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# Anticipatory Repudiation of Leases

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## ANTICIPATORY REPUDIATION OF LEASES

At common law, and perhaps in a majority of jurisdictions today, no obligation was imposed upon the lessor to mitigate damages upon a wrongful abandonment of the leasehold by the lessee. The lessor could, if he chose, sit back complacently and demand his rent as it fell due, or wait until the end of the term and bring an action for the total consideration.

Wyoming, however, by virtue of a dictum contained in *Systems Terminal Corporation v. Cornelison,*[1] seems to have laid the foundation for aligning our judiciary with that growing and vocal minority which imposes a duty upon the lessor to mitigate. In that case, the lessee had apparently abandoned the premises and the lessor reoccupied, then acquiesced in allowing the re-entry of the lessee. Upon a subsequent suit for damages to the leasehold in violation of covenants in the lease, the defendant counter claimed for pasturage by the lessor during the period of the lease, for a period of five and a half months. The Supreme Court commented:

> "Construed reasonably, this evidence tends to show that there was no wrongful taking over of the premises on November 15 since there was an apparent breach of the lease by the lessee and a leaving of the premises without someone in attendance, which situation required the landlord to make a reasonable effort to mitigate damages which might arise therefrom."[2]

On its face, this dictum goes no further that to say a lessor who uses the abandoned premises for his own benefit must make a setoff for that use in computing damages. If, however, it is a tentative step toward the establishment of a duty to mitigate, its consequences will be manifold. The lessor relying upon the old common-law rules may well suffer a judicially-imposed mitigation instead, and thus will be well-advised to assess his damages and terminate the lease as expeditiously as is possible. The progressive tendency of the court to apply the doctrine of mitigation to contracts of lease should concomitantly make available a remedy for anticipatory repudiation of the lease.

Justice Cardozo described an anticipatory breach strictly as "one committed before the time has come when there is a present duty of performance."[3] The breach is thus the consequence of actions or declarations manifesting a repudiation of a forthcoming contractual obligation in anticipation of the time of performance. The conceptual difficulty is in the recognition of the subtle distinction between (1) an anticipatory repudiation of a *future* obligation which constitutes a breach, and (2) the disavowal of a material contractual

1. 364 P.2d 91 (Wyo. 1961).
2. *Ibid,* at 95.
3. N.Y. Life Insurance Co. v. Viglas, 297 U.S. 672, 56 S.Ct. 615, 618, 80 L.Ed. 971, 977 (1936).

provision, the performance of which is *presently* due, as constituting a total breach where the performance of other portions of the contract is not required until a future time.

Professor Williston points out that, even in jurisdiction which do not recognize the doctrine of anticipatory breach, a present partial breach, accompanied by repudiation of future performance, is an actionable total breach. He concludes that "in most of the cases cited in support of the doctrine of anticipatory breach there had been in fact an actual breach, and, therefore, no novel principle was needed to sustain recovery."[4]

Probably the best-reasoned case, in enunciating this distinction, is *Sagamore Corporation v. Willcutt.*[5] There the lessor certain premises to the defendant lessee for an annual rental of $480.00, payable at $40.00 per month in advance. The defendant occupied the leasehold for four months and abandoned the premises, informing the lessor that he would pay no more rent and would not comply with the terms of the lease. The Court rejected the lessor's anticipatory breach argument, but pointed out that he need not rely on that doctrine to sustain recovery. In a well-reasoned analysis of the *Restatement of Contracts,* the Court concluded:

> "Defendant's failure to pay the rent due on February 1st, considered alone, constituted only a breach of his agreement to pay that particular installment of rent. His subsequent statement that he would no longer comply with the terms of the lease and would pay no further rent was a repudiation of his entire contract. The breach thereupon became a total one justifying an immediate action. . . "[6]

By way of summation, where there is a present violation of a contractural provision accompanied by a repudiation of future performance, the contract has been presently breached *in toto,* and the anticipatory breach doctrine is inapplicable. A repudiation, to be anticipatory, must precede the time of performance.[7]

A great deal of difficulty in applying the doctrine to contracts of lease is stimulated by the peculiar nature of rent, haunted as it is by spectors of dogma from the past. It might fairly but unfortunately be said that the law

4. 5 Williston, Contracts, § 1317; Compare Employment Advisors, Inc. v. Sparks, 364 S.W.2d 478 (1963). Employment Advisers, the lessee, entered into a lease with Sparks, the lessor, providing for a total rental of $3,240, payable at $90 per month. Defendant paid rent for 11 months, then abandoned the premises and made no further rental payment. The Court said: "We are thus confronted with both a breach of contract as to the rental payments past due at the time of suit, and anticipatory breach of contract as to payments not yet due." According to Professor Williston's rationale, the failure to pay the 12th month's rent, accompanied by abandonment of the leasehold, constituted a present total breach, and the court need not have alluded to the doctrine of anticipatory breach. The erroneous application of the doctrine in many instances is probably a consequence of semantical confusion.
5. 120 Conn. 315, 180 A. 464 (1935).
6. *Id. at* 465, 466.
7. *N.Y. Life Insurance Co. v. Viglas, supra* note 3.

has not generally adapted itself to modern commercial realities when its perspective is turned to contracts of lease.

The effects of the execution of a contract of lease are twofold. On one side of the coin are the lessor-lessee obligations arising from the contract by virtue of the *privity of estate* it creates, since the lease is a conveyance of an interest in reality.[8] On the other side are the obligations arising as a consequence of the covenants and conditions of the lease, founded upon the *privity of contract* between parties.[9]

At common law, rent was not regarded as a promissory obligation created by the contractual privity between the parties, but instead was regarded as a tenurial service of the state. Thus, the lessee's liability was contingent upon his quiet use and enjoyment of the premises. It was not, for example, analagous to money payable on a promissory note, owing presently but payable in the future—*debitum in praesenti, solvendum in futuro.* In contractural terms, then, rent may be described as an obligation which arises subject to a condition precedent (the arrival of the day payable with the lessee in quiet possession) and is not regarded as a debt presently owing, subject to a condition subsequent. Thus the rule relieving the tenant of all liability for rent upon a wrongful eviction by the landlord: the tenant is ousted from the premises, the contingency is unfulfilled, and hence no rent will be due on the day established for its accrual.[10]

As a consequence of this "contingent" nature, the objection has been raised that to allow damages for an anticipatory repudiation of the lease would do violence to the rule forbidding the award of damages for a contingent obligation which may never become due. Courts following this line of reasoning assert that even if the lessee had not breached the contract by an anticipatory repudiation, but instead had continued performance, no liability might possibly arise because the condition precedent to the obligation might not be fulfilled. Rent being contingent and not an absolute obligation until its accrual, there is no obligation until the contingency is fulfilled, and a fortiori an action for anticipatory repudiation of a covenant to pay rent will not lie.[11]

Conceding arguendo that there is some logical basis for continuing to regard rent as a contingent obligation, there still is an inconsistency in allowing the lessee to assert the contingency where he has, by his own conduct, prevented its fruition. It would logically appear that he should be estopped by his conduct, and the contingency should be fulfilled by operation of law for the purposes of establishing damages only. Thus the rent would become absolute *infuturo*, and each rental installment would be a fixed and absolute sum payable on the specified due days and a certain result of the breach

8. *Sagamore Corporation v. Willcott, supra* note 5 at 465.
9. Samuels v. Ottinger, 169 Cal. 209, 146 PAC. 368 (1915).
10. Halbert v. Jones, 93 Cal. App.2d 783, 209 P.2d 812, 819 (1949).
11. In Re McAllister-Mohler Co., 46 F.2d 91, 93, 94 (S.D. Ohio, E.D. 1930).

subject, of course, to the usual rules of mitigation. Such a rule would be in keeping with modern commercial practices, for requiring the lessor to fulfill the contingency is tantamount to requiring him to increase his damages by a bootless continuation of his performance.

The most substantial objection raised to thwart the application of the doctrine to contracts of lease arises from the supposed unilateral nature of a lease or, more properly, as a bilateral contract which has become unilateral through full performance by one of the parties. The *Restatement of Contracts* rejects the application of the doctrine to unilateral contracts and to bilateral contracts which have become unilateral through full performance by one of the parties,[12] the theory being that there must be some dependency of performance before the doctrine may be utilized.[13]

The rejection of the doctrine as applied to contracts of lease is usually predicated on three premises: (1) a lease is primarily a conveyance of an interest in land; (2) upon execution of the lease, the lessor's consideration has been fully executed, and thus the contract is a bilateral one which has become unilateral through full performance by one of the parties; (3) all that remains is a unilateral money debt (usually payable in installments) owning by the lessee.

Even if it be conceded that a lease is primarily a conveyance of an interest in land, arising as a consequence of the privity of estate created, such a treatment completely ignores the obvious fact that, in the majority of instances, most lessors and lessees require the inclusion of covenants providing for the payments of taxes and insurance, provisions for the division of maintenance of the premises, and so forth. Generally these covenants are interdependent with the lessee's obligation to pay rent, and the contract of lease is in part executory. The lessee does not merely bargain for the conveyance of the leasehold; the payment of the taxes and utilities, the maintenance of the premises and provisions for insurance and other similar covenants are part and parcel of the bargained-for consideration. While the execution of the lease may effectively convey the leasehold, these other covenants obviously render the lease contract still partially executory, and from the privity of contract perspective, as opposed to the privity of estate, the lease is still bilateral.

But again, even if it be conceded that the lease is a unilateral instrument (by full performance of the lessor) what is the validity of the distinction? Why allow the utilization of the doctrine of anticipatory breach to a plaintiff whose promises have only been partially fulfilled, yet deny the remedy to a party who has fully executed his consideration? The distinction was not

12. Restatement, Contracts § 318. (1932).
13. *Id.*, comment e.

appealing to Justice Cardozo,[14] nor to Justice Learned Hand, who described the exclusion as arbitrary.[15]

The most vigorous and pursuasive attack on the exclusion of unilateral contracts from the doctrine has been launched by Professor Corbin,[16] who asserts that "a very relevant question that has never been given a convincing answer is this: If a plaintiff who has rendered *only a fraction* of his own promised performance (whether only one tenth or nine tenths) can maintain suit for an anticipatory repudiation by the other party, what reason is there for denying him such a remedy when he has rendered (and the repudiator has received) *the whole* of his promised performance?"[17] And again: "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."[18]

The word "money" seems to be the grain upon which many courts flounder. In cases of damages for anticipatory breach, the opinions are studded with such phrases as "collection of a money debt before the obligation accrues," and "accelerating the date of maturity of the obligation."

No doubt but that an action for damages for breach of a covenant to pay money appears superficially to be an action for specific performance, principally because of the similarity in character between the performance required and the relief requested. Professor Corbin comments:

> This, it certainly is not if the judgment is not for the full sum promised, but is merely for its present value after making proper discount for advance collection. Furthermore, in an action for damages for breach of a promise to make a money payment, the plaintiff can get a judgment for much more than the amount promised him if he can prove with reasonable certainty the amount of additional losses that the defendant had reason to foresee. Therefore, a plaintiff should not be deprived of his remedy in damages for an anticipatory repudiation merely because the promised perforance is similar in character to the performance that is required by the

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14. *N.Y. Life Insurance Co. v. Viglas, supra* note 3. "The root of any valid distinction is not in the difference between money and merchandise or between money and services. What counts decisively is the relation between the maintenance of the contract and the frustration of the ends it was expected to subserve. The ascertainment of this relation calls for something more than the mechanical application of a uniform formula."
15. Equitable Trust Co. of New York v. Western Pac. Ry. Co., 244 F. 485, 501-502 (S.D. N.Y. 1917): "Furthermore, if performance remains mutually executory, the doctrine still applies, even though the promise is only to pay money. . . . If the doctrine has any limits, they only exclude, and that arbitrarily enough, cases in which at once the promissee has wholly performed, and the promise is only to pay money. Assuming what I do not mean to admit, that it has such limits, they result because the eventual victory of the doctrine over vigorous attack . . . has not left it scathless."
16. 4 Corbin, Contracts, sec sec 962-969.
17. *Id.* sec. 902.
18. *Id.* sec. 963.

judicial remedy that is commonly given for all kinds of breaches of contract.[19]

Even in the manifold jurisdictions which now allow the recovery of damages for an anticipatory breach of lease, this distinction has been recognized. A suit to recover future rental installments after an anticipatory repudiation (or even after an actual present breach) is, unquestionably, a suit in the nature of specific performance, seeking to accelerate an unaccrued obligation. Thus, Courts confronted with such an action reject the suit on the ground that the action is premature, since the rental installments are not yet due.[20] But an action properly brought for *damages* for breach of the contract, in the same jurisdiction, will be maintained.[21] The fact that the rental installments usually are the measure of the damages for the breach (subject, of course, to mitigation) seems to unduly trouble the courts. The lessor does not seek to recover future rentals; he seeks to recover damages for the breach by anticipatory repudiation of the promise to pay the future rent.

Even, however, conceding that there is some reason for distinguishing between bilateral and unilateral contracts for the purposes of anticipatory repudiation, and some valid distinction between contracts for money and contracts for services, a breach of a contractual covenant to pay rent cannot be equated with money payable upon a promissory note. At first glance there appears to be little distinction. But the obvious answer is that the lender of money has no means of mitigation where the promissor repudiates. He has no performance which he can terminate in order to lessen his damages. The lessor, however, has. He may discount against his damages the present value of the leasehold to him. In some instances, of course, the value will be negligible, as, for example, the rental for a one-year period of a summer home, and the repudiation of the lease during the winter months. In some instances, the lessor will actually have no damages, because of improved economic conditions in the community which create a demand for the rental property. In the latter case the repudiation may even be economically advantageous to the lessor. But the obvious fact is that the lessor has something which he may reacquire in mitigation of his damages. The leasehold may be relet to another tenant, which is more realistic than requiring the lessor to continue the lease until there is an actual total breach, which can but increase his damages and be seriously detrimental to the interests of the lessee repudiator.

> The real sanctity of any contract rests only in the mutual willingness of the parties to perform. Where this willingness ceases to exist, any attempt to prolong or preserve the status between them will usually be unsatisfactory and mechanical. Generally speaking, it is far better in such a situation, for the individuals and for society, that

19. *Id.* sec. 965.
20. Jordan v. Nickell, 253 S.W.2d 237 (Kentucky, 1952).
21. *Ibid.*

the rights and obligations between them should be promptly and definitely settled, if the injured party so desires, unless there is some provision in the contract that, as a matter of mutual intention, can be said to prevent this from being done. The commercial world has long since learned the desirability of fixing its liabilities and losses as quickly as possible, and the law similarly needs to remind itself that, to be useful, it too must seek to be practical.[22]

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22. Hawkinson v. Johnston, 137 Ala. 420, 122 F.2d 724 (8th Cir. 1941).