

ANTICIPATORY REPUDIATION AND DISABILITY INSURANCE

IN THE year 1896, the life insurance world welcomed into its midst, a new and startling innovation—disability insurance.¹ This form of coverage completed the economic protective net which life insurance aimed to offer to society.² The first old line company to grant this coverage was the Fidelity Mutual Life Insurance Company of Philadelphia.³ Prior to this time the disability field in America⁴ was occupied by the fraternal and the casualty companies.

Under the provision⁵ issued by the Fidelity Mutual, the assured, in the event he became totally and permanently disabled, had the option of a policy paid up for life or receiving an annuity in lieu of a paid up policy. This was the opening shot in, what afterwards turned out to be, a wild and disastrous competitive struggle. . . . Each company in seeking new business held out a clause more liberal than its competitor's. The rates were hardly adequate.⁶

The next step in liberalization came from the Travelers Insurance Company. This company issued a disability provision⁷ providing for waiver of the premium due under the policy in the event of the assured's total and permanent disability,⁸ from engaging in work of any nature for gain.

The competitive struggle waxed fiercer and several years later, a few companies attempted to pay 10 per cent of the face of the policy on an annual basis during the insured's disability. Each

1. HUNTER, *DISABILITY BENEFITS IN LIFE INSURANCE POLICIES* (Actuarial Studies) 2.

2. Life insurance attempts to cushion the loss in economic values caused by death, superannuation and disability (often referred to as living death).

3. HUNTER, *loc. cit. supra* note 1.

4. *Ibid.* Disability insurance was offered by the German insurance carriers prior to 1876.

5. *Ibid.*

6. *Id.* at 6-8.

7. *Id.* at 2.

8. Most of the life insurance companies in contrast to the casualty companies provide for total or total and permanent disability from any and every occupation for gain. The casualty companies cover generally against physical disability incapacitating a man from his own occupation.

payment reduced the amount payable on the assured's death, by the amount of the disability benefit paid, *i.e.*, 10 per cent of the face.⁹ This failed to quiet the demands for liberalization. Thereupon in 1915¹⁰ a few companies dispensed with the reduction of the face concept and paid 10 per cent of the face, leaving the policy amount intact. In addition, the companies waived the premiums during the disability period.

The year 1920 witnessed the next step in liberalization. In that year there appeared the most popular form of disability provision¹¹ found in the life insurance contract. Instead of paying ten per cent of the face annually, the companies agreed to pay 1 per cent of the face for each month of total and permanent disability. For ten years this provision was virtually standard among the companies.¹²

Due to the great variance in types of clauses and with a dim recognition of the impending deluge of claims, the companies in 1930 agreed to modify their provisions to conform to standard provisions resulting from conferences held by insurance department actuaries under the auspices of the National Convention of Insurance Commissioners.¹³ But the waters of trouble had overrun the dam and the companies frantically strove to reduce their losses¹⁴—profits being a thing of the past.

9. *Hunter, op. cit. supra* note 1, at 3.

10. *Ibid.*

11. The word "provision" is used advisedly. There is some question as to whether the disability portion of the life insurance contract is a contract separate and distinct from the main contract or is a clause of the main contract. The conclusion reached brings different legal consequences—particularly in reference to incontestable ability and assignment. The writer hopes to develop this topic at a future date.

12. *HUNTER, op. cit. supra* note 1, at 4.

13. *Id.* at 9.

14. The following income and disbursement exhibit taken from the Spectator Life Insurance index chart indicates the losses by the companies.

Year	Income Received	Losses Paid
1931	79,483,709	60,688,796
1932	78,210,487	78,703,550
1933	70,253,725	98,851,215
1934	62,754,913	85,630,258

In 1932 the companies took drastic action. Most of them discontinued the issuance of their clauses. Some of them reduced their benefits to one half of one per cent of the face, at the same time increasing their rates. Others continued to issue waiver of premiums only. A few companies continued at the old rate of one per cent of the face per month. But they increased their premium rates, underwrote more strictly and limited the coverage in other respects.¹⁵

The reasons for this debacle are apparent: (1) The public had become educated to the benefit with a consequent increase in claims; (2) the unscientific liberalization of the provisions; (3) a very lax and easy attitude towards claims; (4) an inadequate rate base; (5) an increase in the sickness rate which has accompanied our decreasing death rate; (6) the depression and the consequent distortion of the benefit into a form of unemployment insurance.¹⁶

With this background, it should not be surprising to find a formidable body of cases covering this topic. The legal problems engendered by this mountain of litigation have been many and varied.

One of the most interesting of the problems raised has been the application of the doctrine of anticipatory repudiation¹⁷ to the dis-

15. For example: They inserted in their policies a six months waiting period before benefits were payable. They also reduced the age limits for submitting a claim from 65 to 60 or 55.

16. It did not take the malingerers or dishonest claimants long to realize that medicine is far from being an exact science; that conditions like nervous breakdowns or Angina Pectoris were based for their diagnosis largely in subjective symptoms as related by the patient. Therefore, the seeker after unemployment relief through the medium of the disability provision capitalized on these factors. The net result has been that many honest claimants have been made to suffer for the unfairness of the few.

17. Ballantine, *Anticipatory Breach and the Enforcement of Contractual Duties*, 22 MICH. L. REV. 329; *National Life and Accident Insurance Co. v. Whitfield*, 53 S. W. (2d) 10 (Ark. 1932) (generally refer to this doctrine as that of anticipatory breach). But logically there can be no breach of a promise until the terms or conditions, upon the performance of which the promise rests, have been fulfilled. A person who makes a legally enforceable promise to do a certain thing at a stipulated time does not breach that promise until the time arrives. *Mobley v. N. Y. Life Ins. Co.*, 74 F. (2d) 588, *aff'd*, 295 U. S. 632 (1935). "Ordinarily breach of a contract cannot occur until performance is due." What confusion may result

ability provision. The law is in its formative stage on this point.¹⁸ Perhaps an analysis and presentation of the doctrine as applied in the disability cases may contribute in some slight way to the guidance of the thirty-five jurisdictions which have as yet to pass on the question.¹⁹

The whole question of anticipatory repudiation finds its first written expression in the now famous case of *Hochster v. De La Tour*.²⁰ The facts are simple. Defendant hired plaintiff as a courier. The latter was to commence work on June 1, 1852, at

is brilliantly portrayed by Justice Cardozo in *N. Y. Life Ins. Co. v. Viglas* recently decided by the U. S. Sup. Ct. (March 30, 1936).

18. Most of the cases have been decided since 1927.

19. As an amusing illustration of the uncertainty which attends the whole doctrine of anticipatory repudiation in insurance litigation, one need only refer to the Legion of Honor cases in which New York, New Jersey, and Massachusetts arrived at almost diametrically opposed results on the same factual set up.

The Legion of Honor, a beneficiary society, issued a number of fraternal certificates. Later the Society changed its by-laws to increase the assessment payable by each member as a condition to the continuance of the certificates. Thereupon holders of unmaturing certificates sued the society in each of the three aforementioned states on the theory of anticipatory repudiation.

Massachusetts, in *Porter v. American Legion of Honor*, 183 Mass. 326, 67 N. E. 238 (1903) held that the plaintiff could not recover because Massachusetts did not recognize the doctrine of anticipatory breach.

New York, in *Langam v. Legion of Honor*, 174 N. Y. 266, 66 N. E. 932 (1903) held that though it adopted the doctrine of anticipatory breach, this contract was not within the types of contracts to which the doctrine was applicable.

The New Jersey court in *O'Neil v. Legion of Honor*, 70 N. J. L. 410, 57 Atl. 463, (Sup. Ct. 1904) approved the doctrine of anticipatory repudiation and held it applicable to the facts at hand. The New Jersey court took a verbal "swipe" at the New York court on two grounds. The New York court argued that the defendant could not by repudiation terminate its liability under the benefit certificate, "the answer to which is that under the doctrine referred to (anticipatory repudiation) each repudiation does give rise to a present liability at the option of the party injured." The second argument advanced by the New York court is that the plaintiff could by an equitable action require the defendant to recognize the contract as enforced." It is needless to say that under our system of jurisprudence, the latter ground is untenable. We frequently deny equitable relief where an adequate remedy exists at law, but where a suitor has a legal cause of action, we do not turn him out of the courts of law on the ground that he may be able to obtain adequate relief in equity."

20. 2 E. & B. 678 (Q. B. 1853).

ten pounds a month. "On the 11th May 1852, defendant wrote to plaintiff that he had changed his mind and declined his services. He refused to make any compensation. Action was commenced on the 22nd May." The question was squarely raised. Could a suit for damages be brought prior to the date when the promisee was to perform? The court held that such a suit was maintainable. The case is commonly cited for the principle that when there is an anticipatory repudiation by one party to a bilateral executory contract, the other party has an immediate right to damages for the breach.²¹ The doctrine soon was rounded out.²²

The fountain head of the general doctrine of anticipatory repudiation in America and the case most frequently cited is that of *Roehm v. Horst*.²³ This involved an action for breach of four contracts for the delivery of hops. These deliveries were to be made periodically. When the plaintiff offered delivery of the first installment under the first contract, the defendant refused to accept it. Furthermore, the defendant notified the plaintiff that he would not accept delivery of any future shipments under any of the contracts. The plaintiff thereupon commenced suit before the date for delivery of all of the shipments in the first contract had arrived and before the time for the delivery of any of the installments under the other contracts had arrived.²⁴ The court per-

21. *Frost v. Knight*, L. R. 7 Ex. 111 (1872); *The Danube and the Black Sea Co. v. Xenos*, 13 C. B. N. S. 825 (1863); *Johnstone v. Milling*, 16 Q. B. D. 460 (1886); WILLISTON, *CONTRACTS* § 1328, at 238. At this point it is appropriate to mention that it is not the intention of the writer to multiply citations endlessly. No more trenchant criticism can be directed at law review articles than the hopeless sinking of a text in an ocean of citations. The net result is complete confusion in the reader's mind accompanied generally by a severe eyestrain. Where one case will serve to prove the point, why indulge in abortive process of fruitless multiplication of citations?

22. For example, in the case of *Avery v. Boucher*, 5 E. & B. 714, *aff'd*, 6 E. & B. 953 (1855), two subsidiary rules were clarified and made definite. They were: [1] the repudiation or the enunciation must be absolute; [2] the repudiation or the enunciation must be accepted. *Barrick v. Bubse*, 2 C. B. N. S. 563 (1857); *Frost v. Knight* and *Johnstone v. Milling*, *supra* note 21. Comment on the cases in note to *Cutter v. Powell*, 2 SMITH, *LEADING CASES* 1212.

23. 178 U. S. 1 (1900).

24. Note the situation here. There is an actual breach of the first contract and a repudiation of the other three contracts.

mitted full recovery under all of the contracts, adopting the reasoning of *Hochster v. De La Tour*,²⁵ without too much consideration of its basis in logic. The American doctrine as a result of this case became crystalized in the following form: (1) The rule of anticipatory repudiation may be applied only to a bilateral contract which is executory on both sides at the time of the repudiation.²⁶ (2) The rule of anticipatory repudiation may not be applied to a unilateral contract to pay money or to a bilateral contract where one party has performed all that he has been called upon to do, thereby changing this bilateral contract, with mutual obligations, into a unilateral contract where the one side merely has to pay the price agreed upon.²⁷ (3) In those cases where the doctrine applies, the repudiation must be clear and unequivocal.²⁸ Some courts have

25. *Supra* note 20.

26. This rule has been almost universally accepted by the American courts. RESTATEMENT CONTRACTS § 318; 3 WILLISTON, CONTRACTS § 1328; 13 C. J. 655; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561 (1893); cases collected in ANSON, CONTRACTS (Corbin's ed. 1924) 463 n. 4; WILLISTON, CONTRACTS 2363 n. 97-99; *id.* at 2364 n. 1. Only two jurisdictions fail to follow the rule: Massachusetts in Daniels v. Newton, 114 Mass. 530 (1874) and Nebraska in King v. Waterman, 55 Neb. 324, 75 N. W. 830 (1898). In support of this minority rule, *cf.* Williston, 14 HARV. L. REV. 421. But even in Massachusetts, a present breach of part of a contract duty accompanied by a repudiation of the remainder gives a cause of action for a total breach. Parker v. Russell, 133 Mass. 74 (1882); 2 PATTERSON, CASES ON CONTRACTS 88.

27. RESTATEMENT, CONTRACTS § 316; WILLISTON, CONTRACTS § 1290, at 2335. In 3 WILLISTON, CONTRACTS § 2024, the author makes the following statement after referring to the general rule: "but an obligation to pay money originally unilateral or becoming so by performance on the part of the creditor, remains after a breach an obligation to pay that sum of money and if by its terms the money is payable in installments, no breach, however serious as to earlier installments can resolve the creditor's right into a single claim for damages on the entire contract." *Cf.* also Ballantine, *supra* note 17; Leon v. Barnsdall Zinc Co., 309 Mo. 276, 274 S. W. 699 (1925); Alger Fowler Co. v. Tracey, 98 Minn. 432, 107 N. W. 1124 (1906).

28. Roehm v. Horst, *supra* note 23; 3 WILLISTON, CONTRACTS (1920) 2376-7; Ravers Law & Collection Co. v. Harrell, 32 Calif. App. 45, 162 Pac. 125 (1916); Frank F. Pels Co. v. Saxony Spinning Co., 287 Fed. 282 (C. C. A. 4th, 1923), *cert. denied*, 263 U. S. 402; RESTATEMENT, CONTRACTS § 318; Wells v. Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599 (1903); Donlen v. Fidelity and Casualty Co., 192 N. Y. Supp. 513 (1921); National King Co. v. Hudson River Power Co., 110 A. D. 133, 97 N. Y. Supp. 92 (1905). In discussing the requirement of an equivocal repudiation

complicated the difficulties clustering about this doctrine by predicated intent as a necessary essential to an actionable repudiation.²⁹ The theory behind this addition to the doctrine is that the penalty incurred is too severe for a mere mistake. But the effect would be to subject the court to the severe psychological problem of ascertaining whether or not this defendant, if he discovers his mistake, would perform his part of the bargain. The ramifications are obvious. This test of good faith appears to be very sound as a theoretical proposition. Its soundness appears questionable when practical application is sought.

The whole doctrine of anticipatory repudiation, with its excep-

Professor Williston wrote in an article appearing in the N. Y. L. J., June 20, 1924, "It is stated in the decisions that in order to give rise to an anticipatory breach of contract the defendant's refusal to perform must have been positive and unconditional. In *Dingley v. Oler* (117 U. S. 490) the defendant had taken a cargo of ice from the plaintiff and agreed to make return in kind the next season, which closed in September, 1880. In July, 1880, the defendant wrote: 'We must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered it to other parties here (fifty cents a ton), or give you ice when the market reaches that point.' At the time when this letter was written ice was worth five dollars a ton. One does not need expert testimony to judge what probability there is of ice going down before the close of September to one-tenth of the price for which it is selling in July, and yet the court held the letter constituted no anticipatory breach of contract because the refusal was not absolute, but accompanied with the expression to ship the ice 'if and when the market price should reach the point which, in their opinion the plaintiffs ought to be willing to accept as its fair price between them.' Surely a man must be well advised to know when he has the right to regard his contract as broken by anticipation." The importance of this comment will become apparent in the disability cases. The rule is easy to assert. The application is fraught with uncertainty and difficulty.

29. *Dingley v. Oler*, *supra* note 28. *United Farmers City Market, Inc. v. Donofino*, 29 P. (2d) 144 (Ariz. 1934); *RESTATEMENT, CONTRACTS* 323 (2). But *cf.* *Armstrong v. St. Paul & Pacific Coal & Iron Co.*, 48 Minn. 113, 119, 50 N. W. 1029 (1892); *DeMille Co. v. Casey*, 115 Misc. 646, 653, 189 N. Y. Supp. 275, 280 (1921) which state that the intent of the repudiating party is immaterial. Yet if one is worried about the harshness of the penalty why isn't this a possible answer? If the defendant's repudiation flows from a possible mistake rather than a positive intent, isn't the best demonstration of this good faith error, the testing of the defendant's liability through the medium of a declaratory judgment. Of course, it is recognized that not all jurisdictions make this remedy available. In those jurisdictions another test must be applied.

tion, appears to have been shaped and directed by its original historical mold.³⁰ The cases, almost without exception, have incanted the same reasoning first given forth in the *Hochster* case, without any examination as to its validity. Anticipatory repudiation does not apply to unilateral contracts for the payment of money or bilateral contracts executed on one side, they say. Why this distinction? The answer is almost unanimously *Hochster v. De La Tour*. What is the reasoning found in that case which prompted the later cases to make this exception? Lord Campbell in enunciating the anticipatory repudiation doctrine seems to rest his decision on the ground that if the promisee is not given a present cause of action, he would have to perform the conditions, on his part to be performed, in order to sue on the contract after the defendant's time to perform arrived. If this is the reason for the rule, and most courts think it is, then the exception appears logical. The promisee has completely performed when the repudiation takes place. He is in no way prejudiced by the repudiation. Therefore, let him sue for a present breach of the contract. But isn't the reasoning illogical? It does not necessarily follow that if we deny a promisee a cause of action for a repudiation of the contract by the promisor, before the time arrives for the promisor's action under the contract, that the promisee must perform the conditions precedent to the enforcement of the promisor's promise. Professor Williston³¹ in criticizing the reasoning of Lord Campbell, points out that he is confusing the exercise of an excuse with a present right of action. To excuse conditions precedent does not necessarily imply the granting of a cause of action contemporaneous with the excuse. This is the basis for Massachusetts refusal to follow the doctrine of the *Hochster* case. In the *Daniels* case³² the court said: "A renunciation of the agreement by declarations or inconsistent conduct, before the time of performance may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or release him from

30. 31 MICH. L. REV. 536.

31. WILLISTON, CONTRACTS § 1303.

32. *Supra* note 26, at 533.

the necessity of offering performance in order to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterwards, if the other party had acted upon such disavowal." But, of course, the granting of an excuse does not compel the granting of an immediate cause of action for anticipatory repudiation.³³ Furthermore, one does not have to search far for a legal justification for excusing the performance of the conditions precedent. The well accepted rule for minimizing damages may almost turn the excuse of performance on the promisee's part into an enforceable duty to refrain from further performance.³⁴

In *Roehm v. Horst*³⁵ the court, however, sets up another reason why there is a need for anticipatory repudiation in executory bilateral contracts. The court adopts the reasoning of Lord Chief Justice Cockburn in *Frost v. Knight*:³⁶ "the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all such advantage, the repudiation of this contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him." Apparently the reason the court is advancing here is that the promisee cannot deal commercially with his rights under the contract. No man wants to buy a lawsuit.³⁷ Is not this reasoning highly hypothetical? Is not

33. In *Equitable Trust Co. of New York v. Western Pacific Ry.*, 244 Fed. 485, 501 (D. C. S. D. N. Y., 1917) Judge Learned Hand had this to say regarding the limitations on the doctrine: "assuming what I do not mean to admit, that it has such limits, they result because the eventual victory of the doctrine over vigorous attacks has not left it scatheless."

34. *Clark v. Maisiglio*, 1 Denio (N. Y. 317 (1845)); *Novelty Advertisement Co. v. Famous Mutual Tobacco Warehouse Co.*, 186 N. C. 197, 119 S. E. 196; *Cox & Sons Co. v. Crane Iron Works*, 5 F. (2d) 314 (C. C. A. 3rd, 1925); *Rockingham Co. v. Luten Bridge Co.*, 35 F. (2d) 301 (C. C. A. 4th, 1929).

35. *Supra* note 23, at 19.

36. *Supra* note 22.

37. A very unique reason which is particularly interesting in view of recent events is advanced in the case of *Alger-Fowler Co. v. Tracy*, 98 Minn. at 437 (1906).

the court receding to a position where a new exception comes into being, namely, wherever the promisee can show that he cannot deal with some stranger concerning his rights, then and only then is he entitled to avail himself of the doctrine?

The exception appears wholly illogical. Historical existence should vanish before the assaults of logic. Yet the exception is universally accepted wherever the doctrine of anticipatory repudiation holds sway.

With this review as a background the question arises: what application has anticipatory repudiation to insurance contracts? Are not insurance contracts unilateral contracts for the payment of money? The answer to this question in terms of authorities is divided. Professor Vance in his text³⁸ on insurance has this to say on the question: "But the course of business has developed a customary form of policy contract which is uniformly unilateral, imposing legal duties on the insurer only . . . in the case of life insurance which customarily requires periodic payment of premiums, the insured usually makes no promise to pay. The continued liability of the insurer is conditioned upon the payment of successive premiums, and the insured has the privilege of paying, but no duty to do so." So Professor Vance is convinced that the contract is unilateral, and at least in life insurance, the insurer's promise is to pay money. A person is insured in consideration of a first payment. The payment of the later premiums are conditions precedent to the right of the insured to collect on the policy.

But Couch and Joyce, two other noted authorities disagree.³⁹ To quote from Couch's cyclopedia of insurance law: "The element of synallagmaticism in contracts of insurance arises from the fact that they are bilateral,⁴⁰ in that there is a mutual agreement which

"The reason why a contract to pay money at a definite time in the future is an exception to the rule is that money is not a commodity which is bought and sold in the market and the market value of which fluctuates, as is the case with grain, stock and other similar articles."

38. VANCE, *INSURANCE* (2d ed.) 67; in support of Vance's view see *O'Neil v. Legion of Honor*, *supra* note 19.

39. 1 COUCH, *INSURANCE* 6; 1 JOYCE, *INSURANCE* (2d ed.) § 21.

40. *O'Neil v. Legion of Honor*, *supra* note 19, for an indication that N. J. believes that an assessment contract of life insurance is bilateral.

imposes certain reciprocal obligations upon the insurer and the insured, no matter what the subject matter of the contract may be."

Into which analysis is correct we need not delve very deeply. May a life insurance company sue an assured for a premium? May a life insurance company sue an assured to compel him to submit proof of disability or death? The answer is obviously *no*. Therefore, the contract is decidedly unilateral. *Pay your premiums and comply with the other conditions of your policy, and we will be liable when the contingency insured against occurs*, says the insurance carrier.

With this preliminary analysis as an indicator and introduction, the application of anticipatory repudiation to the disability provision in the life insurance contract may be examined.

How does the situation arise in which a plaintiff seeks damages for anticipatory repudiation of the disability provision of the life insurance contract? Mr. X has a life insurance policy containing a disability provision. Subsequent to the issuance of the contract he becomes disabled. He puts in a claim for disability benefits. The company, after an investigation of several months, refuses to pay the accrued installments. Thereupon, the insured brings suit not only for the benefits due but also for all future benefits to become due during his life expectancy.

The most famous case and certainly the most discussed case in the field is *Federal Life Insurance Co. v. Roscoe*.⁴¹ It is well worth analyzing the case thoroughly.

Jennie Roscoe, the plaintiff in the action took out a policy in the defendant company. Under the contract the defendant agreed to pay the sum of \$25.00 per week so long as she was totally disabled from accidental injuries sustained while a passenger on a common carrier. The plaintiff was injured accidentally while riding on a common carrier. She submitted a claim for disability benefits. The company made several payments and then refused to allow any further benefits. The plaintiff, thereupon, through her attorney, commenced a suit in chancery⁴² seeking to recover the

41. 12 F. (2d) 693 (C. C. A. 6th, 1925), *cert. denied*, 273 U. S. 722 (1926).

42. LEGAL SECTION, AMERICAN LIFE CONVENTION (1927) 55.

monthly installments due at the time and praying in the alternative that the present value of the future installments based on complainant's life expectancy be granted. After the commencement of the trial, the plaintiff's attorneys asked that the case be transferred to the law side of the docket and that the pleadings be amended to recite a cause of action for anticipatory repudiation.

At the conclusion of the trial, judgment was rendered for the plaintiff, permitting the recovery of the benefits due to date and the present value of the future benefits based upon plaintiff's life expectancy. The court rendered its opinion setting forth generally, findings of facts and conclusions of law. Leave was asked of the court to submit findings in ultimate form. The court replied that this could be done on a motion for a new trial. Thereupon, the defendant made such a motion setting forth specifically the errors of the court.

The Circuit Court of Appeals held that neither the opinion of the lower court nor the motion for a new trial could be accepted as a separate finding of fact. The result of this decision is important. It left but one question to be decided on appeal: whether the judgment is supported by the pleadings? The Circuit Court, however, discussed every question involved despite its ruling. But such discussion can have no legal strength other than as dicta.

Therefore, the discussion of this case must revolve about what the court said not what it did.

The majority opinion in the Circuit Court took the attitude that this was not a unilateral contract for the unconditional payment of money. The reason for this was that the plaintiff had to furnish this company monthly medical reports on her physical condition in order to entitle her to the future installments. This made the contract bilateral since there were mutual executory duties, *i.e.*, the plaintiff to furnish proof of disability and the defendant to pay. The company could enforce plaintiff's obligation to furnish proof by a refusal to pay even though it could not enforce the obligation by an action.⁴³

43. To quote the Court: "This contract is not an unconditional promise to pay a sum certain in installment or in gross where the plaintiff has fully performed.

Therefore, assuming the accuracy of the court's reasoning, we have our first requirement for the application of the anticipatory repudiation, a bilateral executory contract.

Was there an unequivocal repudiation? Since the defendant insurance company failed to preserve its rights in the District Court to a review of the evidence, the Circuit Court had to assume that there was such a repudiation in view of the District Court's decision. The Circuit Court said on this point: "The Court (District Court) found that the defendant was acting in bad faith; that it was guilty of an actual breach and an unequivocal repudiation of the entire contract."

There was a vigorous dissent in the case. The theory of the dissent rested on the fact that the provision in the policy with reference to furnishing monthly reports was merely a condition and not an obligation.⁴⁴ Therefore, the contract was executed so far as the plaintiff was concerned. From this reasoning flows the obvious answer that the case does not fall within the category of fact set-ups covered by the doctrine of anticipatory repudiation. The dissent also adverted to the fact that there was no "absolute

On the contrary, she is required every 30 days to submit her person to the examination of a physician. . . . These are the means and methods of proof of continuing disability stipulated in the contract to be furnished by the assured after first proofs of injury and resulting disability have been made and accepted by the insurance company; and in the absence of fraud or collusion, this provision is binding alike on the company and the assured."

"It is not merely a technical requirement but a substantial and continuing burden, involving the expenditure of time and money on the part of the assured. It is said, however, that this is merely a condition precedent to the payment of these installments and not a condition that could be enforced by the company. The latter may be true, so far as enforcement by action is concerned, nevertheless it is a provision binding on the plaintiff the performance of which may be enforced by refusal to pay."

44. "I do not understand that a contract sued upon is executory as against a plaintiff, unless it binds him to do something, so that an action may lie against him for specific performance or for non-performance. By that definition the contract here sued upon is not executory on the plaintiff's part. She is merely obliged from time to time to furnish evidence, if and when she wishes payment, what she must do is, in kind, like presenting a note for payment at a particular place, although it is more burdensome in degree; after all it is a condition, not an obligation." Judge Denison, at 697.

repudiation of the contract as justifies the application of the anticipatory breach rule."⁴⁵

The most striking feature of the case was the traditional approach of the opinions. Both accepted the present legal mold.⁴⁶ Both opinions agreed that to apply the rule of anticipatory repudiation, there must be an executory bilateral contract and an unequivocal repudiation. Their disagreement commenced with whether such circumstances were present.

What did the case hold? It is the writer's opinion that it held that the judgment, as rendered, was supported by the pleadings. As such, the case is of no great importance. But it did generate an idea. The legal profession was not long in seizing upon it. Soon the case became the mainstay of the plaintiff's briefs.⁴⁷ It became known for the proposition that one might sue for anticipatory repudiation of the disability provision, if a company denied liability.⁴⁸ The fashion of suing for the present value of future disability benefits became common.⁴⁹ The courts were, therefore, forced to take a position regarding the supposed holding of the *Roscoe* case.⁵⁰

The reactions of the courts can be split up into six categories.

45. Judge Denison, at 697.

46. *Wyll v. Pacific Mutual Life Ins. Co. of Cal.*, 3 Fed. Supp. 433 (D. C. Tex., 1933). The court points out the anomaly of a majority opinion and a dissenting opinion relying on the same case for their opposite conclusions, *i.e.*, *Roehm v. Horst*.

47. See for example, plaintiff's briefs in *Robbins v. Travelers*, 241 A. D. 351, 272 N. Y. Supp. 551 (1934) or *Metropolitan Ins. Co. v. Goldberg* (unreported) N. Y. Sup. Ct. (1933). Plaintiff's brief in the latter case contains this language: "Another case which is directly on all fours with the instant case is *Federal Life Ins. Co. v. Rascoe*. . . ."

48. *Atlantic Life Ins. Co. v. Serio*, 171 Miss. 596, 157 So. 474 (1934): "The appellant's (plaintiff suing for anticipatory repudiation of the disability provision) view seems to be supported by *Federal Life Ins. Co. v. Rascoe*."

49. There have been approximately 60 cases reported in the upper courts in the last eight years.

50. The *Rascoe* policy contract was made in Tennessee. Yet in *Atkinson v. R. R. Employees Society*, 160 Tenn. 158, 22 S. W. (2d) 631 (1929), the Tennessee Court expressly held that anticipatory repudiation did not apply to disability provisions. The *Atkinson* case was decided subsequent to the *Rascoe* case. But it is ironical that the case cannot even find support in its own bailiwick.

Cases in category one approve this supposed holding and grant a judgment for the present value of the future benefits.⁵¹ The second group of cases avoids the question by finding no unequivocal repudiation when a company denies the existence of an assured's disability within the terms and conditions of the disability provision.⁵² The third group of cases holds that the doctrine applies in a limited number of cases, *i.e.*, those where the amount of installments and the number of installments are definitely fixed and payable on the contingency of disability or death.⁵³ The fourth group of cases denies the right to sue for anticipatory repudiation when a company denies liability under the terms of the disability provision.⁵⁴ The fifth group of cases adheres to the theory that

51. Arkansas position. Most positive statement of the position may be found in *National Life & Accident Ins. Co. v. Whitfield*, 53 S. W. (2d) 10 (Ark. 1932).

52. *Kimel v. Mo. State Life Ins. Co.*, 71 F. (2d) 921 (1934); *Mobley v. N. Y. Life Ins. Co.*, 295 U. S. 632 (1935); *N. Y. Life Ins. Co. v. Viglas* (U. S. Sup. Ct., decided March 30, 1936); *Donlen v. Fidelity and Casualty Co.*, 192 N. Y. Supp. 513, 117 Misc. 414 (1921); *Needham v. American National Ins. Co.*, 78 S. W. (2d) 1059 (Tex., 1935). The Texas doctrine is in a state of utter confusion, several rules being in force there.

53. This covers group insurance contracts, largely. *Metropolitan Life Ins. Co. v. Day*, 145 Ga. 425, 89 S. E. 576; *Aetna Life Ins. Co. v. Dorman*, 180 S. E. 640 (1935); *Metropolitan Life Ins. Co. v. Schneider*, 193 N. E. 690 (Indiana, 1935).

54. *Parks v. Md. Casualty Co.*, 59 F. (2d) 735 (1935) (dicta); *Menssen v. Travelers Ins. Co.*, 5 Fed. Supp. 296 (E. D. N. Y. 1933); *Hines v. Fidelity Mutual Life Ins. Co.*, 6 Fed. Supp. 692 (1934); *Smith v. Mutual Benefit Health & Accident Assn.* (D. C. Okla. 1933); *Robbins v. Travelers*, 278 N. Y. Supp. 144, 155 Misc. 384 (1934) (questionable); *Hardie v. Metropolitan Life Ins. Co.*, 7 S. W. (2d) 746 (Mo., 1928); *Allen v. National Life and Accident Ins. Co.*, 67 S. W. (2d) 534 (Mo., 1934); *Boris v. Prudential*, 77 S. W. (2d) 127 (Mo., 1934); *Puckett v. National Annuity Assn.*, 114 S. W. 1039 (Mo., 1908); *Metropolitan Life Ins. Co. v. Lambert*, 157 Miss. 759, 128 So. 750 (1930); *Atlantic Life Ins. Co. v. Serio*, 171 Miss. 596, 157 So. 474 (1934); *Mid-Continent Life Ins. Co. v. Walker*, 128 Okla. 75, 260 Pac. 1109 (Okla. 1926); *Mid-Continent Life v. Christian*, 164 Okla. 161, 23 P. (2d) 672 (1932); *Cobb v. Pacific Mutual Life Ins. Co.*, 40 P. (2d) 257 (Cal. 1935); *Renter v. Pacific Mutual Life Ins. Co.*, 43 P. (2d) 576 (Cal. 1935); *Colovos v. Home Life Ins. Co.*, 28 P. (2d) 611 (Utah, 1934); *Garbush v. Order of United Commercial Travelers*, 228 Minn. 148 (1929); *Rishmiller v. Prudential Ins. Co.*, 256 N. W. 186 (Minn., 1934); *Jordan v. Equitable Life*, 170 S. C. 19, 169 S. E. 673 (1933); *Life Ins. Co. v. English*, 96 Tex. 268, 273, 72 S. W. 58 (1903) (dicta); *Howard v. Benefit Assn. of R. R. Employees*, 239 Ky. 465, 39 S. W. (2d) 657 (1931).

a denial of liability by the company is a present breach; that this breach is of so serious a nature as to entitle the assured in a suit in addition to the accrued benefits, the present value of the future benefits, based upon his life expectancy.⁵⁵ The sixth group of cases adopts a modified specific performance rule.⁵⁶

The cases found in category one, paying full homage to the dicta of the *Roscoe* case, are confined primarily to one state, Arkansas. Here the doctrine has had only slight apparent vicissitudes in its forward path. The mainspring of the Arkansas theory is the *Phifer* case.⁵⁷ Yet the majority opinion in the *Phifer* case did not discuss anticipatory repudiation. The majority thought that there was a present breach of such a serious nature as to entitle the plaintiff to present and future damages. However, the minority opinion did construe the majority opinion to be based upon the doctrine of anticipatory repudiation. The minority opinion stated that this was a contract to pay money, executed on one side, and therefore, the recovery allowed was erroneous. It pointed out that the decision was in conflict with *Van Winkle v. Satterfield*.^{57a} In that case an employee whose wages were due in installments was denied the right to sue for future instalments.⁵⁸

55. *Aetna Life v. Phifer*, 160 Ark. 98 (1923). Dicta in following cases: *N. Y. Life Ins. Co. v. Viglas* (U. S. Sup. Ct., decided March 30, 1936); *Federal Ins. Co. v. Rascoe*, 12 F. (2d) 693 (C. C. A. 6th, 1925), *cert. denied*, 273 U. S. 722 (1926). For cases of a non-insurance character which might support this view, see *Parker v. Russel*, 133 Mass. 74 (1882); *Pierce v. Tennessee Coal Co.*, 173 U. S. 1 (1899); *East Tennessee R. R. v. Staub*, 75 Tenn. 397 (1881); *Packus v. Hollingshed*, 184 N. Y. 211, 77 N. E. 40 (1906).

56. *Equitable Life v. Branham*, 250 Ky. 472, 63 S. W. (2d) 498 (1933); *Equitable Life v. Preston*, 253 Ky. 459, 70 S. W. (2d) 18 (1934); *Prudential Ins. Co. v. Cox*, 254 Ky. 98, 71 S. W. (2d) 31 (1934); *Equitable Life v. Goble*, 72 S. W. (2d) 35 (Ky. 1934); *Equitable Life v. Powers*, 72 S. W. (2d) 469 (Ky. 1934); *Prudential Ins. Co. v. Budgum*, 76 S. W. (2d) 693 (Ky. 1934); *State Life Ins. Co. v. Atkins*, 9 S. W. (2d) 290 (Tex. 1928).

57. *Supra* note 56.

57a. 58 Ark. 617 (1894).

58. Might there not be a distinction between these cases. In the discharged servant case, he is duty bound to minimize damages and to grant him full benefits would be to excuse him from the cardinal rule of minimizing damages. In the disability case—there is nothing the assured can do. He is totally and permanently disabled. What can he minimize?

The *Phifer* case was followed several years later by the case of *Manufacturer's Furniture Co. v. Read*.⁵⁹ This was not an insurance case. It involved an installment contract to pay money at specified times. The court held that where there is a contract merely to pay money at specified times, a refusal not to pay does not accelerate the maturity of installments not yet due under the contract. The case appears to be in direct conflict with the *Phifer* case, if that case is based upon the doctrine of anticipatory repudiation. The court in the *Read* case, with devilish perversity said: "We do not overlook the recent case of *Aetna Life Ins. Co. v. Phifer*." Then it proceeded to ignore it and came to a conclusion which might be argued is in direct conflict with the *Phifer* case.

This dubious setting furnished the background for the subsequent cases. Strangely enough, the later cases pay absolute fealty to the doctrine of the *Phifer* case, yet that very doctrine is uncertain.⁶⁰ It is considerably delimited and vitiated by other Arkansas cases.⁶¹

The next case added to this conglomerate mosaic of legal doctrine was *Travelers Protective Association of America v. Stephens*.⁶² This was a case in which the number and amount of the installments were definite. Without any discussion of anticipatory repudiation, the court granted the present value of the future benefits. The doctrine was slowly developing.

The next step in the growth of the doctrine in this state was found in *National Life & Accident Ins. Co. v. Whitfield*.⁶³ Here the full flower of the doctrine appeared. From that point on the doctrine of anticipatory repudiation was applied to actions for disability benefits. The rule in Arkansas is stated in a recent case⁶⁴ as follows: "If the insurer renounces the continuing contract

59. 172 Ark. 645.

60. *I.e.*, was the case decided on the theory of a serious present breach or an anticipatory repudiation?

61. *Supra* notes 57 and 56.

62. 49 S. W. (2d) 364.

63. 53 S. W. (2d) 11 (Ark. 1932).

64. *Aetna Life Ins. Co. v. Davis*, 187 Ark. 398, 60 S. W. (2d) 912 (1933).

of insurance upon his part and unequivocally refuses in advance of its maturity to perform it, the insured may, at his option, take the insurer at his word. The insured is then relieved of the duty of further performance on his part and may maintain an action at law for damages before the specified date of expiration. Add to this statement, a line appearing in the *Whitfield*⁶⁵ case and you complete the Arkansas rule: "The measure of such damages is the present value of the past and future installments . . . based on the life expectancy of the insured."

The second group of cases comes closest to a realization of the futility of the application of the doctrine to disability cases. If a company refuses to pay, it will generally write a letter along these lines: "It appears that for sometime past you have not been continuously totally disabled within the meaning of the disability benefit provision contained in the policies. In view of this condition we regret to inform you that no further disability payments will be made and the premiums due on and after the day of , become payable in conformity with the terms of this contract."

In discussing a letter of denial of this type, the United States Supreme Court⁶⁶ said: "Mere refusal upon mistake or misunderstanding as to matters of fact or upon an erroneous construction of the disability clause, to pay a monthly benefit when due is sufficient to constitute a breach of that provision but it does not amount to a renunciation or repudiation of the policy." In this case the company later reconsidered its decision and before trial offered to pay the benefits due.

Even where a company does not make a subsequent offer to pay disability benefits, but actually lapses the policy for non-payment of the premium, it has been held⁶⁷ not to constitute a repudiation. The letter of disclaimer of liability was similar to the one quoted above. Justice Cardozo, in his opinion, after stating that the mere

65. *Supra* note 63.

66. Taken from *Mobley v. N. Y. Life Ins. Co.*, 74 F. (2d) 588 (1935), *aff'd*, 295 U. S. 632 (1935).

67. *N. Y. Life Ins. Co. v. Viglas*, *supra* note 56.

sending of the disclaimer letter did not amount to a repudiation, took up the question of whether the subsequent lapse changed the breach into a repudiation. But says the Court "Renunciation or abandonment if not effected at that stage, became consummate in the plaintiff's view at the end of the period of grace when the Company declared the policy lapsed upon its records. Throughout the plaintiff's argument, the declaration of a lapse is treated as equivalent to a declaration that the contract is a nullity. But the two are widely different under such a policy as this. The policy survived for many purposes as an enforceable obligation, though default in the payment of premium had brought about a change of rights and liabilities." At this point the court discusses the duty of the company to give the so-called non-forfeiture values, *i.e.*, cash surrender value or extended term or paid up insurance, depending upon the option chosen. "None of these duties were renounced. None of them questioned. . . . We hold that upon the facts declared in the complaint the insurer did not repudiate the obligation of the contract but did commit a breach for which it is answerable in damages."⁶⁸

Because of the cases holding that a denial of liability within the terms and conditions of the policy was not a repudiation, the companies renewed their efforts to stem the prodigious liability which the Arkansas courts were imposing upon them. They now argued that a denial of liability based upon the terms of the disability provision was not an unequivocal repudiation.

The point was first raised in the case of *New York Life v. Jacques*⁶⁹ The Arkansas court refused to listen to an argument that such a disclaimer, as set out previously, was not a repudiation, as a matter of law. It is a question of fact for the jury.⁷⁰ The success of insurance companies before juries has hardly been a matter of boast. What the jury thought in this case is obvious.

The companies tried again in *Metropolitan Life Ins. Co. v. Har-*

68. To like effect, cases cited *supra* note 52.

69. 64 S. W. (2d) 96 (Ark. 1933).

70. Two judges dissented in the Jacques case on the ground that the evidence failed to disclose a repudiation.

*per.*⁷¹ The case is interesting as an illustration of inconsistency. The plaintiff, through his attorney, notified the company of his disability. He had a group certificate.⁷² Several days later the claimant's attorney received a letter from the company to the effect that it was writing to the employer under the group policy for information regarding the status of the claimant's insurance. This was on June 27th. On July 6th, nine days later, the company forwarded proofs of claim to be filled out by the claimant and his doctor. On July 14th, the claimant sued. He recovered for anticipatory repudiation of his contract. The court held as a matter of law that the failure of the company to furnish the form proofs of claim immediately upon the receipt of the attorney's letter was a complete renunciation of the contract. There was a very vigorous dissent by four judges.

In the *Jacques* case a denial letter raises a question of fact for a jury as to the existence of a repudiation. One year later, a delay of nine days in furnishing form proofs of claim is, as a matter of law, held a repudiation. The inconsistency of the court is obvious.

But the companies persisted. Success finally crowned their efforts. In the same year as the *Harper* case, the court held in *Home Life v. Ward*⁷³ that a company which writes a letter to an assured stating that under the terms of its disability clauses, the assured is not entitled to monthly benefits is not repudiating the contract so as to give rise to the application of the doctrine of anticipatory repudiation.

The following year the court reaffirmed the *Ward* case. In *Jefferson Standard Life v. Slaughter*⁷⁴ the court held that a letter

71. 70 S. W. (2d) 1042 (1934).

72. The courts have exhibited unusual solicitude for claimants under group certificates. This, at the expense of established legal doctrine. The fact that the assured is a worker; that the coverage is small, seem to weigh quite heavily with the courts. It might also be stated that although most states have statutory requirements for ordinary life insurance policy provisions, very few states have legislated as to group insurance provisions. See CRAWFORD, GROUP INS. 190. Perhaps the courts feel an especial guardianship for this reason also.

73. 75 S. W. (2d) 379, 189 Ark. 862 (1934).

74. 79 S. W. (2d) 58 (1935).

denying liability on the ground that the assured was not totally disabled, because he was working, was not a repudiation. In a space of three (3) years, the Arkansas court reversed its attitude twice.

What then becomes of the doctrine of anticipatory repudiation? Generally, the companies write a carefully prepared denial letter. It would seem that the application of the doctrine must necessarily bog down in the disability cases because of the difficulty of establishing unequivocal repudiation.

The third group of cases portray a preoccupation of the minds of certain judges with another inherent difficulty in the application of the anticipatory repudiation doctrine to the disability cases. What about the measure of damages? The difficulty is well stated by Judge Dennison in his dissent in the *Roscoe* case:⁷⁵ "In my judgment, this case illustrates the evils of laxity in permitting a premature recovery. In such a case as this, plaintiff in a year or two may recover entirely⁷⁶ or is very likely not to live long."⁷⁷ In either case, the true liability is for a short term; but the recovery has been upon the basis of the full expectation of life of a healthy person . . ."⁷⁸

75. 12 F. (2d) at 698 (1925).

76. The following is a statement made by Mr. Eckert, counsel for the Federal Life Ins. Co. at the "Proceedings of the Legal Section of the American Life Convention" in 1927:—"just prior to the time I came down here, I had an investigation made and an inspection to ascertain the physical condition of Jennie Rascoe, and I find she is up and around as actively engaged in business as she ever was before she claimed this from us."

77. In the Whitfield case, *supra* 51, the assured died before the taking of the appeal, but after the verdict in the lower court.

78. This problem weighed heavily with the court in *Menssen v. Travelers*, 5 Fed. Supp. 296 (1933). Most courts accept the American experience table as the measuring stick of one's life expectancy; *cf.* *American National Ins. Co. v. Points*, 81 S. W. (2d), 762 (1935). No more erroneous basis could be found. The table is based upon calculations of the average expectancy of a large number of selected risks, *i.e.*, medically examined or questioned by means of an application as to their health. As such they furnish a base for insurance premiums, since insurance is nothing more than the application of the law of averages. But being an expression of the average, they tell us nothing of the duration of the individual life. This is true even if the measured life is in good health. If ineffective as a measure of the individual life

But in the group insurance cases, the procedure is to pay the face of the policy in installments. If the assured dies before the face amount is paid out, his beneficiary gets the remainder. The courts, therefore, are not vexed with a speculative damage rule.⁷⁹

span in a state of good health, how can these tables measure the life span of a sick person? As the court said in *Huey v. American National Ins. Co.*, "Appellant next contends that because he was totally and permanently disabled he was entitled to recover the \$86.10 per month during his 42.2 years of expectancy of life as shown by the American Experience tables of mortality. Such was not his measure of damages. The mortality table offered is computed upon averages of those in good health and under normal conditions. Obviously a person so critically injured as to be permanently and totally disabled could not hope to live as long as if no such injury had occurred." Unfortunately, this case was overruled by the *Points* case cited *supra* this note—although it was not necessary under the facts in the *Points* case.

Of course, it is possible to use Hunter's Table of Disabled Lives which is a more exact portrayal of an impaired life expectancy. But in the *Whitfield* case, *supra* 51, the court refused to take judicial notice of these tables and insisted on the use of the American Experience Table. The reasoning of the court is of the most circular nature. The company repudiated the contract; the contract was "a policy for the insurance of a healthy man;" therefore, there must be assumed a measure of damages based on the expectancy of a healthy man. This baffling logic was too much for the Arkansas court.

In the following year in *National Life and Accident Ins. Co. v. Sims*, 187 Ark. 969, 63 S. W. (2d) 524 (1933) the court said, "evidence of disease or of ill health or of a hazardous employment may impair or destroy probative effect of tables of expectancy of life. . . ." Most cases take the view that the mortality tables are only evidence subject to being rebutted by evidence indicating a different expectancy. *Robins v. Travelers*, *supra* note 54; *Travelers Protective Assn. v. Stephens*, *supra* note 62.

It has been argued that the courts are called upon quite often to measure damages based upon life expectancy and reference is made to the Workman's Compensation cases and the negligence cases. *Cf.* 13 TEX. L. REV. 301 for the compensation analogy and the *Stephens* case for the tort analogy. The analogies seem erroneous. The rule in the compensation cases flows from a statutory mandate. Further, it is rare that lump sum settlements are given in permanent total cases. Bi-monthly or monthly payments are made for the life of the injured worker.

In the tort cases, there is no other alternative. All damages must be decided in one action. The rule is unfortunate but our courts look sacredly upon the finality of judgments. But *cf.* category 5 *supra* text page —. In the disability cases there is an alternative. Pay the accrued amount. The plaintiff can sue again if the company discontinues payments. He is not splitting a cause of action if the installment contract and lease cases are any criteria.

79. The rule is by no means universal as to group contracts. *Hardie v. Metropolitan Life Ins. Co.*, 7 S. W. (2d) 746 (Mo., 1928); *Boris v. Prudential*, 77 S. W.

The attitude of the courts is merely that the company loses its privilege to pay the face in installments by denying liability.⁸⁰

The fourth group of cases express the majority rule. Most of the cases spend their time hurling invectives at the *Roscoe* case.⁸¹ The majority rule is consistent with the exceptions to the doctrine of anticipatory repudiation as stated in *Roehm v. Horst*.⁸² It eliminates the problem of speculating as to damages.

(2d) 127 (Mo., 1934); *Metropolitan Life Ins. Co. v. Lambert*, 157 Miss. 759, 128 So. 750 (1930).

80. *Metropolitan Life Ins. Co. v. Schneider*, 193 N. E. 690 (Ind., 1935). The illustration of this difference in rule may be seen by comparing the instant case with *Indiana Life v. Reed*, 103 N. E. 77 (Ind. 1913) in the same jurisdiction.

81. It is interesting to trace the Federal cases following the *Rascoe* case. The courts were caught between the Scylla of precedent and the Charybdis of correct law. Therefore, the first case following the *Rascoe* case was very wary in its reasoning. This was the case of *Parks v. Md. Casualty Co.*, 59 F. (2d) 735 (1932). Said the court: "The *Rascoe* case represents the extreme development of the theory (anticipatory repudiation). It was decided by a divided court, a very convincing dissenting opinion by Denison holding that the majority had in its application of the law to the facts extended the doctrine of *Roehm v. Horst* beyond the limits of that doctrine as it was declared by the Supreme Court." Then the court cognizant of its break with the opinion of colleagues on the bench said: "The *Rascoe* case does not support the petition here because the plaintiff here alleges he has performed all obligations required of him by the contract. Nothing remains for him to do so far as he is concerned, if the allegations of the petitioner are to be taken at their face value, the contract has been executed." The court also vested its decision on the ground that only conclusions were stated as to repudiation, in the petition, adduced. Therefore, the allegation was defective.

The criticism became more bold in *Kithcart v. Metropolitan Life Ins. Co.*, 1 Fed. Supp. 719. "The court cannot accept as law the statement of the majority opinion in the *Rascoe* case that the mere examination of a physician every 30 days imposed upon the insured an executory contractual obligation. . . ."

It was left to the *Mobley* case to strike the finishing blows to this unfortunate case. The circuit court judge said: "It (the *Rascoe* case) has been more conspicuously distinguished and disapproved than followed."

Justice Cardozo in the *Viglas* case *supra* note 56 sang the requiem for this case: "*Federal Life Insurance Co. v. Rascoe* . . . was disapproved in *Mobley's* case and is now disapproved again."

Other comments in the *Rascoe* case are equally as deprecatory; *cf.* *Allen v. National Life*, 228 Mo. App. 450, 67 S. W. (2d) 534 (1934): "We deem it wholly illogical." See also *Atlantic Life v. Serio*, 171 Miss. 596, 157 So. 474 (1934).

82. *Supra* note 23.

The fifth classification headed by the *Phifer* case is an attempt by legal reasoning to avoid the pitfalls of the unilateral contract exception to the anticipatory repudiation rule. It is a recognition of the true situation. When a company denies liability, it is a present breach. But if the breach be serious enough why not grant full damages even though the contract is by its terms to continue into the future. Cannot the analogy to tort cases of granting present and future damages in one action for a present breach, be availed of?⁸³ The rule is not subject to criticism. But inquiry must be directed to the point of whether or not a denial of liability is so serious a breach as to entitle plaintiff to present and future damages. Justice Cardozo⁸⁴ expresses the test succinctly and well. "... there are times . . . when the breach of a present duty, though only partial in its extension, may confer upon the injured party the privilege at his election, to deal with the contract as if breached altogether." Correlate this statement with another part of the opinion: "To determine whether a breach avoids the contract as a whole, one must consider what is necessary to work out reparation in varying conditions." Does an assured need redress in the form of future unmatured installments to put himself in a position to shape his conduct for the future? It hardly seems so. Therefore, the rule of this group of cases should not apply to disability cases.

To this point the attitude has been focused on the unfortunate and undeserved consequences of the anticipatory repudiation theory on the companies. What of the assured? Does he need any protection? If he can only collect the accrued amount at the time of a suit, what is to prevent a company from making him sue each month for the previous month's disability. What an effective weapon to compel a settlement, were a company to decide to adopt it! With clogged court calendars, high court fees, the increased suffering of the insured due to the curtailment of his income, the worries of a litigation, and the staggering cost of expert medical testimony, a real problem is raised. There is absolutely no ques-

83. 36 YALE L. J. 263.

84. New York Life Ins. Co. v. Viglas, *supra* note 56.

tion of the honorable and ethical attitude of American life insurance companies. Yet the effect of honest mistake which may bring about unintentionally a vexatious state for the assured requires that some effective procedures should be evolved to protect him. The state of Kentucky has a solution.

There a judgment is given for the present and future payments but directing the future payments to be made in the regular installments as provided in the contract. The case is kept on the docket and the privilege is given the company at any time to come into court and show to the court's satisfaction that the assured is no longer entitled to disability benefits. The judgment for the future payments should read something like this:⁸⁵ "It is further ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant, the further sum of \$ per month,⁸⁶ the first payment to be made on the day of and on payment of \$ on the day of each succeeding month thereafter and continuing throughout his natural life, subject, however, to the right of the defendant to a physical examination of plaintiff not more often than (stipulate time in disability provision), said physical examination to be made, if desired by the defendant on the day of and further to investigate plaintiff's capacity to engage in an occupation for gain for which he is by education, training and experience capable of performing and if upon physical examination and/or satisfactory proof the court finds that the plaintiff herein has recovered to such an extent as to be able to engage in an occupation for gain for which he is by education, training and experience capable of performing, said payments may be after due notice to all parties, and a hearing before the court, under the order of the court, be discontinued and this judgment modified. It is further ordered, adjudged and decreed by the court that this cause should remain on the docket of this court subject to the further orders of the court, in accordance with the terms of this judgment. Subject however, to any compromise,

85. *State Life Ins. Co. v. Atkins*, 9 S. W. (2d) 290 (Tex. 1928).

86. If the disability provision provides for monthly installments.

agreement or settlement that the parties to this suit may make and cause to be entered upon the record."

The Kentucky rule was announced in *Equitable Life Ins. Co. v. Branham*.⁸⁷ The court in substantiating its conclusion said this: "A judgment so qualified . . . fairly interprets and construes the intended contractual obligations as understood and meant by the parties according to the terms of their insurance contracts and more fairly secures for the insured the contracted benefits under the policy than would be realized by him under a different holding whereby he would be required by further repeated action or demand to successively collect each future installment as the same became due, regardless of the fact that his condition of disability remained the same as that existing and upon which he was adjudged to recover the installment then due and payable."

It seems unfortunate that this rule has not received wider acclaim. It is doubly unfortunate that a few jurisdictions are opposed to it.⁸⁸ For, it appears to work out that state of compromise which is the keynote of so much of our economic life.

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87. *Supra* note 56—also for the other cases.

88. The rule is castigated very severely in *Brix v. People's Mutual Life Ins. Co.*, 37 P. (2d) 448 (Cal. 1934); *Mid-Continent Life v. Walker*, 128 Okla. 75, 260 Pac. 1109 (1926) is also *contra*. To like effect, see *Green v. Casualty Co.*, 203 N. C. 767, 167 S. E. 38.