WAIVER IN INSURANCE LAW

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Nine years ago I distributed, or thought that I distributed, all cases of so-called "waiver" among the four departments, Election, Estoppel, Contract, and Release. The book[1] having been warmly approved by the reviewers, I sat back complacently awaiting aureoles from the benches, and LL.D's. from the universities. But nothing happened. And now, in YALE LAW JOURNAL for June last,[2] Professor W. R. Vance picks me up and bounces me about as though I had contributed little in my "amusing book" beyond the framing of a few *facetiae* of very qualified quality. It is sad.

Waiver or Election? The Professor's special subject is the law of insurance, in which waiver has frolicked and masqueraded (the words are right) profusely, confusedly, and unrestrainedly for many years. In very truth, the vast majority of insurance cases which have been sacrificed on the altar of "waiver" were in reality not cases of waiver at all, but of election. And for this the lawyers were chiefly to blame, for the issue which they constantly presented to the courts was, waiver or no waiver. In the multitudinous actions for loss, the insurance company pleaded (1) that the policy contained a proviso that (for example) if coal-oil were brought upon the premises the policy should be void; and (2) that coal-oil was brought upon the premises. To this the plaintiff replied that the company waived the proviso. But the lawyers and the courts did not observe that the plea was wrong. The word "void" in the policy meant voidable at the election of the company,[3] and the plea ought, therefore, to have been (1) the policy contained a proviso that if coal-oil were brought upon the premises the company *might elect to terminate the policy;* (2) coal-oil was brought upon the premises; and (3) the company elected to terminate. Obviously, without this third allegation the plea was bad.

And observe that the very important effects of this substitution of election for waiver are (1) that the issue is not *waiver or no waiver,* but *election or no election;* and (2) that instead of the onus of proving waiver being on the plaintiff (difficult to discharge even when aided by the sympathy of the court), it is on the company to prove an election which probably never existed.

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[1] Ewart, *Waiver Distributed among the Departments Election, Estoppel, Contract and Release* (1917), with a foreword by Roscoe Pound, Ph.D., LL.D. Harvard University Press.

[2] Vance, *Waiver and Estoppel in Insurance Law* (1925) 34 YALE LAW JOURNAL, 834.

[3] To that, Prof. Vance assents. Vance, *op. cit. supra* note 2, at 851.

I judge that Professor Vance has not escaped the general mistake to which I have alluded, for, in his book, he refers to scores of cases in which the pleadings were as I have indicated (including the much discussed case of *Northern Assurance Co. v. Grand View Building Association*[4]), and he makes no objection to the way in which the issues were presented.[5]

Forfeiture. Another fundamental mistake into which the courts and the insurance writers (including Professor Vance[6]) have fallen is their misuse of the word *forfeiture.* By a breach of a condition in a policy, the writers and the courts say that the policy is forfeited. But that is a mistake. Notwithstanding the breach, the policy remains intact and effective in every respect as before, including the obligation of the company to pay. All that has happened is that the company has acquired a right to elect between continuing and terminating the policy. And the Professor went far astray when, speaking generally, he said in his book, that,[7]

"the condition of forfeiture in the contract of insurance is self-operative; upon breach of the condition the rights of the insured are terminated ipso facto."

Much improving upon his book, the Professor, in his article, agrees that default does not cause "the extinguishment of the legal relations of the parties," and that the effect of default is that the company acquires power to extinguish the contract. But he adds the curious statement that,[8]

" 'waiver' more adequately describes what really takes place than does the word 'election,' for the insurer's only election is between exercising his power of rescission and waiving it."

Waiver is better than election because it is election—"the insurer's only election,"—that is the operating agency. Not a very convincing reason! The election lies between continuing the policy and terminating it; or (if it be better) between exercising the power to terminate and not exercising it. For there is certainly no waiver, no relinquishment of the power by its non-exercise, unless indeed, as concession to the insurance men, we were to agree that when, negatively, we do not want to do something and do not do it, we, positively, waive our right to do it.

Father—Bobby, you may have a second piece of pie.

Son—I don't want it.

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[4] (1902) 183 U. S. 308, 22 Sup. Ct. 133.

[5] A sentence of the Professor's article leads to the same conclusion. Vance, *op. cit. supra* note 2, at 841.

[6] Vance, *Handbook of the Law of Insurance* (1904) 213–6 and *passim.*

[7] *Ibid.* at 218. There are rare occasions when the word "void" in a policy means *ipso facto* void. It was not to such cases that this quotation was intended to apply.

[8] Vance, *op. cit. supra* note 2, at 848.

Father—You ought to say "I waive the pie," or "I relinquish my privilege to have a second piece of pie."

Son—Naw, I don't want it.

Perhaps Bobby was right.

Election plus Waiver. Loyally adhering to waiver, the Professor insists upon introducing it even when he has to admit the sufficiency of election. I said in my book,[9]

"If you had a choice between a horse and a mule, and you chose the horse, you would not say that you 'waived' the mule. For you did not. You had an election between two animals, and, electing to take one, you could do nothing with reference to the other."

While granting me election, the Professor insists upon a supererogatory waiver as well. He says:[10]

"If Mr. Ewart should elect to take the mule, one might accurately enough say he had waived his privilege to take the horse."

The idea appears to be that in such cases there are two privileges —two of this very peculiar sort:

"(1) You may have one of these animals and take him away with you; and (2) you may have the other, but you must not take him away. You must waive him."

To me that has the appearance of being only one privilege—a privilege to choose. If I had two real privileges, I could take both animals. I had only one. I exercised it. I did not waive it, or any part of it.

Eleven Supposititious Cases. In my book I asked for some intelligible definition of "waiver," for some idea of what it is, and for the rules under which it operates. Professor Vance does not help me. He adheres to,[11]

"the generally accepted definition of a waiver, 'an intentional relinquishment of a known right.' "

But, after formulating eleven supposititious cases, all coming "roughly," he says (I do not like "roughly"), within the definition, he tells us that,[12]

"differentiating legal relations cast them into several quite distinct classes, which for convenience we will designate (I) substitute agreements, (II) proper waivers, (III) assumption of excepted risk, (IV) removal of condition upon acceptance, (V) denial of liability, (VI) election."

I proposed to empty the waiver category by placing all its supposed cases in four others. The Professor, on the other hand, retains waiver, gives us six categories of it, and calls one of them "proper waivers"—the others, I suppose, being improper. More

[9] Ewart, *op. cit. supra* note 1, at 7.

[10] Vance, *op. cit. supra* note 2, at 845, note.

[11] Vance, *op. cit. supra* note 2, at 846.

[12] Vance, *op. cit. supra* note 2, at 846.

startling still, he tells us that in Professor Williston's book on Contracts,[13]

"are listed no fewer than nine legal relationships to which the term waiver is indifferently applied." [14]

Evidently, either we have no waiver at all, or we have it in multiple and very complex forms. And, this way or that, there appears to be little truth in the statement that waiver is such a simple thing as "an intentional relinquishment of a known right." To those who hold that it is a living, actuating concept, I repeat my request for definition and rules. If we expect that examination of the eleven cases will throw some light upon the subject, we shall be disappointed. Not one of them is a case of "waiver." They go off, very easily, into contract and election.

Cases 1, 2, and 3. Calling his first three cases "substitute agreements," the Professor naturally declares that[15] "these three 'waivers' are but modifying contracts"—two of them unsupported by admissible evidence. But why should anybody speak of a "substitute agreement"—a new contract varying an old one—as a waiver? The idea seems to be that when the parties made the new contract, they waived their right to remain as they were, just as when they made the original contract, they waived their right not to make it. When you go down town, you waive your right to remain at home. Choose the horse and waive the mule! I suppose one could get used to it. The first three cases are cases of contract.

Case 4 is as follows:[16] "Jones, having such a policy"—one with an anti-military clause in it—"serves in the army without injury and is discharged. He informs the agent of these facts, and tenders the next accruing premium. The agent accepts the premium saying that while the policy had been forfeited the company will waive the forfeiture."

In explanation, the Professor says that "the agreement,"

"accomplishes merely the relinquishment of the insurer's privilege to set up an otherwise perfectly valid defense in any action on the policy. This may very properly be called a waiver."

But why call an "agreement" a "waiver"? Into the use of the word the Professor was misled by his forgetfulness of what he had said (as above quoted) about *forfeiture*. As already explained, there was no forfeiture. All that had happened was that, because of the breach of condition, the company had acquired a right to elect between continuing the policy and terminating it. Acceptance of the premium evidenced an election to continue, and there was no more to be said. On a later page the Pro-

[13] 2 Williston, *Contracts* (1920) sec. 679.
[14] Vance, *op. cit. supra* note 2, at 841, note.
[15] Vance, *op. cit. supra* note 2, at 847.
[16] Vance, *op. cit. supra* note 2, at 842.

fessor offers a different, and quite inconsistent, solution of this case 4. He says:[17]

"the waiver . . . . operates as a kind [What kind?] of release of a privilege of defense. . . ."

There was no release of any kind. If there was an "agreement," the case would be one of contract. And if there was no "agreement" (the Professor seems to be uncertain about it), the case would be one of election.

Case 5[18] is one of a policy, " 'void' in its inception because he has other insurance on the building covered. Subsequently the insurer, being informed of the breach of condition, expressly excuses it and accepts payment of a deferred premium."

In explanation, the Professor says that the policy,

"is voidable at the option of the insurer, not of the insured; that is, the insurer has the power to avoid the entire contract if he so elects." And the conclusion is, that "it is this power which he subsequently waives."

That is exactly what he does not do. Having an "option," he exercises it by electing to continue the policy. The case is one of election.

Case 6. "Jones, having a life policy containing the anti-military clause, enlists without the consent of the insurer, but is shortly afterwards discharged with health unimpaired. The agent of the insurer thereupon writes him a letter stating that the company takes pleasure in reinstating his forfeited policy. Jones then dies before paying another premium, or doing any other act in reliance upon the letter of reinstatement. The insurer has extinguished his privilege to set up the breach of condition." [19]

The insurer extinguished nothing. Having a right to elect between continuing and terminating, he exercised that right by electing to continue. And the Professor's slip back into "forfeited policy" partially accounts for his mistake.

The Professor's distinction between "waivers" and "proper waivers" is new and interesting. Referring to cases 4 to 7, he says that,[20]

"in each the insurer has expressed an intention not to assert an otherwise perfectly good existing defense, and has expressly or impliedly promised not to do so. In the first two cases of the group this promise or 'waiver' rests upon a consideration, the payment of a premium not otherwise due, but in the other two no consideration for the promise can be found. Hence we may say that the waiver in the first two of these cases operates as a kind of release of a privilege of defense, but the waiver in the other two cases cannot be so described, as a release not under seal is inoperative in the absence of a consideration. Therefore this second group of cases may be called proper waivers, since there is no other term that is adequately descriptive."

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[17] Vance, *op. cit. supra* note 2, at 847.
[18] Vance, *op. cit. supra* note 2, at 843.
[19] Vance, *op. cit. supra* note 2, at 843 and 844.
[20] Vance, *op. cit. supra* note 2, at 847.

In other words, where there is a consideration for an implied promise (sounds like a contract), there is a "waiver" which "operates as a kind of release"—all very difficult to follow. But where there is no consideration, there can be no operative release, and cases of that kind must be called, "proper waivers, since there is no other term that is adequately descriptive."

They are cases of election.

Case 7 is sufficiently identical with 6 to make comment unnecessary. It is a clear case of election.

Case 8 may be passed, there being in it no suggestion of waiver.

Case 9. "The insurance company's agent tenders to Jones a life policy containing a stipulation that it shall not take effect until actually delivered to the insured while he is in good health and the first premium is actually paid in cash. Jones explains that he has not the ready money, and offers to give his note at three months for the premium. The agent accepts the note and delivers the policy. Jones dies within the three months. Is the insurer under a duty to pay?" [21]

The Professor properly, if I may say so, points out that the stipulation is not a qualification of, or a limitation upon, the company's liability to pay, but a stipulation applicable only to the creation of the contract.

"The question," he says, "involves the making of the contract, not the operation of a contract already made. The cases rightly hold that the insurer may 'waive' this condition, and that such waiver may be shown by parol." [22]

The first sentence is right. The second, as I think, is wrong. The company offers to make a contract if the insured pays the first premium in cash. The insured counters with "an offer" to give a note instead of cash. "The agent accepts the offer." That sort of thing often happens. Of course, when you accept a counter-offer, you may, if you are a waiver-devotee, say that you waive yours. Just as when a man signs a note, you may, if you choose, declare that he has estopped himself from denying that he has signed it. But I venture to offer a plea for something a little more scientific than such distortions. The case is one of contract.

Case 10. "Jones' fire policy contains a provision that no action shall be brought thereon unless satisfactory proofs of loss are furnished within sixty days after the fire. Immediately after a fire, Jones applies for forms on which to make his proofs of loss, but is told by the insurer that such proofs are not required, all liability under the policy being denied because of breach of the condition against other insurance. Almost without dissent the courts hold that such denial of liability is a 'waiver' of the insurer's privilege to require proofs of loss." [23]

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[21] Vance, *op. cit. supra* note 2, at 844.

[22] Vance, *op. cit. supra* note 2, at 845.

[23] Vance, *op. cit. supra* note 2, at 845.

The company's reason for not requiring delivery of proofs being immaterial, it may be omitted. The case, then, is simply that the company said to the insured that "proofs are not required" as a prerequisite of action, and when action was brought, the company pleaded that proofs were not furnished. So far from the case being one of waiver, the Professor himself, on a later page, disposes of the idea in this way:[24]

"Here the term 'waiver' is used to describe the operation of that long settled rule of law and good sense that when one party to a contract has made the performance of conditions required of the other either impossible or unnecessary, the latter is excused from performance."

After dealing with a contrary suggestion, the Professor adds that,

"the excuse for the insured's failure to perform is sufficiently clear under the general rule stated above, and there is no need to invoke the doctrine of waiver or to seek a consideration."

The case is one of contract.

Case 11. "The policy may give to the insurer the privilege of electing between two alternative duties, such as payment or replacement in case of property loss, as stated in case (11). Here it is usually said that by electing to do either one the insurer 'waives his right' to do the other. It would perhaps be more accurate to say that the insurer has reserved to himself the *privilege* of electing between two alternative duties, and also the *power*, by expressing his election to fix the right of the insured and his own duty, and likewise to extinguish his own privilege of election. Such a relinquishment of a privilege of election may very properly be called a waiver." [25]

That is bothersome. A privilege to elect between two things is a power to extinguish the privilege; the privilege is extinguished by its exercise; and the exercise of the privilege having extinguished it,

"such a relinquishment of a privilege of election may very properly be called a waiver."

That is very bothersome. The case is a clear one of election between two permitted alternatives; and I gladly, almost triumphantly, note that the Professor does not approve of the suggestion that,

"by election to do either one, the insurer 'waives his right' to do the other."

Just as, similarly, when you elect to take the horse, you do *not* waive your right to the mule. I thought so.

The foregoing analysis has, I think, satisfactorily demonstrated that, omitting case 8 as of no present relevancy, the other ten cases are about equally divided between contract and election. Introduction of notions about waiver is not only confusing but

[24] Vance, *op. cit. supra* note 2, at 849.

[25] Vance, *op. cit. supra* note 2, at 849 and 850.

erroneous. Any other eleven cases can as easily be assigned to one of these departments, or to estoppel or release. All that is needed is accuracy in the use of language.

Observations upon two unattached points may be added.

1. In his article, the Professor says:[26]

"This discussion makes it clear that a waiver is conventional in its nature, often taking the form of a true contract."

If in its nature waiver is conventional, what are the characteristics which distinguish it, or, in that view, can distinguish it from contract? In cases 6 and 7—cases of pure election—the Professor gives us examples of what he calls "proper waivers." But in these there is no trace of convention, and he assigns to them their peculiar designation only because "there is no other term that is adequately descriptive." [27]

2. Again, the Professor says:[28]

"It will be found that however uncertain the meaning of the word waiver, and however many varying concepts it may include, it is nevertheless a useful term, connoting a group of legal relationships that have many incidents in common."

According to the definition accepted by the Professor, waiver is a simple enough concept. It is merely "an intentional relinquishment of a known right." [29] And now we are told that it may include "many varying concepts." Waiver, moreover, by the definition, is an activity, and, if so, how can the word "connote" (mean or signify) "a group of legal relationships"? If the Professor means that waiver is to be found operating in certain "groups," he might have helped us by specifying the groups and the common incidents. In his eleven cases, he does not even furnish illustration of what he means, for while he says (quite inaccurately, as I think) that their various legal relationships "exhibit a common character," he adds (inconsistently, as I think) that,[30]

"differentiating legal relationships cast them into several quite distinct classes."

Once more, if it be true that the waiver cases are those which "have many incidents in common," the Professor nevertheless appears to be of the opinion that the group may contain cases exhibiting fundamental dissimilarity. There are, for example, waivers which are "inoperative without a consideration." [31] There are other waivers which need "no consideration." [32] And in a single

[26] Vance, *op. cit. supra* note 2, at 856.
[27] Vance, *op. cit. supra* note 2, at 847.
[28] Vance, *op. cit. supra* note 2, at 840 and 841.
[29] Vance, *op. cit. supra* note 2, at 846.
[30] Vance, *op. cit. supra* note 2, at 846.
[31] Vance, *op. cit. supra* note 2, at 851.
[32] *Ibid.*

class of waivers—those pre-eminently ranked as "proper waivers"—there is "serious difficulty," for,

"in cases (4) and (5) a consideration is clearly present, but none exists in cases (6) and (7)." [33]

We are a long way from our simple concept of "intentional relinquishment." And I am still in search of some intelligible definition of waiver; of some idea what it is; and of the rules under which it operates.

Epilogue. As an exposition of the decisions as they stood, Professor Vance's book must have been of great value to the profession. I should like to see in a second edition devotion rather to the enlightenment of the courts. For the law is in frightful disorder, as the Professor quite recognizes. Reconciliation, not merely of the conflicting opinions but of the conflicting ideas underlying them, is impossible. Nothing short of sweeping the whole thing away and commencing anew can be useful. And in reconstruction there must be no place for foolish notions about forfeiture and waiver which, in very large measure, are responsible for the mess. My reforming efforts failed. Possibly Professor Vance may succeed. But the task is difficult. It might take more than two dogs to turn a buffalo stampede.

[33] *Ibid.*