A BRIEF HISTORY OF ANTICIPATORY REPUDIATION
IN AMERICAN CONTRACT LAW

Keith A. Rowley*

Contract law is the law of enforceable promises.1 A promise is the
promisor’s expression of how or to what end he intends to act (or to
refrain from acting), made so as to justify and induce reliance by the
promisee.2 A promise is enforceable if, inter alia, the promisor’s breach
affords the promisee a legal remedy.3

In the typical case, a promisor breaches a contract by failing to
perform when and as promised. Until the time has come for him to
perform, and until all conditions precedent to his performance are
satisfied, he cannot breach the contract by failing to perform as
promised.4 If, for example, X and Y agree that Y will travel to Europe
on X’s behalf next November and that X will pay Y $5,000 at the time

* Visiting Associate Professor of Law, Emory University School of Law; Associate Professor of
Law, William S. Boyd School of Law, University of Nevada, Las Vegas (effective Fall 2001). B.A., Baylor
University; M.P.P., Harvard University, John F. Kennedy School of Government; J.D., University of
Texas School of Law. This Article derives from my work on Volume 9 of the Revised Edition of Corbin on
Contracts, which will be published in late 2001 or early 2002. I would like to thank Andrew Kull, Scott
Norberg, Joe Perillo, and Steve Ware for their comments, Tana Vollendorf, Donald Campbell, and Gayle
Berne for their research assistance, the staffs at the Mississippi College School of Law Library and the Hugh
F. MacMillan Law Library at Emory University School of Law for their assistance tracking down dozens
of hoary cases and secondary sources, and Emory University School of Law and Mississippi College School
of Law for providing summer research support. All errors and omissions, of course, are my own.

1. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) [hereinafter RESTATEMENT (SECOND)]
("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the
performance of which the law in some way recognizes as a duty."); see, e.g., Schaefer v. Williams, 19 Cal.
Rptr. 2d 212, 213-14 (Cal. Ct. App. 1993); Awood v. Western Constr., Inc., 923 P.2d 479, 483 (Idaho

2. See RESTATEMENT (SECOND), supra note 1, § 2(1) ("A promise is a manifestation of intention to
act or refrain from acting in a specified way, so made as to justify [the person to whom the manifestation
is addressed] in understanding that a commitment has been made."); see, e.g., In re Herrick, 922 P.2d 942,
951 (Haw. 1996); Montgomery County Hosp. Dist. v. Brown, 963 S.W.2d 501, 502 (Tex. 1998); Chen

3. See RESTATEMENT (SECOND), supra note 1, § 1; see e.g., Nelson v. State Farm Mut. Auto Ins. Co.,

4. RESTATEMENT (SECOND), supra note 1, § 235 cmt. b, at 212 ("Non-performance is not a breach
unless performance is due. . . . When performance is due, however, anything short of full performance is
a breach, even if the party who does not fully perform was not at fault and even if the defect in her
performance was not substantial. . . . Non-performance includes defective performance as well as an
absence of performance."); see, e.g., Romano v. Rockwell Int'l, Inc., 926 P.2d 1114, 1119 (Cal. 1996);
Taylor v. Johnston, 539 P.2d 425, 430-31 (Cal. 1975) (en banc); Woody v. Tamon, 405 N.W.2d 213, 216

565
of Y's departure plus expenses, X is not obligated to perform until next November, and thus cannot breach his promise until then.\(^5\)

Or, can he?

X's promise creates immediate duties, irrespective of the length of time between when X makes his promise and when he is obligated to perform.\(^6\) X is required both to perform as promised next November and to refrain from repudiating his promise to Y at any time prior to next November.\(^7\) If X definitely and unconditionally repudiates his promise, and communicates his repudiation to Y, then, even though X's breach occurs before he was obligated to perform and before one or more conditions specified in his promise have ever occurred, X's repudiation constitutes an anticipatory breach of the contract, and entitles Y to immediately sue X for breach—despite the fact that Y had no right to expect X to perform until some future date.\(^8\)

---

5. The classic formulation of this hypothetical has X promising (1) to send Y to Europe at a future date and (2) to pay Y at the time of Y's departure or upon Y's return. See, e.g., 4 ARTHUR L. CORBIN, CORBIN ON CONTRACTS 852 (1951) ("[I]n 1950, A promises to take B to Europe as his courier in 1952 and to pay him $500 on return from the trip . . . ."). The classic formulation, however, may run afoot of the general unwillingness of American courts to apply the doctrine of anticipatory repudiation to unilateral contracts, see infra note 25, because only X is promising any future performance. This is true even under Corbin's formulation. The fact that X does not promise to pay Y until Y's return (as opposed to on Y's departure) no more obligates Y to undertake the journey than would my promise to pay you $100 if you cross the Brooklyn Bridge obligate you to cross it. See I. Maurice Wormser, The True Conception of Unilateral Contracts, 26 YALE L.J. 136, 136-38 (1916). If, on the other hand, we read "at the time of Y's departure" to impose an express or implied condition on X's promise to pay—that is, if X is only obligated to pay if Y, in fact, departs for Europe as agreed—or even an implied promise by Y that he will travel to Europe on X's behalf, then the doctrine should apply as readily as it would in the case of any mutually executory contract (a bilateral contract which neither party has yet fully performed).

6. See, e.g., Roehm v. Horst, 178 U.S. 1, 19 (1900) ("The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due.").

7. See, e.g., Hochser v. De la Tour, 118 Eng. Rep. 922, 926 (Q.B. 1853) ("[W]here there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and . . . they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation.").

A promisor may repudiate either by word or by deed. If a promisor tells his promisee that he either will not or cannot perform the contract at the time called for or in the manner called for, the promisor’s statement may operate as an anticipatory breach, unless the promisor’s statement is justified. Likewise, the promisor may anticipatorily breach if he commits some voluntary act that makes it impossible for him to perform the contract when and as promised. And, to the extent that the promisor can exercise such dominion over the promisee, the promisor may anticipatorily breach by committing a voluntary act that makes it impossible for the promisee to perform her contractual obligations.

obligations. 12 With one notable exception, 13 a promisor cannot anticipatorily repudiate by mere silence or inaction. 14 A promisee whose promisor has repudiated his obligation may elect to (1) cancel the contract, (2) treat the anticipatory repudiation as a breach by bringing suit against the promisor or otherwise act in reliance on the repudiation, or (3) do nothing, subject to the promisee's obligation to mitigate damages, 15 and await the promisor's performance at the appointed time. 16 The promisor's repudiation relieves the promisee from any further tender or performance that would otherwise be due under the contract. 17

In order to recover damages for the promisor's repudiation, the promisee may be required to show that, but for the promisor's repudiation, she was ready, willing, and able to tender or perform at the appointed time. 18 If the promisee elects to ignore the promisor's repudiation, 19 or if the promisee does not act on it one way or another before the promisor retracts or otherwise cures his repudiation, 20 the

---


13. Failing to provide adequate assurance of performance in response to a reasonable request by the promisee may constitute an anticipatory breach. See RESTATEMENT (SECOND), supra note 1, § 251; U.C.C. § 2-609 (1999); see, e.g., C.L. Maddox, Inc. v. Coalfield Servs., Inc., 51 F.3d 76, 81 (7th Cir. 1995); Banco Int'l, Inc. v. Goody's Family Clothing, 54 F. Supp. 2d 765, 774 (E.D. Tenn. 1999); United States ex rel. Virginia Beach Mechanical Servs., Inc. v. SAMCO Constr. Co., 39 F. Supp. 2d 661, 671 (E.D. Va. 1999).


promisee may not prevail on a claim for damages based on the promisor's anticipatory breach.

Whether a promisor repudiates by word, act, silence, or inaction, his anticipatory repudiation will only be actionable if he communicates it to the promisee, 21 in definite and unequivocal terms, 22 and the promisee acts upon it, 23 prior to the time that the promisor’s performance is due under the contract. Otherwise, the promisor’s repudiation is an actual—not anticipatory—breach of contract, and must be prosecuted, defended, and adjudged accordingly. 24

Not all contracts are susceptible to actionable anticipatory breaches. The doctrine does not generally apply to unilateral contracts, 25 including


Professor Corbin argued that this exclusion was based upon the erroneous idea that the reason for holding an anticipatory repudiation to be a breach of contract is that otherwise the injured party must himself continue to be ready to perform on his own part. It would follow from this that, if the injured party never had any performance to render on his part, or, having such a performance, has already fully performed it, it would not be necessary for his protection to give him an immediate action for damages for the anticipatory breach... [T]he rule allowing an action for an anticipatory breach cannot properly be rested upon this reason. The reasons upon which it can actually be sustained are equally applicable to unilateral contracts. The harm caused to the plaintiff is equally great in either case; and it seems strange to deny to a plaintiff a remedy of this kind merely on the ground that he has already fully performed as his contract has required.

4 CORBIN, supra note 5, at 864-65 (footnote omitted); see also Comment, Anticipatory Repudiation: Anachronistic Limitations, 159 DUKEL.J. 165, 167-70 (arguing for the extension of the anticipatory repudiation doctrine to unilateral contracts) [hereinafter Anachronistic Limitations]; Sam F. Whitlock, Jr., Note, Contracts: Anticipatory Breach of Unilateral Contracts, 4 OKLA. L. REV. 112, 112-14 (1951) (same).
unilateral contracts to pay money. Similarly, once one party to a

26. See, e.g., Smyth v. United States, 302 U.S. 329, 356 (1937); Roehm v. Horst, 178 U.S. 1, 17-18 (1900); Quick v. American Steel & Pump Corp., 397 F.2d 561, 564 (2d Cir. 1968); John Hancock Mut. Life Ins. Co. v. Cohen, 254 F.2d 417, 424-26 (9th Cir. 1958); Wallace Clark & Co. v. Acheson Indus., Inc., 422 F. Supp. 20, 23 & n.6 (S.D.N.Y. 1976); Bird v. Computer Tech., Inc., 364 F. Supp. 1336, 1345 (S.D.N.Y. 1973); McCready v. Lindenborn, 65 N.E. 208, 210-11 (N.Y. 1902); Romar v. Alli, 501 N.Y.S.2d 877, 878 (N.Y. App. Div. 1986); Crouse v. Nantucket Village Dev. Co., 460 N.E.2d 1389, 1391 (Ohio Ct. App. 1983); Gregson v. Mutual of Omaha Ins. Co., 461 P.2d 285, 287 (Utah 1969). But see, e.g., Williams v. Mutual Benefit & Accident Ass'n, 100 F.2d 264, 264-65 (5th Cir. 1938) (applying Texas law) (holding that insurer who repudiated its obligation to pay annuity benefits to its insured had anticipatorily breached and could be immediately sued for payments not yet due); see also Anachronistic Limitations, supra note 25, at 169-70 ("[W]hy should the fact that the consideration has passed effectively deprive a promisee of a reasonable expectation that he will be duly recompensed for the consideration he has conveyed? So long as this latter exception to the doctrine governing anticipatory breach of contract is recognized, the only expectancy of a promisee in such [a] situation is a future law suit." (footnote omitted)).

The doctrine of anticipatory breach generally does not apply to an installment payment contract that does not include an acceleration clause. See, e.g., Rosenfeld v. City Paper Co., 527 So. 2d 704, 705-06 (Ala. 1988); Mabery v. Western Cas. & Sur. Co., 250 P.2d 824, 828-29 (Kan. 1952).

Indeed, the use of the "acceleration of maturity of payment" clause is in recognition of the nonapplicability of the anticipatory breach doctrine in installment payment contracts. Once the promisee has done all there is for him to do under the contract and the promisor's obligation is confined to payment by installments as specified by the contract, the doctrine of anticipatory breach has no field of operation and will not intercede to rescue the promisee [sic] from the consequences of the absence of an acceleration clause.

Rosenfeld, 527 So. 2d at 706. Again, Professor Corbin disagreed:

[The refusal to recognize an anticipatory repudiation of a unilateral money debt as an immediate breach is mainly to be found in the notion expressed by the unfortunate phrase "accelerate the date of maturity." Money due next year cannot be made due now by the debtor's saying that he is not going to pay it. But neither can services that by the contract are to be performed next year be rendered immediately performance by the employee's saying that he is not going to render the service. The same is true with respect to contracts for the sale of goods or the conveyance of land. It is probable that the court should never decree the specific performance of these duties ahead of the time fixed for performance by the contract. What the plaintiff asks for and what he is given is a judgment for money damages. It is merely an accidental circumstance that where the contractual duty is a duty to pay money, the performance that is expressly promised is identical in character with the performance that is required by a judgment for money damages. . . . Therefore, a plaintiff should not be deprived of his remedy in damages for an anticipatory repudiation merely because the promised performance is similar in character to the performance that is required by the judicial remedy that is commonly given for all kinds of breaches of contract.

4 CORBIN, supra note 5, at 872-73 (footnote omitted); see also Anachronistic Limitations, supra note 25, at 170 ("[I]t is highly doubtful that there is any less 'mutuality of obligation' involved in money contracts than in such other contracts as Mr. Justice Fuller would have conceded to fall 'within the reason of the rule.'" (quoting Roehm v. Horst, 178 U.S. 1, 17 (1900) (footnote omitted)); Whidlock, supra note 25, at 113-14 ("If a greater burden than contracted for must fall either upon the promisee in the form of a multiplicity of suits, or upon the promisor in the form of a lump sum judgment, . . . such burden [should] be placed upon the wrongdoer [the promisor] rather than the innocent party [the promisee].").

In any event, we should distinguish a unilateral contract to pay money—i.e., one in which the promisor vows to pay the promisee a sum of money, in installments or in a lump sum, at some future date in exchange for some consideration already performed by the promisee (e.g., a promissory note whereby the promisor agrees to pay back a cash loan from the promisee plus interest or whereby the promisor agrees to pay for an automobile in monthly installments in exchange for the immediate delivery of the automobile
bilateral contract has fully performed its obligations—and, thus, effectively converted the contract into a unilateral one—any repudiation by the party who has yet to perform will generally not support a claim of anticipatory breach.27

At common law, a promisee who establishes a promisor’s anticipatory breach may recover damages attributable to the promisor’s repudiation,28 subject to the promisee’s duty to mitigate.29 In certain cases, a promisee may elect restitutionary relief30 or specific performance31 in lieu of compensatory damages. The relevant provisions of the Uniform Commercial Code32 and the United Nations Convention on Contracts for the International Sale of Goods33 provide their own set of remedies for a promisee whose promisor anticipatorily repudiates a contract governed thereby.34

---


29. See supra note 25.


32. See U.C.C. §§ 2-609 to -611 (1999). See generally infra Part III.


34. See U.C.C. §§ 2-703 to -716; CISG arts. 74-78, 81 & 84, respectively.
I. DEVELOPMENT OF THE COMMON LAW DOCTRINE

Anticipatory repudiation is not a new idea. As early as 1855, a prominent American commentator advised that, "[i]f a party, bound to do a thing on a certain day, and therefore having the whole intermediate time, by some act distinctly incapacitates himself from doing that thing on that day, . . . an action may be commenced at once."35 Only twenty years later, the New York Court of Appeals declared that it was "well settled . . . that if a person enters into a contract for service, to commence at a future day, and before that day arrives does an act inconsistent with continuance of the contract, an action may be immediately brought by the other party."36 By the time the Supreme Court decided Central Trust Co. of Illinois v. Chicago Auditorium Association37 some forty years later, the Court declared that it was "no longer open to question" that

35. 2 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 179 (1855). Parsons, who at the time was Dane Professor of Law at Harvard (a position subsequently held by, among others, Samuel Williston), suggested that "[i]t might . . . seem more reasonable to permit such an action only where the capacity of the promisor could not be restored before the day [on which performance was due], or the promise had received a present injury from the [repudiatory] act of the promisor." Id. Nonetheless, he recognized that the promise may bring an action prior to the date set for performance even if the promisor is not actually incapacitated and the promise has not been presently injured by the repudiation. See id. at 179-81.

36. Howard v. Daly, 61 N.Y. 362, 374 (1875); see also JEROME C. KNOWLTON, ANSON ON CONTRACTS 368 (2d Am. ed. 1887) ("The parties to a contract which is wholly executory have a right to . . . the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due."). Charles Fisk Beach, writing some years later, suggested that Shaw v. Republic Life Insurance Co., 69 N.Y. 286 (1877), somewhat gainsaid Howard and cast doubt on whether an immediate action would lie for anticipatory repudiation. See 1 CHARLES FISK BEACH, JR., A TREATISE ON THE MODERN LAW OF CONTRACTS 495 (1897). Beach apparently rested his conclusion on the court's statement that [w]here one party to a contract declares to the other party to it, that he will not make the performance on the future day fixed by it therefor, and does not, before the time arrives for an act to be done by the other party, withdraw his declaration, the other party is excused from performance on his part, or offer to perform, and may maintain his action for a breach of the contract when the day has passed. Shaw, 69 N.Y. at 292-93 (emphasis added). However, even a cursory reading of Shaw suggests that Beach misread the point. In the first place, the Shaw court makes clear that anything it said about the permisibility of a cause commenced prior to the date performance was due would be pure dicta, as the case at hand was not commenced until after performance was due. Id. at 293. Moreover, rather than abrogating, or even questioning, prior rulings permitting an immediate cause of action, the Shaw court cited Burton v. Thompson, 42 N.Y. 246 (1870) (holding that an action commenced by the promisee prior to the date the promisor was bound to marry the promisee was not premature, in light of the promisor's unequivocal statement that he would not then or ever marry the promisee), as well as the earlier English cases of Cott v. Ambergate, Nottingham & Boston & E. Junction Ry., 117 Eng. Rep. 1229 (Q.B. 1851), Hochster v. De la Tour, 118 Eng. Rep. 922 (Q.B. 1853), and Frost v. Knight, 7 L.R.-Ex. 111 (Ex. Ch. 1872), as supporting the rule. See Shaw, 69 N.Y. at 293.

where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach.  

But, from whence came the doctrine?

A. Hochster v. De la Tour and the Origins of Anticipatory Repudiation

The landmark case holding that a party may bring an action for damages immediately upon the other party's anticipatory breach is Hochster v. De la Tour. By contract dated April 12, 1852, De la Tour agreed to employ Hochster as a courier for a three-month period, commencing June 1, 1852, for £10 per month. On May 11, 1852, De la Tour wrote Hochster that he had changed his mind, that he would not employ Hochster as first promised, and that he would not otherwise employ or compensate Hochster. Hochster subsequently secured other employment on comparable terms, but not until July 4, 1852.

Hochster sued on May 22, 1852—ten days before De la Tour was obligated to perform—arguing that De la Tour's repudiation of his promise to employ Hochster was a breach of contract, notwithstanding that De la Tour had breached prior to the time he was due to perform. De la Tour answered that there could be no breach before June 1.

The jury found for Hochster, and De la Tour sought a nonsuit or to arrest the judgment. Lord Chief Justice Campbell, posed the question before the court this way:

Whether, if there be an agreement between A. and B., whereby B. engages to employ A. on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to

38. Id. at 589; see also 5 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 2885, at 5100-01 (2d ed. 1921) (commenting that, in most jurisdictions, the rule "is so thoroughly settled that discussion is unnecessary"); 3 WILLIAM F. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS 206 (1913) (remarking that American courts permit an immediate suit for breach by the aggrieved promisee of a repudiating promisor "with almost practical unanimity," and citing cases from twenty-three state and several federal courts).
40. See id. at 922.
41. See id. at 923.
42. See id.
43. See id.
44. See id.
45. See id.
start with him in that capacity on that day, A. being to receive a monthly salary during the continuance of such service, B. may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A. before the day to commence an action against B. to recover damages for breach of the agreement; A. having been ready and willing to perform it, till it was broken and renounced by B.  

De la Tour argued that, if Hochster was unwilling to agree to dissolve the contract upon De la Tour's repudiation, then Hochster was obligated to stand ready and willing to perform at all times prior to the date he was to perform the contract, to the exclusion of accepting other employment; and, therefore, Hochster could not suffer any injury from De la Tour's repudiation, and could not bring suit thereon, until De la Tour's performance was due. The court disagreed:

If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st [of] June 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract.

As for Hochster's right to an immediate remedy,

[i]t he man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued... by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.

46. Id. at 925.
47. See id. at 925-26.
48. Id. at 926.
49. Id. at 927.
Hochster was not the first reported Anglo-American case to hold that a promisee has an immediate right of action upon a promisor’s anticipatory repudiation. Dean Hunter and Professor Jackson each bestow that honor upon the New York Supreme Court of Judicature’s decision in Masterton & Smith v. Mayor of Brooklyn. In Masterton & Smith, the plaintiffs (M & S) agreed in January 1836 to procure, cut, fit, and deliver “with all diligence” marble to be used for the City Hall being built by the defendants (the City of Brooklyn and certain city officials, collectively “the City”). In March 1836, M & S contracted to purchase marble from the quarry of Kain & Morgan (K & M). The terms of this second contract provided that M & S would pay K & M from the funds M & S were to receive from the City, and that K & M would “in no event” expect payment from M & S until M & S received payment from the City. Several months into the building project, in July 1837, the City halted construction and refused to accept any more marble from M & S, who were ready and able to deliver more. The evidence before the trial court suggested that M & S’s contract with the City could not be fully performed until at least 1842. M & S commenced suit in 1840, and prevailed at trial.

On appeal, Chief Judge Nelson held that M & S were entitled to recover, as of the day of the City’s repudiation, any profits lost as a result of the City’s refusal to fully perform. Judge Beardsley agreed that M & S were entitled to recover their unrealized profits, and extended the logic of Chief Judge Nelson’s argument that M & S’s cause of action arose on the day the City anticipatorily breached, holding that M & S were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them from making further efforts to perform and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant.

52. See id. at 63.
53. Id. at 64.
54. See id. at 64-65.
55. See id. at 65.
56. See id. at 62.
57. See id. at 69, 71 (Nelson, C.J.).
58. See id. at 73-74 (Beardsley, J.).
had they from time to time made repeated offers to perform on their part, which were refused by the defendants: but this the plaintiffs were not bound to do.\textsuperscript{59}

Further digging unearthed several earlier cases—including \textit{Jones v. Barkley},\textsuperscript{60} which pre-dates \textit{Masterton \& Smith} by sixty-four years. The plaintiffs in \textit{Jones} (who were assignees of Gardiner, a bankrupt) were entitled to the equity of redemption of £1490 worth of bank stock held by Gardiner and mortgaged to Lane to secure a loan by Lane to Gardiner.\textsuperscript{61} Barkley and the plaintiffs agreed that the plaintiffs would assign and release their claims in favor of Lane (or anyone he should designate), for which Barkley would pay the plaintiffs £611 “on the plaintiffs assigning the equity of redemption . . . to Lane, or any person he should appoint, and executing and delivering such general release.”\textsuperscript{62} The plaintiffs tendered a draft assignment and release to Barkley for his approval, who refused to pay the plaintiffs the £611 as promised and “absolutely discharged” the plaintiffs from executing any assignment and release.\textsuperscript{63} The plaintiffs sued. At trial, Barkley argued that the plaintiffs failed to perform their end of the bargain because they did not, in fact, execute an assignment and release in Lane’s favor; and, therefore, that Barkley was not obligated to pay the plaintiffs.\textsuperscript{64} The court found that, while a party seeking to recover for breach of contract must show that he is ready to perform when required,

\begin{quote}
if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shewn to the defendant for his [approval] . . . but he would not read it, and, upon a different ground, namely, that he mean[t] not to pay the money, discharge[d] the plaintiffs from executing it.\textsuperscript{65}
\end{quote}

\textsuperscript{59} Id. at 75.

\textit{Masterton \& Smith} is arguably not a “true” anticipatory repudiation case because the City’s manifestation of its intent not to perform as obligated in the future was accompanied by a present refusal to perform. As such, it is distinguishable from more traditional anticipatory repudiation cases, like \textit{Hochster v. De la Tour}, 118 Eng. Rep. 922 (Q.B. 1853), see supra text accompanying notes 39-49, and the cases discussed later in this subpart, see infra text accompanying notes 60-101, where the promisor’s manifestation of its intent not to perform as obligated in the future is not accompanied by a present refusal to perform. These latter cases bring to a finish the question of whether and when a promise may sue, not because the promisor has failed to perform as promised, but because the promisee believes that the promisor will not perform as promised when the time comes for the promisor to do so.

\textsuperscript{60} 99 Eng. Rep. 434 (K.B. 1781).

\textsuperscript{61} Id. at 434.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} See id.

\textsuperscript{65} Id. at 440 (Mansfield, L.J.).
In Bowdell v. Parsons, Bowdell agreed to purchase twelve loads of hay from Parsons, to be removed from Parsons’s property at Bowdell’s convenience, for which Bowdell was to pay Parsons 5£ 10s. per load. Bowdell received the first load from Parsons, and paid Parsons at the agreed rate. Thereafter, Parsons refused Bowdell’s request to remove any of the remaining eleven loads of hay; and, in fact, sold them to third parties without Bowdell’s consent. Bowdell sued Parsons for breach, and won a default judgment. The bulk of the court’s opinion focused on a procedural matter relating to venue, and the court ultimately concluded that Bowdell’s default judgment should not be arrested because of the alleged procedural irregularity. In reaching that conclusion, Lord Ellenborough first observed that Bowdell was entitled to judgment on the merits because Parsons’s “selling and disposing of the rest of the hay to other persons . . . disqualified him[ ] from delivering it to” Bowdell; and, therefore, Bowdell need not have made further requests that Parsons perform as promised before bringing suit.

In Newcomb v. Brackett, Field owed Brackett $100, which Brackett had secured by a deed against Field’s estate. Newcomb and Brackett agreed that Brackett would convey Field’s estate to Newcomb in exchange for $100 to discharge Field’s debt to Brackett plus a one-half interest in the sloop Union and its apparel (valued at $200). Before Newcomb could pay Brackett the $100, but after Newcomb had conveyed to Brackett a bill of sale for the sloop and its apparel, Brackett conveyed the deed to a third party. Newcomb sued Brackett for breach, and Brackett defended on the ground that Newcomb had not paid him the $100; and, therefore, was not entitled to the deed. The Massachusetts Supreme Judicial Court held for Newcomb:

No time is fixed in the contract, within which the money was to be paid, or the estate conveyed to the plaintiff. The plaintiff then had a reasonable time, by virtue of the contract, to perform his part of it . . . .

67. See id. at 811-12.
68. See id. at 813-14.
69. Id. at 812-13.
70. 16 Mass. 161 (1819). It is interesting to note that perhaps the earliest reported American case recognizing an immediate right of action for a promisor’s repudiation prior to the appointed time for performance comes from Massachusetts—the one state that does not presently recognize a common law claim for anticipatory repudiation. See infra note 162.
71. See id. at 161.
72. See id. at 161-62.
73. See id. at 162.
It is implied in the contract, on the part of the defendant, that he would do nothing by which he should become unable to perform it; and by making a deed to another person, he has disabled himself, and so virtually broken his contract. It being impossible for him, after having thus done, to account for the 200 dollars in the land, as he undertook, there is a breach of his contract, for which proper damages may be recovered. The law will not, in such circumstances, require a payment or tender by the plaintiff; for this would be to hazard an additional loss, without any possible advantage. 74

In *Ford v. Tiley*, 75 the parties entered into a contract on January 3, 1824, whereby Tiley agreed to lease a building to Ford beginning December 21, 1825 and running for 14 or 21 years, at Ford's option, with rent at £105 per annum. 76 On June 24, 1825, Tiley agreed to lease the same building to a third party (Sims), for 23 years, commencing September 29, 1825. 77 Upon learning of Tiley's June 1825 lease of the subject property to Sims, Ford brought suit. At the time Tiley entered into both contracts, the building in question was under a pre-existing lease to Sims until "midsummer 1827." 78 Tiley used this fact to argue that Ford's suit was premature, and that it could not be brought until the pre-existing lease expired or was abandoned by the lessee. The court disagreed:

[T]hough we are satisfied that [the original] lease is, as between the parties, to be considered as subsisting, and that the defendant cannot hitherto have been taken to have been possessed, and has never had a right to have the possession, we are of the opinion that the action is maintainable; because, by the lease of June 1825, the defendant has given up his right to have the possession, and has put it out of his power, so long as the lease of June 1825 subsists, to grant the lease that he stipulated to grant [to Ford]. It is very true, the defendant may obtain a surrender of the lease before midsummer 1827, and then he will be in a condition to grant the lease he stipulated to grant; but . . . obtaining such a surrender is not to be expected, and . . . where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives. 79

74. Id. at 165.
76. Id. at 472.
77. See id.
78. See id.
79. Id. at 472-73; accord Heard v. Bowers, 40 Mass. (23 Pick.) 455, 460 (1839) ("The general doctrine undoubtedly is that, where a party stipulates to make a conveyance of an estate to another at a future day, and before the day conveys the estate to a third person, he is to be considered as guilty of a
The plaintiff in *Planché v. Colburn* agreed to write a volume on "Costume and Ancient Armour" to be published as a part of the defendants' serial, *The Juvenile Library*. The defendants agreed to pay Planché £100 when Planché submitted a completed manuscript. While Planché was still at work on the manuscript, the defendants abandoned *The Juvenile Library*, owing to poor sales of the earlier volumes in the set, and notified Planché that they would not publish his volume nor pay him for his efforts. Planché, who at the time of the defendants' repudiation had completed a substantial part of the manuscript and had incurred expenses associated with preparing the work, sued for breach. The jury found for Planché, and awarded him £50 as damages. The Court of Common Pleas affirmed, holding that the defendants' action in canceling *The Juvenile Library* entitled Planché to sue for and recover the reasonable value of his services despite having not completed his manuscript, and thereby obligated the defendants to pay him, at the time of the cancellation.

In *Williams v. Champion*, Williams purchased 666 acres of land in January 1818 from Champion, who agreed to accept the purchase price of $3,562.00 in four installments: three equal payments of $725.77 due...
on October 1, 1818, October 1, 1819, and October 1, 1820, and a fourth payment of $1,384.77 due on demand. Prior to August 5, 1820, Williams had paid Champion $500, and had sold all but 257 acres of the original tract to third parties. While the facts are unclear, Champion appears to have received some, but not all, of the sale price from the sales by Williams to the third parties.

On August 5, 1820, Williams and Champion entered into a new contract whereby Champion agreed (1) to convey 82 acres of the remaining 257 acres to Williams’s son, (2) to accept the third party sales contracts Williams had already entered into, (3) to designate Williams as his agent to sell the remaining 175 acres, and (4) upon Williams’s successful sale of 100 of the remaining acres at a price of not less than $10 per acre, to convey to Williams the remaining 75 acres as compensation for his sale of the entire 666 acre tract, less the acres set aside for Williams and Williams’s son. Despite Williams’s diligence, he was unable for several years to sell the 100 acres required of him by the August 5, 1820 contract. In May 1825, Champion conveyed to Goodrich the 100 unsold acres, plus the 75 acres promised to Williams. Williams subsequently sued Champion and Goodrich for the 75 acres promised to him, or for their value in money. The Ohio Supreme Court held that Williams was entitled to recover from Champion because “Champion, by conveying to Goodrich, put an end to the contract, and disabled Williams from performing that portion of it that remained unperformed.”

In both Short v. Stone and Caines v. Smith the issue was whether a man who had promised to marry a particular woman (the promisee) on, or within a reasonable time following, request by the promisee and then, while the promise was still outstanding, married another woman, was in present breach of the promise to marry the promisee. In both cases, the man argued that the promisee did not ask him to marry her prior to filing suit. Both courts found her request to be unnecessary, given that the man had disabled himself from fulfilling his promise even had she

---

86. See id. at 170.
87. See id.
88. See id.
89. Id. at 171.
made the request. The court in Caines also rejected the argument that the defendant's present wife might die before the plaintiff, enabling him to fulfill his promise to marry her at some later date.

The most immediate antecedent to Hochster was Cort & Gee v. Ambergate, Nottingham & Boston & Eastern Junction Railway, in which one issue for the court was whether a purchaser who had entered into an installment contract for the manufacture and delivery of railroad chairs made to its specifications could be liable to the manufacturer for damages incurred when the purchaser notified the manufacturer several months before the final installment was due under the contract, and after having received and accepted a portion of the chairs, not to tender any more chairs as the purchaser had no need for any more and would neither accept nor pay for any that the manufacturer subsequently delivered. The purchaser defended against the manufacturer's action for breach by arguing that the manufacturer had not proven that it was ready, willing, and able to supply the remaining chairs because the manufacturer never actually tendered them to the purchaser following the purchaser's notice. The trial court found for the manufacturer. On rule nisi, the Court of Queen's Bench held that the manufacturer was entitled to recover; despite failing to tender, because the tender was made moot by the purchaser's declaration.

95. Chief Baron Pollock analogized the case to one where the defendant had promised to deliver certain goods upon request and then destroyed them before the plaintiff could make the request. In such a case, he wrote, "it could not be necessary to request him to deliver them." Caines, 153 Eng. Rep. at 817.
96. Caines, 153 Eng. Rep. at 817 (Alderson, B.) ("Why should we presume that the wife will die before the lapse of a reasonable time, or in the lifetime of her husband? We ought rather to presume the continuance of the present state of things; and while that continues, it is clear that the defendant is disabled from performing his contract.").
98. The contract called for the manufacturer to deliver the chairs in monthly shipments from February 1847 through November 1847, and from January 1848 through May 1848. See id. at 1230.
99. At the time the defendant told the plaintiff not to tender any more chairs, the plaintiffs had delivered 1787 tons out of a total of 3900 tons called for in the contract. See id. at 1231.
100. The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract; that, after the notice from the defendants, which in truth amounted to a declaration that they had broken and thenceforward renounced the contract, the plaintiffs, if they wished to have any redress, were bound to buy the requisite quantity of the peculiar sort of iron suited for these railway chairs, to make the whole of them according to the pattern, with the name of the [defendant railway] upon them, and to bring them to the appointed places of delivery and tender them to the defendants.

Id. at 1236.
101. When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more
Even though it was not the first reported Anglo-American decision to find an anticipatory breach immediately actionable, *Hochster* is nonetheless generally considered, for better or for worse, to be the source from which the doctrine sprung.\(^2\)

---

102. As for the purchaser's defense that the manufacturer had not proven itself ready, willing, and able to complete the contract because it had not tendered the remaining chairs, the court opined: 'The jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense the meaning of such an avowal of readiness and willingness must be that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants.\(^\text{2}\)

103. See, e.g., 2 PARSONS, supra note 55, at 179 n.4 (observing that *Hochster* "goes further in sustaining such an action than any previous case"); Jackson, supra note 50, at 74 ("The case credited as the first to recognize an anticipatory repudiation is *Hochster v. De la Tour* ...").


HeinOnline 69 U. Cin. L. Rev. 583 20002001
B. Other Early English Cases: Danube & Black Sea Railway, Frost, Johnstone, and Synge

Four other early English cases deserve comment: Danube & Black Sea Railway & Kustendije Harbour Co. v. Xenos, Frost v. Knight, Johnstone v. Milling, and Synge v. Synge. The plaintiffs in Danube & Black Sea Railway engaged the defendant’s company to load on August 1, 1860, and thereafter deliver, certain rolling stock, plant, and materials from London to Kustendije, Turkey on the defendant’s ship, the Macarcondatos. On July 20th or 21st, the defendant (Xenos) sent a letter to the plaintiffs (Danube) denying the existence of the contract and informing Danube that Xenos had no intention of performing. On July 23rd, Danube replied, informing Xenos that they considered the contract to be binding, that were ready to perform their part of it, and that, if Xenos failed to perform his part, they would hold him responsible for any ensuing damages. Xenos again denied the existence of the contract, but proffered a new contract.


104. 7 L.R.-Ex. 111 (Ex. Ch. 1872).
105. 16 Q.B.D. 460 (C.A. 1886).
108. See id. at 756, 762.
109. See id.
(on terms less favorable to Danube), which Danube refused to sign.\(^{110}\) Faced with Xenos's twice-stated refusal to perform the original contract, Danube, prior to August 1st, made other arrangements to have their goods loaded and shipped to Kustendjie.\(^{111}\) On August 1st, Xenos notified Danube that he was ready to receive and ship their goods. Danube then informed Xenos that they had made other arrangements and that they would look to Xenos "for re-imbursement of the heavy loss which is likely to result" from having to make substitute arrangements on short notice.\(^{112}\)

Danube sued Xenos to recover the additional expenses they incurred. Xenos answered by (1) denying the existence of the original contract, (2) denying Danube’s readiness and willingness to perform according to the terms of the original contract, (3) denying that he breached the original contract, and (4) arguing that Danube had discharged any obligations Xenos had under the original contract by making substitute arrangements, informing Xenos that they would not need his services, and refusing to deliver the goods for loading on the appointed date.\(^{113}\) Xenos also counterclaimed, arguing that Danube’s refusal to make their goods available for loading on the appointed date caused Xenos to lose [e] the hire and freight he would have earned had the said cargo been shipped.\(^{114}\) Danube answered the counterclaim by arguing, inter alia, that Xenos had repudiated the contract, entitling Danube to treat it as breached, discharging Danube from further performance, and permitting Danube to sue Xenos for any damages resulting from his repudiation.\(^{115}\)

The Court of Common Pleas found for Danube on two grounds: first, that Xenos had repudiated the contract giving Danube the right to treat his repudiation as a present breach and bring suit;\(^{116}\) and, second, that any attempt by Xenos to retract his repudiation by notifying Danube on August 1st that his ship stood ready to receive Danube's goods, if indeed Xenos had such a right, was cut off by Danube making

---

10. See id. at 756-57, 762.
11. See id. at 758, 762.
12. Id. at 758.
13. See id. at 753.
14. Id. at 754.
15. See id.
16. [W]here a contract is for the performance of a thing on a given day, it is competent to the party who is to perform it to declare before the day that he will not perform it, and then the other party has the option of treating that as a breach of the contract. . . . [W]here there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords the non-repudiating party a cause of action.

Id. at 762-63 (Erle, C.J.).
other arrangements in reliance on Xenos's repudiation. On appeal, the Exchequer Chamber affirmed the Court of Common Pleas per curiam.

In Frost, the defendant promised to marry the plaintiff on the death of the defendant's father. However, before the defendant's father died, the defendant announced his intention not to marry the plaintiff as promised and broke off their engagement. The plaintiff brought suit shortly thereafter, and before the death of the defendant's father. The jury found for the plaintiff, but the trial court entered judgment for the defendant on the ground that the defendant could not breach his contract until his father died; and, therefore, the plaintiff's claim was premature.

On appeal, the Exchequer Chamber reversed on the authority of Hochster v. De la Tour, which the court referred to as "settled law" that was "obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commercial or pecuniary interests." A promisee whose promisor announces, prior

---

117. As to whether it was competent to [Xenos] before the day for the performance of the contract to retract his declaration of breach . . . the facts do not raise it . . . [T]he contract was broken by Xenos when he declared that he would not hold himself bound by it, and . . . his renunciation of the contract was adopted, and . . . abundantly acted on by [Danube] when they entered into a [contract] with Messrs. Smith & Co. for the forwarding of their goods by another vessel.

Id. at 763.

119. See Frost v. Knight, 7 L.R.-Ex. 111, 111-12 (Ex. Ch. 1872).
120. See id. at 112.
122. Frost, 7 L.R.-Ex. at 113.
123. Id. at 115. In reversing the lower court, the Exchequer Chamber "held to be ill-founded . . . the doubts intimated by the lower Court as to the principle of Hochster" that a promisee could commence an action prior to the date fixed for the repudiating promisor's performance. BENJAMIN, supra note 102, at 454-55.

In addition to the fact that the former was an action on a commercial contract and the latter on a promise to marry, the facts of Hochster and Frost differed in another potentially material way: [I]n Hochster v. De la Tour . . . the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself, before the time for performance arrives, but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise.

Frost, 7 L.R.-Ex. at 113 (footnotes omitted). However, "[a]fter full consideration," the Frost court concluded that "notwithstanding the distinguishing circumstance[s] . . . . this case falls within the principle of Hochster v. De la Tour, and that, consequently, the present action is well brought." Id. (footnote omitted). Indeed, the Frost court later observed,
to the time his performance is due, that he will not perform as promised, may

if [s]he pleases, ... treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case [s]he keeps the contract alive for the benefit of the other party as well as h[er] own; [s]he remains subject to all h[er] own obligations and liabilities under it, and enables the other party not only to complete the contract, ... notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

On the other hand, the promisee may ... treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring h[er] action as on a breach of it ....

The plaintiff in *Frost* elected the second option. She was justified in doing so, the *Frost* court reasoned, because permitting the promisee to act immediately on the promisor’s repudiation, and take timely measures to arrange for substitute performance may enable the

the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in futuro. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage.

*Id.* at 115.

124. *Id.* at 112-13. Acknowledging the trial judge’s premise that there could be no actual breach of a contract until the time has come for its performance, see *id.* at 113, Lord Cockburn nonetheless explained:

The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has the right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it will never be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded ....; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages [may] be assessed and recovered in respect of it, though the time for performance may yet be remote.

*Id.* at 114.
promisee to "in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract," thereby reducing both the inconvenience to the promisee and the damages owed by the promisor.

In *Johnstone v. Milling*, the plaintiff leased certain realty to the defendant for a term of twenty-one years. The lease contained a covenant obligating the plaintiff, at any time after the fourth year, and upon six months written notice from the defendant, to rebuild the premises at his own expense in the manner and within the time period provided for in the covenant. During the defendant's tenancy, he frequently spoke with the plaintiff about rebuilding. The plaintiff repeatedly told the defendant that he did not have the money needed to comply with the covenant, but that he hoped to secure a second mortgage loan on the property to raise the funds. The first four years of the lease having run, the defendant served the plaintiff with the required notice to trigger the covenant, and the plaintiff, again, told the defendant that he was "utterly unable" to get the money. The defendant continued to occupy the leased premises for some period of time thereafter, but eventually surrendered the lease. The plaintiff then sued for unpaid rent, and the defendant counterclaimed that the plaintiff had anticipatorily breached the covenant to rebuild and, therefore, the defendant was relieved of its obligations under the lease. The county court found for the plaintiff, but the Queen's Bench Division entered judgment for the defendant on the defendant's counterclaim. The plaintiff appealed.

Lord Esher framed the dispute before the Court of Appeal as follows:

> It is alleged that a breach of the contract was committed by the plaintiff before the end of the four years, inasmuch as he had declared that he was unable and would be unable to find the money for rebuilding when the time came. It is insisted that such declaration amounted to a declaration of his intention not to perform the contract, and was intended as a repudiation of it, or that, if it was not so intended, the expressions used by the plaintiff were such that the defendant was entitled to treat them as equivalent to a repudiation of

---

125. *Id.* at 115.

The leading British commentator of his time, writing shortly after the Exchequer Chamber’s decision, declared that *Fust* had "conclusively settled" the "whole law" on the subject of whether an aggrieved promisee may bring suit prior to the date fixed for performance against a promisor who had "distinctly and unequivocally" refused to perform. *See* BENJAMIN, supra note 102, at 454-55. The state of the law was not yet quite so well settled in the United States. *See infra* text accompanying notes 142-162.

126. 16 Q.B.D. 460 (C.A. 1886).
127. *See id.* at 461.
128. *See id.*
129. *See id.* at 461-62.
130. *See id.* at 462.
the contract; and it is accordingly contended that there was a breach of the contract by anticipation before the time for its performance arrived, for which the defendant was entitled to damages, and that the fact that the defendant afterwards exercised his option of determining the lease is immaterial, for in so doing the defendant only acted for the benefit of the landlord in order to minimize the damages arising from his repudiation of the contract.\textsuperscript{131}

After reviewing the relevant authorities\textsuperscript{132}—most notably, \textit{Hochster v. De la Tour}\textsuperscript{133}—the court considered three issues: first, whether the plaintiff's declaration that he was unable to find a lender to finance the rebuilding of certain leased premises was sufficient to constitute an anticipatory repudiation of his covenant to rebuild; second, whether the repudiation, if any, of a single obligation embodied in a larger contract was sufficient to constitute an anticipatory repudiation of the entire contract; and, third, whether, in fact, the defendant treated the contract as repudiated or, instead, attempted to both hold the plaintiff to the contract and sue the plaintiff for its breach.\textsuperscript{134} The Court of Appeal found for the plaintiff on all three issues, concluding that the plaintiff's declarations of inability to find the money for rebuilding the leased premises did not mean that "whatever happened, whether he came into the money or not, his intention was not to rebuild the premises",\textsuperscript{135} that,

\begin{flushleft}
\footnotesize
\textsuperscript{131} \textit{Id.} at 466.
\textsuperscript{132} The defendant has recourse to the doctrine laid down in several cases . . . that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party . . . as to give an immediate right of action. When one party assumes to renounce the contract . . . he entitles the other party, if he pleases, to . . . adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to [adopt the renunciation], he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. \textit{He must elect which course he will pursue. Id.} at 467 (citations omitted) (emphases added).
\textsuperscript{133} 118 Eng. Rep. 922 (Q.B. 1855); see supra text accompanying notes 39-49.
\textsuperscript{134} \textit{See Johnston}, 16 Q.B.D. at 468-69.
\textsuperscript{135} Whether a statement rises to the level of a repudiation "must depend on the circumstances of the case and the nature of the contract." \textit{Id.} at 471 (Cotton, L.J., concurring). As Lord Bowen explained:

\textit{We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract . . . Unless the language of the plaintiff can only reasonably be construed as importing such renunciation, I think the Court below ought not to have disregarded the finding [of the trial judge], and treated what the plaintiff said as amounting to a renunciation of the contract . . .}
\textit{Id.} at 474 (Bowen, L.J., concurring).
\end{flushleft}
because an actual breach of the covenant would not entitle the defendant to avoid the entire lease, an anticipatory breach of the covenant, if any, would likewise not entitle the defendant to avoid the entire lease; and, in any event, that the defendant did not accept the plaintiff’s purported repudiation by immediately quitting the leased premises, rather the defendant stayed on for several months, and should not be permitted to have benefited from the lease while simultaneously arguing that it no longer existed.

Applying this test, Lord Esher wrote:

It does not seem to me that what he said naturally leads to the inference that such was his intention, and I think . . . the county court judge declined to draw that inference. If he declined to do so, I think we ought not to do so, unless it was a necessary inference from what the plaintiff said. . . . If we ought not to draw that inference from what the plaintiff said, it seems to me to follow as a matter of course that the defendant was not entitled to draw it . . . .

Id. at 468; accord id. at 470 (Cotton, L.J.), concurring (“It seems to me that it would be a reasonable construction of [the plaintiff’s] statements that they rather meant that he was afraid, and was under the impression that he would not be able to get the money than that he did not intend to perform the contract even if he could get it.”).

136. Lord Esher explained:

The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not . . . entitle the tenant to throw up his lease. That being so, I do not hesitate to say . . . that an anticipatory breach could not entitle him to do so . . . .

Id. at 468; see also id. at 471 (Cotton, L.J.) (“I am not favourably impressed with the view that the doctrine would apply to the case of a lease where the tenant cannot, in consequence of the refusal by the landlord to perform a particular covenant, put an end to the entire contract.”).

137. Lord Esher continued:

[T]he defendant could not elect to put an end to the contract in consequence of what the plaintiff stated. But, whether he could do so or not, it seems to me that in fact he did not. He did not renounce the lease or give up the premises. He did not do any act which affected the existence of the contract. He made no declaration of intention to treat it as rescinded except for the purpose of bringing his action upon it. On the contrary, at the time fixed by the contract he gave the requisite notice to determine the lease.

Id. at 468-69; see id. at 472 (Cotton, L.J.) (“The defendant appears to have thought it on the whole the best course to act on the contract and not to treat it as at an end . . . . It seems to me, therefore, that there was nothing amounting to a renunciation of the contract by the plaintiff, and that, if there were, the defendant did not adopt it but treated the contract as still existing.”); id. at 474 (Bowen, L.J.) (“[A]ssuming that there was evidence to support a finding that what the plaintiff said was a renunciation of the contract, there does not seem to me to be a title of evidence to shew that the defendant ever elected to treat it as such . . . .”).

While the Court of Appeal’s treatment of the second and third issues was, technically, dictum—as it found that the plaintiff’s statements did not rise to the level of an anticipatory repudiation of the covenant; and, therefore, did not need to reach the issues of whether repudiation of the covenant repudiated the entire contract or whether the defendant properly exercised his options on the plaintiff’s repudiation—it is, nonetheless, instructive, and has been cited by subsequent courts. See, e.g., Roehm v. Horst, 178 U.S. 1, 12-13 (1900); Dunkin’ Donuts of Am., Inc. v. Minerva, Inc., 956 F.2d 1566, 1583 (11th Cir. 1992); International Minerals & Resources Co. v. American Geophysical Union, Inc., No. 87 Civ. 3988 HB, 1999 WL 672907, at *4 (S.D.N.Y. Aug. 27, 1999); Stefanowicz Corp. v. Harris, 373 A.2d 54, 62 (Md. Ct. Spec. App.), cert. denied, 281 Md. 738 (1977); Simpson v. Scott, 53 S.E.2d 21, 23 (Va. 1949).
Finally, in *Synge v. Synge*, a husband conveyed to his daughters his whole estate and interest in certain property that he had agreed, in consideration of his wife’s promise to marry him, to leave to his wife in his will. The issue for the Court of Appeal was whether the husband, by conveying the property to others during his life, had anticipatorily repudiated his promise to leave the same upon his death to his wife, thus entitling the wife to treat the promise as broken and sue, prior to her husband’s death, for damages. The Court of Appeal reversed the trial court’s judgment for the husband, holding that the defendant’s conveyance to his daughters “put it absolutely out of his power to perform this contract”, and, therefore, his wife “had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages.”

C. The Doctrine’s Early Development in the United States

In the United States, the doctrine of anticipatory breach met with somewhat mixed results in the Nineteenth Century. Courts in Arkansas, California, Illinois, Indiana, Iowa, Michigan,

---

139. See id. at 466.
140. Id. at 471.
141. Id. (citing Frost v. Knight, 7 L.R.-Ex. 111 (Ex. Ch. 1872), and Hochster v. De la Tour, 118 Eng. Rep. 922 (Q.B. 1853)).
143. See Remy v. Olds, 26 P. 355, 356 (Cal. 1891); Hale v. Trout, 35 Cal. 229, 241-42 (1868).
144. See Lake Shore & Mich. S. Ry. v. Richards, 38 N.E. 773 (Ill. 1894); Mt. Hope Cemetery Ass’n v. Weidenman, 28 N.E. 834, 835-36 (Ill. 1891); John A. Roebling’s Sons Co. v. Lock Stitch Fence Co., 22 N.E. 518, 518-19 (Ill. 1899); Kadish v. Young, 108 Ill. 170, 177-80 (1883); Follansbee v. Adams, 86 Ill. 13, 15-16 (1877); Fox v. Kitton, 19 Ill. (9 Peck) 519, 533 (1858). But see McPherson v. Walker, 40 Ill. 371, 373 (1866) (“If one bound to perform a future act, before the time for doing it declares his intention not to do it, this, of itself, is no breach of his contract . . . .”).
145. See Adams v. Byerly, 24 N.E. 130, 131 (Ind. 1890); Kurtz v. Frank, 76 Ind. 594, 598 (1881).
146. See McCormick v. Basal, 46 Iowa 235, 236-37 (1877); Holloway v. Griffith, 32 Iowa 409, 412-14 (1871); Crabtree v. Messersmith, 19 Iowa 179, 182 (1865).
Minnesota, Missouri, New York, Ohio, Pennsylvania, Texas, Vermont, Virginia, and West Virginia recognized and applied the doctrine before the end of the Nineteenth Century. Courts in Maine, Massachusetts, Nebraska, and North Dakota rejected the doctrine.

150. See Union Ins. Co. of Phila. v. Central Trust Co. of N.Y., 52 N.E. 671, 674 (N.Y. 1899); Nichols v. Scranton Steel Co., 33 N.E. 561, 565 (N.Y. 1893); Bernstein v. Meech, 29 N.E. 255, 256-57 (N.Y. 1891); Windmuller v. Popc, 14 N.E. 436, 437 (N.Y. 1887) (per curiam); Ferris v. Spooner, 5 N.E. 773, 774 (N.Y. 1888); Shaw v. Republic Life Ins. Co., 69 N.Y. 286, 292-93 (1877); Howard v. Daly, 61 N.Y. 362, 374 (1875); Burtis v. Thompson, 42 N.Y. 246, 248 (1870) (Ingalls, J.); id. at 250 (Grover, J.).
157. See also, e.g., New Brunswick & Canada R.R. v. Wheeler, 12 F. 377, 383-84 (C.D. Conn. 1882) (recognizing the doctrine without citation to any state statute), aff'd, 115 U.S. 29 (1885); Thompson v. Kyle, 23 So. 12, 17 (Fla. 1897) (dictum) (discussing, but declining to resolve, whether the doctrine permits suit before the contractual performance date); Dambmann v. Lorenz, 17 A. 389, 389-90 (Md. 1889) (dictum) (same); Sullivan v. McMillan, 8 So. 450, 457-58 (Fla. 1890) (same); Olmstead v. Bach, 25 A. 343, 345 (Md. 1892) (same); Pinckney v. Dambmann, 19 A. 450, 452 (Md. 1890) (same); Dugan v. Anderson, 36 Md. 567, 582-84 (1879) (same).
158. See South Gardiner Lumber Co. v. Bradstreet, 53 A. 1110, 1112 (Me. 1902) (dictum). But see Dixon v. Fridette, 16 A. 412, 412 (Me. 1888); Sutherland v. Wyer, 67 Me. 68, 68-69 (1877) (finding that the plaintiff’s suit, brought following his discharge before the completion of a thirty-five work employment contract, “was not premature” as “[t]he performance of [the] contract had been commenced, and the plaintiff been discharged and thereby been prevented from the further execution of it”).
160. See Hisson Map Co. v. Nebraska Post Co., 98 N.W. 872, 875 (Neb. 1904); King v. Waterman, 75 N.W. 830, 831 (Neb. 1898); Carstens v. McDonald, 57 N.W. 757, 758 (Neb. 1894).
161. See Stanford v. McGill, 72 N.W. 938, 951 (N.D. 1897). But see Davis v. Bronson, 50 N.W. 836, 837-38 (N.D. 1891) (holding that, where performance comes in stages or where pre-performance acts are required, a prior repudiation will act as a breach at the time the stage or act affected by the repudiation is due, even if that date is before the ultimate date by which complete performance of the contract is due).
162. See generally 3 ELLIOTT, supra note 38, 208-09 (discussing the “contrary view” held by the Main, Massachusetts, Nebraska, and North Dakota courts). Subsequent decisions by the courts of last resort in Maine, Nebraska, and North Dakota embraced the doctrine. See Listman Mill Co. v. Dufresne, 88 A. 354, 355 (Me. 1913); Lang v. Todd, 28 N.W.2d 434, 438 (Neb. 1947) (overruling King v. Waterman, 75 N.W. 830 (Neb. 1898)); and Carstens v. McDonald, 57 N.W. 757 (Neb. 1894), and Hart-Parr Co. v. Finley, 153
N.W. 137, 139-40 (N.D. 1915) (overruling Stanford v. McGill, 72 N.W. 938 (N.D. 1897)). While the Lang court did not specifically overrule Hixson Map Co. v. Nebraska Post Co., 98 N.W. 872 (Neb. 1904), the holding in Hixson Map followed King and Curtains verbatim. See id. at 875. So, it seems safe to say that Lang also overruled Hixson Map.

Massachusetts remains the lone holdout. See Cavanagh v. Cavanagh, 598 N.E.2d 677, 679 (Mass. App. Ct.) ("Outside of the commercial law context, Massachusetts has not generally recognized the doctrine of anticipatory repudiation, which permits a party to a contract to bring an action for damages prior to the time performance is due if the other party repudiates." (footnote omitted)), review denied, 602 N.E.2d 1094 (Mass. 1992); see also, e.g., Carrig v. Gilbert-Varker Corp., 50 N.E.2d 59, 62 (Mass. 1943); Porter, 67 N.E. at 239; Daniels, 114 Mass. at 531-41. That said, the Massachusetts courts have carved out several exceptions to the general rule that an action may not be maintained if brought before performance is due. See, e.g., Tucker v. Connors, 173 N.E.2d 619, 623 (Mass. 1961) (action for specific performance of a conveyance of real property); Johnson v. Starr, 74 N.E.2d 137, 138-39 (Mass. 1947) (action in quantum meruit); Gillis v. Bonelli-Adams Co., 187 N.E. 555, 556 (Mass. 1933) (action for rescission); Collins v. Snow, 106 N.E. 148, 149 (Mass. 1914) (holding that, despite the rule of Daniels v. Newton, a suit in equity for breach of contract could be maintained, though brought prior to the date when performance was due, as long as performance would come due while the suit was pending because, in equity, relief can be given based upon events which occur after the commencement of the suit and "which grow out of the matters on which the [complaint] is founded"). Parker v. Russell, 133 Mass. 74, 75-76 (1882) (anticipatory breach accompanied by an actual breach). See generally Norman R. Franchise, Anticipatory Repudiation of Contracts: A Massachusetts Anomaly, 67 Mass. L. Rev. 30 (1982); Joseph T. Doyle, A Century Without Anticipatory Breach in Massachusetts, 31 B.U. L. Rev. 505 (1951).

Daniels v. Newton, 114 Mass. 530 (1874), the case most often cited as the source of Massachusetts's variant approach to anticipatory breach, seems to be a departure from earlier Massachusetts decisions that appear to have embraced the concept. See Heard v. Bowers, 40 Mass. (2 Pick.) 455, 460 (1839) ("[W]here a party stipulates to make a conveyance of an estate to another at a future day, and before the day conveys the estate to a third person, he is to be considered as guilty of a breach of his stipulation, and is liable to be sued before the day arrives." (emphasis added)); see also Buttrick v. Holden, 62 Mass. (8 Cush.) 233, 235-36 (1851) ("If the defendant disabled himself from complying with his contract, by conveying the estate to another person within the time limited in the contract for making a conveyance to the plaintiff, the tender of performance on the part of the latter is not necessary."); Newcomb v. Brackett, 16 Mass. (16 Tyr.) 161, 164 (1819) ("It is implied in the contract, on the part of the defendant, that he would do nothing by which he should become unable to perform it; and by making a deed to another person, he has disabled himself, and so virtually broken his contract. . . . The law will not, in such circumstances, require a payment or tender by the plaintiff; for this would be to hazard an additional loss, without any possible advantage."). See generally 1 BEACH, supra note 36, at 486-87, 495-96 (commenting, respectively, on Massachusetts's minority rules declaring an immediate breach when the promisor disables himself from performing when performance later comes due, per Heard v. Bowers, and refusing to permit an immediate cause of action against a promisor who renounces his intention to perform, per Daniels v. Newton).

Buttrick and Newcomb seem distinguishable from Daniels on the ground that they excuse tender by the aggrieved promisee, but do not authorize the promisee to bring suit before the time for performance has run. Heard cannot be so distinguished. The only explanation in the court in Daniels gave for ignoring Heard is that the Heard court referred to—did not rely upon, but merely referred to—Ford v. Tiley, 108 Eng. Rep. 305 (C.P. 1831); see supra text accompanying notes 75-79, and Ford erroneously applied the maxim contained in Viner's Abridgment—an Eighteenth Century counterpart to Corpus Juris Secundum or West's Decennial Digests. See Daniels, 114 Mass. at 532 (citing 5 CHARLES VINEY, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 224 (1741)). The Daniels court went on to otherwise criticize both Ford and Hochster v. De la Tour and its progeny on more substantive grounds. See Daniels, 114 Mass. at 533-41. However, the Daniels court never squarely dealt with the precedential effect of Heard.

Viner's Abridgment was the spiritual progenitor of the first great American abridgment: Nathan Dane's eight-volume General Abridgment and Digest of American Law. NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW (1823); see Steve Sheppard, Casebooks, Commentaries, and Cormudgesons: An Introductory History of Law in the Lecture Hall, 82 IOWA L. REV. 547, 575 (1997) (referring to
Two significant early United States Supreme Court decisions seem to have insured that the doctrine would be widely adopted in this country. In *Dingley v. Oler*, the plaintiffs and defendants were in the business of cutting and transporting bulk ice. The plaintiffs, "finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total loss, pressed the defendants to buy some or all of it." The defendants responded to the plaintiffs' entreaties by letter dated September 6, 1879, offering to take the plaintiffs' excess ice and "return the same to you next year from our houses." At the time the defendants took the plaintiffs' ice, it was worth fifty cents ($0.50) per ton. In July 1880, a representative of the plaintiffs inquired when the defendants intended to ship the replacement ice. On July 7, 1880, the defendants wrote that, in light of the fact the prevailing market price was five dollars ($5.00) per ton, "we must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered other parties here (that is, fifty cents [$0.50]), or give you ice when the market reaches that point." Following a second demand by the plaintiffs, the defendants again wrote, on July 15, 1880: "We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us ..." The plaintiffs brought suit on July 21, 1880.

The trial court found that, while the shipping season was far from over in July 1880, the defendants' letters of July 7 and July 15, 1880 constituted an unequivocal refusal to deliver any ice to the plaintiffs

---

Dane as "a Charles Viner for America"; H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1288-89 (1985) (remarking that Dane's *General Abridgment*, "was modelled after the widely used Eighteenth-Century English abridgement of Charles Viner"). Interestingly, both Viner and Dane gave proceeds from their abridgements to great law schools, who, in turn, used the funds to create great professorships that facilitated great contracts scholarship. The first Vinerian Professor of the English Common Law at Oxford was Sir William Blackstone, whose own *Commentaries on the Laws of England*, written in part while he held the Vinerian Professorship, revolutionized the way we write about the common law. See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4-5 (1996). The first Dane Professor of Law at Harvard was Justice Joseph Story, see Sheppard, supra, at 575; and, as previously remarked, the position eventually passed to two renowned contracts scholars, Theophilus Parsons and Samuel Williston, see supra note 35.

163. 117 U.S. 490 (1886).
164. Id. at 491-92.
165. Id. at 492. Of course, there was no issue that the defendants would not return the exact same ice; rather, the understanding was that the defendants would return the same quantity of ice.
166. See id.
167. Id.
168. Id. at 492.

In response to the defendants' July 7, 1880 letter, the plaintiffs wrote on July 10 that, in reliance on the defendants' promise to return ice to the plaintiffs, "we have acted, and in the utmost good faith made sale of the ice; and now, after all of this, and having refused to buy it yourselves, for you to ask a postponement in the delivery, seems to us hardly right." Id. at 495.
during the season; and, therefore, the plaintiffs' claim was properly brought before the end of the season. 169 The trial court awarded the plaintiffs damages based on the lowest market price between July 1880 and the end of that year's ice shipping season: two dollars ($2.00) per ton. 170 The defendants appealed on the ground that, because their statements to the plaintiffs did not constitute an unequivocal refusal to deliver any ice during the season, the plaintiffs' claim was premature. 171

The Supreme Court reversed, holding that the defendants' July 7th and 15th letters did not unequivocally manifest their intent not to perform the agreement; and, therefore, the plaintiffs' action was prematurely brought:

In the letter of July 7th, the defendants ... accompany their refusal to ship immediately] with the expression of alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs. For, in their answer of July 10th, they repeat their demand for delivery immediately, speak of the letter of the 7th instant as asking "for a postponement of the delivery," urge them "to fill our order," and close with "hoping you (the defendants) will take a more favorable view upon further reflection," [etc]. Here, certainly, was ... a request for further consideration, based upon a renewed demand, instead of abiding by and standing upon the previous one.

Accordingly, on July 15th, the defendants replied to the demand for an immediate delivery to meet the exigency of the plaintiffs' sale of the same ice to others, and the letter is evidently and expressly confined to an answer to the particular demand for a delivery at that time. [The defendants' July 15th letter], we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning. 172

170. See Dingley, 117 U.S. at 493.
171. See id.
172. Id. at 501-04 (citations omitted). Citing to Johnston v. Milling, 16 Q.B.D. 460 (C.A. 1886), the Court concluded: "The present action was prematurely brought before there had been a breach of the contract ... by the defendants, for what they said on July 15th amounted merely to a refusal to comply
In *Roehm v. Horst*, decided, poetically, at the dawn of the Twentieth Century, the Court went the extra step that it had felt was unnecessary in *Dingley*, clearly endorsing the doctrine and holding that an action for damages could be properly brought by a promisee before the date the promisor's performance was due if the promisor unequivocally manifested its intention not to be bound. The plaintiffs, individually and in the name of their firm, Horst Brothers, entered into a series of contracts to sell hops to the defendant over a five-year period. During the term of the contract, Horst Brothers was dissolved, and the plaintiffs notified the defendant of that fact. The defendant replied that he considered the firm's dissolution to put an end to their contract, and the defendant refused to receive and pay for subsequent shipments from the plaintiffs. The plaintiffs sued the defendant, and prevailed in the trial court. The Supreme Court affirmed.

Describing the issue for the Court and summarizing the relevant authorities, Chief Justice Fuller wrote:

[T]hree contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. . . .

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it, has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. . . .

. . . .

The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, although the precise point has not been ruled by this court. 

---

with the particular demand then made for an immediate delivery." *Dingley*, 117 U.S. at 503-04. For more discussion of Johnstone, see supra text accompanying notes 126-37.

173. 178 U.S. 1 (1900).

Having painstakingly reviewed numerous prior decisions, the Court held:

The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a locus poenitentiae be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction per se is there between liability for a refusal to perform future acts to be done under a


The Roehm Court recognized that Gremomy v. Gaither, 10 F. Cas. 1180 (C.C.D. Md. 1853) (No. 5,788) (Taney, C.J., sitting by designation), Daniels v. Newton, 114 Mass. 530 (1874), and Stanford v. McGill, 72 N.W. 938 (N.D. 1897), are contrary authority. See Roehm, 170 U.S. at 16-17. However, it paid no heed to Stanford, and distinguished Gaither on the grounds that, first, Gaither was decided on a procedural issue, and second, that the contract at issue in Gaither was one for the payment of money. See id. As for Daniels v. Newton, the Court observed that the Massachusetts court's decision rests precariously on the premise that "until the time for performance arrives neither contracting party can suffer any injury which can form a ground of damages." Id. at 18.

It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in Daniels v. Newton, though it is not there in terms decided "that an absolute refusal to perform a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future."

In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmatured obligations of a contract while it is in course of performance, and it is said that before the argument on the ground of convenience and mutual advantage to the parties can properly have weight, "the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case."

We think that there can be no controlling distinction on this point between the two classes of cases... Id. at 18-19 (quoting Parker v. Russell, 133 Mass. 74 (1882)).

contract in course of performance and liability for a refusal to perform
the whole contract made before the time for commencement of
performance?

If in this case these ten hop contracts had been written into one
contract for the supply of hops for five years in instalments [sic], then
when the default happened in October, 1896, it cannot be denied that
an immediate action could have been brought in which damages
could have been recovered in advance for the breach of the
agreement to deliver during the two remaining years. But treating the
four outstanding contracts as separate contracts, why is it not equally
reasonable that an unqualified and positive refusal to perform them
constitutes such a breach that damages could be recovered in an
immediate action? Why should plaintiff be compelled to bring four
suits instead of one? For the reasons above stated, and having
reference to the state of the authorities on the subject, our conclusion
is that the rule laid down in Hochster v. De la Tour is a reasonable and
proper rule to be applied in this case and in many others arising out
of the transactions of commerce of the present day.176

Nineteenth-Century American commentators generally appear to
have taken the doctrine at face value, reporting—and, in some cases,
misreporting177—the foundational cases without much real advocacy or
criticism.178 That said, Parsons did suggest that it might “seem more
reasonable” to permit the promisee to sue immediately upon the
promisor’s anticipatory repudiation “only where the capacity of the
promisor could not be restored before the day, or the promisee had
received a present injury from the act of the promisor.”179 Bishop
counseled that the doctrine “cannot properly be carried so far as to work
a palpable injustice” such as promoting economic waste or unjust
enrichment.180 And Knowlton described the rationale of the
Massachusetts Supreme Judicial Court, rejecting the doctrine in Daniels
v. Newton,181 as “able” and offering “strong reasons why the English cases
should not be followed,”182 before concluding that contrary authorities

177. See, e.g., supra note 36 (discussing Beach’s misreading of Shaw v. Republic Insurance Co., 69 N.Y. 286
(1877)).
178. See, e.g., 1 Beach, supra note 36, at 492-501; Tiffany, supra note 102, at 158-59; Lawson,
supra note 102, at 478-82; Knowlton, supra note 102, at 368-72; Bishop, supra note 102, at 253-55; 2
Parsons, supra note 35, at 179-81, 187-88; Lawson, supra note 102, at 113-15.
179. 2 Parsons, supra note 35, at 179.
180. Bishop, supra note 102, at 255.
181. 114 Mass. 530 (1874).
182. Knowlton, supra note 102, at 369 n.1.
made available an immediate right of action "depend[ing] on the nature of the contract." 183

The most organized and insightful analysis of the state of the doctrine during this period was probably that of Horace Henderson, who traced the doctrine from before Hochster v. De la Tour, 184 up through Dingley v. Oler, 185 and identified key aspects of the doctrine deriving from various cases. 186 He then offered a somewhat less expansive assessment of early state court decisions, noting the split in authority between the majority of states to have considered the doctrine to date and Massachusetts, and then assaying a middle ground wherein the courts of New York "ha[d] been vacillating ... , unwilling to take the position of Massachusetts and deny in toto the validity of the rule," but also not yet "ready to follow the other States in a full approval and acceptance if it." 187

D. Increasing Acceptance Following Roehm

Over the three decades following the Supreme Court's decision in Roehm v. Horst, the number of American jurisdictions that accepted the doctrine of anticipatory repudiation and the right of a wronged promisee to sue immediately upon the promisor's unequivocal repudiation, even when the time for performance under the contract was not at hand, more than doubled, 188 to include two of the four jurisdictions that had originally opposed the doctrine—Maine 189 and North Dakota 190—as well as Alabama, 191 Arizona, 192 Colorado, 193 Connecticut, 194 the District

---

183. Id. at 369 n.1.
185. 117 U.S. 490 (1886); see supra text accompanying notes 163-72.
186. See Henderson, supra note 102, at 763-80.
187. Id. at 780-83.
188. See supra text accompanying notes 142-56 for a list of the jurisdictions that had embraced the doctrine prior to Roehm. See also, e.g., Sorensen v. Larue, 252 P. 494, 498 (Idaho 1926) (discussing the doctrine but refusing to apply it on the facts of the case). See generally Owen E. Duffy, Comment, Contracts—Anticipatory Breach—Good Faith Refusal to Perform, 23 GEO. L.J. 329, 329 (1935) (noting that the rule allowing an aggrieved promisee an immediate right of action "is followed in almost every American jurisdiction, but is not recognized in Massachusetts or in Nebraska" (citations omitted)).
189. See Listman Mill Co. v. Dufresne, 88 A. 354, 355 (Me. 1913).
190. See Slimmer v. Martin, 172 N.W. 829, 830 (N.D. 1919); Hart-Parr Co. v. Finley, 153 N.W. 137, 139-40 (N.D. 1915).
193. See Long v. Wright, 197 P. 1016, 1017 (Colo. 1921).
194. See Belisle v. Berkshire Ice Co., 120 A. 599, 602 (Conn. 1923); Neuschat v. Rosenthal, 87 A. 741, 743 (Conn. 1913); Home Pattern Co. v. W.W. Mertz Co., 86 A. 19, 21-22 (Conn. 1913); Wells v. Hartford Manilla Co., 55 A. 599, 602 (Conn. 1903).
of Columbia,\textsuperscript{195} Florida,\textsuperscript{196} Georgia,\textsuperscript{197} Kansas,\textsuperscript{198} Kentucky,\textsuperscript{199} Maryland,\textsuperscript{200} Mississippi,\textsuperscript{201} Nebraska,\textsuperscript{202} New Jersey,\textsuperscript{203} North Carolina,\textsuperscript{204} Oklahoma,\textsuperscript{205} Oregon,\textsuperscript{206} Rhode Island,\textsuperscript{207} South Carolina,\textsuperscript{208} Tennessee,\textsuperscript{209} Washington,\textsuperscript{210} and Wisconsin.\textsuperscript{211}


\textsuperscript{196} See Hall v. Northern & S. Co., 46 So. 178, 180 (Fla. 1908).


\textsuperscript{199} See Paducah Cooperage Co. v. Arkansas State Co., 237 S.W. 412, 413-14 (Ky. 1922); Globe Fertilizer Co. v. Tennessee Phosphate Co., 85 S.W. 1177, 1178 (Ky. 1905).

\textsuperscript{200} See Friedman v. Kaezner, 114 A. 884, 887 (Md. 1921); Lewis v. Tapman, 45 A. 459, 464 (Md. 1900).

\textsuperscript{201} See Carter v. Witherspoon, 126 So. 388, 389 (Miss. 1930); Weir v. Cooper, 84 So. 184, 184 (Miss. 1920); Bolling v. Red Snapper Sauce Co., 53 So. 394, 394 (Miss. 1910).


\textsuperscript{204} See Brown v. Williams, 143 S.E. 233, 234 (N.C. 1928); La Salle Extension Univ. v. Ogbum, 93 S.E. 986, 988 (N.C. 1917); American Trust Co. v. Life Ins. Co. of Va., 92 S.E. 706, 710-11 (N.C. 1917); Edwards v. Proctor, 91 S.E. 584, 584-85 (N.C. 1917).

\textsuperscript{205} See Wolfe v. Stevenson, 264 P. 182, 184 (Okla. 1928); American Ins. Union v. Woodard, 247 P. 398, 399-400 (Okl. 1926); Waggner Ref. Co. v. Bell Oil & Gas Co., 244 P. 756, 758 (Okl. 1926); Deming Inv. Co. v. Christensen, 159 P. 666, 667 (Okl. 1916).

\textsuperscript{206} See Godlove v. Russell, 293 P. 936, 938 (Or. 1930); Dibble v. David Hodes Co., 286 P. 554, 557 (Or. 1930); Klinge v. Farris, 273 P. 954, 956 (Or. 1929); Cornelv v. Campbell, 187 P. 1103, 1104 (Or. 1920); Massey v. Becker, 176 P. 425, 426 (Or. 1918); J.K. Armsby Co. v. Grays Harbor Commercial Co., 123 P. 32, 34-35 (Or. 1912); Krebs Hop Co. v. Livesley, 114 P. 944, 946-47 (Or.), modified on other grounds on reh'g, 118 P. 165 (Or. 1911); Maffet v. Oregon & Cal. R.R., 80 P. 489, 494-95 (Or. 1905); Graham v. Merchant, 72 P. 1088, 1090 (Or. 1903).


\textsuperscript{208} See Brooke v. Laurens Milling Co., 58 S.E. 806, 808 (S.C. 1907); Payne v. Melton, 45 S.E. 154, 155 (S.C. 1903).

\textsuperscript{209} See Atkinson v. Railroad Employes' Mut. Relief Soc'y, 22 S.W.2d 631, 633 (Tenn. 1929); Lamborn & Co. v. Green & Green, 262 S.W. 467, 469 (Tenn. 1924); Brady v. Oliver, 147 S.W. 1135, 1139-40 (Tenn. 1911).

\textsuperscript{210} See Boyer v. City of Yakima, 287 P. 211, 213-14 (Wash. 1930); Boyer v. City of Yakima, 273 P. 188, 191 (Wash. 1928); Casey v. Murphy, 253 P. 1078, 1079 (Wash. 1927); Smith v. Town of Tukwila, 203 P. 369, 370 (Wash. 1922); Finch v. Sprague, 202 P. 257, 259 (Wash. 1921); Calhoun, Denny & Ewing v. Pederson, 149 P. 25, 26 (Wash. 1915); Hunter v. Wenatchee Land Co., 97 P. 494, 496 (Wash. 1908).

\textsuperscript{211} See Pierson v. Dorff, 223 N.W. 579, 581 (Wis. 1929); Biof v. Hoppe, 202 N.W. 699, 701 (Wis. 1925); Russell v. Ives, 178 N.W. 300, 301 (Wis. 1920); Ferron v. Lyons, 155 N.W. 935, 938 (Wis. 1916); Richards v. Maniowoc & N. Traction Co., 121 N.W. 937, 938 (Wis. 1909); Davidor v. Bradford, 109 N.W. 576, 577 (Wis. 1906); Woodman v. Blue Grass Land Co., 104 N.W. 920, 921 (Wis. 1905); Merrick
At the same time that the number of jurisdictions embracing the doctrine was doubling, so were the efforts of those who criticized the doctrine. While Nineteenth-Century American commentators confined themselves primarily to reporting the evolution of the doctrine, rather than either singing its praises or pointing out its deficiencies, the gloves soon came off.

In a multi-part article appearing close on the heels of the Supreme Court’s decision in *Roehm v. Horst*, Paul Moses criticized the doctrine in general, the Supreme Court’s holding and reasoning in *Roehm*, specifically, and the American judicial system for having ever opened the door to the doctrine. Reminiscent of a latter-day Martin Luther, nailing his complaints to the door of the Wittenberg

---

212. See supra text accompanying notes 177-87.

213. 178 U.S. 1 (1900); see supra notes 173-77 and accompanying text.

214. Repudiation may be an excuse for not performing conditions precedent to a right to sue, or it maybe a defense to an action instituted by the repudiator for non-performance, after the latter has withdrawn his renunciation. But it does not necessarily follow that a right of action immediately accrues. The doctrine of estoppel can fairly be applied as a defense, but it is a strange conclusion to jump to, that it creates a right of action at the same time. A cause of action is given by the provisions of the contract. The remedy for its breach is fixed in time by its terms. This cannot be affected by the conduct of a party in repudiating the obligations of his contract. It can be neither postponed nor accelerated in time by anything that he does. We may again be permitted to quote the admirable language of Justice Wells:

“A renunciation of the agreement, by declarations or inconsistent conduct before the time of performance may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. * * * But we are unable to see how it can of itself constitute a present violation of any legal rights of the other party, or confer upon him a present right of action.”

Moses, supra note 102, at 125 (quoting Daniels v. Newton, 114 Mass. 530, 532 (1874)) (omission in original).

Moses appears to have gone 0-for-2. In addition to taking what was, even then, clearly the minority view on anticipatory repudiation, he attempted to make his argument against the viability of a cause of action for anticipatory breach by arguing against what would come to be known as promissory estoppel. See *Restatement of Contracts* § 90 (1932) [hereinafter *Restatement*] (recognizing a right to affirmative relief for breach of a promise based on a theory of estoppel brought on by the wronged party’s detrimental reliance on the party who broke the promise). Promissory estoppel has subsequently been widely recognized. See generally Eric M. Holmes, *Restatement of Promissory Estoppel*, 32 *Williamette L. Rev.* 263 (1996).

215. See, e.g., Moses, supra note 102, at 125 (describing the *Roehm* Court’s argument that there is no “reasonable distinction, per se,” between liability for refusing to perform when due and liability for repudiating one’s obligation to perform before the time performance is due as “either an unfortunate confusion or blind disregard of all legal distinctions”).

216. See id. (describing those American courts that had adopted the doctrine—including, presumably, the Supreme Court—as “servile disciples” of the obviously wrong-headed English courts that had given shape to the doctrine in the first place).
Cathedral, Moses concluded with twelve "points" of criticism and this parting shot:

[H]owever much "a diversity in the law as administered on the two sides of the Atlantic concerning the interpretation of contracts of this kind is greatly to be deprecated," it is nevertheless to be regretted that the highest tribunal in the land, by its carefully considered and deliberate judgment, has sanctioned this anomalous doctrine, and by the weight of its authority and example, fortified it, so that it bids fair to become the American doctrine as well.

It is not clear what audience or what impact, if any, Moses's criticisms had at or near the time of their publication. A thorough review of case reports available on-line, as well as a careful reading of the numerous articles and other secondary sources cited in this work, reveal no mention of Moses's criticisms.

The other outspoken early Twentieth-Century critic of the doctrine was none other than Samuel Williston, Dane Professor of Law at Harvard Law School, who published some preliminary thoughts about the doctrine in a two-part article appearing in the Harvard Law Review, which then formed the basis for the corresponding sections in what would eventually become the leading American contracts treatise of the day.

---

217. In 1517, Martin Luther launched the Protestant Reformation by publicly challenging the power of the Catholic church and the authority of the Pope with his 95 Theses, which he nailed to the door of Wittenberg Cathedral. See Charles J. Reid, Jr., The Fundamental Freedoms: Judge John T. Noonan Jr.'s Historiography of Religious Liberty, 83 MARQ. L. REV. 367, 393 (1999). Moses's attempt to reform the doctrine of anticipatory breach did not meet with the same success as Luther's efforts to reform the Church.

218. See Moses, supra note 102, at 158 (arguing, inter alia, that the authorities cited by the Hochster court to support its "novel" holding "were misconceived" and did not support transforming an excuse from performing into a cause of action, that the doctrine "is a violation of sound principles and irreconcilable with the elementary rules of contract," that "the effect of this doctrine is to substitute for the contract which the parties really entered into another contract which they never entered into, or even contemplated," and that the application of the doctrine, during its formative years "has already caused, and will continue to give rise to difficulties, inconsistencies, and conflicts with established principles").

219. Id. (quoting Norrington v. Wright, 115 U.S. 188, 190 (1885)).

As indicated by the roll call of states which adopted the doctrine in the thirty or so years following Radm and the publication of Moses's critique, see supra text accompanying notes 188-211, Moses proved to be no more prescient about the development of the anticipatory repudiatory doctrine in American contract law than he was about the recognition and development of promissory estoppel, see supra note 214.

220. See Samuel Williston, Repudiation of Contracts (Part I), 14 HARV. L. REV. 317 (1901); Williston, supra note 102.

221. See SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920) [4 vols.]. See generally Charles Thaddeus Terry, Book Review, 34 HARV. L. REV. 891, 892 (1921) (describing Williston's four-volume work as "a monument treatise on contracts, a treasure-house of the accumulated learning of centuries on the subject, an exhaustive exposition of the principles which constitute this branch of law, accompanied by a critical analysis of them, running with and through their statement," and "the last word in scholarly
Williston’s criticism of the doctrine focused most finely on the same issue that underlay Moses’s attack: while a promisor’s anticipatory repudiation might excuse the promisee from further performance, it should not empower the promisee to immediately declare the contract at an end and sue the promisor for failing to render a performance not yet due.\(^{222}\) Williston also argued against giving the promisee the right to elect whether to “accept” the promisor’s anticipatory repudiation and put the contract to an end or to “reject” the repudiation and keep the contract in force until the time when the promisor’s performance is due and she either performs as promised or commits an actual breach.\(^{223}\)

Williston criticized the English rule—generally not followed by the American courts of his day—permitting a promisee to increase its

---

and scientific treatment of the wide-reaches of the subject”); Walter Wheeler Cook, Book Review, 21 COLUM. L. REV. 395, 395 (1921) (“[I]t may be said without hesitation that in Williston on Contracts we have the most important contribution to the literature of Anglo-American law which has been made since the publication of Wigmore on Evidence.”).

When the first edition of Williston’s treatise came off the presses in 1920, there were several domestic rivals—most notably the multi-volume treatises of William Herbert Page and William F. Elliott, as well as Charles Fisk Beach, Jr.’s, two-volume Treatise on the Modern Law of Contracts, the second edition of John D. Lawson’s single volume Principles, and Arthur Corbin’s “Third American Edition” of Sir William Anson’s venerable Principles of the Law of Contract with a Chapter on the Law of Agency, which superseded Ernest Hufcut’s prior edition of the same work. See WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS (1905) [3 vols.]; ELLIOTT, supra note 38; BEACH, supra note 36; JOHN D. LAWSON, THE PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS AT LAW AND IN EQUITY (2d ed. 1905); ARTHUR L. CORBIN, ANSON ON CONTRACT (3d ed. 1919); HUFSCUT, supra note 102. While Page published a second edition about the same time as Williston’s first edition appeared, see PAGE, supra note 38, and Elliott further supplemented his treatise shortly thereafter, see 8 WILLIAM F. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS (Supp. 1923), the influence of Elliott’s and then Page’s treatises waned as Williston published a substantially expanded Revised Edition: SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS (rev. ed. 1937) [9 vols.]. Corbin published two more American editions of Anson’s treatise—see ARTHUR L. CORBIN, ANSON ON CONTRACT (4th Am. ed. 1924); ARTHUR L. CORBIN, ANSON ON CONTRACT (5th Am. ed. 1930)—before handing the reins over to Thomas Patterson, see THOMAS H. PATTERSON, ANSON ON CONTRACTS (1939), and turning to his own treatise Corbin on Contracts, which the great contracts curmudgeon Grant Gilmore once called “the best law book ever written.” GRANT GILMORE, THE DEATH OF CONTRACT 57 (1974). See generally E. Allan Farnsworth, Contracts Scholarship in the Age of Anthology, 85 MICH. L. REV. 1406, 1416, 1424-25 (1987) (discussing contracts treatises in the course of a history of contracts casebooks and other teaching devices).

\(^{222}\) See 3 WILLISTON, supra note 221, at 2356-74; WILLISTON, supra note 102, at 959; WALD & WILLISTON, supra note 102, at 355-69; Williston, supra note 102, at 428-59 (all assaying the same broad attack on the notion that an anticipatory repudiation gives rise to an immediate right of action by the promisee).

\(^{223}\) 3 WILLISTON, supra note 221, at 2375 (“The conception that a breach of contract is caused by something which the promisee does is so foreign to the notions not only of lawyers but of business men that it cannot fail to make trouble.”); accord WILLISTON, supra note 102, at 439. Williston also pointed out that, even if permitting the promisee to elect whether to treat the promisor’s repudiation as a breach were theoretically and practically sound, the early cases failed to clearly establish what the promisee is required to do to make such an election, see 3 WILLISTON, supra note 221, at 2375, and how long the promisee may wait before making its election known to the promisor, see id.
damages by electing not to treat a repudiation as a breach,\textsuperscript{224} the English rule—on which American courts of his day were most circumspect—that treated a promisee's expression of willingness to continue, or request that the promisor continue, the contract despite the promisor's repudiation as an election to keep the contract alive and to waive the right to "accept" the promisor's anticipatory breach,\textsuperscript{225} and the English and American rules that unilateral contracts not be subject to anticipatory breach.\textsuperscript{226}

Williston concluded that

the great weight of American authority, whether rightly or wrongly, accepts the doctrine of anticipatory breach but with some differences from the English law. If the doctrine is to be accepted at all, the modifications which American decisions suggest should certainly be incorporated into it. The rights of a party to a bilateral contract of mutually dependent promises upon an anticipatory repudiation by the other party will then be: (1) To rescind the contract altogether, and if any performance has already been rendered by the injured party, to recover its value on principles of quasi-contract; (2) to elect to treat the repudiation as a breach, either by bringing suit promptly, or by making some change of position, or (3) to await the time for performance of the contract and bring suit after that time has arrived. Even if the plaintiff thus elects to wait until the stated time for performance, he will be excused from the necessity of performing or being ready to perform on his own part unless the repudiating party withdraws his repudiation before a change of position by the injured party makes this performance more burdensome. Indeed, the injured party has no right to perform, if, by so doing, damages will be enhanced.\textsuperscript{227}

We need not wonder, as we did with Moses, whether Williston had an audience or whether his criticisms were afforded due consideration.\textsuperscript{228} Even if his views, like those of Moses, did not win the

\begin{footnotes}
\item[224] See 3 WILLISTON, supra note 221, at 2385-86.
\item[225] See id. at 2386-89.
\item[226] See id. at 2381.
\item[227] Id. at 2391 (footnotes omitted).
\item[228] See, e.g., Pearce v. Hubbard, 135 So. 179, 180-81 (Ala. 1931) (considering, but rejecting, Williston's argument that affording an aggrieved promisee an immediate action following an anticipatory breach holds the promisor "to a promise he never made"—that is, to a promise not to do anything before the time performance is due to shake the promisee's firm belief that the promised performance will be forthcoming). See generally Ballantine, supra note 102, at 329 ("Professor Williston, probably the leading American authority in the field of contracts, has for many years been a vigorous critic of this doctrine [of anticipatory breach]. . . . There are no doubt many other learned persons who regard the doctrine as an anomaly, which has found its way into the law without proper credentials, and which is to be applied with caution and hostility." (footnote omitted)); Cook, supra note 221, at 397-98 (criticizing Williston's critique of the doctrine, but recognizing that "his criticisms of the rule . . . are of great weight").
\end{footnotes}
day outside Massachusetts, Williston’s criticisms of the doctrine of anticipatory repudiation have been both widely read and influential.

The doctrine was not without its contemporary supporters, chief among whom were the University of Nebraska’s Lauriz Vold and the University of Minnesota’s Henry Winthrop Ballentine. In response to the argument advanced by critics of the doctrine that an immediate cause of action is “illogical,” because there can be no breach prior to the time for performance, Vold wrote that the doctrine’s critics overlooked the inherent value to the promisee (and, presumably, the promisor) of the promise to perform, itself, as distinct from the promised performance.

Vold defended the right to sue immediately upon the promisor’s anticipatory repudiation as vital to protect the promisee’s advantageous

229. See supra note 162.

230. Williston and Moses were not alone in their criticism of the doctrine. Colin Campbell cast his lot in with the Massachusetts courts, Williston, and Moses, arguing that “permitting an immediate action upon the repudiation of a promise” is “illogical and unsound because a contract cannot be broken before performance is due . . . [and] because there are no damages until the time for performance.” Colin Campbell, supra note 102, at 67, 69. Charles Terry attacked the doctrine as “false” and one that “is not and never has been defensible,” and applauded Williston’s efforts to “stamp[] in no uncertain terms and with clearness of logic and irrebuttable argument those vicious errors which have crept in” to the doctrine “but which should be extirpated for the everlasting good of the science.” Terry, supra note 221, at 894; see also, e.g., Riley, supra note 102, at 185 (agreeing with Williston and the Massachusetts courts that “[i]t is illogical to allow suit before the date of performance,” but conceding that “when all interests are weighed the convenience created by the doctrine of anticipatory breach fully justifies its offense to logic”); Note, Anticipatory Breach of Contract, supra note 102, at 164-68 (tracing the doctrine’s evolution from a case—Hochster—“based upon a misunderstanding of previous authorities and upon false premises” to an “illogical” rule so “firmly established in our law” that it should be applied without the arbitrary exceptions carved out for unilateral and conditional contracts).

231. See, e.g., 3 WILLISTON, supra note 221, at 2351-52, 2373-75; Riley, supra note 102, at 185; Note, Anticipatory Breach of Contract, supra note 102, at 164-68; Colin Campbell, supra note 102, at 67, 69; Moses, supra note 102, at 125.

232. This type of argument overlooks the manifest fact that the contractual relation pending performance is itself an interest valuable to the promisee which the anticipatory repudiation impairs or destroys. When the substantial value of the promisee’s interest in the contractual relation pending performance is clearly recognized it is at once apparent that the unjustified destruction or impairment of that value by anticipatory repudiation prima facie constitutes a legal wrong for which redress should be afforded.

Vold, Repudiation, supra note 102, at 286.

Writing a few years later, Vernon Swanson echoed the same theme:

[R]epudiation impairs a contractual relationship existent between the parties before performance. . . . There is an implied promise or a duty to preserve the contract relationship, and a repudiation before performance, destroying the reasonable expectations of the innocent party, should give rise to an immediate cause of action.

Swanson, supra note 102, at 146; see also, e.g., Cook, supra note 221, at 397-98 (arguing that Williston’s “logical” criticism of the doctrine allowing immediate suit “seems to overlook the distinction between facts and the legal consequences of facts”—to wit, “[p]romisors are never, strictly speaking, held liable for breaking promises as such, but rather for violating the legal obligations attached by the law to their promises”—legal obligations that “become[ ] at once different in scope from the promise as made”).
business relations. Vold's argument started with the premise that existing contracts are an essential part of the "going concern" value and creditworthiness of a business. Indeed, proceeds of contracts yet to be performed may well secure some or all of the credit extended to a going business concern. Once we accept this premise, Vold argued, it is a small and obvious step to see the promisor's prospective repudiation as having an immediate effect on the value and creditworthiness of the promisee's business:

The business value—the present advantage—from established contractual relations is quickly and seriously impaired or destroyed by the promisor's anticipatory repudiation. A repudiated contract, no matter how binding in law, cannot effectively serve the promisee as the substantial foundation for business credit. A repudiated contract, no matter how binding in law, ceases at once to be an effective business resource upon which the promisee can depend in arranging his own affairs. The repudiator at a stroke destroys the intangible asset quite as effectually as the incendiary with his torch destroys tangible property.

Vold also argued that an immediate right to sue was essential to promote efficient allocation of resources by the promisee, to avoid

233. See, e.g., Vold, Tort Aspects, supra note 102, at 345 ("[A]nticipatory repudiation . . . impairing the value of the contractual relation pending performance is substantially analogous to tortious acts wrongfully interfering with advantageous relations . . . ").
234. See id. at 353; Vold, Repudiation, supra note 102, at 275-76.
235. See Vold, Tort Aspects, supra note 102, at 353; Vold, Repudiation, supra note 102, at 276.
236. Vold, Tort Aspects, supra note 102, at 353-54; accord Vold, Repudiation, supra note 102, at 275-76 (observing that the promisee's contractual relation with the promisor may have "very great business value to the promisee even pending performance," and arguing that "[i]t is the business value to the promisee's contractual relationship that is [presently] impaired or destroyed by the promisor's anticipatory repudiation"); Swanson, supra note 102, at 146 ("The security of a continued contractual relationship is a material economic asset which can only be adequately protected by allowing an immediate action by the injured party upon repudiation.").

Understood as a means of protecting advantageous relationships, anticipatory breach becomes actionable on the same basis as, e.g., tortious interference with contract or other existing business relations, interference with another's employees, or interference with the expectancy of succession to property under a will. See Vold, Tort Aspects, supra note 102, at 355.
237. [A]llowing an action at once tends to conserve available resources and prevent waste. . . . [I]f no cause of action is recognized until there is a failure to perform at the time for performance, large losses may be incurred which suing promptly might avoid. Merely recognizing repudiation as an excuse to the aggrieved party for future non-performance is not enough . . . . Unless the aggrieved promisee can at once come to court in an action for anticipatory repudiation he must either struggle on with hostile or possibly insolvent parties, incurring expense and loss of time in preparations which may be of no use to anybody, or he must cease such further preparations for performance at the peril of being found in default after all in later litigation at the time for performance. . . . .

. . . The sooner the controversy can be disposed of the sooner the parties can know their obligations and the sooner they can in accordance therewith adjust their affairs to
financial repercussions for innocent third parties, and to advance other important societal interests.

Ballantine met all comers, including Williston and the Massachusetts courts, with a vigorous defense of the doctrine based both on legal principle and equity. As for Williston’s argument that giving the promisee an immediate right to sue forecloses the possibility

practical productive efforts, instead of remaining idle or engaging in misdirected futile activity while awaiting the results of distant future litigation.

Vold, Repudiation, supra note 102, at 280-85 (footnotes omitted).

238. The aggrieved promisee, whose resources must be called in or diverted in turn, is forced to disappoint the financial expectations of his business connections. The inevitable shrinkage of credit and consequent loss of productive business thus must tend to spread from the aggrieved promisee who is injuriously affected in the first instance, and to project itself through him to his surrounding business field.

Vold, Tort Aspect, supra note 102, at 369.

239. Without substantial stability of promises no credit system could endure. It seems equally plain that with increased stability of promises the credit system must function more effectively. . . . [T]he injury inflicted by an anticipatory repudiation is not necessarily to be considered as the destruction of the contract; instead, [t]he injury inflicted by an anticipatory repudiation is not necessarily to be considered as the destruction of the contract; instead, [it] may be considered as a violation of the duty to respect the rights of the [promisee], giving rise to a cause of action to enforce the primary contractual duty.

240. See, e.g., Ballantine, supra note 102, at 350-31 (“Williston fails to distinguish between the promise and the duties arising from the promise. To be exact a breach of contract involves a failure to perform a contractual duty rather than a [mere] broken promise. . . . A repudiation may thus be a breach of duty and a cause of action to enforce the contract even if not literally a present breach . . . .”).

241. See, e.g., id. at 341 (questioning the holding in Daniels v. Newton, 114 Mass. 530 (1874)—the leading American case opposing the right of the promisee to immediately sue for breach following the promisor’s anticipatory repudiation, see supra note 162—and arguing that “[t]he injury inflicted by an anticipatory breach is not necessarily to be considered as the destruction of the contract”; instead, “[t]he injury inflicted by an anticipatory breach is not necessarily to be considered as the destruction of the contract”; instead, “[t]he injury inflicted by an anticipatory breach is not necessarily to be considered as the destruction of the contract”; instead, “[t]he injury inflicted by an anticipatory breach is not necessarily to be considered as the destruction of the contract”).

242. An action for damages for breach of contract is essentially an action to enforce the duty of performance by giving a substitute therefor, namely, the money equivalent of the performance which was bargained for, but which has not been rendered, or which evidently will not be rendered . . . .

A “total breach” of the contract simply means that the situation is such that the plaintiff need not await further performance by the defendant, but may at once claim damages representing the value of the promised performance. . . . So in the case of repudiation prior to the day for performance, the cause of action does not depend upon showing an actual breach . . . ., but upon showing the need of enforcement of the duty.

Ballantine, supra note 102, at 339, 341.

243. See id. at 338 (“It is . . . less unjust to require the defendant to pay his damages ahead of time than to make the plaintiff wait several years for any redress.”); see also CORBIN, ANSON ON CONTRACT (3d Am. ed.), supra note 221, at 443 (“The chief objection to the rule [allowing an immediate action for an anticipatory repudiation] seems to be that it advances the time of trial so that in rare circumstances the plaintiff might recover a judgment for damages that later developments show that he does not [or need not] suffer. This is not a very strong objection; it is an objection that applies to all future damages, and yet recovery of such damages is necessary and desirable.”).
that the promisor might "repent" and perform as called for, Ballantine answered that the promisor's right to retract its renunciation might be preserved, while permitting the promisee an immediate right of action, if courts would allow a subsequent offer to perform to be shown in mitigation of damages, or by rendering a judgment in the alternative that the defendant perform . . . or pay damages at the date set. But we can hardly be asked to deny the innocent man an immediate right of action and keep him waiting in suspense, in order that the sinner may speculate in repentance and perchance waste or conceal his assets against the evil day of suit.

Ballantine concluded his defense of the doctrine by arguing that

[i]o say that the law cannot logically give any remedy to enforce the contract against the repudiator until he actually carries out his injurious threat seems as pacificist as to say that a country cannot take any measures to defend itself upon a mere declaration of war, but must wait until it is actually invaded and occupied by the enemy. There is no logical necessity that the law should indulge the repudiator in the power or privilege of breaking his contract or let him threaten with impunity. . . . [T]he doctrine of anticipatory breach is not only supported by its practical convenience, but by strong considerations of justice to the plaintiff. . . . [T] does not enlarge the duties of the defendant or hold him liable on a promise he never made. It simply authorizes the commencement of proceedings to enforce those duties when the situation or misconduct of the defendant demands it.

II. "CANONIZATION" OF THE DOCTRINE: ANTICIPATORY REPUDIATION IN THE FIRST RESTATEMENT OF CONTRACTS

Against this backdrop of widespread judicial acceptance of the doctrine and vigorous academic debate over its merits and contours, the American Law Institute published the first Restatement of Contracts in 1932. The Restatement constituted the first serious attempt to
“standardize” American law on anticipatory repudiation. The Restatement included several provisions on anticipatory repudiation within a larger chapter on breach of contract. Many of the first Restatement’s anticipatory repudiation provisions continue to inform current statutory and common law.

The Restatement provided that a promisor committed an anticipatory breach of a bilateral contract, excusing the promisee from performing any condition precedent or any return promise, and entitling the promisee to sue immediately, if the promisor, without justification, and before the time her performance was due under the contract.

1) made a positive statement to the promisee, or other person having a right under the contract, indicating that she would not or could not perform her contractual duties; or

YALE L.J. 643 (1933), and Edwin W. Patterson, The Restatement of the Law of Contracts, 33 COLUM. L. REV. 397 (1933).


249. For a topical analysis of cases decided under the Restatement’s anticipatory repudiation provisions before the widespread adoption of the Uniform Commercial Code, see Anderson, Restatement, supra note 102.

250. By its terms, section 318 did not apply to unilateral contracts that are “not conditional on some future performance by the promisee.” RESTATEMENT, supra note 214, § 318. Comment e explained:

The doctrine of anticipatory breach is not extended to unilateral contracts unless the promisor’s duty is conditional on some future performance by the promisee. It is immaterial whether the contract was originally thus unconditionally unilateral or has become so by the performance of one party. In neither case can a breach arise before the time fixed in the contract for some performance. There must be some dependency of performances in order to make anticipatory breach possible.

Id. § 318 cmt. e, at 477; see, e.g., Sagamore Corp. v. Willcutt, 180 A. 464, 465 (Conn. 1935). Section 318 also did not, by its terms, apply to bilateral contracts that have become unilateral because the promisee has fully performed. RESTATEMENT, supra note 214, § 318.

251. See RESTATEMENT, supra note 214, § 320 cmt. a, at 482. The promisee is so excused even if she has indicated her desire that the promisor withdraw its repudiation and perform the contract as called for. See id. § 320 & cmt. a; see, e.g., Sawyers Farmer Coop. Ass’n v. Linke, 231 N.W.2d 791, 795 (N.D. 1975).

252. See RESTATEMENT, supra note 214, § 318 cmt. d, at 476.

The Restatement’s grant of an immediate right to sue is particularly noteworthy given that Williston had previously written against the notion that an immediate cause of action accrued and that the promisee could sue before the date performance was due as long as the promisor did not subsequently retract his repudiation before the promisee detrimentally relied upon it. See supra note 222. Interestingly, Williston’s criticism of the doctrine did not appear to soften over time, despite his capitulation to it in the first Restatement. See 5 WILLISTON & THOMPSON, supra note 221, at 3704-72. Subsequent editions of Williston’s treatise (admittedly under new authorship) have softened their criticism of the doctrine. See 11 JAEGER, supra note 27, at 107-89; 15 RICHARD A. LORD, WILLISTON ON CONTRACTS 2:61 (4th ed. 2000).

253. See RESTATEMENT, supra note 214, § 318 cmt. b, at 476.

254. While in most cases the person affected by the repudiation, and therefore entitled to seek and actually seeking recourse, is the promisee, the doctrine also empowers third-party beneficiaries, guarantors, sureties, assignees, and the like, to treat a promisor’s repudiation as a breach of the contract. See id. § 318 cmt. f, at 476.

255. Id. § 318(a); see, e.g., Walker v. Herke, 147 P.2d 255, 262 (Wash. 1944) (citing § 318 and finding that the obligors’ refusals to perform in accordance with the terms of their contracts constituted a
transferred or contracted to transfer to a third person an interest in specific land, goods, or other things essential for the substantial performance of her contractual duties to the promisee; 256 or committed any voluntary affirmative act that rendered substantial performance of her contractual duties to the promisee impossible or apparently impossible.257

The Restatement thus gave its imprimatur to the view held at the time by a majority of American courts258 and several prominent commentators259—but contrary to that of its Reporter and other commentators,260 as well as a handful of courts261—that an anticipatory repudiation entitled the aggrieved promisee to bring suit against the repudiating promisor even before the promisor’s performance was technically due under the contract. It also adopted the view held by the United States Supreme Court and a number of lower courts,262 but rejected by its Reporter and most other commentators,263 that limited the foregoing

256. RESTATEMENT, supra note 214, § 318(b).

257. Id. § 318(c).

Though where affirmative action is promised, mere failure to act, at the time when action has been promised, is a breach, failure to take preparatory action before the time when any performance is promised is not an anticipatory breach, even though such failure makes it impossible that performance shall take place, and though the promisor at the time of the failure intends not to perform his promise.

Id. § 318 cmt. i, at 479.

258. See supra notes 188-211 and accompanying text; see also, e.g., 5 PAGE, supra note 38, at 5100-01 & nn. 11-14 (collecting cases).

259. See supra notes 232-46 and accompanying text; see also, e.g., 5 PAGE, supra note 38, at 5098-5102.

260. See supra notes 214, 222, 230, and 252 and accompanying text.

Some such opposition survived the promulgation of the Restatement. See supra note 252 (discussing Williston’s continued opposition to an immediate right of action); Mann, supra note 102, at 350 (arguing, on many of the same bases as Williston and fifteen years after the Restatement was promulgated, that Kentucky should abandon “the doctrine of anticipatory breach of contract allowing an immediate action”); see also, e.g., Meyer, supra note 102, at 68-69, 75 (describing the doctrine as a “plague” that “enlarge[s] . . . contractual obligation[s]” and “causes a party to be held liable on a promise he never made,” but ultimately conceding that the doctrine “enlarge[s] contract law” and that any deleterious effect caused by the enlargement of one party’s contractual obligations is nullified by the quick settlement of disputes made possible by recognizing the doctrine).

261. See supra note 162.


263. See supra note 226 and accompanying text; CORBIN, ANSON ON CONTRACT (3d Am. ed.), supra note 221, at 442 (arguing that the disparate treatment of unilateral contracts “can hardly be maintained if the ‘reason of the rule’ is that a repudiation injures the promisee”); see also, e.g., Recent Decisions, Contracts—Anticipatory Breach—Unilateral Contract to Pay Money, 27 Mich. L. Rev. 811, 811-12 (1929); Note, Anticipatory Breach of Unilateral Contracts, supra note 102, at 265-66; Lintburg, supra note 102, at 143-44; Note, Anticipatory Breach of Contract, supra note 102, at 164-68 (all arguing that the doctrine should be applied without the arbitrary exceptions carved out for unilateral contracts).
rule to contracts that remained mutually executory at the time of the repudiation. 264

The Restatement empowered the promisee to sue, if at all, only before the promisor withdrew or retracted her repudiation, and before the promisee became aware that any facts constituting the repudiation no longer existed, unless the promisee materially changed his position in reliance on the promisor’s repudiation. 265 Absent withdrawal or

---

264. The Restatement’s recognition of the distinction between mutually executory contracts and those that were no longer mutually executory by the time of the promisor’s repudiation did not discourage those who continued to argue that the applicability of the doctrine should not turn on such a distinction. See supra notes 25-27 (discussing Corbin’s and others’ objections to treating unilateral contracts differently from bilateral contracts for purposes of anticipatory repudiation); see also, e.g., Graham Loving, Jr., Recent Cases, Contracts—Anticipatory Breach, 23 Tex. L. Rev. 400, 401 (1945) (finding “no valid reasons” to support the “artificial barrier” that excludes unilateral contracts, bilateral contracts fully performed by one side, and contracts to pay money from the reach of the doctrine); Recent Decisions, Contracts—Anticipatory Breach—Brokerage Contracts—Impossibility, 33 Colum. L. Rev. 1442, 1443 (1933) (“[T]he reasons advanced for the [contract’s] allowance in bilateral contracts—the promisor’s duty not to impair the promisee’s interest in the contractual relation, the diminished value of a repudiated promise, and the practical advantages in an immediate action—seem equally cogent in unilateral contracts.”); cf. John M. Ulman, Recent Decisions, Contracts—Anticipatory Breach—Right to Recover in Advance on a Unilateral Obligation to Pay Money, 37 Mich. L. Rev. 1198, 1199 (1939). “The allowance of an action for anticipatory damages ought to be governed by the certainty with which damages can be measured and the hardship on the obligor in each case of paying in a lump sum in the present what he contracted to pay in the future, without regard to whether the obligation is unilateral or not.” (footnote omitted).

265. The effect of repudiation is nullified

(a) where statements constituting such a repudiation are withdrawn by information to that effect given by the repudiator to the injured party before he has brought an action on the breach or has otherwise materially changed his position in reliance on them; or

(b) where facts other than statements constitute such repudiation and these facts have, as the injured party knows, ceased to exist before action brought or such change of position as is stated in Clause (a).

RESTATEMENT, supra note 214, § 319(a); see also id. § 318 cmt. d, at 477 (commenting that withdrawal of an anticipatory repudiation “before either an action has been brought, or other change of position made by the other party to the contract nullifies all effects of the [anticipatory] breach”). Compare, e.g., Walter, 147 P.2d at 262 (citing § 319 and holding that the obligors had nullified their repudiation by retracting their refusal and offering to perform in accordance with the terms of their contract before the obligee had acted on the obligors’ repudiation), with, e.g., Derwell Co. v. Apic, Inc., 278 A.2d 338, 342 (Del. Ch. 1971) (citing § 319 and holding that the obligor’s attempted withdrawal of his repudiation was ineffective because the withdrawal was attempted after the obligee brought suit on the repudiation).

Section 319 did not allow a promisee to foreclose a repudiating promisor from retracting her repudiation by a “mere statement” accepting the repudiation. See Stephen E. Strom, Recent Cases, Contracts—Conditional Acceptance of Anticipatory Repudiation, 19 Mo. L. Rev. 88, 90 (1954).

With regard to the consequences of a promisee’s material change in position,

[w]here a party to a contract materially changes his position in reasonable reliance on the other party’s

(a) manifestations of unjustified lack either of intention or of ability, or

(b) apparent inability without justification to perform a condition or a promise for an agreed exchange,

a subsequent tender of correct performance by the latter party is inoperative to prevent the occurrence of a breach of contract by him at the time when performance becomes due.

RESTATEMENT, supra note 214, § 323(1); see, e.g., First Nat’l Bank of Aberdeen v. Indian Indus., Inc., 600 F.2d 702, 709 (8th Cir. 1979) (citing § 323) (applying South Dakota law).
retraction by the repudiating promisor, the promisee could bring suit on
the repudiation at any time prior to the date performance was due, even
if that date was many years distant, because limitations on the
promisee's claim did not begin to run until the date performance was
due, rather than the date of the repudiation. 266

The Restatement's provisions on anticipatory repudiation did not
specifically address the promisee's options in response to the promisor's
repudiation—that is, whether the promisee could choose between
immediately bringing suit and waiting until a later date to do so in hopes
that the repudiating promisor would, in fact, perform as promised.
However, it did (1) treat a qualifying repudiation as a total breach 267
entitling—but not compelling—the promisee to sue for any remedy
authorized for a total breach of contract; 268 (2) provide that limitations
would not run against a promisee's action until the date the promisor's
performance was due under the terms of the contract 269—strongly
suggesting that, subject to her obligation to mitigate damages, 270 the
promisee could, in fact, elect not to act on the promisor's repudiation in
hopes that the promisor would ultimately perform; and (3) adopt the
position, advanced by many commentators, 271 that allowed a promisee
to request or even urge the repudiating promisor to perform without
waiving the promisee's right to sue for anticipatory breach and to forego
his own performance if the promisor failed to perform. 272

266. Restatement, supra note 214, § 322 ("If no action on an anticipatory breach is brought before
the time fixed by the contract for the beginning of performance by the party who has committed such a
breach, the period of the Statute of Limitations begins to run only from the time so fixed by the contract.");
see id. § 318 cmt. d, at 477 ("[If] no action is brought, the Statute of Limitations will . . . run . . . only from
the time when there is [a] failure to perform a promise."); see, e.g., Lane v. Nationwide Mut. Ins. Co., 582
A.2d 501, 505-06 (Md. 1990); City of Algona v. City of Pacific, 667 P.2d 1124, 1126-27 (Wash. Ct. App.),
renewed, 100 Wash. 2d 1028 (1985); Kansas City v. Kansas City Transit, Inc., 406 S.W.2d 18, 24-25
(Mo. 1966), cert. denied, 385 U.S. 1036 (1967); Harless v. Western & S. Life Ins. Co., 192 S.E. 137, 140 (W.
Va. 1937).

267. See Restatement, supra note 214, § 318.
Thus,
the "election of the injured party to treat the repudiation as a breach" is . . . only a
theoretical possibility; the contract remains broken [by the promisor's repudiation], only
the effects of the breach may be averted by an election of the aggrieved party to ignore the
breach . . .
Rothschild, supra note 102, at 390.

268. See Restatement, supra note 214, §§ 326-380.

269. See supra note 266.

270. See supra note 251.

271. See, e.g., supra note 225 and accompanying text.

272. See Restatement, supra note 214, § 320 ("Manifestation by the injured party of a purpose to
allow or to require performance by the promisor in spite of repudiation by him, does not nullify its effect
as a breach, or prevent it from excusing performance of conditions and from discharging the duty to render
a return performance.").
Two Supreme Court cases decided shortly after the Restatement's promulgation further ingrained and refined the doctrine of anticipatory repudiation as part of American contract jurisprudence. In *Mobley v. New York Life Insurance Co.*, the plaintiff (Mobley), an insured of the defendant (NYL), suffered an acute attack of appendicitis on December 13, 1930, requiring emergency surgery from which he did not recover as expected. At the time of the attack, Mobley had life insurance policies with NYL in the amounts of $5,000 and $2,000. Both policies included monthly benefits in the event he was disabled, and provided that, during any period of disability, NYL would waive all premiums otherwise due.

After waiting out the exclusion period in his NYL policies, Mobley submitted the necessary forms, including the results of a physical examination, to claim his monthly benefits for permanent and total disability. NYL initially allowed his claim, waived his monthly premiums during the period of his disability (as provided for in the policies), and began paying the benefits. Several times over the next two years, NYL notified Mobley that it had concluded that he was no longer continuously and totally disabled and, therefore, it would pay him no further benefits and he would be required to resume paying premiums. In each instance, Mobley insisted that he continued to be disabled; and, after further investigation and consideration, NYL agreed, paid his past-due benefits, resumed his monthly benefits payments, and waived his premiums.

On March 1, 1933, NYL again notified Mobley that it had determined that he was no longer totally disabled and that, therefore, NYL would no longer pay him any benefits and he would be required to resume making premium payments. This time NYL did not relent in the face of Mobley’s protests. After Mobley failed to make the required premium payments on the $5,000 policy, NYL notified him on April 13, 1933 that the policy had lapsed and urged him to apply for its reinstatement. When Mobley did not do so, NYL wrote again to notify him that the value of the policy had been applied to continue the insurance in force until June 20, 1937. On June 9, 1933, NYL notified Mobley that the premium on the $2,000 policy was about to mature.

On July 12, 1933, NYL notified Mobley that it was willing to further consider his claim for disability benefits. On July 24th, one of NYL’s

---

274. See id. at 635.
275. See id. at 634.
276. See id. at 635.
277. See id. at 635-36.
own physicians examined Mobley. The physician’s report, received by NYL on July 28th, stated that, since the time of the initial attack, Mobley “had been prevented by disability from engaging in any occupation [and] that he would be permanently prevented from strenuous occupation.” On August 9th, NYL notified Mobley that it would resume waiving his premiums, retroactive to February 1933, and tendered checks to cover all disability payments accruing on both policies up to and including July 1933. Mobley, having already filed suit, refused the checks. NYL continued to tender disability benefits each month thereafter.

NYL prevailed against Mobley’s claim for anticipatory breach both at the trial level and before the Fifth Circuit Court of Appeals. The Supreme Court affirmed.

Repudiation by one party, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and to recover damages as upon total breach, must at least amount to an unqualified refusal, or declaration of inability, substantially to perform according to the terms of his obligation. Mere refusal, upon mistake or misunderstanding as to matters of fact or upon an erroneous construction of the disability clause, to pay a monthly benefit when due is sufficient to constitute a breach of that provision, but it does not amount to a renunciation or repudiation of the policy. There is nothing to show that any refusal of the company to pay the monthly disability benefits was not made in good faith. Its position appears at all times to have been that, if plaintiff was disabled as defined in the policy, he was entitled to the monthly benefits and waiver of premiums. The fact that, with additional information and upon further consideration, it gave greater weight to his claims and decided that he was continuously disabled as defined in the policies and so entitled to the specified payments goes to show adherence to, rather than repudiation of, the contracts. The company’s efforts to have the policies kept in force were inconsistent with purpose to renounce them.

*New York Life Insurance Co. v. Viglas* also involved an alleged anticipatory repudiation of a life insurance policy with a provision for disability benefits and waiver of premiums during period of disability. In *Viglas*, the insured “lost ‘the total and irrecoverable use’ of one hand and one foot, and became totally and permanently disabled” in

---

278. *Id.* at 636-37.
279. *See id.* at 637.
September 1931.\textsuperscript{283} Upon proof of his condition, NYL paid him monthly disability benefits until July 1933, and during the same period waived the insured’s premium payments.\textsuperscript{284} In August 1933, NYL notified the insured that it would pay no more benefits and no longer waive the insured’s premiums because NYL believed that “for some time past the plaintiff had not been continuously totally disabled within the meaning of the disability benefit provision of the policy.”\textsuperscript{285} Unlike the insured in \textit{Mobley}, the insured in \textit{Viglas} apparently made no effort to get NYL to reconsider its determination that he was no longer disabled. When the insured did not make the necessary premium payment, NYL declared the policy lapsed\textsuperscript{286}—although it is unclear that NYL communicated this decision to its insured.\textsuperscript{287} The insured sued, arguing that NYL had anticipatorily repudiated the policy.

As it had a year earlier in \textit{Mobley}, the Supreme Court in \textit{Viglas} found that NYL had not repudiated the policy:

\begin{quote}
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. If the insured was still disabled, monthly benefits were payable, and there should have been a waiver of the premium. If he had recovered the use of hand or foot and was not otherwise disabled, his right to benefits had ceased, and the payment of the premium was again a contractual condition. There is nothing to show that the insurer was not acting in good faith in giving notice of its contention that the disability was over.\textsuperscript{288}
\end{quote}
III. CODIFICATION OF THE DOCTRINE: ANTICIPATORY REPUDIATION UNDER THE UNIFORM COMMERCIAL CODE

By the early 1960s, all but a handful of American jurisdictions had adopted the doctrine of anticipatory repudiation, with Delaware, Louisiana, Nebraska, Nevada, New Mexico, and Utah joining the ranks of those states that had already recognized the doctrine by the publication of the first Restatement. The next major step in the doctrine's development was its recognition by and inclusion in Article 2 of the Uniform Commercial Code.

...an honest, but erroneous, interpretation.

Knel, 71 F.2d at 923 (quoting Armstrong v. Ross, 55 S.E. 895, 899 (W. Va. 1906)).

Professor Corbin disagreed:

The renunciation that constitutes a breach is the renunciation of duty and declaration of intention not to perform it. Its essence lies in a declaration of intention not to perform a duty that actually exists. Such a declaration may be a repudiation and a total breach, even though there is no denial that the contract was ever made or ever created any primary obligation. If a contractor says, "I admit that the contract was made and that I am bound by its terms, but I assure you that I will not perform it," we have a renunciation of the contract that is a total breach.

It should make no difference ... that the contractor believed that he had been discharged, or that the contract was never valid, or that some condition precedent had not been performed. His declaration is a total breach, if it is in fact his duty to render performance and he declares it to be his intention not to render that performance.


This disagreement among courts and commentators notwithstanding, Viglas has been liberally cited by subsequent courts and, even if dubiously decided, remains an important case in the development of anticipatory repudiation in this country.


290. See Marek v. McHardy, 101 So. 2d 689, 695 (La. 1958).

291. See Lang v. Todd, 28 N.W.2d 434, 438 (Neb. 1947) (overruling King v. Waterman, 75 N.W. 830 (Neb. 1898), and Carstens v. McDonald, 57 N.W. 757 (Neb. 1894)). See generally Robert A. Barlow, Jr., Recent Cases, Contracts—Doctrines of Anticipatory Breach—Repudiation by Vendor, 27 Neb. L. Rev. 85, 85 (1947) (remarked that, with the Nebraska Supreme Court's decision in Lang v. Todd, "Nebraska has clearly accepted the doctrine of anticipatory breach").


293. See Viramontes v. Fox, 335 P.2d 1071, 1075 (N.M. 1959).


295. See supra text accompanying notes 142-56 and 189-211; see also, e.g., Thompson v. Lincoln Nat'l Life Ins. Co., 138 P.2d 951, 963 (Mont. 1943) (Adair, J., dissenting).

296. U.C.C. §§ 2-609, -610 & -611 (1999); see also id. § 2-612(2) (addressing adequate assurances of performance in the context of an installment sales contract).

Articles 2A and 5 also contain provisions dealing with anticipatory repudiation of leases of personal property, see U.C.C. §§ 2A-401, -402, -403 (1999), and letters of credit, see id. § 5-111(a) & cmt.
promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.297

Section 2-610 provides that a promisee whose promisor repudiates298 "with respect to a performance not yet due the loss of which will substantially impair the value of the contract to" the promisee299 may

1. U.C.C. § 5-115(2) & cmt. 2 (1994). This Article will focus on the anticipatory repudiation provisions of Article 2. More specifically, this discussion will focus on Sections 2-609, 2-610, and 2-611, which govern non-installment contracts. Section 2-612(2) addresses adequate assurances in the context of installment contracts, but does not fully flesh out an anticipatory repudiation doctrine for installment contracts. See U.C.C. § 2-612(2) (1999). For a survey of cases implicating Section 2-612(2), see Anna L. Vasenheit, Annotated, Sales: Construction and Application of UCC § 2-612(2), Dealing with Rejection of Goods Under Installment Contracts, 61 A.L.R.5th 611 (1998).


Likewise, the contours of Article 2's anticipatory repudiation provisions have received considerable academic attention. See e.g., Denooyer, supra note 102; George I. Wallach, Anticipatory Repudiation and the UCC, 13 UCC L.J. 48 (1980); Janice C. Vyn, Anticipatory Repudiation Under the Uniform Commercial Code: Interpretation, Analysis, and Problems, 30 SW. L.J. 601 (1976); E. Hunter Taylor, Jr., The Impact of Article 2 of the U.C.C. on the Doctrine of Anticipatory Repudiation, 9 B.C. INDUS. & COM. L. REV. 917 (1968); Anderson, UCC, supra note 102. Given the quality and currency of this commentary, as well as my desire to keep this a "Brief History," I will concentrate here on the highlights of Article 2's anticipatory repudiation provisions and how they compare and contrast to common law doctrine. For a more complete discussion, see 9 KEITH A. ROWLEY, CORBIN ON CONTRACTS §§ 42:3, 42:37-38 & 42:56-57 [Joseph M. Perillo ed., rev. ed. forthcoming 2001-02].

298. The Code does not define "repudiate." However, the official comments to Section 2-610 do provide some guidance. See U.C.C. § 2-610 cmt. 1 (1999) ("[A]nticipatory repudiation centers upon overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance."); id. § 2-610 cmt. 2 ("Repudiation can result from action which reasonably indicates a rejection of the continuing obligation."). Section 250 of the Restatement (Second) of Contracts, discussed infra notes 346-47 and accompanying text, may also guide a court applying Section 2-610. See generally GREGORY M. TRAVALE ET AL., NORDSTROM ON SALES & LEASES OF GOODS 748-49 & n.159 (2d ed. 2000) (suggesting the use of Section 250 to illuminate Section 2-610 and discussing the similarities between Section 250 and the definition of repudiation in the comments to the proposed draft revision of Article 2).

Thus, like the promisee at common law whose promisor repudiates, an aggrieved promisee of a contract governed by Article 2 may ignore the repudiation and await performance in due course by the repudiating promisor, or she may treat the repudiation as a breach and seek any


For a survey of cases addressing whether the obligor's words or conduct rose to the level of an anticipatory breach, see Milton Roberts, Annotation, What Constitutes Anticipatory Repudiation of a Sales Contract Under UCC § 2-610, 1 A.L.R.4th 527 (1980 & Supp. 1999).


302. See U.C.C. § 2-610(a); see, e.g., Fredonia Broad. Corp. v. RCA Corp., 481 F.2d 781, 801-02 (5th Cir. 1973); Klockner, Inc. v. Federal Wire Mill Corp., 663 F.2d 1370, 1380 (7th Cir. 1981); Trinidad Bean & Elevator Co. v. Froeh, 494 N.W.2d 347, 351 (Neb. Ct. App. 1992). But see, e.g., Corden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft, 736 F.2d 1064, 1071-73 (5th Cir. 1984) (suggesting that an aggrieved buyer's ability to ignore the repudiation and await performance in due course by a repudiating seller may be tempered by the buyer's duty to attempt cover within a reasonable time of learning of the repudiation, where the market price for the subject of the contract continues to rise from the date of
remedy afforded by Article 2. In either case, the promisee may suspend her own performance upon the promisor’s repudiation.

The Article 2 promisee has a fourth option not generally available at common law at the time Article 2 was promulgated. Section 2-609(1) provides that

[w]hen reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

reputation through the date performance was due); Cargill, Inc. v. Stafford, 553 F.2d 1222, 1227 (10th Cir. 1977) (same).


304. See U.C.C. § 2-610(1); see, e.g., Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 582 (7th Cir. 1976); Roye Realty & Developing, Inc. v. Arka, Inc., 863 P.2d 1150, 1160 (Okla. 1993).

305. See Garvin, supra note 102, at 71; Thomas Campbell, supra note 102, at 1296; Anderson, UCC, supra note 102, at 3.

306. U.C.C. § 2-609(1); see, e.g., Central Oil Co. v. M/V Lamma-Forest, 821 F.2d 48, 51 (1st Cir. 1987); Kaiser-Francis Oil Co. v. Producer’s Gas Co., 870 F.2d 563, 568-69 (10th Cir. 1989).


Like the Code and Article 2 in general, see supra note 297, the evolution and contours of Section 2-609 have been the subject of considerable academic commentary, including a brilliant recent article by Larry Garvin that also addresses the corresponding provisions of the Restatement (Second) of Contracts, discussed infra Part IV. Garvin, supra note 102; see also, e.g., 4 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM
The promisee seeking assurances need only be reasonably uncertain that the promisor can perform, not absolutely certain that the promisor cannot perform.\textsuperscript{307} Once a promisor receives a "justifiable" written demand for adequate assurances, he must "provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case."\textsuperscript{308} A promisor failing to timely comply with a reasonable demand for adequate assurances has, by definition, committed an anticipatory breach on the basis of which the promisee can immediately bring suit.\textsuperscript{309}

Section 2-609(1) begs several questions. First, how do we judge whether the promisee's grounds for insecurity are "reasonable" or "justifiable"? Second, what constitutes a "written demand" for adequate assurance? Third, how do we judge whether the assurance offered is "adequate"? Fourth, when is suspension of performance pending receipt of adequate assurance "commercially reasonable"?

Unless otherwise agreed by the parties,\textsuperscript{310} between merchants the reasonableness of the promisee's insecurity and the adequacy of the promisor's offered assurances are determined "according to commercial standards,"\textsuperscript{311} including the obligation of good faith,\textsuperscript{312} in all other cases,


\textsuperscript{308} U.C.C. § 2-609(4).

\textsuperscript{309} See id.; see, e.g., Land O'Lakes, Inc. v. Hanig, 610 N.W.2d 518, 523 (Iowa 2000); see also Travallo, supra note 300, at 751 ("If Seller's failure to provide an adequate assurance continues for more than a reasonable time (which reasonable time cannot exceed thirty days), . . . Buyer can reliably treat Seller as having repudiated."). See generally JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 294 (4th ed. 1995) ("A fourth type of repudiation that occurs when a party fails to give adequate assurances of performance when required to do so under section 2-609(4).")

\textsuperscript{310} As is the case with most of Article 2, the parties to a contract for the sale of goods can agree \textit{ex ante} on what they consider to be reasonable grounds for insecurity and adequate assurance of performance, as long as in doing so they do not vitiate the obligation of good faith read into every Article 2 contract. See U.C.C. § 1-202(3). See generally 4 ANDERSON, supra note 306, at 497.

reasonableness and adequacy are judged by an objective, “reasonable person” standard. Under either standard, it seems clear that a letter from the promisor to the promissee informing the promissee that the promisor’s bank had shut off the promisor’s operating funds and forced the promisor to lay off virtually all of its production personnel and cease operations would not constitute adequate assurance that the promisor would perform as called for by the contract.

Unless otherwise agreed by the parties, a demand need not always be written—in the sense of committing it to paper. E-mail may suffice. Some courts have even allowed an oral demand for assurance to satisfy Section 2-609(1), as long as it is unequivocal. Those doing so, however, are clearly in the minority.

Nor need the written “demand” always be very demanding. In Smyers v. Quartz Works Corp., the seller wrote the buyer as follows:

Where reasonableness is determined by commercial standards, the party seeking to establish the reasonableness of its insecurity must prove that it had “an objective factual basis for the insecurity, rather than a purely subjective fear that the party will not perform.” Top of Iowa Cooper v. Sime Farms, Inc., 608 N.W.2d 454, 466 (Iowa 2000); see R.J. Robertson, Jr., The Right to Demand Adequate Assurance of Due Performance: Uniform Commercial Code Section 2-609 and Restatement (Second) of Contracts Section 251, 38 Drake L. Rev. 305, 322 (1988-89). See generally 4 ANDERSON, supra note 306, at 499 (remarking that the party claiming that its conduct is justified by § 2-609 bears the burden of proving its applicability). 312. See U.C.C. §§ 1-203, 2-103(1)(b) & 2-609 cmt. 3; American Bronze Corp. v. Streamway Prods., 456 N.E.2d 1295, 1303 (Ohio Ct. App. 1982).

313. That is to say: Would a reasonable person in the same position as the promisee have an objective basis for insecurity or deem the promisor’s assurances objectively adequate? See, e.g., Ford Motor Credit Co. v. Ellison, 974 S.W.2d 464, 467 (Ark. 1998) (holding that, “for sales transactions between a merchant seller and a nonmerchant buyer, the test for determining whether the seller has reasonable grounds for insecurity is whether a reasonable merchant in the seller’s position would have that feeling” (emphasis omitted) (citing 2 HAWKLAND, supra note 306, § 2-209:2)).


315. See, e.g., 5 ILL. COMP. STAT. 175/5-115(a) (West 2000) (“Where a rule of law requires information to be ‘written’ or ‘in writing,’ or provides for certain consequences if it is not, an electronic record”—defined in 5 ILL. COMP. STAT. 175/5-105 as “a record generated, communicated, received, or stored by electronic means for use in an information system or for transmission from one information system to another,” which includes e-mail—“satisfies that rule of law.”).


Reciting that Article 2 dictates that courts "construe the writing requirement liberally," the court found that the letter quoted above constituted a written demand for adequate assurances, entitling the sender to suspend its performance when the recipient did not give the requested assurances. That said, most courts "require[] that the writing clearly specify that assurances are being sought." The reasonableness of the promisee's insecurity, the adequacy of
the promisee’s demand for assurances,\textsuperscript{324} the adequacy of the promisor’s offered assurances,\textsuperscript{325} and the reasonableness of the promisee’s suspension of performance awaiting assurance\textsuperscript{326} are all questions of fact that, again subject to a contrary agreement of the parties,\textsuperscript{327} "depend[ ] upon various factors, including the [promisor or promisee]'s exact words or actions, the course of dealing or performance between the parties, and the nature of the sales contract and the industry."\textsuperscript{328}

Despite these questions, Article 2’s right to demand adequate assurance of due performance was a major addition to the doctrine of anticipatory repudiation, affording an aggrieved promisee a “middle ground” option between doing nothing, in hopes that the promisor will ultimately perform, and immediately bringing suit and running the risk that a court might find that the promisor’s words or deeds did not rise to the level of a “clear determination not to continue with performance,”\textsuperscript{329} with all of the attendant consequences.


\textsuperscript{326} See, e.g., Clam Perrin Marine Towing, 730 F.2d at 191. \textit{But see Scott v. Crown}, 765 P.2d 1043, 1046-47 (Colo. Ct. App. 1988) (finding, as a matter of law, that the promisee did not have reasonable grounds to suspend performance where the promisee’s written demand for assurances “demanded performance beyond that required by the contracts”).

\textsuperscript{327} See, e.g., Canteen Corp. v. Former Foods, Inc., 606 N.E.2d 174, 183 (Ill. App. Ct. 1992) (holding that the promisee’s suspension of performance was not justified, notwithstanding the promisee’s reasonable insecurity, because “Section 12 of the contract substituted the requirement of a 30-day cure period for the Code provision that would have allowed plaintiff to suspend performance and await adequate assurances”), \textit{rev’d in part, aff’d in part}, 610 N.E.2d 1260 (Ill. 1993).

\textsuperscript{328} Hornell Brewing Co. v. Spyr, 664 N.Y.S.2d 698, 702 (N.Y. Sup. Ct. 1997).

\textsuperscript{329} U.C.C. § 2-610 cmt. I (1999).
As is true at common law, a promise who repudiates a contract governed by Article 2 may retract or withdraw its repudiation prior to the date its performance is due, as long as the promisee has not cancelled the contract, materially changed her position, brought suit upon the repudiation, or otherwise indicated that she considers the repudiation to be final. A promisor who successfully retracts its prior repudiation reinstates its contractual rights and obligations, "with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation." The promisor may retract its repudiation "by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform." A promisor's right to retract,


332. U.C.C. § 2-611(3); see e.g., Al Ferro Commodities, 728 F. Supp. at 1164.

and the manner in which it must accomplish the retraction, is subject to
the promisee’s earlier demand for adequate assurance of performance. 334

Sections 2-609, -610, and -611 (and their state-by-state counterparts)
alloy only to contracts for the sale of goods. 335 Nonetheless, a number
of courts have applied the Code’s anticipatory repudiation
provisions—and, in particular, Section 2-609 and the concept of
adequate assurance of performance—by analogy to contracts not
involving the sale of goods. 336 Thus, the Code’s anticipatory repudiation
provisions have influenced non-Code common law. A primary example
of that influence—the incorporation of an adequate assurance of
performance provision in the Restatement (Second) of Contracts—will be
discussed presently. The Code’s anticipatory repudiation provisions
have also influenced the evolving law of contracts for the international
sale of goods, as will be discussed in Part V.

IV. STANDARDIZATION OF THE DOCTRINE: ANTICIPATORY
REPU DIATION UNDER THE RESTATEMENT (SECOND) OF CONTRACTS

The provisions of the Restatement (Second) of Contracts dealing with
anticipatory repudiation 337 are built upon the foundations laid by the
first Restatement of Contracts 338 and by Article 2 of the Uniform
Commercial Code, 339 as well as the vast body of case law supporting
the doctrine that had developed in this country by 1980. 340

334. See U.C.C. § 2-611(2) ("Retraction . . . must include any assurance justifiably demanded under the
provisions of this Article (Section 2-609). ").
335. See U.C.C. § 2-102.
336. See, e.g., C.L. Maddox, Inc. v. Coalfield Servs., Inc., 51 F.3d 76, 80-81 (7th Cir. 1995)
demolition and reinstallation of mining facility); Argonaut Partnership, 1996 WL 61733, at *6-7 (sale of
corporate debt instruments); Conference Ctr. Ltd. v. TRC-The Research Corp. of New England, 455 A.2d
857, 863-64 (Conn. 1983) (constructive eviction); Romig v. deVallance, 637 P.2d 1147, 1152-53 (Haw.
Ct. App. 1981) (sale of real property); Lo Re v. Tel-Air Communications, Inc., 490 A.2d 344, 350-51 (N.J.
Power Corp., 705 N.E.2d 656, 659-60 (N.Y. 1998) (sale of electricity). This can work both ways. See, e.g.,
Banco Int'l, Inc. v. Goody's Family Clothing, 54 F. Supp. 2d 765, 774 (E.D. Tenn. 1999) (referring to
Section 250 of the Restatement (Second) of Contracts, see infra text accompanying notes 346-47, for guidance in
resolving a dispute governed by Code § 2-610).
337. RESTATEMENT (SECOND), supra note 1, §§ 250-57.
338. RESTATEMENT, supra note 214, §§ 318-24; see supra notes 248-69 and accompanying text.
339. U.C.C. §§ 2-609 to 2-611 (1999); see supra Part III.
340. In addition to those jurisdictions identified in supra notes 142-56 and 189-211 and
accompanying text as having recognized the common law doctrine of anticipatory repudiation by the early
1960s, Alaska, see Holiday Inns of Am., Inc. v. Peck, 520 P.2d 87, 89 n.3 (Alaska 1974), Hawaii, see Golf
carts, Inc. v. Mid-Pacific Country Club, 493 P.2d 1358, 1340 (Haw. 1972), Idaho, see Industrial Leasing
Corp. v. Thomason, 532 P.2d 916, 920 (Idaho 1974), Montana, see STC, Inc. v. City of Billings, 543 P.2d
374, 377 (Mont. 1975), New Hampshire, see Hoyt v. Horst, 201 A.2d 118, 124 (N.H. 1964), and Wyoming,
see Connor v. Boggett, 596 P.2d 683, 688 (Wyo. 1979), had joined the club by the time the Restatement
The Restatement (Second) provides that an obligor’s\textsuperscript{341} repudiation prior to the time his performance is due, and before he has received all of the agreed exchange for his performance, (1) discharges the obligee’s remaining duties to perform,\textsuperscript{342} and (2) entitles the non-repudiating obligee to immediately sue the repudiating obligor for breach.\textsuperscript{343} Echoing Article 2’s provision that the obligee may pursue any of her remedies for the obligor’s repudiation despite “notif[y]ing] the repudiating party that [s]he would await the latter’s performance and urg[ing] retraction,”\textsuperscript{344} the Restatement (Second) provides: “The injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation.”\textsuperscript{345}

An obligor repudiates his duty, in turn, by (1) making a statement to the obligee “indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach,”\textsuperscript{346} (2) committing “a voluntary affirmative act which renders the obligor

\textsuperscript{341} The Restatement (Second) uses the terms “obligor” and “obligee” in lieu of promisor and promisee, respectively. In order to avoid confusion between text and quoted material, this Part will adhere to the Restatement (Second)’s nomenclature.

\textsuperscript{342} RESTATEMENT (SECOND), supra note 1, § 253(2); see, e.g., Acme Inv., Inc. v. Southwest Tracor, Inc., 105 F.3d 412, 415-16 (8th Cir. 1997); Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp., 693 F.2d 748, 760 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983); Far West Fed. Bank, S.B. v. Office of Thrift Supervision, 119 F.3d 1358, 1365 (9th Cir. 1997); Down E. Energy Corp. v. RMR, Inc., 677 A.2d 1070, 1073 (Me. 1996); Gaglia v. Kirchner, 721 A.2d 1028, 1031-32 (N.J. Super. Ct. App. Div.) (“A non-breaching party to a contract faced with the other party's anticipatory breach . . . is entitled to treat the other party's repudiation as terminating the contract and relieving him of any further obligation of performance.”), cert. denied, 733 A.2d 496 (N.J. 1999); Millis Constr. Co. v. Fairfield Sapphire Valley, Inc., 358 S.E.2d 566, 569 (N.C. Ct. App. 1987).

\textsuperscript{343} RESTATEMENT (SECOND), supra note 1, § 253(1); see, e.g., Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 163 F.3d 153, 157 (2d Cir. 1998); Acme Investments, 105 F.3d at 415-16; Cedar Point Apartments, 693 F.2d at 760; Far West Federal Bank, 119 F.3d at 1365; Down East Energy, 677 A.2d at 1073; Millis Construction, 358 S.E.2d at 569.

\textsuperscript{344} U.C.C. § 2-610(b) (1999); supra note 303 and accompanying text.

\textsuperscript{345} RESTATEMENT (SECOND), supra note 1, § 257; see, e.g., Cedar Point Apartments, 693 F.2d at 760; Dow Chem. Co. v. United States, 32 Fed. Cl. 11, 18 (1994); Mindel v. Image Point Prods., Inc., 725 F. Supp. 189, 194 (S.D.N.Y. 1989); Gaglia, 721 A.2d at 1031 (observing that the non-breaching party “may choose to attempt to persuade the breaching party to retract his repudiation and to perform,” but “is not required to do so”).


While an obligor’s “mere expression of doubt as to his willingness or ability to perform is not enough to constitute a repudiation,” language that is “sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform” is sufficient, as is a statement “of intention not to perform except on conditions which go beyond the contract” rises to the same level. RESTATEMENT (SECOND), supra note 1, § 250 cmt. b. See generally Burlington Landmark Associates, 27 F. Supp. 2d at 99.
unable or apparently unable to perform,\textsuperscript{347} or (3) failing to give adequate assurance of performance when properly asked to do so by the obligee.\textsuperscript{348}

Echoing Section 2-609(1) of the Uniform Commercial Code,\textsuperscript{349} the \textit{Restatement (Second)} entitles an obligee who has “reasonable grounds . . . to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach” to demand that the obligor give “adequate assurance of due performance” before the obligee is required to perform any act “for which he has not already received the agreed exchange.”\textsuperscript{350} For example, if

the obligor’s insolvency gives the obligee reasonable grounds to believe that the obligor will commit a breach under the rule stated in § 251, the obligee may suspend any performance for which he has not already received the agreed exchange until he receives assurance in the form of performance itself, an offer of performance, or adequate security.\textsuperscript{351}

The \textit{Restatement (Second)} excuses a repudiating party from paying damages if, after his repudiation, it appears that (1) “there would have been a total failure by the injured party to perform his return promise,”\textsuperscript{352} or (2) the duty that the obligor repudiated “would have been discharged by impracticability or frustration” before the time that


\textsuperscript{348} See \textit{Restatement (Second)}, supra note 1, § 251(2); see, e.g., Nashville Lodging Co. v. RTC, 59 F.3d 236, 241-42 (D.C. Cir. 1995); Burke v. Athens, 703 N.E.2d 804, 807 (Ohio Ct. App. 1997); Bizer, 649 P.2d at 70; see also, e.g., Harlan v. Hardaway, 796 S.W.2d 953, 958 (Tenn. Ct. App. 1990) (dicta).

\textsuperscript{349} See supra note 306 and accompanying text.

\textsuperscript{350} \textit{Restatement (Second)}, supra note 1, § 251(1); see, e.g., Ticali v. Roman Catholic Diocese of Brooklyn, 41 F. Supp. 2d 249, 258 (E.D.N.Y.), aff’d, 201 F.3d 432 (2d Cir. 1999); Magnet Resources, Inc. v. Summit MRI, Inc., 723 A.2d 976, 982 (N.J. Super. Ct. App. Div. 1998); Burke, 703 N.E.2d at 807; see also, e.g., L.E. Spitzer Co. v. Barron, 581 P.2d 213, 216-17 (Alaska 1978) (applying draft version of § 251). See generally Garvin, supra note 102; Taylor, supra note 297; Crespi, supra note 102.

\textsuperscript{351} \textit{Restatement (Second)}, supra note 1, § 252(1); see, e.g., Nashville Lodging, 59 F.3d at 242. See generally \textit{Restatement (Second)}, supra note 1, § 252(2) ("A person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.").

\textsuperscript{352} \textit{Restatement (Second)}, supra note 1, § 254(1); see, e.g., Record Club of Am., Inc. v. United Artists Records, Inc., 890 F.2d 1264, 1275 (2d Cir. 1989); Gibbs, Nathaniel (Canada) Ltd. v. International Multifoods Corp., 804 F.2d 450, 452-53 (8th Cir. 1986); Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska, 685 P.2d 1211, 1216-17 (Alaska 1984); Summit Blvd. Animal Clinic v. Lemon Tree Plaza, 641 So. 2d 437, 438 (Fla. Dist. Ct. App. 1994); Ingalls v. Keene, 496 A.2d 1051, 1052 (Me. 1985).
the obligor’s performance would have been due,\textsuperscript{353} or (3) the obligee ratified the contract following the obligor’s repudiation.\textsuperscript{354}

In \textit{Estate of Reaves v. Owen},\textsuperscript{355} for example, Owen and Reaves, following the termination of their intimate relationship, entered into a settlement agreement whereby, \textit{inter alia}, Reaves (and his heirs) would pay Owen $59,500 over the course of twelve months and Owen would return various items of personal property to Reaves. Despite Owen’s failure to return all of the items, Reaves continued to make the scheduled monthly payments. Upon his death, Reaves’s heirs attempted to avoid the obligation to continue paying Owen based on Owen’s failure to return the personalty.\textsuperscript{356} The court held that Reaves, fully aware of Owen’s failure to fully perform his obligations, had nonetheless ratified the contract; and, therefore, Reaves’s heirs were bound to make the remaining payments.\textsuperscript{357}

The \textit{Restatement (Second)} also generally excuses a repudiating party from paying damages if some condition precedent to his obligation to perform fails to occur prior to the date its performance is due,\textsuperscript{358} unless the obligor’s repudiation “contributes materially” to the non-occurrence of the condition.\textsuperscript{359} In essence, the repudiating obligor cannot excuse his own repudiation by claiming the non-occurrence of a condition when his repudiation caused the non-occurrence.\textsuperscript{360}

As is true under Article 2,\textsuperscript{361} an obligor who repudiates a contract by any of the means identified above\textsuperscript{362} may retract or nullify his repudiation prior to the date his performance is due, as long as the obligee receives notice of the retraction and has not materially changed

\begin{thebibliography}{9}
\bibitem{footnote2} \textit{See}, \textit{e.g.}, \textit{Williamson v. Metzger}, 379 So. 2d 1227, 1231 (Miss. 1980).
\bibitem{footnote3} 744 So. 2d 799 (Miss. Ct. App. 1999).
\bibitem{footnote4} \textit{See id.} at 800-01.
\bibitem{footnote5} \textit{See id.} at 802-03 ("[T]he testimony ... coupled with the documentary evidence of the continued payments demonstrated an election to affirm the contract by Reaves even though Owen did not return his personal items. By continuing payments in light of the purported breach, Reaves waived his right to assert breach as a defense to the contract.").
\bibitem{footnote6} \textit{Restatement (Second)}, supra note 1, §§ 237 cmt. a & 255 cmt. a.
\bibitem{footnote8} Were the law otherwise, it would encourage repudiators to act with the same “chutzpah” as the proverbial young man who kills both of his parents and then begs the mercy of the court because he is an orphan. \textit{See}, \textit{e.g.}, \textit{David Luban, Considered Ignorance}, 87 GEO. L.J. 957, 970 (1999).
\bibitem{footnote9} \textit{See supra} notes 331-33 and accompanying text.
\bibitem{footnote10} \textit{See supra} notes 346-48 and accompanying text.
\end{thebibliography}
her position or otherwise indicated that she considers the repudiation to be final. Additionally, if the repudiation was triggered by something other than a statement of the obligor, the repudiation will be nullified if, before the obligee materially changed her position or otherwise indicated that she considers the repudiation to be final, the obligee knows that the event or circumstance triggering the repudiation no longer exists. The obligor may retract or nullify his repudiation by words or by conduct “adequate to convey the idea of retraction to the injured party.”

The Restatement (Second)’s most significant contribution to the doctrine of anticipatory repudiation may well be its extension of the right to demand adequate assurances to all contracts—not merely those governed by the Uniform Commercial Code. It also serves a support function to the Code’s anticipatory repudiation provisions. Given the close parallels between substance of the Code’s provisions and the corresponding provisions in the Restatement (Second), to the extent that the Restatement (Second) comments on, explains, or fills gaps in those provisions, courts can turn to the Restatement (Second) to better understand and apply the Code.

V. “INTERNATIONALIZATION” OF THE DOCTRINE: ANTICIPATORY REPUDIATION OF CONTRACTS GOVERNED BY THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The most recent major step in the development of the doctrine of anticipatory repudiation has been in the area of contracts for the international sale of goods.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to contracts for the sale of goods between


365. RESTATEMENT (SECOND), supra note 1, § 256 cmt. b.

366. See, e.g., Banco Int’l Inc. v. Goody’s Family Clothing, 54 F. Supp. 2d 765, 774 (E.D. Tenn. 1999); see also supra note 299; cf. Thomas M. Campbell, supra note 102 (advocating a “uniform rule” of adequate assurances, combining the best elements of UCC § 2-609 and Restatement (Second) § 251).
parties whose places of business or habitual residences are in two (or more) different countries, each of which has acceded, accepted; approved, ratified, or succeeded to the CISG.\textsuperscript{367} As of September 1, 2000, 57 countries, including the United States, had acceded, accepted, approved, ratified, or succeeded to the CISG.\textsuperscript{368}

Because the CISG is a treaty of the United States, it is the law of every United States jurisdiction.\textsuperscript{369} To the extent that the CISG

\begin{footnotes}

\item[368] On the other hand, the CISG does not apply if the foreign buyer or seller’s place of business or habitual residence is in a country that has not ratified the CISG. See CISG arts. 1(1)(a) & 10(b). Nor does the CISG apply if, even though the foreign buyer or seller’s place of business or habitual residence is in a country that has ratified the CISG, the domestic buyer or seller neither knew nor had reason to know that it was dealing with a party whose place of business or habitual residence was in a foreign country. See id. art. 1(2). Notice that the key to the CISG’s applicability is the place of business or habitual residence of a party, rather than the party’s nationality, legal residence, or place of incorporation. If a party has one or more place(s) of business, the location of the place of business with the “closest relationship to the contract and its performance,” determines whether the CISG applies. Id. art. 10(a). If a party has no place of business, then the location of its habitual residence controls whether the CISG applies. Id. art. 10(b).

Even if the buyer’s and seller’s place(s) of business or habitual residence(s) are in different countries that both have ratified the CISG, the CISG does not apply to contracts for goods being purchased for personal, family, or household use if the seller neither knew nor had reason to know at any time prior to or at the conclusion of the contract how the buyer intended to use the goods. See id. 2(a). Nor does the CISG apply to contracts that predominantly involve the sale of services, id. art. 3(2), or contracts involving the sale of real property, id. art. 1(1).

Parties to a contract that would otherwise be governed by the CISG may contractually agree not to be governed by it in part or in whole, see id. art. 6, subject to certain limitations, see id. art. 12.

368. The CISG took effect in the United States and ten other countries (Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, Yugoslavia, and Zambia) on January 1, 1988. See MAGRAW & KATHREIN, supra note 367, at 4, 67-69. As of September 1, 2000, the CISG has also been ratified by: Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, Cuba, Czech Republic, Denmark, Ecuador, Estonia, Finland, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Uganda, Ukraine, Uruguay, and Uzbekistan. See International Trade Law Branch, United Nations Office of Legal Affairs, Status of Conventions and Model Laws, Aug. 13, 2000, at 6-9. Croatia is also a party (denominated a “Contracting State”) to the CISG, by virtue of succeeding one of the original eleven parties—the former Yugoslavia. See id. at 9 n.8. Ghana and Venezuela have signed the CISG, but have not ratified it, see id. at 7-8; and, therefore, are not Contracting States. The United Kingdom and Japan are particularly notable non-parties to the CISG.

The CISG has been incorporated into Israeli law by the Sales Law, 5760-1999, which took effect on February 5, 1999. See WEST GROUP, SELECTED COMMERCIAL STATUTES - 2000 EDITION, at 1638. Israel will not become a Contracting State until the first of the month following the expiration of twelve months after the date of the deposit with the UN of its instrument of acceptance. See CISG art. 99(2).

369. See U.S. CONST. art. VI, cl. 2; Hauenstein v. Lynham, 100 U.S. 483, 490 (1879) ("[T]he Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution."). See generally Richard E. Speidel, The Revision of UCC Article 2, Sales in Light of
conflicts with the Uniform Commercial Code or state common law, the CISG controls. 370

Articles 71 and 72 of the CISG collectively establish a three-tiered scheme for a promisee faced with a promisor's prospective repudiation. 371 First, if it becomes apparent to the promisee 372 that the promisor will not perform a substantial part of his obligations, the promisee may suspend her own performance, 373 provided that the

---


In addition to the CISG, there exists another source of law pertaining to contracts for the international sale of goods—the UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles" or, more simply, the "Principles"). UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter UNIDROIT PRINCIPLES]. For an excellent overview of the Principles, see Joseph M. Perillo, UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review, 63 FORDHAM L. REV. 281 (1994).

The UNIDROIT Principles serve somewhat the same function with regard to international contract law as the Restatement (Second) serves with regard to domestic contract law. See id. at 283 (observing that the Principles are "in the nature of a restatement of the commercial contract law of the world"). See generally MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994). The Principles are not binding, merely persuasive; nonetheless, much like the Restatement (Second), the Principles are a force to be reckoned with by courts and counsel confronted with issues not clearly and unequivocally resolved by resort to the text of the CISG.

371. Article 73 provides a special scheme for anticipatory repudiation in the context of international installment sales contracts. See CISG art. 73. As was true with the prior discussion of anticipatory repudiation under the Uniform Commercial Code, see supra note 296, I have elected not to discuss anticipatory repudiation of installment contracts under the CISG here. For those who are interested, see, e.g., JOHN O. HONNOULD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 441-44 (3d ed. 1999); Hans G. Leser, Anticipatory Breach and Installment Contracts, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 542-551 (Peter Schlechtriem ed. & Geoffrey Thomas trans., 2d ed. 1998); C.M. Bianca & M.J. Bonell, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 531-37 (1987); Harry M. Flechtner, Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C., 8 J. L. & COM. 53, 88-92 (1988).

372. Circumstances "that make it apparent that the other party will not perform need not establish a certainty of non-performance." HONNOULD, supra note 371, at 430. Nonetheless, "subjective fear will not justify suspension; there must be objective grounds showing substantial probability of non-performance." Id. See generally id. at 427-36 (discussing the scope and effect of Article 71). Moreover,

[i]f the reasons which allow a party to suspend performance of his obligations were known to him at the time the contract was concluded, that party could not refer to them to suspend performance. It is, however, not a condition that those reasons emerge only after the conclusion of the contract. It will suffice if they become apparent only after the conclusion of the contract.


373. Article 71 provides, specifically, that a promisee
promisee (1) immediately notifies the promisor after the fact that the promisee has suspended her performance, and (2) promptly resumes performance if and when the promisor provides adequate assurances that he will, in fact, substantially perform his contractual obligations.

may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or
(b) his conduct in preparing to perform or in performing the contract.

CISG art. 71(1). A promisee who justifiably suspends its performance is not in breach of the contract the performance of which is suspended. See ENDERLEIN & MASKOW, supra note 372, at 284.

374. See CISG art. 71(3).

375. For purposes of both Articles 71 and 72, the Secretariat's Commentary describes an "adequate assurance" of performance as an act or statement that "will give reasonable security to the first party either that the other party will perform in fact or that the first party will be compensated for all his losses from going forward with his own performance." Secretariat's Commentary on the Draft Convention on Contracts for the International Sale of Goods, March 14, 1979, U.N. Doc. A/CONF.97/5, art. 71 cmt. 13, reprinted in UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS—OFFICIAL RECORDS 14, 53 (1981).

Unlike the "official comments" that accompany the Uniform Commercial Code and the first and second Restatements, the comments on the CISG are not contained in the same document as the text of the CISG. To add to the confusion, the Secretariat's comments correspond to draft article numbers that are not the same as the numbers assigned in the final version of the Convention—specifically, draft articles 63 and 64 correspond with final Articles 71 and 72. For simplicity's sake, all references to the Secretariat's comments will be denoted "CISG art. x cmt. y"—in the same manner as comments to the UCC or Restatement are cited—with "art. x" representing the article number in the final version of the Convention, rather than the draft article number stated in the Secretariat's comments. The reader should understand, however, that this is a simplified form of citation.

According to Professor Honnold:

Reassuring words alone cannot provide "adequate assurance" of performance: under paragraph (3) a party notified of suspension must provide evidence of concrete facts or action that removes the threat that he "will not perform a substantial part of his obligation" (Art. 71(1)).

Threats of non-performance may develop under a wide variety of circumstances; the range of remedial steps can only be suggested. For example, where a buyer has suspended payment of his current obligations adequate assurance of performance may, in some circumstances, be provided by proof that the buyer has reestablished current payments; in other circumstances "adequate assurance" may call for the issuance by a bank of an irrevocable letter of credit. Threats to continued performance by the seller resulting from a strike or the loss of a source of necessary materials may be removed by showing that the strike has been settled or that a new source of materials has been obtained. Developing an adequate solution to such problems calls for good faith consultation between the parties.

.... An assurance under Article 71(3) should be "adequate" even if it involves an insubstantial nonconformity in performance. Of course, a party in breach must compensate the other party for damages (Art. 74); the likelihood of even minor damages may well call for adequate assurance for the payment of the damages.

HONNOLD, supra note 371, at 434-35 (footnote and citations omitted).

376. See CISG art. 71(3). Once a party properly suspends performance under Article 71, its duty to perform "remains suspended until either (1) the other party performs his obligations, (2) adequate assurances are given, (3) the [non-repudiating] party declares the contract avoided, or (4) the period of limitation applicable to the contract [four years] has expired." Id. art. 71 cmt. 14.
Second, if it becomes clear to the promisee\textsuperscript{377} that the promisor will fundamentally breach his obligations\textsuperscript{378} the promisee may avoid her own performance,\textsuperscript{379} provided that the promisee, if time allows, notifies the promisor before the fact that the promisee intends to forego her

\begin{footnotesize}
\begin{enumerate}
\item[377.] The prospect that the other party will commit a fundamental breach prior to the date its performance is due may be made sufficiently clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance. The failure by a party to give adequate assurances that he will perform when properly requested to do so under [Article 71(3)] may [make] it "clear" that he will commit a fundamental breach. \textit{Id.} art. 72 cmt. 2.

The UNIDROIT Principles permit a party to "terminate the contract" if, prior to the date the other party's performance is due, "it is clear" to the party empowered to terminate "that there will be a fundamental non-performance" by the other party. UNIDROIT PRINCIPLES art. 7.3.3. Article 7.3.3 requires "that it be clear that there will be a non-performance; a suspicion, even a well-founded one, is not sufficient." \textit{Id.} art. 7.3.3 cmt. While a party's declaration that it will not perform when due will satisfy 7.3.3—and, hence, Article 71(3) of the CISG, see supra notes 372-76 and accompanying text—such a declaration is not required—fundamental non-performance may be indicated by the circumstances. See UNIDROIT PRINCIPLES art. 7.3.3 cmt. For example:

A promises to deliver oil to B by M/S Paul in Montreal on 3 February. On 25 January M/S Paul is still 2000 kilometres from Montreal. At the speed it is making it will not arrive in Montreal on 3 February, but at the earliest on 8 February. As time is of the essence, a substantial delay is to be expected, and B may terminate the contract before 3 February. \textit{Id.} art. 7.3.3 illus.

Professor Honnold adds:

What circumstances make it "clear" that a party "will commit a fundamental breach of contract?" \textit{[Article 72(3)]} shows that a party's declaration "that he will not perform his obligations" empowers the aggrieved party to declare the contract avoided, even though such a declaration does not make it absolutely "clear" that the repudiating party will not change his mind and perform by the due date. . . . Actions may be the equivalent to a repudiation—e.g., the wrongful resale to a third person of the goods that the seller had contracted to deliver to the buyer, or the sale of the manufacturing plant at which the seller had agreed to produce goods for the buyer.\textsuperscript{116}

HONNOLD, supra note 371, at 438 (footnote omitted). See generally \textit{id.} at 437-40 (discussing the scope and effect of Article 72).

\item[378.] A breach of contract is "fundamental" if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.\textsuperscript{117}

CISG art. 25.


\item[379.] See CISG art. 72(1).
\end{enumerate}
\end{footnotesize}
performance, "in order to permit [the promisor] to provide adequate assurance of his performance."^380^ 

Third, if it becomes clear to the promisee that the promisor will \textit{fundamentally breach} his obligations because the promisor "has declared that he will not perform his obligations," the promisee may \textit{avoid} her own performance \textit{without prior notice}^381^ — and, hence, without the obligation to resume performance if and when the promisor provides adequate assurances.

Professor Flechtner advises that

suspension under Article 71 requires less certainty concerning a future breach than does avoidance under Article 72. Article 72(1) permits avoidance only when "it is clear" that the other party will breach; under Article 71, the threatened breach need merely be "apparent" in order to justify suspension. It also appears that, compared to the requirements for avoidance under Article 72, the consequences of the threatened breach need not be as serious to trigger suspension under Article 71. The standard in Article 71 is non-performance of "a substantial part" of a party's obligations. Article 72 requires a threat of "a fundamental breach of contract." The distinction apparently drawn here between substantial non-performance and fundamental breach lends support to those who have argued that the definition of fundamental breach demands more than a "mere" material breach.

The distinction also creates an ambiguity in the operation of Article 71. Suppose that a party has suspended performance because the other side will apparently fail to perform a substantial but not "fundamental" part of its obligations. If adequate assurances are not forthcoming, can the aggrieved party continue to suspend its performance indefinitely? The answer should be no. . . . Permitting indefinite suspension where the threatened breach is not fundamental, therefore, would undermine Article 72, which permits avoidance only where it is clear that a fundamental breach will occur. Two solutions are possible: (1) Article 71 could be construed to require that the suspending party either avoid the contract or end its suspension within a reasonable time after demanding adequate assurances; (2) the standards for the seriousness of the threatened breach in Articles 71 and 72 could be treated as equivalent. Neither solution, however, is supported by the text of the Convention.^382^

Professor Honnold cautions that, unless the promisor has declared that he will not perform (the third alternative discussed above), the promisee's

---

380. \textit{Id.} art. 72(2).
381. \textit{Id.} art. 72(1) & (3) (emphasis added).
382. Flechtner, supra note 371, at 94-95 (footnotes omitted).
attempt to avoid the contract in advance of the time for performance may overstep the limits set by Article 72. In this event, [the promisee] has a duty to accept due performance by [the promisor]. Moreover, [the promisee]'s wrongful declaration of avoidance may constitute a repudiation giving [the promisor] the right to avoid the contract under Article 72(1).  

*Magellan International Corp. v. Salzgitter Handel GmbH* is the first reported American case applying the CISG's anticipatory repudiation provisions. *Magellan*, an American distributor of steel products, attempted to negotiate an agreement whereby Salzgitter, a German steel trader, would purchase steel bars from a Ukrainian steel producer, DSS, and resell them to Magellan. Prior to the date by which Salzgitter was to perform, Salzgitter demanded that Magellan amend a letter of credit Magellan had issued in Salzgitter's favor to permit Salzgitter to demand payment from the letter of credit without bills of lading or else Salzgitter would "no longer feel obligated" to perform and would sell the materials it had undertaken to purchase from DSS on Magellan's behalf "elsewhere." Believing Salzgitter to be in breach, Magellan sought to cancel the letter of credit. Salzgitter returned the letter of credit, and attempted to sell the manufactured steel to Magellan's customers in the United States.

Magellan sued Salzgitter for, *inter alia*, anticipatory repudiation of Salzgitter's contract to resell to Magellan the steel bars purchased from DSS. On Salzgitter's motion to dismiss, the trial court found that Magellan had stated a claim for anticipatory repudiation under Article 72(1) because the CISG only required Magellan to

allege (1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental. Here Magellan has pleaded that Salzgitter's March 29 letter indicated its pre-performance intention not to perform the contract, coupled with Magellan's allegation that the bill of lading requirement was an essential part of the parties' bargain. That being the case, Salzgitter's [sic] insistence upon an amendment of that requirement would indeed be a fundamental breach.

There are several significant differences between the CISG's approach to anticipatory repudiation and that of the Uniform

---

384. 76 F. Supp. 2d 919 (N.D. Ill. 1999).
385. *Id.* at 921.
386. *See id.* at 921-22.
387. *Id.* at 925-26.
Commercial Code, the Restatement (Second), and American common law. Foremost, while the UCC\(^\text{388}\) Restatement (Second)\(^\text{389}\), and American common law (outside of Massachusetts)\(^\text{390}\) authorize a promisee whose promisor has repudiated to immediately bring an action for damages, the CISG only authorizes the promisee to suspend its own performance\(^\text{391}\) to stop goods in transit\(^\text{392}\) or, under more restrictive circumstances, to declare the contract “avoided.”\(^\text{393}\)

Second, the CISG circumscribes the sources of a promisee’s insecurity, providing that it may only suspend its performance if the promisor’s apparent inability to perform is caused by (1) a serious deficiency in the promisor’s ability to perform, (2) a serious deficiency in the promisor’s creditworthiness, or (3) the promisor’s conduct in preparing to perform or in performing the contract.\(^\text{394}\) By contrast, the UCC authorizes a promisee to suspend its own performance on the basis of “reasonable grounds for insecurity,”\(^\text{395}\) and the Restatement (Second) authorizes suspension when “reasonable grounds arise to believe that the obligor will commit a breach by non-performance.”\(^\text{396}\) The key under both the Code and the Restatement (Second) is the probability that the promisor will not perform, not the inability of the promisor to perform.\(^\text{397}\)

---

\(^{388}\) U.C.C. § 2-610(b) (1999).

\(^{389}\) Restatement (Second), supra note 1, § 253(1).

\(^{390}\) See supra note 8 and 162.

\(^{391}\) See CISG art. 71(1).

\(^{392}\) See id. art. 71(2).

\(^{393}\) See id. art. 72(1).

“Avoidance” under the CISG is not the same thing as “rescission” under American common law, the Restatement (Second), or the U.C.C. A promisee who avoids a contract under the CISG due to the promisor’s fundamental breach is entitled, upon avoidance, to seek contract or restitutionary damages, see CISG arts. 75, 76 & 81, subject to foreseeability, see id. art. 74, and the promisee’s duty to mitigate, see id. art. 77. Specific performance, while recognized by the CISG subject to the requirement that it be available to remedy the same wrong under domestic law, see id. art. 28, does not seem to be available to a promisee avoiding a contract under Article 72, see id.

\(^{394}\) See id. art. 71(1).


\(^{396}\) See Restatement (Second), supra note 1, § 251(1).

\(^{397}\) For example:

[Suppose a seller suggests (but does not openly declare) that it may simply refuse to deliver the goods. Under U.C.C. section 2-609(1), the buyer clearly could suspend performance. Under Article 71(1) of the Convention, however, the buyer could suspend only if the seller’s statement indicate an inability to perform or constitute “conduct in preparing to perform or in performing.” The latter phrase may refer only to conduct directly related to contract performance (e.g., manufacturing the goods or preparing them for shipment). If the grounds for suspensions under the Convention are too limited to reach this situation, the buyer must determine whether the seller’s ambiguous statement is enough to satisfy the standards for avoidance under Article 72—i.e., whether it constitutes a “clear” threat of a fundamental breach. This is the kind of dilemma that U.C.C. section 2-609(1) avoids by using the “reasonable grounds for insecurity” formulation.

Flecher, supra note 371, at 96 (footnotes omitted).
Third, the CISG mandates that a promisee suspending performance under Article 71 give immediate notice of the suspension to the promisor. Likewise, a promisee declaring a contract avoided under Article 72 must, time permitting, give reasonable notice to the promisor, unless a prior declaration by the promisor makes it clear that such notice would be futile. Neither the UCC, the Restatement (Second), nor American common law require the promisee to give notice prior to suspending its own performance or bringing suit on the repudiation.

Fourth, if, after receiving the required notice, a promisor gives the promisee adequate assurance that the promisor will perform, then the CISG requires the promisee to continue with its performance (and give the promisor the opportunity to render its performance). Neither the UCC, the Restatement (Second), nor American common law require a promisee whose promisor has repudiated to accept an unsolicited

398. See CISG art. 71(3). The CISG tries to compensate for this requirement by permitting a party who has suspended performance who suffers damages due to the repudiating party's failure to give adequate assurances to recover any damages it may have suffered even if the party suspending performance does not ultimately rescind the contract. See id. art. 71 cmt. 16.

399. See id. art. 72(2).

400. See id. art. 72(3); Flechtner, supra note 371, at 94 n. 191 ("Article 72 of the Convention dispenses with a demand for adequate assurances if the other side has declared that it will not perform. Similarly, U.C.C. Article 2 does not require use of the adequate assurances procedure where there has been a clear anticipatory repudiation—i.e., "an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." (citations omitted)).

401. See generally Flechtner, supra note 371, at 93.

Comment 4 to Section 2-610 of the Code suggests that the promisee's ability to vindicate her rights by any of the means provided in Section 2-610 may be tempered by a good faith duty to give prior notice to the promisor. See U.C.C. § 2-610 cmt. 4 (1999). However, the scope of this good faith notice requirement is unclear. Comment 4 has sparked little academic or judicial consideration. What little attention it has drawn generally relates not to the question of prior notice; rather, courts and commentators have addressed the good faith limitations imposed on an aggrieved promisee's ability to "for a commercially reasonable time await performance by the repudiating party." Id. § 2-610(a); see, e.g., Olofson v. Coomer, 296 N.E.2d 871, 874-75 (Ill. App. Ct. 1973). The case most on point is National Fuel Gas Distribution Corp. v. TGX Corp., No. 84-CV-1372E, 1992 WL 170819 (W.D.N.Y. July 10, 1992), in which a natural gas purchaser (National Fuel) sought a partial summary judgment declaring that its supplier (Paragon) had repudiated their Gas Purchase Agreement (GPA) in 1981 by failing to provide adequate assurances, entitling National Fuel to suspend its performance under, and eventually terminate, the GPA. See id. at *1. In response to Paragon's argument that National Fuel had waived it right to act on its purported repudiation because National Fuel had continued to accept shipments of gas under the GPA, the court found that Comment 4 qualifies the right to proceed at any time by adding that such is true only if the aggrieved party takes no positive action which in good faith requires notification to the other party. National Fuel took such positive action when it continued to perform under the GPA; therefore, it needed to supply some notification that it was reserving its rights to suspend performance because of the failure of Paragon to supply adequate assurance of performance.

Id. at *10.

402. See CISG art. 71(3).
assurance of performance; rather, an assurance of performance from
the promisor will only obligate the promisee to further perform if the
promisee asked for such assurance.

Finally, both the UCC\textsuperscript{403} and the Restatement (Second)\textsuperscript{404} treat a
promisor's failure to timely provide adequate assurance as a repudiation
entitling the promisee to immediately bring suit for damages. The
CISG, on the other hand, does not spell out the promisee's options if the
promisor refuses to provide adequate assurance.\textsuperscript{405}

VI. CONCLUSION

From its modest beginnings, the doctrine of anticipatory repudiation
has evolved into an integral part of American contract law. A party
whose contracting partner's words or deeds make it sufficiently clear
that she will not or cannot perform as and when expected need not
await the actual breach to settle accounts. Instead, the party may
immediately suspend his own performance and, except in cases
governed by the U.N. Convention on Contracts for the International
Sale of Goods or the common law of Massachusetts, immediately sue for
damages. In the alternative, the party may immediately suspend his
own performance and, even in cases governed by the U.N. Convention
on Contracts for the International Sale of Goods or the common law of
Massachusetts, demand that the contracting partner provide adequate
assurances that she will perform as and when expected. If the contract-
ing partner fails to provide adequate assurances within a reasonable

\textsuperscript{403} See U.C.C. § 2-609(4) (1999).

\textsuperscript{404} See Restatement (Second), supra note 1, § 251(2).

\textsuperscript{405} Commentators are not in accord about the consequences of this omission. Professor Honnold
argues that the obligor's failure to provide the requested assurance "make[s] it 'clear' that [he] will commit
a fundamental breach of contract—a ground for avoiding the contract under Article 72." HONNOLD, supra
note 371, at 436 (footnote omitted). Professor Ziegel, on the other hand, is not so sure.

I am not convinced that [Honnold] is right, given the fact that article 72(1) only comes into
play when "it is clear" that one of the parties will commit a fundamental breach of contract.

A party's failure to provide an assurance of performance is surely not unequivocal evidence
of his unwillingness to perform, particularly when he may question the validity of the
requesting party's feeling of insecurity to begin with.

Jacob S. Ziegel, The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives, in
INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS ch. 9, at 9-35 (Nina M. Galston & Hans Smit eds., 1984); see also
Flechtner, supra note 371, at 94-95 (as quoted in text accompanying supra note 382).

The UNIDROIT Principles appear to resolve the disagreement amongst Professors Honnold, Ziegel,
and Flechtner regarding the consequence of an obligor's failure to timely provide adequate assurance upon
a reasonable request by the obligee. Article 7.3.4 states that the obligor's failure to provide adequate
assurance authorizes the obligee to terminate the contract, see UNIDROIT PRINCIPLES art. 7.3.4—or,
using the language of Article 72, to avoid it, see CISG art. 72. The Principles appear to come down on the
side of Professor Honnold.
time, the party may then more confidently pursue his legal remedies. In any case, the nonbreaching party is excused from performing any conditions and from making necessary preparations to perform his contractual duties until the contracting partner (again) manifest her intent and ability to perform.

As this doctrine has evolved in the United States, each successive stage has contributed to its present contours. The doctrine as we now know it was "born" in the landmark 1853 case of Hochster v. De la Tour, but the processes of fertilization, gestation, and labor took more than seventy years. During the latter half of the Nineteenth Century, a number of American jurisdictions embraced the doctrine, a few rejected it, and academic commentators first recognized its existence. In the course of doing so, the courts—both those who embraced the doctrine and those who rejected it—and the commentators who brought it to the attention of the academy, bench, and bar influenced its development as a legal doctrine and its application to practical disputes.

The watershed period for the doctrine in this country was between 1900—when the United States Supreme Court first applied the doctrine to permit an aggrieved promisee to bring suit against a repudiating promisor prior to the date the promisor’s performance was due—and 1932—when the first Restatement of Contracts, authored by one of the doctrine’s leading critics, included anticipatory repudiation in the first "canon" of American contract law. During this period, the number of American jurisdictions recognizing the doctrine more than doubled, and all but two jurisdictions that had previously rejected the doctrine embraced it.

The doctrine was subsequently codified in Article 2 of the Uniform Commercial Code, and later extended to all manner of contracts—except, in most jurisdictions, unilateral contracts and those that had become unilateral by the time of the repudiation due to the nonbreaching party’s full performance—by its inclusion in the Restatement (Second) of Contracts. The contours sketched by Article 2 and the Restatement (Second) continue to define the doctrine today, except in cases involving contracts for the international sale of goods between a party in the United States and a party in another country that is a Contracting State to the CISG. While the anticipatory repudiation provisions of the CISG bear a strong resemblance to those in Article 2 and the Restatement (Second), there are important differences that those unfamiliar with the Convention may ignore at their own peril.