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CONTRACTS (Herein of Agency)—
1955 TENNESSEE SURVEY

MERTON L. FERSON*

CONTRACTS

Offer and Acceptance: Listing Property for Sale With Broker: In *Jenkins v. Vaughan*¹ the facts were these: Vaughan had a drug store for sale. He gave Jenkins, a broker, an exclusive listing for 90 days and promised to pay Jenkins a commission if the property were sold within that time "either through you or any other reason." This listing was made October 10, 1951. On December 10, 1951, Vaughan directed an employee of Jenkins to cancel the listing. And on December 28 Vaughan sold the store to a purchaser procured by another broker. Jenkins had not spent any appreciable time or money trying to find a purchaser. The court held that Vaughan was not required to pay a commission to plaintiff Jenkins.

The principles to be applied in such cases are admirably set forth in an opinion by Judge Felts in *Hutchinson v. Dobson-Bainbridge Realty Co.*² The Judge there points out that the owner is able to revoke the agent's power in spite of a listing that has been stated to be for an extended time. He indicates, however, that a separate question is whether the owner is bound by contract to pay the agent. The listing is an offer to become bound in a unilateral contract. That is, the owner offers to become bound to pay if the agent procures a purchaser. As Judge Felts points out, a good many of the older decisions were to the effect that such an offer could be revoked any time before the acceptance was complete—i.e., any time before the offeree-broker procured a purchaser. But a majority of the modern decisions hold that after the offeree-broker has done an appreciable amount of work toward procuring a purchaser he has virtually an option to complete his acceptance and earn the commission.³ In the *Hutchinson* case the broker had, before the attempted revocation, put out money and effort to sell the property. The offer therefore became irrevocable. The owner was required to pay the commission. The *Vaughan* case is different in that the broker here had "spent no appreciable time or money in an effort to find a purchaser." The owner could thus with impunity revoke the broker's power.

Words Versus Intention of Parties: In *Petty v. Sloan*⁴ the facts were

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1. 276 S.W.2d 732 (Tenn. 1955).

2. 31 Tenn. App. 490, 217 S.W.2d 6 (M.S. 1946).

3. A provision in RESTATEMENT, CONTRACTS § 45 (1932), is to the same effect.

4. 277 S.W.2d 355 (Tenn. 1955).

these: Smith County constructed a hospital and leased it to the defendants. The lease contract contained the following paragraph: "Lessees agree to cooperate with all reputable doctors and especially the doctors of Smith County in the operation of said hospital and to make available the facilities of said hospital for the treatment of their patients." The plaintiffs, who presumably are reputable doctors, brought a bill in which they say that the lessee-defendants refused to allow the plaintiffs to bring patients to the hospital for surgical treatment. The suit was brought under the Declaratory Judgment Act and sought a declaration of the plaintiffs' rights under the contract.

The lessee-defendants denied that the plaintiffs had a right to bring patients to the hospital and give them surgical treatment. With regard to the provision in the contract that other doctors might treat their patients in the hospital the defendants assert in their answer as follows: "Lessees agree . . . to make available the facilities of said hospital for the treatment of their patients' (*i.e.*, patients of other doctors) was by the contracting parties intended as excluding, not including, surgical operations, and was by them employed to effectuate such intent, and that it does fairly impart and manifest and express such meaning, intent and purpose."

The case was set for trial on bill and answer. The effect of this procedural action according to Tennessee practice is that the "answer is to be considered true in all points." So says Justice Burnett, citing earlier Tennessee opinions.

Justice Burnett notes that third party beneficiaries are affected with the same infirmities of the contracts on which they sue as existed between the parties who made the contracts; he then turns to a construction of the contract. His argument and citations are convincing that the phrase "treatment of patients" includes surgical treatment. The words of the contract then may be taken to say that the defendants are bound to permit other doctors to administer surgical treatment in the hospital. But the fact was that the parties who made the contract did not intend that the lessee-defendants should be so bound. Which should prevail, the words or the intention of the parties who used the words? It would seem on principle that the intention of the parties should prevail. It is a basic fact in this case that the defendants did not, and the promisee knew the defendants did not, assent to have the plaintiffs do surgery in the Smith County Hospital. Chancellor Officer, in the trial court, held that the plaintiffs did not have a right to administer surgical treatment in the hospital. His decision was reversed by the supreme court.

It should be remembered that in the instant case the intention of the parties (both of them) is an established fact. It is not a mere inference. It is not dependent on parol evidence. It is not the result of interpreta-

tion or construction. It is to be treated as though stipulated.

The case is unique in this respect. If the plaintiff has to prove by parol evidence that the parties intended something different from the usual import of the words in the contract, he would be hindered by the parol evidence rule. But this case comes before the chancellor with the fact established that the words of the contract belie the intention of the parties. A chancellor might reasonably say, "I will not be convinced by parol evidence as to what the parties intended." But is it reasonable for him to say, "I will not take into account a fact that is established by stipulation of the parties"?

In early stages of the law the word was all important. "A strictly formal system of law knows no contrast between the will and the utterance, and no possibility of a contradiction between the two."⁵ Says Professor Wigmore: "These notions come down into Coke's time shorn of their first crudeness. . . . A word was still a fixed symbol. Its meaning was something inherent and objective, not subjective and personal."⁶ The old rule that the word prevails over the intention of the parties still finds application in a good many cases where the problem is whether to admit parol evidence.⁷

Other cases take a more liberal view. One group of such cases has to do with utterances which, taken at face value, seem to create obligations when in fact the parties did not intend that the words should be binding. In a Michigan case,⁸ for instance, it appeared that the defendant had given his check for three hundred dollars in payment for a silver watch, worth only fifteen dollars, and the whole transaction was "in frolic and banter." The defendant was held not bound by his check. In an Illinois case⁹ the facts were these: The defendant had a set of harness of small value which was stolen. The defendant in excitement and anger said: "I will give \$100 to any man who will find out who the thief is." The court held that the words used did not, under the circumstances, show an intention to contract.

In *New York Trust Co. v. Island Oil & Transport Corp.*¹⁰ these were the facts: An oil company operating in Mexico and its subsidiary kept

5. HEUSLER, INSTITUTIONS OF GERMANIC PRIVATE LAW I, 60 (1885), quoted in 9 WIGMORE, EVIDENCE 12 (3d ed. 1940).

6. *Id.* § 2461.

7. *Violette v. Rice*, 173 Mass. 82, 53 N.E. 144 (1899) (actress agreed in writing "to render services at any theaters"; evidence not admissible to prove that it was agreed that the word "services" meant services in a particular part in a certain play); *Abraham v. Oregon & C.R.R.*, 37 Ore. 495, 60 Pac. 899 (1900) (a deed to a railroad company conveyed land "for all legitimate railroad, depot and warehouse purposes"; evidence not admissible to show that the parties understood and agreed that the words did not mean or include a hotel or eating house).

8. *Keller v. Holderman*, 11 Mich. 248, 83 Am. Dec. 737 (1863).

9. *Higgins v. Lessig*, 49 Ill. App. 459 (1893).

10. 34 F.2d 655 (2d Cir. 1929). See also *McClurg v. Terry*, 21 N.J. Eq. 225 (Ch. 1870); *Graves v. Northern N.Y. Pub. Co.*, 260 App. Div. 900, 22 N.Y.S.2d 537 (4th Dep't 1940); RESTATEMENT, CONTRACTS § 71(c) (1932).

books of account showing apparent sales of oil. But the entries were a sham meant to deceive the Mexican government. The assets of the subsidiary fell into new hands and the new owners sought to collect a large amount which, according to the books of the two companies, was owing from the parent company. Judge Learned Hand held that the apparent sales, even though the books of account showed "a complete simulacrum of real transactions," did not create obligations. Said he: "The form of utterance chosen is never final: it is always possible to show that the parties did not intend to perform what they said they would." In a recent Tennessee case Judge Felts similarly held: "In the construction of all writings, the cardinal rule is to find the intention of the parties."¹¹

The reformation cases also can fairly be cited. In *Goode v. Riley*,¹² for instance, a deed, according to its words, included more land than the parties intended to have it include. Reformation of the deed was granted to make the deed conform to the agreement. Said Justice Holmes: "It is not necessarily fatal that the evidence is parol which is relied on to show that the contract was not made as it purports on the face of the document to have been made."

Professor Wigmore criticises the "plain meaning" rule: "There is, then neither in theory, nor in policy any basis for an absolute rule declaring that when a word has a 'plain meaning' i.e. by the popular standard, neither the local nor the mutual nor the individual standard can be substituted. Such a rule is still maintained by many utterances like those above quoted. But its vogue is disappearing; as may be seen from the utterances of judges who have plainly championed the modern and more liberal rule."¹³ To be sure the parties to a contract cannot change the usual meanings of words. But it would seem that, by agreement, they can use words in their private affairs with any meanings they choose. They are allowed to do just that when they communicate in code. The exaltation of the word above the intent of the parties is consonant with the ancient idea that obligations were created and conveyances made by formalism. But such exaltation of the word seems out of keeping with the modern idea that contracts are created and conveyances made according to the assent and understanding of the parties.

The plaintiffs may have been unwise in going to trial on bill and answer. That procedure called upon Chancellor Officer to apply the law mechanically to the facts in the record without regard to policy. By the record it was established that the parties did not intend to give the plaintiffs the privilege of doing surgery in the hospital. Chancellor

11. *Walker v. Tanner*, 275 S.W.2d 958 (Tenn. App. M.S. 1955).

12. 153 Mass. 585, 28 N.E. 228 (1891). See also *Corticelli Silk Co. v. Slosberg*, 101 Conn. 44, 124 Atl. 818 (1924); *Connecticut Fire Ins. Co. v. Oakley Improved Bldg. & Loan Co.*, 80 F.2d 717 (6th Cir. 1936).

13. 9 WIGMORE, EVIDENCE § 2462 (3d ed. 1940).

Officer, having regard for the intention of the parties, rather than the general meaning of the words they used, held for the defendants. It would seem that he should have been sustained.

In *Sky Chefs v. Pryor*¹⁴ the court had to determine the intention of the parties by construing the contract they made. It was there held, according to well-settled rules, that parol evidence is admissible to supply missing terms or to explain ambiguous terms.

Anticipatory Breach: In *Kentucky Home Mutual Life Insurance Co. v. Rogers*¹⁵ the facts were these: Rogers was one of a group that was severally covered by a life insurance policy on which the defendant company was bound. The policy was for one year and was renewable from year to year. Rogers was entitled to have his insurance renewed for a premium that was calculated according to a "step-rate" basis. In 1945 the company gave notice to the group that beginning February, 1946, the premiums would be calculated according to the "attained-age" basis. Such change worked a large increase in the premium that was demanded from Rogers. Rogers did not pay the premium demanded and the company "lapsed the policy." After July 16, 1951, the company offered to reinstate Rogers' contract on the "step-rate" basis but Rogers refused to accept that offer. Rogers elected to sue in the instant case "for damages for the alleged breach of an insurance contract." The company's repudiation was held to be a breach of its contract and the plaintiff was allowed to recover. The measure of his recovery was the amount of premiums he had paid prior to the company's repudiation together with interest on said payments.

As a background for the decision, it will be helpful to recall several distinctions. First, some contracts can be subjects of breach by repudiation. Other contracts cannot be so broken. The two kinds need to be distinguished. Second, a flat repudiation by an obligor must be distinguished from an expression of doubt by him with regard to his willingness or ability to perform. And third, there is a distinction, in case of breach, between a suit to get damages that would make the victim as well off as he would be if the contract had been performed and a suit to get damages based on a rescission of the contract—*i.e.*, damages to make the victim as well off as he would be if he had not entered the contract.

What contracts can be subjects of breach by repudiation? Here we encounter still another distinction—*viz.*, between "partial breach" and "total breach." A partial breach enables the victim to recover damages for the default that has occurred but not for defaults that may occur in the future. The victim may sue for the partial breach and keep the contract alive pending future developments. A total breach enables the victim to cash in on the whole contract or, in the alternative, to

14. 276 S.W.2d 485 (Tenn. App. E.S. 1954).

15. 270 S.W.2d 188 (Tenn. 1954).

rescind and have restitution. Action according to either alternative winds up the contract. Since breach by repudiation is always a total breach, it follows that there cannot be a breach by repudiation unless the contract was one that could be the subject of total breach.

Factually, a total breach is one that prevents or dissuades the victim from rendering a performance that he must render as a condition precedent to enforcing the wrongdoer's promise. For instance, an insured must pay his premiums. And in a bilateral contract for an agreed exchange each party must render—or at least tender—his own performance. So, first of all, a contract must be of a sort that is susceptible of total breach in order that it shall be susceptible to breach by repudiation.

A breach that consists entirely of a repudiation before the specific undertakings of the parties were due is called "anticipatory breach." Judge Cardozo distinguishes anticipatory breach from other forms of breach as follows: "The line of division between the two has not always been preserved with consistency or clearness. To blur it is prejudicial to accuracy of thought as well as precision of terminology. Strictly an anticipatory breach is one committed before the time has come when there is a present duty of performance. [Citations omitted]. It is the outcome of words or acts evincing an intention to refuse performance in the future. On the other hand, there are times, as we have seen, when the breach of a present duty, though only partial in its extension, may confer upon the injured party the privilege at his election to deal with the contract as if broken altogether. A loose practice has been growing up whereby the breach on such occasions is spoken of as anticipatory, whereas in truth it is strictly present, though with consequences effective upon performance in the future."¹⁶ Judge Cardozo says that an anticipatory breach occurs at a time when there is no present duty of performance. It may be noted, however, that at the time it occurs there is a present negative duty,—*viz.*, not to dissuade the injured party from performing his conditions.

The case of *Hochster v. De la Tour*¹⁷ will serve to illustrate the type of case where an anticipatory breach can occur. It will illustrate also the kind of act on the part of an obligor that amounts to an anticipatory breach. In this case it appeared that Hochster and De la Tour had made a bilateral contract in April, 1852, whereby Hochster agreed to serve De la Tour as courier on a continental trip beginning June 1st and De la Tour agreed to pay Hochster £10 per month for his services. On May 11th De la Tour wrote to Hochster saying that he had changed his mind and that he would not accept the services of Hochster. On May 22nd (before the time when Hochster was to serve, or De la Tour was to pay) Hochster brought suit against De la Tour on the contract.

16. *New York Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936).

17. 2 E. & B. 679, 118 Eng. Rep. 922 (1853).

It was asserted in defense that Hochster's action was premature. Hochster, in the face of this objection, was allowed to recover as for a total breach. De la Tour's repudiation is termed an anticipatory breach. The doctrine of that case has generally been followed.¹⁸

There has been some concern about the basic theory of anticipatory breach.¹⁹ It seems, at first blush, to recognize the possibility of breaking a contract before its performance is due. But account must be taken of the implied duties that were assumed by the obligor in addition to his specific undertaking. Particular emphasis must be put on the negative duty of the obligor,—*viz.*, that he shall not prevent or hinder the obligee²⁰ in the performance of his conditions. When the implied duties of the obligor, and their due dates, have been taken into account, it will be seen that the breach is not really "anticipatory." It is a present breach. In the *Hochster* case, for instance, the specific undertaking of De la Tour was to pay Hochster £10 per month for his services. But Hochster's right to recover was conditional. He could recover only if he rendered the service. It seems reasonable to imply that De la Tour contemplated and agreed that Hochster had a right to render the service and thus to remove the "if" that qualified his right to wages. It was the implied duty of De la Tour not to hinder Hochster's performance—not De la Tour's duty to pay—that was broken. Bearing this in mind, De la Tour's breach appears to be a present one. Let us consider how De la Tour violated the right of Hochster to perform his condition, and particularly *when* De la Tour violated that right.

A party against whom a total breach has been committed is free to give up all preparation to perform his part of the bargained-for exchange. He is justified in changing his position by disposing of the services or property he would have used in rendering his performance if the contract had not been broken. In case the breach consists of or includes a repudiation the injured party must change his program, if by doing so he can hold down the extent of his loss. Otherwise he must lose the enhanced damages. Since an anticipatory breach consists entirely of a repudiation, the injured party omits at his peril to adapt himself to the changed prospect. It would seem that in all cases he *may*, and in some situations he *must*, change his position owing to the repudiation. When the injured party changes his position the exchange is off. And it was the party who repudiated that cancelled it. The

18. RESTATEMENT, CONTRACTS § 318 (Supp. 1948).

19. Professor Williston, after noting that the doctrine is settled law, goes on to say "clearness of thought requires recognition of the lack of logical basis for the rule." 5 WILLISTON, CONTRACTS § 1315 (rev. ed. 1937).

Professor Vold takes the view that an anticipatory repudiation of a contract obligation is essentially a tort. See Vold, *The Tort Aspect of Anticipatory Repudiation of Contracts*, 41 HARV. L. REV. 340 (1928).

20. RESTATEMENT, CONTRACTS § 315 (1932).

injured party has only done what he might or must do in a situation that was wrongfully set up by the party who repudiated.

It should be noted incidentally that the term anticipatory breach is inapt and misleading. Taken literally, it is an anachronism. It seems to say that a duty was broken before it became due. But quibbling about the aptness of that term is fruitless. The question is whether the facts that are called "anticipatory breach" make out a right of action.

How did De la Tour violate the right of Hochster to serve? He, of course, did not physically restrain Hochster. But there are other means of prevention.²¹ De la Tour repudiated the contract. He admonished Hochster substantially as follows: "Proceed at your peril. You will get nothing for serving or remaining ready to serve me." That would naturally dissuade Hochster from remaining ready to serve De la Tour. And De la Tour's repudiation is an effective block the moment it leads Hochster to commit himself to a course that is inconsistent with his serving De la Tour. The situation at that moment becomes fixed on a no-exchange basis. De la Tour has broken his duty not to prevent or hinder Hochster from performing what he was to do. The breach of that duty was as complete as it ever could be.

The fact that the specific undertaking of De la Tour, to pay wages, was not due is beside the point. His duty not to prevent or hinder Hochster was due from the moment the contract was made, and that is the duty that was broken. To be sure the prevention in this case occurred before it was time for Hochster to travel with and serve De la Tour. But Hochster could not perform his service,—his condition—unless he approached the time for service ready and able to perform it, and De la Tour prevented that approach. A pilgrim can be prevented from visiting the Holy Land as effectively by stopping him at the outset of his journey as by stopping him when he is about to set his foot on the Holy Land. A judicial utterance to the same effect is that of Chief Justice Fuller in *Roehm v. Horst*. "What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?"²²

An anticipatory breach is always a total breach.²³ It cannot be partial. It always enables the victim to sue for loss of an exchange that he had a right to make—not to sue for past defaults. It is therefore said at times that there cannot be an anticipatory breach of a unilateral contract, with rare exceptions. Such statements are accurate enough when the exceptions are noted. But such statements do not emphasize

21. *Lake Shore & M.S. Ry. v. Richards*, 152 Ill. 59, 38 N.E. 773 (1894).

22. 178 U.S. 1, 19 (1899).

23. RESTATEMENT, CONTRACTS § 318 (Supp. 1948).

the essential feature—*viz.*, the injured party is suing because he was prevented from performing his part of an exchange that he had a right to make. The right to make an exchange is more commonly acquired by a bilateral contract than it is by a unilateral. But it is by no means exclusively in bilaterals that obligees get such rights. The right of an optionee under a unilateral contract may be a right to exchange performances with the optionor. It is not different from the right of one who acquired such a right as party to a bilateral contract. It is, therefore, capable of total breach by repudiation.²⁴ Life insurance contracts often give to the insured what amounts to an option. He does not ordinarily promise to pay the premiums. But his right of action against the insurer is conditional on his paying the premium. In this situation the insured can bring action at once for an anticipatory repudiation by the insurer.²⁵

It has been noted above that a breach is total when it prevents the injured party from rendering his own performance. In a case where the injured party has already rendered his complete performance a total breach cannot thus be committed. A breach now cannot prevent what is already an accomplished fact. The one and only right of an injured party, who has performed, is to receive the agreed price for his performance. Any breach of that right, short of total omission by the wrongdoer, is a partial, not a total, breach.²⁶

Suppose, for example, that *A* borrows \$1,000 at a bank and undertakes to pay it back in \$100 installments. Suppose further, that *A* defaults on some of the installments and strongly declares that he will never pay any of the future installments. *A*'s breach is only partial. In other words the bank can recover only the installments that are past due. It must await the due dates before it can recover the later installments.²⁷ The bank has not been hindered from rendering its part of the exchange. That was rendered completely when it advanced the \$1,000. Now, its only right is to have the purchase price of its performance—*viz.*, payment by *A* of the installments. *A* is bound according to his specific undertaking but not otherwise. Since *A*'s default and repudiation do not break any implied duty not to hinder the bank in its performance and do not make the later installments due, it is common in installment notes to provide that, in case there is default

24. *Id.* § 316, illustration 2, § 314, illustration 8. The fact that one party to a bilateral contract has a right to cancel the contract does not preclude him from recovering on an anticipatory breach by the other party. *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581 (1916).

25. CORBIN, CONTRACTS § 968 n.35 (1951) (collected cases).

26. RESTATEMENT, CONTRACTS § 316 (1932).

27. "[A] party to a contract who has no longer any obligation of performance on his side but is in the position of an annuitant or a creditor exacting payment from a debtor, may be compelled to wait for the installments as they severally mature, just as a landlord may not accelerate the rent for the residue of the term because the rent is in default for a month or for a year." *Cardozo, J. in New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 680 (1936).

in any installment, the payee can, at his option, declare all the installments due.

The party injured by a breach has been allowed to cash in on his whole contract in a few cases where he was not entitled to that remedy. The case of *Federal Life Ins. Co. v. Rascoe*²⁸ will serve to illustrate. In that case it appeared that the plaintiff had an accident insurance policy whereby the company promised to pay, for total disability from accidental injuries, \$25.00 per week so long as total disabilities were suffered. By the terms of the policy the insured was required to furnish every thirty days a report from her physician stating her condition and the probable duration of her disability. After suffering an injury, the insured filed the reports that were required and the company made payments according to the policy for almost a year. The company then refused to make further payments and denied further liability. The insured sued as for a total breach. That is, she claimed a right to cash in on the whole contract, and argued that she was not limited to a recovery of the \$25.00 weekly payments that were in arrears. The court sustained the plaintiff's contention. It took into account the life expectancy of the plaintiff and she had judgment for \$21,518.98.

The behavior of the company in the *Rascoe* case would amount to total breach and so would have enabled the injured plaintiff to cash in on her whole contract if her right had been one to exchange performances. But did the plaintiff have a right to exchange performances? Was she prevented by the breach from rendering her part of an exchange? True, there were conditions incumbent on her—*viz.*, to remain disabled, to have physical examinations and to submit reports. But these were no part of an exchange to be given for the company's performance. It would seem that the court mistook the type of case with which it was dealing. A strong dissenting opinion was filed by Judge Denison and the decision of the court has been disapproved, at least by dicta, in the Supreme Court of the United States.²⁹

Assuming that the contract involved is susceptible to breach by repudiation, how definite must be the repudiation in order that it shall amount to a breach? The acts that will amount to anticipatory breach are set forth in the *Restatement of Contracts* as follows:

- “(a) a positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties;
- (b) transferring or contracting to transfer to a third person an interest in specific land, goods, or in any other thing essential for the substantial performance of his contractual duties;

28. 12 F.2d 693 (6th Cir. 1926), *cert. denied*, 273 U.S. 722 (1953).

29. *Mobley v. New York Life Ins. Co.*, 295 U.S. 632 (1935); *New York Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936). See also *King v. Mutual Life Ins. Co.*, 114 F. Supp. 700 (E.D. Tenn. 1953).

- (c) any voluntary affirmative act which renders substantial performance of his contractual duties impossible, or apparently impossible."³⁰

It will be observed that the factual requirement for making out anticipatory breach is considerably more definite and restricted than the requirement for making out prospective failure of consideration.³¹ Particularly a repudiation, in order to make out anticipatory breach, must be flat and definite, whereas a mere expression of doubt might make out a prospective failure of consideration. It should be noted too that a breach by repudiation is not final and irretrievable until and unless the victim changes his position in reliance on the repudiation. According to the *Restatement*:

"The effect of repudiation is nullified

- (a) where statements constituting such a repudiation are withdrawn by information to that effect given by the repudiator to the injured party before he has brought an action on the breach or has otherwise materially changed his position in reliance on them."³²

Next, assuming that a breach by repudiation has been made out, what can the victim do about it? In exceptional cases he can bring a bill in equity for specific performance. In all cases, where there has been a total breach by repudiation or otherwise, the victim may claim damages that will make him as well off as he would be if the contract were performed, or, in the alternative, he may rescind the contract and have a judgment for the value of the performance he has given. Suppose, for example, a contract wherein *S* promised to sell and *B* promised to buy Pompey on June 1 for a total price of \$200. *B* pays \$100 when the contract is made and undertakes to pay \$100 on June 1. Suppose further that Pompey is worth \$250. And suppose still further that on May 1, preceding settlement day, *S* flatly repudiates the contract. Consider the alternative bases on which *B* can sue. He can sue on his right to be made as well off as he would be if both parties were to perform according to contract. That would yield him \$150—the value of Pompey minus what remained for *B* to pay. Or he can rescind the contract and sue to be reimbursed for what he has paid—*viz.*, \$100. In the foregoing illustration it is to *B*'s advantage to seek recovery according to the terms of the contract. But in other circumstances the victim of a total breach may find it advantageous to rescind and seek restitution.³³

Let us now consider how the decision in *Kentucky Home Mutual Life Insurance Co. v. Rogers* fits into the general doctrine with regard to anticipatory breach.

In the first place the contract involved was of a sort that is suscep-

30. RESTATEMENT, CONTRACTS § 318 (Supp. 1948).

31. RESTATEMENT, CONTRACTS §§ 280-87 (1932).

32. *Id.* § 319.

33. For a more extended discussion of breach of contract, see Ferson, *Breach of Contract Elements, Degrees and Effect*, 24 U. CIN. L. REV. 1 (1955).

tible of anticipatory breach. It was, to be sure, a unilateral contract and most unilateral contracts cannot be broken by repudiation alone.³⁴ But Rogers in this case had a right to build up and maintain a right to recover according to the face of the policy. He was entitled to do this by payments calculated by the "step-rate" plan. The company denied that right and so kept the payments from being made. This case is distinguishable from the *Rascoe* case discussed above. In that case the insured had been relieved, by a disability clause in the policy, from the need to make further payments. In such a situation it would seem that the contract is not properly susceptible of total breach except by a total omission on the part of the company.³⁵ The *Rascoe* case has been disapproved in later cases.³⁶

A second question to consider in the *Kentucky Home Insurance Co.* case is this: Did the company flatly repudiate? And, if so, did their later offer to reinstate Rogers' contract nullify their repudiation? It would seem that when the company "lapsed the policy" they definitely repudiated liability under it. Justice Burnett gives the company credit for acting in good faith. But, says he: "The Company should not be allowed to put forward their good faith change (in the rate) as an excuse or a bar to allowing damages when they have breached the contract thereunder." A closer question is whether the company nullified their repudiation when they offered to reinstate Rogers' contract. A repudiation can be nullified if it is withdrawn before the injured party has materially changed his position in reliance on it.³⁷ In this case Rogers quit paying premiums in reliance on the repudiation. But when the company offered to reinstate Rogers' contract he is put very close to his position as it was before the repudiation.

The third point to notice is that Rogers, when the breach occurred, had alternative claims that he might press. He might claim to be made as well off as he would be if the contract were carried out according to its terms. Or he might rescind and claim restitution in value of the payments he had made.³⁸ The insured in such a case can proceed on the alternative that is more advantageous to him. There are other insurance cases, comparable as to facts with the *Kentucky Home* case, where the insured persons did not rescind but sued to recover the losses they would sustain owing to the nonperformance by the companies of their obligations.

Such a case was *Davis v. Anna Grotto*.³⁹ In that case, the insured

34. *Id.* § 316.

35. RESTATEMENT, CONTRACTS § 316 (1932).

36. *New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 678 (1936); *Mobley v. New York Life Ins. Co.*, 295 U.S. 632, 639 (1935).

37. RESTATEMENT, CONTRACTS § 319 (1932).

38. *Id.* § 347.

39. 169 Tenn. 564, 89 S.W.2d 754 (1936), *cert. denied*, 170 Tenn. 19, 91 S.W.2d 294 (1936). See also *American Ins. Union v. Woodward*, 118 Okla. 248, 247 Pac. 398 (1926).

claimed an amount that would make her as well off as she would be if the contract were carried out. That amount was \$730.90 for which the court gave her judgment, whereas a return of the premiums she had paid would have yielded to her only \$123.25. In the course of the opinion it was said: "It would not be equitable, in cases of this type, to hold that the policy-holder is limited to a recovery for the premiums paid. The insured has advanced in age, may have suffered disabilities which would preclude the procurement of another policy, and there may be other elements which would enter into the rights and liabilities of the parties."

In view of Rogers' advanced age (74 years) he might have done better if he had claimed the value of his contract. That would be—as nearly as could be determined—the "present value," at the time of breach, of what the policy would ultimately yield, minus the cost of carrying it during his life expectancy.⁴⁰ But Rogers elected to rescind. On that basis the court gave him restitution in value of what he had paid. In doing this the court should deduct the value of any benefit Rogers had already received under the contract. In a sense Rogers had received some benefit—"protection." But the company was not out anything in affording this protection and so the court took the view that nothing need be subtracted for that alleged benefit. The company had to return the premium payments with interest.

AGENCY

*Master and Servant: Jones v. Agnew*⁴¹ was a death action arising from the operation of defendant's ambulance. There was a verdict and judgment for the plaintiff in the trial court and that result was sustained by the court of appeals. The supreme court held that the evidence was sufficient to sustain the verdict and denied certiorari.

The evidence in question was to the effect that Duckett, the regular driver of the ambulance, permitted Brown, an incompetent driver, to drive the ambulance. This tended to show negligence on the part of Duckett in the scope of his employment.

The theory upon which the defendant is held should be noted. The defendant is not held by reason of Duckett's authority. It is rather by reason of Duckett's employment. Duckett had no authority to employ Brown for the defendant or to extend the scope of Brown's employment so as to make him a driver for the defendant.

If the showing had been merely that Duckett presumed to engage a substitute driver and the driver so engaged had caused the accident,

40. *American Ins. Union v. Woodward*, *supra* note 39; *Mutual Reserve Fund Life Ass'n v. Ferrenbach*, 144 Fed. 342 (8th Cir. 1906); *Supreme Lodge K. of P. v. Neeley*, 135 S.W. 1046 (Tex. App. 1911).

41. 274 S.W.2d 825 (Tenn. 1954).

the defendant would not have been held liable.⁴² But in this case Duckett was present and was acting in the scope of his employment when he permitted an incompetent person to take the wheel.

An earlier Tennessee case⁴³ presented facts much like the facts in the principal case. A like result was reached.

Independent Contractor: Borrowed Servant: The case of *Virginia Surety Co. v. Eastern Tennessee & Western North Carolina Transportation Co.*⁴⁴ was brought to determine who was liable for a truck accident. The truck, owned by Wade H. Carter, was being driven at the time of the accident by his employee, Christian. The truck was being used at the time to haul freight for the transportation company. The agreement between Carter and the transportation company was, by the parties, called a "lease" of the truck. By terms of the agreement Carter was to pay all taxes for the use of the highway; furnish all fuel, oil and labor necessary to operate the truck; be liable for personal injuries and property damage; and carry public liability and property damage insurance. The court held that Carter, rather than the transportation company, was liable for the injuries that occurred.

The court deemed that the agreement between the parties was not truly a lease. It was simply a contract whereby the transportation company was to pay Carter a fixed mileage sum for transporting its freight. The decision appears to be sound. There is perhaps an additional ground on which the result can be justified. Even if the arrangement did amount to a lease of the truck, Christian was in the general employ of Carter and remained subject to the control of Carter as to his manner of driving. It is common for the owner of an automobile, steam roller or other equipment to loan it for hire along with an operator. In most such cases the owner is liable if the operator is negligent in handling the equipment.⁴⁵

Employers' Liability: In *Thomas v. Union Ry.*⁴⁶ the action was brought under the Federal Employers' Liability Act. The plaintiff claimed to have been injured by a fall in the course of duty. The fall occurred when the plaintiff stepped into grease on the concrete floor of a roundhouse, which grease had been left on the floor by negligence of the railroad. The trial court charged the jury that "the railroad was not liable for injuries sustained from dangers that were obvious or as well known to the injured party as to the railroad." The giving

42. *White v. Consumers Finance Service*, 339 Pa. 417, 15 A.2d 142 (1940).

43. *Potter v. Golden Rule Grocery Co.*, 169 Tenn. 240, 84 S.W.2d 364 (1935). See also *Tennessee Coach Co. v. Reece*, 178 Tenn. 126, 156 S.W.2d 404 (1941); 6 Miss. L.J. 187 (1933).

44. 219 F.2d 919 (6th Cir. 1955).

45. *Densby v. Bartlett*, 318 Ill. 616, 149 N.E. 591, 42 A.L.R. 1406 (1925); *Stewart v. California Improvement Co.*, 131 Cal. 125, 63 Pac. 177, 52 L.R.A. 205 (1900). But see *McFarland v. Dixie Mach. & Equip. Co.*, 348 Mo. 341, 153 S.W.2d 67, 136 A.L.R. 516 (1941).

46. 216 F.2d 18 (6th Cir. 1954).

of that instruction was held to be error. The judgment of the district court was reversed and the case remanded for new trial. Said the court of appeals, "every vestige of the doctrine of assumption of risk was obliterated from the law [the Federal Employers' Liability Act] by the 1939 Amendment."

Agent: Fiduciary: The case of *Black v. Pettigrew*⁴⁷ illustrates the strictness with which an agent is charged as a fiduciary. It appeared that shares of stock had been transferred for value from a principal to her agent. The transaction was deemed to be prima facie invalid. In the absence of evidence to overcome that presumption the transaction was set aside.

47. 270 S.W.2d 196 (Tenn. App. W.S. 1953).