

ST. MARY'S UNIVERSITY SCHOOL OF LAW
FINAL EXAMINATION

CONTRACTS I
MR. FLINT

Fall term
December 16, 1991
Id. No. _____

Essay -- 12 pages

PLEASE READ CAREFULLY

ALL ANSWERS ARE TO BE WRITTEN ON THE BLUE BOOKS PROVIDED WITH THIS EXAMINATION. THE EXAMINATION IS TO BE TURNED IN WITH THE ANSWERS AT THE END OF THE EXAMINATION AND IS NOT TO BE KEPT BY THE TESTEE. NO COPY OF THIS EXAMINATION MAY BE REMOVED FROM THE EXAMINATION ROOM DURING THE EXAMINATION.

There are six questions of indicated value. The time for completing the examination is three hours.

1. This examination is "closed book." Assume that all action takes place in a jurisdiction in which the Uniform Commercial Code is in effect.
2. Be sure to answer the specific question that is asked. Information supplied relating to some unasked question will not increase your score, consumes your time needed to answer the asked questions, and could lower your score if erroneous.
3. If additional facts are necessary to resolve an issue, specify what additional facts you believe to be necessary and why they are significant. You may not make an assumption that changes or contradicts the stated facts.
4. Quality, not quantity, is desired. Think through and briefly outline your answer before you begin to write.
5. Write legibly. Be sure to formulate your answers in complete sentences and paragraphs with proper grammar. Failure to so do will result in an appropriately lower score.
6. Do not seek an interpretation of language in the questions from anyone. If you sense ambiguity or typographical error, correct the shortcoming by shaping the question in a reasonable way and by recording your editorial corrections in your answer.

Under the Honor Code, when you turn in this examination, you affirm that you have neither given, received, nor obtained aid in connection with this examination, nor have you known of any one so doing. If you cannot make this affirmation, you shall note such fact on your examination and must immediately advise the Dean of the reason therefor.

I.

[16.67%--20 minutes]

Arunah Hubbell entered into a contract of sale for a commercial office building for \$80,000 with John Hartt. During the negotiation process, Hartt claimed that the building would generate profits in the five-figure range. Afterwards under Hubbell's management, the building operated at a loss.

Hubbell has come to you as an associate at Suem and Stickem, P.C., to determine whether he would be successful in a lawsuit against Hartt. Hubbell has brought the contract of sale with him, which states in one clause: "No representation has been made other than those stated herein." Evaluate this potential lawsuit, explaining your rationale.

II.

[16.67%--20 minutes]

Amos Carll told Mr. and Mrs. Nicholas Gasaway that the used car he was selling them was in "great condition and was never mistreated by its prior owner, a nun." In fact, unknown to Carll, the nun had been a bad driver and repeatedly wrecked and repaired the vehicle. The Gasaways signed a contract of sale which conspicuously stated there were "no express or implied warranties, particularly not the implied warranty to MERCHANTABILITY", involved in the sale. Two days later the car fell to pieces because of its many prior accidents, and the Gasaways were injured.

The Gasaways have come to you as an associate at Blue Stocking Law Firm, P.C., for advice as to what to do. Give your recommended course of action and explain your reasoning for each step. Does it make any difference that Carll did not know nor have reason to know of the car's defects.

III.

[16.67%--20 minutes]

Every time his rich Aunt Sarah Gilmore came to town she gave Davis Flint a gift of one thousand dollars. Her next visit was scheduled for the first of April, but Flint ran short of funds before that date. Flint went to his friend Joseph Baker and asked to borrow two hundred dollars, signing a promissory note in which he agreed to repay the money "when Aunt Sarah Gilmore next arrives in town." Unfortunately, Aunt Sarah Gilmore died suddenly, leaving all of her fortune to her daughter Agnes Gilmore.

Flint has come to you as an associate of Blue Stocking Law Firm for advice as to what to do when Baker presents the promissory note for payment. Explain your recommended course of action.

IV.

[16.67%--20 minutes]

A series of strikes rocked the MacClannachan Coal Company and lead to the formation of a union, with which the company signed a contract. The union agreed not to strike for five years in return for wage and benefits agreements, including a requirement that MacClannachan Coal Company pay the sum of 15 cents for each ton of coal produced into a welfare fund for retired employees and their dependents. Four years later the union called a strike and the company stopped making the welfare fund payments. While the strike was still underway, the trustee of the welfare fund sued the MacClannachan Coal Company for the amounts allegedly due.

You are the judge. Provide your opinion with reasons.

V.

[16.67%--20 minutes]

Garret Voshell's Food Mart has promised to buy 4,000 boxcars of bananas for \$400,000 and George Christian's Produce has promised to sell the bananas to Garret Voshell's Food Mart. The contract contains the following provision:

The parties promise not to assign this contract. Any purported assignment will be void from the beginning. The parties recognize the significance of this limitation and agree it controls over any trade usage or any other limitation allowing contract rights to be assigned.

Shortly after the contract was entered into, George Christian's Produce assigned its right to payment from Garret Voshell's Food Mart to Andrew Melvin's Farm Coop.

Garrett Voshell has entered your office as an associate at Blue Stocking Law Firm, P.C., to determine who he is to pay when George Christian's Food Mart delivers the bananas. Provide your advice with reasons.

VI.

[16.67%--20 minutes]

Legal historiography indicates that one of the great disputes historians have about the development of the law relates to what causes it to develop. The Doctrinal School, dominate before 1950, held that judges derived rules of law autonomously, such as from prior appellate opinions in a scientific manner, unaffected by developments outside the law. The Wisconsin School, beginning about 1950, held the opposite, that judges derived rules of law on the basis of policy, which depended on events outside of the law rather than such things as prior appellate opinions.

From your understanding of the history of contracts since 1602, which of these two schools is correct (at least for the subject of contracts since 1602). Discuss.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. COHEN

Cite as 254 F.2d 417

Defendant insurance company appeals from the judgment awarding damages for breach of contract, and plaintiff cross-appeals from the denial of damages for breach of the alleged warranty. This Court has jurisdiction under 28 U.S.C. § 1291.

Plaintiff Mary Troutfelt Cohen is the surviving spouse of the insured Martin E. Troutfelt, and beneficiary of a contract of insurance between her deceased husband and the defendant John Hancock Mutual Life Insurance Company, a corporation, hereinafter, the "company." The facts must be stated in some detail in order that we may understand the case.

I—Facts and Findings

Troutfelt originally applied to the defendant company in writing under date of February 1st, 1939 for a twenty-pay life policy, stating he wanted family income provisions for a twenty year term. (Form A, dated 2-1-39.) Such a policy, numbered 3171136, with such twenty year term, was thereafter issued.

On May 31, 1939 the insured applied in writing to the company to convert or exchange his existing policy to a "15 year Endowment with Family Income

Provisions Policy." No space existed on such application for the insured to designate the term of the "Supplementary Provision respecting Family Income," which was to be part of the policy. But he was informed and on his "Application for Exchange or Conversion" dated May 31, 1939 he represented:

"The statements made in the application on which the said original policy was issued, a copy of which is to be attached to and made a part of the said new policy, are hereby declared to be true and complete, and are confirmed as of the date of this application, and it is agreed that the said statements shall be accepted by the said Company as the basis for the new policy in like manner and with the same effect as if the said statements were herein specifically set forth."

Sometime after May 31, 1939 and before July 11, 1939 Troutfelt received from the company a form of application, to be filled in, "For Supplementary Provision for Family Income, to be attached to Existing Policies." Although this form is apparently signed and filled in by the insured (Troutfelt) in ink, three blanks thereon are filled in by typewritten figures: to-wit, the figures "15", "10", and "\$44.30", in the following two "boxes":

- "11. Term of the Supplementary Provision
... 15... years.
(Insert 10, 15, or 20)
14. Premium to be paid
for ... 10 ... years
(Insert 5, 10, or 15)

Amount of
Premium:
\$44.30"

It is an admitted fact that "all typewriting was inserted on the form by a representative of defendant and none by Martin E. Troutfelt." This application is dated July 11, 1939.

On July 27, 1939 Policy No. 3223099 (the policy in suit) was issued under date of February 24, 1939; it being a 15 year Endowment Policy with premiums

payable for 15 years. The relevant documents attached to the policy and made a part of it were: (1) a photostat of the prospective insured's February 1, 1939 Application for the original policy—Part A, Statements to the Company Agent (hereinafter mentioned); (2) a photostat of the insured's May 31, 1939 Application for Exchange or Conversion;

(3) a photostat of the insured's July 11, 1939 Application for Supplementary Provision for Family Income; and, (4) a printed form No. 1260 denominated "Supplementary Provision for Family Income with Benefit for total and Permanent Disability Waiver of Premiums." This is the crucial document.

Inserted in this printed form by means of a typewriter were: (a) the number of the new policy, "3223099"; (b) the name of the insured, "Martin E. Troutfelt"; (c) the figures "20" (on two occasions) as the number of years from date of issue within which the insured's death must occur and during which the family income payments were to be made to the beneficiary; (d) the figure "\$43.20" as the annual premium for the "annuity certain"; (e) the figure "\$1.10" as the annual premium for the waiver of the annuity certain premium if under the permanent and total disability provisions there occurred a waiver of its premiums; and, (f) the figure "15", representing the number of years the special "annuity certain" and total and permanent disability premiums would be payable, "in addition to and under the same conditions as the regular premium under the policy."

Thus, the company through a claimed scrivener's error,¹ issued a 15 year policy with a 20 year family income provision with premiums to be paid for 15 years, when it assertedly "always limited itself" to a 15 year family income provision with premiums payable for 10 years in any 15 year Endowment Policy.

The insured died on June 28, 1945 within the 20 year period and with all premiums paid. Due proof of death was made to the company; the policy with all its riders was delivered to the company, and on July 26, 1945 the policy was endorsed by the company as follows:

"Insured died June 28, 1945.
Settlement in accordance with the

1. The court, in its written opinion, stated the defendant made a mistake, but the court made no finding of mistake, although it found and referred to defendant's "al-

Supplementary Provision for Family Income, dated February 24th, 1939, attached hereto.

John Hancock Mutual Life Ins.
Company
by (signed) Elmer L. French
Secretary

Dated at Boston, Mass., July 26,
1945."

This Supplementary Provision for Family Income contained the following material provisions:

"If * * * the death of the Insured shall occur within 20 years from the date hereof [February 24, 1939], the Company * * * will, in lieu of immediate payment of the amount insured in one sum, pay to the beneficiary * * * on the first day of each policy month following the death of the Insured, a monthly income * * * the last monthly income payment to be made on the first day of the policy month directly preceding the expiration of 20 years from the date of issue of the provision. Upon the expiration of the said period the Company will pay the amount insured. * * * (here \$5,000).

* * *

"The special premium [for this monthly income] will be payable in addition to and under the same conditions as the regular premium under the policy during 15 years from the date of issue of this provision." [Emphasis added.]

Pursuant to the two documents last mentioned above, after the insured's death the company paid to the beneficiary each month the sum of \$49.98 to and including February 1st, 1954. The company then offered to make to plaintiff a lump sum payment of \$4,993.59, "due and payable on February 24, 1954," but refused to pay any further monthly sum.

leged mistake." We, of course, are bound by the findings. But we will refer in this opinion to the insurance company's "mistake."

The beneficiary refused the lump sum payment.

* Defendant claimed below and here claims that the contract agreed upon provided, as to family income benefits, only 15 years (to February 1, 1954) of monthly payments in return for 10 years of premiums, as shown by the application allegedly submitted by the insured; and that the policy as written contained a clerical error and therefore did not represent the contract of the parties. Mistake was raised as an affirmative defense and by way of counterclaim for reformation. Both the defense and counterclaim were rejected by the District Court as unproved and barred by the statute of limitations.

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IV—Anticipatory Breach

Appellant's sixth alleged error is the finding that the appellant committed an anticipatory breach of said contract on or about May 13th, 1954.⁷

Appellant cites *Cobb v. Pacific Mut. Life Ins. Co.*, 1935, 4 Cal.2d 565, 51 P.2d 84; 12 Cal.Juris. 2d Contracts, § 250, and Restatement of Contracts, § 318. Cal.Juris. 2d cites the *Cobb* case as authority for the rule there can be no anticipatory breach of a unilateral contract in California, and *Flinn v. Mowry*, 1901, 131 Cal. 481, 63 P. 724, 1006, and *Brix v. People's Mut. Life Ins. Co.*, 1935, 2 Cal.2d 446, 41 P.2d 537, (as well as *Cobb*, supra) for the proposition that

"* * * notwithstanding the failure or refusal to pay the installment, the other party cannot treat the contract as repudiated and demand payment in full, contrary to the terms of the contract providing for payment in installments."

7. Finding 14: "On or about May 13, 1954 defendant notified plaintiff in writing that it 'does not consider it is liable for any further monthly payments under the family income provision', and that it would pay a final payment of \$4,993.59

Appellee here urges that there yet remains a condition to be performed by the plaintiff—the surrender of the policy to the defendant in Boston. This being so, and relying on *Corbin on Contracts* § 967, he states that the plaintiff can maintain an action at once for anticipatory repudiation. *Corbin* divides his discussion of repudiation of unilateral insurance contracts into two classes: First, "those in which the insurer undertakes to pay a definite sum of money at a specified future time or on the happening of a future event that is certain to occur, but the time of which is uncertain. * * * A second class consists of disability and annuity policies. * * *" ("Annuity" here is used, we presume, in its usual sense and not as an "annuity certain" in length of time as it was in the instant case.) In reference to the first class of cases, *Corbin* states:

"It is well settled by ample authority that an action lies at once for anticipatory repudiation by an insurer, either for the recovery of premiums paid or for damages." *Corbin*, § 968.

We need not go into *Corbin's* "ample authority," nor determine if this action falls within the limited type of actions which *Corbin* states can be filed,—for recovery of premiums or damages.

The contract here under consideration is a "payment certain" insurance contract. It has become, in effect, an unconditional unilateral contract for the payment of money in future installments. There were no contingencies which might occur to give the company a right to refuse payment. Even should the beneficiary have died, the "payment certain" would have been payable to her heirs. Particularly, after the insured's death and the company's endorsement on July 26, 1945 is this true. The insurer then undertook to pay certain sums each

but only upon surrender of the policy. Thereby defendant committed an anticipatory breach of the said contract entered into between it and said Troutfelt." [Tr. p. 104.]

month and a larger certain sum at a later date.

This contract falls neither into Corbin's first class—a definite sum or sums payable on a future event certain to occur, but uncertain as to the time of occurrence—nor into his second class—the disability and annuity policies providing for periodic payments for an indefinite time." It is a contract wherein the time for payment is certain and there remains no condition or covenant for performance by the plaintiff.

Corbin does not like the "dicta" to the effect that there can be no anticipatory breach of a unilateral contract because in the first class of cases the doctrine is in fact applied. (See cases cited at Corbin, § 968, n. 35.) Nor does he care for the rule that the doctrine of anticipatory breach is inapplicable to a case of an unconditional unilateral contract for the payment of money in installments, but he cites no authority to the contrary. (Corbin, §§ 965, 969.)

[5] We are in essence here asked to hold that the doctrine of anticipatory breach applies to an unconditional unilateral insurance contract in a case where the insurer has promised to pay definite sums of money at specified future dates and that this should be declared by the Federal Court to be the law of New Mexico because an eminent writer and authority on contracts disagrees with the more recent New York cases and the Massachusetts rule and two Supreme Court cases. (Corbin, § 968, n. 34.)

We are asked to so rule in a case where the "present value" of future payments was not raised below, nor apparently considered by the trial court. Corbin states:

"Some of the courts denying that the insurer has committed a total breach by anticipation base their decision upon the ground that the contract is a unilateral contract for the payment of money. That this is not a good reason has already been argued in a previous section. The decision of the Supreme Court does not rest upon it; indeed, in the opin-

ion rendered it is in part, at least, rejected. We differ with the court in holding that there was no total breach by anticipatory repudiation; but its reasoning and analysis may be otherwise approved. The decision itself need not be regretted, if it leads to the granting of the truly 'appropriate relief' in all such cases. This is a single decree that money already overdue shall be paid, with interest, and that future instalments shall be paid as they fall due.
* * * Corbin, § 969, pp. 893-4.

Williston on Contracts states the general rule to be "that no unilateral promise for an executed agreed exchange to pay money at a future time can be enforced until that day arrives." (Williston, § 1328; accord, Restatement, Contracts § 318.) With respect to the applicability of the doctrine of anticipatory breach to future disability payments, he says: "[T]here remained divided opinions until two recent decisions of the Supreme Court of the United States," citing *Mobley v. New York Life Ins. Co.*, 1935, 295 U.S. 632, 55 S.Ct. 876, 79 L.Ed. 1621; *New York Life Ins. Co. v. Viglas*, 1936, 297 U.S. 672, 56 S.Ct. 615, 80 L.Ed. 971; the *Brix and Cobb* cases, *supra*; and, 24 Calif.L.Rev. 216.

Williston goes on:

"The only argument for allowing immediate recovery of a future payment due under such a (disability) policy is the hardship supposedly imposed on the insured of bringing successive suits." (§ 1330A.)

He then points out how this can be avoided by the courts' "full exercise of equitable powers." He quotes from *Mobley v. New York Life Ins. Co.*, *supra*, to the effect that if the insured is

"* * * allowed a present recovery for all future benefits, the calculations on which insurance business is done would be upset, and the purposes for which the benefits were made payable only in installments would often be defeated." (Ibid.)

Williston then criticizes as "extreme" the application of the doctrine to a non-insurance case in Texas,⁸ although "the present value" was therein determined, after use of expectancy tables—a value not herein considered by the trial court.

We conclude the general rule to be that the doctrine of anticipatory breach has no application to suits to enforce contracts for future payment of money only, in installments or otherwise. *Cobb v. Pacific Mutual*, supra; *Flinn v. Mowry*, supra; *Brix v. People's Mutual Life Ins. Co.*, supra; *Sulyok v. Penzintezeti*, 279 App.Div. 528, 111 N.Y.S.2d 75, 82; 105 A.L.R. 460; Restatement, Contracts, §§ 316-318; 5 Williston, Contracts, 3740-3743; 12 Cal.Jur.2d, Contracts, §§ 246-250; see also 24 Calif.L.Rev. 216.

Appellee seeks to distinguish the *Brix* and *Cobb* cases on the ground they deal with permanent and total disability only (which is true), and the *Flinn v. Mowry* case, as not a case of anticipatory breach, there being no repudiation. But he relies on *Caminetti v. Manierre*, cited as *Caminetti v. Pacific Mutual Life Ins. Co.*, 1943, 23 Cal.2d 94, 142 P.2d 741, which states:

"The wrongful cancellation of a contract of insurance under the certain circumstances is somewhat analogous to a breach by anticipatory repudiation. In the instant case the old company is insolvent and is being liquidated. It cannot perform under the noncancellable policies it had issued. They have been in effect cancelled. The situation is thus analogous to a breach by anticipatory repudiation. Anticipatory breach is recognized in California. 6 Cal.Jur. 457. Upon the repudiation the promisee may immediately bring an action for future damages. *Hollywood Cleaning & Pressing Co. v. Hollywood L. Service*, 217 Cal. 131, 17 P.2d 712; *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. And 'It is true that in most cases the determination

of future damage is surrounded with many difficulties, but it hardly rests with defendant to complain of such difficulties, since they exist only because of the wrongful act of the defendant, itself. *Seymour v. Oelrichs*, supra.' *Hollywood Cleaning & Pressing Co. v. Hollywood L. Service*, supra, 217 Cal. 134, 17 P.2d 713.

"The cases of *Cobb v. Pacific Mutual Life Ins. Co.*, 4 Cal.2d 565, 51 P. 2d 84; *Brix v. People's Mutual Life Ins. Co.*, 2 Cal.2d 446, 41 P.2d 537, and *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 36 P. 955, 24 L.R.A. 715, 42 Am.St.Rep. 93, were concerned only with the question of the recovery of the payments that might become due for continuance in the future of the existing disability, as well as payments past due. There was not involved the issue of damages for a total repudiation of the contract of insurance where it is beyond the power of the insurer to respond in the future for future damages." *Caminetti v. Manierre*, supra, 142 P.2d at page 746.

[6] Appellant's reliance on 12 Cal. Jur. 2d, § 250 is criticized by appellee, who states correctly that "the statement of law in texts is no sounder than the cases that are cited to support the text." Appellee then cites the *Caminetti* case, which states *Brix* and *Cobb* and *Robinson* are not controlling because "there was not involved the issue of damages for a total repudiation of the contracts of insurance where it is beyond the power of the insurer to respond in the future for future damages." [Emphasis added.] There is not the slightest suggestion here that the *John Hancock Mutual Life Insurance Company* "cannot in the future respond for future damages." We recognize the possible distinction between "disability contracts" which are always, in effect, conditional, and contracts like the one in suit which are entirely unconditional. But we find no in-

8. *Pollack v. Pollack*, Tex.Civ.App., 23 S.W. 2d 890, Tex.Com.App., 39 S.W.2d 853.

question in either the law of New Mexico or of California of an intent to depart from the majority view that unconditional unilateral contracts for the payment of money in installments are not the proper subjects for the doctrine of anticipatory breach.

It is our conclusion that the theory of anticipatory breach is not here applicable to make it so where the defendant insurer has disputed liability in good faith would change the terms of the contract executed by the insurer and force him to pay now what he contracted to pay later; that the court should decree that money already overdue shall be paid now with interest; and that future installments shall be paid as they fall due, including the final payment.

What we have said with respect to the alleged error in holding an anticipatory breach controls the seventh specification of error, and requires us to hold the judgment as given to be error.

CAMINETTI v. MANIERRE
142 F.2d 741

Appellants in this case were the holders of noncancellable (non-can) disability insurance policies issued by The Pacific Mutual Life Insurance Company of California, called the old company. They belong to the same general group of "non-can" pol-

policyholders referred to in the case of Caminetti v. Pacific Mutual, etc., Co., 22 Cal.2d 77, 136 P.2d 779. They gave notice of rejection of the reinsurance offered by Pacific Mutual Life Insurance Company, the new company, in conformity with the rehabilitation and reinsurance agreement and plan discussed in the above-cited case, and within the proper time filed their claims for damages with the insurance commissioner as liquidator of the old company pursuant to the order for liquidation referred to in the above-cited case. Their claims being allowed for a lesser sum than demanded, they petitioned the superior court under section 1032 of the Insurance Code, St.1935, p. 544, to test the validity of the commissioner's allowance. They were denied relief and now appeal. Appellants' insurance policies were in full force and effect and all premiums had been paid on July 22, 1936, the date as of which their right to damages was fixed.

According to the bill of exceptions, appellants' (petitioners') petition requested the issuance of an order to the commissioner to show cause why their claims should not be allowed in full. They named the new company and the commissioner as parties. The petition charged that they had been prejudiced by the application of an erroneous measure of damages. The order to show cause was issued and came on for hearing. Counsel for the commissioner stated that pursuant to the suggestion of the court conferences had been held between counsel for the parties from which it appeared that the principal point of disagreement was the proper measure of damages to apply to certain facts; that agreement had been reached as to some facts including the information disclosed by the records of the old company and its underwriting and claims experience, but they could not agree upon the evidence appellants claimed to be available to establish the price at which appellants might have obtained equivalent policies in another company within a reasonable time after July 22, 1936, nor whether any company regularly issued similar policies. It was stipulated that counsel for each party would express his views of the proper legal measure of damages, and what he would be able to prove in support thereof, and upon the determination of the court as to the correct measure, the parties could present such evidence as they desired. Thereupon, counsel for the commissioner made a statement of facts and the law relied upon by

the commissioner. He stated that the correct measure was the difference between the premiums that would have been paid under all the "non-can" policies and the benefits that would have been payable thereunder, except for the insolvency, each calculated at its present value, those factors being based upon the past experience of the old company and other data; that each policyholder would be entitled to his share of the total difference. This might be called the theory of averages or probabilities. He stated that:

*"The Commissioner has therefore taken the difference between these two figures for each policyholder on the basis of his attained age on July 22, 1936, as the measure of the damages for such policyholder. * * **

"In making this computation, we have computed when the disability payments would, on the basis of past experience, have been made in the future. These would have been paid over a number of years. We have discounted these payments to their present value, computing such an amount as, if put at simple interest at seven per cent, would permit the future payments at the times when it is computed they would have been payable, and there has also been deducted the premiums which such policyholders would have been compelled to pay to keep their policies in effect, also discounted to their present worth on a similar seven per cent simple interest basis. By following this theory and this method the Commissioner has computed that petitioner George W. Manierre would be entitled to \$1411.23 and petitioner Victor Levine would be entitled to \$246.41 (the amounts allowed by the commissioner)." (Emphasis added.)

Counsel for the new company then stated its theory of the measure of damages as being the return of the unearned portion of the last premium paid. No appeal was taken by the new company.

Counsel for appellants stated their theory to be the reasonable replacement cost of the insurance, that is, the cost of obtaining similar insurance in another company from July 22, 1936, to the maturity specified in the old policy. The court then rendered an oral opinion "that the measure of damages advanced by the Insurance Commissioner and used by him in the computation of the damages allowed to the petitioners * * * (appellants) was the proper legal measure of damages." Thereupon, appel-

lants made an offer to prove by testimony of actuarial experts the replacement value of appellants' policies, supported by a comparison with similar policies of other insurance companies, experience tables computed by companies showing similar insurance, and experience of the old company; and testimony of investment experts that a reasonable rate of interest for investments is $3\frac{1}{2}\%$. Counsel for the commissioner objected to the offer on various grounds including its failure to show what, if any, policies similar to those of appellants were available. The objection was sustained and appellants rested. The court dismissed the petition.

• • • •

[8,9] The wrongful cancellation of a contract of insurance under the certain circumstances is somewhat analogous to a breach by anticipatory repudiation. In the instant case the old company is insolvent and is being liquidated. It cannot perform under the noncancellable policies it had issued. They have been in effect cancelled. The situation is thus analogous to a breach by anticipatory repudiation. Anticipatory breach is recognized in California. 6 Cal. Jur. 457. Upon the repudiation the promisee may immediately bring an action for future damages. *Hollywood Cleaning & P. Co. v. Hollywood L. Service*, 217 Cal. 131, 17 P.2d 712; *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. And "It is true that in most cases the determination of future damage is surrounded with many difficulties, but it hardly rests with defendant to complain of such difficulties, since they exist only because of the wrongful act of the defendant, itself. *Seymour v. Oelrichs*, supra." *Hollywood Cleaning & P. Co. v. Hollywood L. Service*, supra, 217 Cal. 134, 17 P.2d 713.

The cases of *Cobb v. Pacific Mutual Life Ins. Co.*, 4 Cal.2d 565, 51 P.2d 84; *Brix v. People's Mutual Life Ins. Co.*, 2 Cal.2d 446, 41 P.2d 537, and *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 36 P. 955, 24 L.R.A. 715, 42 Am.St.Rep. 93, were concerned only with the question of the recovery of the payments that might become due for continuance in the future of the existing dis-

ability, as well as payments past due. There was not involved the issue of damages for a total repudiation of the contract of insurance where it is beyond the power of the insurer to respond in the future for future damages.

That the insureds will be damaged in the instant case is clear. They have forever lost the protection against possible loss which was secured to them by their policies. They have lost the chance they had to be specifically benefited by that protection. While it may be true that the majority of the policyholders would in the ordinary course of events pay their premiums but never receive disability payments, yet taken as a group the probabilities based upon actuarial tables and other data may definitely establish as to each policyholder that he had a reasonably certain chance which is of ascertainable value. The fact of the loss may clearly appear. The chief difficulty is the correct method for ascertaining the value of that contract right, that is, the amount of damages that will be suffered.

• • • •

For the foregoing reasons we believe that the measure of damages adopted by the commissioner is the correct measure of the amount to be allowed disability policyholders of the character involved where the insurer becomes insolvent. We do not express any views with respect to the proper measure to be used in life or disability policies where the insurer has repudiated a

policy but is not prevented by insolvency from being compelled to continue the insurance.

The orders from which the appeal is taken are affirmed.

FINAL EXAMINATION
CONTRACTS I
MR. FLINT

Essay--5 pages

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1. This examination is "closed book." Assume that all action takes place in a jurisdiction in which the Uniform Commercial Code is in effect.
2. Be sure to answer the specific question that is asked. Information supplied relating to some unasked question will not increase your score, consumes your time needed to answer the asked questions, and could lower your score if erroneous.
3. If additional facts are necessary to resolve an issue, specify what additional facts you believe to be necessary and why they are significant. You may not make an assumption that changes or contradicts the stated facts.
4. Quality, not quantity, is desired. Think through and briefly outline your answer before you begin to write.
5. Write legibly. Be sure to formulate your answers in complete sentences and paragraphs with proper grammar. Failure to do so will result in an appropriately lower score.
6. Do not seek an interpretation of language in the questions from anyone. If you sense ambiguity or typographical error, correct the shortcoming by shaping the question in a reasonable way and by recording your editorial corrections in your answer.

Under the Honor Code, when you turn in this examination, you affirm that you have neither given, received, nor obtained aid in connection with this examination, nor have you known of any one so doing. If you cannot make this affirmation, you shall note such fact on your examination and must immediately advise the Dean of the reason therefor.