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$35 during any one week regardless of the number of disabilities he has suffered or the number of employers liable for compensation. This position can be supported on policy grounds. Presumably the question will not be finally settled until the Supreme Court or the Legislature acts upon it.

William M. Nolen

The Doctrine of Anticipatory Breach of Contract

In the recent case of *Marek v. McHardy*[1] the Supreme Court announced that the common law doctrine of anticipatory breach of contract[2] is now law in Louisiana. The purpose of this Comment is to outline the most significant features of that doctrine at common law,[3] and to compare these features with established principles of Louisiana law.

THE DOCTRINE AT COMMON LAW

In General

At common law it is well-settled that when a contracting party learns from his obligor prior to the time for performance of the contract that the obligor does not intend to comply with his contractual obligation, the party so informed may sue his obligor immediately, as for a present breach of contract.[4] Furthermore, whether or not the obligee in this situation chooses to bring his action at the time of the repudiation, he may nevertheless discontinue his own performance under the contract without fear of prejudicing his right of action against the obligor.[5] In other words, the doctrine of anticipatory breach of contract includes two basic principles: (1) that the party receiving an anticipatory repudiation of a contractual obligation

1. 234 La. 841, 101 So.2d 689 (1958). See Note, 33 TUL. L REV. 229 (1958).
2. A more accurate title for the doctrine might be "the doctrine of breach of contract by anticipatory repudiation."
3. For a complete discussion of the doctrine at common law, see 4 CORBIN, CONTRACTS §§ 959-989 (1951); 5 WILLISTON, CONTRACTS §§ 1296-1337A (rev. ed. 1937). Other discussions include Ballantine, *Anticipatory Breach and the Enforcement of Contractual Duties*, 22 MICH. L. REV. 329 (1924); Limburg, *Anticipatory Repudiation of Contracts*, 10 CORN. L.Q. 135 (1925); Vold, *Withdrawal of Repudiation After Anticipatory Breach of Contract*, 5 TEXAS L. REV. 9 (1926); Vold, *Repudiation of Contracts*, 5 NEB. L. BULL. 269 (1927); Vold, *The Tort Aspect of Anticipatory Repudiation of Contracts*, 41 HARV. L. REV. 340 (1927); Williston, *Repudiation of Contracts*, 14 HARV. L. REV. 317, 421 (1901); Comment, *Anticipatory Breach in Louisiana*, 7 TUL. L. REV. 586 (1933).
4. 4 CORBIN, CONTRACTS § 959 (1951), and authorities therein cited.
5. *Id.* §§ 960, 975.

may bring an immediate suit; and (2) that the repudiatee in this situation need not continue with his part of the performance, but may discontinue performance immediately without fear of prejudicing his right against the repudiator.[6]

The leading case in a long line of common law decisions recognizing the doctrine of immediate suit for an anticipatory breach is *Hochster v. De la Tour.*[7] In that case defendant repudiated an employment contract and plaintiff brought suit prior to the time performance was to begin. Defendant objected that this suit was premature, contending that the repudiation amounted to an offer to rescind the contract, and that if plaintiff accepted the offer to rescind, he would thereby render himself unable to recover damages for breach of contract. According to defendant's argument, if plaintiff did not accept the offer to rescind, he was obligated to hold himself ready to perform until the time for performance, at which time he could bring his action for damages for breach of contract. The court, seeing no reason why plaintiff should have to hold himself in readiness to perform the contract for several weeks before bringing his action for damages, rejected defendant's argument and gave judgment for the plaintiff. Apparently it did not occur to the court that the legal effect of defendant's repudiation might be to make it unnecessary for plaintiff to remain ready to perform under the contract without at the same time giving him an immediate action for damages. If the court had taken notice of the fact that it is in no way inconsistent to allow plaintiff to look for another job while at the same time making him wait until the time for performance before bringing his action, the desired result in this case might have been reached without giving rise to the anticipatory breach doctrine.[8]

Several objections have been made to the rule of the Hochster case.[9] It is objected that it is illogical to conclude that the breach of a promise is possible other than by non-performance in accordance with its terms. However, as pointed out by Professor Corbin,[10] this is not an area in which logic has controlled the

6. This second principle was existing law in England prior to the formulation of the anticipatory breach rule. *Ibid.*

7. 2 El. & Bl. 678 (K. B. 1853). See discussion in 4 CORBIN, CONTRACTS § 960 (1951). See also 5 WILLISTON, CONTRACTS § 1313 (rev. ed. 1937); Ballantine, *Anticipatory Breach and the Enforcement of Contractual Duties*, 22 MICH. L. REV. 329 (1924); Note, 33 TUL. L. REV. 229 (1958).

8. 4 CORBIN, CONTRACTS § 960 (1951).

9. *Id.* § 961.

10. *Ibid.*

development of the law; the law is supposedly an instrument with which to work justice, rather than an inanimate creature of logic. Moreover, there is room for argument that the *Hochster* rule is in no way illogical. An argument which seems persuasive to this writer is that a suit based upon an anticipatory repudiation is not in reality a suit for the breach of any promise, express or implied, in the contract, but for the breach of a contractual duty not to impair the obligee's confidence in the contract.[11] Such an argument is persuasive largely because of the emphasis it places on security in business transactions.

A second objection to the *Hochster* rule is to the effect that it works injustice to the defendant to make him pay damages for the breach of a promise he has never made.[12] This argument can be dispelled by pointing out that the action is not brought against the defendant because of his failure to perform in accordance with his promise, but rather because of his wrongful and injurious repudiation of his contractual duty to preserve the obligee's confidence in the contract.

A third and more serious objection to the *Hochster* rule is that allowing suit to be brought before the time fixed for performance increases the difficulty of calculating damages, in that it requires an estimate on the part of the court as to the extent of the injury suffered by the plaintiff.[13] It is submitted that this objection is largely overcome by the following two considerations. In the first place, in a large percentage of cases, even though suit is instituted prior to the time performance is due under the contract, judgment will not be rendered until after the time for performance, due to the slowness of judicial procedure. In the second place, justice often requires that damages be awarded for injury to be endured in the future in tort as well as in contract cases, and it is not believed that the difficulties of such awards are any more prohibitive in cases of anticipatory breach.[14]

Despite the above arguments against the doctrine of anticipatory breach, it is now law in most Anglo-American jurisdictions.[15] The wide acceptance of the doctrine is not difficult to

11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*
15. The doctrine appears to be well-settled throughout the United States, with the exception of Nebraska and Massachusetts. 5 WILLISTON, CONTRACTS § 1314 (rev. ed. 1937). Even in those two states there is substantial movement

understand, although specific justifications for the doctrine are more difficult to articulate than are the objections to it. One justification for allowing an immediate action in cases of an anticipatory repudiation is that such repudiation often causes instant injury to the repudiatee, which injury is different from that caused by actual non-performance.[16] Then, too, the repudiation by the defendant is generally indefensible. Awarding immediate damages for the anticipatory breach seems only fair and equitable.[17]

Unilateral Contracts

It has been frequently held that an anticipatory repudiation of a unilateral contract is not actionable.[18] Such holdings are based upon the notion that the reason for holding an anticipatory repudiation to be a breach of contract is that otherwise the injured party must continue to perform on his own part.[19] Since this reason would not apply to a unilateral contract because no duty to perform exists in the repudiatee, the courts think it unnecessary to apply the doctrine to unilateral contracts. But as pointed out above in the discussion of the *Hochster* case,[20] the reasons for holding an anticipatory repudiation to be a breach of contract are much more general. It is believed that the reasons on which the doctrine can actually be sustained are equally as applicable to unilateral contracts as to bilateral.[21]

Another proposed reason for the rule that the doctrine does not apply to unilateral contracts is that perhaps the most common kind of unilateral contract is the promise to pay money, such as a promissory note.[22] It is argued by some writers that allowing suit on a promissory note prior to its coming due would be tantamount to maturing a money obligation before its due date.[23] This concept is often expressed in the phrase "accelerating the date of maturity."[24] However, Corbin and others argue that this is not the case, although it appears so superficially.

toward an acceptance of the doctrine. Some writers argue that the doctrine is now law in Nebraska. Vold, *Repudiation of Contracts*, 5 NEB. L. BULL. 269 (1927).

16. 4 CORBIN, CONTRACTS § 961 (1951).
17. *Ibid.*
18. *Id.* § 962.
19. *Ibid.*
20. See page 120 *supra*.
21. 4 CORBIN, CONTRACTS § 962 (1951).
22. *Id.* § 963.
23. *Ibid.*
24. *Id.* § 965.

They argue that awarding money damages for the injurious repudiation of a promise to pay money is no more allowing specific performance of that contract than is awarding damages for the repudiation of a promise to convey land.[25]

A third reason for the view that the doctrine of anticipatory breach does not apply to unilateral contracts is associated with the notion that the two basic premises of the anticipatory breach doctrine are inseparable. In other words, since the principle that the repudiation justifies discontinuance of his performance by the repudiatee would not apply in the case of a contract wherein the repudiatee has no obligation to perform, *i.e.*, a unilateral contract, the entire doctrine should not be applied in these cases. The flaw in this argument is apparent on its face. There is no valid objection to applying the applicable portion of the doctrine to unilateral contracts, although part of the doctrine is inapplicable.

In any event, despite arguments that it should be otherwise, this is the present situation. The anticipatory breach doctrine is generally recognized in cases involving bilateral contracts provided that both sides are at least partly executory; it is not generally recognized in cases involving unilateral contracts.[26]

Retraction

Another facet of the anticipatory breach doctrine which should be considered is the fact that as long as the repudiatee does not materially change his position in reliance on the repudiation, the repudiator may retract it and announce his intention to go through with the contract. The retraction may be either express or tacit, provided the repudiatee has actual notice of it.[27] If the repudiator does effectively retract his repudiation, the effect of the repudiation as a breach is nullified, and the repudiatee's obligation is reinstated.[28] However, in order to operate as a restoration of the contract, the retraction must be made when the repudiator is in a position to perform his obligation in all material respects.[29] Furthermore, any signifi-

25. *Ibid.* See Comment, *Anticipatory Breach of Unilateral Contracts*, 36 YALE L.J. 263 (1926).

26. 4 CORBIN, CONTRACTS § 962 (1951). A bilateral contract, one side of which had been fully performed prior to the repudiation, is for purposes of this rule a unilateral contract.

27. *Id.* § 960.

28. *Ibid.*

29. *Ibid.*

cant change of position by the repudiatee in reliance on the repudiation will be sufficient to prevent an effective retraction.[30] Bringing suit is one sort of reliance making effective retraction impossible.[31]

Manifestation

There is no hard and fast rule as to what sort of manifestation is necessary to amount to a repudiation.[32] The general rule is that any unequivocal manifestation, either express or implied, of intention not to go through with the contract, or of inability to do so, will be sufficient.[33] This would include repudiation of the contract by making performance of it impossible.[34]

Measure of Damages

The common law rule that damages are to be measured as of the time for performance[35] is not changed in the case of an anticipatory breach.[36] It is true that if the breach is not anticipatory, the time for performance will have arrived when the breach occurs. However, although the calculation of damages may be more difficult, the general rule applies to the anticipatory breach.[37]

APPLICATION OF THE DOCTRINE IN LOUISIANA

According to some authorities, the doctrine of anticipatory breach was not recognized in the civil law until comparatively recent times.[38] One writer suggests that this has been true largely because of the civil law principle that specific performance is the preferred remedy for a breach of contract, as opposed to the common law preference for the award of damages.[39] Since it is illogical to specifically enforce an agreement prior to

30. *Ibid.*
31. *Ibid.*
32. *Id.* § 973.
33. *Ibid.*
34. *Id.* § 984.
35. *Id.* § 961; 3 WILLISTON, CONTRACTS § 587 (rev. ed. 1937).
36. 4 CORBIN, CONTRACTS § 961 (1951).
37. Of course, it could be contended that calculating damages to be awarded in a suit for anticipatory breach on the basis of the extent of the injury at the time for performance is inconsistent with one of the justifications posed for the doctrine, i.e., that the obligee has suffered a present injury by the repudiation different from that which he would suffer by a breach of the entire contract.
38. 5 WILLISTON, CONTRACTS § 1337A (rev. ed. 1937), quoted in Marek v. McHardy, 234 La. 841, 856, 101 So.2d 689, 694 (1958). See also Comment, *Anticipatory Repudiation in Louisiana*, 7 TUL. L. REV. 586 (1933).
39. 5 WILLISTON, CONTRACTS § 1337A (rev. ed. 1937).

the time for performance, the courts hesitate to allow an action for an anticipatory breach. This reasoning, however, is subject to question. In the first place, the fact that most civil law jurisdictions prefer specific performance as a remedy for a breach of contract does not present an iron-clad objection to the adoption of the anticipatory breach doctrine in those jurisdictions. To say that specific enforcement is the preferred remedy is not to say that it is the only one available. Just as in the common law a decree of specific performance may, in appropriate cases, be substituted for the award of damages, so in the civil law the award of damages could be substituted for specific enforcement. Further, the statement that specific enforcement is the preferred remedy for breach of contract in civil law is not unqualifiedly true. In France the award of damages is preferred in contracts to do, as opposed to contracts to give or to deliver.[40] Furthermore, in Louisiana the rule as to the preferred remedy for breach of contract is not entirely clear. Articles 1926 and 1927 of the Civil Code[41] would seem to indicate that the award of damages is a substitute for specific performance only in obligations to do.[42] It could be argued that the negative implication of these articles is that specific enforcement is available in other cases. However, the cases are not in accord with that interpretation. Accepting the statement of the cases that the

40. FRENCH CIVIL CODE art. 1142 (1804) provides: "Every obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor." Nevertheless, it may be proper to say with the majority of the French commentators that, as a consequence of the wide discretion assumed by the courts in specifically enforcing obligations to do or not to do with the aid of the method of *astreintes* (7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 84, nº 787 (1931)), specific performance is the rule rather than the exception even as to such obligations. However, there is still a judicial reluctance to compel the performance of a personal act. I BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL — DES OBLIGATIONS 469, nº 431 (3 ed. 1906); 24 DEMOLOMBE, TRAITÉ DES CONTRATS OU DES OBLIGATIONS CONVENTIONNELLES EN GENERAL 486, nº 488 (1877).

41. LA. CIVIL CODE art. 1926 (1870): "On the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued, according to the rules established in the following section."

Id. art. 1927: "In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts."

42. This would be in accord with the French view. See note 40 *supra*.

Following the spirit of these articles, it has been consistently held that specific performance of contracts to do or not to do is not favored and cannot be demanded as a matter of right. Tri-State Transit Co. v. Sunshine Bus Lines, Inc., 181 La. 779, 160 So. 411 (1935); Pratt v. McCoy, 128 La. 570, 54 So. 1012 (1911); Caperton v. Forrey, 49 La. Ann. 872, 21 So. 600 (1897); Mirandona v.

award of damages is the preferred remedy in Louisiana,[43] specific enforcement being given only when damages would prove inadequate,[44] there seems to be no objection in this regard to the adoption of the anticipatory breach doctrine in Louisiana.

Although no express recognition of the anticipatory breach doctrine in Louisiana prior to the *Marek* case has been discovered, there have nevertheless been cases in which the question of allowing the institution of suit prior to the time for performance has arisen.[45] Cases involving the problem of allowing suit prior to the time performance is due include the line of cases which allow suit by a landowner for rent for the entirety of the lease period when the tenant abandons the leased premises prior to the expiration of the lease.[46] However, the landowner can exe-

Burg, 49 La. Ann. 656, 21 So. 723 (1897); Solomon v. Diefenthal, 46 La. Ann. 897, 15 So. 183 (1894); New Orleans & Orleans Levee Board v. New Orleans & N.E. R.R., 44 La. Ann. 64, 10 So. 401 (1892).

43. T.S.C. Motor Freight Lines v. Leonard Truck Lines, 57 F. Supp. 628 (D.D.C. 1945); Goudeau v. Daigle, 124 F.2d 656 (5th Cir. 1942), cert. denied, 316 U.S. 695 (1942); Fite v. Miller, 192 La. 229, 187 So. 650 (1939); New Orleans Polo Club v. New Orleans Jockey Club, 128 La. 1044, 55 So. 668 (1911); Pratt v. McCoy, 128 La. 570, 54 So. 1012 (1911); Viator v. Patout, 1 La. App. 362 (1924). See also Manning v. Cohen, 124 La. 869, 50 So. 778 (1909); Rice v. Rice, 46 La. Ann. 711, 15 So. 538 (1894); New Orleans & Orleans Levee Board v. New Orleans & N.E.R.R., 44 La. Ann. 64, 10 So. 401 (1892); Posner v. Dale & Son, 3 La. App. 577 (1926); Michel v. Southern Ins. Co., 8 Orl. App. 24 (La. App. 1910).

44. Fuselier v. United States, 111 F. Supp. 471 (D.D.C. 1953); Tri-State Transit Co. v. Sunshine Bus Lines, Inc., 181 La. 779, 160 So. 411 (1935); New Orleans Polo Club v. New Orleans Jockey Club, 128 La. 1044, 55 So. 668 (1911); Gauche v. Metropolitan Bldg. Co., 125 La. 530, 51 So. 573 (1910); Mirandona v. Burg, 49 La. Ann. 656, 21 So. 723 (1897); Caperton v. Forrey, 49 La. Ann. 872, 21 So. 600 (1897); Rice v. Rice, 46 La. Ann. 711, 15 So. 538 (1894); New Orleans & Orleans Levee Board v. New Orleans & N.E.R.R., 44 La. Ann. 64, 10 So. 401 (1892); Levin's Auction Exchange v. Samuels, 28 So.2d 340 (La. App. 1947); Blackshear v. Sandifer, 132 So. 282 (La. App. 1931); Youngblood v. Daily & Weekly Signal Tribune, 131 So. 604 (La. App. 1930); Gerson v. Benson, Orleans No. 8373 (La. App. 1923).

45. In Aronson v. Klein, 175 La. 506, 143 So. 389 (1932), plaintiff assigned to the defendant his interest in a contract for the purchase of land from a third party. The defendant gave in payment therefor a note payable "at the time of act of sale." Subsequently he seemingly abandoned the transaction and refused to pay the note on demand. Plaintiff sued on the note, and the defense was set up that the suit was prematurely brought. Thus the question of allowing the institution of suit prior to the time performance was due was squarely presented to the court. The court did not decide the case on that basis, instead basing its decision on the theory that selling the property was a suspensive condition to the defendant's liability on the note, and that by refusing to pass the act of sale defendant made the performance of the condition impossible, thereby maturing his obligation and becoming immediately liable on the note under Article 2040. This article provides that "the condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it."

46. Hyman v. Hibernia Bank & Trust Co., 144 La. 1074, 81 So. 718 (1919); Succession of Romero, 137 La. 236, 68 So. 433 (1915); American Machinery & Construction Co. v. Stewart & Haas, 115 La. 100, 38 So. 960 (1905); O'Kelley v. Ferguson, 49 La. Ann. 1230, 22 So. 783 (1897); Henderson v. Meyers & Bro., 45 La. Ann. 798, 13 So. 191 (1893); Holden v. Tanner, 6 La. Ann. 74 (1851);

cute judgment only to the extent of provoking the sale of the lessee's property seized under his lessor's privilege.[47] Beyond the value of such property, he is relegated to the position of an ordinary creditor.[48] Since this privilege of bringing suit prior to the expiration of the lease period is in furtherance of the lessor's privilege, many of the cases contain language to the effect that this is an "extraordinary privilege" of the landowner.

The privilege of bringing suit prior to the expiration of the contract period is extended to creditors in bankruptcy,[49] and to creditors of an insolvent, provided there has been an actual surrender of property.[50] Other cases allow the institution of suit by a wrongfully discharged employee for the entirety of salary or wages due under the contract, even though the contract period has not expired.[51] These cases are based on Article 2749,[52] which provides this recourse for the wrongfully discharged employee.

At this point it should be remembered that the common law doctrine of anticipatory breach consists of two basic principles:

Sigur v. Lloyd, 1 La. Ann. 421 (1846); Roumage v. Blatrier, 11 Rob. 101 (La. 1845); Reynolds v. Swain, 13 La. 193 (1839); Christy v. Casanave, 2 Mart. (N.S.) 451 (La. 1824); Dixon v. Alford, 143 So. 679 (La. App. 1932); Massett v. C. G. Conn Co., Ltd., 127 So. 638 (La. App. 1930).

47. Hyman v. Hibernia Bank & Trust Co., 144 La. 1074, 81 So. 718 (1919); Succession of Romero, 137 La. 236, 68 So. 433 (1915); Reynolds v. Swain, 13 La. 193 (1839).

48. The landlord in this situation can also re-let the premises, applying the revenue therefrom to the credit of the original tenant. See Sirianos v. Hill, Harris & Co., 224 La. 80, 68 So.2d 757 (1953).

49. Carollo v. President of Bank of United States, 10 Rob. 533 (La. 1845). The National Bankruptcy Act, 11 U.S.C., §§ 91-1255 (1952), largely suspends the provisions of Louisiana law in regard to bankruptcy. Under this act, the obligor's bankruptcy is counted as an anticipatory breach of an executory contract, and an immediate action may be brought thereon. City Bank Farmers' Trust Co. v. Irving Trust Co., 299 U.S. 133 (1937).

50. LA. CIVIL CODE art. 2054 (1870): "Whenever there is a cession of property, either voluntary or forced, all debts due by the insolvent shall be deemed to be due, although contracted to be paid at a term not yet arrived; but in such case, a discount must be made of the interest at the highest conventional rate, if none has been agreed to by the contract." See Succession of Gravolet, 195 La. 832, 197 So. 572 (1940); C. T. Patterson Co. v. Port Barre Lumber Co., 136 La. 60, 66 So. 418 (1914); Kleinworth v. Llingender, 14 La. Ann. 96 (1859); Carollo v. Bank of United States, 10 Rob. 533 (La. 1845); Millaudon v. Foucher, 8 La. 582 (1835); Atwill v. Belden & Co., 1 La. 500 (1830).

51. See, e.g., Long v. Charles Kaufman Co., 122 La. 281, 47 So. 606 (1908); Tete v. Lanaux, 45 La. Ann. 143, 14 So. 241 (1893); Shea v. Schlatre, 1 Rob. 319 (La. 1842); Sherborne v. Orleans Cotton Press, 15 La. 360 (La. 1840); Aymond v. Haas Inv. Co., 59 So.2d 479 (La. App. 1952).

52. LA. CIVIL CODE art. 2749 (1870): "If, without any serious ground of complaint, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived."

(1) that the repudiatee may bring an instant action as for a present breach of contract; and (2) that the repudiatee, whether or not he chooses to rely on the repudiation as a present breach, has a defense to any claim by the repudiator that he has failed to go through with his part of the bargain. This second principle could be said to constitute a modified application of the Louisiana rule that a party is under a duty to mitigate damages.[53] This rule simply means that a party under a contract must take reasonable steps to prevent the needless enhancement of damages. It is not extended, in most cases, to require that a party receiving an anticipatory repudiation of his obligor's contractual obligation enter a covering contract,[54] but it does mean that he must discontinue his performance where a failure to do so would result only in increasing the amount of harm caused by the repudiation. The duty of mitigation being accepted, it is apparent that the repudiatee need not continue with his performance. Indeed in many instances he will be under a duty to discontinue.

At first glance it is plausible that Articles 1912 and 1913[55] support the argument that the doctrine of anticipatory breach is inconsistent with the Louisiana law. Under Article 1912 it is necessary for an injured party, before suing for damages, to put the other party in default. According to 1913, he cannot put the other party in default unless he himself is ready and willing to perform at the time and at the place stipulated in the contract. Of course, if these articles apply in the case of an anticipatory repudiation, they would require that the repudiatee wait until the time stipulated for performance before putting the repudiator in default and suing him for damages. However,

53. Noland v. Liberty Mutual Ins. Co., 96 So.2d 360 (La. App. 1957); Baird v. Employers' Liability Assur. Corp., 38 So.2d 669 (La. App. 1951); Mossler Acceptance Corp. v. Naquin, 31 So.2d 247 (La. App. 1947); Mayer v. Succession of McClellan, 30 So.2d 788 (La. App. 1947); Interurban Transp. Co. v. F. Strauss & Sons, 196 So. 367 (La. App. 1940); Andrews v. Foster, 170 So. 563 (La. App. 1936).

54. See, e.g., Friedman Iron & Supply Co. v. J. B. Beaird Co., Inc., 222 La. 627, 63 So.2d 144 (1953).

55. LA. CIVIL CODE art. 1912 (1870): "The effects of being put in default are not only that, in contracts to give, the thing which is the object of the stipulation is at the risk of the person in default; but in the cases hereinafter provided for it is a prerequisite to the recovery of damages and of profits and fruits, or the rescission of the contract."

Id. art. 1913: "In commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default, must, at the time and place expressed in, or implied by the agreement, offer or perform, as the contract requires, that which on his part was to be performed, otherwise the opposite party will not be legally put in default."

it is doubtful that the articles do apply to such a situation. There is a line of Louisiana cases which holds that in the event of a manifestation of intention not to perform on the part of an obligor, the obligee need not put him in default before bringing suit, such a manifestation being an active breach of the contract.[56] In such event no putting in default is necessary under the provisions of Article 1932,[57] which provides that when there is an active breach, the creditor is under no obligation to put the debtor in default in order to entitle him to an action. It would seem that this jurisprudential rule should apply in the case of a manifestation of intention not to perform made prior to the time performance is due, as well as to such a manifestation made at the time for performance. If this rule does apply, then Articles 1912 and 1913 are not inconsistent with the anticipatory breach doctrine.

Even if it should be held that the cases which hold that no putting in default is necessary in the event of a positive manifestation of intention not to perform have no application to the anticipatory repudiation situation, there is still room for argument that Articles 1912 and 1913 present no objection to the anticipatory breach doctrine. It should be noted in this regard that the peculiar wording[58] of Article 1913 has occasioned considerable perplexity in other areas of the law.[59] It is plausible that this article was intended to mean that the injured party must have been willing and ready to perform at some time substantially close to that stipulated in the contract. In the case of an anticipatory breach, this interpretation would not conflict with an immediate suit. Another possible argument is that Article 1913 simply should not be applied in the case of an anticipatory breach, as this article was presumably designed to pre-

56. Woolie v. Carson Carbon Co., 177 La. 990, 149 So. 551 (1933); Stocklebach v. Bradley, 157 La. 336, 105 So. 363 (1925); Shelby Mills v. Nami, 1 La. App. 116 (1924); Allen v. Steers, 39 La. Ann. 586, 2 So. 199 (1887); Camors v. Madden, 36 La. Ann. 425 (1884); Abels v. Glover, 15 La. Ann. 247 (1860).

57. LA. CIVIL CODE art. 1932 (1870): "When there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the other in default in order to entitle him to his action."

58. The injured party must offer to perform "at the time" stipulated in the contract before he can put the other party in default. Carried to its logical conclusion, this would mean that if the injured party waited until after the time performance was due, giving the other party a few extra days before making demand, he would be unable to bring suit.

59. See Everhardt v. Sighinolfi, 232 La. 996, 95 So.2d 632 (1957); Di Cristina v. Weiser, 215 La. 115, 42 So.2d 868 (1949). See also Erwin v. Fenwick, 6 Mart.(N.S.) 229 (La. 1827).

vent "surprise suits" by injured parties.[60] Certainly a party who unjustifiedly manifests his intention not to go through with his contractual obligation when it comes due should not be heard to complain that he is surprised at being sued for breach of contract.

Another possible objection to the adoption of the anticipatory breach doctrine in Louisiana is presented by Article 2052. This article provides: "What is due only at a certain time, cannot be demanded before the expiration of the intermediate time. . . ." It seems clearly to stand for the proposition that an obligation may not be sued upon until it is due. A case in which this article was applied is *American Machinery & Construction Co. v. Stewart & Haas*,[61] wherein the right to recover judgment for future royalties on the ground that the defendant had abandoned some rented machines and refused to comply with the contract was denied, and the action declared premature. However, in the final analysis the defense of prematurity was sustained because in consequence of other provisions in the contract the obligation to pay the royalties was contingent on future events, the outcome of which could not be foreseen at the time of suit. In other words, the court found that the "equity of the case" would "be reached"[62] by delaying the right to sue. It is significant that no judicial interpretation of Article 2052 which is directly at odds with the anticipatory breach doctrine has been discovered.

Another argument against the construction of Article 2052 as presenting an obstacle to the adoption of the anticipatory breach doctrine might be that Article 2053[63] modifies 2052 to a certain extent. Article 2053 provides that "the term is always presumed to be stipulated in favor of the debtor, unless it result from the stipulation, or from circumstances, that it was also agreed upon in favor of the creditor." Presumably this would mean that if the debtor wants to accelerate payment of his obligation he can do so.[64] It could be argued from this assumption that the obligor can accelerate the due date of his obligation

60. This conclusion is at least tenable from the wording of the article. See note 55 *supra*.

61. 115 La. 192, 38 So. 960 (1905).

62. *Id.* at 195, 38 So. at 961.

63. LA. CIVIL CODE art. 2053 (1870).

64. If the term is stipulated in the debtor's favor, he will presumably be able to pay off the entire obligation at any time prior to its coming due, in the absence of circumstances bringing his conduct under some other prohibition.

even as against his own interest, and that an anticipatory repudiation of his obligation should be counted as such an acceleration.

Another article which would seem to lend considerable support to the anticipatory breach doctrine is Article 1932,[65] which provides: "When there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default in order to entitle him to his action." As mentioned above in the discussion of Article 2052, there is jurisprudence to the effect that an unequivocal manifestation of intention not to perform constitutes an active breach of the contract, and no putting in default is necessary.[66] These cases, of course, are not *direct* authority for the proposition that a repudiation of one's obligation prior to the time performance is due amounts to an active breach, as they deal with such manifestations made at the time performance was due. However, it is certainly arguable that these cases are indirect authority for that proposition, as there seems no reason to make a distinction between the two situations. Added support for the proposition that an anticipatory repudiation amounts to an active breach is found in Article 1931,[67] which states that "a contract may be violated . . . actively by doing something inconsistent with the obligation it has proposed." Article 1901 provides that agreements must be performed with good faith.[68] An anticipatory repudiation seems to constitute a clear violation of these provisions, as it appears to be a bad faith action which is inconsistent with the obligation. Therefore, it seems entirely plausible that a manifestation of intention not to go through with the contract, even though made prior to the time for performance stipulated in the contract, should be held to be "doing something inconsistent with the obligation," and therefore an active breach.[69] If an anticipatory repudiation of an obligation is an active breach, then Article 1932 is direct authority for allowing an immediate suit for damages, in that it states that "damages

65. *Id.* art. 1932.
66. See note 55 *supra.*
67. LA. CIVIL CODE art. 1931 (1870).
68. *Id.* art. 1901: "Agreements . . . must be performed with good faith."
69. If a manifestation of intention not to go through with the contract, made at the time performance is due, is an active breach, it seems entirely sound to contend that such a manifestation made prior to the time performance is due would also be an active breach.

are due from the moment the act of contravention has been done."

An area in which the Louisiana law may require some qualification of the anticipatory breach doctrine is the situation where the repudiator retracts his repudiation. At common law the repudiator may retract his repudiation and restore the contractual obligations as long as the repudiatee has made no material change of position in reliance on the repudiation.[70] The institution of suit by the repudiatee would be such reliance as to preclude retraction.[71] This proposition would probably not be accepted in Louisiana in view of Article 2047,[72] which provides that the obligee may be allowed further time in which to comply with his contractual obligation even after the institution of suit. Presumably this principle would be applied in cases where suit is instituted prior to the time performance was due under the contract, as well as in suits at or after that time. Thus, even though the repudiatee had instituted suit based upon the repudiation, the repudiator under 2047 could be allowed to retract his repudiation and go through with the contract.

Another area in which the anticipatory breach doctrine may require some modification is in the matter of the calculation of damages. At common law it is established that damages are to be calculated on the basis of the extent of the injury as of the time performance is due under the contract.[73] The rule in Louisiana is not so clear. It is true that language is often found in the decisions indicating that damages are to be calculated as of the time of the breach.[74] However, it is arguable that, as the anticipatory breach situation is largely undeveloped here, the courts have not intended to make a distinction between the time of the breach and the time performance is due.[75] In *Friedman Iron & Supply Co. v. J. B. Beaird, Inc.*,[76] there was an anticipatory repudiation on the part of the defendant. Suit was brought

70. 5 CORBIN, CONTRACTS § 980 (1951).
71. *Ibid.*
72. LA. CIVIL CODE art. 2047 (1870): "In all cases the dissolution of a contract may be demanded by a suit or by exception, . . . and the party in default may, according to circumstances, have a further time allowed for the performance of the conditions."
73. 5 CORBIN, CONTRACTS § 961 (1951).
74. See, e.g., McCord v. The West Feliciana R.R., 3 La. Ann. 285 (1848); Seaton v. The Second Municipality of New Orleans, 3 La. Ann. 44 (1848).
75. Of course, in situations other than those involving an anticipatory breach, the time of the breach and the time performance is due under the contract will be the same.
76. 222 La. 627, 63 So.2d 144 (1953).

after the time for performance. The court said damages were to be calculated as of the "date of the breach."[77] However, there is substantial room for argument that this language was not intended to establish a distinction between the time of the breach and the time performance is due, in view of the fact that the court was there announcing the date of the breach as opposed to the date of trial as a basis for calculating damages. At one point in the opinion the court states the rule in terms of "time for delivery."[78] If it should be decided that the *Friedman* case is authority for the proposition that in the case of an anticipatory breach damages are to be calculated as of the time of the breach, there is room for valid argument that such a rule would be unsound. This argument would be based on the principle that damages are generally supposed to be based on the contemplation of the parties;[79] ordinarily the parties would contemplate that damages would be based on the extent of the injury at the time performance was due.

SUMMARY

It would seem that the common law doctrine of anticipatory breach is sound and equitable, and that it is not inconsistent with most of the basic principles of Louisiana law.

(1) Accepting the statement of most of the cases that the preferred remedy for breach of contract in Louisiana is the award of damages, there seems no objection in this regard to the adoption of the doctrine.

(2) There is some indirect jurisprudential support for the doctrine, in that there have been cases allowing the institution of suit prior to the time for performance stipulated in the contract. However, these cases were in special and isolated instances, and were supported by legislation.

(3) The Louisiana law regarding the mitigation of damages is in accord with that portion of the anticipatory breach doctrine which allows the repudiatee to immediately discontinue his own performance.

77. *Id.* at 642, 63 So.2d at 149.
78. *Ibid.*
79. LA. CIVIL CODE art. 1934 (1870) reads in part: "When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered the contemplation of the parties at the time of the contract."

(4) The Louisiana law of default is reconcilable with the doctrine.

(5) Article 2052, while on its face presenting some objection to the doctrine, can be reconciled with the doctrine by reading the article in conjunction with Articles 2053 and 1932.

There are, however, certain areas of the Louisiana law which may well require some modification in the anticipatory breach doctrine.

(1) Article 2047 of the Code may well overcome the common law rule that a repudiator may not retract his repudiation after suit is brought by the repudiatee in reliance on the repudiation.

(2) It is possible that the Louisiana rule as to the calculation of damages will cause some qualification of the anticipatory breach doctrine.[80]

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Revival of Judgments

Following the rendition of a favorable judgment, the plaintiff looks next to execution thereon. Often, however, there are reasons which prevent successful execution at that time. For example, if the judgment is one for money, immediate execution may be deterred by reason of the defendant's insolvency. Therefore, in those legal systems which place a limitation on the life of a judgment there must be some means provided to extend this period if execution is not to be barred by the mere lapse of time. The purpose of this Comment is to compare the procedure permitting extension of the life of a judgment at the common law, in France, and in Louisiana. Major emphasis is placed on the revival of judgments in Louisiana and the contributions of the proposed Louisiana Code of Civil Procedure in this area.

Revival of Judgments at Common Law

At common law, if execution was not issued upon a judgment within a year and a day, the judgment became dormant. After this period it was presumed that the judgment had been satis-

80. For another discussion of the anticipatory breach doctrine in Louisiana see Comment, *Anticipatory Breach in Louisiana*, 7 TUL. L. REV. 586 (1933).