

The Doctrine of Anticipatory Breach Revisited - Does Unnecessary Confusion Still Exist?

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NOTES

THE DOCTRINE OF ANTICIPATORY BREACH REVISITED—DOES UNNECESSARY CONFUSION STILL EXIST?

Plaintiff, a seller of timber, and defendant buyer entered into a contract of sale which was conditioned on plaintiff's obtaining a right-of-way so that defendant could remove the timber to a public road. Having obtained the right-of-way, plaintiff wrote a letter to defendant requesting performance, to which defendant replied that it considered the contract invalid. In affirming a district court judgment for plaintiff granting specific performance of the contract the court of appeals rejected defendant's claim that he had not been adequately placed in default and *held* that an anticipatory breach of contract is actionable in Louisiana. *Lawton v. Louisiana Pacific Corp.*, 344 So. 2d 1129 (La. App. 3d Cir. 1977).

It is often contended that there is no civilian counterpart to the common law doctrine of anticipatory breach.¹ This, however, is not exactly so.

At common law an anticipatory breach of contract is a repudiation by a promisor of his obligation before the time for his performance has arrived. Unless the promisor has some legal justification for repudiating, any definite statement made to the promisee that he will not or cannot perform his contract operates as an anticipatory breach.² Thus, a contractor who realizes he has unprofitably underbid a job and notifies the owner of his intention not to build at the accepted price has committed an anticipatory breach of contract. Similarly, any voluntary act by an obligor which renders his performance impossible constitutes an anticipatory breach.³

The doctrine of anticipatory breach was a departure from older and stricter legal theory. If the law of contracts is the law of promises, a promisor cannot breach a contract unless he fails to perform as promised,

1. 5 S. WILLISTON, *CONTRACTS* § 1337(A) (rev. ed. 1937); Comment, *The Doctrine of Anticipatory Breach of Contract*, 20 LA. L. REV. 119 (1959); Comment, *Anticipatory Breach In Louisiana*, 7 TUL. L. REV. 586 (1933).

2. 4 A. CORBIN, *CONTRACTS* § 959 (1951), and authorities cited therein.

3. *Id.* Such a situation arises when a vendor sells to a third party that which he has already promised to another, for such an act amounts to a positive manifestation of intention not to perform the first contract.

and such a failure can only occur at the time and under the conditions specified in the contract. However, existing law in England and the United States has evolved otherwise, creating a duty on the promisor not only to perform when the term arrives, but also to refrain from repudiating his promise beforehand.⁴ This apparent inconsistency is better explained by policy considerations than by the theoretical duty not to foresake one's promise.⁵

Once the common law recognized that an obligor could anticipatorily breach his contract, the courts began to formulate a set of legal consequences flowing from the breach. It was early established that the obligee could sue immediately, and could discontinue his own performance under the contract without prejudicing his right of action against the obligor.⁶ The leading English case on anticipatory breach was *Hochster v. De la Tour*.⁷ The parties entered into a contract in April, 1852, which bound plaintiff to three months of employment starting on June 1. On May 11 defendant totally repudiated the contract, and plaintiff sued on May 22. Terming the suit premature, defendant argued that the repudiation was only an offer to rescind, which could be retracted until the date of performance, and that until that time plaintiff had to be ready to perform. The court disagreed, however, and allowed the suit, by reasoning that requiring plaintiff to stand ready to perform would effectively eliminate his ability to mitigate damages by seeking other employment.⁸ Although

4. *Id.*

5. *Id.* Before the doctrine of anticipatory breach arose, the preferred theory was that a person could be bound only by the expression of his own will, and that there could be no legal duty to be enforced against him beyond the terms of his own consensual promise. This may account for the many statements that "logically" or "in the nature of things" there can be no breach of contract except by failure to perform something that was promised. In any society as social conditions change, personal liberty must necessarily be limited. The legal rights and duties growing out of and regarded as a part of "contract" are determined more by the needs of all, and less by the mere will of the contractor. *See id.*

6. *Id.* *See* *Central Trust Co. of Ill. v. Chicago Auditorium*, 240 U.S. 581, 589 (1916).

7. [1853] Q.B. 678. *See* discussion in 4 A. CORBIN, *supra* note 2, § 960. *See also* 5 S. WILLISTON, *supra* note 1, § 1313.

8. 4 A. CORBIN, *supra* note 2, § 960. Williston notes another early English rule as formulated in the case of *Frost v. Knight*, L.R. 7 Ex. 111, 112 (1872). The essence of this rule was that the obligee had his choice of course of action: he could either ignore the obligor's repudiation and continue with his own performance, thus holding the obligor responsible for all the consequences of non-performance, or he could assume the repudiation to be a wrongful termination of the contract, and at once bring his action for breach. Although Williston takes issue with the reasoning of both of these alternatives, he shows that the first alternative was rejected in the United States by a line of cases, beginning in 1845, which held that after an absolute

some writers have argued that the duty to mitigate damages does not necessitate an immediate cause of action by plaintiff, the doctrine of the *Hochster* case has received wide acceptance in most Anglo-American jurisdictions.⁹

Many civil law scholars believe anticipatory breach to be of dubious value for the civil law because most civilian systems require the obligor to be placed in default as a prerequisite to his liability.¹⁰ It has been suggested that the civilian preference for specific performance as a remedy for breach of contract, as opposed to the common law preference for damages, delayed recognition of the doctrine until comparatively recent times.¹¹ Granting specific performance of an agreement prior to the time for its performance was considered illogical.¹²

repudiation or refusal to perform by one party, the other party cannot continue to perform and recover damages based on full performance. This result adheres to the rule that an injured party has no right to recover for subsequent performance if damages will be thereby enhanced, even though he is not required to bring an immediate suit but can wait until the time for performance has elapsed. 5 S. WILLISTON, *supra* note 1, § 1297-98. Also it should be noted that at common law today if the obligee elects to wait until the stated time for performance, the obligor has the option to retract his repudiation before a change of position by the injured party makes his performance more burdensome. *Id.*

9. Only Massachusetts and Nebraska seem to have been slow in adopting the doctrine. For years the Massachusetts case of *Daniels v. Newton*, 114 Mass. 530 (1874), expressed that state's vigorous rejection of the rule of *Hochster*. However, with the adoption of the U.C.C. both Massachusetts and Nebraska have officially accepted the law of anticipatory breach. See the Massachusetts Annotations to MASS. ANN. LAWS, ch. 106, § 2-610 (U.C.C.—Michie/Law. Co-op 1976).

10. See Baudouin, *La sanction de l'inexécution du contrat y compris 'l'Anticipatory Breach'*, 1966 REVUE DE L'ASSOCIATION QUEBÉCOISE POUR L'ÉTUDE COMPARATIVE DU DROIT 53, 61. See also L.-J. CONSTANTINESCO, *INEXÉCUTION ET FAUTE CONTRACTUELLE EN DROIT COMPARÉ* 128 (1960); B. GILSON, *INEXÉCUTION ET RESOLUTION EN DROIT ANGLAIS* 57 (1969), cited in 2 S. LITVINOFF, *OBLIGATIONS* § 238 in 7 LOUISIANA CIVIL LAW TREATISE 449 (1975).

11. 5 S. WILLISTON, *supra* note 1, § 1337(A).

12. *Id.* Accordingly, anticipatory breach has found little support in France. In G. MADRAY, *DES CONTRATS D'APRES LA RECENTE CODIFICATION PRIVÉE FAITE AUX ÉTATS UNIS* 141 (1935), the author says of the doctrine of anticipatory breach that "it is surprising in view of the extreme powers which it gives to the creditor: it seems that such Draconian provisions can never be introduced into our laws." 5 S. WILLISTON, *supra* note 1, § 1337(A). However, Williston states that in Germany the publication of a famous essay in 1902 by Hermann Staub on "Positive Breaches of Contract" has lent considerable weight to the acceptance of the doctrine in that country. H. STAUB, *FESTSCHRIFT FUER DEN DEUTSCHEN JURISTENTAG* 29 (1902). Williston explains that Staub used the principles of good faith as a basis for an elaborate theory of "secondary duties," holding a promisor bound not only to do what he has promised in express words but also to many other things to which he must be understood to have bound himself "in good faith." Any violation of such

The doctrine of anticipatory breach has received cursory and often confused treatment in Louisiana. In response to the case of *Aronson v. Klein*¹³ the first significant analysis of the problem appeared in a law review comment in 1933.¹⁴ The author argued that allowing an immediate suit for an anticipatory breach amounts to an acceleration of the term, which violates article 2052 of the Civil Code.¹⁵ The author postulated that an injured party cannot sue for damages on a contract until the term of the contract expires. An appeal was made to the Louisiana courts not to yield to common law influence when dealing with this contractual problem, but instead to resort to civilian techniques in analysis of the Code.¹⁶

In 1958 the Supreme Court of Louisiana in *Marek v. McHardy*¹⁷ held that an anticipatory breach of contract was actionable. The court discussed at length the major remedy for breach of contract in Louisiana, in an apparent attempt to refute the observation that the civil law should reject the doctrine of anticipatory breach because of the preference for specific performance as a remedy in actions *ex contractu*.¹⁸ Consequently, the court inaccurately concluded that, at least in obligations to do, damages are the preferred remedy in Louisiana and that the doctrine of anticipatory breach was available to plaintiff.¹⁹

A year after the *Marek* decision, another law review comment

"subsidiary duties" is a "positive breach of contract" which immediately gives rise to a duty to make compensation for the loss suffered by the obligee.

13. 175 La. 506, 143 So. 389 (1932).

14. See *Anticipatory Breach in Louisiana*, *supra* note 1, at 586.

15. LA. CIV. CODE art. 2052: "What is due only at a certain time, can not be demanded before the expiration of the intermediate time; but what has been paid in advance can not be redemanded."

16. See *Anticipatory Breach In Louisiana*, *supra* note 1, at 597. Interestingly, the supreme court in *Aronson* had not even talked in terms of anticipatory breach, but rather had based its decision on the theory that the act of sale was a suspensive condition to the defendant's liability on the note, and by refusing to pass the act of sale he made the condition impossible, and became immediately liable on the contract. 143 So. at 389-90.

17. 234 La. 841, 101 So. 2d 689 (1958).

18. 5 S. WILLISTON, *supra* note 1, § 1337(A).

19. 234 La. at 856-58, 101 So. 2d at 694-95. There are two bases for terming the court's conclusion inaccurate: (1) specific performance, not damages, is Louisiana's major remedy for breach of contract, even for obligations to do, (2) this was not an obligation to do, but an obligation to give. See materials cited in notes 25-26, *infra*. It should also be noted here that plaintiff did not file an immediate suit prior to the term for performance. In fact the suit was filed over three years after the alleged breach, and the court had to grapple with defendant's plea of liberative prescription. Thus in analyzing the case as an anticipatory repudiation, the court did not decide whether an anticipatory breach gives an injured promisee an immediate cause of action in Louisiana.

analyzed the doctrine of anticipatory breach.²⁰ The author concluded that anticipatory breach is consistent with most of the basic principles of Louisiana obligations law. Moreover, the author indicated that *Marek* and similar Louisiana cases had effectively imported this common law doctrine, and agreed with the *Marek* court's statement that damages are the preferred remedy for breach of contract in Louisiana.²¹ Thus, once again, the problem of reconciling specific performance and anticipatory breach was pretermitted by declaring that the preferred remedy for breach of contract is the award of damages.

Many Louisiana courts have said that the preferred remedy for breach of contract, at least of obligations to do, is damages.²² This conclusion is often based on what is considered a careful reading of articles 1926 and 1927 of the Civil Code *in pari materia*.²³ Courts have often held that Article 1927 plainly declares that the breach of an obligation to do or not to do entitles the party aggrieved in ordinary cases to damages; specific performance is allowed only where damages would not furnish adequate compensation and where the defaulting party can perform.²⁴ However, Litvinoff has suggested that the proper interpretation of articles 1926 and 1927, and the most definitive statement on specific performance of contracts, was made by Justice Provosty in *Girault v. Feucht*.²⁵ In a case involving obligations to do arising from a bilateral promise of sale of immovable property, the Louisiana court asserted that the parties to such a contract are "entitled" to specific performance.²⁶

20. See *The Doctrine of Anticipatory Breach of Contract*, *supra* note 1, at 119.

21. *Id.* at 125-26, 133.

22. See *Pratt v. McCoy*, 128 La. 570, 54 So. 1012 (1911), and the numerous authorities cited therein.

23. LA. CIV. CODE art. 1926: "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 specific performance of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may lie 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."

24. *Marek v. McHardy*, 234 La. 841, 856-57, 101 So. 2d 689, 694-95; *Pratt v. McCoy*, 128 La. 570, 617, 54 So. 1012, 1029-30.

25. 117 La. 276, 41 So. 572 (1906). See 2 S. LITVINOFF, *supra* note 10, § 121.

26. 117 La. at 280-81, 41 So. at 573-74. The court said:

According to article 1926 the obligee is 'entitled' to damages or specific performance 'at his option,' and according to article 1927 he is 'entitled' only to damages in ordinary cases, 'but may' be awarded specific performance in cases

The importance of this decision cannot be overemphasized, for even though the leading case of *McDonald v. Aubert*²⁷ had already recognized the right to claim *recta via* (by specific performance) the delivery of a thing, the specific performance of other obligations to do had been denied in very general terms. Before *Girault* Louisiana courts at times would say that specific performance is not a matter of right, but that its use rests in the discretion of the court.²⁸ Consequently, the failure of prior decisions to make proper distinctions and their use of general language full of equity overtones had created uncertainty.²⁹

If *Girault v. Feucht* correctly interpreted the law of specific performance, the Louisiana courts have needlessly strayed from this basic tenet of the civil law. The courts have misinterpreted the law of specific performance not only by trying to justify the doctrine of anticipatory breach, but also by overemphasizing the principle that the law will not force someone to do something against his will. Thus, if a contractor repudiates his contract to build, the courts have invariably refused to say that he must build, and have instead granted general damages.³⁰ However, Louisiana courts could decree a sterner judgment more consistent with specific performance whereby the contractor would be given the option either to perform or to pay for the entire cost of the job as performed by another.³¹

where damages would be inadequate relief. Reading these two articles together, that is to say, reading the word 'may' in conjunction with the twice used word 'entitled,' to which it stands in co-relation, the word 'may' must be given, we think, the meaning of shall, and the articles must read that, where damages are inadequate relief, the court, not 'may' but 'shall' or 'must,' order specific performance. If the obligee is 'entitled' to a thing, the court has no discretion about according it to him or not, but is obliged to do so. The sole question is therefore, as to whether in this case damages would be adequate relief.

Evidently, in our opinion it would not be. The plaintiff is entitled to have this particular piece of property, and the measure of his right is this property. The court cannot take upon itself to say that anything short of this property will satisfy his demand. Such a thing might be as that damages to the full market value of this property would be as nothing to him, as compared with having the property itself.

27. 17 La. 448 (1841).

28. 2 S. LITVINOFF, *supra* note 10, § 121. See *Caperton v. Forrey*, 49 La. Ann. 872, 21 So. 600 (1897); *Mirandona v. Burg*, 49 La. Ann. 656, 21 So. 723 (1897); *Laroussini v. Werlein*, 48 La. Ann. 13, 18 So. 704 (1896); *City of New Orleans v. New Orleans & N.E.R.R.*, 44 La. Ann. 64, 10 So. 401 (1892); *Citizens' Bank v. James*, 26 La. Ann. 264 (1874).

29. 2 S. LITVINOFF, *supra* note 10, § 121.

30. *City of New Orleans v. New Orleans & N.E.R.R.*, 44 La. Ann. 64, 10 So. 401.

31. LA. CODE CIV. PRO. art. 2502 lists the remedies available to a party entitled to specific performance when the defendant refuses to comply. Article 2503 pro-

If the foundation of the law of obligations is to hold people accountable for their promises, then specific performance of obligations is necessary. In *Girault* Justice Provosty simply said that the court cannot say that anything short of the property contracted for will satisfy plaintiff's demand; that damages to the full market value of this property would be nothing to him, as compared with having the property itself.³²

Against this background an immediate suit for specific performance in the case of an anticipatory breach is a perfectly logical and equitable remedy. Despite the argument of some commentators that such a suit would violate article 2052 of the Civil Code,³³ an immediate suit for specific performance would merely ask for a judgment ordering a specific performance when the term arrives and would not accelerate the contract's term.³⁴ In the case of a sale, an immediate suit might have the further advantage of allowing the plaintiff to enjoin the vendor from selling the contracted goods or property to a third party. Viewed in this light, the doctrine of anticipatory breach fits well into the scheme of Louisiana obligations law.

Despite the logic of allowing an immediate suit for specific performance for contracts which have been anticipatorily breached, the requirement of placing the obligor in default still presents problems. The chief question raised is whether an anticipatory breach can be viewed as an active breach, for which no placing in default is required.³⁵ If an anticipatory breach is merely a passive breach, then an immediate suit could not be entertained, for the obligee would have to remain ready and willing to

vides for the procedures for the execution of the writ of *distringas*. Article 2504 provides: "If a judgment directs a party to perform a specific act, and he fails to comply within the time specified, *the court may direct the act to be done by the sheriff or some other person appointed by the court, at the cost of the disobedient party, and with the same effect as if done by the party.*" (Emphasis added). For a more complete discussion of specific performance of obligations to do and not to do, see 2 S. LITVINOFF, *supra* note 10, § 168-69, where Professor Litvinoff reaches the conclusion that the Louisiana law offers a carefully designed system of enforcement techniques to obtain performance in specific form of obligations to do or not to do. See also Comment, *Louisiana Law of Specific Performance: Codal Provisions and Methods of Enforcement*, 40 TUL. L. REV. 340, 355 (1966).

32. *Girault v. Feucht*, 117 La. 276, 281, 41 So. 572, 574.

33. For the text of article 2052, see note 15, *supra*.

34. In any event judicial backlog will cause a judgment to be rendered in most cases after the expiration of the term for performance.

35. LA. CIV. CODE arts. 1932-33. The application of these principles to various kinds of breaches of contract has often been extremely difficult and inconsistent because article 1931, which defines active and passive violations of contracts, is far from clear.

perform until the date of performance, at which time he would have to place the obligor in default if he refuses to perform.³⁶

An active breach has been defined in various ways and may occur in a wide variety of situations. The courts have said that if placing the obligor in default would be a vain and useless act, the obligor has actively breached his contract and has automatically fallen into default.³⁷ At times the nature of the obligation suffices to show that an act of the obligor is an active breach, as when he does an act which he is obligated not to do. At other times, the obligor may do an act so clearly inconsistent with the obligation he has contracted to do, that an active breach is manifest, as when the obligor sells to a third party property which he has contracted to sell to the obligee.³⁸

In interpreting their Code's provisions on active breach, the French courts have successfully developed a doctrine of implied or accessory negative obligation.³⁹ According to this doctrine, in every obligation there is an implied correlative obligation not to do something inconsistent with that obligation.⁴⁰ If, for example, a party contracts to buy exclusively from a certain supplier, he automatically places himself under the negative obligation not to buy from another, and violates this obligation at the moment, and by the mere fact, of buying from another. Thus the obligor who does what he has impliedly contracted not to do has actively breached his contract, and the obligee is under no duty to place him in default. This principle could be applied in Louisiana under the theory that an anticipatory repudiation is an act which the obligor has impliedly obligated himself not to do, thus obviating the requirement of placing the obligor in default.⁴¹

36. LA. CIV. CODE art. 1933. The *Marek* court recognized but failed to resolve this issue. The court stated that if the doctrine of anticipatory breach is entitled to recognition, then an anticipatory repudiation of a contract is an active breach which requires no putting in default on the part of the obligee. However, the court should have said that if an anticipatory repudiation is an active breach of contract, then the legal consequence of the doctrine of anticipatory breach, an immediate suit with no necessity for putting in default, deserves recognition.

37. See *Elliot v. Dupuy*, 242 La. 173, 135 So. 2d 54 (1961); *Woolie v. Carson Carbon Co.*, 177 La. 990, 149 So. 551 (1933); *Voss v. Roach*, 35 So. 2d 142 (La. App. 2d Cir. 1948).

38. 2 S. LITVINOFF, *supra* note 10, § 233.

39. Code Civil art. 1145: "Where there is an obligation not to do, the one who violates it owes damages by the mere fact of the violation." Cf. LA. CIV. CODE art. 1932.

40. 2 S. LITVINOFF, *supra* note 10, § 234.

41. See *id.*

Moreover, none of the purposes of putting the obligor in default is advanced when the obligation imposes abstention or forbearance on the obligor. An obligation not to do is insusceptible of delayed performance, and the obligor violates his duty upon doing whatever he promised not to do. Such a defaulting obligor is in no position to request a period of grace to avoid the payment of damages, and certainly he should not be surprised at being sued immediately for specific performance of the repudiated obligation.⁴²

Article 1931 of the Louisiana Civil Code defines an active breach as the doing of something inconsistent with the obligation. An inconsistent act has been interpreted as "any deliberate act of the obligor that renders him unable to perform or that so diminishes his ability to perform that a performance would be no longer of value for the obligee" ⁴³ Although an anticipatory repudiation does not fall very neatly within this definition, Litvinoff points out that "the obligor, even without having *done* anything inconsistent with the obligation, may simply advise the obligee that he will not perform, and that such a declaration by the obligor is in itself inconsistent with his duty to perform." ⁴⁴ French doctrine and jurisprudence agree that an obligee is relieved from putting in default an obligor who communicates his refusal to perform.⁴⁵ For the same reasons, Louisiana courts have held that no putting in default is necessary when the obligor refuses to comply with the contract, denies the existence of the contract, or denies that a particular obligation is imposed upon him.⁴⁶

42. *Id.* Litvinoff points out that "this approach of the negative obligation not to do is useful in doubtful situations where fairness may demand that the obligor not be allowed to avail himself of the technicality of putting in default." A few Louisiana cases can be explained as a result of this approach. *See* Noel Estate, Inc. v. Louisiana Oil Refining Corp., 188 La. 45, 175 So. 744 (1937) (abandoning the premises regarded as an active violation by the lessee of the obligation not to abandon them implied in his obligation to carry out the terms of the lease); Levy v. M. Schwartz & Bro., 34 La. Ann. 209 (1882) (delivery of a defective press); Cable v. Leeds & Co., 6 La. Ann. 293 (1851) (making and delivery of a crank unfit for the use for which it was designed). French doctrine and courts strive to minimize the requirement of putting the obligor in default, or simply to do away with it entirely, at least for the recovery of compensatory damages. 6 R. DEMOGUE, TRAITÉ DES OBLIGATIONS EN GENERAL 274 (1931).

43. 2 S. LITVINOFF, *supra* note 10, § 235.

44. *Id.* at § 236.

45. *See id.*

46. *Id.* *See* Elliot v. Dupuy, 242 La. 173, 135 So. 2d 54 (1961); Stockelback v. Bradley, 159 La. 336, 105 So. 363 (1925); Johnson v. Levy, 122 La. 118, 47 So. 422 (1908); Jones v. Whittington, 171 So. 2d 764 (La. App. 2d Cir. 1965). *See also* Friedman Iron & Supply Co. v. J. B. Beaird Co., 222 La. 627, 63 So. 2d 144 (1952), where the court held that once defendant notified plaintiff that it was cancelling the

Thus it becomes apparent that the civil law concept of putting in default is no bar to the acceptance of the doctrine of anticipatory breach in Louisiana. An active violation of a contract in Louisiana is equivalent to an anticipatory breach at common law and should be controlled by article 1932, requiring no putting in default,⁴⁷ a conclusion confirmed by the Louisiana jurisprudence.⁴⁸

However, the question still remains whether an obligee has the absolute right to terminate his performance upon notice of anticipatory breach on the obligor's part. Certainly cases will arise when an obligee will consider the contract at an end and will choose not to sue for specific performance or even damages. The obligor should not be able to take advantage of his own default by instituting a suit against the obligee who has discontinued his performance, although it is arguable that the obligee has breached his own obligation by discontinuing performance without suing for dissolution.⁴⁹ The injustice of such a situation is obvious and can be avoided by interpreting article 2047 in light of articles 1912 and 1932 to conclude that an active violation is an exception to the requirement that the obligee sue for dissolution.⁵⁰ Since an anticipatory breach is an active breach, the party receiving the repudiation may consider the contract dissolved by his own initiative without incurring liability, subject only, of course, to proof of the anticipatory breach.

The instant case illustrates the misunderstanding of the doctrine of anticipatory breach in Louisiana and typifies the confusion caused by a failure to use precise terms. The opinion is short, and the language of the court is simple and straightforward, but the court lumps together legal

contract no putting in default was necessary, regardless of whether the cancellation was considered an active or passive breach.

47. "A situation that would be characterized as an anticipatory breach at common law can be regarded as an active violation of the contract in Louisiana, and therefore no act of the obligee is required for the obligor to be found in default." 2 S. LITVINOFF, *supra* note 10, § 238.

48. See *Marek v. McHardy*, 234 La. 841, 101 So. 2d 689 (1958); *Friedman Iron & Supply Co. v. J. B. Beaird Co.*, 222 La. 627, 63 So. 2d 144 (1953); *Seaton v. Second Mun.*, 3 La. Ann. 44 (1848).

49. LA. CIV. CODE art. 2047: "In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutive condition is an event, not depending on the will of either party, the contract is dissolved of right; but, in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition."

50. 2 S. LITVINOFF, *supra* note 10, § 287. LA. CIV. CODE art. 1912: "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 cases hereinafter provided for it is a prerequisite to the recovery of damages and of profits and fruits, or to the rescission of the contract."

concepts in a somewhat baffling manner. The pertinent defenses to the suit for specific performance were that plaintiff had failed to place defendant in default,⁵¹ and that plaintiff had failed to obtain a right-of-way to a public road, a suspensive condition of the contract.⁵²

In response to the claim that defendant had not been placed in default, the court noted that plaintiff had written a letter demanding performance, and that defendant had replied that he did not consider the contract valid. The court concluded that it would have been useless for plaintiff to make any further demands on defendant, and cited *Marek v. McHardy* and the subsequent law review comment⁵³ for the proposition that anticipatory breach of contract is actionable in Louisiana. However, the citation of these sources is somewhat odd, for although both impliedly stand for the proposition that no putting in default is necessary in the case of an anticipatory breach,⁵⁴ neither argued for the availability of specific performance in the case of an anticipatory breach. On the other hand, the court in the instant case made no mention of article 1932 of the Civil Code

51. LA. CIV. CODE art. 1911(2):

The debtor may be put in default in three different ways: by the term [terms] of the contract, by the act of the creditor or by the operation of law:

2. By the act of the party, when at or after the time stipulated for the performance, he demands that it shall be carried into effect, which demand may be made, either by the commencement of a suit, by a demand in writing, by a protest made by a notary public, or by a verbal requisition made in the presence of two witnesses.

See note 50, *supra*, for the text of article 1912.

LA. CIV. CODE 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."

52. LA. CIV. CODE art. 2021: "Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happens, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutive condition."

53. 344 So. 2d 1130 (1977).

54. *The Doctrine of Anticipatory Breach of Contract*, *supra* note 1, at 128-30. This article briefly analyzed the possibility that an anticipatory breach might be considered an active breach which requires no putting in default. Alternatively the author argued that article 1913, one of the articles setting forth the requirements of putting in default, should not be applied in the case of an anticipatory breach, "as this article was presumably designed to prevent 'surprise suits' by injured parties. 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."

and the possibility of categorizing an anticipatory breach as an active breach which requires no putting in default.

In analyzing defendant's second line of defense, the court agreed with the trial judge's observation that plaintiff had in fact acquired the necessary rights-of-way.⁵⁵ If the court was of this mind, it is striking that it ever digressed into a discussion of anticipatory breach, for once a suspensive condition is performed the obligation takes effect; the time for performance, although not expressly stated in the contract, has arrived.⁵⁶ The plaintiff wrote a letter to defendant offering to perform his part of the contract and thereby placed defendant in default if he failed to perform his reciprocal obligation. Defendant's letter denouncing the validity of the contract was a present, not an anticipatory, breach of contract. Having adequately placed the defendant in default, plaintiff was entitled to institute a suit for damages, dissolution, or specific performance at any time within the prescriptive period.⁵⁷

Since the instant case is not a case of anticipatory breach at all, it is not surprising that the court did not have to contend with a claim that it is illogical to allow a suit for specific performance of a contract prior to the term for its performance. To defendant's claim that he had not been properly placed in default the court should have replied either that defendant had committed an active breach, which requires no putting in default, or that plaintiff's letter had adequately placed defendant in default regardless of whether the breach was active or passive. Alternatively the court could merely have said that Louisiana jurisprudence has recognized that no putting in default is necessary when the obligor refuses to comply with or denies the existence of the contract.⁵⁸ If this had been a case of

55. The court also observed that defendant's real reason for trying to avoid the contract was the dramatic decline in the price of timber shortly after the contract was confected.

56. LA. CIV. CODE art. 2028: "The contract of which the condition forms a part is, like all others, complete by the assent of the parties; the obligee has a right of which the obligor can not deprive him; its exercise is only suspended, or may be defeated, according to the nature of the condition."

Id. art. 2038: "When an obligation has been contracted on condition that an event shall happen within a limited time, the condition is considered as broken, when the time has expired without the event having taken place. If there be no time fixed, the condition may always be performed, and it is not considered as broken, until it is become certain that the event will not happen."

57. See note 50, *supra*. Plaintiff's suit for specific performance was even further substantiated by article 2462 of the Civil Code, which gives to either party the right to enforce by specific performance a promise to sell.

58. See authorities cited in notes 44-46, *supra*.

anticipatory breach, the court should have specifically held that an anticipatory breach is an active breach which requires no putting in default and that a suit for specific performance may be instituted immediately.

Michael D. Bewers

ALL IN THE FAMILY: EQUAL PROTECTION AND THE ILLEGITIMATE CHILD IN
LOUISIANA SUCCESSION LAW

In *Trimble v. Gordon*¹ the United States Supreme Court held that an Illinois law prohibiting an illegitimate child from inheriting her father's intestate succession, even though paternity had been judicially determined prior to his death, violated the equal protection clause of the fourteenth amendment. In *Succession of Robins*² the Louisiana Supreme Court held that Civil Code article 1488 was in violation of article I, section 3 of the Louisiana Constitution³ insofar as it denied the right of a father to dispose of his separate property by testament to his own adulterous, illegitimate children. An analysis of these two cases in light of Louisiana codal law and its history suggests the necessity for significant alteration of Louisiana's succession law.

Louisiana's Civil Code provides for different civil, social and political rights based on differences of conditions existing between persons.⁴ Children are either legitimate, illegitimate, or legitimated⁵ depending on whether they are born in or out of marriage.⁶ Illegitimates are further classified as those conceived of parents who, at the time of conception, might have legally contracted marriage and those whose parents could not then have married⁷ (adulterous⁸ and incestuous⁹ bastards). Adulterous

1. 97 S. Ct. 1459 (1977).

2. 349 So. 2d 276 (La. 1977).

3. "No person shall be denied the equal protection of the laws No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations" LA. CONST. art. I, § 3.

4. LA. CIV. CODE art. 24, as amended in 1921, now includes all differences between persons. The original article referred only to differences based on sex. LA. CIV. CODE art. 24 (1870) (as it appeared prior to the 1921 amendment).

5. LA. CIV. CODE art. 178.

6. *Id.* arts. 179, 180.

7. *Id.* art. 181.

8. *Id.* art. 182.

9. *Id.* art. 183.