

1936

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Harold C. Havighurst

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Recommended Citation

Havighurst, Harold C., "Clauses in Sales Contracts Protecting the Seller against Impairment of the Buyer's Credit" (1936). *Minnesota Law Review*. 1421.

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CLAUSES IN SALES CONTRACTS PROTECTING THE SELLER AGAINST IMPAIRMENT OF THE BUYER'S CREDIT

By HAROLD C. HAVIGHURST*

THE extensive borderland between rule of law and implied intention, which supplies interstitial provisions for bargains into which parties enter, affords some protection to a seller who has agreed to extend credit to a buyer, when it subsequently appears that the latter has become insolvent prior to the delivery of the goods. It is clear that under such circumstances the seller may, even in the absence of any contract provision, refuse to deliver except for cash.¹ It may be observed that this right is not affected by the question whether title to the goods has passed to the buyer. The apparent implications of the title concept developed for allocating risks of another kind have been rendered impotent as far as this problem is concerned by the superimposed machinery of the seller's lien. Although title has passed, and by reason of the agreement to extend credit no lien exists, the insolvency of the buyer calls it into being.² An extension of this protection to the seller is found in the right to stop in transitu.³ The seller who exercises his privilege in any of the above ways is not limited to avoiding the contract. If it is a favorable one for him from the market standpoint, he may offer to deliver for cash, and if the buyer refuses to take the goods, the seller has his claim for damages.⁴

*Professor of Law, Northwestern University.

Valuable assistance in the preparation of this article has been rendered by S. G. Schoenbrod, J. D., Northwestern University, 1933, Member of the Chicago Bar.

¹Ex parte Chaimers, (1873) 8 Ch. App. 289, 42 L. J. Bcy. 37, 28 L. T. 325; Williston, Sales, 2d ed., 577 and cases there cited; Crummey v. Raudenbush, (1893) 55 Minn. 426, 56 N. W. 1113; Pratt v. S. Freeman & Sons Mfg. Co., (1902) 115 Wis. 698, 92 N. W. 368. Insolvency within the meaning of these rules is the inability to meet current obligations, not insolvency in the bankruptcy sense. H. Muehlstein & Co. v. Hickman, C. C. A. 8th Cir., (1928), 26 F. (2d) 40; Crummey v. Raudenbush, (1893) 55 Minn. 426, 56 N. W. 1113.

²Uniform Sales Act, sec. 54, Mason's 1927 Minn. Stat., sec. 8431. (1c).

³Uniform Sales Act, sec. 54, Mason's 1927 Minn. Stat., sec. 8431.

⁴Muehlstein & Co. v. Hickman, (C.C.A. 8th Cir. 1928) 26 F. (2d) 40; Patten's Appeal, (1863) 45 Pa. St. 151 (stoppage in transit); Ex parte Stapleton, (1879) 10 Ch. Div. 586. But to preserve his rights the seller

In some instances, if the contract is the common one for delivery in installments, the seller may also be relieved from the risk of the buyer's possible insolvency by refusing delivery on the ground that past shipments have not been paid for promptly. To be sure a seller to justify such action must show that the breach was material.⁵ But if circumstances are such as to lead the seller to believe that the delay in payment has been due to financial embarrassment, that would usually lead to a holding that the breach was material.⁶ It is clear, of course, that when the seller relies on material breach under such circumstances, his right will be either to delay future shipments or to cancel. There is no precedent for the view that he may in such a case withdraw credit and offer to deliver for cash, even though the breach is not so serious as to justify cancellation.⁷ It is probable, however, that if he does in fact offer to deliver for cash, that would constitute such clear evidence of the fact that he was actuated by fear of the buyer's inability to pay, and not merely by the desire to escape an unfavorable contract, that a court would be more disposed to hold the breach material. Furthermore, in those jurisdictions which impose on the buyer under certain conditions the duty to avoid the consequences of the breach by accepting the offer for cash,⁸ he may sometimes, as a practical matter, withdraw credit without serious consequences, when a cancellation would subject him to substantial damages. He takes the very substantial risk, however, that he will not be able to show that the buyer was able to pay cash. And, furthermore, this rule is not helpful if the

must offer to deliver for cash. *Florence Mining Co. v. Brown*, (1888) 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424.

⁵*Helgar Corp. v. Warner's Features*, (1918) 222 N. Y. 449, 119 N. E. 113. Before the enactment of the Uniform Sales Act, sec. 45 (2), a few American jurisdictions followed the English test as to whether the breach is a repudiation [Sale of Goods Act, sec. 31 (2)]. See Williston, *Sales*, 2d. ed. 467c. And even after its enactment there is occasional evidence of a curious survival of the language. See *Cadillac Machine Co. v. Mitchell-Diggins Iron Co.*, (1919) 205 Mich. 107, 171 N. W. sec. 479. Needless to say, this test makes the seller's position more difficult.

⁶In *National Machine & Tool Co. v. Standard Shoe Machinery Co.*, (1902) 181 Mass. 275, 63 N. E. 900, the court says, "A failure to pay a small sum promptly because of difficulty in raising the money . . . may have a greater effect than a similar failure simply because . . . of some misunderstanding."

⁷There is an ill-considered dictum that this may be done, in *Lincoln v. Chas. Ashuler Mfg. Co.*, (1910) 142 Wis. 475, 483, 125 N. W. 908, 911.

⁸See *McCormick, Avoiding Injurious Consequences*, (1931) 37 W. Va. L. Q. 331, 345.

contract is profitable to him and he would like to withdraw credit, but retain his rights under the contract.⁹

The manifold problems that arise in connection with the application of the rules above summarized are not dealt with in this article. It has been necessary thus to set them forth, however, to show the reasons for the appearance in recent years of special clauses in sales contracts which sellers have insisted upon incorporating for the purpose of securing more adequate protection than they would otherwise enjoy. Without such a clause it would be necessary to prove insolvency, whereas impairment of credit short of insolvency may well expose the seller to a risk of not receiving his money, which he does not care to take. Even if he believes the buyer insolvent, the step of withdrawing credit would entail the risk that a court or jury would not take the same view if the matter should come to litigation. If the contract has become unprofitable for him, it is true, his problem is seldom serious. Usually the settlement or the damages the buyer might show would not be greater than the loss to him of performing the contract. In a few jurisdictions, as already noted, the duty of the buyer to avoid the consequences of the breach by accepting an offer to sell for cash would relieve the seller of paying damages if he guesses wrong, and in any case it is probable that the buyer in a rising market would find the necessary cash if credit is withdrawn. But it is when the seller has a favorable contract and does not wish to jeopardize his profits, yet fears to continue to extend credit, that the doubts above enumerated are particularly troubling.

It is perfectly obvious, also, that the protection afforded by the material breach doctrine is usually not of much value. Although a buyer's financial condition is badly impaired, his payments may be prompt. If payments are late, the uncertainty of being able to show a material breach at least gives the buyer a talking point and encourages him to litigate unless he is given a favorable settlement.

Thus, as above suggested, sellers have felt the need for more substantial protection against the impairment of the buyer's finan-

⁹The disadvantage of being unable to withdraw credit is shown by the facts of *J. S. Lingo & Co. v. Okey Hosiery Mills*, (C.C.A. 3rd Cir. 1923) 291 Fed. 573, where it appeared that the seller, who had agreed to extend credit, was doubtful of the buyer's ability to pay and required cash or security, relying on some delinquency in payment. In an action for damages, however, he was nonsuited in the lower court, and on appeal it was stated that he could only go to a jury on the question whether the buyer had told the seller he would be unable to pay.

cial responsibility. To this end various clauses have been introduced into contracts, designed to eliminate as far as possible the difficulties noted. Of course if there is any doubt about a buyer's credit when the contract is made, the most desirable arrangement would be a secured transaction. But the needs of the seller's customers and fear of losing business to competitors frequently make this out of the question for a seller. A clause in the contract form, more or less obscure, dealing with a contingency at the time not anticipated, will not ordinarily drive away customers who understand that credit is being extended to them. But when the occasion arises, such a clause may be very helpful in enabling the seller to cancel or to sell only on a cash basis, without subjecting himself in some instances to an action for damages, or in others to the loss of a favorable bargain.

Rights reserved to the seller under clauses designed for this purpose may be classified as follows:¹⁰

As to the nature of the right reserved:

1. To cancel the contract.
2. To delay subsequent shipments.
3. To withdraw credit and cancel if the buyer fails to pay cash.
4. To withdraw credit and enforce the contract against the buyer if he fails to pay cash.

As to the condition upon which the right may be exercised:

- a. Upon the failure of the buyer to make payment when due for a past installment of goods delivered.
- b. Upon the impairment of the buyer's credit.
- c. If in the seller's opinion the buyer's credit is impaired.
- d. Unconditionally.

¹⁰These clauses are found with various wordings. A common one in use in the oil trade and others might under a permissible construction be classified as 4c, and is sometimes found in combination with 4a. It reads as follows, "In the event that payment for goods shipped is not promptly made in accordance with the terms of this sale, or in the event that the credit or the financial responsibility of the purchaser becomes impaired or unsatisfactory to the seller, the seller reserves the right to demand cash or satisfactory security before making shipments." See *James B. Berry's Sons Co. v. Monark Gasoline and Oil Co.*, (C.C.A. 8th Cir. 1929) 32 F. (2d) 74. In the sugar trade a clause (4d) is used, reading, "Terms . . . subject to the approval of seller's credit department." See *A. B. Small Co. v. Lamborn & Co.*, (1925) 267 U. S. 248, 45 Sup. Ct. 300, 69 L. Ed. 597. The right to delay shipment (2) is found only in combination with the right to cancel for non-payment. Rights conditioned only on impairment of the buyer's credit (c) are rare, since most clauses containing such conditions use the terms "in the opinion of the seller" or "unsatisfactory to the seller." A clause conditioned merely on the financial responsibility of the buyer becoming unsatisfactory appeared in the contract involved in *In re Independent Coal Corp.*, (C.C.A. 2d Cir. 1927) 18 F. (2d) 1. Whether a particular

MUTUALITY OF OBLIGATION

In a surprisingly large number of cases arising under contracts containing such clauses the buyer has urged that the agreement lacked mutuality. This might indicate that among members of the bar there is a widespread notion that this term is not synonymous with consideration as applied to bilateral agreements. For it is rather apparent that in all except one, or possibly two, of the types of clauses enumerated, the seller's undertaking is a substantial one and the conditions precedent to termination are beyond his control. It is only upon the view that a measure of inequality or unfairness will render the agreement lacking in mutuality that there appears to be any ground whatever for advancing such a contention. Obviously in any case where the seller's only right is to withdraw credit upon the failure of the buyer to pay promptly for goods delivered, his undertaking to deliver for cash remains and provides consideration for the buyer's promise.¹¹ Of course no question could be raised as to the validity of an agreement originally for a cash sale. The provision here, though in the form of an unconditional option to withdraw credit, is in substance not different from an agreement to sell for cash, with such extension of credit as might be made, regarded as an act of grace on the seller's part.

The right to cancel stands on a different basis. No draftsman worthy of the name would hope that the contract would be upheld if an unconditional right to cancel is provided for. It is, therefore, seldom found in precisely those terms.¹² In *Bernstein v. W. B. Mfg. Co.*,¹³ however, it appeared that the draftsman, in his zeal for the seller's cause, went so far as to defeat his purpose. The clause read, "Subject to a limit of credit and determination at any time by the seller." It was argued that "determination" referred only to credit, and this would seem to be a permissible

clause falls within one or another of the categories enumerated is often a difficult question of construction.

¹¹*A. B. Small Co. v. Lamborn & Co.*, (1925) 267 U. S. 248, 45 Sup. Ct. 300, 69 L. Ed. 597; *James B. Berry's Sons Co. v. Monark Gasoline & Oil Co.* (C.C.A. 8th Cir. 1929) 32 F. (2d) 74; *La Grange Grocery Co. v. Lamborn & Co.*, (C.C.A. 5th Cir. 1922) 283 Fed. 869; *Klimax Overall Co. v. Converse & Co.*, (1929) 39 Ga. App. 742, 148 S. E. 349; *Mendel v. Converse & Co.*, (1923) 30 Ga. App. 549, 118 S. E. 586; *Slater v. Savannah Sugar Refining Co.*, (1922) 28 Ga. App. 280, 110 S. E. 759.

¹²For an example of a rare contract providing for such an unconditional right, see *American Agricultural Chemical Co. v. Kennedy & Crawford*, (1904) 103 Va. 171, 48 S. E. 868.

¹³(1921) 238 Mass. 589, 131 N. E. 200.

construction, especially in view of the fact that there was another clause in the contract dealing with the conditions of shipment, which was so worded as to preserve mutuality of obligation.¹⁴ The court, however, construed the above clause as giving an absolute right to cancel, and held the contract lacking in mutuality.¹⁵

Clauses giving the seller the right to cancel if in his opinion the buyer's credit has become impaired are also close to the line. However, the requirement that the seller must act in good faith¹⁶ makes it necessary that there be some basis in fact for his determination, and is probably sufficient to make it impossible for him to use the power given merely to escape a bad bargain. Nevertheless the leeway accorded might enable him in some instances to use the clause for such an ulterior purpose, so that his undertaking is in a measure illusory. No case has been found, however, which holds such an agreement lacking in mutuality.

The clause permitting cancellation upon failure to pay promptly is also susceptible of a similar use in instances where the failure to pay by the exact date is due merely to misunderstanding or inadvertence, and not to financial difficulties.¹⁷ But the contention that such a clause makes the seller's promise without consideration is clearly unfounded, in view of the unquestioned undertaking to perform so long as the buyer makes his payments promptly.¹⁸

QUESTIONS OF CONSTRUCTION

Unfortunately for the seller, the draftsmanship responsible for these clauses has not always been of a very high order. It is hardly necessary to state that this means that there has been a failure to appreciate in advance the possible issues and the ne-

¹⁴See *Bernstein v. W. B. Mfg. Co.*, (1920) 235 Mass. 425, 126 N. E. 796.

¹⁵In *A. B. Small Co. v. Lamborn & Co.*, (1925) 267 U. S. 248, 45 Sup. Ct. 300, 69 L. Ed. 597, and in *La Grange Grocery Co. v. Lamborn & Co.*, (C.C.A. 5th Cir. 1922) 283 Fed. 869, it was unsuccessfully argued that the clause in the standard sugar contract (*supra* note 10) gave the right to cancel, and that therefore there was no mutuality.

¹⁶See footnote 35.

¹⁷*Dow Chemical Co. v. Detroit Chemical Works*, (1919) 208 Mich. 157, 175 N. W. 269; *Southern Coal & Coke Co. v. Bowling Green Coal Co.*, (1914) 161 Ky. 477, 170 S. W. 1185.

¹⁸*Casinghead Gas Co. v. Osborn*, (1921) 269 Pa. St. 395, 112 Atl. 469; *Dale Oil Refining Co. v. City of Tulia*, (Tex. Civ. App. 1930) 25 S. W. (2d) 671. In *Peck v. Stafford Flour Mills Co.*, (C.C.A. 8th Cir. 1923) 289 Fed. 43, the claim of lack of mutuality rested on a little more substantial basis in that the clause permitted cancellation upon the failure to make payment under the contract or prior contracts; the buyer was in default under prior contracts at the time the new one was made, and remained so.

cessity of selecting the category in the above classification which is intended. The result has been that the seller has sometimes lost his hoped-for advantage. In view of the fact that the words appear on the seller's forms often in obscure places, and that there is a measure of judicial sympathy for a hard-pressed buyer, doubtful questions have more frequently been resolved against the seller.¹⁹

One question has been whether general language calling for approval of the buyer's credit is to be taken to be a condition of contract formation or of performance. Doubtless in some instances the seller using such general language contemplates only one investigation of credit at the outset, and if this is true he should not later have the benefit of an afterthought. If the "contract" is made subject to the approval of credit, this would, without question, be the proper construction. In *McLain - Hadden - Simperts Co. v. Trent Rubber Co.*,²⁰ however, it was held that a clause providing, "application of these [credit] terms subject to the approval of our [seller's] credit department," gave only the opportunity to approve at the outset. When deliveries started, the terms of credit became unconditional.²¹ The same argument was made in *A. B. Small Co. v. Lamborn & Co.*,²² with respect to the standard sugar contract, providing that "terms" are "subject to approval of seller's credit department." This contract, however, specifies alternative terms, one for cash and another for credit. The obvious meaning is that the credit department has the choice of terms, and not that the approval is a condition precedent to the *contract*.

Another question that rarely arises is whether the clause gives the seller an option, or whether the extension of credit is unqualified. In *W. T. Rawleigh Co. v. Wilson*,²³ it appeared that the provision read that payment was to be "by cash or by installment

¹⁹There is an indication of this attitude in *Dery v. Blate*, (1924) 239 N. Y. 203, 146 N. E. 204. The court said, "The contract is drawn on one of the seller's order blanks. Its ambiguities should be resolved against him." In dealing with the option to withdraw credit, it is said that the question is to what extent "the purchasers put themselves at the mercy of the seller."

²⁰(C.C.A. 3rd Cir. 1921) 275 Fed. 831.

²¹A similar questionable result was reached in *Anchor Cotton Mills v. Bellow*, (C.C.A. 3rd Cir. 1922) 279 Fed. 390, where the buyer's order stipulated 10 days credit, "terms and dating subject to the right of seller . . . to establish and from time to time modify, regulate and fix buyer's credit limit." It was said that acceptance of the order after investigation of credit constituted "final approval as to credit."

²²(1925) 267 U. S. 248, 45 Sup. Ct. 300, 69 L. Ed. 597. This contention appears only in argument of counsel in 69 L. Ed. 597. It is not mentioned in the opinion.

²³(1927) 141 S. C. 182, 139 S. E. 395.

payments satisfactory to the seller;" the majority of the court, influenced by the fact that sureties were required for the buyer, held that the buyer was entitled to credit, cash payment apparently being regarded as an option of the buyer.²⁴

The most frequent controversy arises with respect to the question whether a particular clause gives the right to withdraw credit and, if the buyer fails to pay cash, maintain a claim for damages for breach of contract, or whether, in such event, his only right is to cancel. Seldom does the language preclude doubt on this point. Yet it is only if the seller has this right that he is able to retain the benefits of a contract that is advantageous, except for the danger that the account may be uncollectible.

Some courts have recognized this. Thus the clause involved in *James B. Berry's Sons Co. v. Monark Gasoline & Oil Co.*,²⁵ after providing for the right to demand cash,²⁶ proceeded, "Upon failure to provide cash or satisfactory security . . . the seller reserves the right to discontinue making shipment and to cancel the sale . . . thereby terminating all obligation on the part of the seller." In spite of the fact that the only right stated was to cancel, the court construed this to mean that the clause might be used not only as a "shield" but also as a "sword."²⁷ On the other hand, in *Dery v. Blate*,²⁸ a clause providing that "the amount of credit to be extended to the buyer may be determined at any time by the seller" was construed to give no right to the seller to compel the buyer to take the goods for cash. In some respects this latter clause more readily admits of the interpretation that the buyer could be required to pay cash than the former. The court emphasizes that the *amount* only of credit could be limited, apparently implying that it could not be withdrawn entirely. However, the decision is not rested squarely on that point, but rather on the ground that, though credit might be withdrawn, the only right of the seller was to refuse to deliver.²⁹ The two quite distinct lines of argument

²⁴In *Hazel Hill Canning Co. v. Roberts Bros.*, (1916) 129 Md. 306, 99 Atl. 424, the seller unsuccessfully made the rather weak contention that "cash less 1½% 10 days" gave it the option to demand cash.

²⁵(C.C.A. 8th Cir. 1929) 32 F. (2d) 74.

²⁶This part of the clause is set forth in footnote 10.

²⁷In *Midland Linseed Products Co. v. Charles R. Sargent Co.*, (C.C.A. 5th Cir. 1922) 281 Fed. 704, the same result is reached on the curious reasoning that if the seller's only right were to cancel, the buyer could compel the seller to invoke the clause by refusing payment and thus the agreement would be lacking in mutuality.

²⁸(1924) 239 N. Y. 203, 146 N. E. 204.

²⁹This reasoning follows precisely that of the earlier appellate division

are confused in the opinion. The court appears to be much impressed by the fact that the contract was on the seller's form and that the clause was in the contract solely by reason of its appearance in the rules of a trade association which incorporated by reference.³⁰

ISSUES OF FACT

When rights are reserved conditioned on non-payment, a question of waiver is frequently presented. Primarily the material facts upon which to rest this claim are previous acceptance of late payments or any other acts of the seller calculated to lead the buyer to believe that prompt payment will not be insisted upon.

But if it appears that the seller is taking advantage of a minor delay in payment for the purpose of escaping a bad bargain, the tendency of the court is to find waiver if possible.³¹ On the other hand, if the seller seems to be justified in believing that delay in payment means difficulty in raising the money, the tendency will be to resolve a doubtful issue of waiver in his favor.³² Thus it is

case, *Raw Silk Trading Co. v. Katz*, (1922) 201 App. Div. 713, 194 N. Y. S. 638, where the clause read, "Subject to credit limit at seller's discretion." In *Wilton Mfg. Co. v. Bergér*, (1921) 196 App. Div. 121, 187 N. Y. S. 487, under a clause providing, "Subject to credit limit placed on your account by our credit department," it was contended that the seller was merely entitled to refuse deliveries, but held that the seller could demand cash for goods in excess of credit limit, the buyer having acquiesced in that construction by previously paying cash. See also *Mendel v. Converse & Co.*, (1923) 30 Ga. App. 549, 118 S. E. 586, where it was assumed that a clause similar to that involved in *Dery v. Blate* gave the option to demand cash.

³⁰Another minor question of construction was raised in *Rathbone, Sand & Co. v. Virginia Iron, Coal & Coke Co.*, (1921) 198 App. Div. 889, 191 N. Y. S. 210, affirmed (1923) 234 N. Y. 642, 138 N. E. 480. The contract gave the "options" to the seller to postpone shipments until prior installments were paid for or to cancel. It would seem clear that the exercise of the option to postpone shipments would not preclude the exercise of the right to cancel. The contention was made that it did, but it probably would not have occurred to counsel to raise the point if the simple alternative had been used without the unnecessary words "at seller's option."

³¹See *Texas Co. v. Pensacola Maritime Corp.*, (C.C.A. 5th Cir. 1922) 279 Fed. 19; also, *Everett v. Emmons Coal Mining Co.*, (C.C.A. 5th Cir. 1923) 289 Fed. 686, where the waiver issue was not raised, but the court ignored the clause, saying (p. 691), "The debit balance . . . was relatively so small and was so far subject to good faith dispute, that we think it an unsatisfactory and insufficient basis for a refusal to ship." In *Dow Chemical Co. v. Detroit Chemical Works*, (1919) 208 Mich. 157, 175 N. W. 269, the waiver issue was decided against the buyer when there was apparently no question of credit impairment. The facts in support of the claim of waiver were extremely slim, however, it appearing merely that the second shipment was made after payment for the first one fell due, but before the seller knew it had not been promptly mailed.

³²*Cadillac Machine Co. v. Mitchell-Diggins Iron Co.*, (1919) 205 Mich. 107, 171 N. W. 479; *Rathbone, Sand & Co. v. Virginia Iron, Coal & Coke Co.*, (1921) 198 App. Div. 889, 191 N. Y. S. 210, affirmed (1923) 234 N. Y.

obvious that the condition of the buyer's credit and the significance of the delay as it appears to the seller afford a background for the determination of the issue, just as they do when, in the absence of such a clause, the inquiry is addressed to the question of material breach.³³

When the condition relates to the impairment of the buyer's credit, an issue of fact may be raised. It is conceded that this means something less than insolvency. The buyer may be able to meet his current obligations, but facts may be known which make his ability to continue to do so somewhat doubtful. However, evidence of prompt payments under other contracts would probably be material as tending to show no impairment. The financial statements of the buyer at the time of making the contract and and at the time the clause is invoked might be compared. It could hardly be said, however, that any minor decrease of surplus would constitute an impairment within the meaning of the contract. It has been held that reports of commercial credit rating agencies are admissible.³⁴

Because of such doubt in determining this issue, the clause making the opinion of the seller the condition of the exercise of the right is much more common and more desirable for the seller. Here the issue becomes one of good faith.³⁵ Some basis for a belief that the buyer's credit is impaired must be shown. If the buyer can find evidence of other motives, it should be admissible on this issue.³⁶ Thus, even if the right reserved is to cancel, the

642, 138 N. E. 480. In the first case cited the trial court made the rather curious finding that the buyer must "be held to have realized that long-continued outward sufferance toward a debtor does not, ipso facto, indicate long-continued inward satisfaction on the part of the creditor."

³³See *Crocker Chair Co. v. Edward Hines Hardwood & Hemlock Co.*, (1930) 201 Wis. 415, 230 N. W. 61.

³⁴On these points see *Trainor v. Buchanan Coal Co.*, (1923) 154 Minn. 204, 191 N. W. 431; *Dodge Bros. v. General Petroleum Corp.*, (1932) 54 Nev. 249, 13 P. (2d) 218.

³⁵*James B. Berry's Sons Co. v. Monark Gasoline & Oil Co.*, (C.C.A. 8th Cir. 1929) 32 F. (2d) 74; *Fidelity Fuel Co. v. Martin Howe Coal Co.*, (C.C.A. 7th Cir. 1926) 15 F. (2d) 470; *Everett v. Emmons Coal Mining Co.*, (C.C.A. 6th Cir. 1923) 289 Fed. 686; *Midland Linseed Products Co. v. Charles R. Sargent Co.*, (C.C.A. 6th Cir. 1922) 281 Fed. 704; *Trainor v. Buchanan Coal Co.*, (1923) 154 Minn. 204, 191 N. W. 431; *Corn Products Refining Co. v. Fasola*, (1920) 94 N. J. 181, 109 Atl. 505. In the last cited case, the court said, "There must be a real want of satisfaction with the buyer's financial responsibility, and the refusal to ship . . . must be based upon that reason alone." Thus in New Jersey there is the additional requirement that the seller have no other motive. In other jurisdictions, other motives are merely evidence on the good faith issue.

³⁶*Fidelity Fuel Co. v. Martin Howe Coal Co.*, (C.C.A. 7th Cir. 1926) 15 F. (2d) 470. In *Trainor v. Buchanan Coal Co.*, (1923) 154 Minn. 204,

buyer has some protection against arbitrary action by the seller. The same evidence comes in, but is submitted to the trier of facts under a formula more favorable to the seller.

ADVANTAGES OF VARIOUS CLAUSES TO THE SELLER

Clauses of the type giving the seller special rights when the buyer fails to meet his payments on the date due are, when standing alone, unsatisfactory in many respects. Although they purport to eliminate the uncertain inquiry as to whether failure to pay promptly constitutes a material breach, they fail to provide for the common case where a struggling buyer is meeting all his payments on the particular contract on the dot, yet complete default and bankruptcy may be just around the corner. Under these circumstances they are, therefore, too narrow. But under others, a literal interpretation gives rights broader than necessary for the purpose of achieving the protection desired. A perfectly solvent buyer may occasionally fail to forward his check on the exact date it is called for. A seller for whom the contract has become burdensome may use the clause to escape.³⁷ So applied, the clause makes the contract operate in a one-sided and unfair manner; and the impression thus created may in a close case operate prejudicially to the seller. The additional phrase, that no forbearance or course of dealing shall affect the right of the seller, has sometimes been added.³⁸ No case has been found where the effect of such an addition has been squarely considered, but it is at least doubtful if a seller can thus in advance provide for the avoidance of the plain inferences from his subsequent conduct.

The right to cancel on impairment of the buyer's credit, either when shown as a fact or in the seller's opinion, makes possible the use of evidence of non-payment as bearing on this issue without subjecting its effect to nullification by a contention on the part of the buyer of waiver.³⁹ A clause giving such a right is also capable

191 N. W. 431, other motives were apparently in evidence, but the question of admissibility was not discussed.

³⁷*Southern Coal & Coke Co. v. Bowling Green Coal Co.*, (1914) 161 Ky. 477, 170 S. W. 1185; *Dow Chemical Co. v. Detroit Chemical Works*, (1919) 208 Mich. 157, 175 N. W. 269; *H. R. Wylie China Co. v. Vinton*, (1920) 97 Or. 350, 192 Pac. 400.

³⁸See *Everett v. Emmons Coal Mining Co.*, (C.C.A. 6th Cir. 1923) 289 Fed. 686; *Texas Co. v. Pensacola Maritime Corp.*, (C.C.A. 5th Cir. 1922) 279 Fed. 19.

³⁹*Dodge Bros. v. General Petroleum Corp.*, (1932) 54 Nev. 249. 13 P. (2d) 218.

of use for escaping a bad bargain,⁴⁰ whereas if the only right is to withdraw credit, the chances are that in a favorable market the buyer will find the cash. But such a clause is not entirely satisfactory if the purpose is really to obtain protection against credit impairment. For it seems to offer no aid in preserving a favorable bargain without continuing the credit risk. The choice in the event of impairment is either to continue with the contract on the terms of payment as they stand, or to terminate it entirely.⁴¹

A clause merely giving the right to delay future shipments when the buyer has not paid would add nothing to the rights which the seller would have in most jurisdictions in the absence of such a provision. It is of value, however, if a court follows the rather unfortunate test that the buyer's non-payment excuses the seller only when it shows an intent to repudiate.⁴² Such a clause, as well as the broader one, giving the right to terminate, tends to eliminate the unjustifiable advantage to the buyer given by this formula, when an impasse is reached as sometimes happens, the seller refusing to ship until paid and the buyer refusing to pay until goods are shipped.⁴³

A clause giving the right to withdraw credit upon failure of the buyer to pay promptly would in some instances be advantageous, but it is seldom found alone. Often it is combined with a clause giving such a right in the event the seller is dissatisfied with the buyer's credit.⁴⁴ Such clauses are not unfair and go far toward achieving the desired protection. Obviously an even more advan-

⁴⁰In *Fidelity Fuel Co. v. Martin Howe Coal Co.*, (C.C.A. 7th Cir. 1926) 15 F. (2d) 470, it appears that the seller attempted to use it for this purpose, although his success would depend on the result of the second trial.

⁴¹*Sterling Mint Co. v. Dellenbarger Machine Co.*, (1932) 107 Pa. Super. 287, 163 Atl. 370.

⁴²See footnote 5. This formula was devised to meet the facts of *Freeth v. Burr*, (1874) L. R. 9 C. P. 208, 46 L. J. C. P. 91, 29 L. T. 773, where the seller was holding up shipment until the buyer paid for the first installment and the buyer was withholding payment until the second installment was shipped. The seller was far behind in delivering the first installment, the market had advanced, and every indication was that the second would never be shipped. Under such circumstances it would seem that the buyer was justified in withholding payment. The "intent to repudiate" test fits these facts. But its enunciation as a general formula has provided a stumbling block which even the valiant efforts of Professor Williston have not served wholly to eradicate. In the absence of such a formula, it would seem to follow without question that the seller could refuse to make further shipments until payments already due are made. See Williston, *Sales*, 2d ed., sec. 467j.

⁴³See *H. R. Wyllie China Co. v. Vinton*, (1920) 97 Or. 350, 192 Pac. 400.

⁴⁴See footnote 10.

tageous clause is the one making the withdrawal of credit optional.⁴⁵ In any event, the clause ought to make clear that the failure of the buyer to tender cash or satisfactory security, when credit is properly withdrawn, should constitute a breach of the contract. Thus the type of clause appearing in the above outline as 4d is unquestionably the best from the seller's point of view, provided his purpose is actually to secure more adequate protection against the risk of impairment of the buyer's credit. A combination of 4a and 4c would be an excellent second choice.

THE BUYER'S INTERESTS

This article has been written from the point of view of counsel for the seller. Buyers who have sufficient bargaining power to overcome the inertia of the form contract and the established method of doing things may find it possible to insist that all such clauses be stricken from the contract. Particularly objectionable will be clauses giving the right to cancel on failure to make payment when due, and those giving the seller optional or discretionary rights. Nevertheless, it will not always be advantageous to press the matter too far. The possibility of jeopardizing a favorable price proposition must be weighed against the seller's character and the probability of occasion arising for the exercise of rights provided for. No doubt most buyers, without benefit of counsel, are apt to overstress the all important and imminent price term as against the more remote provisions herein discussed. They may also be satisfied by assurances that such clauses are never invoked, or refrain from raising the point, because they do not wish to appear doubtful of their own credit standing. For these reasons, even if the bargaining power of buyers is great, the clauses, if incorporated in the seller's form, will usually remain.

⁴⁵Under such a clause the issue of good faith is not raised, since the option is unconditional. In *Siegel v. Heubshman*, (1919) 187 App. Div. 548, 176 N. Y. S. 71, it was held error to submit the issue of good faith to the jury, but the court unnecessarily placed emphasis upon the fact that the option was given to factors who guaranteed the buyer's credit. See also, *Gillman v. Dunmore Worsted Co.*, (1920) 183 N. Y. S. 47; *Lyonette Silks v. K. Wilbur Dolson Co.*, (1919) 187 App. Div. 473, 175 N. Y. S. 789.

Although cash may be required, the seller must be careful not to demand a too specific security. In *Wausau Canning Co. v. Woodruff*, (1926) 189 Wis. 184, 207 N. W. 421, the court, on a questionable construction of the seller's letter, held that he had breached the contract by requiring that credit be established at a particular bank.

PROSPECTIVE INABILITY IN THE LAW OF
CONTRACTS

By LAWRENCE B. WARDROP, JR.*

I. INTRODUCTION

THE LEGAL effect of prospective inability of the promisor to perform his part of the agreed exchange, has in large part been denied systematic treatment by the courts, while the commentators and textwriters have tended either to ignore the subject or to assimilate it to related topics.¹

The questions as to what constitutes inability, and as to the legal consequences attendant thereon, have been brought before the courts in numerous situations. The answer to the former can be found only by an analysis of the facts of the particular case; the latter, which assumes that the facts have been cast into the legally significant category, is exemplified in the varied judicial responses about to be explored.

Inasmuch as the cases dealing with this subject exhibit, in the main, an inadequate analysis, it is the purpose of this paper to examine those situations in which prospective inability has been given recognized and occasionally well-defined effect: second, to contrast with these the results reached in more obscure examples; and third, in the course of doing this to attempt to answer the question, basic in this inquiry, as to whether the courts have in fact recognized any legally significant distinction between the manifestations of inability which will give rise to a cause of action

*Of the New York Bar. Associated with McCanliss & Early, New York City. The writer wishes to acknowledge his indebtedness to Professor Edwin W. Patterson, of Columbia Law School, whose helpful criticism and kind suggestions have been indispensable in the preparation of this paper.

¹See, for instance, Page, *Contracts*, 2nd ed., secs. 2905, 2912, 2913, 2937, 2940, where the author treats the topic wholly from the standpoint of anticipatory repudiation. To the writer's knowledge analytical treatment will be found only in Williston, *Contracts*, secs. 877-880, 768, 1326, 1331, 875; Williston, *Repudiation of Contracts*, (1901) 14 *Harv. L. Rev.* 317 and 421; and Vold, *Repudiation of Contracts*, (1927) 5 *Neb. L. B.* 269, 303-308. See also Ballantine, *Anticipatory Breach and Enforcement of Contractual Duties*, (1924) 22 *Mich. L. Rev.* 329; and Limburg, *Anticipatory Repudiation of Contracts*, (1925) 10 *Cornell Law Quart.* 135, 163, 178, both of whom follow Williston. *Restatement, Contracts*, secs. 280-287, covers the same ground; Professor Williston's views will also be found in Wald's *Pollock on Contracts*, 3d Am. ed. 354. Brief treatment is given in Clark, *Contracts*, 4th ed., 616.

for anticipatory breach against the promisor (the party whose inability is in question), and those which might be said to furnish only an excuse for non-performance of contractual duties by the promisee.

II. WHEN PROSPECTIVE INABILITY GIVES RISE TO IMMEDIATE CAUSE OF ACTION.

A. *Voluntary Disablement*.—That the prospective inability of one party to a bilateral contract to perform his promise conferred upon the other party both a cause of action and an excuse from further performance on his part (embodied in the phrase “voluntarily putting it out of his power to perform”), was recognized by courts in England many years before the doctrine of anticipatory breach was given definite form² and became a source of extensive debate among legal writers.³

In *Sir Anthony Main's Case*,⁴ inability in the form of voluntary disablement to perform was early given this double significance. The plaintiff lessee, with whom defendant lessor had covenanted to make a new lease upon surrender by the former of his existing lease at any time during its twenty-one year term, set forth this covenant in his declaration of debt on the obligation. The plea was that plaintiff had not surrendered the existing lease. On demurrer to the replication, which alleged that the obligor had suffered a fine, and granted the land to the cognizee for eighty years, it was held that Main had broken his covenant, and that the law would not enforce the “vain and fruitless” act of surrender. It was resolved that if a man

“seised of lands in fee covenant to enfeof J. S. of them upon request, and afterwards he makes a feoffment in fee of the said lands; now in this case J. S. shall have an action of covenant without request.”

Judicial acquiescence in this resolution yielded decisions⁵ which were regarded as cogent analogies in *Hochster v. Delatour*.⁶

It may therefore be said that plaintiff's cause of action for anticipatory breach grew out of certain well-defined effects of

²In *Hochster v. Delatour*, (1853) 2 E. & B. 678, 22 L. J. Q. B. 455, 22 L. T. O. S. 171.

³Cf. Williston, *Repudiation of Contracts*, (1901) 14 Harv. L. Rev. 317 and 421, with Ballantine, *Anticipatory Breach and Enforcement of Contractual Duties*, (1924) 22 Mich. L. Rev. 329.

⁴(1596) 5 Co. Rep. 20b, Jenk. 256.

⁵*Short v. Stone*, (1846) 8 Q. B. 358, 15 L. J. Q. B. 143, 6 L. T. O. S. 316; *Ford v. Tiley*, (1827) 6 B. & C. 325, 5 L. J. O. S. K. B. 169.

⁶(1853) 2 E. & B. 678, 22 L. J. Q. B. 455, 22 L. T. O. S. 171.

voluntary disablement, recognized, in cases in which as a matter of fact it could be foreseen that future non-performance was highly probable,⁷ as giving the aggrieved party a cause of action before the day, and as excusing him from the further performance of conditions precedent.

Such conduct, giving rise to a reasonable inference not only that the promisor will be unable to perform at the appointed time, but likewise that he no longer intends to be bound by the contract,⁸ has caused litigation most frequently in executory contracts for the sale of land. If A has contracted to convey Blackacre to B, at a given future date, and before the date conveys to C, an array of authority holds that B thereupon acquires the right to maintain an action against A for anticipatory repudiation,⁹ and is, of course, privileged not to do the fruitless act of tendering performance.

It is arguable, however, that such a conveyance might be made for a purpose not inconsistent with final consummation of the contract with B, and that by the seeming disablement, A has not necessarily put it out of his power to perform.¹⁰ However much weight this argument should be accorded as an original proposition, it seems clear that the cases take an opposite view; they deny its implication that A's conduct, to be treated as a breach, should more forcibly indicate intent to repudiate,¹¹ and, in general, ignore the

⁷The possibility of regained ability was regarded as immaterial in *Short v. Stone*, (1846) 8 Q. B. 358, 15 L. J. Q. B. 143, 6 L. T. O. S. 316, and *Ford v. Tiley*, (1827) 6 B. & C. 325, 5 L. J. O. S. K. B. 169. It was held in the former that when defendant married A, this was a breach of his agreement to marry B on request, and that B was excused from ever making any request; if filing suit be regarded as a request, the breach by unexcused inability is actual.

⁸See Williston, *Contracts*, sec. 1326.

⁹*Cooley v. Moss*, (1905) 123 Ga. 707, 51 S. E. 625; *Bell v. Shields*, (1910) 18 Idaho 699, 111 Pac. 1076; *Newcomb v. Brackett*, (1819) 16 Mass. 161; *Weaver v. Aitchison*, (1887) 65 Mich. 285; *Householder v. Nispel*, (1923) 111 Neb. 156, 195 N. W. 932; *Hunter v. Wenatchee Land Co.*, (1908) 50 Wash. 438, 97 Pac. 494. The California cases were brought into accord by *Brimmer v. Salisbury*, (1914) 167 Cal. 522, 140 Pac. 30, containing an extensive review of the decisions in that state; *Crane v. East Side Canal, etc., Co.*, (Cal. App. 1934) 38 P. (2d) 467, (Cal. App. 1935) 44 P. (2d) 455 (conveyance of water rights disabling defendant to supply water to plaintiff). See also *Slaughter v. Barnett*, (1934) 114 Fla. 352, 154 So. 132, where it was held that a statement by the vendor before the date fixed for performance, that he does not intend to perform, does not entitle the vendee to an action for anticipatory breach.

¹⁰See *Webb v. Stephenson*, (1895) 11 Wash. 342, 39 Pac. 952.

¹¹In conferring upon the promisee a cause of action for a voluntary disablement by the promisor before the day, the courts do not apply the formula, used in other cases of anticipatory breach, and which derives, for the most part, from *Smoot's Case*, (1872) 15 Wall. (U. S.) 36, 21 L. Ed. 107, that the breach must be "positive, distinct, and unequivocal."

possibility of regained ability. The latter point was raised in *Ford v. Tiley*,¹² and the court dismissed it, saying:

"If a day be limited to perform a condition, if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broken."

If, however, the date set for performance finds A with regained ability, and in the meanwhile, B has brought no suit and suffered no change of position,¹³ in reliance upon prospective inability of A, it is believed that nothing would impeach the soundness of a holding that A may enforce the contract against B. All the elements of an effective withdrawal of repudiation are present.

Nevertheless, the cases do not seem to make this distinction. Thus in a recent case,¹⁴ the vendor, who had conveyed to third persons some of the land agreed to be conveyed to the defendant, sued for specific performance. The complainant, after the answer was in, and before the case came on for hearing, acquired options from the persons to whom the conveyances were made, and averred ability to acquire title and make conveyance in accordance with the terms of the contract. Denying specific performance, the court held that the doctrine of perfecting title before decree has no application where the vendor, having title at the time of contracting, subsequently, and without saving the rights of the vendee, conveys all or a substantial part of the land to a bona fide purchaser.¹⁵ No change of position on the part of the vendee was shown.

In *James v. Burchell*,¹⁶ on the other hand, where again the

¹²(1827) 6 B. & C. 325, 5 L. J. O. S. K. B. 169.

¹³Although time may not be of the essence of the contract, there would seem to be no reason for making use of this factor in favor of the repudiator in determining whether the purchaser has changed his position or acted in reliance on the prospective inability of the vendor. Such action in reliance might consist of failure to commence performance on the purchaser's part, as in *James v. Burchell*, (1881) 82 N. Y. 108, or in failure to raise the money for the land purchase, particularly if this paralleled any tightening in the money market. Instructive cases on the cognate problem of withdrawal of repudiation are *Rayburn v. Comstock*, (1890) 80 Mich. 448, 45 N. W. 378; *Ault v. Dustin*, (1898) 100 Tenn. 366, 45 S. W. 981; *Nilson v. Morse*, (1881) 52 Wis. 240, 9 N. W. 1; *Perkins v. Frazer*, (1901) 107 La. 390, 31 So. 773; *Wharton v. American Law Book Co.*, (1909) 143 Iowa 517, 121 N. W. 1009.

¹⁴*Suburban Improvement Co. v. Scott Lumber Co.*, (C.C.A. 4th Cir. 1933) 67 F. (2d) 335, 90 A. L. R. 330; (1933) 9 Notre Dame Law. 544. 434.

¹⁵The complainant's contention that the conveyance was privileged because defendant prior thereto had committed an anticipatory breach, was disposed of by the court in holding that defendant's conduct had not amounted to anticipatory breach; see footnote 25. This gave the court an additional ground for denying specific performance, that plaintiff could not proceed toward specific performance after electing to treat the contract as broken—a doubtful application of the principle of election of remedies.

¹⁶(1881) 82 N. Y. 108.

plaintiff had regained ability before the day fixed for performance, the defendant had refrained from making the costly outlay which performance on his part would have entailed, when he learned of the plaintiff's interim conveyance. It was held that defendant was excused from performance, although the analysis of the court was in terms not of change of position, but of "breach of the covenant of seisin." The change of position test has been slow in gaining articulate recognition, though it is supported by most of the decisions.

The doctrine under discussion is not confined to contracts for the conveyance of realty; voluntary disablement may occur with precisely the same deflationary effect in other contractual relationships. The courts have held that no different legal consequences attend.¹⁷

Since contracts in which promisors voluntarily disable themselves from performance are as a rule those which are profitable to the other party, cases in which the disablement has been invoked purely as a defense are not numerous.¹⁸ It should be noted, however, that in these cases, the disablement was such that the conduct of the promisor could as easily have been relied on by the promisee in an action for breach. As we have seen, a voluntary disablement is equivalent to an anticipatory breach. Since an anticipatory breach not only confers a cause of action upon the repudiatee, but also excuses him from further acts of performance,¹⁹ these cases illustrate the assertion of the latter segment of the bundle of rights, privileges and powers so conferred, by a repudiatee who, in this case, does not choose to exercise the former.

In the situations so far discussed, it has thus been apparent that prospective inability, voluntarily brought about by the prom-

¹⁷*Dicker v. Italo-American Oil Corp.*, (1931) 119 Cal. App. 451, 6 P. (2d) 550 (contract to issue stock to plaintiff in return for personal services); *Bagley v. Cohen*, (1898) 121 Cal. 605, 53 Pac. 1117 (contract to pay plaintiff out of the profits of packing business); *Israel v. Northwestern Nat'l Life Ins. Co.*, (1910) 111 Minn. 404, 127 N. W. 187 (contract between agent and insurance company, latter selling out its business); see *Ogdens v. Nelson*, [1905] A. C. 109, 74 L. J. K. B. 433, 92 L. T. 478, 53 W. R. 497 (voluntary disablement by liquidation).

¹⁸*Gray v. Smith*, (C.C.A. 9th Cir. 1897) 28 C. C. A. 168, 83 Fed. 824 (lack of title); *Fort Payne Coal & Iron Co. v. Webster*, (1895) 163 Mass. 134, 39 N. E. 786 (conveyance to a stranger); *James v. Burchell*, (1881) 82 N. Y. 108.

¹⁹See excellent analysis in Professor Corbin's American note on anticipatory breach, *Anson, Contract*, 5th Am. ed., sec. 385, p. 483. The statute of limitations does not run, however, from the repudiation; see *Matteson v. Blaisdell*, (1921) 148 Minn. 352, 182 N. W. 442; annotation, (1935) 94 A. L. R. 455.

isor, has entered the picture to be differentiated in no essential respect from the general doctrine of anticipatory breach.²⁰

B. *Promisor's Statement of Inability*.—We have been dealing thus far with cases in which a high degree of probability has been created by the acts of one party, that when the time arrives for performance, he will be unable to render the agreed exchange on his part; in such a case, the remedies of action for damages, or rescission and restitution²¹ are open to the aggrieved party. What of the case, however, where the promisor merely states that he is unable to perform?

The courts as a rule have held that a statement of inability prior to the day set for performance, is not a sufficiently positive indication that performance will not occur to come within the purview of the doctrine of anticipatory breach. In *Johnstone v. Milling*,²² defendant lessor had covenanted to rebuild the premises after expiration of the first four of the twenty-one years of the term; repeatedly he declared his inability to procure funds sufficient for the work. It was held,²³ that such statements did not amount to anticipatory breach, for they could not be taken as equivalent to saying that no matter what happened it was defendant's intention not to rebuild.

It would seem, however, that such early²⁴ limitations upon the doctrine of anticipatory breach should not be perpetuated in

²⁰Illustration of this constant tendency appears in *In re Spittler*, (D.C. Conn., 1907) 151 Fed. 942, and *McRae v. Itasca Paper Co.*, (1922) 153 Minn. 260, 190 N. W. 72.

²¹See *Black, Rescission and Cancellation*, sec. 210, 589-590; note 41 L. R. A. (N.S.) 60; also *Sutton v. Meyering Land Co.*, (1929) 248 Mich. 601, 227 N. W. 783; *Elder v. Chapman*, (1898) 176 Ill. 142, 52 N. E. 10. For an interesting variant, see *Eberhart v. Lind*, (1933) 173 Wash. 316, 23 P. (2d) 17, involving condemnation of the land contracted for by plaintiff, before the first payment fell due; deed upon full payment, but as of the date of the contract; plaintiff sues to rescind; held, for defendant; the deed as of date of contract was in the nature of a risk-shifting device.

²²(1886) 16 Q. B. D. 460, 55 L. J. Q. B. 162, 54 L. T. 629.

²³There is reasonable doubt as to whether the case is not explainable on the ground that the alleged breach did not go sufficiently to the whole of the consideration; see Lord Esher's opinion; see also *Anson, Contract*, 5th Amer. ed., sec. 383. Of course, the repudiation, voluntary disablement, or prospective inability must go to such a portion of the contract as would entitle plaintiff to the remedy he seeks if a like actual breach occurred, if it is to have any effect at all.

²⁴*Johnstone v. Milling* was decided in 1886, thirty-four years after *Hochster v. Delatour*, (1853) 2 E. & B. 678, 22 L. J. Q. B. 455, 22 L. T. O. S. 171, and in the same year as *Dingley v. Oler*, (1886) 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984, which, on its facts, involves a similar extreme insistence on the mental attitude of the promisor. Cf. *In re Spittler*, (D.C. Conn. 1907) 151 Fed. 942; *Louisville Packing Co. v. Crain*, (1910) 141 Ky. 379, 132 S. W. 575.

a day when practically all jurisdictions recognize the propriety of the remedy. No doubt the judicial requirement that intent to repudiate be unequivocal and absolute represents too great an insistence upon the subjective aspect of conduct, the legal significance of which derives chiefly from its effect upon the expectations of the promisee.²⁵ If a future failure to consummate the bargain appears highly probable, then the substantive law, assuming the wisdom of according any action for anticipatory breach, should make no distinction, whether the evidence of such failure of consummation is shown by a statement of intention not to perform or by an unqualified assertion of inability.²⁶

A recent case,²⁷ however, has re-established the doctrine of *Johnstone v. Milling* with equal emphasis. In an action for anticipatory breach of a contract to sell cotton to defendant, plaintiff vendor relied on a letter written while the contract was partly executory, signed by the treasurer of defendant company, stating that corporate existence was being terminated, that it hoped to realize from the sale of its plant sufficient funds to discharge the debt, and that it was unlikely that plaintiff would care to make further shipment, "with the uncertainty as to what and when the payment will be." It was held that though this dismal outlook indicated unquestionably the desire and intention of defendant to get out of the contract if possible, it was not a "distinct, unequivocal, and absolute refusal to perform." The court admitted that plaintiff may well have had a belief that performance would not be forthcoming when the time came to furnish shipping instructions, sufficient to furnish the foundation for an inference that there would be an ultimate breach, but said that

"to use this inference of a probable future breach as the equivalent

²⁵See Professor Corbin's justification of the cause of action for anticipatory breach, footnote 84. See also Williston, Lecture on Repudiation of Contracts, 6 Lectures on Legal Topics, Association of the Bar of the City of New York, 97 et seq., New York Law Journal, June 20, 21, 1924. Compare Gardner, Inquiry into the Principles of the Law of Contracts, (1932) 46 Harv. L. Rev. 1, 12-15. Cf. American Bankers' Ins. Co. v. Moore, (Tex. Civ. App. 1934) 73 S. W. (2d) 620; Kimel v. Missouri State Life Ins. Co., (C.C.A. 10th Cir. 1934) 71 F. (2d) 921, where the court said that an offer to perform in accordance with the promisor's interpretation of the contract, though it be erroneous, is not a clear and unequivocal refusal to perform. Accord, Suburban Improvement Co. v. Scott Lumber Co., (C.C.A. 4th Cir. 1933) 67 F. (2d) 335, 90 A. L. R. 330; Mobley v. N. Y. Life Ins. Co., (1935), 295 U. S. 632, 55 Sup Ct. 876.

²⁶The existence of situations in which the appearance of prospective inability is not sufficiently definite to amount to anticipatory breach is treated at length below. See footnotes 60 ff. and text.

²⁷Wonalancet Co. v. Banfield, (1933) 116 Conn. 582, 165 Atl. 785.

of a present, absolute, unequivocal renunciation of the contract . . . is plainly without justification."²⁸

However much one may disagree with the court's assumption that the necessary effect on the promisee is not present in such statements,²⁹ the rule is generally accepted, as a part of the doctrine of anticipatory breach, that a statement of inability, unless coupled with facts showing an intention not to perform, is not a sufficient repudiation to give rise to an action before the date for performance.

Here, then, there is re-emphasis of the tendency of the courts to think in terms of the sharp distinction: breach of duty or no breach of duty; there is no suggestion of the existence of an excuse for non-performance by the promisee without a concomitant cause of action. This is so even where a court departs from the spirit of *Johnstone v. Milling*. In *In re Spittler*,³⁰ the vendee, under a contract to buy from the vendor the capital stock and plant of the vendor's firm, became insolvent and communicated to the vendor the "absolute impossibility" of performing. Holding that the vendor might treat this as a breach and prove his claim in the bankruptcy of the vendee,³¹ the court said:

"The doubts which assailed [the referee] do not trouble me. He thinks that the decided cases rather carry the idea that the refusal to perform or the inability to perform, must be a wrongful refusal or an inability growing out of a disposition to commit a wrongful act. I do not so read the cases. An absolute inability to perform, which is of such a nature that there is no reasonable probability that thereafter a situation will arise which will make performance possible, is enough. If to such inability is added a statement that it exists, then the party so informed is in a position to treat the contract as broken and to pursue his remedy."

C. *Insolvency and Bankruptcy*.—Still within the more settled confines of the field of prospective inability are the effects of insolvency and bankruptcy on executory contracts.

(1) *Insolvency*.—It is well settled that supervening insolvency³² of the buyer, in a contract for the sale of goods, excuses the seller from compliance with the credit term of the contract;

²⁸(1933) 116 Conn. 582, 165 Atl. 785, 787.

²⁹Compare the attitude in *Chicago Trust Co. v. Chicago Auditorium Association*, (1916) 240 U. S. 581, 591, 36 Sup. Ct. 412, 60 L. Ed. 811: ". . . bankruptcy proceedings (voluntary or involuntary) are but the natural and legal consequences of something done or omitted to be done, by the bankrupt."

³⁰(D.C. Conn. 1907) 151 Fed. 942.

³¹The court refused to consider the question as to whether the bankruptcy itself constituted a breach.

he may retain the goods, notwithstanding the passage of title,³³ until payment of the price is tendered.³⁴ And, although this is not clear on the face of the Uniform Act,³⁵ it has been held, both at common law,³⁶ and under the Act,³⁷ that in addition to the excuse, the seller has a privileged power of resale upon refusal or unreasonable delay by the buyer to tender cash, and the right to maintain an action for damages, or, in the normal case, to prove his claim in the buyer's bankruptcy.³⁸ Delivery on credit, it should be noted, is the other side of the situation dealt with in section 63 (2) of the Act, where the buyer must pay the price in advance of the transfer of title.³⁹ While it is there provided that the seller's inability is a defense to the buyer, the latter would have no cause of action unless the inability amounted to anticipatory breach. It would therefore seem doubtful if, in the converse situation just discussed, the seller should have anything more than an excuse⁴⁰ for not extending credit in accordance with the terms of the contract.

One further point of sales law is relevant. Suppose, on a suspicion of the buyer's financial instability, the seller offers a delivery on sight draft attached to bill of lading, thereby repudiat-

³²Interpreted in cases coming within the present inquiry as meaning an inability to pay one's debts in the ordinary course of business, or as they mature—the so-called "equity definition of insolvency." *Cunningham v. Norton*, (1888) 125 U. S. 77, 8 Sup Ct. 804, 31 L. Ed. 624; *Muehlstein & Co. v. Hickman*, (C.C.A. 8th Cir. 1928) 26 F. (2d) 40, 58 A. L. R. 1294; *Crummey v. Raudenbush*, (1893) 55 Minn. 426, 56 N. W. 1113.

³³Uniform Sales Act, sec. 53.

³⁴At common law, see *Crummey v. Raudenbush*, (1893) 55 Min. 426, 56 N. W. 1113; *Pratt v. Freeman & Sons Mfg. Co.*, (1902) 115 Wis. 648, 92 N. W. 386. See Uniform Sales Act, sec. 54; *Muehlstein & Co. v. Hickman*, (C.C.A. 8th Cir. 1928) 26 F. (2d) 40, 58 A. L. R. 1294.

³⁵Sec. 53 and 60 could be so interpreted.

³⁶*Pratt v. Freeman & Sons Mfg. Co.*, (1902) 115 Wis. 648, 92 N. W. 368. A contrary dictum appears in *Morgan v. Bain*, (1874) L. R. 10 C. P. 15, 27.

³⁷*Muehlstein & Co. v. Hickman*. (C.C.A. 8th Cir. 1928) 26 F. (2d) 40, 58 A. L. R. 1294. The court relied on the Pratt case, and did not purport to construe the act.

³⁸*Muehlstein & Co. v. Hickman*, (C.C.A. 8th Cir. 1928) 26 F. (2d) 40, 58 A. L. R. 1294.

³⁹Sec. 63 (2) is declaratory of the common law theretofore applicable to independent covenants, as stated in rule 1 of the reporter's note to *Pordage v. Cole*, (1669) 1 Wms. Saund. 319; see *Gourd v. Healy*, (1917) 176 App. Div. 464, 163 N. Y. S. 637; no case has been found giving effect to the defense of seller's inability there given to the buyer.

⁴⁰Supervening bankruptcy gives the seller a claim for breach on independent grounds; see footnotes 47-59. The *Muehlstein Case* might be explained on this ground; furthermore, in that case the buyer refused to give shipping instructions, although it is not clear from the opinion that that was a promissory condition.

ing the credit term of the contract. Mere doubts as to solvency being of no operative significance,⁴¹ and the conduct constituting a breach, the rules as to recovery worked out by some courts appear to be as follows: The buyer may recover the market price minus the contract price if, at the time the seller demanded cash, the buyer was in fact unable to pay cash; but if at that time he was able to pay cash, he may recover only interest on the sum involved for the credit period, inasmuch as he is not permitted to enlarge his claim by refusing to consider the seller as part of the market in mitigation of damages; if he was able to do so he should have accepted the tender at the contract price for cash.⁴² There is no presumption of ability to pay cash,⁴³ and the seller, ironically enough, bears the burden of showing the buyer's ability in this respect.

Observe the effect of this rule: if the seller's suspicion has been so accurate that the buyer in fact was disabled to pay cash, he suffers the harsher measure of damages.⁴⁴ But if his suspicion has been poorly founded, the recovery is limited to interest for the credit period. Prospective inability is thus a trap for the seller in this situation. The result, however, seems sound. Since the contract called for delivery on credit, the ability of the buyer to pay cash on delivery is irrelevant; a discovery by S that B is unable to perform an act not required under the contract should have no effect upon the rights of the parties thereto. Furthermore, a failure by S to deliver according to the contract terms might well be the cause of disabling B to pay at the termination of the stipulated credit period.

(2) *Bankruptcy*.—After much fluctuation in the federal courts⁴⁵ on the question of whether bankruptcy was an anticipatory breach of an executory contract, the question was finally settled

⁴¹Jewett Publishing Co. v. Butler, (1893) 159 Mass. 517, 34 N. E. 1087; Koppelon v. Ritter Flooring Corp., (1922) 97 N. J. L. 200, 116 Atl. 491.

⁴²Cook Manufacturing Co. v. Randall, (1883) 62 Iowa 244, 17 N. W. 507; Plesofsky v. Kaufman, (1918); 140 Tenn. 208, 204 S. W. 204; Payzu, Ltd. v. Saunders, [1919] 2 K. B. 581, 89 L. J. K. B. 17, 121 L. T. 563. But see, on the measure of damages, Coppola v. Marden, Orth & Hastings, (1917) 282 Ill. 281, 118 N. E. 499; here, however, the seller made no attempt, apparently, to prove the buyer's ability to pay cash. Other courts consider that the buyer is under no obligation to accept the seller's offer. See note, (1936) 20 MINNESOTA LAW REVIEW 300.

⁴³Cook Mfg. Co. v. Randall, (1883) 62 Iowa 244, 17 N. W. 507.

⁴⁴Normally the market will be higher; the seller's suspicions become more sensitive as the contract price on the credit delivery sinks in relation thereto. See Coppola v. Marden, Orth & Hastings, (1917) 282 Ill. 281, 118 N. E. 499.

⁴⁵See Gilbert's Collier on Bankruptcy, 3d ed., 988.

when the Auditorium Hotel put in a claim of indebtedness in the involuntary bankruptcy of the organization which had contracted to furnish transfer and baggage service for the claimant. Over the objection that to constitute an anticipatory breach within the doctrine of *Roehm v. Horst*,⁴⁶ the repudiation must be positive and unequivocal, the Supreme Court held that the lower court had correctly decided that intervention of bankruptcy constituted such a breach of the contract as to give rise to a provable claim founded upon a contract express or implied within the meaning of section 63 a-4 of the National Bankruptcy Act.⁴⁷ Said the Court:⁴⁸

"It must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequences of something done or omitted to be done, by the bankrupt, in violation of his engagement."⁴⁹

The effect, therefore, is that the bankruptcy of the promisor in

⁴⁶(1900) 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

⁴⁷Chicago Trust Co. v. Chicago Auditorium Ass'n, (1916) 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811; see Glenn, Liquidation, sec. 491.

⁴⁸(1916) 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811.

⁴⁹In re Nye, (D.C. Minn. 1927) 22 F. (2d) 558 (contract to employ plaintiff as director); In re Catts, (D.C. N.Y. 1929) 33 F. (2d) 963 (contract to acquire and convey to plaintiff a lease); but see In re 35% Automobile Supply Co., (D.C. N.Y., 1917) 247 Fed. 377 (contract to pay plaintiff out of future net earnings; held, voluntary bankruptcy not a breach; the agreement was to pay out of future earnings if there were any). As to receivership, notwithstanding, there is usually an allegation, not of insolvency, but of solvency. See *Napier v. People's Stores*, (1923) 98 Conn. 414, 120 Atl. 295 (sale of goods); Glenn, Liquidation, sec. 491, note 55; *Stern v. Mayer*, (1926) 166 Minn. 346, 207 N. W. 737 (contract for sale of capital stock of bankrupt concern; trustee cannot perform such contract); *Drake v. Hodgson*, (1920) 192 App. Div. 676, 183 N. Y. S. 486; cf. *Phenix Nat'l Bank v. Waterbury*, (1910) 197 N. Y. 161, 90 N. E. 435. The New York lower courts have followed the appellate division. In re Rothstein's Will, (1930) 238 N. Y. S. 696, 699, but the court of appeals has yet to speak finally. See also *Kamps & Sacksteder Drug Co. v. United Drug Co.*, (1916) 164 Wis. 412, 160 N. Y. 271.

As to rent claims, for the law prior to the 1934 amendment to section 63a of the Bankruptcy Act, see *Manhattan Properties Inc. v. Irving Trust Co.*, (1934) 291 U. S. 320, 54 Sup. Ct. 385, 78 L. Ed. 825, containing a review of the authorities; see also *Bloch v. Bell Furniture Co.*, (1932) 111 N. J. Eq. 441, 162 Atl. 414; note (1934) 34 Col. L. Rev. 143; for a detailed discussion see Schwabacher and Weinstein, *Rent Claims in Bankruptcy*, (1933) 33 Col. L. Rev. 213. The extent of the modification worked by section 63a as amended June 7, 1934, adding, inter alia, subdivision 7 of section 63a, 11 U. S. C. A. sec. 103 (a), is not within the scope of this paper.

See, in general, Glenn, Liquidation, secs. 494, 495, 496; Bankruptcy Act, sec. 77B(b), 48 Stat. 912(1), 11 U. S. C. A. ch. 8, 207(b), providing in part: "In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section . . . any person injured by such rejection shall for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor."

an executory contract gives rise, with certain exceptions,⁵⁰ to a provable claim in the proceedings, on the ground that an anticipatory breach has occurred; yet this does not impair the right of the trustee, who for this purpose stands in the shoes of the bankrupt, within a reasonable time to carry out the contract.⁵¹

From the point of view of bankruptcy law, the *Auditorium Case* may be viewed as an attempt by the court to render provable contingent claims⁵² not otherwise provided for by the Bankruptcy Act of 1898.⁵³ In attaining this result through the contract doctrine of anticipatory breach, the court has pleased neither the writers on contract law⁵⁴ nor students of bankruptcy.⁵⁵ The theoretical difficulties introduced by the doctrine of anticipatory breach have denied thorough adequacy to this basis for provability of contingent claims.⁵⁶

⁵⁰See *In re United Cigar Stores Co.*, (C.C.A. 2d Cir. 1934) 72 F. (2d) 673, cert. den., (1934) 293 U. S. 617, 55 Sup. Ct. 210, holding that bankruptcy is not a breach of a requirements contract, the court saying: "Though bankruptcy may not excuse a breach, it may have so changed the buyer's requirements that this contract was not broken." As to the rent cases, see footnote 49.

⁵¹*United States Trust Co. v. Wabash & Western Ry. Co.*, (1893) 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; *Brown v. Rushton*, (1916) 223 Mass. 80, 111 N. E. 884; *Gilbert's Collier on Bankruptcy*, 3d ed., 1249-50.

⁵²For definitions of "contingent claim" see *Colman Co. v. Withoft*, (C.C.A. 9th Cir. 1912) 195 Fed. 250, 252, and *In re Mullins Clothing Co.*, (C.C.A. 2d Cir. 1916) 238 Fed. 58. Uncertainty merely as to damages, not as to the existence of the claim, presents no problem of contingency; liquidation occurs under the broad mandate of 63b, 11 U. S. C. A. sec. 103, 1 Mason's U. S. Code, tit. 11, sec. 63b.

⁵³Contingent debts and liabilities, whether liquidated or unliquidated, and including rent claims, have been provable in bankruptcy in England since the Act of 1869, 32 & 33 Vict. ch. 71; *Glenn, Liquidation*, sec. 491; in the United States, both the Acts of 1841, 5 Stat. at L. 440, and of 1867, 14 Stat. at L. 517, made provision for proving contingent debts and demands; it seems, however, that claims for future rent were not deemed provable; see *Manhattan Properties Inc. v. Irving Trust Co.*, (1934) 291 U. S. 320, 54 Sup. Ct. 385, 78 L. Ed. 825. The Act of 1898, 35 Stat. at L. 838, 11 U. S. C. A., makes no express provision therefor.

⁵⁴See *Williston*, 6 *Lectures on Legal Topics* 108-110; 3 *Williston, Contracts*, secs. 1327, 1987; 2 *id.* sec. 880; *Restatement, Contracts*, secs. 287, 324. See also discussion in *Weinstein and Schwabacher, Rent Claims in Bankruptcy*, (1933) 33 *Col. L. Rev.* 213, 232-34.

⁵⁵*Weinstein and Schwabacher, Rent Claims in Bankruptcy*, (1933) 33 *Col. L. Rev.* 213; *Glenn, Liquidation*, sec. 491.

⁵⁶There is no disablement until the adjudication of bankruptcy; if the promisee must then "accept" the repudiation, this election must be related back to the filing of the petition. See *In re Portage Rubber Co.*, (C.C.A. 6th Cir. 1924), 296 Fed. 289, cert. den. (1924) 266 U. S. 604, 45 Sup. Ct. 91, 69 L. Ed. 463. It would not be permitted to the repudiatee to refuse to "accept" the breach, and thus secure exemption from the discharge, see *Lesser v. Gray*, (1915) 236 U. S. 70, 35 Sup. Ct. 227, 59 L. Ed. 471; *Burns Mortgage Co. v. Bond Realty Corp.*, (C.C.A. 5th Cir. 1931) 47 F. (2d) 985) see (1927) 27 *Col. L. Rev.* 600. The court in the *Burns* case said:

Coming after *Williams v. United States Fidelity & Guaranty Co.*,⁵⁷ it was not absolutely necessary for the court to invoke the doctrine of anticipatory breach; and since *Maynard v. Elliott*,⁵⁸ which provides a broad basis for proving contingent claims, the function of the case as in aid of the provisions of the Bankruptcy Act with respect to contingent claims would seem to have been rendered largely unnecessary.

For the purpose of the present paper, however, it is sufficient to note that in so far as bankruptcy indicates inability to perform, especially when the promisor is a corporation, the solution has again been found in conferring an immediate cause of action; no distinction has been made between voluntary and involuntary bankruptcy;⁵⁹ and the court, in adopting this approach, has apparently assumed that without it, the contingent claim would not have been provable.

III. PROSPECTIVE INABILITY AS EXCUSE FOR NON-PERFORMANCE.

The foregoing summary has revealed the legal consequences of prospective inability to perform, when joined with the manifestations from which an immediate cause of action arises in favor of the promisee against the disabled promisor.⁶⁰ However, the limitations which courts have thrown about the doctrine of anticipatory breach, and to which attention has been directed, make possible situations in which the conduct of the promisor does

"This option, if allowed, would defeat the objects of the Bankruptcy Act. It would seem that in cases where specific performance could not be had, that the decision in *Lesser v. Gray* implies that all remedy on the contract ceases with the bankruptcy, except that for the anticipatory breach. A seller must keep undelivered goods and prove only for his claim." (C.C.A. 5th Cir. 1931) 47 F. (2d) 985, 987.

⁵⁷(1915) 236 U. S. 549, 35 Sup. Ct. 289, 59 L. Ed. 713. The right of a surety under section 57i of the Bankruptcy Act, to prove the principal claim in the name of the creditor, and so to reduce its own liability by the amount of the dividends payable thereon, as to a liability contingent at the time of the petition (though default of principal occurred before bankruptcy) was held to bar a later suit by the surety for indemnity, such right under 57i not having been exercised in the bankruptcy proceedings.

⁵⁸(1931) 283 U. S. 273, 51 Sup. Ct. 390, 75 L. Ed. 1028. The claim of a holder of notes indorsed by the bankrupt was held provable although contingent not only on non-payment by the maker, but upon compliance with the appropriate steps necessary to hold parties secondarily liable.

⁵⁹See footnote 29.

⁶⁰In *Hall v. Consumers Ice Co.*, (1933) 260 N. Y. 417, 183 N. E. 903, the company failed to call for payment in 1930 and 1931 its bonds to the amount agreed to be called yearly from 1930 to 1939. The trial court, holding for the plaintiff in his suit upon seven of the bonds, said there was "such an anticipatory inability . . . to perform as amounts to a breach." Although the court of appeals indicated that there was a present breach, it also considered the fact that the promisor corporation had conveyed away all of its assets as amounting to anticipatory breach.

not sufficiently manifest future non-performance to warrant subjection to an immediate cause of action, but in which, nevertheless, prospective inability is made reasonably clear, and conduct in reliance by the promisee seems justified. It is in such situations that problems of the most interest in this field arise.

Suppose the contractual relation existing between A and B, extending over some period of time, and consisting of the performance on the part of each of mutual and dependent promises, becomes undesirable in the eyes of A because of the prospective inability of B to perform in the future. The impending deflation, in future non-performance by B, of A's interest in such future performance, may involve (a) an unexcused inability which will render B liable for breach when the non-performance occurs, or (b) circumstances of legal impossibility which will excuse B's failure to perform.

A cessation of performance by A under the circumstances last mentioned has been before the courts infrequently. In the case of *The Kronprinzessin Cecilie*,⁶¹ the master of the vessel, which was carrying gold to England, turned back, upon the declaration of war on July 31, 1914. The bill of lading representing the gold contained a "restraint of Princes" clause. The court held that such conduct incurred no liability. The effect of this holding is that anticipation of an event which, if it occurred, would excuse performance,⁶² it itself a basis for refusal of performance.⁶³

The first of the two cases mentioned above involves prospective non-performance on the part of B, which, if it occurred, would be unexcused. First as to the case where the suspicion turns out to be the fact. Is A safe in so refusing to perform, or has he committed a breach for which B can hold him, B being entitled to sue on the ground that A's repudiation has excused further performance or ability to perform on his part?

A review of the cases will show, it is believed, that A is safe in this situation. While a repudiation will excuse the repudiatee from making further preparations for performance, and from

⁶¹(1918) 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960.

⁶²See Anson, Contract, 5th Am. Ed., secs. 373-380.

⁶³Contra, *Mitsui & Co. v. Watts, Watts & Co., Ltd.*, [1916] 2 K. B. 826; *Piaggio v. Somerville*, (1918) 119 Miss. 6, 80 So. 342. Accord with the principal case, *Williams v. Miller*, (1885) 68 Cal. 290, 9 Pac. 166 (Contract of agistment); *German-American Securities Co. v. McCulloch*, (1905) 28 Ky. L. Rep. 133, 89 S. W. 5 (investment in bonds of company, which, because of certain conditions therein, would have been illegal).

averring performance of otherwise necessary acts,⁶⁴ it seems clear that the defense is open to the repudiator, A in our case, to show that B, the repudiatee, would have been unable to perform, even if the repudiation had not occurred.⁶⁵ In the words of Judge Learned Hand, speaking of B's supervening inability after an anticipatory breach by A, a related situation:⁶⁶

"It is, indeed, one of the consequences of the doctrine of anticipatory breach that, if damages are assessed before the time of performance has expired, the court must take the chance of forecasting the future as best it can. . . . Hence it is always an answer . . . to show that had the contract continued, the promisee would not have been entitled when the promisor disabled himself or repudiated."

*Weinglass v. Gibson*⁶⁷ is an interesting recent case in this respect. Here the defendant theater owner, in whose theater plaintiff had contracted to produce a play during Christmas week, committed an anticipatory breach by making a similar contract with another producer, and advertising the latter play. Plaintiff shipped on some billing matter, and telegraphed defendant that he was ready and able to perform and elected to hold defendant in damages. Since, as the court held, defendant had clearly committed an anticipatory breach, should the defense be open that plaintiff would have been unable to perform, even in the absence of the repudiation? The court held that it was permissible to defendant to show in defense that two of plaintiff's cast were under contracts to appear elsewhere during Christmas week, but found that the evidence on this point was confused, and held that a verdict discrediting the defense should not be disturbed. Implicit in the opinion was the court's disbelief that

⁶⁴Royal Ins. Co. v. Martin, (1904) 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385 (insured excused from furnishing proofs); Trowbridge v. Jefferson Auto Co., (1918) 92 Conn. 569, 103 Atl. 843 (tender excused); Mertz v. Wallace, (1929) 93 Ind. App. 289, 169 N. E. 333 (lessor excused from further readiness to perform); McCaull-Dinsmore Co. v. Jackson, (1920) 57 Mont. 555, 189 Pac. 771 (repudiation by buyer of wheat); Graham v. Frazier, (1896) 49 Neb. 90, 68 N. W. 367 (tender of price excused in contract to purchase cattle); Ferber v. Cona, (1916) 89 N. J. L. 135, 97 Atl. 720 (contract to build garage); Strassburger v. Leerburger, (1922) 233 N. Y. 55, 134 N. E. 834 (tender of price in sale of goods); Serviss v. Hirsh, (1935) 243 App. Div. 782, 277 N. Y. S. 720.

⁶⁵See Professor Corbin, Cases on Contracts, 684, note: "Repudiation or impossibility on the part of the defendant would justify the plaintiff in refusing to perform, but they do not cause possibility of performance by the plaintiff to cease to be a condition precedent to his enforceable right."

⁶⁶New York Trust Co. v. Island Oil & Transport Corp., (C.C.A. 2d Cir. 1929) 34 F. (2d) 653, 654.

⁶⁷(1931) 304 Pa. St. 203, 155 Atl. 439.

defendant's repudiation in fact had occurred because of a belief in plaintiff's prospective inability. Had the proof supported the defense, however, this consideration should not affect it. If the plaintiff, irrespective of the repudiation, were himself unable to perform, he should have no right to a recovery of damages.⁶⁸

It thus seems clear that if A refuses performance because of B's prospective inability not amounting to an anticipatory breach on B's part, and B in fact is unable at the due date, A cannot be held in damages for his refusal to perform, the defense being open to him that, apart from his (A's) repudiation, B would have been, and was, unable to perform.

One of the risks, however, run by A in this connection, is that the court may take the position that his repudiation was a substantial or contributing factor in inducing B's inability.⁶⁹ Especially true is this where B's inability concerns the payment of money, and A has refused to deliver on credit.⁷⁰

And judicial reluctance to extend A's rights upon the manifestation of inability by B is brought out clearly where A seeks rescission, relying upon the difficulties which beset performance by B, and which point to a future breach. In *Brady v. Oliver*,⁷¹ plaintiff sought to rescind a construction contract because of the prospective inability of defendant to complete the work within the time set, time being of the essence. Denying that prospective inability to perform on time, even where time is of the essence, was any ground for rescission, the court stated that the unwillingness or disability to perform must be a present and existing

⁶⁸That the disabled party cannot recover, see *Peterson v. City of Wells-ville*, (C.C.A. 8th Cir. 1926), 14 F. (2d) 38 (construction contract); *Reeves Lumber Co. v. Davis*, (1916) 124 Ark. 143, 187 S. W. 171 (lumbering contract); *Driensky v. Skonieczny*, (1920) 209 Ill. App. 188 (exchange of real estate); *Dosch v. Andrus*, (1910) 111 Minn. 287, 126 N. W. 1071 (repudiation excuses tender of deed, but repudiatee must have been able); *Gerli v. Poidebard Silk Co.*, (1894) 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61 (sale of silk); *Wells v. Page*, (1905) 48 Or. 74, 82 Pac. 856 (land contract); *McCormick v. Tappendorf*, (1909) 51 Wash. 312, 99 Pac. 2 (contract to sell railroad ties). See also *Wade v. Lutterlock*, (1928) 196 N. C. 116, 144 S. E. 694 (contract to sell stock); and *Brandon v. Smith*, (1931), 16 La. App. 130, 133 So. 489 (land contract).

There is language to the contrary in *Taylor v. Oakes, Roncoroni & Co.*, (1922) 127 L. T. R. 267, 38 T. L. R. 517, 66 Sol. Jo. 556; but this case is expressly based on *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543, 74 L. J. K. B. 688, 92 L. T. 637, 21 T. L. R. 413; it is believed the cases are not inconsistent on their facts with the rule stated in the text.

⁶⁹See *Chicago, R. I. & G. Ry. Co. v. Martin*, (Tex. Civ. App. 1914) 163 S. W. 313.

⁷⁰See cases cited in footnote 42.

⁷¹(1911) 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N.S.) 60.

"legally accomplished" fact, and not a "mere potentiality."⁷² A fortiori, where time is not of the essence, prospective inability gives the promisee no power to repudiate or ask for rescission.⁷³

Assuming, now, that A has a defense to B's action for breach, has his refusal to perform cost him his cause of action, or counterclaim, against B for B's ultimate inability? If B's conduct had amounted to a voluntary disablement, A would have been excused from performance and would have had his immediate cause of action against B.⁷⁴ But B's conduct has not amounted to anticipatory breach. Should A's failure to perform because of B's prospective inability deprive him of a cause of action for actual breach?

The cases do not seem conclusive.⁷⁵ Even were the doctrine of excuse⁷⁶ made articulate in this connection, it would be arguable that inasmuch as recovery is the pecuniary substitute for performance, and since performance is earned by a return performance or a tender thereof, A, by withholding his performance has not earned his right to a return performance.

Two cases may be imagined: (1) A repudiates; B subsequently becomes unable to perform, but had manifested no inability at the time A repudiated. Upon proof by A of such inability, B cannot recover against A.⁷⁷ (2) A repudiates because he accurately senses the coming breach, upon manifestations of inability on the part of B. Again B cannot recover from A, since A can show B's actual inability.⁷⁸ In the former case, however, A should have no cause of action, since he repudiated without semblance

⁷²Cf. *Sutton v. Meyering Land Co.*, (1929) 248 Mich. 601, 227 N. W. 783 (rescission allowed); see also *Eberhart v. Lind*, (1933) 173 Wash. 316, 23 P. (2d) 17.

⁷³*Holt v. Security Life Ins. Co.*, (1908) 76 N. J. L. 585, 72 Atl. 301, 21 L. R. A. (N.S.) 691.

⁷⁴See footnote 9 ff.

⁷⁵*Russell-Miller Milling Co. v. McLean*, (1925) 48 S. D. 198, 203 N. W. 498 (cause of action); and *Robertson v. Davenport & Patterson*, (1855) 27 Ala. 574 (recoupment), indicate that the action will lie. The cases holding that the disabled party cannot recover from the other party, do not discuss the point.

⁷⁶On "excuse" in general, see Ferson, *Excuse as a Legal Concept*, (1933) 7 U. Cin. L. Rev. 362, not, however, discussing the instant topic.

⁷⁷*New York Trust Co. v. Island Oil & Transport Co.* (C.C.A. 2d Cir. 1929) 34 F. (2d) 653; *Driensky v. Sconieczny*, (1920) 209 Ill. App. 188. In cases where A has ceased performance for some other reason than that B was prospectively unable to perform, and it turns out that in fact B is unable at the due date, an analysis of the problem in the more conventional terms of prevention of performance by the other party (see *Miles v. Metzger*, (1934) 316 Pa. St. 211, 173 Atl. 285; *Restatement, Contracts*, sec. 295; *Williston, Contracts*, sec. 677) is impossible.

⁷⁸See footnote 68.

of an excuse. But in the latter it would seem that A should be so entitled, subject to a showing by B that A, too, would have been unable to perform, apart from B's manifestations of inability; both parties would in this event be free.⁷⁹ A's non-performance would be excusable on the ground that no man is compelled to do an act useless in accomplishing its intended purpose, in this case, to receive a return performance by B.⁸⁰ But A's non-performance should be material as to the amount of damages recoverable.⁸¹

The statement in one case⁸² that A's failure to perform is non-prejudicial on the ground that he is disabled to enhance damages by further performance, is theoretically unsound unless confined to the case where the manifestation of inability by B is itself a breach.

So far, we have been dealing with the rights of A and B where B in fact was unexcusably disabled at the due date for performance. A crucial case, testing the position of the courts with regard to the reality of the excuse, arises where B, subsequently and before the maturity of A's claim, regains ability.

Regained ability has, as we have seen, been held ineffective where B's conduct amounted to voluntary disablement.⁸³ Should it be otherwise where B's conduct has not been thus colorable? Clearly, unless A has changed his position, regained ability should entitle B to the benefit of his bargain; any other rule would put B in a worse position than a repudiator, who may, under the prevailing view of anticipatory breach, effectively withdraw his repudiation before change of position, or before suit brought, by the repudiatee.

Suppose A has changed his position in reliance on the manifestations of inability? That the courts have recognized that premature indications of a future breach should not go without effect, however great may be the strain upon legal theory produced by recognition thereof,⁸⁴ is attested by the mass of decisions involving

⁷⁹See Restatement, Contracts, sec. 306.

⁸⁰Restatement, Contracts, sec. 306. See comment (a).

⁸¹Restatement, Contracts, sec. 288.

⁸²Wm. Cramp & Sons v. United States, (1915) 50 Ct. Cl. 179.

⁸³See footnote 7.

⁸⁴Justification is found not so much in theory, as in practical considerations of policy. As Professor Corbin has said, to allow the action is desirable inasmuch as the anticipatory breach "frequently causes immediate loss in property values; it disturbs the mind and serenity of the promisee, and an immediate action makes for an early settlement of the dispute and a timely payment of damages." American Note on Anticipatory Breach, Anson, Contracts, 5th Am. ed., p. 481-482.

anticipatory breach. And a few cases have gone to the extent of giving effect, as anticipatory breach, to statements, without requiring that the intent to repudiate be absolute and unequivocal,⁸⁵ and of giving similar effect to an unexcused inability existing under circumstances devoid of any reasonable indications of future recovery,⁸⁶ even though the facts could not be fitted into the mould of voluntary disablement.

A change of position, in reasonable reliance on manifestations of inability by the other party, is the subject of a group of sections in the Restatement of Contracts.⁸⁷ Effect is there given, to manifestations not involving anticipatory breach, by conferring upon the party who has taken such a change of position, a privileged power of divesting the apparently disabled party of his right to a return performance, even though the latter has regained ability to perform within the proper time.⁸⁸

⁸⁵In *re* Spittler, (D.C. Conn. 1907) 151 Fed. 942; *DeMille Co. v. Casey*, (1921) 115 Misc. Rep. 646, 189 N. Y. S. 275, the court quoted Williston, and said: "As a practical matter, it made no difference to the De Mille Company whether its failure to receive royalties was due to a repudiation of the contract, on Casey's part, to wilfulness, or to impecuniosity. Whether the default was wilful or from neglect merely, is in my opinion immaterial."

According to Professor Williston, a confusion between what facts should confer a cause of action and what facts should constitute excuse, underlies the doctrine of anticipatory breach. Recognition of the excuse without the cause of action, in the subject of the present discussion, is on that account undoubtedly made more difficult. See Williston, *Contracts*, sec. 1331, at p. 2385.

⁸⁶*Wm. Cramp & Sons v. United States*, (1915) 50 Ct. Cl. 179.

⁸⁷Restatement, *Contracts*, secs. 280-287.

⁸⁸The blackletter language of the sections, 280-287, is not unimpeachably clear. Thus the blackletter of 280, the pivot of the next seven sections, is capable of the interpretation that it applies only to a statement, i. e., verbal conduct, of the promisor; but the comment, and the illustrations to the succeeding sections prove the contrary. Furthermore, as will be shown, the state of case authority rendered these sections more than descriptive of the existing law; on innovations in the Restatement, see Patterson, *Restatement of the Law of Contracts*, (1933) 33 *Col. L. Rev.* 397, 414.

Professor Havighurst, however, in *The Restatement of the Law of Contracts*, (1933) 27 *Ill. L. Rev.* 910, has questioned the application of sections 283 and 284 (prospective inability by lack of title) to a case of regained ability. He queries, at p. 919: "If a purchaser under a land contract changes his position on acquiring knowledge of a cloud on the vendor's title, must he perform if the vendor seasonably removes the cloud?" It is believed, however, that illustration 1, sec. 283, furnishes the answer. It is there provided that if B, vendor, before the date of the closing, secures a release of C's dower interest, because of the existence of which A, purchaser, ignorant thereof at the time of contracting, had changed his position by contracting to buy other land, and tenders a proper deed seasonably, A need not accept such deed. Furthermore, unless such sections as 280, 282 (prospective inability by illness of personal servant), 283 and 284 (lack of title), and 286 (prospective illegality), refer to a promisor who has regained ability, they are pointless, since a disabled promisor would be denied recovery on independent grounds. See footnote 68; and see *Restatement, Contracts*, sec. 277.

In this, the Restatement has followed the view previously expressed by legal writers who have considered the question at any length.⁸⁹ But an examination of the cases has convinced the writer that it departs from the scattered and unpersuasive case authority on the point.

Wherever the case has arisen, in which one party's manifestations of inability, relied on by the other as an excuse for non-performance, have not taken the form of voluntary disablement, or insolvency, the courts have taken the view⁹⁰ that the latter does not have the power to divest the former of his right, by performing, to become entitled to the benefits of the contract.⁹¹ As a rule, the discussion of the point in the opinion has been colorlessly confined to a judicial fiat to that effect; but no less a jurist than Holmes has said, at least in the case of an executory agreement to pay money,⁹² that "the degree of his [purchaser's] ability at any moment before he was called on to pay was no concern of the defendant's."⁹³

It thus appears that there is disparity between the state of the

⁸⁹Williston, *Contracts*, secs. 768, 875, 1326, 1331, and especially secs. 877-880; Vold, *Repudiation of Contracts*, (1927) 5 *Neb. L. B.* 269, 303-308.

⁹⁰Stated concisely in Page, *Contracts*, (2d ed.) sec. 2940: "The fact that A has reasonable cause to believe, and does believe, that B will be unable to perform his part of the contract, does not of itself discharge A from performing his part. . . . The fact that it is highly improbable that B will be able to perform the contract does not discharge A if the time for performance has not come and B has not yet failed to perform. . . . As long as the time for performance has not yet arrived, the fact that so much time has elapsed since the contract was made, and so little time is left for performance that in all probability the promisor will not perform, does not discharge the adversary party." [Citations omitted].

⁹¹*Smutz v. Holliday*, (1919) 186 *Iowa* 784, 172 *N. W.* 948 (land contract); *Coonan v. City of Cape Girardeau*, (1910) 149 *Mo. App.* 609, 129 *S. W.* 745 (construction contract); *Gooch v. Coleman*, (1916) 22 *N. M.* 45, 159 *Pac.* 945 (contract to sell cattle); *Morgan v. Tucker*, (1905) 78 *Vt.* 56, 61 *Atl.* 863 (logging contract); *Hathaway v. Sabin*, (1891) 63 *Vt.* 527 (contract to furnish music hall). See also *Kavanaugh Mfg. Co. v. Rosen*, (1902) 132 *Mich.* 44, 92 *N. W.* 788 (contract for sale of goods); *Dimon Corp. v. Federal Sugar Refining Co.*, (1925) 215 *App. Div.* 140, 213 *N. Y. S.* 277 (same); *Plummer v. Kelly*, (1897) 7 *N. D.* 88, 73 *N. W.* 70 (land contract); *Brady v. Oliver*, (1911) 125 *Tenn.* 595, 147 *S. W.* 1135, 41 *L. R. A.* (N.S.) 60; *Jefferson v. Paskell*, (1916) 1 *K. B.* 57, 85 *L. J. K. B.* 398, 113 *L. T.* 1189 (marriage contract).

⁹²*In Lowe v. Harwood*, (1885) 139 *Mass.* 133, 29 *N. E.* 538.

⁹³It is generally stated that contracts to pay money are not subject to anticipatory breach: *Roehm v. Horst*, (1900) 178 *U. S.* 1, 20 *Sup. Ct.* 780, 44 *L. Ed.* 953; *Alger-Fowler Co. v. Tracy*, (1906) 98 *Minn.* 432, 107 *N. W.* 1124; *contra*, *Pollock v. Pollock*, (*Tex. Comm. App.* 1932) 46 *S. W.* (2d) 292; but in *Lowe v. Harwood*, (1885) 139 *Mass.* 133, 29 *N. E.* 538, there were mutual covenants, and therefore the reason stated in *Roehm v. Horst* for the non-applicability of anticipatory breach to contracts to pay money would not apply.

authorities and the position taken by the Restatement. However much the actual conflict with the decided cases may be whittled away by distinctions, it is clear that the Restatement has blazed a new trail. Disinction, of course, is possible. Thus it does not appear that in any of the cases cited in support of the text⁹⁴ was it urged upon the court that the defendant had changed his position, nor did it clearly appear that such had been the case; but if counsel had urged that point, authority giving it significance, in this connection, could not have been found.

The view that manifestations indicating prospective inability, but not constituting anticipatory breach, should be held to give the promisee a privileged power, by changing his position, to deprive the prospectively disabled party of future benefits, will depend, for acceptance, largely upon the weight accorded the Restatement by the judiciary. It is believed that the position taken by the writers and the Restatement is more nearly in accord with the sentiments of the business community; and that it does not unduly threaten the obligation of contracts to allow the promisee, upon a reasonable belief that future performance will fail, to consolidate his position by making new arrangements in the interest of stability.

⁹⁴See footnote 91.