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Contracts--The Anticipatory Breach Doctrine in Kentucky

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A breach of contract is defined as "a non-performance of any contractual duty of immediate performance." This definition contains the premise that until the time has arrived for performance, as called for in the contract, there can be no breach. An exception is found in the doctrine of anticipatory breach. Justice Cardozo gave a general definition of such a breach by saying: "Strictly an anticipatory breach is one committed before the time has come when there is a present duty of performance. . . . It is the outcome of words or acts evincing an intention to refuse performance in the future."

The term "repudiation" as used herein means a manifestation of intent not to perform the contract. The general rule is that to have the effect of a repudiation, the manifestation of intent not to perform must be positive and unconditional. Kentucky cases are in accord with this principle. A repudiation may consist of a positive statement of refusal to perform; selling the subject matter of the contract to another before the time for performance; a denial of the validity of the contract; asserting a meaning to the contract different from the true one, coupled with a manifestation of intent to conform only according to the erroneous interpretation. In line with this, the following acts were held by the Kentucky court to constitute repudiations: denial of the contract and expressed intention not to perform; a statement of probable inability followed by silence in regard to correspondence urging performance; a statement of intention to reduce the price agreed upon in the contract; a statement of intention not to perform unless the other party assents to

1 Restatement, Contracts (1933) sec. 312.
3 Roehm v. Horst, 178 U.S. 1, 20 S. Ct. 780, 44 L. Ed. 953 (1899); Dingley v. Oler, 117 U.S. 490, 6 S. Ct. 850, 29 L. Ed. 984 (1886); Lake Shore & M. S. Ry. v. Richards, 152 Ill. 59, 38 N.E. 773 (1894); Williston, Contracts (Rev. Ed. 1937) sec. 1324.
4 Country Homes Magazine v. Hobbs' Adm'tx., 243 Ky. 663, 49 S.W. 2d 542 (1932); Acme-Jones Co. v. Ellis Milling Co., 200 Ky. 811, 255 S.W. 829 (1923); Paducah Cooperage Co. v. Arkansas Stave Co., 193 Ky. 774, 237 S.W. 412 (1922); see Fidelity & Deposit Co. of Md. v. Brown, 230 Ky. 534, 537, 20 S.W. 2d 284, 286 (1929).
5 Williston, Contracts (Rev. Ed. 1937) sec. 1325; Restatement, Contracts (1933) sec. 318.
6 Country Homes Magazine v. Hobbs' Adm'tx., 243 Ky. 663, 49 S.W. 2d 542 (1932).
7 Louisville Packing Co. v. Crain, 141 Ky. 379, 132 S.W. 575 (1910).
8 Ross v. Columbus Mining Co., 226 Ky. 166, 10 S.W. 2d 628 (1928).
a provision not within the contract; a notice that the remainder of
the goods contracted for will not be received; awarding the contract
for the same work to another.13

As to when a repudiation constitutes a breach there are two
views. The Restatement of Contracts takes the view that the re-
pudiation itself is the breach,12 the effects of which may be nullified
by withdrawal of the repudiation before the innocent party has
brought an action or otherwise materially changed his position in
reliance on the breach.12 Technically, however, a breach of contract
gives rise to a cause of action which, logically, cannot be disposed
of by withdrawal of the breach by the party guilty of it. Mr.
Williston, however, states the general rule to be that a repudiation
is merely one element of a breach giving the innocent party an elec-
tion.14 He may complete the breach by bringing an action or other-
wise materially changing his position in reliance on the repudiation,
or he may ignore it, thereby keeping the contract still in existence.
In Kentucky it has been held that a verbal acceptance of the re-
pudiation, without more, is sufficient to complete the breach.15 In
this, the Kentucky court, standing practically alone, treats the re-
pudiation as an offer. This is unrealistic, as it requires the as-
sumption that the one repudiating is offering to subject himself to
legal liability. It is necessary to treat the repudiation as irrevocable
after the innocent party has brought an action or otherwise material-
ly changed his position in reliance on it, but this result should not
follow a mere verbal acceptance of the repudiation.

The general rule is that if the innocent party does not elect to
treat the repudiation as a breach, the party who repudiated may re-
tract it and the contract remains unimpaired.16 In Kentucky if the
repudiation is not accepted it may be retracted at any time before
the actual breach.17 Though the promisee may ignore the repudia-

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(1900).
15Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112
S.W. 1126 (1908).
16RESTATEMENT, CONTRACTS (1933) sec. 316.
17RESTATEMENT, CONTRACTS (1933) sec. 319.
18WILLISTON, CONTRACTS (Rev. Ed. 1937) secs. 1322, 1323.
19Paducah Cooperage Co. v. Arkansas Stave Co., 193 Ky. 774,
237 S.W. 412 (1922); Louisville Packing Co. v. Crain, 141 Ky. 379,
132 S.W. 575 (1910).
20WILLISTON, CONTRACTS (Rev. Ed. 1937) sec. 1335; RESTATEMENT,
CONTRACTS (1933) sec. 319.
21Paducah Cooperage Co. v. Arkansas Stave Co., 193 Ky. 774,
237 S.W. 412 (1922) (by implication); see Louisville Packing Co.
tion, his own performance must cease after notice of the repudiation, for he can do no act that will increase the amount of the damages." No Kentucky cases were found on this rule.

In addition to the privilege of withdrawing the repudiation, another effect of failure to treat the repudiation as a breach is that the right to so treat it may be lost completely. For example, the party who repudiated may escape liability by the subsequent occurrence of facts that invalidate the contract or render it impossible of performance, thereby discharging his duty. In Avery v. Bowden," a leading case on this point, the promisee insisted after the repudiation that the other party perform. Before the time for performance, war broke out between England and Russia. In a later action for breach of contract it was held that the duty of the party who repudiated the contract had been discharged by impossibility. Kentucky has accepted this principle."

Following a repudiation, and before the time set for performance, the innocent party may pursue one of three courses. He may: (1) treat the contract as though it were rescinded and recover in quantum meruit for any performance he has rendered; (2) treat the repudiation as an immediate breach and sue before the time set for the other party's performance, for damages he has sustained or may sustain, or; (3) treat the contract as still binding for the purpose of suing on the contract on or after the date the performance of the other party is to become due if the repudiation is not withdrawn before that time." Regardless of which of these he chooses, his own non-performance will be excused. It has been held in Kentucky that after a repudiation by one of the parties the non-performance of the other party is excused; that he may recover in quantum meruit for any performance on his part prior to the repudiation,itic

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a Clark v. Marsiglia, 1 Denio (N.Y.) 317, 43 Am. Dec. 670 (1845); RESTATEMENT, CONTRACTS (1933) sec. 338, comment c. (cannot unreasonably enhance the damages)


f Country Homes Magazine v. Hobb's Adm'x., 243 Ky. 663, 49 S.W. 2d 542 (1932).
or, that he may sue on the contract on or after the date performance was due. Or it is not intimated in these cases that he must await that time before suing, and in fact, the right to an immediate action is recognized in other cases.

Of these three courses open to the innocent party, the controversial one is that which permits an action before the time for performance has arrived. This idea of immediate suit had its origin in England in the case of *Hochester v. De la Tour.* In that case the plaintiff contracted with the defendant to serve as his courier beginning June first. On May eleventh, defendant wrote to the plaintiff declining his services. May twenty-second the plaintiff brought an action for damages for breach of contract. The court held for the plaintiff, basing its decision on two premises. First, where there is a contract for performance on a future date, a "relation" exists between the parties in the meantime, accompanied by an implied promise that neither will do anything prejudicial to the other inconsistent with the "relation." Secondly, the plaintiff will be made to remain idle in the meantime, may lose other employment, and unless an immediate action is allowed, will be remediless. If the first premise was correct as to the existence of the implied promise, the action was not based on a duty created by the implied promise, for the plaintiff sought damages for breach of a duty created by the express promise. The implied promise was only to insure that the contract would be carried out according to the express promise. An action on or after June first would have satisfied both promises. But an action before that time ignored the express promise which established the main duty and the time for its existence. In regard to the second promise, the contract did not require the plaintiff to remain idle up to June first, and by allowing suit only on or after that date he could have received the value of his employment. Denying immediate suit would not have, as the court seems to have presumed, denied the plaintiff later remedy by action on or after June first. The court committed an historical error by concluding that it was already established that a renunciation before time of performance was a breach of contract, giving an immediate right of action.

Regardless of whether the doctrine of anticipatory breach allowing an immediate right of action is a logical one, it has been accepted by the great weight of American authority, probably only

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25 Ross v. Columbus Mining Co., 226 Ky. 166, 10 S.W. 2d 628 (1928); see Fidelity & Deposit Co. of Md. v. Brown, 230 Ky. 534, 537, 20 S.W. 2d 284, 286 (1929); Royster v. A. Waller & Co., 186 Ky. 476, 479, 217 S.W. 684, 685 (1920); Louisville Packing Co. v. Crain, 141 Ky. 379, 380, 132 S.W. 575, 579 (1910).
27 WILLISTON, CONTRACTS (Rev. Ed. 1937) sec. 1313.
28 WILLISTON, op. cit. supra note 27, sec. 1337.
two states, Massachusetts\textsuperscript{29} and Nebraska,\textsuperscript{30} have definitely denied it. However, the doctrine does not apply to a contract originally unilateral, or that has become unilateral by complete performance on one side.\textsuperscript{31} Kentucky law is in accord with this limitation.\textsuperscript{32}

It is the opinion of the writer that the doctrine of anticipatory breach of contract allowing an immediate action should be rejected.\textsuperscript{33} The promisee may be fully protected by excusing him from his own performance and by allowing him an action on or after the date set for the other party's performance, if before that time the repudiation is not retracted. This does not require an anticipatory breach, for the excuse for the innocent party's non-performance may be based on such a principle as prospective failure of consideration or apparent inability. There are additional reasons for its rejection:

1. The innocent party receives the benefit of a duty not provided for by the contract, at the expense of the party who repudiated.

2. There can be no breach of a duty before the time set for its existence without resorting to fiction.

3. The doctrine may prevent possible reconciliation of the parties between the time of the repudiation and the time set for performance.

4. Facts subsequent to the repudiation and prior to the date for performance might have occurred which would have destroyed the contract without fault of either party. This is a risk which both parties assumed when they made the contract. To allow an action before the duration of time within which the risk operates may hold one party liable for the value of his performance to the other, when the former might not have obtained the performance of the latter.

5. Damages are frequently difficult to assess and may thereby result in injustice to one or the other of the parties.

The doctrine of anticipatory breach originated by an historical error. Unless the doctrine can be justified, it will be maintained only by reverence for the precedents which have perpetuated the error.

\textsuperscript{29} Tirrell v. Anderson, 244 Mass. 200, 138 N.E. 569 (1923); Daniels v. Newton, 114 Mass. 530 (1874).

\textsuperscript{30} King v. Waterman, 55 Neb. 324, 75 N.W. 830 (1898); see, Carstens v. McDonald, 38 Neb. 858, 57 N.W. 757, 758 (1894).

\textsuperscript{31} New York Life Ins. Co. v. Viglas, 297 U.S. 672, 56 S. Ct. 615, 80 L. Ed. 971 (1936); Brown Paper Mill Co. v. Irvin, 146 F. 2d 232 (1944); RESTATEMENT, CONTRACTS (1933) sec. 318.

\textsuperscript{32} Howard v. Benefit Ass'n. of Ry. Employees, 239 Ky. 465, 39 S.W. 2d 657 (1931); Fidelity & Deposit Co. of Md. v. Brown, 230 Ky. 534, 20 S.W. 2d 284 (1929); Huffman v. Martin, 226 Ky. 137, 10 S.W. 2d 636 (1928); Pittmann v. Pittmann, 110 Ky. 306, 61 S.W. 461 (1901).

The theory that the contract is broken at the time of the repudiation or its acceptance, or upon acts in reliance on the repudiation, has led to some confusion in Kentucky cases in regard to the time of measuring damages. There are cases that treat the time when the repudiation became irrevocable as the time to measure damages. Other cases correctly allow as damages the profit the innocent party would have made had the contract been fully performed. Damages are a substitute for performance and should be determined as of the last day performance was possible according to the contract. The Restatement of Contracts states the correct principle as to damages: "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.

The following conclusions may be drawn as to Kentucky law on anticipatory breach of contract: Kentucky law is in accord with the weight of authority in holding that to constitute a repudiation the manifestation of intent not to carry out a contract must be positive and unconditional. The repudiation is termed a breach, though not final in nature. Some cases erroneously treat the breach as an offer which may be accepted verbally and is complete at the time of acceptance. The three courses recognized by the weight of authority as open to the innocent party following a repudiation, are recognized here. Although some cases intimate that damages are to be measured as of the date of the anticipatory breach, later cases and sounder reasoning would seem to place Kentucky in accord with those jurisdictions which hold that damages are to be measured as of the date performance was to have been due.

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34 Paducah Cooperage Co. v. Arkansas Stave Co., 193 Ky. 774, 237 S.W. 412 (1922); Louisville Packing Co. v. Crain, 141 Ky. 379, 132 S.W. 575 (1910).
35 Ross v. Columbus Mining Co., 226 Ky. 166, 10 S.W. 2d 628 (1928); Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112 S.W. 1126 (1908).
36 Restatement, Contracts (1933) sec. 338.