

St. John's Law Review

Volume 4
Number 1 *Volume 4, December 1929, Number 1*

Article 12

June 2014

Waiver of a Waiver

Sydney J. Taylor

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

it be alleged or proved that such unauthorized use will damage him. This the law will presume." (Italics ours.)²⁵

The decision in the Baumann case does not seem in line with the progressive spirit of our present Court of Appeals. Perhaps the Court feared that a contrary decision might be a dangerous precedent, or perhaps the familiar cry that equity should not control the morals of the people by injunction, moved the Court to the instant decision. But is a court of equity to refuse injunctive relief when the positive result of granting it would be the promotion of good morals?

The attitude of the Court on this and similar questions which arise from domestic relations is assuming more importance each day. While a declaratory judgment may serve to fully protect the rights of the plaintiff in many cases, its effect is deadened when the parties reside in a large city, when the coercive force of an injunction is needed to protect that which every ordinary person aspires to, is entitled to, and which a court of equity should protect, a good name.²⁶

BERTRAM R. BERNSTEIN.

WAIVER OF A WAIVER.

The doctrine of waiver is essentially an equitable one and it is founded on the strong antagonism of the courts to forfeitures.¹

²⁵ Interesting decisions which involved the question of injunctive relief with respect to the use of a name are *Burns v. Stevens*, 236 Mich. 443, 210 N. W. 482 (1926) (where plaintiff and defendant had lived together for many years although not married, and the Court gave injunctive relief restraining the defendant from holding herself out as plaintiff's wife); *B. P. O. E. v. Improved B. P. O. E.*, 205 N. Y. 459, 98 N. E. 756 (1912) (where use of a name similar to plaintiff's was enjoined, although no question of trade, industry or business was involved); *Edison v. Edison Polyform*, 73 N. J. Eq. 136, 67 Atl. 392 (1907) (plaintiff was not a business competitor of defendant and no question of unfair competition was raised); *Blanc v. Blanc*, 21 Misc. 268, 47 N. Y. Supp. 694 (1897) (the Court punished defendant for contempt for failing to observe that part of a divorce decree which enjoined her from further use of plaintiff's name).

²⁶ In *Greenberg v. Greenberg*, 218 App. Div. 104, 218 N. Y. Supp. 87 (1st Dept., 1926), an action to enjoin defendant husband from procuring a Mexican divorce which concededly would be invalid in New York, the Court said: "The mere fact that the husband has secured a divorce from his wife gives grounds for suspicion at least of the virtue and fidelity of the latter, on the part of the general public, in the domicile of both parties, who are unacquainted with the infinite variety of causes for which divorce may be granted in other jurisdictions and have heard only of the statutory ground for divorce in this state. A wife who has given no ground for divorce in this state where she and her husband have always lived during their married life, *should not be exposed to the humiliation and doubt as to her status raised by a judgment of divorce in another state, even if fraudulently obtained and invalid here.*" (Italics ours.)

¹ *Draper v. Oswego County Relief Assn.*, 190 N. Y. 12, 82 N. E. 755 (1907); *Stackhouse v. Barnston*, 10 Ves. 466 (1805), "Waiver at law and in equity are the same thing"; *Commercial, etc. v. New Jersey, etc.*, 61 N. J. Eq. 446, 49 Atl. Rep. 157 (1901).

Will the courts recognize and judicially declare the existence of a waiver by A of the right to set up the waiver by B of a breach by A of the contract between them?

It is characteristic of liability insurance contracts to provide for a forfeiture in the case of non-compliance, by the insured, with the stipulated requirement of notification to the insurer in the event of the contemplated contingency. And so it is characteristic of the courts, when a liberal interpretation of the contract will not avail the plaintiff assured, to eagerly seize upon any evidence of waiver or estoppel to preclude a forfeiture.²

In its early application in cases involving contracts of insurance, waiver was considered as identical with estoppel.

"The doctrine of waiver as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the company has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the condition."³

This theory was in force for many years and found support in the authorities of nearly all jurisdictions.⁴ The case of *Ripley v. Aetna Insurance Co.*⁵ distinguished between waiver and estoppel, stating the rule to be that if there was consideration for the waiver, estoppel was not necessary, but if the waiver was not supported by consideration, even though expressed in terms, it might be revoked at any time, unless the party seeking to revoke was estopped. This case was overruled by *Titus v. Glens Falls Insurance Co.*,⁶ which expresses the rule as it now exists in New York: "Waiver need not be based on any new agreement or estoppel."

In *Alsens A. P. C. Works v. Degnon* the Court of Appeals said: ⁷

"A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the

² *Murray v. State Life Ins. Co.*, 151 Fed. 539 (C. C., W. D., Pa., 1907), *aff'd* 159 Fed. 408 (C. C. A. 3rd, 1908); *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. Rep. 671, 36 L. ed. 496 (1891); *N. Y. Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841 (1877).

³ *Bigelow, Estoppel*, 5th ed. at 672.

⁴ *Insurance Co. v. Wolff*, 95 U. S. 333, 24 L. ed. 387 (1887); *Northern Assurance Co. v. Grand View Building Assn.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213 (1901); *Hoxie v. Howe, etc.*, 32 Conn. 40 (1864); *Union Nat. Bank v. Manhattan Life Ins. Co.*, 52 La. 36, 26 So. 800 (1898); *Blake v. Exchange*, 12 Gray 265 (Mass. 1858); *Société, etc. v. Moison*, 7 Q. B. 131 (Quebec, 1898).

⁵ 30 N. Y. 136 (1864).

⁶ 81 N. Y. 410 (1880).

⁷ 222 N. Y. 34, 118 N. E. 210 (1917).

party would have enjoyed. It is the voluntary act of the party *and does not require or depend upon a new contract, new consideration or an estoppel*. It cannot be recalled or expunged.⁸

It is essentially a matter of intention. Negligence, oversight or thoughtlessness does not create it. The intention to relinquish the right or advantage must be proved. Occasionally *it is proved by the express declaration of the party*, or by his undisputed acts or language so inconsistent with his purpose to stand upon his rights as to leave no opportunity for a reasonable inference to the contrary. *Then the waiver is established as a matter of law.*" (Italics ours.)

The rule was again stated in the more recent case of *Hevenor v. Union Ry. Co.*:⁹

"A waiver is proved as a matter of law by the undisputed acts or language of the party against whom the waiver is asserted, so inconsistent with its purpose to stand upon its rights as to leave no opportunity for a reasonable inference to the contrary."¹⁰

While it is true that waiver is usually exercised or inferred with regard to rights which arise out of a breach of a contract, it is not necessarily confined to such rights. A right arising out of a contract may be waived where there is no breach.

If A agrees to loan money to B on his note if B will secure two sureties, A may later agree to accept the note with only one surety, thereby waiving his right to have two. A breach of contract of itself has no effect on the rights and obligations of the parties, but it gives

⁸ Citing *Hotchkiss v. City of Binghamton*, 211 N. Y. 279, 105 N. E. 410 (1914); *Clark v. West*, 193 N. Y. 349, 86 N. E. 1 (1908); *Draper v. Oswego Co. Fire Relief Assn.*, *supra* Note 1; *Zwietusch v. Luehring*, 156 Wis. 96, 144 N. W. 257 (1913).

⁹ 204 App. Div. 535, 198 N. Y. Supp. 409 (1923).

¹⁰ In *Kiernan v. The Dutchess County Mutual Ins. Co.*, 150 N. Y. 190, at 194 (1896); 44 N. E. 698 at 699, *Vann, J.*, states: "An express waiver is in the nature of a new contract, modifying to some extent the old one. It does not require a new consideration unless it is by inducing a change of position, for the law of waiver seems to be a 'technical doctrine introduced and applied by the courts for the purpose of defeating forfeiture,'" and again at 195, "While the principle may not be easily classified, if the words and acts * * * reasonably justify the conclusion that with full knowledge of all the facts it intended to 'abandon or not to insist upon the particular defense afterwards relied upon,' a verdict or finding to that effect establishes a waiver, which if it once exists, can never be revoked." *Trippe v. Provident Fund Society*, 140 N. Y. 23, 35 N. E. 316 (1893); *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495, 43 A. L. R. 530 (1883); *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108 (1880). See also *People v. Manhattan Co.*, 9 Wend. 351 (N. Y., 1832); *The Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689 (1878).

rise to an election, on the part of the party who has not breached, to ignore the breach and continue, or to terminate the relationship.¹¹ The contract is in full force and effect until this election is exercised. To illustrate, suppose a lease provides that upon the non-payment of rent the lease shall be void. The lease is an onerous one; the tenant refuses to pay his rent; then he claims that he has forfeited his lease; that it is at an end and that he is free. His claim is invalid for he has merely given a right to the landlord to elect whether he will hold him to the lease or terminate the relationship. The tenant is a lessee up to the time the landlord elects to terminate the lease, and if the landlord should decide to waive the right arising out of the breach he continues to be a lessee in spite of himself. If the breach of itself terminated the lease it would come to an end, and could not be revived by a waiver but a new agreement between the parties would be necessary.¹² From this we may draw the general rule that the right to waive does not depend upon a breach, but wherever there is a right cognizable at law or equity, the one possessed of that right may waive it.¹³

If there are acts or language which establish a waiver by one party to a contract of his rights arising out of a breach of conditions of the contract by the other party, there ensues to the latter a right to avail himself of that waiver and recover on the contract as if there were no breach. As a matter of pure logic it would seem that this right in turn may be waived, with the resulting effect that the parties are returned to the status which existed immediately after the breach of the contract.

But the Appellate decision in the recent case of *Two Sixty Nine Canal Street Corporation v. Zurich Insurance Co.*, reaches a contrary

¹¹ In an analogous situation it was said, "I have spoken of the right of re-entry of the landlord as a 'forfeiture' of the lease but the use of the word 'forfeiture' in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts, then the landlord may re-enter"—*Barrow v. Isaacs*, 1 Q. B. 417 (1891).

¹² In England "revivifying a contract is spoken of as *the making of a new contract* after the old one has been forfeited and the policy holder failed in his action because an agent of the company had no authority to *make a bargain* binding the company to a new contract on the terms of the old contract but varying the time of payment," *Acey v. Fernie*, 7 M. & W. 150 (1840).

¹³ In *Hotchkiss v. City of Binghamton*, *supra* Note 8 at 283, 105 N. E. at 411, the Court of Appeals, through Miller, J., states, "Waiver depends, not on contract or estoppel, but on the intention of the party against whom it was asserted, and any provision of law intended for a party's benefit may be waived by him." See also *Clark v. West*, 193 N. Y. 349 at 360, 86 N. E. 1 at 5 (1908), *Werner, J.*, states, "The cases which present the most familiar phases of the doctrine of waiver are those which have arisen out of litigation over insurance policies where the defendants have claimed forfeiture because of the breach of some condition in the contract, * * * but it is a doctrine of general application which is confined to no peculiar class of cases."

decision.¹⁴ In this case there was a contract of insurance containing the usual condition that notice should be immediately given, a breach thereof, followed by acts amounting to a waiver, *which was in turn followed by the negotiation of a "non-waiver" agreement*. The agreement recited that the insurance company

"By undertaking the investigation and defense, *of the suit instituted by the injured party against the insured, does not waive* any condition of the policy * * * and in the event of any claim or suit under said policy, for indemnity or for any other purpose, it shall not be claimed that the said insurance company *has* by an act or conduct waived any provision or condition of its policy or that it is estopped from setting up any defense or defenses it may have."

It was held that continuance in the action brought by the injured party against the insured, by the insurance company with knowledge of the breach, constituted a waiver, and as the defendant was bound to defend at the time of the execution of the non-waiver agreement, the implied promise to continue in defense was no consideration.

True, there was no consideration, but a waiver need not be supported by consideration.¹⁵ Was not the signing of the agreement by the insured an express declaration to waive the right it had to rely on the waiver of its breach by the insurance company?

It seems that the Court did not exhaust all the possibilities of the defense for there is the strongest possible evidence,—a written agreement—of "an intentional relinquishment of a known right"¹⁶ by the plaintiff.

The apparent inclination to favor the insured as reflected in the innumerable cases on the subject of insurance should not outweigh the logical results of sound judicial reasoning.

SYDNEY J. TAYLOR.

WORKMEN'S COMPENSATION LAW—CONSTITUTIONALITY OF SUPPLEMENTAL RECOVERY FROM TORT FEASORS.

The general scheme of the Workmen's Compensation Law has been repeatedly upheld by the highest court of this state and the

¹⁴ 226 A. D. 516 (1st Dept., 1929).

¹⁵ *Supra* Notes 7, 10.

¹⁶ *Rice v. Fidelity & Deposit Co. of Maryland*, 103 Fed. 427 (C. C. A. 8th, 1900); *Kent v. Warner*, 94 Mass. 536 (1868); *West v. Platt*, 127 Mass. 372 (1897); *Dawson v. Shillock*, 29 Minn. 191, 12 N. W. 526 (1882); *Portland Ry. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688 (1893); *Hecht v. Brandus*, 4 Misc. 58, 23 N. Y. Supp. 1004 (1893); *Krivitsky S. Cohen, Inc. v. Western Union*, 129 Misc. 431, 221 N. Y. Supp. 525 (1927); *Ansorge v. Belfer*, 248 N. Y. 145, 161 N. E. 450 (1928); *Boynton v. Brailey*, 54 Vt. 92 (1881).