



Volume 31 | Issue 3

Article 4

April 1925

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Recommended Citation

Robert J. Riley, *The Doctrine of Anticipatory Breach as Applied in West Virginia*, 31 W. Va. L. Rev. (1925).
Available at: <https://researchrepository.wvu.edu/wvlr/vol31/iss3/4>

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THE DOCTRINE OF ANTICIPATORY BREACH AS APPLIED IN WEST VIRGINIA

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The general law of contracts as we all know is the result of a process of growth extending over many centuries. During this period of development, however, the changes have been gradual and for the most part merely the result of reasoning based upon premises already well recognized in the law. In certain instances though, new chapters or additions have been made to the law of contracts by the adoption of ideas rather radically different from the then known theory of the law and seemingly based upon unrecognized premises. One of the more recent of these developments is what is commonly called the doctrine of anticipatory breach.

As its name implies, this doctrine does not deal with the ordinary breach of the performance of a contract, but is concerned only with the right of a party to a contract to sue immediately for a breach to be made at some future time.¹

While some inconsistencies exist in the law dealing with the repudiation of contracts, yet it may safely be said that formerly the general law has been that where a party renounces or renders himself unable to perform a contract prior to the date set for performance the alternative of either of two courses of action was open to the injured party. In the first place, he could act upon the repudiation or renunciation by rescinding the entire contract. The contract being rescinded and no longer having force and effect neither party could complain on the date set for performance if the other actually defaulted. Gradually from this situation the law was extended to allow the injured party to recover the value of any part performance made by him before the renunciation occurred. So, if plaintiff contracted to purchase a horse from de-

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¹ CLARK, *CONTRACTS*, 243-244; WILLISTON, *CONTRACTS* §1296. "Contracts," *DEC. DIG.* (Key No.) 313. *CENT. DIG.* § 1279.

defendant on June 1, for \$100, making an immediate payment of \$10 on account, then if defendant renounced the contract on May first, plaintiff could at once elect to rescind the whole contract, and could recover back the \$10 paid by him. This recovery, of course, could not be made on the contract as it had been rescinded but upon a *quantum meruit*.

The second course of action open to the injured party was that he could remain stolid and ignoring the repudiation of the contract made by the other party, allow the contract to remain in full force and effect. He had no remedy at the time of the renunciation as the date for performance had not arrived and no actual breach had occurred.² In the suppositious case plaintiff then would be forced to wait until June 1 for his remedy when if defendant failed to deliver the horse according to the promise made, an actual breach having resulted, plaintiff could sue on the contract for his damages.

The law remained crystallized in regard to cases of this kind until the celebrated case of *Hochster v. De La Tour* was decided in England in 1853.³ Here defendant contracted to employ plaintiff to travel as his courier, starting June 1, 1851. On May 11, defendant wrote plaintiff stating that his services were not required. Plaintiff brought his suit on May 22, which was prior to the date set for performance. Objection was made that the suit was prematurely brought, but the court held that a declaration by defendant that he intended to break his contract constituted a breach of the contract on which plaintiff could sue immediately. The decision was grounded on the theory that it would be a serious injury to plaintiff to require him to wait till the day of performance to see if defendant would then perform, as he could not seek labor in the meanwhile but would be compelled to remain in readiness to perform himself. Thus finding reason for this decision in convenience the court implied a promise that during the life of the contract neither party would do anything inconsistent with the relationship established by it.

This case by inaugurating the doctrine of anticipatory breach gave to the injured party another course he might elect to follow where the contract had been renounced prior to the date for performance. Instead of resting on his rights until an actual breach occurred, or rescinding the contract, he may now elect to treat the renunciation as an actual breach and may bring an immediate

² *Philpotts v. Evans*, 5 M. & W. 475, 151 Eng. Reprint 200 (1839), Opinions of Baron Parke.

³ 2 E. & B. 678, 118 Eng. Reprint 922 (1853).

suit for damages. West Virginia follows the weight of authority and allows the election to pursue either of these three remedies.⁴

The doctrine of anticipatory breach from a humble beginning has become to be almost of universal acceptance. It is the law in England, in Canada, in our federal courts and in a great majority of our states, including West Virginia.⁵ The rule in this state is best laid down in the case of *Davis v. Grand Rapids School Furniture Company*, Syllabus 1, of which case reads as follows:

“Where a party to a contract notifies the other that he does not intend to abide by or perform it, the other may bring an immediate suit for such damages as he may thereby have sustained, without waiting for the time of performance to expire.”⁶

In this case the plaintiff had leased his theatre in Huntington to a party starting September 1, opera chairs to be provided and in place. He contracted with the defendant company in February through their local agent for the purchase of the chairs. Thirty days later defendant notified him that it would not fill the contract. Plaintiff brought suit on June 3. Held: Plaintiff had right to take defendant at his word that he would not perform and could bring his suit immediately.

As far as the history of this doctrine is concerned, it is understood that the decision of *Hochster v. De La Tour* was based on a series of cases dealing with breach of the marriage contract, and upon property cases which in reality do not justify the decision.⁷ It has always been recognized that the doctrine of anticipatory breach is justified in cases involving breach of the marriage contract, but the logic of the extension of its use to other classes of contracts is not so clear. The reason for the exception in case of contracts to marry may readily be seen. For example: Where parties contract to marry on June 1 but on May 1 D changes her mind and marries X, then an immediate cause of action accrues to P. By her action D has repudiated the contract and has rendered performance impossible on her part, but more than this she has caused an actual breach to occur. It is well established that a contract to marry creates a certain status or relation between the parties, namely that of betrothment, and by reason of the existence of this status there is an implied obligation not to

⁴ *Bare, Admr. etc., v. Victoria Coal & Coke Co.*, 73 W. Va. 632, 80 S. E. 941 (1914).

⁵ England—*Hochster v. De La Tour*, *supra*. Canada—*Dalrymple v. Scott*, 19 Ont. App. 477, 483. U. S.—*Roehm v. Horst*, 173 U. S. 1, 44 L. Ed. 953, 20 Sup. Ct. Rep. 780 (1900).

⁶ 41 W. Va. 717, 24 S. E. 630 (1896).

⁷ Williston, *Repudiation of Contracts*, 14 HARV. L. REV. 429-431, citing *Ford v. Tiley*, 6 E. & C. 325 108 Eng. Reprint 472 (1827); *Heard v. Bowers*, 23 Pick. 455, 460 (1829).

do anything inconsistent with it. This is true only of the contract of marriage as it is in this case alone that a status is created by virtue of the contract. This view is expressed in the leading case of *Frost v. Knight*, and is followed by our own Supreme Court.⁸ The following is quoted from the opinion in the case of *Connolly v. Bollinger*:

“A contract of marriage is peculiar and distinct in this, that it establishes, at once and before the consummation of the marriage, a relation of confidence between the parties and alters their status. From the moment the contract is made, the parties are betrothed. The breach thereof, by renunciation or repudiation, ipso facto destroys the relation so established, alters the situation of the parties and works injury.”⁹

No true status is created by contracts other than for marriage.¹⁰ Therefore while suit before the date of performance for renunciation of the marriage contract is justifiable because an actual breach has occurred, yet in other contracts no status exists between the parties and a repudiation prior to the day of performance does not constitute an actual breach. It is illogical to allow suit before the date of performance, because in doing so the court holds that the defendant has breached the contract now when his promise only requires performance on a future day. Thus in reality the promise made by offending party is in a certain sense enlarged without his consent. This view is taken by Massachusetts which forcibly condemns the majority rule.¹¹ Recognizing the well established exception of the marriage contract, the doctrine of anticipatory breach has no basis in logic and must be looked upon merely as the child of convenience. Without question it is more convenient to be allowed a remedy by suit at the time of renunciation rather than to require a delay until the actual breach occurs. Contracting parties are also saved the uncertainty of waiting for the date of performance wondering if the contract is to be performed or not. It would seem though that when all interests are weighed the convenience created by the doctrine of anticipatory breach fully justifies its offense to logic.

Assuming the existence of the contract, in order for the doctrine of anticipatory breach to apply it is first necessary that there be a breach or renunciation of the contract to take effect at some future time, *i. e.*, the day of performance. This breach may be in the form of an oral or written declaration that the offending party

⁸ L. R. 7 Ex. 111 (1872).

⁹ 67 W. Va. 37, 67 S. E. 71 (1910).

¹⁰ *Connolly v. Bollinger*, *supra*.

¹¹ *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384 (1874).

will not perform, or it may be a renunciation implied from the conduct of the party.¹² The breach may occur while the contract is still executory or it may occur in the course of performance and relate only to acts to be performed at a later time. The case of *Hochster v. De La Tour* is an example of a breach while the contract was still executory.¹³ When several shipments have been made under a contract to deliver coal over a period of time, a declaration by the seller that after July 1, he would no longer deliver would constitute a breach in the course of performance. Most of the cases decided by the Supreme Court of West Virginia deal with this style of breach and the court applies the doctrine of anticipatory breach though in fact in most instances an actual breach of the contract had occurred and the aid of this doctrine need not have been invoked.¹⁴ Syllabus 2 of the case of *Pancake v. George Campbell Co.*, reads:

“Where there is a contract for the sale of goods and the purchaser repudiates the contract, and refuses to consummate it by acceptance of the goods, the seller may at once sue for damages for breach of the contract, without waiting for the period for the delivery of the goods to elapse, and without tender of them.”¹⁵

Here P contracted to sell 1000 tons of bark to D, delivery to be made between August 1, 1893, and June 1, 1894. P later offered to deliver under the terms of the contract but D refused to accept any deliveries and P brought suit on September 20. It is submitted that since P was privileged to make delivery any time between the dates named, an actual breach of the entire contract occurred when D refused the tender made. Independently of the doctrine of anticipatory breach suit could have been brought on the contract for all damages suffered as the breach clearly went to the entire contract. Instead of basing the decision on a method of reasoning identical with the doctrine of anticipatory breach, should not the ordinary test governing the actual repudiation of contracts have been applied? Was the breach a substantial one going to the entire contract, so that the injured party would not

¹² By conduct: *Roberts v. American Column & Lumber Co.*, 76 W. Va. 290, 85 S. E. 535 (1915); *Lewis v. W. Va. Pulp & Paper Co.*, 76 W. Va. 103, 84 S. E. 1063 (1915).

Oral: *Davis v. Grand Rapids School Furniture Co.*, *supra*, *Bare Admr. v. Victoria Coal & Coke Co.*, *supra*.

Written: *James & Mitchell v. Adams*, 16 W. Va. 245 (1880); *Chapman v. J. W. Beltz & Sons Co.*, 48 W. Va. 1, 35 S. E. 1013, (1900).

¹³ Executory: *Davis v. Grand Rapids School Furniture Co.*, *supra*; *Connolly v. Bollinger*, *supra*.

In course of performance: *James & Mitchell v. Adams*, *supra*; *Pancake v. George Campbell Co.*, 44 W. Va. 82, 28 S. E. 719 (1897); *Miller v. Jones*, 68 W. Va. 526, 71 S. E. 248 (1911); *Bare Admr. v. Victoria Coal & Coke Co.*, *supra*.

¹⁴ *Pancake et al., v. George Campbell Co.*, *supra*; *Miller v. Jones*, *supra*; *Catlett v. Bloyd*, 33 W. Va., 776, 99 S. E. 81 (1919), Syl. 3; *Bare Admr. v. Victoria Coal & Coke Co.*, *supra*.

¹⁵ *Supra*.

get substantially what he bargained for?¹⁶ In the given case the refusal of D to accept the bark within the time provided for delivery was absolute and was a substantial breach going to the entire contract. It was an actual breach as it was refusal to accept at a time when D was required to deliver. An examination of decisions in West Virginia involving contracts where a breach has occurred in the course of performance will show that in a majority of such cases a substantial breach was actually made which would have entitled the plaintiff to recover independently of the doctrine of anticipatory breach. To invoke this doctrine in such cases effects the same result as far as recovery is concerned, but it requires that the decision of the court be reached by a method of reasoning in reality inapplicable.

As previously stated, for purposes of invoking the doctrine of anticipatory breach it is necessary that a breach or renunciation of the contract be shown. This breach may be in the form of an oral or written renunciation of the contract or a material part thereof by one of the contracting parties. The elements essential to such a declaration have been clearly defined by the West Virginia Supreme court.¹⁷ The cases seem to require that the renunciation be distinct, unequivocal and absolute and deal with the entire performance of the contract. Thus the statement made which is to be regarded as a renunciation of the contract must be clear and unambiguous, must definitely renounce the contract and show an intention not to perform. The renunciation must also go to a material part of the contract and a refusal to perform an immaterial part thereof will not be regarded as a breach of the entire contract.¹⁸

The repudiation of the contract either prior to the date of performance or in the course of performance may be made by conduct of one of the contracting parties.¹⁹

In cases of repudiation by conduct the same elements are required to constitute a breach or repudiation as where there is an oral or written renunciation. This conduct must show a clear and absolute intention to revoke the contract, and must relate to the performance of the entire contract or a material part thereof.

¹⁶ 24 Am. & Eng. Enc. 644; *J. W. Ellison, Son & Co. v. Flat Top Grocery Co.* 69 W. Va. 380, 387.

¹⁷ *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338 (1908); *Bare, Admr. etc. v. Victoria Coal & Coke Co.*, *supra*; *Peerless Carbon Black Co., v. Gillespie*, 87 W. Va. 441, 464, 105 S. E. 517 (1920); *Poling, Trustee, v. Coudon-Lane Boom Lumber Co.*, 55 W. Va. 529, 47 S. E. 279 (1904); *J. W. Ellison Son Company v. Flat Top Grocery Co.*, *supra*.

¹⁸ *J. W. Ellison Son Company v. Flat Top Grocery Company*, 69 W. Va. 380, 71 S. E. 391 (1911).

¹⁹ *Pancake et al., v. George Campbell Co.*, *supra*; *Lewis v. W. Va. Pulp & Paper Co.*, *supra*; *Roberts v. American Column & Lumber Co.*, *supra*.

A clear example of this is where D, one of the parties to contract to marry, would breach it by marrying X, a third party. The default goes to the entire contract and D has clearly rendered performance impossible by marrying X.

Assuming the existence of a valid contract, and a complete renunciation or breach thereof prior to the day of performance, may the delinquent party change his mind and come in later with an offer of performance? Clearly such offer can have no effect if made after suit is brought for the breach made.²⁰ A strong stand against allowing the delinquent party to repent is taken by the United States Supreme Court in the leading case of *Roehm v. Hurst*.²¹ In cases involving breach of a marriage contract a subsequent offer of performance after the defendant has renounced or breached the contract is of no force and effect, and an action for damages will lie even in the face of such an offer.²² This stand is taken by the court due to fact that a status is created by the contract and once a breach has occurred the relationship of betrothment to which both parties are entitled is interrupted, and the damage has accrued regardless of a later willingness to again renew this relationship. West Virginia coincides with this view but regards this type of case as being an exception to the rules laid down determining the right of the delinquent or offending party to repent. Aside from this exception, authority in this state seems to hold that once having breached or renounced the contract the offending party may repent prior to the day set for performance unless the injured party has elected to treat this conduct as a breach.²³ An offer of performance then made subsequently and before plaintiff had elected to treat defendant's conduct as a breach would be a good defense to a suit on the contract. Such is the holding in the case of *Swiger v. Hayman*, where the court stated that:

"A mere declaration, by one of the parties to an executory contract, of an intention not to perform it, which is retracted almost immediately and before any declaration has been made or act done by the other party in respect to such renunciation, and before injury therefrom has resulted to him or a change in his situation or the condition of the subject matter has occurred, does not constitute a breach, unless, perhaps, in the case of a contract of marriage, or other similar contract, imposing pecu-

²⁰ *Connolly v. Bollinger, supra.*

²¹ *Supra.*

²² *Connolly v. Bollinger, supra.*

²³ *Bannister v. Coal & Coke Co., supra*, 510 of opinion; *Swiger v. Hayman*, 56 W. Va. 123, 48 S. E. 839 (1904); *Smoot v. U. S.*, 15 Wall. 36, 21 L. Ed. 107 (1873); *Dingely v. Oler*, 117 U. S. 490, 29 L. Ed. 984 (1886).

liar obligations upon the parties during the time intervening between the making and performance thereof.²⁴

The courts differ in determining what is required of the injured party, or plaintiff, to show that he has elected to treat the offending party's conduct as a breach. Some jurisdictions demand that he change his position in some way in reliance on defendant's repudiation, as by purchasing from or selling to someone else in reliance upon defendant's act or declaration, thus creating something in the nature of an estoppel.²⁵ West Virginia seems merely to require a declaration or act showing a clear and unequivocal intention to treat the defendant's conduct as a breach.²⁶

Perhaps one of the strongest objections to the doctrine of anticipatory breach is made on the ground that recovery is allowed of damages which are highly speculative. For purpose of orderly discussion the cases must be considered from two distinct viewpoints: first, where a trial is had after the day of performance; second, where the trial takes place prior to the day of performance. In the first class of cases the damages suffered generally are clearly capable of being ascertained, and the same rule should be applied in cases of anticipatory breach as in the ordinary case of the repudiation of a contract. West Virginia allows the plaintiff to recover the profits he would have made under the contract, together with the value of any expenditures made by him by reason of the contract.²⁷ In a contract for the sale of chattels or a commodity the measure of profit would be the difference between the contract price and the cost or market price. Some confusion arises, however, where recovery is made upon the doctrine of anticipatory breach, in determining whether damages shall be computed by the use of the cost or market price at the time and place of performance or at the time and place of the repudiation. This question has not been directly passed upon in West Virginia. In some jurisdictions the latter standard has been adopted, but the better rule seems to be that the cost or market price at the time of the performance should govern.²⁸ This is the only logical view to be taken as, while the breach or repudiation may have occurred today, yet it is a breach to take effect at a subsequent time, namely, the time of performance, and damages should be governed by conditions existing at that time.

In cases involving the doctrine of anticipatory breach where a trial is had prior to the date of delivery or performance, the

²⁴ *Supra*.

²⁵ *Dingely v. Oler, supra*.

²⁶ *Dictum in Swiger v. Hayman, supra*.

²⁷ *Catlett v. Bloyd*, 83 W. Va. 776, 99 S. E. 81 (1919); *Polino v. Keck*, 80 W. Va. 426, 92 S. E. 665 (1917); *Bare, Admr. v. Victoria Coal & Coke Co., supra*.

²⁸ *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436 (1887); *Williston, Repudiation of Contracts*, 14 HARV. L. REV. 421, 441.

damages are incapable of accurate determination in most cases and are somewhat speculative. It is towards this type of case that criticism has been mostly directed. Here again some courts allow damages to be computed on the basis of conditions and prices existing on the day the contract was repudiated.²⁹ It would seem better though to accept the latest evidence obtainable, if possible, using the cost and prices existing the day previous to the introduction of the testimony as the test for the computation. In this way generally a more accurate idea can be gained as to the price and conditions existing on the day of performance than by accepting conditions on the day of the breach or repudiation as the gauge. That the damages allowed in either case are speculative may readily be seen, especially in contracts involving the manufacture and sale of chattels or commodities where prices fluctuate or where transportation and labor costs directly affect the measure of profit of the vendor. For example, where A, in West Virginia, on March 1st, contracts to deliver coal from his mine to B, f. o. b. Norfolk, Virginia, from June 1st, to December 1st, at the rate of one hundred tons per day, for which B contracts to pay at the rate of \$3.00 per ton. On April 1st, B repudiated the entire contract without cause and A brought his suit for damages immediately. Assuming that there is no market for A's coal, what is he entitled to recover? His measure of recovery would be the expenditures made by him under the contract plus the profit he would have made. The difficulty then arises of showing what that profit would be. Whereas, on the day of trial or on the day the breach occurred A might be able to mine and deliver coal f. o. b. Norfolk at a cost of \$2.00 per ton, giving him a profit of \$100 per day on his contract, yet due to increased transportation rates and cost of labor, on December 1st, and during the actual term of the performance of the contract this measure of profit might be wholly eliminated, or, assuming the reverse condition, it might possibly be doubled. In view of this problem it would seem that the computation of damages by the proof of prices and conditions existing at the last possible day before the introduction of the evidence would more nearly arrive at a true and just test. Having repudiated the contract the defendant must bear the risks of his act and cannot complain that no accurate measurement can be made of the resulting damages.³⁰

As far as pure theory is concerned, West Virginia has followed

²⁹ *Roehm v. Horst*, *supra*; *Jebbes & Collico Confectionery Co., v. Stephanson*, 6 Ala. App. 103, 60 So. 437 (1912).

³⁰ *Roehm v. Hurst*, *supra*, p. 21 of opinion.

the doctrine of *Hochster v. De La Tour* with some care and as a result the law on the doctrine of anticipatory breach is well defined. The custom has not prevailed as yet in this state to create exceptions to the general rule which has been the practice in those jurisdictions where the courts have looked upon this doctrine with a less friendly eye.