Torts—Interference with Performance of Agreement Relating to Fungible Goods—[New York].—The plaintiff leased her farm to the defendant Wingeier, the lease containing the covenant: "No grain, hay, straw, or corn shall be sold by second party." Wingeier was induced to enter into an agreement with the defendant Schmitz, whereby the latter was to sell all the hay, straw, and standing corn; and from the proceeds pay a number of antecedent debts of Wingeier, including debts owing to Schmitz and to the defendant milling company which had supplied feed and fertilizer for the farm. The defendants in making the agreement knew of the restrictive clause in the lease. Later the plaintiff and Wingeier agreed to a cancellation of the lease, and upon retaking possession the plaintiff discovered the loss. Wingeier was then insolvent. *Held*, no cause of action was established for the tort of inducing breach of contract because the tort action is not available in the case of contracts relating to fungible goods. *Conrad v. Schmitz*, 246 App. Div. 893, 285 N.Y.S. 804, aff'd, 272 N.Y. 868, 3 N.E. (2d) 868 (1936).

Where a defendant has intentionally induced a third party to break his contract with the plaintiff, it is difficult to find anything in the nature of fungible goods to justify a denial of recovery if the inducement and damage are proved. If recovery were allowed against a mere purchaser with knowledge of a prior contract, the traditional arguments against such an extension of tort relief would apply with increased force to a case involving a contract for the sale of fungible goods. Thus it has been argued that (1) permitting tort recovery against all parties knowingly dealing with a contract-breaker would result in equitable servitudes on chattels. If every contract calling for a specific use or disposition of a chattel were protected by a tort remedy of this sort, the transfer of chattels might be restricted and the normal course of business impeded. See Chafee, Equitable Servitude on Chattels, 41 Harv. L. Rev. 945, 969 (1928). (2) permitting recovery might result in an increase of litigation because of the frequency with which ordinary contracts of sale are broken and because of the relative ease with which mere notice can be proved. In the case of a contract for the sale of fungible goods this latter objection has particular application both because this is the most common type of contract and because the only damage resulting from breach is mere loss of a bargain. However, the courts in requiring that the stranger's acts be the inducing cause of the breach have sufficiently narrowed the scope of the action so as to preclude any serious restriction on normal business transactions. See Sayre, Inducing Breach of Contract, 36 Harv. L. Rev. 663 (1923); but see Carpenter, Interference with Contract Relations, 41 Harv. L. Rev. 728, 735 (1928). Thus it has been held that a principal contractor may voluntarily break his contract and enter into a second inconsistent with performance of the first without constituting the second contractor a tortfeasor. *Sweeney v. Smith*, 167 Fed. 385 (C.C.Pa. 1909), aff'd, 171 Fed. 645 (C.C.A. 3d 1909); *Wheat Growers' Coop. Ass'n v. Radke*, 163 Minn. 403, 204 N.W. 314 (1925).

In arriving at its decision in the principal case, the court might have been relying on either of two arguments. One is that the acts of the defendants left the tenant still able to perform substantially; therefore, the technical breach of contract induced by the defendant was not a sufficient harm to warrant recovery. The holding that substantial performance was sufficient to satisfy the purpose of the covenant in the lease is questionable in view of the express stipulation against sale of the crops. Moreover, in the present case, the breach of the express stipulation did result in substantial injury to the plaintiff. The result of the defendants' acts was not the mere loss of a bar-

gain; the plaintiff was forced to buy new supplies equivalent to those delivered to the defendants by the now insolvent tenant. But even assuming that the court was correct in holding that the tenant could have substantially performed by supplying other feed for the stock on the farm as it was needed, the result reached in the present case indicates that the New York court does not consider the tort action available in cases of inducing anticipatory breach. In this case there was almost no likelihood of the tenant's replacing the crops which were removed. The acts of all the parties seem to have been based on the knowledge either that the tenant was, or was about to become, insolvent. The defendants nevertheless sold the crops and applied the proceeds to the discharge of past debts of the tenant, thereby leaving him without the means to render even substantial performance when due. It is well settled in American jurisdictions, including New York, that a voluntary act by which one of the parties to an agreement renders performance either actually or apparently impossible constitutes a breach by anticipation. *Hochster v. De la Tour*, 2 El. & Bl. 678 (1853); *Central Trust Co. v. Chicago Aud. Ass'n*, 240 U.S. 581 (1916); *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 221 N.Y. 120, 116 N.E. 1073 (1917); *Assembly Co. v. Giller*, 134 Misc. 657, 236 N.Y.S. 308 (1929). In spite of the present holding, there is some indication that a cause of action arises against a party who induces a breach by way of anticipation. Thus an injunction may be granted to prevent threatened interference with contractual relations, pending performance. *Automobile Ins. Co. v. Guaranty Securities Corp.*, 240 Fed. 222 (D.C. N.Y. 1917); *Standard Fashion Co. v. Siegel-Cooper Co.*, 30 App. Div. 564, 52 N.Y.S. 433 (1898); *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N.Y.S. 401 (1922). The injured party to a long-term contract has been given damages at law, both present and prospective, against a party who procured repudiation in the early stages of performance. *Twitchell v. Glenwood-Inglewood Co.*, 131 Minn. 375, 155 N.W. 621 (1915); *Simonsen v. Barth*, 64 Mont. 95, 208 Pac. 938 (1922); *McBride v. O'Neal*, 128 Ga. 473, 57 S.E. 789 (1907) (statutory interpretation). See also *Lumley v. Gye*, 2 El. & Bl. 216, 225 (1853); *Walker v. Cronin*, 107 Mass. 555 (1871) (count for inducing breach of contract before performance was due held good on demurrer).

A second possible ground of decision in this case is that the tort remedy should be restricted to cases in which the legal remedies for breach of contract are inadequate. It might be argued that the tort action is intended only as a substitute for specific performance. Thus in the leading cases of *Lumley v. Wagner* (1 De. G. M. & G. 604 (1852)), and *Lumley v. Gye* (2 El. & Bl. 216 (1853)), the plaintiff had the equities necessary to a decree of specific performance; but the court could not grant such relief because of the policy against specific enforcement of personal service contracts. The plaintiff, therefore, was allowed the less satisfactory equitable relief of injunction and also a tort action at law. In a more recent, American, case tort relief was granted, possibly because neither a contract action nor specific performance was available. *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405 (1908) (contract for sale of ice over indefinitely long period; measure of contract damages conjectural and availability of specific performance likewise uncertain); but *cf. Cumberland Glass Mfg. Co. v. DeWitt*, 120 Md. 381, 87 Atl. 927 (1913) (contract for sale of lettered glass flasks; defendant induced purchaser to break the contract before the flasks were manufactured). However, if the requisite intent, causation, and harm are clearly established in this type of case, there seems to be no reason why the technical availability or non-availability of an equitable remedy should affect the result in a tort action.