UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 8 | Number 3 Article 11

4-1-1930

Contracts -- Anticipatory Breach -- Mailing of Letter as Test of Time and Place of Repudiation

W. T. Covington Jr.

whether for such personal liability he had had a sufficient day in court to comply with the rule of due process.

If the levy is a judgment and therefore void, the privilege of appeal given by the statute cannot cure the defect.

A. W. GHOLSON, JR.

Contracts—Anticipatory Breach—Mailing of Letter as Test of Time and Place of Repudiation

Before the time for delivery under a contract of sale, the buyer in Kansas wrote and mailed a notice of repudiation to the seller in Ohio. *Held:* that the renunciation constituted a breach when and where the letter was posted.[1]

The doctrine of anticipatory breach of contract, which is well established,[2] allows the aggrieved party an option of remedies,[3] but there is an immediate duty to mitigate damages.[4] Although the anticipatory breach gives rise to a present cause of action,[5] the party in default may withdraw his repudiation, and thus revive the previous contractual relations, provided the breach has not been accepted, or has not caused the innocent party to change his position.[6]

[1] Auglaize Box Board Co. v. Kansas City Fibre Box Co., 35 F (2d) 822 (C. C. A. 6th, 1929). The question of where the breach occurred was decided in order to determine where the cause of action arose so that the proper statute of limitations could be applied.

[2] Where a party to an executory contract repudiates his obligations before the time for performance, the opposite party may immediately sue for damages. Hochster v. De La Tour, 2 Ellis & Bl. 678 (1853); Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953 (1900); Bryant v. So. Box and Lumber Co., 192 N. C. 607, 135 S. E. 531 (1926). *Contra:* Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384 (1874); Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757 (1894).

[3] He may bring an action for damages before performance is due, await the actual breach, or rescind the agreement. United Press Ass'n v. National Newspaper Ass'n, 237 Fed. 547 (C. C. A. 8th., 1916).

[4] Although the injured party chooses to keep the contract alive, he will not be awarded damages he could have prevented, after notice of the repudiation. WILLISTON, CONTRACTS (1924) §1298; Kingman v. Western Mfg. Co., 92 Fed. 486 (C. C. A. 8th., 1899); Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655 (1891). *Contra:* Roebling's Sons Co. v. Lock Stitch Fence Co., 130 Ill. 660, 22 N. E. 518 (1789); McAlister v. Safley, 65 Ia. 719, 23 N. W. 139 (1885); Michael v. Hart, [1902] 1 K. B. 482.

[5] *Supra* note 2.

[6] Vold, *Withdrawal of Repudiation after Anticipatory Breach of Contract* (1926) 5 TEX. L. REV. 9; Zuck v. McClure, 98 Pa. St. 541 (1881); Swiger v. Hayman, 56 W. Va. 123, 48 S. E. 839, 107 Am. St. Rep. 899 (1904); Iowa Mausoleum Co. v. Wright, 170 Ia. 546, 153 N. W. 94 (1915); Independent Milling Co. v. Howe Scales Co., 105 Kan. 87, 181 Pac. 554 (1919).

The courts all require the repudiation to be distinct, unequivocal, and absolute.[7] The instant case is unique, however, in denying the proposition that it must also be communicated.[8] *Wester v. Casein Co. of America*,[9] from New York, the sole domestic authority cited by the court in support of this exceptional doctrine, is not in point. In a later New York case[10] the court held that an anticipatory breach occurred when a letter renouncing the contract was received, and showed that the opinion in the *Wester* case rested on the fact that the aggrieved party had expressly made the telegraph company its agent to receive the message, which, as it happened, was a repudiation. Another decision[11] from the same jurisdiction held a letter of repudiation which reached the addressee after the time for performance did not excuse his failure to make a tender, even though the renunciation had been mailed before performance was due.

An English case[12] furnishes authority for the doctrine that a repudiation does not have to be communicated to be effective, but not for the doctrine that the breach occurs at the time and place the message of repudiation is delivered for transmission. Here a marriage agreement was held to be breached in Germany, where the defendant renounced the contract and evidenced her renunciation by mailing a letter to the plaintiff in England. The act of renouncing and not the act of mailing was expressly the determining factor in the decision.

There is no apparent reason why a message delivered to the mails or a telegraph company for transmission should be an exception to the rule in this country that a repudiation must be communicated. In lieu of an understanding to the contrary, the medium of com-

[7] Johnstone v. Milling, 54 L. T. 629, 16 Q. B. D. 460 (Eng. 1886); Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. ed. 984 (1886); Edwards v. Proctor, 173 N. C. 41, 91 S. E. 584 (1917).

[8] To set up an anticipatory breach the claimant must show that notice of the repudiation was given before time for performance. Terrell v. Nelson, 177 Ala. 596, 58 So. 989 (1912). Failure to tender performance is not excused by a letter of repudiation that was not received until after performance was due. Makepeace v. Dilltown Smokeless Coal Co., 179 App. Div. 60, 166 N. Y. S. 92 (1917). Intention not to perform is not a breach. Rauer's Law and Collection Co. v. Harrell, 32 Cal. App. 45, 162 Pac. 125 (1917). Letter of repudiation not effective until received. Glynn v. Hyde-Murphy Co., 113 Misc. Rep. 329, 184 N. Y. S. 462 (1920).

[9] 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B 377 (1912).

[10] Glynn v. Hyde-Murphy Co., *supra* note 8.

[11] Makepeace v. Dilltown Smokeless Coal Co., *supra* note 8.

[12] Cherry v. Thompson, L. R. 7 Q. B. 573 (Eng. 1872).

munication is the agent of the sender to carry information,[13] but adherence to the doctrine under discussion would make it the compulsory agent of the sendee without his knowledge or consent.

W. T. COVINGTON, JR.

Contracts—Consideration—Promise Not to Assign Note and to Keep Matter Secret

In a recent North Carolina case[1] the widow of an insolvent defaulter signed a note not under seal to the amount of the defalcation payable to the firm from which her husband had embezzled. Her only assets at the time of the signing were moneys derived from a life insurance policy belonging to her husband, of which she was beneficiary. It was agreed that the note should be held without publicity of any kind and not turned over to any bank. In an action to enforce collection of the note it was *held* that there was no consideration to support her promise to pay. The promise to observe silence and not to assign was called "sentimental rather than valuable."

It is generally held that a note given by a widow in payment of a debt owed by her husband, who was insolvent at the time of his death, is void without a new consideration to support it.[2] Nor does the surrender of the old note provide such consideration.[3] Where the estate is solvent a different result obtains.[4] Moral obligation arising out of kinship does not ordinarily afford consideration to support a promise to pay another's debt.[5] This doctrine appears to

[13] Glynn v. Hyde-Murphy Co., *supra* note 8.

[1] People's Building and Loan Association v. Swaim, 198 N. C. 14, 150 S. E. 668 (1929).

[2] Paxon v. Niels, 137 Pa. 385, 20 Atl. 1016 (1891); Sykes v. Moore, 115 Miss. 508, 76 So. 538 (1917); Bank v. Hunter, 243 Mich. 516, 220 N. W. 665 (1928); Ferrell v. Scott, 2 Speers, 344, 42 Am. Dec. 371 (S. C., 1844); Gilbert v. Brown, 29 Ky. L. R. 1248, 97 S. W. 40 (1906); *Cf.* Shroeder v. Fink, 60 Md. 436 (1883); *Contra:* Nowlin v. Weson, 93 Ala. 509, 8 So. 800 (1891); *Cf.* Wilton v. Eaton, 127 Mass. 174 (1880); Rathfon v. Loacher, 215 Pa. 571, 64 Atl. 790 (1906).

[3] Paxon v. Niels, *supra* note 2.

[4] Steep v. Harpham, 241 Mich. 652, 217 N. W. 787 (1928); Cawthorpe v. Clark, 173 Mich. 267, 138 N. W. 1075 (1912). But *cf.* Rosenberg v. Ford, 85 Cal. 612, 24 Pac. 779 (1890); Sullivan v. Sullivan, 99 Cal. 193, 33 Pac. 862 (1893).

[5] Mortimore v. Wright, 6 Mees. & W. 482, 151 Eng. Rep. 502 (Ex. 1840); Wiggins v. Keizer, 6 Ind. 252 (1855); Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453 (1861); Beauchamp v. Beauchamp, 198 Ky. 167, 248 S. W. 502 (1923). See, for a comprehensive discussion of this problem, 3 L. R. A. (N. S.) 437, and cases there cited.