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DAMAGES - INSURANCE CONTRACT - RECOVERY OF PRESENT WORTH OF UNMATURED INSTALLMENTS

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DAMAGES — INSURANCE CONTRACT — RECOVERY OF PRESENT WORTH OF UNMATURED INSTALLMENTS — After paying the twenty-three monthly benefits according to the provisions in the plaintiff's policy relating to total and permanent disability, the defendant decided that the plaintiff was no longer totally disabled, and thereupon stopped the monthly payments, demanded payment of premiums, and, when premiums were not paid, declared the policy lapsed on its books. Plaintiff brought suit, alleging continuance of his disability and repudiation of the insurance contract by the defendant, and he claimed as damages installments already due and installments that would mature during the period of his life expectancy. Defendant demurred. *Held*, there has been no such breach or repudiation as entitles the plaintiff to future installments, and, since the benefits matured are less than the jurisdictional amount, the demurrer should be sustained. *New York Life Ins. Co. v. Viglas*, 297 U. S. 672, 56 S. Ct. 615 (1936).

The necessity of deciding whether, when a contract is repudiated, future installments can be claimed at once was avoided by the Court by simply denying that a refusal to pay benefits is a repudiation if made in good faith and only for the purpose of testing liability.[1] That the defendant had also declared the policy lapsed on its books was not deemed enough to affect this conclusion.[2] The Court pointed out the fact that the policy continued to exist for many purposes,[3] and seemed to feel that the insurance company was actually

[1] Accord: Mobley v. New York Life Ins. Co., 295 U. S. 632, 55 S. Ct. 876 (1935). See also, Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780 (1899); Dingley v. Oler, 117 U. S. 490, 6 S. Ct. 850 (1885); Pierce v. Tennessee Coal, Iron & R. R., 173 U. S. 1, 19 S. Ct. 335 (1898); Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895 (1906); Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 S. E. 338 (1908); Woods v. Provident Life & Acc. Ins. Co., 240 Ky. 398, 42 S. W. (2d) 499 (1931); Kimel v. Missouri State Life Ins. Co., (C. C. A. 10th, 1934) 71 F. (2d) 921, discussed in 33 MICH. L. REV. 122 (1934).

Contra: Federal Life Ins. Co. v. Rascoe, (C. C. A. 6th, 1926) 12 F. (2d) 693. For consideration of what degree of renunciation justifies an anticipatory breach action, see 9 NOTRE DAME LAWYER 433 (1934).

[2] Mobley v. New York Life Ins. Co., 295 U. S. 632, 55 S. Ct. 876 (1935).

[3] The Court refers to surrender rights, cash value rights and re-insurance privileges.

affirming the policy, relying on its terms.[4] While the position that such a breach as is involved here is not a repudiation is surely not beyond dispute,[5] it is submitted that the Court has reached a desirable result, and one which should follow even if it is decided that there has been a repudiation. If we apply in the traditional manner the rule allowing recovery of future installments in cases of anticipatory breach[6] or of an actual breach plus repudiation,[7] we should find that the facts of the principal case bring it within the exception made for unilateral contracts.[8] Even if we recognize that this exception is grounded in the fallacious notion of *Hockster v. De La Tour*[9] that we allow anticipatory breach in order to relieve the innocent party from the necessity of performing his own obligations,[10] and if we choose to ignore this exception, there are other bases for denying recovery of future installments in the present case, in spite of a proper desire to avoid multiple litigation when a contract has been repudiated.[11] In the first place, there are unusual difficulties involved in deciding what future installments should be allowed.[12] Both the duration of life and the duration of disability are uncertain, and the life tables used to resolve the first problem can at best offer averages.[13] Secondly, many courts have insisted that future installments cannot be given because to do so is to ignore the expressed intent of the parties as to time and manner of payment.[14]

[4] See 35 COL. L. REV. 105 (1935), discussing Kimel v. Missouri State Life Ins. Co., (C. C. A. 10th, 1934) 71 F. (2d) 921.

[5] The principal case reverses the decision in Viglas v. New York Life Ins. Co., (C. C. A. 1st, 1935) 78 F. (2d) 829. Also see Parker v. Russell, 133 Mass. 74 (1882).

[6] Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780 (1899), is the leading American case.

[7] 3 WILLISTON, CONTRACTS, § 1317 (1931).

[8] Cases collected in 99 A. L. R. 1171 (1935). See 45 HARV. L. REV. 585 (1932); McCready v. Lindenborn, 172 N. Y. 400, 65 N. E. 208 (1902); Allen v. National Life & Acc. Ins. Co., 228 Mo. App. 450, 67 S. W. (2d) 534 (1934). Contra: the principal case in the circuit court, Viglas v. New York Life Ins. Co., (C. C. A. 1st, 1935) 78 F. (2) 829; also Aetna Life Ins. Co. v. Phifer, 160 Ark. 98, 254 S. W. 335 (1923); Metropolitan Life Ins. Co. v. Schneider, 99 Ind. App. 570, 193 N. E. 690 (1935); Robbins v. Travelers' Ins. Co., 151 Misc. 151, 269 N. Y. S. 843 (1934), apparently disregarding dictum to the contrary in Donlen v. Fidelity & Casualty Co., 117 Misc. 414, 192 N. Y. S. 513 (1921); Needham v. Am. Nat. Ins. Co., (Tex. Civ. App. 1935) 78 S. W. (2d) 1059.

[9] 2 El. & Bl. 678, 118 Eng. Rep. 922 (1853), the leading case on anticipatory breach.

[10] 31 MICH. L. REV. 526 (1933); 24 CAL. L. REV. 216 (1936).

[11] 31 MICH L. REV. 526 (1933); 45 HARV. L. REV. 585 (1932).

[12] Cases collected in 81 A. L. R. 379 (1932). See 24 CAL. L. REV. 216 (1936).

[13] See dissent in Federal Life Ins. Co. v. Rascoe, (C. C. A. 6th, 1926) 12 F. (2d) 693; GRAQUE and MCCLURE, PRESENT VALUE TABLES, 4th ed. (1904); cases collected in 81 A. L. R. 379 (1932) and 99 A. L. R. 1171 (1935). For cases illustrating peculiar harshness of granting future damages in these circumstances see National Life & Acc. Ins. Co. v. Whitfield, 186 Ark. 198, 53 S. W. (2d) 10 (1932), and Howard v. Benefit Assn. of Railway Employees, 239 Ky. 465, 39 S. W. (2d) 657 (1931).

[14] See 81 A. L. R. 379 (1932). This, however, seems rather an unfortunate base to choose since it lets the one repudiating a contract rely on its terms.

Finally, it seems that when, as in the federal courts, declaratory judgments are not available the mere necessity for letting insurance companies make good faith tests of their liability without being unduly penalized for so doing would justify a relaxation of the endeavor to settle as much as possible in one lawsuit.[15] Such exceptions are hardly foreign to a mature legal system. It is worth noting that some courts have tried a middle ground in these cases.[16] Thus, judgment has been given at once for future installments, but it has been ordered that payment be made only from time to time as the contract provided. Both the practicability and the legal justification for such a result have been criticized.[17] While we can hardly be desirous of giving insurance companies new ways to delay payments and avoid assumption of responsibility, yet it seems that no matter whether we do or do not find a repudiation they at least deserve the protection given in the principal case.

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[15] 31 MICH. L. REV. 526 (1933).

[16] 20 ST. LOUIS L. REV. 278 (1935); cases collected in 81 A. L. R. 379 (1932), and 99 A. L. R. 1171 (1935).

[17] Brotherhood of Locomotive Firemen & Enginemen v. Simmons, 190 Ark. 480, 79 S. W. (2d) 419 (1935); Green v. Inter-Ocean Casualty Co., 203 N. C. 767, 167 S. E. 38 (1932); Brix v. People's Mut. Life Ins. Co., 2 Cal. (2d) 446, 41 P. (2d) 537 (1935), discussed in 24 CAL. L. REV. 216 (1936). See also cases cited in 81 A. L. R. 379 at 386 (1932), and 99 A. L. R. 1171 at 1177 (1935).