"WAIVER" IN INSURANCE LAW.[1]

A somewhat protracted experience has convinced me that almost all the bad law is the product of defective thinking, and that much of the defective thinking is the result of the employment of blundering phraseology. Lawyers, I believe, more than men in other professions, imagine that they can use words in vague or erroneous senses and yet reason rightly. It cannot be done. As Bacon said:

> Words manifestly force the understanding, throw everything into confusion, and lead mankind into vain and innumerable controversies and fallacies.

My favorite aphorism is, bad law is the product of bad language. The converse, I believe, is also sometimes true. Let me offer a few examples of what I mean.

Unilateral Contracts. It has been well said that:

> . . . the unilateral contract has proven a stumbling block to nearly every court which has had occasion to consider the question. In no domain of law are the opinions marked by such lack of a clear thinking.[2]

But even a moderate amount of very ordinary thinking would tell us that the the stumbling block does not exist. When you have found a unilateral elephant, or a unilateral fiddle, or a unilateral anything else that is necessary bilateral, you may venture with hesitating diffidence to refer to unilateral contracts as though you had seen a specimen. Text-writers tell us that a case occurs when one man supplies a consideration for a promise and another makes the promise. But that is inaccurate. It is the promise that is unilateral. The Roman lawyers called it a unilateral obligation—not a unilateral contract. The contract is, of course, bilateral. And you may observe that while a contract is always at the least bilateral, a promise is always unilateral. In the case of a contract, there are not only two parties but two actors—one may supply the consideration and the other the promise. In the case of a promise, there are two parties but only one actor. Sometimes there are reciprocal promises. But each of them is only unilateral. And the two promises make

[1] The following paper was read on December 31st, 1927, before a Round Table meeting of the Association of American Law Schools at Chicago, Illinois. The CANADIAN BAR REVIEW is indebted to the *Iowa Law Review* for the privilege of reprinting it.

[2] I, Maurice Wormser, "The True Conception of Unilateral Contracts," 26 Yale L.J. 136.

one contract. Careful distinction between promise and contract will oust the stumbling block. There could hardly be imagined a more muddled and misleading method of attacking the simple question, "Is the promise binding?" than by turning it into "Were the circumstances such as to constitute a unilateral contract?"

Quasi-contracts. The term "quasi-contracts" is an unwarranted derivation from the Roman law, according to which—

> All obligations owed their origin either to the consent of the parties (*contractus*) or to injuries (*delicta*) done by one person to another, which gave the injured party a right to recompense."[3]

Experience proved to the legists that their analysis was defective, there was no room in their categories for very many cases. And, instead of making a new category or new categories, they forced attachment to the two old ones of the loose-lying cases. They observed that these cases—

> If separately examined, would approach more nearly either to an *obligatio ex contractu* or to one *ex delicto.* If it more nearly resembled the former, the binding tie was called an *obligatio quasi ex contractu;* if the latter, it was called an *obligatio quasi ex delicto."* [4]

That is extremely vague and altogether unscientific. But we moderns have done much worse. For (1) we have not only perpetuated the fictions—a sure indication of undeveloped law, but (2) by dropping to a large extent the word *obligations* we have produced the impression that there are contracts and quasi-contracts, instead of obligations arising out of contracts and as if out of contracts. Roman lawyers would not have spoken of *quasi contractus* in the plural. For them *obligations* was the subject for consideration, and *quasi contract* merely the source from which some obligations arose. We have substituted the source of the thing for the thing itself. We have pluralised it—(*quasi-contracts*) into a category. And (3), although many of the cases more nearly approach tort than contract, we have provided no quasi-tort receptacle for their accommodation. Whatever their character,—near this, or near that, or uneasily straddling the equator—we have dumped them all into one copious variety bag labelled *quasi-contracts.* We ought to have done better than that.

I object to every quasi – quasi-realty; quasi-tenant; quasi-trustee; quasi-fee; quasi-res-judicata, etc. I advocate calling things what they are, and not what they otherwise might be. And I would urge

[3] Sandars. Institutes of Justinian (5th ed.) liii-liv.
[4] *Ibid.* 378-9.

the advisability of the substitution of our own language for that of Rome. It is curious how a Latin word will sometimes appear to sanctify an acknowledged heresy! *Quasi-contracts* may achieve longevity. Translated into *As-if-contracts* they would shrink into obscurity within six weeks. *Pseudo-contracts* might fool the profession for a few generations. *Sham-contracts* would be tolerated by nobody.

And now, myself somewhat venturing, what would be thought, may I ask, of the suggestion that, regarding civil obligations as the widely inclusive category, we should divide it into *contracts, torts,* and *other obligations?* I plead that, inasmuch as there is no possibility of finding a correct class-name for a lot of cases that are too heterogeneous to be regarded as a class, the practice of forcing upon them an inappropriate and misleading title ought to be dropped.

Quasi-estoppel. I make special objection to the term *quasi-estoppel.* Dr. Melville M. Bigelow, the pioneer writer on the law of estoppel was well aware of the difference between estoppel and election, but, surrendering to current notions, he brought, as he said:

> Together the scattered fragments of the law having a resemblance to election,

and christened them *quasi-estoppel.*[5] He would have earned equal reputation as a baptiser had he collected all the diseases having a resemblance to measles and christened them *quasi-appendicitis.* His is the blame for much that we might well have escaped—for such, for example, as the jumbled pôtpourri assertion that *quasi-estoppel*

> Includes the doctrine of election, the principle which precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver.[6]

Very little reflection, one might imagine, would render impossible such an almost inconceivably erroneous association of terms. Of the supposed relationship between estoppel and waiver, I shall speak in a few moments. Between estoppel—quasi or other—and election there is no affinity. After a man has made his election, he cannot, of course, assert a right inconsistent with what he has done. But the same remark applies to everything else that a man may do. And to say that the maker of a promissory note is prevented by quasi-estoppel from asserting that he did not sign it, would be to indulge in a conspicuously amateurish misuse of language.

[5] Bigelow, Estoppel (6th ed.) 732 n.
[6] 21 C.J. 1202.

Unauthorized Agent. Quite as paradoxical as *unilateral contracts* is the oft-recurring term "unauthorized agent." For the adjective and the noun are once more in sharp conflict. If a man is unauthorized, he is most certainly not an agent. Text-writers and courts vie with one another in their endeavors to define the circumstances under which the act of an unauthorized agent will bind his principal. It is useless. All that need be said is, that there being no authorization there is no agent and no principal. Reams of paper have been spoiled by disquisitions on "ratification of contracts made by unauthorized agents," whereas every thinking reader knows (1) that a contract made by an unauthorized agent never existed, and (2) that a contract needs no ratification.

Employment of the phrase "unauthorized agent" clouds the distinction between authority, and estoppel to deny authority. It is apt to, and sometimes does, lead even capable men to seek solution of questions along the line of agency, instead of by realization of the fact that, there being no agency, the point for consideration is whether there is estoppel to deny the existence of that which *ex hypothesi* does not exist. In other words, inasmuch as the phrase "unauthorized agent" means an agent of some kind, we must, if we employ the words, accustom ourselves to the necessity for always accompanying them with the mental antidote, "There is no such thing. It is estoppel to deny agency that I am looking for."

The Germans, knowing nothing of the principles of estoppel, solve the "unauthorized agent" problem by the crude expedient of changing the facts. For example, section 54 of their commercial code provides that:

> When a person, without being appointed formally as agent, has been commissioned to manage a business or conduct certain business matters, the authority extends to all operations and acts which are necessary for the carrying on of such business or the management of affairs of the kind.

Although the person's powers may, as a matter of fact, be much more narrowly limited, the law declares that they are not. That is a good example of fiction helping lame law over a stile. In the course of correspondence, a very able German lawyer defended the enactment upon the ground that:

> The German mode of expression attaches much more importance to conciseness than to strict legal accuracy. The words "the authority" would be correct if "shall be deemed to extend" were substituted for the last word [extends], and it is well understood by German lawyers that this is correct.

In other words, the fact "shall be deemed" to be something other than that which it really is. To my friend I replied that, in my

opinion, German lawyers ought to attach some importance to the law of estoppel.

The French have not developed the principles of estoppel as we understand them, but they avoid our mistake and the Germans' by providing (in the Quebec law) as follows:

> 1730. The mandator is liable to third parties who in good faith contract with a person not his mandatary, under the belief that he is so, when the mandator has given reasonable cause for such belief.

That is estoppel, although the word is not used. The French could not be induced to speak of an unauthorized mandatary.

Penalties. Experience has, to some extent, taught the profession to be careful in their employment of the word *penalty,* but, as the law reports testify, its ambiguity is still frequently a subject for adjudication by the courts. Why provide for payment of a penalty of $2,000 for non-payment of $1,000, depending upon the courts' declaring that that was mere foolish verbiage? Why employ equivocal language when you are well aware that it is equivocal?

Void. Lawyers have profited little by their experience with the word *void.* Many leases and policies of insurance contain the word, but it almost never means void. It means voidable at the election of the landlord or the insurance company. Everybody knows that—when attention is called to it; but hundreds of cases go through the courts without anybody pointing it out—as we shall see.

Forfeiture. Misuse of the word *void* is principally responsible for erroneous application of the words *forfeited* and *forfeiture.* It is customary to say that, upon breach of a condition of a policy, the policy became *forfeited,* when, as a matter of plain fact and law, it did not. All that happened was that the company acquired a right to elect to terminate or to continue the contract. Unless and until terminated by election, the policy remained unaffected.

Revival. Misuse of the words *void* and *forfeiture* has appeared to make necessary the erroneous employment of a third. Breach of a condition of a policy having forfeited it, the policy-holder must prove (so it is said) that by some act of the company it has been revived. Usually, without the help of a sympathetic court, that is an impossible task.

Waiver. Apart from its two obsolete meanings, there is no such thing as waiver—I mean, as a distinct legal concept. Every case in which the word is employed can be, and ought to be, referred to one or other of four departments of the law: election, estoppel,

contract, release. Waiver bears the same relation to scientific law as the word *suction* bears to physics. For although the latter is a useful word in general conversation, it describes no natural force. And when men tell you that something happened through suction, the word, although possibly conveying the intended idea, must be translated into atmospheric pressure, muscular action, or some other well-known force, before any argument can be based upon it. It is not itself a category. Neither is waiver. I offer no objection to continuation of the word *waiver* in general literature and as a colloquial expression. No one would think of disapproving Cowper's line, "She rather waives than will dispute her right." But if we are told that, as a matter of law, she had waived it, our informant might well be asked whether he meant that she had executed a release; and if not, what had she done?

Waiver and Estoppel. Confusion of waiver with estoppel is unpardonable. I suppose that the men who use the term *waiver* would agree that they regard it as connoting a unilateral action of some sort. Twenty-three variations of a definition of the word may be seen in "Cyc."[7] and every one of them conveys the impression of a solo performance. Estoppel, on the other hand, is essentially bilateral—somebody does or says something, and, in reliance upon it, someone else changes his position prejudicially. Nevertheless, the profession appears to be fairly well agreed that waiver and estoppel are very much alike, or, at all events, very closely associated. Listen to the following:

> While waiver belongs to the family of estoppel, and the doctrine of estoppel lies at the foundation of the law of waiver, they are nevertheless distinguishable terms. It is difficult to make a distinction between waiver and estoppel which will give to each a clear legal significance and scope, separate and independent of the other, as they are frequently used in the cases as convertible terms, especially as applied to the law of insurance contracts and in the avoidance of forfeiture.[8]

The true distinction between estoppel and waiver is that one of them exists as a legal concept and the other does not. But coalescence of them in current conception (or rather misconception) has proceeded so far that in the American Digest, under the title *Waiver* instead of cases, is "See Estoppel;" under *Estoppel,* "Nature and Essentials in General," are all the cases which their respective courts would have assigned to waiver; and under *Insurance* is the subtitle "Estoppel, waiver, or agreements affecting right to avoid or

[7] 40 Cyc. 253-4.
[8] *Ibid.* 255-6.

forfeit policy." Evidently, the gentlemen of the Digest believe not only in the existence of waiver but in its close affinity to estoppel. They are not to be blamed. They must adapt themselves to the ideas of the courts; and in the United States, as the text-writers tell us,

> The terms "waiver" and "estoppel" are ordinarily used both by the courts and text-writers as synonymous, in the law of insurance.[9]

Sometimes the two things are joined as helpmates in the expression "estoppel to deny a waiver." It would test the genius of the proverbial Philadelphia lawyer to construct anything worse than that.

Waiver and Contract. Having, as I hope, helped to separate estoppel from waiver, let me suggest the disentanglement of contract from the same evil association. Exclusive of such special pleas as infancy, illegality, fraud, etc., there are six well-known defences to an action for non-performance of a term of a contract: 1. Performance. 2. Elimination of the term by contract. 3. Estoppel. 4. Substituted performance. 5. Accord and satisfaction. 6. Release. And the idea appears to be that there are two more possible (but usually confounded) defences: (1) that the plaintiff waived the term of the contract, and (2) that the plaintiff waived performance of it. With that idea I respectfully disagree. And I ask for a set of facts which would form a good defence to an action for breach of contract, and would not be referable to one or other of the six defences above specified.

Waiver and Election in Insurance Cases. I am guilty of no exaggeration when I affirm that inaccurate use of the three words, *void, forfeiture,* and *waiver,* has made a disgraceful mess of the law of insurance. Their evil influence has been such that lawyers do not now know even how to frame the pleadings in a simple case of a total loss, with breach of a condition as a defence. The company usually pleads two things: (1) that the policy was subject to a condition that (for example) if gasoline was brought upon the premises the policy would be void, and (2) that gasoline was brought upon the premises. That is regarded as a good plea. And the plaintiff replies that the company waived the condition. Such pleadings (and I have seen hundreds of them) are all wrong. For although the alleged condition did exist in the policy in the form pleaded, it meant not that upon breach the policy would be *ipso facto* void, but that it would be voidable at the election of the

[9] Vance, Insurance, 343. To the same effect is Richards, Insurance, 158.

company, and the plea ought to have stated the condition according to its meaning. The defence, therefore, should have contained three allegations instead of two: (1) the policy contained a condition that, if gasoline was brought upon the premises, the policy would be voidable at the election of the company; (2) gasoline was brought upon the premises; and (3) in consequence thereof, the company elected to terminate the policy. Without this last allegation, the defence is obviously insufficient. And to that defence, the natural and usually sufficient reply would be that the company did not so elect.

The effects of this alteration in the pleadings are extremely important. Under the first set, the onus is on the plaintiff to prove (1) that somebody did something which, as the court might think, amounted to a waiver, and (2) that the somebody had been authorized by the company to do what he did; and success at the trial would probably depend upon the presence of a very sympathetic judge and jury. Under the second set of pleadings, the onus is on the company to prove (1) that somebody did something which amounted to a termination of the policy, and (2) that the somebody had been authorized by the company to do what he did. In other words, instead of the plaintiff having to prove an act of waiver and the authority of the actor, the company must prove election and the authority of the actor. That is all very obvious, but misuse of the words *void, forfeiture,* and *waiver* has hitherto concealed it.

It would be a fair criticism of what has been said to suggest that although the plaintiff might, in his reply to the company's plea, be content to rest his case upon denial of the company's allegation that it terminated the policy, there is no reason why he should not also assert that the company had waived the condition under which it had the right to elect to terminate it. The plaintiff might make a double reply.

But should he be advised so to do? Observe that whatever he could offer in support of his allegation of waiver would be equally admissible under his denial of the company's allegation of termination. For everything which tended to indicate that the company had waived the condition would also tend to indicate that the company did not act upon it. And evidence of that sort would be more valuable when directed against the company's allegation of termination, than when advanced in support of the plaintiff's allegation of waiver. Why? Because although it might not be sufficient to establish waiver by the company, it might, in conjunc-

tion with the other adduced evidence, be sufficient to prevent the company's proving that it terminated the policy. And the plaintiff will succeed if the company fails to prove termination.

Moreover, by replying waiver as well as denial of termination, the plaintiff would accept embarrassments which he might well avoid. For he would not only be undertaking the difficult task of proving the two elements of waiver instead of remaining on the defensive, but he would be appearing to make the contest one between waiver and termination, although he would win were neither of them proved. A further embarrassment would be that, when endeavoring to prove waiver, he would be insisting that the man who did the "something" had authority from the company to do it, while in contesting termination, one of his points would be that the man who did the "something" had not authority from the company. The man might be the same man; but in any event, the plaintiff would, in one case, be arguing that the existence of authority might be inferred from the course of business, from general understanding, from a variety of things, and, in the other case, he would be taking contrary ground.

To these needlessly assumed embarrassments might be added the hitherto insufficiently explored difficulty as to what is meant by waiver of a stipulation in a contract. Does it, or does it not, amount to an amendment of, or an addition to, the main contract? Is it in reality a new contract, or nothing at all? Must it be capable of being interpreted as "You need not comply with the condition, and the company will nevertheless remain bound by its obligation?" Discussion of that point cannot be undertaken in the present paper.[10] Professor Williston, in his valuable work on contracts, has said that variation of a contract, or substitution of one clause of it for another:

> Should be called a collateral promise or substituted contract or accord, which rescinds rather than waives the inconsistent terms of the prior obligation.[11]

With that I respectfully express my agreement. Speaking colloquially, one may say that the company waived the condition. Technically, one would say that a new contract had superseded the old. Both parties having been willing that there should be no performance of the condition, they had agreed that it need not be per-

[10] Some observations upon this point may be seen in my book Waiver Distributed, among the Departments Election, Estoppel, Contracts, Release, pp. 131-143.

[11] 2 Williston, Contracts, 1311.

formed; that the provisions of the existing contract should be amended in that respect; and that in other respects it should remain operative.

A further important effect of the change from waiver to election is that silence-strategy would no longer be available to the company. At present some courts say that a breach of a condition is a forfeiture of the policy, and that a waiver of such forfeiture:

> Cannot be inferred from mere silence. It [the company] is not obliged to do or say anything to make a forfeiture effectual. It may wait until claim is made under the policy, and then in denial thereof, or in defence of a suit commenced therefor, allege a forfeiture.[12]

And these courts are consistent in thus holding. For if we assume that breach of a condition has, in reality, "forfeited," in the sense of terminated, the policy, there can be no reason why the company should send notification of any sort to the insured. He knows of the breach as well as the company does (usually better), and he knows, therefore, that his contract is at an end. He may be reminded of the fact when, at some later date, he brings an action on the policy, but meanwhile, by remaining silent, the company retains its option (so it is said) between keeping the policy alive as a premium collector, and declaring that some months ago it ceased to be obligatory.

Upon the basis of forfeiture, that is all logical enough. But if, by a breach of a condition, the policy has not been forfeited, the situation is altogether different. The company's position now is that it has a right to elect whether it will terminate or continue the policy. It must elect within a reasonable time after becoming aware of the breach, and the policy-holder has no knowledge of what is being done. If, therefore, the company elects to terminate, it ought not to neglect to send notification to that effect to the policy-holder. For if it afterwards pleads that it elected to terminate, it may be told that notification within a reasonable time is an essential element of election.[13]

It must not be assumed from what has been said that election has been altogether overlooked in insurance cases. But if the word is mentioned, it rarely escapes embodiment in such a phrase as "an election to waive the forfeiture," or in such a sentence as:

> Estoppel by election or inconsistent positions . . . is a subdivision of the general subject of estoppel *in pais*—[14]

[12] Titus v. Glens Falls Ins. Co., 81 N.Y. 410, 8 Abb. N.C. 315 (1880).
[13] The subject is discussed in my book, *supra* n. 10, at 88-95.
[14] 21 C. J. 1202 n. 19.

locutions which constitute further distinct challenges to the Philadelphia lawyer.

Insurance Contracts—Contemporaneous Breaches. Waiver obtrudes itself at every stage in the life of insurance policies, from the making of the contracts down to the settlement of disputes over claims for losses. Frequently a company has refused to pay a loss because of the existence, at the inception of the contract, of circumstances which, although inconsistent with one of its conditions, were well known to the company. For example, a condition provides that the policy shall be void if there is other insurance upon the property; there is other insurance; but of its existence the company is well aware. With such cases the courts have been badly puzzled. They think that the company ought to pay; but upon what ground can payment be ordered? Some of the courts have said fraud. Some natural justice. Some alteration of the contract. And some, as we might expect, waiver. In a notable case in the United States Supreme Court, *Northern Assurance Co. v. Grand View Building Assn.*, it is said that

> It is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the insured unless the company waived the condition.[25]

In that, as in hundreds of other cases, misuse of the word *void* caused all the trouble. For the policy was not void. It was, by its terms, voidable at the election of the company. And the question for the court ought to have been: Did the company, because of the existence of the breach of the condition, elect to terminate the policy? Of course, it did not. The situation is this: the company delivered a policy, knowing of a contemporaneous breach of it; the company was therefore entitled, the next moment, to rescind it; instead of rescinding it and asking its immediate redelivery, the company permitted the assured to carry it away, and put the premium in its cash box, intending to keep it there. That conduct was evidence of election to continue the obligation. The solution is simple.

Non-payment of Premiums. Policies frequently provide that they shall be void if recurring premiums are not promptly paid, and the courts hold that non-payment works a forfeiture which must be waived if the company is to be held liable. The Supreme Court of the United States has said that

[25] 183 U. S. 308, 317, 22 Sup. Ct. 133, 136 (1901).

If a forfeiture is provided for in case of non-payment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all.[16]

It is in cases of this kind that the substitution of election for waiver becomes specially important. The companies are aware of the breach the moment that it occurs. They have the right to elect to continue the policy or to terminate it. And they must act promptly. They cannot defer decision with a view to subsequent exercise of their option according as the future may point their interest. They would like to postpone action. They do not desire to cancel the policy. They want to keep it alive as a premium collector. But a loss may occur any day, and they would like to be able to plead forfeiture. They have sometimes thought of notifying the policy-holder that if his default continues for so many days they will elect to terminate. But, under the terms of customary policies, they have no right to do that. If they fail to terminate at once, their right in that respect will be gone. And go it probably will. The common law right of one party to terminate a contract, because of default by the other, by notice requiring performance within a reasonable time, will, of course, remain. The policy-conferred right of election will have disappeared.

The foregoing observations apply to certain policies only. They have no reference, of course, to policies in which the obligation of the company ceases with the expiration of the period for which an earlier premium has been paid. They apply to all policies which provide that they shall be void upon non-payment of premiums. They are of special importance when applied to life policies.

Accepting Premiums after Default. The following are fair examples of authoritative declarations as to the effect of acceptance by insurance companies of premiums after having become aware of a breach of a condition.

If, after the policy has been forfeited by non-observance of a condition annexed to it, the insurers, or their agent, continue to receive the premiums with full knowledge of the breach of the condition, they will be deemed to have waived the forfeiture, and will not afterwards be permitted to avoid the policy.[17]

. . . They could not afterwards set up its forfeiture. It would be an estoppel, which is the true ground upon which the doctrine of waiver in such cases rests.[18]

[16] Thompson v. Insurance Co., 104 U. S. 252, 258 (1881).
[17] Addison, Contracts (11th ed.) 1231-2.
[18] Elliot v. Lycoming City Mut. Ins. Co., 66 Pa. St. 22, 26 (1870).

This means, I suppose, that a breach of a condition renders the policy void, in the sense that it ceases to exist. It remains dead until, at some later date, the policy-holder tenders the belated premium, when, if the company has heard of the breach and accepts the money, it revives. It is a curious way of dealing with a contract: The unilateral act of one party, unknown to the other party, terminates the contract; and it is reestablished, not as one familiar with the law of contracts might suppose by a new contract, but by the company's waiving what the policy-holder had done; or, according to the second of the quotations, by a waiver resting upon estoppel.

I have several times tried to keep the idea of estoppel as a pedastal supporting "the doctrine of waiver" steady enough to get a good look at it. So far I have not been successful. Why is it that the courts have not observed that in such cases there is no forfeiture, and, therefore, no estoppel and no waiver? Non-payment of the premium gave the company a right to elect to determine or to continue the policy, and acceptance of a later premium is evidence of election to continue.

Demand of Premium, and no Payment. Similar misconception led to the following judicial pronouncement:

> We have found no case, which goes to the extent of holding that merely a demand of the payment of the overdue premium, without its payment, is sufficient to reinstate a policy which is forfeited.[29]

If the policy had been terminated (as is supposed) by the unilateral act of the policy-holder, it would indeed be curious if it could be revived by the unilateral act of the company — by the sending of a note. Arguing, therefore, from the basis of forfeiture, it is correct enough to say that a demand for the payment of a premium could have no effect whatever upon the liability of the company. The policy had been killed by the default, and nothing that could revive it had occurred. But if the policy had not been terminated—if all that had happened was that the company had been placed in a position in which it might elect between continuation and termination of the policy, then the existence of the demand becomes important, for it is conclusive evidence that the company had elected to continue.

Default in Delivery of Proofs. There are hundreds of cases in which the companies pleaded default in delivery of proofs of

[29] Cohen v. Continental Fire Ins. Co., 67 Tex. 325, 329 3 S. W. 296, 297 (1887).

loss. In almost all of them the policy-holders replied waiver. And, in not a few, the companies improperly escaped liability because the evidence failed to establish some act of waiver, or the authority of the person who was said to have done the waiving. Sometimes in such cases the courts have gone further and declared that nothing short of agreement by the company can reinstate the policy. For example.

> After the thirty days had expired without any statement [of proofs], nothing but the express agreement of the company could renew or revivify the contract.[20]

Argument that there had been no forfeiture, and no necessity therefore for revivification; that the onus to prove election was on the companies, and not on the policy-holders to prove waiver, would probably have been acquiesced in by many of the courts, with as result in some cases the defeat of the companies.

Company's Request for Proofs, etc. Where there has been a breach prior to loss, knowledge by the company of the breach after the loss, and request by the company for proofs or for examination of the policy-holder, some of the courts hold that "the forfeiture is as a matter of law waived;" others posit estoppel as the operative principal; others join waiver and estoppel, declaring that the waiver "estops the company to claim a forfeiture of the policy;" while still others appear to warrant the assertion of Mr. Richards that

> Demanding the usual verified proofs of loss, in itself effects no waiver or estoppel . . . It must be observed also that one great difficulty with all parol waivers is that written terms of the contract are sought to be set aside by testimony which at its best is uncertain and unreliable.[21]

Application of election to such cases removes the "great difficulty." For, so far from setting aside the "written terms of the contract," the courts would be acting upon them. The company has a right of election whether to determine or to continue the policy. And its request for proofs is evidence of election to continue.

Courts vs. Companies. The history of the law of insurance is very largely the history of a struggle between the courts and the companies. Observing that some of the companies were in the habit of repudiating liability upon trumpery grounds, the courts

[20] Beatty v. Lycoming City Mut. Ins. Co., 66 Pa. St. 19, 18 (1870).
[21] Richards, Insurance, 83.

encouraged the reply of waiver to the allegation of forfeiture. One court said:

> The doctrine of waiver . . . has been an efficient means by which to prevent insurers from treating the contract as valid when it is to their interest, and repudiating it when called upon to respond to its burdens, thus playing fast and loose with the insured.[22]

Meeting that move, the companies added to their policies the "no-waiver" clause, a stipulation that none of the conditions could be waived. To that the courts replied that the companies could waive the "no-waiver" clause as easily as they had been accustomed to waive all the others. In their methods the courts were not very astute. Or shall we not rather blame the hundreds of lawyers who acted for the policy-holders? Why did none of them point out that *void* did not mean void; that a breach of a condition did not create a forfeiture; that, on the contrary, a breach had no effect upon the policy; that a breach merely gave to the company a right to elect to terminate the policy if it so desired; and that for defence to an action the company must prove not only the breach but that, because of it, the company had elected to terminate the policy? Gentlemen, I plead for phraseological accuracy.

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[22] Parsons, Rich & Co. v. Lane, 97 Minn. 98, 115, 106 N.W. 485, 492 (1906).