

SOME PROBLEMS OF ANTICIPATORY BREACH

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[A Doctrine of Anticipatory Breach can be traced back to the Fifteenth and Sixteenth Centuries. However its modern and leading principles were laid down in a series of Nineteenth Century decisions. Unfortunately the doctrine has been obfuscated by a misconceived emphasis upon the action of the innocent party in 'accepting' the breach or otherwise. Decided cases are based upon unsatisfying reasoning. Some results turn out, to say the least, to be quite unintelligible. Dr Stoljar traces this process and argues that the problem should be analysed in terms of the duty of the innocent party to mitigate his damage.]

A contract can be broken in, broadly, two ways. On the one hand, the promisor may fail to give or do what the contract requires, at the time when, or to the full measure in which, the performance is due, such as by making short or faulty delivery or by doing only incomplete work. On the other hand, the promisor may repudiate the contract, that is, manifest his intention not to perform, either before or after the time of performance has arrived, a manifestation of intention that may consist of an express refusal, or notice of refusal, to perform or may consist of some other act from which it can be safely inferred that the agreed performance will not materialize.¹

What is commonly known as an anticipatory breach inevitably falls into the second category in that it cannot but take the form of an express or an implied or inferred repudiation, since it can never consist of an actual misperformance as *ex hypothesi* the time of performance has not yet come. Even so, whether a repudiation comes before or during or after due performance, the essential nature of the promisor's repudiation can hardly change, if only because it always rests, as we here define it, on a firm refusal to perform, except of course that where a repudiation occurs (say) long before the specified time of performance, a promisor has more opportunity to retract or abandon his refusal without any special hardship to the promisee. Still the exact nature of anticipatory breach has given rise to various difficult problems. This paper is an attempt to clear them up.

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¹ See more generally Cheshire and Fifoot, *The Law of Contract* (2nd Australian ed. 1969) 734-5. For other meanings of repudiation, not relevant here, see *Heyman v. Darwins Ltd.* [1942] A.C. 356, 378, *per* Lord Wright.

I

To begin with, it has long been accepted that an express or implied repudiation gives the aggrieved side an immediate right to sue. So much is clear from the early decisions under which a promisor's self-induced impossibility to perform was taken to be an instant breach of covenant. Perhaps the best instance is *Main's Case*² where a lessor, having undertaken under bond to renew certain leases to the plaintiff-lessee, shortly thereafter demised the bonded land to third parties for eighty years. Could the lessee sue immediately? His obvious complaint was that the lessor had 'disabled himself' from making the renewals 'according to this covenant', to which the lessor rejoined that his 'disablement' was here irrelevant since he could anyhow do nothing to renew the lease until the lessee both surrendered it and requested it to be renewed. The lessee replied that there was no point in making such a request as the lessor was in no position to renew, a view with which the King's Bench agreed: to ask for a prior surrender or request had become a 'vain and fruitless' exercise.³

These 'disabling' ideas were extended to breach of promise to marry;⁴ but otherwise they remained curiously dormant for some two hundred years. They however revived in the early nineteenth century, in a group of cases in which the defendant's self-disablement presented the vital fact. The following five decisions chronicle virtually the whole tale. In one where a seller was to deliver a quantity of hay upon the buyer's request, but then sold the hay to a third party, the buyer was held entitled to sue for breach without alleging a request: a request was now thought unnecessary since the seller had 'disqualified himself from delivering'.⁵ In another where a covenantor was to do certain acts at the covenantee's request which request the former objected was 'imperfectly declared', this imperfection was regarded as unimportant since the covenantor had 'disabled himself from keeping his covenant'.⁶ In a third where a lessor was to

² (1596) 5 Co. Rep. 20b, Poph. 109.

³ 'Disablement' was by no means a new idea. So where a feoffee took a grant upon condition of (later) enfeoffing another but then either granted to a stranger or let the land, the grant was forfeited and the feoffer could re-enter at once. Even if the feoffee merely married after such a grant, 'many have said', according to Littleton, that 'the feoffer and his heir *maintenant* may enter, this simply because the wife would have dower, so that the land would now be 'in another plight', i.e. not in the state or condition which the feoffor had a right to see preserved. Indeed a forfeiture ensued even if the new wife died so that the disablement was thus only a temporary one, for a 'feoffee being once disabled is ever disabled'. However if the feoffee was married at the time of the grant, his marriage was not seen as a disablement as the 'plight' of the land remained unaltered. See on all this: *Co. Litt.* ss. 355, 356, 357; and see also (1481) Y.B. 21 Edw. IV, 54, pl. 26, *per* Choke J; *Vynior's case* (1609) 8 Co. Rep. 81b, 82-3a; 5 *Viner's Abridgment* 224, Condition (Bc) pl. 1, 2.

⁴ *Harrison v. Cape* (1698) 1 Ld Raym. 386, 3 Ld Raym. 268, where a woman was held to have disabled herself from marrying the plaintiff upon request by marrying another man.

⁵ *Bowdell v. Parsons* (1808) 10 East 359.

⁶ *Amory v. Brodrick* (1822) 5 B. & Ald. 712.

re-grant a lease upon its expiry but meanwhile granted the lease to another for a longer term, he was held to have 'run from his agreement' having put it out of his power to renew the lease.⁷ In a fourth instance relating to breach of promise of marriage, the defendant having married somebody else, his objection that the marriage was not to take place until the plaintiff's request was dismissed since he had 'put himself out of condition' and so had 'disabled himself from fulfilling such a request'.⁸ In a fifth, where a vendor was to assign land to a vendee within seven years from a day named, but then sold to a stranger, it was again held that (assuming the vendee remained ready and willing to accept the assignment) the vendor had incapacitated himself from performing as agreed.⁹

Thus much earlier than usually believed, a principle of anticipatory breach was fully set up, not only in substance but also in form: 'there was', said Patteson J. in the fourth instance above, 'a breach of contract at once when the defendant married'.¹⁰ Accordingly the aggrieved side could sue immediately, that is, without having to wait for the specified time of performance to arrive or for all prior conditions to occur. If he so sued, the plaintiff had of course to aver his own readiness and willingness to perform. But even so he himself was no longer under any immediate duty to perform, for the defendant could not traverse the plaintiff's averment of being ready and willing, since it was the defendant's own fault if the plaintiff had stopped his own performance.¹¹ Were this not so, quite absurd results would ensue. For suppose, suggested a court, that a buyer firmly announced 'I'm not going to accept your article', would the seller still have to finish and at least tender it? Or suppose a plaintiff, having agreed to send a ship to a certain port, is then notified by the charterer that no cargo will be furnished there: must the ship be sent, to return empty? If this were the law, said Lord Campbell, it would make no sense.¹²

II

All this was straightforward enough, but another difficulty soon appeared, a difficulty in fact coming from a different direction more concerned with the appropriate measure of damages than with the aggrieved party's right to sue: in short, a difficulty having to do with the consequence of an anticipatory breach, not with its basic rationale. The new difficulty was neatly posed in *Leigh v. Paterson*.¹³ The defendant, having agreed to deliver tallow in December, told the plaintiff in October

⁷ *Ford v. Tilley* (1827) 6 B. & C. 325.

⁸ *Short v. Stone* (1846) 8 Q.B. 358.

⁹ *Lovelock v. Franklyn* (1846) 8 Q.B. 371.

¹⁰ *Short v. Stone*, *supra* 370. My italics.

¹¹ *Cort v. The Ambergate, etc., Railway Coy* (1851) 17 Q.B. 127, 143-5.

¹² *Ibid.* 140.

¹³ (1818) 8 Taunt, 540; (1818) 2 Moore 588.

that he would not execute the contract. The (undisputed) reason for this was that the price of tallow was then rising: from the contract price of 65 shillings *per cwt*, it rose to 75 shillings in October and to 81 shillings in December, a rise of nearly 25 per cent.¹⁴ Not surprisingly the buyer claimed damages calculated on the December price, while the seller said that he was not entitled to more than the difference calculated on the price in October. The court upheld the buyer's argument, for though the seller had repudiated the contract in October, and though the buyer could have gone into the market at that time, he was not bound to do so; he could wait until the end of December for until then the contract remained fully afoot. Obviously all this was a somewhat awkward way of saying that the buyer was here under no duty to mitigate damages as soon as the seller announced his refusal to deliver the goods. Indeed to impose such a duty upon the buyer would have offended basic contract rules. It would have meant compelling the buyer to accept a repudiation to his own loss, as it would have deprived him of a specific 'profit' or advantage (*i.e.* the difference between the original contract price and the current market price) to which the contract entitled him. Even worse, it would have meant allowing that advantage, or at least part of it, to go to the seller since he would have been in a position to resell the goods at the (higher) December price however much he remained liable to the buyer for breach, for his damages would now have been calculated at the (lower) October rate. Unfortunately, this is not how the relevant issues were put. Rather was it said that what now mattered was whether the plaintiff had, or had not, 'accepted' the repudiation which the defendant had (so to speak) 'offered' by his breach.

And this is the way the issue continued to be defined. So in *Phillpotts v. Evans*¹⁵ a buyer who cancelled a purchase of wheat already in transit was held liable for non-acceptance, the measure of damages being the difference between the contract price and the market price on the day when the wheat was tendered to him for acceptance, not on the day when the seller received the notice of refusal. Following *Leigh v. Paterson*, the main question was taken to be whether the contract had been merely repudiated by one party, or had been 'dissolved' by both. This view emerged even more strongly in *Ripley v. McClure*.¹⁶ Here, too, the buyer cancelled an order of tea before its delivery, but also wrote expressing his readiness to accept the tea on somewhat different terms more favourable to himself. This letter the seller disregarded, so that, as was said, he never 'accepted' the buyer's announced refusal to take the goods. Certainly without such an 'acceptance', the buyer could have retracted

¹⁴ The plaintiff, it must be noticed, had to show this rise of market prices, for he could not otherwise have identified the injury to himself caused by the non-delivery. He could not simply say that he 'might have made a profit', for the law does not recognize such 'speculative profits': *Startup v. Cortazzi* (1835) 2 C.M. & R. 165.

¹⁵ (1839) 5 M. & W. 475.

¹⁶ (1849) 4 Exch. 345.

his repudiation so as to allow the contract to proceed; but since he did not, and since his later terms did not amount to a retraction, his repudiation remained operative up to the time of his duty to receive the goods. In particular, the repudiation remained operative as a waiver of the condition of delivery, so that even without any delivery or tender by the seller the buyer stood in breach of contract when his own duty to accept arrived. This waiver was also a complete answer to the buyer's objection that the seller had himself failed to perform, a failure (the buyer had contended) which made the findings on the record palpably inconsistent as they stated the plaintiff to be unwilling to deliver as well as the defendant unwilling to accept.¹⁷ For, as Parke B. remarked, by his express refusal the buyer must be understood to have said to the seller: 'You need not take the trouble to deliver the cargo' for I shall never become your purchaser.

The buyer had made another point, namely, that the judge had wrongly directed the jury that the plaintiff had a right, before the arrival of the cargo, to a distinct answer whether the defendant would fulfil the contract or not. Such a direction, Baron Parke now said, would not have been correct, for 'the defendant was not bound to anything before the arrival'. Indeed, the judge continued, it would have been wrong to say that a party's refusal at a time 'long before the contract to buy became absolute' was a breach instead of being 'nothing more than an expression of an intention to break the contract, not final, and capable of being retracted'.¹⁸ Now it was, as it is, perfectly true that an anticipatory refusal to perform is not a final but a corrigible because a retractable step. Yet it was profoundly wrong to describe it as 'nothing more' than an intention to commit a breach, for the expression of such an intention, assuming it to be firm and unambiguous, is a repudiation and as such does amount to a breach of contract, at any rate to the extent that, as in the above case, the seller was excused from further delivery as well as entitled, had he so wished, to accept the unretracted repudiation by suing the buyer immediately.

It is not at all clear whether, in spite of his wide language, Baron Parke really intended to deny any of this. But, at least superficially, it looked as though he did. Both *Phillpotts* and *Ripley* could thus be read as denying the very possibility of anticipatory breach, unless a repudiation was 'accepted' by the promisee; in which case, however, what began as a unilateral repudiation rather became a sort of bilateral dissolution of the contract, one agreed to by both sides. On this basis one might argue, as in the well-known case of *Hochster v. De La Tour*¹⁹ the defendant did argue, that an anticipatory repudiation was not a breach but merely 'evidence' of one, hence a 'breach' on which the plaintiff could not sue.

¹⁷ *Ibid.* 355.

¹⁸ *Ibid.* 358-9.

¹⁹ (1853) 2 E. & B. 678.

In this case, as everyone knows, the plaintiff was to act as a courier for the defendant, starting work in June, when told in May that he would be no longer required. He at once sought and obtained other employment on equally good terms, but not before July: could he then sue the defendant for his loss of wages for June? The court had little doubt that he could, and Lord Campbell C.J., once again, put the earlier cases in perspective.²⁰ *Phillpotts v. Evans*^{20a} he saw as an attempt by the defendant to take advantage of his own wrong by suggesting that damages were to be calculated at the time of his notice, but where it was 'very properly' held that the damages were those at the time of the tender. Of *Ripley v. McClure*^{20b} he said that the buyer's refusal, if unretracted, certainly did constitute a 'continuing breach' and that if Baron Parke meant to maintain the contrary he was wrong.

III

So reinterpreted the law returned to the basic principle of the 'disablement'-cases we noticed earlier, but it so returned with a certain self-consciousness. Under the earlier law the plaintiff's right of action simply sprang from the defendant's repudiation, express or implied, of his promise to perform. Under the new interpretation, in an apparent effort to come to terms with the views expressed by Baron Parke, greater emphasis was placed on the need to identify a breach of contract, not in the sense of a repudiation but in the sense of some misperformance by the promisor. So in *Hochster* Lord Campbell adverted to 'a relation constituted between parties' as they 'impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation'. Again, in *Frost v. Knight*²¹ where a lower court had indeed refused to follow *Hochster* (which they thought to be 'unsupported by any previous authority' since a contract could not be 'broken' before the time of performance, this being merely a 'prospective' or 'a possible breach') the Exchequer Chamber admitted there could be no 'actual breach' yet they also held that a party had 'an inchoate right to the performance of the bargain', including 'a right to have the contract kept open as a subsisting and effective contract', so that the 'eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it'.²²

A little reflection shows that the terms 'inchoate right' or 'anticipatory breach', while perhaps acceptable as a sort of shorthand to distinguish the present from a second (misperforming) kind of breach, were neither

²⁰ See his remarks *ibid.* 685-7, and in *Cort v. The Ambergate etc. Ry Coy* (1851) 17 Q.B. 127, 148.

^{20a} (1839) 5 M. & W. 475.

^{20b} (1849) 4 Exch. 345.

²¹ (1870) L.R. 5 Exch. 322, (1872) L.R. 7 Exch. 111.

²² (1872) L.R. 7 Exch. 111, 114.

very helpful nor strictly correct. Obviously, a contract cannot, strictly speaking, be broken by anticipation, it can only be broken here and now. What is more, the phrases somehow conceal the special nature of a repudiation which is, as we earlier defined it, an express or implied refusal to perform so that it inevitably relates either to a future duty to perform or to a duty still outstanding even if the actual time for performance has passed. The repudiation, in other words, does not break a performance, it only breaks a duty or *promise* to perform. Nor does this promise merely represent an 'inchoate' duty or right; on the contrary, it represents a 'present' or 'continuing' one, if only because once an offeror's promise to perform is accepted by the offeree, that promise can no longer be repudiated or revoked. For once a contract is made, there is this consequence for each side: 'Each becomes bound to the other; neither can, consistently with such a relation, enter a similar [and inconsistent] engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished.'²³

Of course where such an anticipatory repudiation of a contract occurs, the promisee does not have to sue at once. He may simply sit back in the hope that the promisor might change his mind. Still, it is very important to him to have this immediate right to terminate the contractual relationship. For one thing, it is vastly important to him to be able to stop his own performance, once the other side has indicated that he will not pay for it. For another, only immediate termination can avoid keeping the contract 'open', a distinct danger or disadvantage to the promisee, for so long as the contract remains open, the promisee remains subject to all liabilities under it, so that the repudiating party may take advantage of supervening circumstances (such as impossibility) that would excuse his own non-performance.²⁴ Further, an immediate right to sue permits the promisee to accelerate his recovery as well as to terminate an unsatisfactory relationship. It 'is surely much more rational', said Lord Campbell, if upon the employer's renunciation the employee should be free both to abandon future performance and to sue for damages immediately.²⁵ This is specially important where the time of performance is still remote. Take the facts in *Frost v. Knight*²⁶ where the defendant had promised to marry the plaintiff as soon as his

²³ *Frost v. Knight*, *supra* 115. This 'present' nature of the breach of a promise was not fully appreciated by an earlier generation of contract lawyers who, apparently misled by the phrase 'anticipatory breach', viewed the whole doctrine as both historically and analytically unsound. Its foremost critic was Professor Samuel Williston, 'The Repudiation of Contract' (1901) 14 *Harvard Law Review*, 317, 421. And even those who (like Professors Ballantine and Vold) disagreed with him, did not really challenge Williston's premises but rather tried to justify the doctrine either on 'practical' or on other (e.g. tort) grounds. For the whole controversy, see *Selected Readings on the Law of Contracts* (1931) 1044-164.

²⁴ Under the principle of *Avery v. Bowden* (1855) 5 E. & B. 714, (1856) 6 E. & B. 953.

²⁵ *Hochster v. De La Tour* (1853) 2 E. & B. 678, 690.

²⁶ (1870) L.R. 5 Exch. 322; (1872) L.R. 7 Exch. 111.

father died, but then married another woman while the father was still alive. The father's death might be many years off: was the plaintiff then to wait indefinitely to recover for the 'mental pain' and 'serious disadvantage' she suffered by the breach of the promise, quite apart from the fact that the would-be husband was anyhow no longer available?

Even in a contract of sale where, as we have seen, either party is entitled to his lost 'profit', *i.e.* the difference between the contract and the market price at the time of delivery, an aggrieved party can nevertheless sue at once. Just this is the import of *Roper v. Johnson*²⁷ where, very briefly, the defendant was to deliver coal in instalments in May, June, July and August, but (perhaps owing to a misunderstanding, but still wrongfully) repudiated the contract late in May and again early in June whereupon the buyer started an action for this breach. Prices had been rising during the whole period, with the defendant therefore saying that the measure of damages was to be calculated as at the time of the buyer's action, while the buyer maintained, in fact successfully so, that the true measure was the difference between the agreed and the rising price at the several dates of delivery, notwithstanding that the last period (July-August) had not elapsed when the action was brought or the cause was tried.²⁸

This last decision raises a wider point. It not only confirmed (in conformity with *Leigh v. Paterson*²⁹) that the contract-market difference was a fixed measure, but concomitantly that the plaintiff was under no duty to go earlier into the market so as to mitigate this difference, and consequently under no duty to give evidence whether he could have mitigated his loss. The court, it is true, conceded that the defendant could, for his part, give evidence that another similar contract might have been obtained on more mitigated terms, and if so this would affect the calculation of damages. But this was a concession without real substance. For how, if the market was rising, is a similar contract on mitigated terms ever to be obtained? And if the market is not rising, the duty to mitigate is not even relevant. Moreover, even assuming the improbable case that the defendant can give evidence of possible mitigation, it is difficult to see how this can affect the plaintiff's claim. Because to reduce this claim by the amount of a possible mitigation is, as we earlier explained, to permit the defendant to enrich himself simply by breaking the contract where prices rise against him. The concomitant result is that, in relation to this particular profit (the contract-market difference) neither party is under any obligation to 'accept' a repudiation, nor can it matter even if he does 'accept' it as by suing at once. For even the latter

²⁷ (1873) L.R. 8 C.P. 167.

²⁸ The trial took place on 13 August, delivery was specified for the 31st: *ibid.* 171.

²⁹ (1818) 8 Taunt. 540, (1818) 2 Moore 588.

'acceptance' does not constitute an act by which the aggrieved side now waives his lost profit; by suing at once he only accepts the breach as a *fait accompli*.

If this analysis is correct, a number of cases become of very questionable authority if they suggest that a party either is under a duty to mitigate or falls under such a duty where he 'accepts' the other's breach.³⁰ Moreover, a case like *Payzu v. Saunders*,³¹ the case usually cited as establishing a duty to mitigate loss, becomes almost unintelligible. Here the defendant was to deliver goods in instalments, payment to be made for each instalment within one month. The plaintiff failed so to pay whereupon the defendant refused to make further deliveries unless the buyer agreed to pay cash with each delivery, the defendant acting in the erroneous belief that the buyer's failure to pay was due to his lack of funds. As well as refusing to pay cash, the buyer also regarded the seller's refusal as an anticipatory breach, claiming as damages the difference between the contract price and the (now higher) market price. Denying this claim, the court held that there was a duty to mitigate. Hence the relevant measure of damages was not the difference between the contract and the market price but only the loss the buyer would have suffered if he had accepted the seller's invitation to pay cash. The question, said McCardie J. in a judgment supported by the Court of Appeal, is what a prudent man ought to do to mitigate a loss arising from a breach of contract. The plaintiff, though able to pay cash, chose to incur a large measure of loss which he could have avoided by accepting the defendant's offer and which as a reasonable and prudent person he ought to have avoided.³²

There can be little doubt that this decision was deeply confused by two other things. First, by certain observations such as that by Lord Haldane to the effect that a plaintiff has a duty of taking 'all reasonable steps to mitigate the loss consequent on the breach'.³³ However the duty to which Lord Haldane was here referring was one arising *after* breach, as where, for example, a buyer receives a defective article but does nothing to repair or correct the defect, nor solicits nor accepts an alternative sounder article the seller might be willing to provide, with the result that his damages accumulate unnecessarily. And this sort of duty to mitigate is utterly different from that canvassed by McCardie J. In his

³⁰ See e.g. *Roth v. Taysen* (1895) 12 T.L.R. 100, 211; *Tredgar Iron & Coal Co. v. Hawihorn Bros* (1902) 18 T.L.R. 716; *Melachrino v. Nickoll & Knight* [1920] 1 K.B. 693; *Millett v. Van Heek & Co.* [1920] 3 K.B. 535, [1921] 2 K.B. 369. And see also Davies, *Anticipatory Breach and Mitigation of Damages* 5 *University of Western Australia Law Review* 576, the whole argument of which in fact rests on the idea that a duty to mitigate exists where the anticipatory breach is 'accepted', but does not exist where it is not.

³¹ [1919] 2 K.B. 581.

³² *Ibid.* 586: 'I feel no inclination to allow in a mercantile dispute an unhappy indulgence in far-fetched resentment or an undue sensitiveness to slights or unfortunately worded letters. Business often gives rise to certain asperities.'

³³ *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London* [1912] A.C. 673, 689.

case the duty to mitigate rather meant that a party has to accept the other's unilateral changes of the contractual terms, provided these changes can be regarded as perhaps minor ones. But the point surely is that any such changes of a contract cannot be effected under the threat of a breach; certainly *Ripley v. McClure*³⁴ is authority for saying that they cannot, nor have other cases ever announced a different view. A second source of confusion lies in an incorrect analogy drawn from the contract of services. Here a duty to mitigate loss undoubtedly exists, but the reasons for this, as we are about to explain, are very special and have little or nothing to do with the larger duty that *Payzu's* case imposed.

IV

This brings us to contracts of employment or services where anticipatory breach raises several problems of its own. Now it has never been doubted that a servant can sue the master immediately if wrongfully dismissed. Indeed wrongful dismissal is but an instance of a wrongful repudiation of a contract by the employer concerned.³⁵ Nor, it is important to notice, is there any real difference between a repudiation during actual employment and one before employment begins. It is true that during employment a dismissal can take forms which it cannot take where the servant is not yet at work: so during employment a master can hinder or prevent a servant from working, something the former cannot do anticipatorily. Again, during employment a master may have less opportunity of retracting his dismissal or repudiation than he would perhaps have when employment has not begun. But subject to this, a repudiation remains the same in either situation, for the simple reason that a repudiation results from certain acts express or implied, that is, results from a master's refusal or from his disablement to employ, and of course these are acts which do not vary according to whether employment has, or has not yet, commenced.

A few examples may further illustrate this point. In the well-known case of *Planché v. Colburn*³⁶ the plaintiff was to write a book for which he was to receive £100. The publishers abandoned the project, whereupon the plaintiff decided not to complete the book, though he had done much work on it. He sued for breach of contract, the jury awarding him damages of £50.³⁷ On a move to set this verdict aside, the contention

³⁴ (1849) 4 Exch. 345.

³⁵ See on this *In re Rubel Bronze and Metal Company and Vos* [1918] 1 K.B. 315, 321.

³⁶ (1831) 8 Bing. 14.

³⁷ The plaintiff, though apparently entirely relying on the defendant's breach, included in his declaration a claim for work and labour as on a *quantum meruit*. Such an inclusion was then usual pleading practice, but of questionable value in a situation such as this: for one thing because a common count would not lie without the plaintiff having conferred a perceptible benefit on the other; for another, and even more importantly, because the whole question here was whether the publisher had in fact 'broken' or 'repudiated' the contract by abandoning the project before

was that the plaintiff could recover nothing as he had not tendered the completed work. However the court upheld the verdict, since the publisher's abandonment of the venture had made completion a useless exercise. For, as Bosanquet J. pointed out, once the venture was abandoned, the plaintiff's work, even if completed, might have been published 'in a way not consistent with the plaintiff's reputation, or not [have been published] at all'. Thus the publisher had, by his abandonment, broken the contract by utterly frustrating the plaintiff's expectations which, even if not specifically mentioned in the contract, were nevertheless obvious and legitimate. Clearly, these expectations operated from the moment this contract was made, whether the plaintiff had or had not begun to write the book. The defendant's breach of contract would thus have been the same even if it had been a purely anticipatory one.

Next consider *Elderton v. Emmens*³⁸ where the defendant had employed the plaintiff, an attorney, under a contract of retainer. As in the nature of the case, a retainer only required the plaintiff to act for the defendant from time to time, as occasion arose, his wrongful dismissal before being given any work could be described equally well as either an ordinary or as an anticipatory breach. Or consider a variation of *Hochster v. De La Tour*³⁹ where the courier might have been dismissed not (as he was) in May but (say) at 8.00 a.m. on 1 June, that is, at the very first moment of the first day when his employment was to commence. Here, again, any distinction between ordinary and anticipatory breach could not have affected the outcome of the case. Indeed the two examples show how inappropriate or irrelevant any such distinction would here be.

If all this may appear to be utterly self-evident, the fact remains that the point has hardly been recognized. On the contrary what is usually maintained is that an anticipatory repudiation constitutes a special sort of breach since it is of no effect unless the breach is accepted by the employee and that, moreover, the latter has an option whether to accept or not.⁴⁰ But this proposition is largely misconceived as it is only true in a very limited sense, certainly not true in the wide sense in which it is meant to obtain. What is true is that an employee has an option not to accept in the sense that he need not treat every threatened dismissal as final or definitive, especially where the alleged repudiation happens to be ambiguous. Furthermore, this option, such as it is, applies to an ordinary breach as well. Where, for example, a servant gained the impression that his contract of employment either had or was about to be repudiated by the defendant, but nevertheless continued in his employment while the latter, too, did nothing except continue to employ him, the time. That the action turned on breach of contract rather than *quantum meruit* was specifically recognized in *Hochster v. De La Tour* (1853) 2 E. & B. 678, 693.

³⁸ (1848) 6 C.B. 160; (1853) 4 H.L.C. 624.

³⁹ (1853) 2 E. & B. 678.

⁴⁰ See e.g. Davies, *op. cit.* 576, 579.

contract was held not to have been terminated: an unaccepted repudiation, said the Court of Appeal, was 'nugatory' or 'writ in water'.⁴¹ Obviously this was overstating the role of acceptance; for the true reason why the servant could continue was not because the repudiation was not accepted by him, but more simply because the repudiation, while certainly threatened, was never carried into effect: it was, in other words, not a definite repudiation, for it was either never meant to be final or was in any case implicitly retracted the next day.

Nor of course is it true that the servant has a full option to accept a repudiation or not to accept. If in the above case the dismissal had been final, the servant would have had no option but to accept, simply because he could not have continued in his employment against the express wishes of the defendant employer. It follows that far from having an option, he can do no other than 'accept' an employer's repudiation of his services, however wrongful this dismissal may be. Indeed the servant has no such option also in another respect. While he may or may not start an immediate action against his employer, he nevertheless remains under a duty to 'accept' the repudiation at any rate to this extent: that he remains under a duty to mitigate his loss, that is, look for and accept alternative employment as soon as possible. This, to be sure, does not mean that he must quickly start work on another job, it only means that the practical availability or possibility of such work will be taken into account so as to provide a yard-stick of the damages the wrongful dismissal has caused. Thus only if a servant cannot find similar work except at a lower rate of pay, does he become entitled to claim this difference between the agreed and the alternative pay.⁴²

It follows that to speak, in this context, of a duty to mitigate is merely to indicate how we must calculate the measure of damages. In sale we do not need such a duty to mitigate because we can calculate the relevant measure simply by comparing the contract with the market price. But in services such a direct comparison is not often possible since the 'market price' of alternative employment may not be easily gauged either because there may not be an exact market for the plaintiff's work or because the market price of work refers not to the price on a particular day (such as the day of the agreed delivery of goods in sale) but to obtainable (alternative) employment over a longer period of time. It is this difficulty of calculation that the duty to mitigate here tries to meet. It is then a 'duty to mitigate' in a special sense, denoting a way of calculating the plaintiff's lost profit, not the duty in its wider, and more familiar, sense when it refers to a plaintiff's obligation to prevent his damages from growing unchecked. Nor, of course, does it now at all matter whether the wrongful dismissal constitutes an anticipatory or an ordinary breach.

⁴¹ *Howard v. Pickford Tool Co. Ltd.* [1951] 1 K.B. 417, 420-1.

⁴² See Crompton J. in *Elderton v. Emmens* (1853) 4 H.L.C. 624, 645-6.

We may apply these ideas to the following case.⁴³ The plaintiff, a managing director, employed for ten years as from April 1958, was told in September that his employment would be terminated in November of the same year. It was not disputed that the plaintiff was wrongfully dismissed in November, the only question was how much in damages he could claim. His annual salary was £3,000 and he indeed claimed, roughly, ten times that amount, a claim which the defendants resisted on the ground that they had offered him alternative employment on comparable terms, which employment the plaintiff was bound to accept as it offered him a chance fully to mitigate his damages. This alternative job however the plaintiff rejected, the court agreeing that he was entitled to refuse. 'As a matter of law', said Diplock J. (as he then was), 'it cannot be said that there is any duty on the plaintiff to mitigate his damages before there had been any act which is either an actual breach or an act which he has elected to treat as an anticipatory breach'.⁴⁴

But, surely, there was here no anticipatory breach in any strict sense. The plaintiff was dismissed not before but during his employment, *i.e.* as from November, being until then fully employed. More important still, the reason why the plaintiff was entitled to reject the offered employment had absolutely nothing to do with this alleged option upon an anticipatory breach, but had to do with the fact that the new employment was with the same employers with whom relations had become very bitter as they had treated the plaintiff rather shabbily. Apart from this circumstantial right to refuse, furthermore, the plaintiff remained under a general duty to mitigate his loss, that is to say, he was bound to find other employment or to have the possibility of such other employment taken into account in the computation of his damages. The plaintiff did not deny this duty, but he said that, despite many attempts, he had not been able to find equally remunerative employment, so that the amount he claimed was fully justified. But in the event he was awarded damages of only £7,500 as the court took a far more optimistic view of his prospects of future employment than the plaintiff did himself. In more concrete terms, the plaintiff, though wrongfully dismissed, remained under a duty to mitigate his damages, here to the tune of virtually two-thirds of the damages claimed, precisely because the extent of these damages depended upon his prospects of other work. More broadly, it follows that a plaintiff can claim less the better his (realistic) prospects to earn, and, accordingly, he cannot recover more than nominal damages if he is offered similar employment which he cannot refuse.⁴⁵

⁴³ *Shindler v. Northern Raincoat Co.* [1960] 2 All E.R. 239.

⁴⁴ *Ibid.* 249.

⁴⁵ *Brace v. Calder* [1895] 2 Q.B. 253 where the plaintiff's contract of employment with a partnership was prematurely broken owing to two partners' retirement. The remaining partners offered to *continue to employ him on the same terms*, but this the plaintiff refused. He recovered only nominal damages since the offered employment fully mitigated his loss. For a completely different analysis, see *Davies, op. cit.*

And it also follows that the duty to mitigate here exists quite irrespectively of whether the repudiation is 'accepted' or not. The general reason for this is not far to seek. Our present duty to mitigate indeed connects with a much broader principle, namely, that a wrongfully dismissed servant cannot be permitted to wait out his full period for which he is originally employed, if only because he would otherwise be paid for work or services he has not done. It is also immaterial upon which particular ground this is put, that is, whether we say that a servant is under a duty to mitigate damages, or whether we say, as nineteenth century cases said, that a servant cannot claim for 'constructive service',⁴⁶ or whether we say, with the High Court of Australia, that a contract between master and servant belongs to the 'category of agreements to pay in respect of the consideration when and so often as it is executed, and is, therefore, commonly understood as involving no liability for wages or unless earned by service, even though the failure to serve is a consequence of the master's wrongful act'.⁴⁷ Nor is this peculiar to services, for it applies equally to contracts of sale. Thus a seller cannot claim the full price for his goods (assuming property in them has not passed) even though the buyer wrongfully refuses to accept. He can, as we have seen, recover his profit, *i.e.* the difference, if any, between the contract and the market price; but he cannot recover the price for the full exchange, even though the exchange is frustrated by the buyer's own wrong.

All this was completely overlooked in *White v. McGregor*.⁴⁸ Here the pursuers had agreed to place advertisements for the defender's business for a period of three years. The defender repudiated the contract very shortly after it was made and before the advertisers had started work. Nevertheless the latter refused to accept the repudiation and performed the contract according to its terms. This the House of Lords astonishingly held (albeit by a bare majority) the pursuers were entitled to do, as well as entitled to claim upon completion the full contract price: they were so entitled because they had an option to accept the repudiation or not to accept, and if they did not accept the contract did remain in full force. We have said enough to show that, at least as far as English or Anglo-Australian law is concerned, this decision is utterly untenable.⁴⁹ For what, in effect, it amounts to is that a party, in the position of the present defender, cannot even repudiate the contract, subject to his liability in

579, who distinguishes *Brace* from *Shindler* on the ground that in the former the offer of alternative employment was made after breach while in *Shindler* it was made before the termination of the contract, apparently regarding this as a 'true case of anticipatory breach'.

⁴⁶ See *Elderton v. Emmens* (1853) 4 H.L.C. 624, 647.

⁴⁷ *Automatic Fire Sprinklers Pty. Ltd. v. Watson* (1946) 72 C.L.R. 435, 465, *per* Dixon J.

⁴⁸ *White and Carter (Councils) Ltd. v. McGregor* [1962] A.C. 413 a Scots case generally assumed to apply equally to English law.

⁴⁹ For Australian law, see *Cheshire and Fifoot, op. cit.* 765.

damages, since, as Lord Morton pointed out, the contract will in fact be specifically enforced, provided the innocent party is able to perform the services without the co-operation of the repudiating side.⁵⁰

Moreover, an earlier case suggests quite a different result. So in *De Bernardy v. Harding*⁵¹ the plaintiff was to advertise and sell tickets for the defendant who later repudiated the contract, preferring to sell his own tickets. There was no doubt that the plaintiff could not disregard the defendant's repudiation by continuing to advertise or sell tickets for him. The only question was whether the plaintiff could recover on a *quantum meruit* for his work (apparently the advertising) already done.⁵² All this makes it again very clear that to speak of an 'option' of 'accepting' an anticipatory breach is profoundly misleading, precisely because it omits the plaintiff's duty to mitigate his loss, a duty which exists whether the breach is anticipatory or not. Indeed, and more generally *White v. McGregor* rather shows how easily the law can go awry, even in superior courts, when basic principles are not fully understood owing to a lack of full discussion or analysis.

⁵⁰ [1962] A.C. 413, 432-3.

⁵¹ (1853) 8 Exch. 822.

⁵² The defendant strenuously objected to *quantum meruit* on the ground that the plaintiff should have declared specially for breach of contract. The truer aim of the objection was to defeat the plaintiff's claim for his work done as the defendant did not wish to pay him more than for certain expenses incurred. However after much debate the court upheld the plaintiff's *indebitatus* count.