 (E. & A., 1942).

[78] San Gabriel Valley Readi-Mixt v. Casillas, 298 P. 2d 76 (Dist. Ct. App. Cal., 1956); Rest., Contracts, § 406, Comment b (1932).

[79] Fenwal, Inc. v. Montgomery, 193 F. 2d 404 (C.A. 9th, 1951); Nemanick v. Christensen, 87 Cal. App. 2d 844, 197 P. 2d 785 (1948); Hladik v. Noe, 214 Iowa 854, 243 N.W. 180 (1932); Nevins v. Ward, 320 Mass. 70, 67 N.E. 2d 673 (1946); Ratcliffe v. Union Oil Co., 159 Ore. 221, 77 P. 2d 136 (1938).

[80] W. H. Kirkland Co. v. King, 248 Ala. 643, 29 So. 2d 141 (1947); Danico v. Ford, 230 Iowa 1237, 300 N.W. 547 (1941).

[81] Carl v. McDonald, 60 Ariz. 170, 133 P. 2d 1013 (1943); Mitchell v. Aimo, 124 Cal. App. 508, 12 P. 2d 1063 (1932); Givens v. Vaughn-Griffin Packing Co., 146 Fla. 575, 1 So. 2d 714 (1941); Tancred v. Beppler, 15 N.J. Super. 394, 83 A. 2d 470 (1951); Swick v. Mueller, 193 Ore. 668, 238 P. 2d 717 (1951); Bean v. Hallett, 40 Wash. 2d 70, 240 P. 2d 931 (1952); Menako v. Kassien, 265 Wis. 269, 61 N.W. 2d 332 (1953). See Van Meter v. Norris, 318 Pa. 137, 177 Atl. 799 (1935).

[82] Johnson v. Starr, 321 Mass. 566, 74 N.E. 2d 137 (1947); Trisch v. Fairman, 334 Mich. 432, 54 N.W. 2d 621 (1952); Smith v. Long, 183 Okla. 441, 83 P. 2d 167 (1938); West v. Peoples First National Bank & Trust Co., 378 Pa. 275, 106 A. 2d 427 (1954). See Galloway v. Eichells, 1 N.J. Super. 584, 62 A. 2d 499 (1948).

[83] Alder v. Drudis, 30 Cal. 2d 372, 182 P. 2d 195 (1947).

[84] Bean v. Hallett, 40 Wash. 2d 70, 240 P. 2d 931 (1952).

in Massachusetts even though the premature action for damages is not permitted.

When a repudiator seeks restitution, he normally encounters a doctrine that restitution should not be granted to a party wilfully in default. The *Restatement* precludes recovery by a repudiator by providing for restitution only if "the plaintiff's breach or non-performance is not wilful and deliberate. . . ."[85] In the cases cited in the footnote, however, the court made a point of finding a mutual assent, and thereupon granted restitution to the repudiator.[86]

7. *The duties of the injured party alone may become discharged.*— A repudiation is a manifestation that the repudiator will in the future commit a material breach of his promise, and that the constructive condition or condition implied in law to the injured party's duty, that he receive substantial performance, will never occur. The injured party may be expected, and is permitted, to take the repudiator at his word and make a material change of position, and if he does so his duties under the contract are discharged.[87] The discharge of the injured party does not occur until he changes his position, for until he does, the repudiator may retract his repudiation and thereby nullify it. It is probably true that filing a suit based on the repudiation has the same effect in this connection as a material change of position.

8. *The injured party, whose duties under the contract have been discharged, may nevertheless recover damages from the repudiator.*— In the topic just discussed, the injured party alone was discharged, and the repudiator accordingly remained liable for damages for breach of contract.[88] The fact that the repudiator remains liable for damages shows that no rescission by mutual assent has occurred.

A common application of this rule is seen in the case of a contract for the sale of land when the buyer, after paying earnest money, repudiates. The seller is then entitled to retain the earnest money up to

[85] Rest., Contracts § 357 (1) (a) (1932).

[86] Guill v. Pugh, 311 Ky. 90, 223 S.W. 2d 574 (1949); Harris v. Kirshner, 194 Md. 139, 70 A. 2d 47 (1949); Gibula v. Sause, 173 Md. 87, 194 Atl. 826 (1937).

[87] Nemanick v. Christensen, 87 Cal. App. 2d 844, 197 P. 2d 785 (1948); Nevins v. Ward, 320 Mass. 70, 67 N.E. 2d 673 (1946). Accord: Levitin v. Musicant, 15 N.J. Super. 256, 83 A. 2d 350 (1951). Rest., Contracts, §§ 280(1), 398 (1932).

[88] Humphrey v. Placid Oil Co., 142 F. Supp. 246 (E. D. Tex., 1956); Kreisa v. Stoddard, 127 Cal. App. 2d 627, 274 P. 2d 164 (1954); City of Farrell v. H. Platt Co., 142 Pa. Super. 242, 15 A. 2d 718 (1940); Amberg Granite Co. v. Marinette County, 247 Wis. 36, 18 N.W. 2d 496 (1945); Miswald-Wilde Co. v. Armory Realty Co., 210 Wis. 53, 243 N.W. 492 (1932).

at least the amount of his damages,[89] and since there usually is no proof that the earnest money exceeds the damages, the result is that the seller retains the entire earnest money.[90]

9. *The repudiation may excuse a condition.*—If a promise is subject to a condition precedent or concurrent, the promisor is not under a "duty of immediate performance" unless and until the condition occurs or is excused. Upon the occurrence or excuse of the condition, the promisor immediately is under a duty to perform the promise, and if he fails to do so he is liable to an action for breach of contract.[91] One of the most important of the excuses is a repudiation by the promisor.[92] This rule actually is a particular application of the principle that a condition is excused if the promisor prevents or hinders its occurrence.[93] When a promisor declares that he will not perform his promise in any event, the natural consequence is that the promisee discontinues any effort he may have been making to bring about the occurrence of the condition. If such discontinuance of efforts results in the non-occurrence of the condition, it is fair to say that the promisor is responsible therefor, and the legal effect is that the condition is excused.

The cases fall into four groups:

First: Where the condition is a fact under the control of the promisee, a repudiation excuses the condition, but the promisee should be required to show that he would have caused the condition to occur had there been no repudiation. The condition has been held to be excused in numerous cases involving such facts as the act of tendering or paying the price of land[94] or goods[95] by a certain date, or the acts

[89] Sheffield v. Paul T. Stone, Inc., 68 App. D.C. 378, 98 F. 2d 250 (1938); Schwartz v. Syver, 264 Wis. 526, 59 N.W. 2d 489 (1953).

[90] Sabghir v. Ginsburg, 51 A. 2d 308 (Mun. C.A., D.C., 1947); Earlin v. Mors, 1 N.J. 336, 63 A. 2d 531 (1949); Bernstein v. Rosenzweig, 1 N.J. Super. 48, 62 A. 2d 147 (1948). Accord: Mitchell v. Ralph D. Cohn, Inc., 52 A. 2d 631 (Mun. C.A., D.C., 1947).

[91] Rest., Contracts, § 250 and Comment c (1932).

[92] Ibid., at § 306.

[93] Ibid., at § 295.

[94] Jeppi v. Brockman Holding Co., 34 Cal. 2d 11, 206 P. 2d 847 (1949); Johnson v. Goldberg, 130 Cal. App. 2d 571, 279 P. 2d 131 (1955); Country Club Oil Co. v. Lee, 239 Minn. 148, 58 N.W. 2d 247 (1953); Moran v. Fifteenth Ward Building & Loan Assn., 131 N.J. Eq. 361, 25 A. 2d 426 (Ch., 1942); Unger v. Chaves, 113 N.E. 2d 753 (Ohio App., 1953); Erkess v. Eisenthal, 354 Pa. 161, 47 A. 2d 154 (1946); Sidle v. Kaufman, 345 Pa. 549, 29 A. 2d 77 (1942); Major v. Price, 196 Va. 526, 84 S.E. 2d 445 (1954). But see Blake v. Williams, 208 Ga. 353, 66 S.E. 2d 829 (1951).

[95] Albert v. Ford Motor Co., 112 N.J.L. 597, 172 A. 2d 379 (E. & A., 1934); Benedict v. Harris, 158 Ore. 613, 77 P. 2d 442 (1938).

of paying insurance premiums,[96] or the act of giving a certain notice,[97] or the acts of acknowledging a deed and drafting a document,[98] or the act of paying off a mortgage,[99] or the act of tendering goods[100] or a deed to land.[101] In each of the foregoing cases, where the question was raised, it appeared to be true that the promisee could have and would have performed the condition had there been no repudiation.[102]

Second: Where a condition is a fact under the control of a third party, a repudiation may induce but cannot be certain to be the cause of its non-occurrence, and the condition therefore is excused only if it appears that it probably would have happened had there been no repudiation. In the outstanding case of *Friedman v. Decatur Corporation*,[103] involving a bilateral contract for the sale of land by the plaintiff to the defendant, the defendant's promise to pay the price was subject to the express condition precedent that plaintiff-seller cause the property to be zoned for industrial use and that it obtain wharfage and pipeline privileges for the property from the proper government officials. The buyer said in substance, "I will pay the price if you obtain the zoning change and the wharfage and pipeline privileges." The seller obtained the zoning change and was engaged in efforts to obtain the grant of wharfage and pipeline privileges when the buyer repudiated the contract. The seller naturally discontinued its efforts and the wharfage and pipeline privileges were never granted. The court referred to the progress which the promisee had made (this included the enactment of legislation by the Congress), and said in effect that defendant's repudiation was the cause of their not being obtained and that therefore he was liable for breach of contract.

In these cases, where the final control over the fact which constitutes the condition rests in a third party, it usually will be impossible to learn with certainty whether the condition would have occurred

[96] Universal Life & Accident Ins. Co. v. Shaw, 139 Tex. 434, 163 S.W. 2d 376 (1942).

[97] United States v. Conti, 64 F. Supp. 187 (D. Mass., 1946), aff'd 158 F. 2d 581 (C.C.A. 1st).

[98] Ashkenazy v. R. M. Bradley & Co., 328 Mass. 242, 103 N.E. 2d 251 (1952).

[99] Schilling v. Levin, 328 Mass. 2, 101 N.E. 2d 360 (1951).

[100] Bisbee Linseed Corp. v. Paragon Paint & Varnish Corp., 96 F. 2d 464 (C.C.A. 2d, 1938); General Lamps Mfg. Corp. v. Rader, 43 Berks 45 (Pa., 1950).

[101] Davis v. Lacy, 121 F. Supp. 246 (E. D. Ky., 1954).

[102] Contra: Humphrey v. Showalter, 283 S.W. 2d 91 (Tex. Civ. App., 1955) (the repudiation was held not to excuse the condition; Corbin says: "Both the reasoning of the court and its decision are clearly erroneous." 4 Corbin, Contracts, § 954, pocket part (1956)).

[103] 77 U.S.A.D.C. 326, 135 F. 2d 812 (1943).

had there been no repudiation. The most that the promisee usually can show is that the condition probably would have occurred, and this should be enough to excuse the condition.[104]

Third: Where the condition is a fact not under the control of the promisor and its non-occurrence is a certainty, a repudiation cannot prevent its occurrence and does not excuse it. A repudiation under these circumstances has no legal effect. In the outstanding case of *Miller v. Schwinn, Inc.*,[105] the defendant in substance promised to buy a tract of land from the plaintiff on the express condition precedent that plaintiff's title was clear. Defendant's plans for the property fell through and he repudiated the contract. After plaintiff had filed suit, defendant learned that plaintiff, before the repudiation, had encumbered his title by irrevocably dedicating a six-foot strip of the land to the Sanitation Commission in order to have sewers installed as the contract required. This dedication meant that plaintiff's title was not clear and that the express condition precedent to defendant's promise could never occur, but it was not prevented or hindered by the defendant. Judgment was for the defendant. His repudiation was in no way the cause of the non-occurrence of the condition and accordingly did not excuse it. He had not committed a breach of contract and was subject to no legal liability: he had repudiated with impunity.[106]

Fourth: Where the condition is a fact which requires the exertion of effort by the promisor, a repudiation by him will result in and cause its non-occurrence, and it accordingly will be excused, apparently without inquiring whether it would have occurred had there been no repudiation.

In *Glazer v. Klughaupt*,[107] an attorney hired his fiancée as his stenographer, promising to pay her $10.00 per week at the rate of $5.00

[104] Supporting the view that the condition is excused if the promisee can show that it probably would have occurred had there been no repudiation: Atlas Trading Corp. v. S. H. Grossman, Inc., 169 F. 2d 240 (C.C.A. 3rd, 1948); Vermillion v. Marvel Merchandising Co., 314 Ky. 196, 234 S.W. 2d 673 (1950); Corzelius v. Oliver, 148 Tex. 76, 220 S.W. 2d 632 (1949). But cf. National Dairymen Ass'n, Inc. v. Dean Milk Co., 183 F. 2d 349 (C.A. 7th, 1950), cert. denied 340 U.S. 876, where the court allowed the promisee to recover without any apparent showing that the condition probably would have occurred.

[105] 72 U.S.A.D.C. 282, 113 F. 2d 748 (1940).

[106] Other cases of such repudiation with impunity: United States v. Penn Foundry & Mfg. Co., 337 U.S. 198 (1949), rehearing denied 338 U.S. 840; Arnold v. H. Piper Co., 319 Ill. App. 91, 48 N.E. 2d 580 (1943); Fratelli Pantanella, S.A. v. International Commercial Corp., 89 N.Y.S. 2d 736 (S. Ct., 1949); Bagnoli v. Cleveland Trust Co., 84 Ohio App. 170, 79 N.E. 2d 557 (1948); Standard Petroleum Co. v. Janssen, 116 Utah 352, 209 P. 2d 932 (1949).

[107] 116 N.J.L. 507, 185 Atl. 8 (E. & A., 1936).

cash per week and the other $5.00 when they were married, for the purchase of articles for their home. He repudiated the contract to marry some three years later and she sued for the accumulated salary. Her rendering of a week's services would create a $10.00 debt, but no "duty of immediate performance" would exist as to the second $5.00 until the express condition precedent (i.e., their marriage) occurred.[108] The court allowed her to recover saying, in substance, that defendant should not be permitted to postpone the occurrence of the "contingency" so as to deprive her of her wages. Here the condition of marriage undoubtedly would have occurred had defendant not repudiated the engagement and his repudiation clearly excused it.

In an even more striking case,[109] the plaintiff rendered engineering services in connection with the rehabilitation of defendant's graphite mine and was to be paid $500.00 at once, $500.00 in sixty days, and $4,000.00 at the rate of $500.00 per month "as soon as the plant is in successful operation, profitably processing and selling commercial grade graphite." After plaintiff had performed substantially all of the services, defendant repudiated. Still later the defendant abandoned the entire project and it never has been operated successfully. The court allowed the plaintiff to recover the $4,000.00 without inquiring whether the plant would have been a success if defendant had persevered: the condition was excused by the repudiation.[110]

In three of the four cases cited in connection with the present subtopic,[111] the court did not employ the analysis that defendant's promise was conditional and that the condition had been excused by his repudiation, but instead said, in substance, that defendant owed an absolute debt, that the "contingency" related only to the time of payment and merely postponed it, and that when the "contingency" did not occur because of defendant's fault, the law would substitute another time of payment, such as after a reasonable time. According to a classic statement:

> If the parties intend that a debt shall be contingent . . . then it will be so held by the Court. If, on the contrary, they intend that the debt shall be absolute, and fix upon the future event as a convenient time for payment merely,

[108] Rest., Contracts, § 250 and Comment c (1932).

[109] North American Graphite Corp. v. Allan, 87 U.S.A.D.C. 154, 184 F. 2d 387 (1950).

[110] The innocent party recovered after the repudiation without an apparent showing that the condition would have occurred had there been no repudiation in: Glover v. Grubbs, 367 Pa. 257, 80 A. 2d 75 (1951); Caneer v. Martin, 238 S.W. 2d 828 (Tex. Civ. App., 1951).

[111] Glazer v. Klughaupt, North American Graphite Corp. v. Allan, and Caneer v. Martin.

as where a drover purchases cattle, promising to pay for them on his return from market, overlooking the contingency that he may never return, then the debt will not be contingent; and, if the future event does not happen as contemplated, the law will require payment to be made within a reasonable time.[112]

This was an unsatisfactory analysis, (1) because the drover's return from market had the characteristics of an express condition precedent, and, (2) because it was hard to agree that "the law" might furnish a substituted time for payment. The analysis happily was rejected by Section 250 of the *Restatement of Contracts*, in its definition of a condition precedent as "a fact (other than mere lapse of time) which, unless excused . . . must exist or occur before a duty of immediate performance of a promise arises. . . ." Under this definition, the attorney's promise to pay the accumulated salary, the mining company's promise to pay the $4,000.00, and the drover's promise to pay for the cattle, were all conditional promises, being subject to their respective express conditions precedent, namely, the marriage, the successful operation of the graphite mine, and the return of the drover from market. Each of these conditions was susceptible of being excused by a number of excuses, including repudiation, and upon such excuse the promisor would become subject to a duty of immediate performance.

10. *A repudiation by the offeror of an irrevocable offer has no effect on the offer.*—An irrevocable offer is not terminated by the offeror's repudiation and an acceptance within the proper time therefore forms a contract.[113] A repudiation, however, does not dispense with acceptance, and failure of the offeree to accept causes the offer to terminate on its normal expiration date.[114]

11. *A repudiator who has partly performed a divisible contract may be both entitled to recover and liable for damages.*—The outstanding case of *Carrig v. Gilbert-Varker Corporation*[115] involved a divisible contract for the erection of thirty-five houses. The contract was divisible into thirty-five portions, each portion consisting of one house and its price.[116] The contractor built twenty houses, and then repudiated and refused to build the other fifteen, giving as its reason that it was losing money. The court held that since the contract was divisi-

[112] DeWolfe v. French, 51 Me. 420, 421 (1864).

[113] Country Club Oil Co. v. Lee, 239 Minn. 148, 58 N.W. 2d 247 (1953).

[114] Kotcher v. Edelblute, 250 N.Y. 178, 164 N.E. 897 (1928).

[115] 314 Mass. 351, 50 N.E. 2d 59 (1943).

[116] Rest., Contracts, § 266 (3) and Comments e and f (1932).

ble, the repudiator was entitled to the contract price of the twenty houses it had built, and was liable in damages for breach of contract as to the fifteen not built, these damages being the difference between their contract price and what it would cost to have them built by another contractor. Had this been an entire contract for the thirty-five houses, the contractor undoubtedly would not have rendered substantial performance in building only twenty, and undoubtedly would have committed a material breach in not building the fifteen: it accordingly would have had no rights upon the contract, and, according to a dictum of the court, it would have had no right to recover upon a quantum meruit.[117]

12. *The injured party should not continue to perform if such continuation will increase his damages.*—The purpose of an award of damages for breach of contract is to compensate the plaintiff for the harm caused to him by the defendant, and there is no intent to compensate him for damages which are readily avoidable by him and which are, therefore, in effect, self-inflicted. Upon the repudiation of a contract, it normally will be appropriate for the injured party to discontinue his own performance, thereby limiting the damages to his loss of profits plus his expenditures to date.[118] In the leading case of *Rockingham County v. Luten Bridge Co.*,[119] the county repudiated a contract for the construction of a bridge (having abandoned the plan for building a road which was to cross the bridge) at a time when the contractor had expended only $1,900.00. If the contractor had discontinued work then and sued for damages, it would have recovered its prospective profits on the whole job plus $1,900.00,[120] but instead it continued to build the unwanted bridge and later sued for $18,301.07 for work done. The court held that it should recover its prospective profits on the whole job plus the $1,900.00: the difference became the builder's loss.

The innocent party may continue his performance, however, where to do so will not increase the damages, as where he has proceeded so far in the manufacture of goods for the repudiator that discontinuation would produce loss,[121] or where discontinuation would

117 Under Section 357 (1) of the Restatement, the contractor apparently would have been denied restitution.

118 Rest., Contracts, § 336 (1932); Uniform Sales Act § 64 (4).

119 35 F. 2d 301 (C.C.A. 4th, 1929).

120 Rest., Contracts, § 346 (2) (1932).

121 Lannom Mfg. Co. v. Strauss Co., 235 Iowa 97, 15 N.W. 2d 899 (1944).

interfere excessively with a contract which he has with a third party.[122]

13. *Damages in an action for anticipatory breach.*—The governing principle is set forth in Section 338 of the *Restatement of Contracts:*

> The rules for determining the damages recoverable for an anticipatory breach are the same as in the case of a breach at the time fixed for performance.

In a case where the trial takes place after the date fixed for performance, the determination of damages is normally the same in a case of anticipatory breach as in a case of actual breach.[123]

If, however, the trial occurs before the date fixed for performance, and if the case is one where the measure of damages is the difference between the contract price and the market value (i.e., market value at date for performance), then a peculiar problem is presented: it becomes necessary to know the future value of the property in question. In a striking case,[124] tried in 1930 and involving a contract for the sale of land to be performed in 1936, the court accepted the 1930 value as "the best prediction possible," and as valid proof, of the 1936 value.[125] In another case, involving a three-year contract for hops, as to which there was an established futures market, the court affirmed a calculation of damages based upon the price, at the time of the repudiation, of futures contracts for the three specified years.[126]

It has already been suggested that a repudiator is no favorite of the law, and it may be that this attitude may cause a court to award damages against him on evidence which might not be sufficient in the case of an unwilful contract breaker. For example, a clothing retailer recovered against a repudiating wholesaler on the basis that the plaintiff had bought thirty-four suits for resale at a 66⅔% markup;[127] a seller of scrap iron was allowed to recover the same percentage of profit on

[122] Bomberger v. McKelvey, 35 Cal. 2d 607, 220 P. 2d 729 (1950).

[123] Compania Engraw Commercial E. Industrial S. A. v. Schenley Distillers Corp., 181 F. 2d 876 (C.A. 9th, 1950) (injured party recovered the difference between the contract price of goods and their market value on the date fixed for performance); David J. Joseph Co. v. United States, 82 F. Supp. 345 (Ct. Cl., 1949) (injured party recovered for loss of profits on goods which repudiator had contracted to buy); Hill's, Inc. v. William B. Kessler, Inc., 41 Wash. 2d 42, 246 P. 2d 1099 (1952) (injured party recovered for loss of profits on goods which repudiator had contracted to sell).

[124] In re Marshall's Garage, Inc., 63 F. 2d 759 (C.C.A. 2d, 1933) (This was a case of bankruptcy, which is not a repudiation but which may have some similar consequences. Rest., Contracts, § 324 (1932)).

[125] Cf. Parker v. King, 68 Ga. App. 672, 23 S.E. 2d 575 (1942).

[126] Renner Co. v. McNeff Bros., 102 F. 2d 664 (C.C.A. 6th, 1939), cert. denied 308 U.S. 576.

[127] Hill's, Inc. v. William B. Kessler, Inc., 41 Wash. 2d 42, 246 P. 2d 1099 (1952).

the repudiated part of the contract as it had made on the tonnage delivered;[128] and a buyer of 60,000 cases of wine to be delivered over a three-year period, it appearing that such wine was not readily obtainable on the market, was allowed to recover $72,687.51, as its "prospective net profits which it would have made in the ordinary course of business. . . ."[129]

14. *Repudiation by a seller of goods does not require the buyer to buy on the market for the purpose of lessening his damages.*—As was seen in the preceding section, the innocent party's damages are computed by the values on the date for performance and not on the date of the repudiation. After the date for performance has passed, it may appear that on certain dates between the repudiation and the date for performance, the innocent party might have entered into a favorable contract with a third party for the same performance and thereby might have lessened his damages. For example, in the outstanding case of *Reliance Cooperage Corporation v. Treat*,[130] the defendant in July contracted to deliver barrel staves to plaintiff by December 31 at the price of $450.00 per thousand. In August, the defendant repudiated, and by December 31, the market price of staves was as much as $750.00 per thousand. The market prices were approximately $450.00 in August, $525.00 in September, and $625.00 in December. The court held that the buyer had not been required to buy staves on the market, even though it developed that it thereby would have suffered less damages, citing such reasons as (1) the innocent party should not be required to take the risks involved, and (2) "Any effort to convert the doctrine [of anticipatory breach] into one for the benefit of the party who, without legal excuse, has renounced his agreement should be resisted."[131]

15. *Urging the repudiator to perform does not nullify the repudiation.*—A natural thing for the injured party to do when the other party repudiates is to urge him to perform the contract as made. According to expressions found in some older, and particularly English, cases, such urging is a refusal to "accept" the repudiation and operates to nullify it.[132] But the recent American cases follow the rule of Sec-

[128] David J. Joseph Co. v. United States, 82 F. Supp. 345 (Ct. Cl., 1949).

[129] Bercut v. Park, Benziger & Co., 150 F. 2d 731, 732 (C.C.A. 9th, 1945).

[130] 195 F. 2d 977 (C.A. 8th, 1952), and, to the same effect, Joseph Denunzio Fruit Co. v. Crane, 79 F. Supp. 117 (S.D. Cal., 1948), judgment reinstated 188 F. 2d 569 (C.A. 9th, 1951), cert. denied 342 U.S. 820, cert. denied 344 U.S. 829 (1952).

[131] 195 F. 2d 977, 983.

[132] 5 Williston, Contracts § 1333 (rev. ed., 1937).

tion 320 of the *Restatement of Contracts*, and hold that the injured party may urge performance and, if the repudiator does not retract, may proceed to sue for anticipatory breach.[133]

16. *A written repudiation may render an oral contract enforceable under the Statute of Frauds.*—The Statute of Frauds provides that no action may be maintained upon certain types of oral contracts, and therefore an oral contract within the Statute may be repudiated orally with impunity.[134] A written repudiation, however, which sufficiently establishes the existence and sets forth the terms of the repudiated contract, may constitute a "memorandum or note thereof" and render the contract enforceable.[135]

17. *The repudiation of a contract containing an arbitration clause will not affect the repudiator's rights to arbitration.*—The outstanding case of *Kulukundis Shipping Co., S. A. v. Amtorg Trading Corporation*[136] involved a charter party. Amtorg repudiated by denying that a contract existed. In a libel filed by Kulukundis, Amtorg moved for a stay of the libel proceedings under Section 3 of the United States Arbitration Act,[137] which provides in substance that on the application of either party, a suit in a federal court shall be stayed, if a written contract provides for arbitration, until such arbitration is had. The question was accordingly presented as to whether Amtorg could claim the benefit of the arbitration clause in a contract which it had repudiated. In a scholarly opinion, Judge Jerome Frank said that the intent of the Congress, as evidenced by the Act, required the court "to shake off the old judicial hostility to arbitration,"[138] and "to forget the English attitude,"[139] as portrayed in a House of Lords decision that a repudiator was not entitled to the benefit of an arbitration clause.[140] Instead, he relied upon Williston's argument that a repudiator "can

[133] Renner Co. v. McNeff Bros., 102 F. 2d 664 (C.C.A. 6th, 1939), cert. denied 308 U.S. 576; Jeppi v. Brockman Holding Co., 34 Cal. 2d 11, 206 P. 2d 847 (1949); Carvage v. Stowell, 115 Vt. 187, 55 A. 2d 188 (1947).

[134] Sousa v. First California Co., 101 Cal. App. 2d 533, 225 P. 2d 955 (1950).

[135] Sennott v. Cobb's Pedigreed Chicks, Inc., 324 Mass. 9, 84 N.E. 2d 466 (1949).

[136] 126 F. 2d 978 (C.C.A. 2d, 1942).

[137] 43 Stat. 883 (1925), 9 U.S.C.A. § 3.

[138] 126 F. 2d 978, 985.

[139] Ibid., at 992.

[140] Jureidini v. National British & Irish Millers Insurance Co., [1915] A.C. 499. To the same effect, Mitsubishi Shoji Kaisha, Ltd. v. Nicolaou, 38 F. Supp. 156 (E. D. La., 1941). Arbitration was denied a repudiator in The Wilja, 113 F. 2d 646 (C.C.A. 2d, 1940), cert. denied 311 U.S. 687, but the holding was later explained as being based on the fact that it would have been impossible to hold the arbitration in the specified place, In re Pahlberg Petition, 131 F. 2d 968 (C.C.A. 2d, 1942).

be held liable only according to the terms of the contract,"[141] and held, since arbitration was provided for in the contract and since the Act provided for a stay, that the repudiator was entitled to the stay until arbitration had been made on the issue of damages.[142] The congressional policy of supporting arbitration overcame both the ancient judicial hostility to arbitration and the apparent judicial disrespect for a repudiator.

18. *A repudiation may give the injured party two periods for filing suit under the Statute of Limitations.*—According to the doctrine of anticipatory breach, a repudiation gives the injured party an immediate right of action for breach of contract. Under the American rule, a repudiation by mail is operative at the time and place of mailing, and no "acceptance" of the repudiation by the injured party is necessary to make it effective.[143] The Statute of Limitations applicable to an action for breach of contract starts to run when the repudiation occurs and permits suit until the statutory period has expired.

If the injured party does not sue for anticipatory breach, he acquires another right of action for breach of contract if performance is not rendered on the due date. If this right of action for the actual breach arises before the statute has run on the cause of action for anticipatory breach, the injured party presumably may sue on either one. In the decided cases which have been seen, however, the action for the actual breach was filed, and maintained successfully, after the statute had run on the right of action for anticipatory breach: the injured party had enjoyed the benefit of two statutory periods for filing suit.[144]

IV. SUMMARY

The subject of repudiation of contract has been discussed as consisting of two parts, namely, what constitutes a repudiation and what are its consequences.

A repudiation is a manifestation, by spoken or written words or by

[141] 6 Williston, Contracts, p. 5373 (rev. ed., 1937).

[142] Accord: Batter Building Materials Co. v. Kirschner, 142 Conn. 1, 110 A. 2d 464 (1954).

[143] Auglaize Box Board Co. v. Kansas City Fibre Box Co., 35 F. 2d 822 (C.C.A. 6th, 1929), cert. denied 281 U.S. 730 (1930); Rest., Contracts, § 321. Contra: National Life Co. v. Wolverton, 163 S.W. 2d 654 (Tex. Civ. App., 1942).

[144] St. Regis Sales Corp. v. Wilson Cabinet Co., 47 Del. 261, 90 A. 2d 488 (Super. Ct., 1952); Old Ladies Home Ass'n v. Hall, 212 Miss. 67, 52 So. 2d 650 (1951); Slaughter v. Roark, 244 S.W. 2d 698 (Tex. Civ. App., 1951); Main v. Hopkins, 229 S.W. 2d 820 (Tex. Civ. App., 1950); Simpson v. Scott, 189 Va. 392, 53 S.E. 2d 21 (1949).

conduct of various kinds, that the repudiator wilfully is going to commit a breach of contract in the future: it is an unlawful act and a repudiator is no favorite of the law.

The consequences of a repudiation have been arranged under eighteen headings:

1. The Injured Party May Sue for Damages at Once under the Doctrine of Anticipatory Breach
2. The Injured Party May Be Given Equitable Relief
3. The Injured Party May Be Given a Declaratory Judgment
4. The Repudiation Will Be Nullified if the Repudiator Retracts It
5. The Duties of Both Parties under the Contract May Become Discharged by a Rescission by Partially Reluctant Mutual Assent
6. If the Contract Is So Discharged by a Rescission by Partially Reluctant Mutual Assent, Restitution for Benefits Conferred May Be Obtained by the Injured Party and Possibly by the Repudiator
7. The Duties of the Injured Party Alone May Become Discharged
8. The Injured Party, whose Duties under the Contract Have Been Discharged, May Nevertheless Recover Damages from the Repudiator
9. The Repudiation May Excuse a Condition
10. A Repudiation by the Offeror of an Irrevocable Offer Has No Effect on the Offer
11. A Repudiator Who Has Partly Performed a Divisible Contract May Be Both Entitled to Recover and Liable for Damages
12. The Injured Party Should Not Continue To Perform if Such Continuation Will Increase His Damages
13. Damages in an Action for Anticipatory Breach
14. Repudiation by a Seller of Goods Does Not Require the Buyer To Buy on the Market for the Purpose of Lessening His Damages
15. Urging the Repudiator To Perform Does Not Nullify the Repudiation
16. A Written Repudiation May Render an Oral Contract Enforceable under the Statute of Frauds
17. The Repudiation of a Contract Containing an Arbitration Clause Will Not Affect the Repudiator's Rights to Arbitration
18. A Repudiation May Give the Injured Party Two Periods for Filing Suit under the Statute of Limitations