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Anticipatory Repudiation and Retraction

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ANTICIPATORY REPUDIATION AND RETRACTION

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PART I ANTICIPATORY REPUDIATION

Introduction

As we all know, the business world is a rapidly fluctuating market arena where miniscule happenings often result in catacylsmic upheavals. Interest rates change, key personnel die or look for greener pastures, strikes occur, and a myriad of other things happen to affect drastically a contract for the sale of goods. Any of the above events, and many others not mentioned (including an emotional feeling by one of the parties that he has made a bad bargain), can cause one of the parties to the contract to feel that he cannot or should not perform as has been agreed. That party may then inform the other of his decision not to perform the contract; the result of such a notice is an anticipatory repudiation. The subject of anticipatory repudiation in the law of sales is not particularly complex as a concept; however, not all of the ramifications of anticipatory repudiation, or its retraction, are obvious at first glance.

Definition

"An anticipatory breach of a contract is one committed before the time has come when there is a present duty of performance. It is the outcome of words or acts evincing an intention to refuse performance in the future."[1] In order to justify the aggrieved party's conclusion that there has been an anticipatory repudiation, the breaching party's action must be an actual default, an unequivocal renunciation, or a legal disability to perform.[2]

A key consideration in deciding whether an act is, in fact, an anticipatory repudiation is the intent of the breaching party as manifested by his overt actions, as opposed to any secret intentions the breaching party may harbor.[3] Merely expressing a negative attitude toward the contract or indicating that more negotiations are necessary does not indicate that a contract should be considered to

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1. New York Life Insurance Co. v. Viglas, 297 U.S. 672, 681 (1936) (citation omitted).
2. Brady v. Oliver, 125 Tenn. 595, 147 S.W. 1135 (1911).
3. Forward Publications, Inc. v. International Pictures, Inc., 277 App. Div. 846, 98 N.Y.S.2d 139 (N.Y. Sup. Ct. 1950).

be repudiated anticipatorily.[4] A disclosed intent to breach in the future cannot be asserted to make a party presently liable or to confer a present right of action in the other party if the breach is merely being contemplated but not actually committed.[5] Mere probability that a breach will be committed is insufficient to support a finding that a right of action for breach of contract exists. Certainty, not probability, of breach is required. Courts have firmly adhered to the doctrine that a repudiation must be definite and unequivocal; the repudiating party must indicate with certainty that he will not perform the terms of the contract within the time specified therein.[6] Thus, doubtful or indefinite statements made by one of the parties that he may or may not perform in the future do not create an immediate right of action in the other party.[7] Likewise, a request that certain terms of the contract be changed or that the contract be cancelled does not, in itself, constitute an actionable anticipatory repudiation.[8] The United States Supreme Court has held that whenever an alternative to a contract is proposed, along with what appears to be an anticipatory repudiation, such a statement is too equivocal to be considered actionable.[9]

Nature of Anticipatory Repudiation

The emphasis in the last section has focused upon the probability or possibility of future nonperformance and indicates the uncertainty of discerning whether a breach has occurred. In those cases where a party has indicated his inability or unwillingness to perform, the other party will more than likely understand those indications to be a certain and definite anticipatory repudiation.[10] As Professor Corbin states,

> If one party to a contract, either willfully or by mistake, demands of the other a performance to which he had no right under the contract and states definitely that, unless his demand is complied with, he will not render his promised performance, an anticipatory breach has been committed.[11]

4. Palmiero v. Spada Distrib. Co., 217 F.2d 561 (9th Cir. 1954).
5. Daniels v. Newton, 114 Mass. 530 (1874).
6. Wonalancet Co. v. Banfield, 116 Conn. 582, 165 A. 785 (1933).
7. Kimel v. Missouri State Life Ins. Co., 71 F.2d 921 (10th Cir. 1934).
8. Hixson Map Co. v. Nebraska Post Co., 5 Neb. 388, 98 N.W. 872 (1904).
9. Dingley v. Oler, 117 U.S. 490 (1886).
10. Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356 (1919).
11. 4 A. CORBIN, CORBIN ON CONTRACTS § 973 (1951) [hereinafter cited as CORBIN]; *see*

An absolute refusal to accept the performance under a contract for the sale of goods has been held to be an anticipatory breach. By refusing to accept goods when delivered, the buyer evidences an intention to refuse future deliveries even if within the terms of the contract.[12] If one of the parties to a contract deliberately incapacitates himself before performance is due, he has repudiated the contract anticipatorily and has committed a breach thereby.[13] The result would be the same if a party to the contract deliberately destroyed the subject matter of the contract.[14] However, if the contract is such that neither party is relying on the personal attributes or performance of the other, an assignment of the contract would not be an anticipatory breach or actionable as a breach.[15] It is not necessary that a party specifically state that he is breaching or about to breach a contract—his actions may produce the same result; thus, an anticipatory breach is possible if one of the parties to the contract acts in a manner that makes any performance required under the contract extremely difficult or inordinately expensive.[16] A party to the contract who sells the specific subject matter of the contract to one other than the other contracting party commits an anticipatory breach.[17] Insolvency occurring before the time for required performance is not sufficient to constitute an anticipatory repudiation; however, if the insolvency takes the form of an act of bankruptcy, such act is an anticipatory repudiation.[18] Because of the nature of bankruptcy and its proceedings, it is reasonable for the other party to believe that no performance will be forthcoming at the time designated by the contract for performance.

Application

In dealing with the concept of anticipatory repudiation, as with many other areas of the law of sales, the entire circumstances of the transaction should be taken into consideration before a final determination is made.[19] This practice of considering all the circumstan-

also J.K. Armsby Co. v. Grays Harbor Commercial Co., 62 Ore. 173, 123 P. 32 (1912).

12. Hosmer v. Wilson, 7 Mich. 293 (1859); 4 CORBIN § 973.

13. Roehm v. Horst, 178 U.S. 1 (1900).

14. *Id.*

15. Vandegrift v. Cowles Eng'r Co., 161 N.Y. 435, 55 N.E. 941 (1900).

16. Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 N.E. 221 (1912).

17. 4 CORBIN § 984.

18. Central Trust Co. v. Chicago Auditorium, 240 U.S. 581 (1916).

19. 6 S. WILLISTON, WILLISTON ON CONTRACTS § 876 (Jaeger ed. 1962) [hereinafter cited as WILLISTON].

ces of the transaction connotes that there can be no hard and fast rule as to when an anticipatory repudiation takes place. It is likely that this kind of reasoning formed the basis of a court's opinion, although not stated in those words, when it stated that a repudiation need not be in writing, *i.e.*, that verbal communication may be used to constitute an effective anticipatory breach.[20] Not all performances which are different from that which is called for by the contract amount to anticipatory repudiation—the circumstances of their occurrence will determine their effect. If both contracting parties have different interpretations of certain terms of the contract or their legal impact, an offer by a party to perform in accordance with his own interpretation ought not to be and is not considered an anticipatory repudiation or breach.[21] Certain other actions, rather than words, have been held to amount to an anticipatory repudiation. The destruction, nonexistence or injury of the property involved in the contract,[22] the destruction of or interference with the means of performance,[23] and the inability of a party to the contract to secure the subject matter as required[24] have all been held to give the injured party an immediate action for damages. As Professor Corbin notes,

> If the time for the defendant's promised performance was not definitely fixed in the contract but the defendant promised to perform whenever requested by the plaintiff or as soon as the plaintiff should have performed certain conditions precedent, a repudiation by the defendant is regarded by all courts without exception, as a breach of the contract, creating an immediate right of action.[25]

One other area deserves comment. A prospective failure of consideration may be as effective an excuse as an actual failure of any kind, but the prospective failure must be both certain and material in character before an actionable breach occurs.[26] As stated previously, an equivocal act will not suffice to support an action for

20. Collier v. Sunday Referee Pub. Co., [1904] 4 All E.R. 234.

21. Wester v. Casein Co., 206 N.Y. 506, 100 N.E. 488 (1912). Of course, such differing interpretations do not constitute a breach since mutual mistake may be, and often is, the basis for rescinding a contract.

22. Johnson v. Stalcup, 176 Wash. 153, 28 P.2d 279 (1934).

23. Gray & Co. v. Cavalliotis, 276 F. 565, *aff'd*, 293 F. 1018 (2d Cir. 1921).

24. 6 WILLISTON § 877.

25. 4 CORBIN § 970; *see also* Daniels v. Newton, 114 Mass. 530 (1874).

26. 6 WILLISTON § 875.

anticipatory breach. Where, for example, the arrest and imprisonment or illness of a party to a contract requiring personal performance threatened to be protracted, an Illinois court indicated that such incapacity was a material failure of consideration and constituted a prospective inability to perform.[27]

> It is the
>
> prevailing rule in both England and the United States that a definite and unconditional repudiation of the contract by a party thereto, communicated to the other, is a breach of the contract, creating an immediate right of action and other legal effects, even though it takes place long before . . . conditions specified in the promise have occurred.[28]

Thus, a breach of the contract can occur long before the time for performance called for by the contract comes due. That such an anticipatory breach can occur is the general rule. There is some authority, however, to the contrary—notably Massachusetts[29] and Kentucky.[30] As a general statement, anticipatory repudiation occurs when a party is prevented from performing the contract by the other party.[31] There is no requirement that the repudiation occur or be made at the place designated in the contract for performance;[32] repudiation may occur at any place.

History of the Doctrine

The doctrine of anticipatory repudiation is relatively old, having its origin in the common law. The leading case on the subject is *Hochster v. De La Tour*,[33] which did not involve a contract for the sale of goods, but rather an employment contract. The court therein concluded that the aggrieved party who was to be hired at a subsequent date did not have to remain idle until the date of the contracted performance because he had previously been assured that his services would not be required. Professor Corbin devotes considerable attention to this case in his treatise on contracts, discussing the principle arguments made for and against the holding. One

27. Leopold v. Salkey, 89 Ill. 412 (1878).
28. 4 CORBIN § 959, *citing* N.Y. Life Ins. Co. v. Viglas, 297 U.S. 672 (1936).
29. Porter v. American Legion of Honor, 183 Mass. 326, 67 N.E. 238 (1903).
30. Jordon v. Nickell, 253 S.W.2d 237 (Ky. 1952).
31. Goldston Bros. v. Newkirk, 233 N.C. 428, 64 S.E.2d 424 (1951).
32. Wester v. Casein Co., 206 N.Y. 506, 100 N.E. 488 (1912).
33. 118 Eng. Rep. 922 (1853).

argument against the holding is that there is a logical inconsistency in its rationale: there could be no breach of any kind until the specified time as stated in the contract came to pass. Corbin's answer to this is that the defendant has breached a duty under the contract, a duty not to repudiate.[34] A second argument against the holding contends that to permit the commencement of the suit prior to the due date for performance makes it too difficult to determine the measure of damages; an attempt to measure damages before the time set for performance could at best be speculative. The counter argument is that the suit for anticipatory repudiation is invariably brought after the due date for performance so that the damages can be determined just as if the contract had been breached when performance was due.[35] Further, there is no reason why damages cannot be measured in a manner so as to give the plaintiff the benefit of his bargain. The most effective argument for the injured plaintiff is that he has suffered an immediate injury. His injury is as real (though somewhat different in nature than that caused by actual nonperformance) as the injury of breach at the due date for performance.[36] Corbin's parting comment is that repudiation by an anticipatory breach is *morally* indefensible and should give rise to an immediate cause of action in the aggrieved party for damages.[37]

Applications of the Doctrine

Several courts have stated that there is no cause of action for anticipatory breach of a unilateral contract before the maturation date of that contract.[38] This rationale seems to be

> based upon the erroneous idea that the reason for holding an anticipatory repudiation to be a breach of contract is that otherwise the injured party must himself continue to be ready to perform on his part. . . . The reasons upon which it can actually be sustained are equally applicable to unilateral contracts [as they are to bilateral contracts]. The harm caused to the plaintiff is equally great in either case; and it seems strange to deny to a plaintiff a remedy of this kind merely on the ground that he has already fully performed as his contract has required.[39]

34. 4 CORBIN § 961.
35. *Id.*
36. *Id.*
37. *Id.*
38. *E.g.*, General American Tank Car Corp. v. Goree, 296 F. 32 (4th Cir. 1924).
39. 4 CORBIN § 962.

Courts have had very little problem in using the anticipatory repudiation theory for holding a party liable under a bilateral contract. Most courts have found that if a party repudiates the contract and then attempts to maintain suit on it later, the plaintiff's repudiation is a good defense to be used by the defendant against the plaintiff.[40] Where a bilateral contract for the sale of goods is involved, an anticipatory repudiation by the buyer will make unnecessary a tender of performance by the seller, and will allow the seller to maintain his action immediately.[41]

Thus far, only ordinary bilateral and unilateral contracts have been discussed. At this point a word should be said about aleatory contracts. An aleatory contract is a contract the performance of which depends upon an uncertain event, such as the occurrence of a fire for a fire insurance contract; of course, although the performance of the contract is based upon an uncertain event, the contract is nonetheless enforceable should the event occur. Thus, an aleatory sale is a sale the consummation of which rests upon the occurrence or nonoccurrence of a specific event which has been agreed upon by the parties. The consequences of an anticipatory repudiation are not the same for aleatory contracts as they are for other types of contracts; a total nonperformance by one party under an aleatory contract will not discharge the other, and neither will a repudiation by one discharge the obligation of the other.[42]

Breach

Not all anticipatory actions that a party may make in violation of a contract will amount to anticipatory repudiation of the entire contract. Professor Corbin is of the opinion that a breach of contract may be either total or partial and that an action for partial breach can be maintained in the same way as one for a total breach of contract.[43] The example he uses is that of a construction contract. Corbin appears to be advocating an inconsistent position concerning remedies for partial or total breach. In a later section of his treatise on contracts he states, "In order to operate as a discharge of the other party, the repudiation must be either with respect to the entire performance that was promised or with respect to so material a part of it as to go to the essence. It must involve a total and not

40. Roach v. Harty Coal Co., 79 W. Va. 793, 92 S.E. 458 (1917).
41. 4 CORBIN § 972.
42. New England Mutual Fire Ins. Co. v. Butler, 34 Me. 451 (1852).
43. 4 CORBIN § 972.

merely a partial breach."[44] It is the opinion of this author that these two statements are in direct conflict and cannot be reconciled. Preference would have to go to the first statement which would permit suit for a partial repudiation. Since it is possible to breach only a part of a contract and perform another part, there is no reason not to support a similar rule concerning anticipatory repudiation.

Very often a contract will contain one or more conditions precedent, the performance of which will then require a performance by the other party. An anticipatory repudiation by one of the parties enables the other to maintain suit immediately either for damages or for restitution; the party maintaining the suit need not perform any conditions precedent under the contract.[45] The injured party is no longer required to perform or tender his performance in order to maintain his action. The performance of any conditions precedent otherwise required is unnecessary to his right of action.[46] If the contract requires a party to specially manufacture goods and the other party repudiates anticipatorily, it is unnecessary for the injured party to make a tender of his performance.[47] When a condition requires arbitration before suit can be maintained and one party refuses to honor the condition, the contract becomes repudiated and the injured party is not required to arbitrate before he can maintain his action.[48] However, in spite of the continued holdings that conditions precedent need not be performed in order to maintain an action in the event of an anticipatory repudiation, there is one form of condition precedent which a party must meet before he may sue; this particular condition precedent is not usually found in most contracts. If the parties agree that the plaintiff's right of recovery is delimited by his ability to perform all the conditions of the contract, then that condition precedent must be fulfilled in order for the plaintiff to maintain his suit.[49]

Rights of the Injured Party

An anticipatory repudiation gives rise to certain rights in the injured party. Any conduct by a party to a contract which indicates that the party will not perform as required by the terms of the

44. *Id.* § 975.
45. Douglas v. Hustead, 216 Pa. 292, 65 A. 670 (1907).
46. Weinglass v. Gibson, 304 Pa. 203, 155 A. 439 (1931).
47. Gardner v. Deeds & Hirsig, 116 Tenn. 128, 92 S.W. 518 (1906).
48. Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 A. 134 (1906).
49. Weiser v. Rowe, 185 Ia. 501, 170 N.W. 753 (1919).

contract excuses the other party of his obligation to perform.[50] However, the party's right to action will be extinguished if it appears that the injured party would not have been able to perform his return promise at the time of the breach.[51] "The willingness and ability to perform need not continue after the repudiation; it is merely required that they should have existed before the repudiation and that the plaintiff would have rendered the aggrieved performance if the defendant had not repudiated."[52] Upon receipt of notice of repudiation, the aggrieved party is required to follow the rule of avoidable consequences; he cannot continue his own performance if in doing so he would increase the damages of the breaching party.[53] By this rule the court is merely telling a party that it will not permit that party to collect damages for that which could have been avoided. The plaintiff continues his performance at his own risk, for he will not be able to recover any additional damages caused by his further performance. The aggrieved party has been held to have a right to restitution even if the breaching party's refusal to perform was justified, as in the situation where full performance by both parties subsequently becomes impossible.[54] If consequential damages, which the other party could have reasonably foreseen as the result of his breach, are incurred, the injured party may include these in his claim for damages.[55] Equitable remedies such as specific performance, as well as restitution and damages, are all available remedies for any injured party.[56] The plaintiff's right to bring an action does not require him to have mitigated the prior damages, but only that he not add new damages to the defendant's liability.[57]

PART II RETRACTION

Nature of Retraction

The English courts have been the major advocates of the rule that repudiation is not a valid breach until accepted by the other

50. W.H. Kirkland Co. v. King, 248 Ala. 643, 29 So. 2d 141 (1947).
51. Rubinger v. Rippey, 201 Misc. 135, 110 N.Y.S.2d 5 (Sup. Ct. 1951).
52. 4 CORBIN § 977.
53. Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929).
54. Bigler v. Morgan, 77 N.Y. 312 (1879).
55. 4 CORBIN § 983.
56. Miller v. Jones, 68 W. Va. 526, 71 S.E. 248 (1911).
57. Dose v. C.H. Lilly Co., 132 Ore. 533, 286 P. 560 (1930).

party.[58] The rationale for such a stance is simple enough: if one were to permit the breaching party to breach at his convenience, the result would be to give him the benefit of selecting the time to act or not to act based upon market conditions. This, of course, could work an intolerable hardship upon the nonbreaching party. Therefore, if the nonbreaching party is required to accept the breach as a condition of its validity, the benefit of choice would fall to the innocent party. Early American decisions followed this rule;[59] however, newer cases have rejected it.[60] These later cases are particularly well reasoned. The idea that an anticipatory repudiation is not a valid breach until accepted by the nonbreaching party originally came into being by confusing anticipatory repudiation with an offer, which it is definitely not.[61] Even when such reasoning is applied to anticipatory breaches, some holdings have stated that the institution of a suit is automatically an acceptance of the anticipatory repudiation.[62]

Even though a party may give the other party notice of his intent not to perform under a contract, he still has the opportunity to retract his repudiation under certain conditions. In order to effectuate a valid retraction, the repudiator must give notice to the nonbreaching party that he intends to perform the contract as originally required according to the terms thereof.[63] The repudiator no longer has the power to make a retraction if the other party has materially changed his position in reliance on the repudiation;[64] bringing an action will be sufficient change of position to preclude the repudiator from making his retraction.[65] The mere statement by the repudiating party that he will now perform according to the terms of the contract is insufficient to amount to an effective retraction; he must be able to perform fully according to the terms of the original contract.[66] Thus, a valid retraction requires that the repudiating party have both the intent and the ability to perform according to the terms of the contract. An effective retraction reinstates any condi-

58. Michael v. Hart & Co., [1902] 1 K.B. 482.
59. Jung Brewing Co. v. Konrad, 137 Wis. 107, 118 N.W. 548 (1908).
60. De Forest Radio Tel. & Tel. Co. v. Triangle Radio Supply Co., 243 N.Y. 283, 153 N.E. 75 (1926).
61. 4 CORBIN § 980.
62. Greenwall Theatrical Circuit Co. v. Markowitz, 97 Tex. 479, 79 S.W. 1069 (1904).
63. Paducah Cooperage Co. v. Arkansas Stave Co., 193 Ky. 774, 237 S.W. 412 (1922).
64. Nilson v. Morse, 52 Wis. 240, 9 N.W. 1 (1881).
65. Kentucky Nat. Gas Corp. v. Indiana Gas & Coal Corp., 129 F.2d 17 (7th Cir. 1942).
66. Independent Milling Co. v. Howe Scale Co., 105 Kan. 87, 181 P. 554 (1919).

tions precedent because the whole contract is, at that point, enforceable.

There is no requirement that the aggrieved party give notice to the repudiator of acceptance of the repudiation before the aggrieved party may bring suit.[67] A requirement for notice of acceptance of the repudiation is not necessary because the bringing of the suit has been deemed an acceptance of the repudiation; the commencement of an action would most certainly give notice to the repudiator of the acceptance of his repudiation.[68] In the event that the aggrieved party delays bringing suit upon the occurrence of the repudiation, he does not lose the right to any relief available to him for the breach.[69] In the event that the aggrieved party attempts to bring about a retraction by the repudiator, he will not be penalized if his efforts fail. In attempting to persuade the repudiator to perform according to the contract terms, the aggrieved party has not precluded himself from maintaining an action to enforce his rights.[70] If the relationship between the parties is a personal one based upon trust and confidence, an anticipatory repudiation is a sufficient imposition on the aggrieved party to prevent any retraction.[71]

The correct terminology used to describe the nature of a contract after a valid repudiation of that contract is not that it has been rescinded; rather, it is more properly said that the injured party is excused from further performance under the contract.[72]

Actions based upon anticipatory repudiation involve certain procedural matters that may be determinative of a party's ability to recover. If a contract is partially breached by nonperformance and is later wholly repudiated, the injured party has but one cause of action and all damages must be proved when such cause is brought.[73] Even in jurisdictions which do not recognize the right to base a suit for damages upon an anticipatory repudiation, the injured party is permitted to maintain his action for restitution of the consideration paid in creating the contract.[74] The statute of limitations begins to run on an action for anticipatory repudiation from

67. Blumenthal & Co. v. Gallert & Co., 240 N.Y. 217, 148 N.E. 215 (1925).
68. Greenwall Theatrical Circuit Co. v. Markowitz, 97 Tex. 479, 79 S.W. 1069 (1904).
69. Lemle v. Barry, 181 Cal. 6, 183 P. 148 (1919).
70. Carvage v. Stowell, 115 Vt. 187, 55 A.2d 188 (1947).
71. Kendall v. Dunn, 71 W. Va. 262, 76 S.E. 454 (1912).
72. 4 CORBIN § 982.
73. Bridgeford & Co. v. Meagher, 144 Ky. 479, 139 S.W. 750 (1911).
74. Smith v. Jaccard, 20 Cal. App. 280, 128 P. 1023 (1912).

the date set for the performance of the contract and not from the date of repudiation.[75]

PART III UNIFORM STATUTORY TREATMENT

Uniform Sales Act

The subject of anticipatory repudiation had been given uniform statutory treatment prior to the enactment of the Uniform Commercial Code. The Uniform Sales Act gave the seller an immediate right of action against the buyer for an anticipatory repudiation at the time the repudiation occurred.[76] However, in an action for anticipatory repudiation, the buyer had a good defense if he could show that the seller had manifested an inability or intention not to perform before the buyer made his repudiation.[77] The remedy given to the nonrepudiating party was to rescind the entire contract. In the event that the nonrepudiating party chose to rescind, he was obliged to give notice of his intention to do so.[78]

Restatement of Contracts

Although the Restatement of Contracts is not, strictly speaking, statutory material, its content deserves mention at this point. The 1932 Restatement contains several provisions dealing with anticipatory repudiation and recognizes the existence of anticipatory repudiation where a party states that he will not or cannot perform. Further, the repudiation is recognized as having occurred when something essential to the contract is transferred to a party other than a contracting party or when some voluntary act is committed which renders the substantial performance under the contract impossible.[79] The Restatement rule, however, does not apply to unilateral contracts or to contracts which have become unilateral in nature as a result of the full performance by one of the parties to the contract.[80] The Restatement makes no provision for the retraction of an anticipatory repudiation in the manner discussed above.[81] Prospective failure of consideration is a valid cause for anticipatory

75. Gold v. Killeen, 44 Ariz. 29, 33 P.2d 595 (1934).
76. UNIFORM SALES ACT § 63(2).
77. *Id.*
78. *Id.* § 65.
79. RESTATEMENT OF CONTRACTS § 318 (1932).
80. *Id.*
81. See notes 58-75 *supra* and accompanying text; see also RESTATEMENT OF CONTRACTS §§ 306, 319.

repudiation and is so recognized by the Restatement.[82] If the nonrepudiating party attempts to induce the repudiator to retract his repudiation, his attempt at obtaining a retraction does not nullify the effect of the breach and the injured party is still permitted to maintain his suit against the repudiating party.[83]

Uniform Commercial Code

The Code provides the most recent uniform statutory compilation on the subject of anticipatory repudiation. Both the subject of repudiation itself[84] and retraction of repudiation[85] are specifically covered.

At least one author is of the opinion that the Code has not changed the existing law concerning repudiation and retraction, at least insofar as the law of Texas is concerned.[86] When analyzed, sections 2-610 and 2-611 have kept the essence of the common law, the Uniform Sales Act and the Restatement of Contracts concepts concerning repudiation and retraction. However, the codification

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82. *Id.* § 280, Comment a.

83. *Id.* § 320.

84. UNIFORM COMMERCIAL CODE [hereinafter cited as UCC] § 2-610: **Anticipatory Repudiation.**

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

85. UCC § 2-611: **Retraction of Anticipatory Repudiation.**

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

86. Comment, *Anticipatory Breach of Contract: A Comparison of Texas Law and the U.C.C.*, 30 TEX. L. REV. 744, 748 (1952).

has not brought the concurrence of these three legal concepts in every detail.

In order for a repudiation to be effective, the value of the contract must be substantially impaired and the performance must be literally and utterly impossible.[87] The aggrieved party may wait a commercially reasonable time before he starts his action or he may institute proceedings immediately after the repudiation, even though he has told the other party he would wait and has urged that the repudiating party retract his repudiation.[88] A party who justifiably requires assurance of performance (section 2-609 permits a party to ask for assurance of performance; if such assurance is not forthcoming, the party asking for assurance may treat the contract as having been anticipatorily breached) may consider the contract anticipatorily repudiated if such assurance is not received within 30 days.[89] The essential ingredient of repudiation under the Code is the same as it was under prior law—it is the intent of the parties which is determinative.[90]

The aggrieved party can proceed with his options under section 2-610 at any time unless he has taken some action which, under the circumstances, requires him to notify the repudiating party that he is about to pursue his remedies.[91] The provision of section 2-610 which permits the aggrieved party to wait for a retraction has met with some disapproval from a leading authority in the field. Williston felt that section 2-610 ought not to have been written as it is. He stated, "This unqualified statement is most objectionable in its implication that the aggrieved party may treat the contract as continuing, though doing so will unnecessarily increase damages."[92] On the other hand, the author of this article feels that the Code has established a workable solution to a difficult problem. A balance must be struck between the rights of the parties to a transaction. The aggrieved party has suffered because of the repudiation. Because the law recognizes that a retraction may be issued—this is a right of the repudiator, so long as the other party has not changed his position in reliance on the repudiation—some provision for a

87. UCC § 2-610, Comments 1 and 2.
88. *Id.*§ 2-610(a), (b).
89. *Id.*, Comment 2.
90. *Id.*
91. *Id.*, Comment 4.
92. Williston, *The Law of Sales in the Proposed U.C.C.*, 63 HARV. L. REV. 561, 584 (1950).

period of time to elapse in order to allow a retraction to be made must be established. The present section on anticipatory repudiation appears to be a workable solution which provides for the protection of both parties.

Another author has expressed the opinion that the Code codified the common law with regard to anticipatory repudiation, with the only difference being that the Code is more detailed as to the rights of the parties.[93] However, this opinion is not shared by all members of the legal community. Still another author perceives at least two differences between repudiation under the Code and under prior law. First, under common law, only the promissor could repudiate a contract, but under the Code either party may do so. Second, the expressions "substantial performance" and "material breach" are not used by the Code; in their stead the Code speaks of nonperformance "which will substantially impair the value of the contract to the other."[94] The right to suspend performance due under the contract existed at common law as a part of the doctrine of dependency.[95] The single greatest change effected by the Code is in the measure of damages. Damages are measured from the time of repudiation rather than from the time when performance is due.[96]

The Code section dealing with retraction of repudiation does not appear to contain any significant changes from prior law.[97] Retraction can be made before the next performance is due as long as the other party has not materially changed his position in reliance upon the repudiation.[98] Retraction can be made by any means which shows that the repudiator intends to perform according to the terms of the contract. Under the Code, though, it should be noted that the nonrepudiating party can demand an assurance of performance which the repudiator must give before a retraction may become effective.[99] An effective retraction reinstates every party's rights under the contract as it previously existed.[100]

93. Gilbride, *The U.C.C.: Impact on the Law of Contracts*, 30 BROOKLYN L. REV. 177, 196 (1964).

94. Anderson, *Repudiation of a Contract Under the U.C.C.*, 14 DEPAUL L. REV. 1, 2 (1964).

95. *Id.* at 14.

96. *Id.* at 16.

97. UCC § 2-611.

98. *Id.* § 2-611(1).

99. *Id.* § 2-611(2).

100. *Id.* § 2-611(3).