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Waiver and Estoppel in Insurance Law in California

It may be doubted whether there is any field of the law in which are to be found more confusion, more inconsistency and contradiction, and less painstaking analysis and clear enunciation of principle than that commonly designated by the title of waiver and estoppel. The extent to which insurers, as compared with other classes of contracting parties, have been subjected to vague theories of waiver and estoppel justifies the conclusion that in insurance cases ordinary principles of law have frequently been thrown overboard. It was with reference to a question of waiver and estoppel that Judge Cuthbert Pound remarked:

"The tendency on the part of the courts to treat insurance contracts as standing in a class by themselves and to protect against forfeitures invoked in defense of honest claims has led to much subtlety. As Professor Woodruff says in his preface to his 'Cases on Insurance,' (2d ed. p. 5): 'What do they know of the law of the insurance contract who only the law of contract know?' "¹

While "estoppel" is a slippery enough term under ordinary circumstances, being frequently employed indifferently to cover estoppel by misrepresentation and promissory estoppel, it is found in the insurance cases to take on an even more enlarged meaning and to be inextricably interwoven with "waiver." The two terms are frequently used synonymously. What is waiver? Professor Williston shows² that the term has been used to describe at least nine different legal situations, many of which fall within and are more properly denominated by some other principle. In that acute work by John S. Ewart, with the curious title of "Waiver Distributed," the author states that after beginning a book on the subject he discovered that there was no such thing as waiver, with two exceptions in medieval law, and that supposed cases of waiver were referable to election, estoppel, contract or release.³ Mr. Ewart piles up

¹ *Satz v. Massachusetts Bonding and Insurance Co.* (1926) 243 N. Y. 385, 393, 153 N. E. 844, 846, 59 A. L. R. 606, 610.

² WILLISTON, *CONTRACTS* (1920) §678.

³ EWART, *WAIVER DISTRIBUTED* (1917) 1-5.

Ossa on Pelion in his collection of confusing and self-contradictory judicial statements with regard to waiver.⁴

It must be admitted that the same confusion exists in the California opinions. Thus in *Goorberg v. Western Assurance Co.*,⁵ the elements of a "promissory estoppel" seem to be required to constitute a waiver. In *Mackintosh v. Agricultural Fire Insurance Co.*⁶ waiver, estoppel and new contract are inseparably intermingled. In *Knarston v. Manhattan Life Insurance Co.*⁷ one is informed that "in fact, in very many cases the acts which constitute a waiver cannot amount to a contract and in other cases they may not have a single contractual feature." Again in the same case appears the statement that although it is sometimes said that waiver is but another name for estoppel, yet "we think it is not true, that such waiver can be created only by acts or conduct, such as would create a technical estoppel." In *McCormick v. Orient Insurance Co.*⁸ it is said:

"Waiver" is used to designate the act, or the consequences of the act, of one side only, while the term 'estoppel' [in pais] is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts; but in the law of insurance the terms are ordinarily used indiscriminately. In this case, we see nothing which would amount to waiver as distinguished from an estoppel."

In *Stockton Combined Harvester & Agricultural Works v. Glens Falls Insurance Co.*⁹ "waiver" and "compromise" seem to be treated as

⁴ Thus, to select but a few of his multitudinous examples: "The doctrine of waiver rests upon estoppel." *Ervay v. Fire Association of Philadelphia* (1903) 119 Ia. 304, 308, 93 N. W. 290, 292.

"It is well settled in this state that estoppel is not the basis of the rules of law as to waiver of forfeiture." *Modern Woodmen of America v. Lane* (1901) 62 Neb. 89, 96, 86 N. W. 943, 945.

"Waiver is necessarily a matter of mutual intention between the contracting parties, in the nature of a new contract between them." *Order of United Commercial Travelers of America v. Boaz* (1915) 27 Colo. App. 423, 437, 150 Pac. 822, 828.

"To constitute a waiver it must fairly appear that there was an intention to waive the covenant right, and the waiver must be founded upon a consideration." *Linwood Park Co. v. Van Dusen* (1900) 63 Ohio St. 183, 198, 58 N. E. 576, 580.

"A waiver, being merely a voluntary relinquishment of a right, cannot be regarded as a contract, and does not require a new consideration to support it." *Schwartz v. Wilmer* (1899) 90 Md. 136, 144, 44 Atl. 1059, 1061.

"A waiver is nothing; unless it amounts to a release . . . A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not, without consideration, bar the right any more than at law accord without satisfaction would be a plea." *Stackhouse v. Barnston* (1805) 10 Ves. 453, 466, 32 Eng. Rep. 921, 925.

Other judicial statements confuse waiver with election.

⁵ (1907) 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N.S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801.

⁶ (1907) 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234.

⁷ (1903) 140 Cal. 57, 65, 73 Pac. 740, 742.

⁸ (1890) 86 Cal. 260, 262, 24 Pac. 1003, 1004.

⁹ (1893) 98 Cal. 557, 33 Pac. 633.

synonyms. In *Aronson v. Frankfurt Accident & Plate Glass Insurance Co.*¹⁰ it is said that waiver is an intentional relinquishment of a known right but that there must be some prejudicial reliance by the other party. In *Wheaton v. North British & Mercantile Insurance Co.*¹¹ it is stated that "the waiver spoken of in the instruction is another term for estoppel. There can be no estoppel where the facts are not known, as no one can be presumed to have waived that the existence of which he has not known."

It is the opinion of the present writer that a great deal of the difficulty and confusion in this branch of law has been caused by a failure to classify the different types of conditions and other provisions found in insurance contracts. As a consequence of such failure, decisions dealing with one type of conditions are frequently cited without discrimination for problems dealing with another. Judicial language, appropriate enough to one class, or at least not leading to erroneous results, is wrenched from its fact situation and applied to another class, thus becoming a source of error. There is also a failure to make use of other legal principles that would serve to solve the problem. Instead, we are merely told frequently that the insurer "waived" or is "estopped." It is through a classification of conditions and other provisions, as well as by the suggestion of such other legal principles, that the writer plans to develop the subject.

In this article it is proposed to examine and analyze the California cases with only such incidental reference to the authorities elsewhere as may yield some light. Since the insurance business is carried on by corporations, the problem of the agent's power to bind his principal is frequently involved. The latter problem is particularly vital in view of the common insertion of provisions limiting the authority of the agent. However, for the sake of simplicity and clearness, it is planned to deal with the subject first as if there were only an individual insurer acting wholly by himself and never through agents. In a later paper attention will be directed to the agency questions.

I. CONDITIONS OPERATIVE CONTEMPORANEOUSLY WITH THE MAKING OF THE CONTRACT, OTHER THAN PREMIUM CONDITIONS, HEREIN TERMED INCEPTIONAL CONDITIONS

Certain conditions found in the policy relate to the inception of the contract. Thus in the life contract affirmative statements in the application may be incorporated in the policy and made conditions or warranties. In the fire policy will be found, for example, this clause:

¹⁰ (1908) 9 Cal. App. 473, 99 Pac. 537.

¹¹ (1888) 76 Cal. 415, 429, 18 Pac. 758, 765, 9 Am. St. Rep. 216, 226.

"This entire policy shall be void if the interest of the insured be other than unconditional and sole ownership." Hence if the condition is violated at all, it is violated at the moment the contract comes into existence. If the condition is violated, the result is either that no valid contract is made, in which case the insurer must return any premium received, or that there is a valid contract voidable by the insurer, but if avoided, the insurer must return the premium since he has given no consideration. If we interpret the word "void" literally, the first alternative is necessary. The result would be that in such a case the insured could himself assert the invalidity and recover back the premium at any time, even after the expiration of the term of the insurance, and even if there had been no loss. But this result is not reached by the cases which interpret "void" as "voidable," *i.e.* that the insurer has really an option to avoid the contract.¹² The reason for this construction is that the condition is for the benefit of the insurer, and consequently it is absurd to allow the insured to have the benefit of the breach, where the insurer is not relying upon it.¹³ In the language of Professor Williston, "Where any possible benefit can accrue to the party for whose benefit the provision is made, by keeping the contract in force, there seems to be no doubt of the propriety of this construction [that the policy is only voidable], for it cannot have been the intention of the parties that by failing to perform a condition one who should perform it can free himself from liability."¹⁴ While in some respects this statement may be more applicable to breaches of condition operative after the inception of the contract, it is not without significance in the present situation. Let it be supposed that an insured, apprised of the uncertainty of his position due to the breach of an inceptional condition, should approach the insurer, after the contract is made but before

¹² "If a title to the property insured, other than sole and unconditional fee simple in the insured, *ipso facto*, rendered the policy void, then it was void as to both parties. It will scarcely be insisted by anyone that the insured, at their option, might have treated the policy as void, and recovered the premium paid, prior to the fire; but the evident meaning of the policy was that, for a breach of its terms, the insurer, acting with reasonable diligence, at its option might avoid the contract." *Glens Falls Insurance Co. v. Michael* (1905) 167 Ind. 659, 678, 74 N. E. 964, 970, 8 L. R. A. (N.S.) 708, 716.

¹³ In *O'Connor Transportation Co. v. Glens Falls Insurance Co.* (1922) 204 App. Div. 56, 197 N. Y. Supp. 549, successive policies were taken out on the same property. A loss occurred during the term of the last and the insurer refused to pay on account of the breach of an inceptional condition. While admitting that the insured could recover the premium paid on the last policy, the court denied recovery of the premiums on the earlier ones, although the same inceptional condition of each was broken. *Waller v. Northern Assurance Co.* (1884) 64 Iowa 101, 19 N. W. 865, is *contra*. The situation is striking. By the New York case the insurer is permitted in effect to avoid the last policy while affirming the others; that is to elect as may best suit its purposes in the light of subsequent facts.

¹⁴ WILLISTON, *CONTRACTS* (1920) §746.

a loss, demanding either the return of the premium or the assurance of protection under the policy. If this assurance is given, it will hardly be contended that the insurer is not liable for a subsequent loss. From this concession it follows that the policy gives the insurer the power to elect between affirmance and avoidance and that the insurer has made a binding election to affirm. The situation here is similar to the case of a contract induced by fraud. The insurer cannot blow both hot and cold at the same moment; it cannot be permitted to take the position that it may keep the premium and at the same time deny any prospective liability; the two positions are inconsistent. If this be granted it is submitted that there is to be found in the law of election, rather than "waiver" and "estoppel," the solution of many problems where there is, what, for a concise name, is termed herein, an inceptual breach.

a. Knowledge by the Insurer of the Breach at the Moment the Contract Is Made

In accordance with the great weight of authority in this country the California courts hold that if the insurer, at the time the contract is made, has knowledge of the breach, he cannot later set up that breach in defense.¹⁵ On this point the Supreme Court of the United States and the courts of Massachusetts and New Jersey take a contrary position.¹⁶ The reason for this, as explained in the leading case of *Northern Assurance Co. v. Grand View Building Ass'n.*¹⁷ is the parol evidence rule; *i.e.* that it would be contradicting the written agreement to allow evidence of such knowledge since the purpose is to show either that the violated condition was not a part of the agreement or that there was to be liability despite its violation. To meet this argument various contentions have been urged

¹⁵ *Loring v. Dutchess Insurance Co.* (1905) 1 Cal. App. 186, 81 Pac. 1025 (unconditional and sole ownership); *Fishbeck v. Phenix Insurance Co.* (1880) 54 Cal. 422 (other insurance); *Davis v. Phenix Insurance Co.* (1896) 111 Cal. 409, 43 Pac. 1115 (unconditional and sole ownership; but here the application, incorporated by reference in the policy, showed the exact interest of the insured so that there was a repugnancy); *Breedlove v. Norwich Union Fire Insurance Society* (1899) 124 Cal. 164, 56 Pac. 770 (unconditional and sole ownership); *Allen v. Honie Insurance Co. of New York* (1901) 133 Cal. 29, 65 Pac. 138 (unconditional and sole ownership; insurer on renewal held chargeable with knowledge possessed when original policy issued).

However, the Federal courts sitting in California follow the view of the United States Supreme Court, *infra* note 17. *Boston Insurance Co. v. Hudson* (1926) 11 F. (2d) 961; *Fidelity Union Fire Insurance Co. v. Kelleber* (1926) 13 F. (2d) 745.

¹⁶ VANCE, *INSURANCE* (2d ed. 1930) §136.

¹⁷ (1902) 183 U. S. 308, 22 Sup. Ct. 133. An agency point is also involved in the case in such a way that it is somewhat difficult to separate the two points. In the subsequent case of *Lumber Underwriters of New York v. Rife* (1915) 237 U. S. 605, 35 Sup. Ct. 717, no limited agency question is involved; the decision is squarely put on the parol evidence rule.

and made the basis of contrary holdings. Sometimes it is said that it is fraud for the insurer to take the premium, or the promise to pay the premium, with knowledge, at the time, that the contract is worthless to the insured. Just what is the fraudulent statement or conduct? If it be contended that it lies merely in the express or implied oral promise to pay despite the violated condition, the answer is that the parol evidence rule is disregarded. If then the argument be made that the insurer's conduct or statement amounts to a representation that the policy will protect the insured in case of loss, it is open to the same objection and to the additional one that it is a statement of law. Furthermore, on this theory the remedy would be in quasi-contract, based on rescission, to recover the premium, or in tort for deceit, with its problem as to the measure of damages which may not be the amount of the loss as in an action on the contract.¹⁸ The basis for some decisions is that the insurer is estopped to set up the breach of condition.¹⁹ In the latest work on insurance Professor Vance²⁰ urges this view strongly on the ground that in effect "the insurer has made a false statement of a material fact — that the policy validly covered the risk — knowing that it would be relied on. The insured relied on the statement, as he was privileged to do, since he had no actual knowledge of its falsity, and his failure to read the policy was not such negligence as to impute knowledge to him. Being so misled he both acted, in paying the premium, and refrained from acting in that he made no further effort to secure insurance, both to his prejudice." However, it must be noted that the estoppel is against a term of the contract because of something known at the time of its execution. In the cases we are now considering the insurer does not represent for example that the building is not on leased ground. His conduct at most indicates an intent to pay for a loss even if the building is on leased ground. The estoppel under the suggested theory prevents the insurer from setting up the condition, not its breach only.²¹ In addition to the perhaps

¹⁸ See WILLISTON, CONTRACTS (1920) §750.

¹⁹ It has frequently been said that the Northern Assurance case overruled *Union Mutual Life Insurance Co. v. Wilkinson* (1871) 80 U. S. (13 Wall.) 222, but *quaere?* In that case the insurer took the word of a third person as to a fact that the insured refused to state on the ground of lack of knowledge and inserted a statement in the application. Here then there was clearly a statement of fact by the insurer, relied on by the insured. The insurer was in effect denied the opportunity to prove the fact false and not denied the opportunity to set up the condition as part of the contract.

²⁰ VANCE, INSURANCE (2d ed. 1930) §137.

²¹ "Most of the cases so deciding speak of estoppel, but it is hard to see how a promissory estoppel can be more efficacious to avoid the application of the parol evidence rule than positive contract with consideration; and certainly a contemporaneous oral modification of a written contract is not generally effectual though it was both supported by a consideration and relied upon." WILLISTON, CONTRACTS (1920) §750.

not insuperable difficulty that the representation is in substance a representation of law as to the legal effect of the contract, unless it amounts to a representation that the particular condition is not in the policy, in which case reformation would seem the proper remedy, Mr. Vance's explanation requires ignorance on the part of the insured of the presence of this particular condition clause. But, so far as has been observed, no cases stress or seem to depend on the lack of knowledge of the insured of its existence. In addition to these arguments many courts content themselves with saying that the insurer "waived" the condition.

If, however, the approach to the problem is from the standpoint that the contract is voidable only at the option of the insurer, is not one justified in saying that when the insurer issues the policy with knowledge of the breach, it then and there manifests an election to affirm and not to avoid? Its conduct is inconsistent with any other honest and rational explanation and may be reasonably so interpreted. To be sure most elections in contracts are exercisable after the contract is entered into. However, is there any necessary reason why it is impossible to have an election at the outset? If the idea of an election at the outset be deemed extraordinary, it may be answered that the insurance contract is practically *sui generis* in containing such inceptional condition clauses. Further it must be borne in mind that policies are issued on standardized forms designed to meet the exigencies of the ordinary situation and are not framed anew each time to fit the facts of the individual case. But if this theory of election at the outset be deemed unsupportable, it can be said that the silence of the insurer after the issue of the policy, coupled, as it usually is, with retention of the premium, although this may not be regarded as an essential element, is conduct indicative of an intent to affirm. In the language of Mr. Ewart:²²

"Giving the word 'void' its accepted meaning — voidable at the election of the company — the situation is this: The company delivered a policy knowing of a contemporaneous breach of it; the company was therefore entitled to rescind it the next moment; instead of rescinding 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."

Silence perhaps is not usually evidence of election. There seems no reason why it should not be in particular cases where it would normally be interpreted as such. Otherwise the insurer is permitted to await events. If the term goes by without a loss, it will elect to affirm and retain the premium. If a loss occurs, it will frequently elect to avoid. This permits the company to use the conditions unfairly for premium-catching but loss-avoiding purposes. By hypothesis the insurer knows at the outset

²² EWART, WAIVER DISTRIBUTED (1917) 210.

of the breach of the condition; should it not be required to elect promptly, particularly as the consequences of its failure may be exceedingly prejudicial?

b. Presumption of Knowledge of Inceptional Breaches

A doctrine gaining headway in some jurisdictions, although repudiated in others,²³ is that if the insured makes no representations concerning the matters covered by inceptional conditions and no inquiry is made by the insurer, the insurer "waives" the breach or is "estopped." Support for this view is to be found in California. The result is sometimes reached on the ground that it must be presumed that the insurer has knowledge of the facts.²⁴ This theory of presumption of knowledge, contrary to the truth, may be criticized as an attempt to maintain a logical deduction by means of a fiction.

In *Raulet v. Northwestern National Insurance Co. of Milwaukee*²⁵ the court added another argument. In brief the argument is that the rule that parties know the terms of written contracts should not be strictly applied to insurance contracts that contain numerous technical provisions which as a matter of common knowledge the insured seldom knows or if he knows would not understand; that people trust the insurer's agent to protect them and hence there is a duty upon the insurer to inquire and call attention specifically to such provisions or ask for written applications concerning the matters covered by such clauses; that chattel mortgages are common, as the insurer well knows, and that the conduct of the insurer misleads the insured into the belief that he has protection and operates as a contrivance to get pay for a risk without assuming it. Whether one accepts or rejects this line of reasoning, it is at least straightforward. It is in accord with the view that insurance is a valuable social and economic device of such public importance as to justify statutory regulations that may be imposed only on those exercis-

²³ VANCE, INSURANCE (2d ed. 1930) 525-528; WILLISTON, CONTRACTS (1920) §751.

²⁴ Sharp v. Scottish Union and National Insurance Co. (1902) 136 Cal. 542, 69 Pac. 253 (unconditional and sole ownership clause). The authority of the case is weakened by the fact that reliance is placed also upon the ground that after the loss and with knowledge at that time the insurer sought to escape liability and yet had not offered to rescind and return the premium. Beatty, C. J., dissented from an order denying a rehearing on the ground that in truth the facts were not known and the decision in effect meant that the insurer is under a duty to inquire.

The idea is frequently expressed that by failure to inquire the insurer indicates that it is not interested in the matter, and so excuses the breach of the condition. Possibly the more rational inference is that no inquiry is made because the matter is expressly covered in the policy.

²⁵ (1910) 157 Cal. 213, 107 Pac. 292 (chattel mortgage clause). The authority of the case is weakened by the fact that the court first held that there had been no violation of the clause, a point sufficient to dispose of the case.

ing a business "affected with a public interest." It is also consistent with the recent development of the tort liability of the insurer who "negligently" fails to act on an application within a reasonable time, which may be regarded as merely another step toward putting insurers into the public service class.²⁶ Without going into the latter doctrine or its details, it must be recognized as laying down a peculiar, if not extraordinary, duty in the case of insurance, although present social needs may not require its application to contracts in general. Similarly there is no necessary reason why the courts should not impose a duty on the insurer to inquire into those facts whose existence will render the insurance contract voidable *ab initio*.²⁷

The doctrine laid down in the *Sharp* and *Raulet* cases received a setback in *Kavanaugh v. Franklin Fire Insurance Co.*²⁸ The court somewhat distinguished the *Sharp* case on the ground that there the insurer retained the premium after the loss with knowledge at that time of the

²⁶ See VANCE, INSURANCE (2d ed. 1930) §64.

In *Stewart v. Helvetia Swiss Fire Insurance Co.* (1894) 102 Cal. 218, 36 Pac. 410, it was suggested that an insurance agent, who had agreed to communicate an application for insurance to his principal but did not do so until after the loss, might be held liable for damages.

²⁷ See VANCE, INSURANCE (2d ed. 1930) 214, 527; Note (1925) 35 YALE L. J. 203, where the view is suggested that the rule of implied warranty in the law of sales should be applied to "sales" of insurance and that the insurer should be held to warrant that the policy furnishes the desired protection.

See Wilbur, J., in *Kavanaugh v. Franklin Fire Insurance Co.* (1921) 185 Cal. 307, 314, 197 Pac. 99, 102: "While it is true that an insurance policy is a contract, it is recognized that in the decisions bearing upon the responsibility of the insurance company, the policy has been treated more as a commodity than as a contract and rules have been evolved which are not applicable to ordinary contracts. It is therefore considered that when an insurance company without any inquiry as to the character of the ownership of the insured issues a policy and receives a premium therefor, it is just to assume that the insurance company intended to cover whatever interest the insured had in the property and that the insured by accepting a policy and paying the premium had the same understanding as to the legal effect of the policy."

Brown, in BALLANTINE, LAW PROBLEMS WITH SOLUTIONS (1927) 567: "If there is any ground for allowing recovery, it must be that ordinary legal rules are not applicable. The form of contract was not arrived at by negotiation of the parties, but it was established beforehand, known intimately to C [insurer] and unknown to A [insured]. If there are any clauses therein liable to trick an unsuspecting applicant for insurance, it may not be unjust to say that C should have advised A thereof, and, having failed to do so, could not use them as a defense."

²⁸ (1921) 185 Cal. 307, 197 Pac. 99 (unconditional and sole ownership clause). The peculiar facts of the case doubtless had considerable weight. When the renewal policy in question was issued, the insured had already contracted to sell and had put the purchaser in possession. Upon obtaining knowledge of this, the agent demanded back and received the policy from the mortgagee to whom the loss was payable, although no notice was given the insured until after the loss. A new policy was issued immediately to the vendee who was later paid for the loss. Furthermore, the plaintiff had never paid the premium.

facts and did not tender it back.²⁹ Without repudiating the reasoning of the *Raulet* case, which on the whole seems to be approved, the court apparently places its conclusion on the ground that the policy in question was issued after the adoption of the statutory fire policy law and that consequently the doctrine did not apply since the statutory form is the commodity bought and sold.³⁰ It should be stated, however, that in some other jurisdictions the statutory policy law has been held not to change the rule.³¹ Despite the *Kavanaugh* case the court of appeal has rendered what seems to be a directly contrary decision.³² Still another decision by the court of appeal³³ follows the *Raulet* and *Sharp* cases, but in this case a statutory policy was not involved. The result of these cases may be said to leave the California law somewhat unsettled on this important point. The moral, for the insurer who would be safe, is to make the appropriate inquiries. It must be added that if the doctrine of the *Sharp* and *Raulet* cases is accepted, the field for the subsequent discussion of inceptual breaches is largely restricted.

c. Knowledge of Inceptual Breaches Obtained after Issue of Policy but before Loss

No California cases have been found discussing this exact situation. Assuming that the contract is voidable at the election of the insurer, it will probably be conceded that if the insured notifies the insurer of the inceptual breach and demands either that the premium be returned or an assurance given of a liability for future losses, and the assurance is made, that this will constitute an effectual election. But the present problem is more difficult. Upon the acquisition of knowledge of the breach, is the insurer required to take the initiative and within a reasonable time give notice of the election to avoid under the alternative of

²⁹ As to this see *infra* pages 13, 14.

³⁰ See the statement by Mr. Justice Wilbur, *supra* note 27.

³¹ See *Gregerson v. Phenix Fire Insurance Co.* (1918) 99 Wash. 639, 170 Pac. 331, L. R. A. 1918E 521, and cases cited therein. On the other hand while also repudiating independently the doctrine on the ground that there is no duty to inquire, the case of *Hardin v. Liverpool & London & Globe Insurance Co.* (1925) 189 N. C. 423, 127 S. E. 353, considered the statutory policy law to be an insuperable obstacle to the insured's contention.

³² *Sam Wong v. Stuyvesant Insurance Co.* (1929) 100 Cal. App. 109, 279 Pac. 1050 (building-on-land-not-owned-in-fee-simple clause; petition to have heard in supreme court denied). There was a finding that before the loss the insurer learned the facts but did not tender back the premium. Although no importance seems to have been attached to this finding, it might have been made the basis of the decision. See *infra* pages 10, 11 and particularly note 35.

³³ *Hutchings v. Southwestern Automobile Insurance Co.* (1929) 96 Cal. App. 318, 274 Pac. 79 (insurance on a vendor against embezzlement by the conditional vendee). The condition was that the automobile had been lawfully registered in the name of the vendor as legal owner.

losing this power? In the case of contracts induced by fraud, where the innocent person has received the consideration, he must act with reasonable promptness to avoid if he would escape liability upon his promise.³⁴ The basis of the rule is ordinary fairness. It may be thought that the same considerations require the insurer to take the initiative and give prompt notice of the exercise of his option. This is particularly true where the insured knows of the insurer's knowledge, since the silence of the company gives a misleading and highly prejudicial impression. But even if this knowledge on the part of the insured is lacking, a contrary conclusion puts the insurer in too favorable a position. It permits the company to await events at the expense of the insured. Obviously the need for great promptness is more marked in insurance cases than in the case of ordinary contracts. Authorities elsewhere have said that the insurer must take such affirmative steps.³⁵

d. Knowledge of Inception Breaches Acquired after Loss

Here from the standpoint of the insured the necessity for prompt action by the insurer is not so apparent since the loss has already happened. Although at first glance it might seem that no insurer, intent on profit, would elect to pay a loss rather than refund the relatively small premium, yet for far-sighted business reasons an insurer may desire to pay despite a breach of condition which had little or no connection with the loss or which is deemed to have increased the physical or moral hazard in the particular case only unappreciably, if at all. A business reputation for fair conduct and lack of technical objection is a valuable asset. But if the breach was substantial, or had some connection with the loss, or if there is an unprovable suspicion of a dishonest loss, the insurer, even

³⁴ In *New York Life Insurance Co. v. Adams* (1921) 151 Ark. 123, 132, 235 S. W. 412, 415, where this doctrine was applied to an insurance contract, the court said: "The company had no right, with this knowledge, to speculate upon the situation by retaining the note to ascertain whether the assured was going to get well or die. If it desired to take advantage of the right to avoid the contract on account of false misrepresentation, the duty rested upon it to at once declare a forfeiture and return the note for the unearned premium." And see *Stiegler v. Eureka Life Insurance Co.* (1925) 146 Md. 629, 127 Atl. 397.

³⁵ "If appellant desired to avoid this policy for the reasons pleaded, it was required to act with reasonable promptness after acquiring knowledge of the facts, and thereupon it was its duty to notify appellee of its decision to avoid the policy and of the reasons therefor, and to return, or tender, or in some appropriate way manifest its willingness and readiness to restore, the unearned premium received. Appellant's contention is that, under the terms of the policy, no risk attached and no liability was assumed by it at any time. It must therefore follow that there was no consideration for the premium received, and good faith and common fairness required its prompt return; and the insurer, by retaining such premium with full knowledge of the facts, elected not to insist upon a forfeiture of the policy." *Glens Falls Insurance Co. v. Michael* (1905) 167 Ind. 659, 679, 74 N. E. 964, 970, 8 L. R. A. (N.S.) 708, 716. Numerous cases are cited.

though bent upon preserving such a reputation, will normally choose to refund the premium. The short-sighted insurer, too intent on the profit of the moment, will elect in every case to take advantage of the breach. In any event the failure to elect promptly can have no misleading or prejudicial effect on the insured, unless perchance there is a partial loss, less in amount than the face of the policy. Nor is the insurer put in the unduly favorable position referred to in the preceding paragraph. For these reasons there is little ground for construing equivocal acts as an election not to avoid the contract.

Presumably in accordance with this view, it has been held in California that a request for proofs of loss or the performance of similar acts required of the insured by the contract is not a "waiver" of the condition although the insurer had knowledge of the breach at that time.³⁶ It may be urged that such a request is inconsistent with an election to avoid, since if avoided there is no longer any contract and hence there are no conditions of proof to be performed. In accordance with this contention many courts have said that there is a "waiver."³⁷ On the other hand a mere request for proofs does not clearly point to an election to affirm the contract since it is consistent with a desire on the part of the insurer to obtain the fullest information before making a decision. To permit the insurer ample opportunity for investigation and knowledge of all relevant facts will in the end redound to the benefit of policy-holders. If the insurer should expressly say: "We know that there has been a breach; nevertheless we may later decide to pay, but before we make a decision we wish complete knowledge as to a number of facts and therefore it is to your interest to give them to us," it would doubtless be held that there is no "waiver" nor election to affirm the contract. It may well seem that a mere request for proofs has no greater significance than such an express statement.³⁸

However, it has been held in this state that if a liability insurer takes charge of the defense of an action against the insured, as the contract requires, it cannot thereafter set up the inceptional breach.³⁹ Although, in the case mentioned, the court seems to go on the ground of prejudicial

³⁶ *McCormick v. Springfield Fire & Marine Insurance Co.* (1885) 66 Cal. 361, 5 Pac. 617; *McCormick v. Orient Insurance Co.* (1890) 86 Cal. 260, 24 Pac. 1003. See also *Wheaton v. North British & Mercantile Insurance Co.* (1888) 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216. But *cf.* *Silverberg v. Phenix Insurance Co.* (1885) 67 Cal. 36, 7 Pac. 38.

³⁷ *VANCE, INSURANCE* (2d ed. 1930) 473; *WILLISTON, CONTRACTS* (1920) §764.

³⁸ To avoid the construction sometimes placed by courts upon the request for proofs or similar acts, policies often contain provisions expressly to the effect that such request shall not be held to be a waiver. See California statutory fire policy.

³⁹ *Frank & Co. v. New Amsterdam Casualty Co.* (1917) 175 Cal. 293, 165 Pac. 927.

reliance by the insured in permitting this, yet, since defending is performance of part of the insurer's obligation under the contract, this conduct clearly evinces an intent to affirm. Additional strength is lent the argument by the fact that, since the question of a breach has not yet been judicially determined, the assumption of the defense may well be to the direct advantage of the insurer, but to the disadvantage of the insured if the defense is not vigorously and properly conducted. The conduct of the defense, while a duty on the insurer, at least where there has been no breach, is also a privilege for its benefit.

If after a loss and with knowledge of the facts the insurer expressly agrees to pay, this is a clear election not to avoid.⁴⁰ In the case cited the defendant agreed to pay its proportionate part of the loss and in consequence the plaintiff released the other insurers upon receiving the proper proportions from them. While the conclusion of the court is based upon the prejudicial acts of the insured, it may be questioned whether such prejudicial acts are necessary.

The *Goorberg* case⁴¹ decides that a failure to offer to return the premium, continued up to the time of trial, coupled with a denial of liability, is not an election to affirm. While it was conceded that the insurer was under liability to return the premium, the court, using the language of waiver and estoppel, said:

"To constitute such waiver or estoppel by the action or non-action of the insurer after the loss, it is essential that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action. Here nothing was done which could have led the insured to believe that the defendant would not take advantage of the breach of warranty."

It was also stated by the court that anything to the contrary in *Fishbeck v. Phenix Insurance Co.*⁴² must be regarded as overruled. In the latter case one of the grounds of the opinion was that where the insured repaid the "unearned" portion of the premium, but retained the "earned" it could not set up the breach since it was its duty upon ascertaining the facts to return the whole premium if it would avoid responsibility. It is doubtful whether the actual holding is inconsistent with the *Goorberg* case since there was no denial of liability in the *Fishbeck* case until after the return of part of the premium which was given for a cancellation of the policy from that time on. Under these circumstances there appears to have been an election to affirm. However, in *Sharp v. Scottish Union &*

⁴⁰ *Fishbeck v. Phenix Insurance Co.* (1880) 54 Cal. 422.

⁴¹ *Goorberg v. Western Assurance Co.* (1907) 150 Cal. 510, 518, 89 Pac. 130, 133, 10 L. R. A. (N.S.) 876, 881, 119 Am. St. Rep. 246, 253, 11 Ann. Cas. 801, 804.

⁴² (1880) 54 Cal. 422.

National Insurance Co.,⁴³ a case based largely on other grounds,⁴⁴ reliance is placed on the fact that the insurer had not offered to rescind and to return the premium, but instead had offered to pay \$500 as a compromise for the loss. This ground is untenable under the later decision in the *Goorberg* case.

Reduced to its minimum it may be said that *Baker v. Fireman's Fund Insurance Co.*⁴⁵ is a case of payment with knowledge and of an attempt to recover back. There was in substance a mortgage with premiums for insurance computed as part of the mortgage debt. The mortgagee took out a policy. With knowledge of the breach of the unconditional and sole ownership clause the insurer paid the mortgagee, taking an assignment of the mortgagee's interest. It was held that the mortgagor was entitled to be credited as against the insurer with the insurance money paid the mortgagee. The court spoke of estoppel by payment with knowledge. In effect it would appear that the mortgagee insured for the benefit of both himself and the mortgagor and that by the payment there was an election to affirm. If the premium was paid out of funds of the mortgagor, or even if the mortgagor was merely under an obligation to reimburse the mortgagee for the premium paid by the latter, a payment by the insurer to the mortgagee would operate as a credit on the mortgage debt. While the insurer could deny liability on the contract and yet be as privileged as anyone else to buy up the mortgage, the insurer here did not deny liability to the mortgagee. Conceding that a mortgagor may not have the benefit of insurance money paid the mortgagee on a contract taken out by the latter for his own benefit only but that on the contrary the insurer will be subrogated to the mortgagee,⁴⁶ that is not the situation here. If the insurer supposed at the time of payment that the mortgagee had insured merely himself and had no knowledge that the premiums were included in the mortgage debt, it might be urged that the insurer would be entitled to recover back his payment from the mortgagee on the ground of mistake. However, in this case the insurer is insisting on rights under the mortgage as against the mortgagor.

II. CONDITIONS RESPECTING PAYMENT OF FIRST PREMIUM

The policy may contain a provision that there shall be no liability on the part of the insurer or that the policy shall not go into effect until the first premium is paid. The California cases are unanimous in holding that the provision is "waived" by the delivery of the policy as a presently

⁴³ (1902) 136 Cal. 542, 69 Pac. 253.

⁴⁴ See *supra* page 8.

⁴⁵ (1889) 79 Cal. 34, 21 Pac. 357.

⁴⁶ VANCE, INSURANCE (2d ed. 1930) 653.

effective contract under an agreement for credit.⁴⁷ The *Farnum* case goes on the ground that the unconditional delivery as a completed contract is too plainly in contradiction with the condition of prepayment for it to be supposed that the condition was intended as a potent part of the contract, since to do so would impute a fraudulent intent to the insurer. It was also said that it would be unjust for the company to charge the full amount of the premium for the entire period and to accept it at the expiration of the period of credit if no loss had occurred but to deny the validity of the policy during the period of credit if loss should occur during that period.

But is the parol evidence rule to be so overcome? It must be noted that the effect of the provision is not to make the contract voidable *ab initio* as in the case of the conditions previously considered. By its terms the policy merely does not go into effect until the payment. After payment it is unquestionably valid. Nor is the argument of "fraud" compelling. Granting the actual existence of a contemporaneous oral agreement conflicting with the terms of a written contract it may always be considered "fraud" in the popular sense at least to insist on the supremacy of the written terms. The parol evidence rule, however, rests upon a policy of stability in written contracts and the dangers of parol evidence due to its uncertainties and the ease of fabrication. The theory of the *Farnum* case, if applied generally, would entirely destroy the parol evidence rule. Nor is there much strength in the argument that when the insured pays the year's premium at the end of the three months' period of credit, he obtains only nine months' insurance. In the absence of statutory regulation of rates and of discrimination, the parties are competent to provide that a particular person shall pay the same sum for nine months' insurance that most pay for twelve months'.

However, the result may be supported on a different line of reasoning. Professor Vance⁴⁸ suggests that while ordinarily the insured makes the offer and the insurer's policy is the acceptance, yet the insertion of this condition makes the policy a counter-offer. When the insurer agrees orally to extend credit, he is removing this condition in the acceptance and is in effect saying: "If you will agree to pay the premium in three months, we will now insure you from this time on." "The parol testimony rule, which applies only to promissory provisions of a written contract, and not to recitals, has no application whatever. The insured is here said to waive the condition of prepayment contained in the policy.

⁴⁷ *Farnum v. Phoenix Insurance Co.* (1890) 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233 (fire policy); *Griffith v. New York Life Insurance Co.* (1894) 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96 (life policy); *Berliner v. Travelers' Insurance Co.* (1898) 121 Cal. 451, 53 Pac. 922 (life policy).

⁴⁸ VANCE, INSURANCE (2d ed. 1930) 460.

What he really does is to modify the condition imposed upon the policy offer. The question involves the making of the contract, not the operation of a contract already made . . . The insurer merely gives up the privilege of insisting upon a given mode of acceptance."⁴⁹ If *A* replies in writing to a written offer from *B* that he will accept if *X* approves and later dispenses with *X*'s approval, to which *B* assents, there is little doubt but that there is a contract, but the provision as to *X*'s approval is no part of it.

However unusual such an arrangement may be, there seems no legal reason why a policy may not be issued with a provision whereby no risk is to be attached until the premium is paid, coupled with the agreement of the insured to pay the premium at some time in the future. This would be merely a contract for future insurance to go into effect upon payment, but must be carefully differentiated from the cases previously cited where the understanding was that there was then and there upon the acceptance of the policy a presently effective insurance upon credit.⁵⁰ However, by section 2598 of the Civil Code: "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid."⁵¹ To give this section any purpose or effect, it must be and is held that where there is such acknowledgment the policy at once becomes a present insurance without suspension of risk during non-payment and not merely a contract to go into effect in the future upon payment of the premium.⁵² Even in the absence of such legislation the same result has been reached in other jurisdictions, although there is authority *contra*.⁵³ The ever-ready "estoppel" is assigned as a reason. Yet the insured will know whether or not he has paid and consequently will not rely on a statement in the policy that he has paid. Indeed the statement of this doctrine is always coupled with a caution that he cannot defend a suit for premiums because of the acknowledgment. The most that can be said is that there is a contradiction in such a policy in that in one place because of the recital of payment there is a promise of present insurance and in another a promise to be liable only for such losses as occur after payment. The liability of the insurer may then be placed on the ground that in the case of contradictory provisions the construction of the contract is in favor of the insured.

⁴⁹ *Ibid.* 461.

⁵⁰ See *Bergson v. Builders' Insurance Co.* (1869) 38 Cal. 541.

⁵¹ In this respect the rule of the *Bergson* case, *supra* note 50, was changed by the statute.

⁵² *Palmer v. Continental Insurance Co.* (1901) 132 Cal. 68, 64 Pac. 97; *Masson v. New England Mutual Life Insurance Co.* (1927) 85 Cal. App. 633, 260 Pac. 367.

⁵³ *VANCE, INSURANCE* (2d ed. 1930) 229.

III. CONDITIONS BECOMING OPERATIVE AFTER THE CONTRACT IS MADE
AND BEFORE LOSS OTHER THAN PREMIUM CONDITIONS, HEREIN
TERMED SUBSEQUENT CONDITIONS

Subsequent conditions relate to matters that are considered to increase the hazard, physical or moral. An example of such a condition is: "This policy shall be void if foreclosure proceedings are commenced." The insurer is willing to undertake a certain risk but no others. By means of such conditions it qualifies the risk it is assuming. In this type of situation the contract is clearly not voidable *ab initio*; losses occurring before the breach can be recovered.

When the breach occurs, does the contract simply terminate so far as subsequent losses are concerned, or does it become merely voidable from that time? Frequent judicial language expresses the latter view and Ewart, pursuing his theory of election, argues most vigorously for it. What reason is there for adopting the meaning "voidable"? If the insurer learns of the breach immediately and says that it is no longer liable for future losses, is there any obligation to return the premium or any part thereof? If there is any gain or advantage to the insurer to be derived from taking one position rather than another, there is ground for construing "void" to mean "voidable" and for applying the doctrine of election. But if there is no obligation to return any part of the premium, there is no advantage to the insurer in continuing its liability except the general benefit of retaining good will.

It becomes necessary then to consider whether the insurer is bound to return the so-called "unearned" portion of the premium, *i.e.* the portion of the premium corresponding to the period after the breach and to the end of the term. Numerous references may be found in the cases both in California and elsewhere to the "unearned" premium as if there were such an obligation. These suggestions seem to be employed as a make-weight to support a theory of waiver or estoppel.⁵⁴ Let us analyze the situation more closely. In return for a premium the insurer issues a policy with the foregoing foreclosure condition. At the end of three months foreclosure proceedings are begun. The insured had had three months protection; he has paid for protection that will normally extend for a year. There is an appearance of hardship, of forfeiture, if he cannot recover back a part of the premium. But the insurer entered into a

⁵⁴ Such references may be found in *Arnold v. American Insurance Co.* (1906) 148 Cal. 660, 84 Pac. 182, 25 L. R. A. (N.S.) 6; *Steil v. Sun Insurance Office of London* (1916) 171 Cal. 795, 155 Pac. 72; *Foristiere v. Aetna Insurance Co.* (1930) 209 Cal. 92, 285 Pac. 849. The last two cases involve a suspension of risk clause. The opinions ignore the express provision of the statutory fire policy, presumably involved, that there shall be no refund when the risk has been suspended. See *infra* note 63.

conditional contract; in effect it said: "We will pay for losses occurring during the year and before foreclosure proceedings are begun." As Holmes, J., said: "When a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration."⁵⁵ Going back to the time of Lord Mansfield⁵⁶ the rule has been that if the risk has once attached, the whole premium is earned and there is no obligation to return any part in the absence of a specific agreement in the contract.⁵⁷

In *Bank of Anderson v. Home Insurance Co. of New York*⁵⁸ there is a clear recognition that there is no obligation to refund; this view is admitted to be embodied in sections 2616, 2618 and 2619 of the Civil Code of California. No reference is made in that case to section 2617 which reads:

"A person insured is entitled to a return of premium, as follows:—
 . . . Two. Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued."

Unless, however, this be interpreted as applying only to a consensual surrender as distinguished from a merely unilateral act on the part of the insured, or to a situation where by some rule of law the insured is entitled as of right to put an end to the contract, it is impossible to reconcile it with section 2618 of the Civil Code.⁵⁹ This view is the basis of the decision in *Joshua Hendy Machine Works v. American Steam Boiler Insurance Co.*⁶⁰

If an insurer pays a \$5000 loss occurring within a week after the issue of a \$5000 one-year fire policy, it would hardly be contended that the

⁵⁵ *Gutlon v. Marcus* (1896) 165 Mass. 335, 336, 43 N. E. 125.

⁵⁶ *Tyrie v. Fletcher* (1777) Cowp. 666, 98 Eng. Rep. 1297.

⁵⁷ EWART, WAIVER DISTRIBUTED (1917) 232-9, pursuing his theory of election even in cases of subsequent breaches, vigorously contends that a part of the premium is returnable, but clearly the cases are against him.

⁵⁸ (1910) 14 Cal. App. 208, 111 Pac. 507.

⁵⁹ "If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned."

⁶⁰ (1890) 86 Cal. 248, 24 Pac. 1018, 21 Am. St. Rep. 33. There had been no breach of condition. The insured sought to cancel a policy which by its terms gave the insurer only that power, and to recover a part of the premium. The court held that the code section did not confer on the insured "the right to have the policy cancelled without cause and upon his mere request. . . If this is its effect, the other sections of the code above referred to are wholly unnecessary." Under this case and the other code sections, it follows that by a breach of condition the insured cannot entitle himself to a return of part of the premium.

insurer must repay a part of the premium on the ground that the insured had paid for a year's protection and had received protection for only a week.⁶¹ Yet it is clear that if the insured had made a contract for a week's protection only, he would have paid a smaller premium. The situation is comparable to the one under consideration. The insurer has agreed to pay only for losses occurring before foreclosure. If there has been no loss during that period there has been no more failure of consideration than when there is no foreclosure but also no loss within the time limit of the policy. This, of course, is not to deny that a fairer contract would provide for a return of a portion of the premium when there has been a breach of condition, and sometimes fire policies expressly provide for such return.⁶² There is obvious danger in relying on cases of policies containing such provisions. There is also a provision for refund in modern life insurance, where either by voluntary contract or under the lash of legislation, after the policy has been in effect two or three years, the reserve value is available to the insured, despite a failure to pay a premium, either in the form of a cash surrender or a paid-up or extended policy. The argument for a return of the "unearned" premium, absent contractual or legislative provisions to that effect, is just as strong where the policy provides for a suspension of the risk during the continuance of certain events.⁶³ However, there is no authority for a return in such a case.

Is the conclusion of no refund affected by the presence of the cancellation clause now in use in some types of insurance, notably fire? There can be no question if the cancellation provision, in addition to the clauses permitting cancellation on notice by either party, adds, as in the old form of the New York standard fire policy, the clause that if the policy "shall become void or cease, the premium having been actually paid, the unearned portion shall be returned." But no similar provision exists in the present New York or in the California statutory fire policies.

⁶¹ CAL. CIV. CODE §2617 originally read: "A person insured is entitled to a return of premium paid, or a ratable proportion thereof, if no part of his interest in the thing insured is exposed to any of the perils insured against; or, where the insurance is made for a definite period of time, if it is not exposed to such peril for the whole of that time." The code examiners (Code Examiners' Notes to §2617) in recommending a change to the present provision thought that the original section would require the result suggested in the text, a result they considered to be not in accordance with the general law and one manifestly unjust.

⁶² See *Schmidt v. Williamsburgh City Fire Insurance Co.* (1914) 95 Neb. 43, 144 N. W. 1044, 51 L. R. A. (N.S.) 261.

⁶³ It is noteworthy that in the California statutory fire policy numerous matters that operated in the policies formerly in use as subsequent conditions now suspend the risk only. But this statutory policy specifically provides that the suspension "shall not extend the terms of the policy nor create any right for refund of the whole or any portion of the premium nor affect the respective rights of cancellation."

The insurer's power of cancellation would seem intended to be exercisable when for any reason, independently of a breach of condition, it wishes to terminate liability. Likewise the corresponding power of the insured is given him to be exercised for any reason and again without reference to a breach of condition, although it may well be that he will desire to cancel because of an intention to commit an act that would constitute a breach or because of a suspension, present or prospective, of liability. In accordance with this view there are a number of flat decisions elsewhere that, when there has been a subsequent breach, the policy has come to an end, and the cancellation provision is no longer applicable, and consequently that no part of the premium can be recovered from the insurer.⁶⁴ No cases *contra* have been found. It may be that of grace the insurer will return a part of the premium on a breach or even make a practice of so doing. This can hardly affect the legal question of the liability to refund.

If there be an obligation to refund part of the premium upon the happening of a subsequent breach and the repudiation of further liability, there is ground for saying that "void" means "voidable" and that consequently the insurer has an election to avoid or continue liability; hence words or conduct of the insurer may amount to a manifestation of an election to continue. Or, there is an opportunity for finding a new contract to continue the insurance, the consideration for which is the retention of the balance of the premium which the insurer must otherwise refund. On the other hand if there be no duty to refund, it would seem that the contract simply comes to an end so far as subsequent losses are concerned. In that case there is no opportunity for election since there are not open to the insurer, for whose benefit the condition is inserted, two courses of action, each of which has its desirable features.⁶⁵ From the standpoint of an insurer, it cannot be said that there is any sensible reason why it should use the word "void" as meaning in effect that in case of a subsequent breach, it should have the election to pay or not to pay subsequent losses. Such a construction strains one's credulity. If there is no election given by the contract, the insurer could still decide to pay and it would be a rare policy-holder who would decline to accept.

⁶⁴ *Colby v. Cedar Rapids Insurance Co.* (1885) 66 Ia. 577, 24 N. W. 54; *Farmers' Mutual Insurance Co. v. Home Fire Insurance Co.* (1898) 54 Neb. 740, 74 N. W. 1101; *Farmers' Mutual Insurance Co. v. Phoenix Insurance Co.* (1902) 65 Neb. 14, 90 N. W. 1000, 95 N. W. 3. And see *Home Fire Insurance Co. v. Kuhlman* (1899) 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111.

⁶⁵ As Professor Williston puts it, *WILLISTON, CONTRACTS* (1920) §753: "It is not a mere election unless the insurer will acquire or retain rights by virtue of keeping the policy in force, which he could not acquire or retain by its termination." Also §756: "If a premium already paid can be retained by the insurer, even though the policy is forfeited, and no further premiums will accrue, the insurer is obviously giving something up and getting no advantage if the policy is continued in force."

Yet, after an immaterial or insignificant breach and before a loss, in order to maintain a reputation for fairness and lack of over-technical objections, the insurer may wish to hold out an assurance of continued protection. If its conduct or words amount to such assurance, on what theory can it be held for the later loss?⁶⁶ From the standpoint of ordinary rules of contract law, this promise would fail for lack of consideration. To enforce it, one is compelled to find some other doctrine in the law or to admit that the law of insurance has some peculiar rule. Two suggestions find support in the opinions.

Some courts speak of estoppel. Clearly there is no estoppel in the sense of a misrepresentation of fact. There is at most a promise to answer for subsequent losses. This may be followed by prejudicial reliance on the part of the insured. For example, trusting in the promise he may neglect to take out other insurance. Rather do we have what has been termed "promissory estoppel." As has been pointed out⁶⁷ this kind of estoppel has occasionally been accepted as a substitute for consideration even when there has been no prior contract, notably in the case of charitable subscriptions. The law, however, here is in such an uncertain condition that dogmatic assertions are out of place. But where there has been a precedent contract to which a complete defense has arisen before the promisor's obligation has matured, for example in insurance cases before a loss, there is much more authority for applying the theory of promissory estoppel. Practical justification may be found in the following facts. The insurer has once received a consideration; while it has actually been under a liability up to the time of the breach of condition, it did not have to pay and therefore is out nothing. After its discharge, if the insurer agrees to pay for subsequent losses during the term of the original policy, it indicates that it does not deem the breach to have substantially increased the risk and hence it is not unfair to hold the insurer to its promise provided the promise has led to prejudicial reliance. There is a vast difference between holding a promisor who has received no consideration and one who has once received consideration but has actually had to pay out nothing. If promissory estoppel is the basis, it will follow that the promise can be withdrawn at any time before a loss, at least if reasonable opportunity is allowed for taking out other insurance.⁶⁸ As

⁶⁶ It is here necessary to distinguish the case where after the contract has been made but before a breach the insurer leads the insured to believe that performance of the condition is unnecessary or will not be required. A well-established doctrine of law takes care of this. See *infra* page 36.

⁶⁷ WILLISTON, CONTRACTS (1920) §139.

⁶⁸ Perhaps the promise cannot be withdrawn at all if, at the time of withdrawal, by a change of circumstances since the promise, the insured is now no longer able to procure other insurance.

long as the law refuses to enforce gratuitous promises, making to some extent an exception where there has been prejudicial reliance on the strength of them, there is no reason for extending the exception beyond the reason therefor. If, on the other hand, the promise of the insurer, whether expressed in words or indicated by conduct, occurs after the loss, there is no opportunity for promissory estoppel unless such insignificant acts as making proof can be considered sufficiently prejudicial reliance.

Other cases speak of waiver. The insurer either before or after a loss indicates its relinquishment of a defense that has occurred before loss. Veil the situation by such a term as much as you please, it still remains that there is nothing but a gratuitous promise to pay for a loss, if we assume that there is not present the prejudicial reliance element. Inasmuch as this element will usually be present where the promise is made before the loss, there is no need for resort to a separate principle of "waiver." But promissory estoppel will not serve where the promise to pay, expressed in words or conduct, is made after the loss. Waiver is commonly defined as an intentional relinquishment of a known right, as if any right or defense might be extinguished by the mere expression of intent. Yet a creditor cannot gratuitously forgive or extinguish a debt by merely saying that he does so.⁶⁹ How then can an insurer gratuitously impose upon itself an obligation, since that is in substance what it must be held to do when it "waives" the defense? The writer begs leave to quote at some length from Professor Williston on this point.

"It may be argued that there is a distinct principle of waiver wide enough to cover any such situation; and authorities may be cited to support the argument that there is a general rule to the effect that even after a perfect defense has arisen to a promise, either because of the breach of condition, or because of some rule of law, an agreement to surrender the excuse is binding without more. And if the generality of this statement be thought too great, it may be argued that at least if the excuse of the promisor is of a narrow or technical character, the principle is applicable. As to the first suggestion it may be replied that presumably no court would hold an insurer bound if he made a promise to pay a policy of insurance against fire, in spite of the fact that the house had not burned down within the term of the policy. The condition of burning would not be so easily 'waived.' Similarly a promise made after the destruction of the building to pay insurance though the premium had never been paid and a condition of the policy required that it should be would probably not be enforced.

"A promise by a guarantor to be absolutely liable though there was for some reason no debt due from the intended principal debtor, would doubtless be similarly unenforceable. But, as has been seen, promises to pay debts voidable for incapacity, or barred by the Statute of Limitations, or

⁶⁹ This statement must be modified in California by reason of CAL. CIV. CODE §1541 which provides that an obligation is extinguished by a release in writing with or without a new consideration. Presumably the release in writing takes the place of the common law release under seal. And see CAL. CIV. CODE §1524.

by discharge in bankruptcy, or by a failure to charge a party secondarily liable on negotiable paper, or released by one of the technical defenses allowed a surety, have all been enforced; and it may be argued that these cases are merely illustrations of a more far reaching general principle applicable to technical defenses. Such a proposition of law is not without much in its favor. Undoubtedly the enforcement of harsh conditions or technical defenses frequently works hardship, and if certainty could be obtained both in regard to the requirements of the law in the way of subsequent promise or recognition by the obligor, and in regard to proof of whether such requirements in a particular case have been satisfied, a less drastic rule than that previously supported would have much to commend it. If, however, any subsequent oral promise or recognition of liability is held sufficient to do away with any defence, or even any technical defence, it will be easy to manufacture testimony of the necessary facts. It has generally been thought necessary to require promises to pay debts barred by the Statute of Limitations to be put in writing in order to make them binding; and reasons have been given previously, for regarding the doctrine of waiver of a defence as inadequate to explain the decisions on that subject. Moreover, there is great difficulty in determining when a particular defence or excuse is technical. This objection is not perhaps insuperable; but certainty of application is a positive merit in a rule of law, and lack of such certainty though necessarily existing in the application of many equitable principles, is a disadvantage. Whatever may be the conclusion as to the desirable course for the law, it is at least true that everything is to be gained and nothing lost by clearly recognizing the nature of a so-called waiver which recreates a liability, or an obligation which by its terms has already been extinguished or made impossible of performance. There is no class of cases so well suited as insurance cases to test the existence of any general principle that an agreement to give up technical defenses is binding without promissory estoppel or consideration.

"The conditions in insurance policies are often harsh and highly technical. The disposition to stretch the law to its utmost in order to favor the insured is constantly observable in the decisions of the courts; and whatever scope be given other principles, there are decisions which can only be explained on the assumption that some courts at least recognize as a principle of law that a technical defence may be surrendered without consideration or estoppel; but the great weight of authority is clearly against the validity of such decisions."⁷⁰

Distinguishing between conditions and excepted risks, it has been said that the doctrines of waiver and estoppel applicable to the former have no application to the latter. Thus conduct after a loss indicating an intent to pay for a loss due to an excepted cause, *e.g.*, death during military service in wartime, is not a "waiver."⁷¹ Nor does conduct before a loss evidencing an intent to pay in case of suicide "estop" the insurer from setting up the provision that suicide is not a risk assumed.⁷² The reason for this has been explained as follows:

⁷⁰ WILLISTON, CONTRACTS (1920) §693. See also *Ibid.* §763.

⁷¹ *Ruddock v. Detroit Life Insurance Co.* (1920) 209 Mich. 638, 177 N. W. 242.

⁷² *McCoy v. Northwestern Mutual Relief Ass'n.* (1896) 92 Wis. 577, 585, 66 N. W. 697, 699, 47 L. R. A. 681, 685.

"To illustrate the principle here laid down, a policy of insurance against loss by fire cannot have engrafted upon or added to it, by way of estoppel or waiver, provisions for insurance against loss by any other cause; and no more can a policy of life insurance, expressly limited to payment of a sum of money in the event of death from causes other than suicide or self-destruction, be broadened out by the application of the law of waiver or estoppel so as to cover the cause excluded under the contract. While a forfeiture of benefits contracted for may be waived, the doctrine of waiver and estoppel cannot be successfully invoked to create a liability for benefits not contracted for at all."⁷³

In addition to conditions and excepted risks there may also be suspensory clauses. Even a provision in the form of an exception may be a suspensory clause. Thus a provision excepting death during military service may be so broad as to include death due to risks not increased by such service.⁷⁴ In such a case the provision merely suspends the liability during the service rather than excepts death due to a particular cause. If we compare conditions, suspensory clauses and excepted risks, we shall find the reason for the insertion of each substantially the same. The mortgage foreclosure condition in the California statutory policy undoubtedly is inserted because the insurer, rightly or wrongly, believes that the moral hazard is so increased by foreclosure that it is unwilling to assume any liability after such proceedings are initiated. The insurer asserts that its contract means that it will pay only for losses occurring before foreclosure. A greater semblance of forfeiture perhaps arises because of the words "shall be void." True enough, there may be a difference of severity in the operation of conditions and suspensory clauses in that with the latter the policy will again become operative upon the termination of the state of affairs causing suspension. Yet if we compare two situations arising under the California fire policy, there may be practically as much forfeiture in one as in the other. Let us suppose two one-year policies. Losses occur 11 months after issue. In one case dynamite is brought on the premises a week after the contract is made and remains there up to the time of loss. In the other foreclosure proceedings are brought a week after the contract is made. In both the insured pays a premium that will normally give a year's protection. In both the insured has protection for a week only, unless we assume in the first that

⁷³ But see *Draper v. Oswego County Fire Relief Ass'n.* (1907) 190 N. Y. 12, 82 N. E. 755, where it is suggested that an insurance company might estop itself [promissory estoppel is probably meant] from denying that an excepted loss was covered by the policy. The distinction above suggested is brought out in *Bowman v. Surety Fund Life Insurance Co.* (1921) 149 Minn. 118, 182 N. W. 991, where the policy by its terms became void upon the entry of the insured into military service in war time. The insured was killed in action. It was held that conduct after the death indicative of an intent to pay followed by the action of the beneficiary in going to a little trouble in proving the loss as requested, worked a waiver or estoppel.

⁷⁴ VANCE, *INSURANCE* (2d ed. 1930) 903-5.

after the fire there is something left of the building and that dynamite is no longer present, in which case the insured has protection for one more month for a partially destroyed building. Or if we compare a strictly excepted risk situation, the forfeiture element may be as strong. Suppose that death occurs due to an excepted risk a week after a life policy issues. The insured obtains but a week's protection while he pays a premium that will normally protect him for a year. Is not the argument of the *McCoy* case, quoted above, as applicable to conditions and suspensory clauses as to excepted risks? Is not the contract "broadened out" by the application of waiver and estoppel to cover risks not assumed by the contract in the former as well as the latter? There perhaps may be, however, a practical difference in some cases. After an event has happened, constituting a breach of a condition or bringing into operation the suspensory provision, the insurer may well feel that the particular event has not substantially increased the risk and hence will be willing to give its assurance of continued protection. Or, after a loss the insurer may express its willingness to pay since it feels that the loss in the particular case was in no way caused by the particular event nor the risk increased by it. In either event the setting up of the defense may appear technical.⁷⁵ But where the loss is due to an excepted risk, the defense does not appear so technical. Also, it may be more of a strain on credulity to believe that either before or after the loss the insurer agreed to pay for a loss due to an excepted risk. Hence if the court is willing to accept the doctrine of "waiver," uncoupled with promissory estoppel, it may make a distinction, at least in some cases, between excepted risks on the one hand and conditions and suspensory provisions on the other.

The importance of the problems under consideration must be pleaded as the only justification for a detailed examination of the California cases.⁷⁶ In *West Coast Lumber Co. v. State Investment and Insurance Co.*⁷⁷ there was a breach of the change-of-interest clause. With knowledge thereof the insurer assured the insured that he was still protected. In holding that the insurer had waived the breach or was estopped to set it up, the court employed the following language:

"To hold otherwise would be to uphold practices which would lull the insured into fancied security, to prevent their seeking other and

⁷⁵ This is hardly true in the *Bowman* case, *supra* note 73, where the insured was killed in action.

⁷⁶ *Mackintosh v. Agricultural Fire Insurance Co.* (1907) 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234, involved the increase-of-hazard clause. The insured paid an additional premium after issue of the policy for permission to increase the hazard. The court held that there was a new contract between the parties. This would seem sufficient to decide the case but the court also talked about estoppel. No reference is made to §1698 of the California Civil Code, prohibiting unexecuted oral modifications of a written contract. See *infra* note 89.

⁷⁷ (1893) 98 Cal. 502, 33 Pac. 258, 260.

further insurance, until when too late they find themselves doomed to loss by confiding in the declarations and following the advice of those who were bound by every consideration of justice and honesty to speak the truth, or at least to stand mute. Defendant had a right to cancel its policy or to treat it as forfeited by reason of the change of title and possession; it failed to do so when it should, if at all, and cannot now be permitted to profit at the expense of plaintiff, who would be a sufferer by the delay."

It is to be noted that the first sentence of the quotation rests on the promissory estoppel theory while in the second the suggestion seems to be that upon knowledge of the breach there is a duty on the insurer to take affirmative steps to notify the insured that the insurance has come to an end.

In *Arnold v. American Insurance Co.*⁷⁸ the court first held in effect that there had been no breach of the prohibited articles condition by the presence of a small bottle of gasoline. After a minor fire this gasoline was removed and at no time thereafter was there any on the premises. In adjusting the first loss, the adjuster was informed of the facts but made no objection and apparently this loss was paid. Angellotti, J., said:

"...In the face of this knowledge, the defendant gave no intimation of any intention on its part to consider the policies terminated by reason thereof, but retained the unearned portion of the premium, and allowed plaintiff to rest under the implied assurance that the policies continued in full force and effect, notwithstanding the technical violation of the letter of the condition. By such assurance, plaintiff was persuaded to refrain from securing other insurance to protect herself against possible future loss. Such a loss having occurred, it is too late for defendant to defend against the same upon this ground."

Similar promissory estoppel language is to be found in *Bank of Anderson v. Home Insurance Co. of New York*⁷⁹ where there was a violation of the other-insurance condition but the insurer in effect informed the insured that he was still protected. While admitting that there was no obligation to return the "unearned" premium, the court thought that upon being informed of the other insurance the insurer must at least affirmatively object in order to avoid a "waiver."

In *Sowell v. London Assurance Corporation*⁸⁰ there had been a violation of the change-of-interest condition by reason of a contract of sale to a third person. With knowledge of this the insurer endorsed upon the policy its approval of the transfer of the policy to the plaintiff, to whom the original insured assigned his remaining interest in the property. This was held to be a "waiver." It is to be noted that here the

⁷⁸ (1906) 148 Cal. 660, 667, 84 Pac. 182, 185.

⁷⁹ (1910) 14 Cal. App. 208, 111 Pac. 507.

⁸⁰ (1916) 32 Cal. App. 443, 163 Pac. 242.

problem is somewhat different in that when the insured "assigns" his policy and transfers his interest in the insured property and the insurer consents, there is a new contract between the insurer and the "assignee." Normally there is no difficulty with consideration since the new contract is a novation supported by the discharge of the insurer's obligation to the original insured.⁸¹ However, in the *Sowell* case there was no longer any obligation on the part of the insurer due to the violation of the change-of-interest clause. Hence this is an instance of a new promise to the "assignee" supported by no consideration. There may be the elements of a "promissory" estoppel but the case can hardly be one of "waiving" a defense of a breach of a condition of a contract between the insurer and the assignee, since the whole question is whether there is a contract between the insurer and the "assignee." Furthermore, it is worthy of attention that if the view be taken that a promissory estoppel is sufficient to excuse a breach of condition but not to take the place of consideration in a new contract, it is difficult to hold the insurer liable. But the distinction may be thought unduly technical since the reasons previously assigned for justifying the former result are present here.

*Silverberg v. Phenix Insurance Co.*⁸² offers more difficulty. In so far as reliance is placed on the ground that there was evidence that before a loss the insurer, having knowledge of a change of interest, agreed that the policy should continue in effect, the case may be classified with the above. However, more stress seems laid in the opinion on the fact that after the loss the insurer directed the plaintiff to make proofs and present witnesses and vouchers and after compliance agreed to pay, there being knowledge at the latter time. In holding that there was a "waiver" there is little explanation save by reference to a Michigan decision which went on the ground that the insurer had put the insured to trouble and expense of correcting proof without intimation that the insurer would rely on breach of condition. If it is to be assumed in the *Silverberg* case that knowledge was not acquired until proofs were completely made, no dependence can be placed on the Michigan decision. If knowledge was obtained immediately after the loss, the request for proofs can hardly be considered alone sufficient evidence of an absolute

⁸¹ One must bear in mind the cardinal principle that property insurance is not insurance of property but a contract to indemnify a particular person against loss of his property. Though, absent a clause to the contrary, an insured may assign his right to collect in case of loss to himself, the assignment of the policy does not *per se* operate to insure the assignee against loss sustained by the latter any more than by an assignment of a life policy it becomes one on the life of the assignee. *Bergson v. Builders' Insurance Co.* (1869) 38 Cal. 541.

⁸² (1885) 67 Cal. 36, 7 Pac. 38.

promise to pay; it is more consistent with the desire to obtain full information before making a decision. The promissory estoppel element is missing since the loss had already occurred unless the inconsiderable labor of making proof be considered sufficient change of position.⁸³ If knowledge was not acquired until after the proofs were made and there was then a promise to pay, we have a clear situation compelling answer to the question whether a promise to pay made after the loss, despite a complete defense, uncoupled with any promissory estoppel element, is binding in the case of such a technical defense. The decision can hardly be considered a strong authority for an affirmative answer.

A number of California cases involve similar problems but in connection with suspension of risk provisions. While *Kruger v. Western Fire & Marine Insurance Co.*⁸⁴ involves a slightly different question, it seems desirable to consider it at this time. The policy provided for suspension of risk while certain articles were kept on the premises. Upon the applicant objecting to the proposed policy on the ground that it would do him no good since he kept coal oil, the insurer stated that the small amount kept would not matter. Apparently coal oil was present at the time of the fire. Treating the case as one of breach of an inceptional condition the court held that there was a waiver, since the insurer knew when the policy was issued that it was void unless the condition was waived. No notice was taken of the undoubted fact that the provision was merely a suspensory one and that consequently the contract would be in full vigor according to its terms upon removal of the coal oil. Thus the case differs from those previously considered of initial breaches, where the doctrine of election may apply. The parole evidence rule forbids the introduction of the contemporaneous oral understanding to modify the terms of the contract.⁸⁵ Unless it can be said that the terms of the contract were ambiguous, in which case the oral understanding might be admissible to determine the meaning the parties placed upon them, the utmost that can be said is that it was a case for reformation in equity.

*Foristiere v. Aetna Insurance Co.*⁸⁶ involved the statutory fire policy with its provision for suspension during a change of interest. After such change of interest the insured assigned his remaining interest to the plaintiff with the endorsed consent of the insurer to the transfer of the property and the assignment of the policy. At the time of endorsement the insurer knew of the change of interest which continued until

⁸³ Compare *supra* page 22.

⁸⁴ (1887) 72 Cal. 91, 13 Pac. 156, 1 Am. St. Rep. 42.

⁸⁵ See VANCE, *INSURANCE* (2d ed. 1930) 529; and particularly the leading case of *Union Mutual Life Insurance Co. v. Mowry* (1877) 96 U. S. 544.

⁸⁶ (1930) 209 Cal. 92, 285 Pac. 849.

after the fire. In effect the court held that there was a promissory estoppel, speaking of the policy as having become void. Yet in a later part of the opinion the court referred to the provision as a suspensory one but said that the operation of such a suspensory provision could be waived. As authorities for this latter position the court cited decisions dealing with inceptual breaches known at the time of the issuance of the policy or decisions dealing with subsequent breaches, cases not in point. It is difficult to support the *Foristiere* case. The insurer at the time of endorsement and by his endorsement did not agree to be liable for losses during the suspension period and hence it is impossible to work out a promissory estoppel unless it can be said that the negotiations between the parties took such a turn as to indicate that the protection was to continue during the change of interest. This cannot be a case of election since, under the terms of the California statutory policy, the insurer is not bound to return a part of the premium proportioned according to the suspension period. Logically the same result reached by the court would follow if the risk had been suspended at the time of endorsement and remained so at the time of loss due to the presence of dynamite, a condition of affairs remediable by the insured. Does the insurer by endorsing his consent to the transfer of the policy and of the property indicate his intent to be liable for losses occurring while dynamite is kept? In fact in the present case the change of title, purchase on a mortgage foreclosure, just as much as the presence of dynamite could have been remedied by the "assignee" and as a matter of fact was remedied after the loss by means of redemption. To support the result it is necessary to hold that when the insurer knows the risk is suspended, it must affirmatively call attention to the provision and warn the insured to bring the condition of affairs to a close. Inasmuch as under the California statutory fire policy the insured may on notice cancel a policy even while a suspension is operative, it would be possible to make a new contract whereby the power of cancellation and the right to a refund is surrendered temporarily or permanently in return for the insurer's agreement to pay for losses occurring during the continuance of the change of interest. However, nothing of the sort was proved here.

Two other California cases involve suspensory provisions. In *Steil v. Sun Insurance Office of London*⁸⁷ a fire policy covered goods only while in a certain location. It was held that a removal of the goods did not avoid the policy but merely suspended the risk while the goods were elsewhere, and that mere knowledge on the part of the insurer coupled with silence and a failure to cancel and return the "unearned"

⁸⁷ (1916) 171 Cal. 795, 155 Pac. 72.

premium did not operate as an "estoppel." This case seems inconsistent with the *Foristiere* decision. However, the court added that if there was a new agreement, express or implied or "created by estoppel," the result might be different. This suggestion was seized upon in the *Steil* and its companion cases when they came up in the court of appeal after a new trial.⁸⁸ It was held that when the insured orally bespoke his desire to have the goods covered in their new location and the insurer led the insured to believe that they were so covered, that would be sufficient to create a contract by estoppel. It is difficult from the context to know what was meant by that term unless the court intended to say that a gratuitous promise followed by a prejudicial reliance was a valid contract. However, it may be suggested, without resorting to estoppel, that there was a new but oral contract supported by the surrender of the power to cancel and the concomitant right to a refund. The only objection to this theory is that such an agreement might be considered an unexecuted oral modification of a written contract, condemned by section 1698 of the Civil Code of California.⁸⁹

Summing up the California cases on the topic of subsequent conditions and suspensory provisions, it is to be noted that in all of them, with the exception of *Foristiere v. Aetna Insurance Co.* and the possible exception of the *Silverberg* decision, either the promise of the insurer, expressed by words or conduct, occurred before a loss and there was present the element of prejudicial reliance, or it is possible to work out a new oral contract supported by consideration. While there was some intimation in a few of these cases that when the insurer learns of the breach of a condition it must take affirmative steps to notify the insured that the contract has come to an end, yet it is doubtful whether any of these cases is a square authority for that proposition, since in them there were dealings between insured and insurer of such a character as to lead the insured to believe that he was protected. The *Steil* case on the analogous problem of suspensory clauses is a clear holding that there is no affirmative duty to notify the insured that the policy stands suspended. If there is such an affirmative duty upon mere acquisition of knowledge, then an onerous burden

⁸⁸ *Reid v. Northern Assurance Co.* (1923) 63 Cal. App. 114, 218 Pac. 290. (hearing in supreme court denied).

⁸⁹ "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." See the criticism of this code section in WILLISTON, *CONTRACTS* (1920) §1828. Citing *Pearsall v. Henry* (1908) 153 Cal. 314, 95 Pac. 154, the author states that this section has led the California court to make the difficult distinction that an oral modification of a written contract is bad while a new oral contract in substitution of a prior written one is upheld. In the *Steil* cases CAL. CIV. CODE §1698 was not mentioned. By the doctrine of "contract by estoppel" it would seem possible to evade §1698 in many cases.

is laid on the insurer of investigating chance rumors and casual information as well as notifying the insured. In any event the silence of the insurer cannot be interpreted by the insured as an assurance of continued protection when the insured is unaware of the insurer's knowledge. Even when the insured does know that the insurer has acquired chance information, it is decidedly questionable whether a reasonable person would construe the silence as indicative of an intent not to insist on the breach. Yet it is possible that silence may be so interpreted, when for example the insured writes to the company notifying it of the breach and inquiring whether the contract is terminated.⁹⁰

IV. SUBSEQUENT PREMIUM CONDITIONS

It is in life insurance contracts that we most commonly meet the condition that the policy shall be "void" in the event that subsequent premiums are not paid at fixed dates. Here the law may be regarded as settled that the acceptance of an overdue premium prevents the insurer from setting up the delay in payment.⁹¹ It must be borne in mind that ordinarily the insured is under no obligation to pay subsequent premiums; he may drop the insurance at any time without incurring liability. Hence if it be said that the insurance comes to an end upon the non-payment of a premium, there is no consideration for the late payment except on the assumption, clearly implied, that the insurer agrees to "continue" the insurance. There is really a new contract embodying the terms of the old which has become defunct.⁹² This analysis is usually cloaked by the term "waiver." Or, if there is a request for the payment of the overdue premium, followed by a tender of the same within the time specified, the forfeiture is "waived," although the tender is not accepted.⁹³

However, the California cases go further. After a premium on a life policy was overdue, the insurer orally agreed to extend the time for payment, but, so far as appears, without any agreement by the insured to pay the premium. The premium was not paid within the extended period which expired November 24th. On the next day and again on

⁹⁰ See WILLISTON, *CONTRACTS* (1920) §758.

⁹¹ *Millard v. Supreme Council of American Legion of Honor* (1889) 81 Cal. 340, 22 Pac. 864; *Faris v. American National Assurance Co.* (1919) 44 Cal. App. 48, 185 Pac. 1035. And see *Curtin v. Phoenix Insurance Co.* (1889) 78 Cal. 619, 21 Pac. 370.

⁹² *Lantz v. Vermont Life Insurance Co.* (1891) 139 Pa. 546, 21 Atl. 80, 10 L. R. A. 577, 23 Am. St. Rep. 202.

⁹³ *Murray v. Home Benefit Life Ass'n.* (1891) 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133. Some difficulty arises in this situation as to whether the request does not amount merely to an offer to continue the insurance upon payment, not merely upon a tender. See WILLISTON, *CONTRACTS* (1920) §60b; (1928) 42 HARV. L. REV. 128; (1929) 29 COL. L. REV. 199.

November 27th the insurer made demands for payment without success but did nothing to indicate that the policy was "forfeited" prior to December 2nd when the insured died. It was held⁹⁴ (1) that the breach was "waived" by the extension agreement for at least the period of extension; and (2) that by reason of the subsequent demands the insurer affirmatively indicated that it had no intention of claiming a forfeiture and hence that after the death it was too late to make such a claim. Disregarding for the moment the extension agreement, can it be said that the demand for the premium would mean to any reasonable person more than a willingness, if payment was then made, to keep the contract in force or to make a new one? Can it possibly mean that the insurer will accept payment at any later date and regardless of changed conditions, the insurance in the meanwhile to continue?⁹⁵ So long as the insured remains in good health, it will frequently be to the advantage of the insurer to receive the premium and reinstate the policy. But receipt after serious impairment of health and particularly after death would be most detrimental to it. It is difficult to find anything in the nature of prejudicial reliance constituting a promissory estoppel, even if it be conceded, as it cannot be, that the demand amounts to an offer to accept payment and reinstate the policy at any time in the future before notice to the contrary is given. If the foregoing analysis that the receipt of the overdue premium amounts to a new contract is sound, and that the demand amounts to an offer, there is the additional difficulty that if payment is offered after the death of the insured, the acceptance is made by someone other than the offeree.

When the case just considered went to the supreme court again, it then appeared that the oral extension had been given for a period beyond the date of death. Following the view referred to in the prior opinion, it was held that the non-payment had been "waived."⁹⁶ If it is to be assumed that the insured had agreed to pay the premium, a fact which does not appear, there is no difficulty in finding a new contract. But, if there was no such promise to pay, the following problem is squarely presented: After the policy is terminated (it was conceded in the case that upon non-payment of premium the insurer could properly consider the policy lapsed and was under no obligation to make any declaration to that effect or to do anything else) will a gratuitous promise to the effect that the insurance will still be in effect up to a certain date, and after that date if payment is made by that time, be binding? Authorities answering affirmatively may undoubtedly be

⁹⁴ *Knarston v. Manhattan Life Insurance Co.* (1899) 124 Cal. 74, 56 Pac. 773.

⁹⁵ WILLISTON, *CONTRACTS* (1920) §761.

⁹⁶ *Knarston v. Manhattan Life Insurance Co.* (1903) 140 Cal. 57, 73 Pac. 740.

cited, but on what theory are they supportable? There seems no ground for election. Conceivably there might be the elements of a promissory estoppel but at least it is worth noting that there is a great difference in degree between a promise to remain liable despite a breach of condition that affects the risk and a promise to remain liable despite a breach of a condition relating to the consideration on which the insurer's liability rests. If the policy has accumulated a cash surrender value, the parties might agree that the insured would release his immediate right to it in consideration of the extension of time. Nothing of this sort appears in the instant case. Furthermore, one is not told just what the extension agreement was. It would be natural to suppose that all the insurer did was to agree to reinstate if the premium was paid within a certain time, that is that there was a mere offer which was never accepted by the insured.

However, on the second appearance of the foregoing case the supreme court was concerned chiefly with another point, namely whether section 1698 of the California Civil Code⁹⁷ forbade the result reached. In a long opinion the court held that the "waiver" was not an alteration in the terms of the written contract, taking the view that the extension might have been revoked upon notice to pay the premium promptly at the peril of forfeiture.

Although *Faris v. American National Assurance Co.*⁹⁸ is rested largely on the *Knarston* cases just considered, it is distinguishable. It would have been sufficient to have based the decision solely on the ground of the receipt of the overdue premium. It is also to be noted that in this case the insured had given his note for the deferred premium. Hence the doctrine of election is applicable. The insurer could avoid liability upon non-payment, in which event the note would have to be returned or could affirm the contract and insist upon payment. It chose the latter course by its demands for payment which the insured was legally obligated to make. *Bryson v. National Travelers Casualty Co.*⁹⁹ is partly based on the views taken in the *Knarston* litigation but is rested also, more firmly it would seem, on the ground that there had been payment of the premium.¹⁰⁰

*Curtin v. Phenix Insurance Co.*¹⁰¹ raised a different question. A fire policy provided for a suspension of risk during default in the payment of a premium note, but also stipulated that this should not prevent the insurer from collecting the note and that an attempt to collect should

⁹⁷ See *supra* note 89.

⁹⁸ (1919) 44 Cal. App. 48, 185 Pac. 1035.

⁹⁹ (1929) 206 Cal. 475, 274 Pac. 957.

¹⁰⁰ The authority of the agent to receive payment was involved.

¹⁰¹ (1889) 78 Cal. 619, 21 Pac. 370.

not revive the liability. Since the insurer had the right to collect despite the suspension, it was decided that a receipt of part payment after default would not be a "waiver." In this respect, the court said, the problem is different from one where non-payment works a forfeiture, since in the latter case acceptance of the premium after a forfeiture is inconsistent with the terms of the policy, whereas here the acceptance after maturity of the note was entirely consistent with the claim of the insurer to insist that the risk was suspended until the full amount was paid.

However, a similar provision for suspension of liability during the period of default, coupled with the provision for liability on the note, has been held by the court of appeals to constitute an invalid penal clause within section 1670 of the Civil Code.¹⁰² Demands for the payment of the note after maturity, it was said, indicated an intent to collect the full amount. The court argued that the insurer could not take advantage of the contract for payment and relieve itself of the obligation to furnish the insurance for which the premium, when collected, ought to pay. If it be granted that the suspension clause is invalid, the case is in accord with the *Paris* case. No authority for the invalidity of the suspension provision was cited nor was there any reference to the *Curtin* case. To hold the insurer liable, despite the express provision that it should not be, is enforcing a promise that the insurer never made. Any penalty must lie in the provision that the insured should be liable on the note despite the suspension of risk, and even then the intended result would be more properly described as working a forfeiture. The insured does not agree to pay a penal sum if he does not pay the note on time; rather he loses certain advantages pending non-payment. If a premium note for a one-year fire policy is given and two days after the policy goes into effect, prohibited articles, whose presence suspends the risk according to the policy, are brought on the premises and kept there until the end of the year, would not the insurer be entitled to collect the full amount of the premium note, despite the fact that there was risk on the insurer for two days only? The California statutory fire policy contains such a suspension clause and also provides for no refund of premium paid. Although the policy contains no provision as to liability on a premium obligation in case of suspension of risk, it would be strange for the California court to declare the full amount of the note uncollectable when the legislature has affirmatively justified this sort of "forfeiture" when the premium is paid in advance. To be sure, there is a difference in one respect. The insured

¹⁰² *Kelly v. Great Western Accident Insurance Co.* (1920) 46 Cal. App. 747, 189 Pac. 785 (petition for hearing in supreme court denied).

does not contract not to bring the prohibited articles on the premises; he merely loses protection during their presence. But in the case under consideration the insured does contract to pay the premium by a certain date; he loses the protection during default. So far as has been discovered, the cases elsewhere with one exception hold both that the provision for suspension is valid and that the full amount of the premium note can be collected.¹⁰³ As Christiancy, J., said:¹⁰⁴

"The competency of the parties to have agreed upon a higher rate of premium, or for the same amount of premium for a shorter period of time, cannot be doubted. And upon the same principle, it must have been equally competent to agree that the period of time to be covered by the insurance, and for which the stipulated amount of premium should be paid, might be made shorter upon any contingency the parties saw fit to agree upon, without altering the amount of premium—especially upon any contingency, which the insured had it in their own power to prevent and which it was their moral and legal duty to prevent."¹⁰⁵

¹⁰³ Action on the note: *St. Paul Fire & Marine Insurance Co. v. Coleman* (1889) 6 Dak. 485, 43 N. W. 693, 6 L. R. A. 87. The discussion is thorough and of particular significance since Dakota had the same code sections as to penalties as California although no specific attention was directed to them. The court thought the provisions not unfair nor unreasonable and that there was nothing contrary to public policy nor prohibited by the statutes. See 32 C. J. 1211 for citation of numerous cases. *Contra*: *Matthews v. American Insurance Co.* (1883) 40 Ohio St. 135, that the insured was entitled to credit for the suspension period.

Action on the policy, suspension provision held valid and the liability of the insured on the note recognized: *Blackerby v. Continental Insurance Co.* (1886) 83 Ky. 574; *Williams v. Albany City Insurance Co.* (1870) 19 Mich. 451, 2 Am. Rep. 95 (thorough discussion); *Caufield v. Continental Insurance Co.* (1882) 47 Mich. 447, 11 N. W. 264; *Wall v. Home Insurance Co.* (1867) 36 N. Y. 157. *Cf.* *Real Estate Title & Trust Co. v. Aetna Life Insurance Co.* (1897) 181 Pa. 61, 37 Atl. 639 where it was held that when a person paid in a lump sum what would normally amount to three annual premiums on life insurance and died within the first year, no part of the payment was recoverable.

¹⁰⁴ *Williams v. Albany City Insurance Co.* (1870) 19 Mich. 451, 465, 2 Am. Rep. 95, 98.

¹⁰⁵ This may be as good a place as any to refer to two California cases which do not fall into any specific subdivision of this paper. In *Upton v. Travelers Insurance Co.* (1919) 179 Cal. 727, 178 Pac. 851, 2 A. L. R. 1597, an accident policy contained an option to renew by payment of premium in advance. An accident occurred a day or so after the last prior renewal had expired. The premium had not been paid. It was held that while late acceptances of prior renewal premiums might be "waivers" of the provision of prepayment (why not new contracts?) so far as those renewals were concerned, they could not operate as abrogating the condition of future renewals.

In *Nielsen v. Provident Savings Life Assurance Society* (1903) 139 Cal. 332, 73 Pac. 168, 96 Am. St. Rep. 146, a New York statute provided that after the lapse of a life policy for non-payment of premiums, the reserve value should "on demand made with surrender of the policy within six months of such lapse be applied as a single premium to purchase extended or paid-up insurance." It was held that there was a "waiver" of the requirement of surrender when after the death and within the six months the insurer denied all liability. This is a case where the waiver consists in causing the breach of the condition. See *infra* pages 39, 40.

V. CONDITIONS OPERATIVE SUBSEQUENT TO LOSS

With the exception of those concerning premiums, the conditions previously considered serve to define the risk assumed. However, conditions becoming operative after loss, such as giving notice, filing proofs, arbitration, etc., have an entirely different purpose. The "forfeiture" element is more striking¹⁰⁶ since the loss is within the risk assumed and the main contingency on which liability depends must occur before there can be a breach of the condition. While the conditions now under examination are of vital importance to the insurer, being reasonable and necessary to protect it against fraudulent claims and overvaluations as well as to afford the insurer an opportunity for determining whether the loss is within the risk assumed, yet a defense that the insured has not complied with these conditions will seem in many cases even more technical and unjust than a defense based on a breach of the other type of conditions. For that reason one is not surprised to find the courts resorting to every possible theory to afford relief to the insured, when an instinctive sense of justice seems to require it. While "waiver" and "estoppel" are the favorite pass-words here as elsewhere, the exact principles on which the courts proceed are frequently obscure.

It is a general principle of the law that a promisor who is himself the cause of a failure to perform a condition resting on the promisee by preventing or hindering performance cannot take advantage of such failure.¹⁰⁷ On a similar principle, it may be regarded as settled, that if a promisor leads the promisee to believe that it is not necessary to perform a condition or that performance is excused, and in consequence

¹⁰⁶ It may be suggested that the forfeiture idea has been overstressed by the decisions dealing with those inceptional and subsequent conditions that serve to define the risk assumed. In the case of inceptional conditions, there is no forfeiture of the premium, since it is recoverable. To be sure the insured loses the protection he supposed he had, but there is missing the element usually present when the courts denounce forfeitures, since in the ordinary case of a forfeiture some tangible affirmative benefit results to the other party through a breach of contract or condition beyond the damages sustained.

In the case of subsequent conditions there is more of an element of forfeiture since the premium paid will normally secure protection for a period extending beyond the date of the violation of the condition and yet no part is recoverable. However, as has already been pointed out, the forfeiture would be less apparent if the policy read, for example, that the insurer would pay only for fire losses occurring during a year and before foreclosure proceedings were begun. In life insurance before the advent of cash surrender, extended and paid-up insurance provisions, there was a forfeiture of part of the premiums upon lapse due to non-payment of a subsequent premium, since under the level premium plan portions of the earlier premiums serve to pay in part for protection during the later years of life. The forfeiture is more pronounced since it arises from non-payment of additional consideration and the condition does not relate to the risk assumed.

¹⁰⁷ WILLISTON, CONTRACTS (1920) §677: See CAL. CIV. CODE §2636, quoted in note 117 *infra*.

thereof the condition is not performed, the promisor cannot later defend on the ground of non-performance.¹⁰⁸ Since this rule rests on the idea that the promisor is a cause of the non-performance, the permission to refrain may be effectually withdrawn before the period for performance has expired, provided that reasonable time in which to perform is still left. The conduct of the promisor amounts merely to a promise to carry out his agreement despite the failure to comply with the condition. The case is one of promissory estoppel if, but only if, there is a prejudicial reliance.¹⁰⁹

a. Notice of Loss

Applying the principles above set forth, if the insurer, within the time allotted for giving notice of loss, indicates by words or conduct that such notice need not be given, the insurer cannot object if his action has caused the insured to refrain. It is possible to rest *Emery v. Svea Fire Insurance Co.*¹¹⁰ on this theory. With actual knowledge of the loss within five days, the insurer demanded and received payment of the premium for which credit had been given. The court said that under such circumstances the insurer could not say that the policy was not in force at that time. This line of reasoning is subject to criticism. If the time for giving notice of the loss has expired prior to the demand for and receipt of the premium, what is to prevent the insurer from claiming the premium and at the same time denying liability for the loss owing to the failure to give notice? The premium has been earned.¹¹¹ The breach of this condition does not put an end to the contract but merely prevents the particular loss ripening into a cause of action. Subsequent losses may still be recovered. But the conduct of the insurer in the *Svea* case may well have led the insured to believe that written notice was unnecessary. *Carroll v. Girard Fire Insurance Co.*¹¹² clearly goes on this ground. The claim was brought to the notice of the insurer which made no objection to the lack of written notice and magistrate's certificate within the time for giving them but joined in

¹⁰⁸ WILLISTON, CONTRACTS (1920) §§ 689, 690.

¹⁰⁹ *Ibid.* § 689: "Nothing could well have a more fraudulent operation than to allow one who is bound by a conditional promise to indicate by words or acts while performance is still possible that its non-performance will not affect his own action under the contract, and, subsequently, when in reliance on this statement the promisee has failed to perform the condition, and the time has passed when it is possible to do so, to set up the failure as an excuse for the non-performance."

And see CAL. CIV. CODE §§ 1511, 1512 which relate to the performance of obligations which may also be conditions, rather than pure conditions which are not also obligations. But the underlying principles are the same in both cases.

¹¹⁰ (1891) 88 Cal. 300, 26 Pac. 88.

¹¹¹ See *Bennett v. Beavers Reserve Fund Fraternity* (1914) 159 Wis. 145, 150 N. W. 181; *EWART, WAIVER DISTRIBUTED* (1917) 226-7.

¹¹² (1887) 72 Cal. 297, 13 Pac. 863.

arbitration to determine the amount of loss. By this latter act the insurer was held to have manifested its intention to dispense with these preliminary formalities. It was said that an intent on the part of the company to require these acts after the time for performing them had expired would be to impute a lack of good faith and fair dealing.¹¹³

In *Frank & Co. v. New Amsterdam Casualty Co.*¹¹⁴ and *Tulare County Power Co. v. Pacific Surety Co.*¹¹⁵ there was held to be a "waiver" of written notice after the time for giving notice had expired. A liability insurer had assumed full control of litigation against the insured, as it was privileged as well as obligated to do under the contract. The cases go on the ground that having led the insured to alter his position by permitting the insurer this control, to which the insurer was entitled as of right only on the assumption that it was liable, it was precluded from taking advantage of the failure to give written notice. In other words there was promissory estoppel in both cases.

b. Proofs of Loss

The principle previously referred to applies when, within the time for filing proofs, the insurer leads the insured to believe that such proofs are dispensed with.¹¹⁶ Reference should be made here to section 2636 of the California Civil Code¹¹⁷ which possibly goes somewhat further than the cases cited in the note.

If the proofs are defective the insurer must indicate his objection within a reasonable time so that the insured may correct them. Failure to object is reasonably indicative that the proofs are satisfactory and consequently lulls the insured into a sense of security.¹¹⁸ And, if the

¹¹³ *Aronson v. Frankfort Accident & Plate Glass Insurance Co.* (1908) 9 Cal. App. 473, 99 Pac. 537, recognizes the principle here suggested but finds insufficient evidence of such dispensation.

¹¹⁴ (1917) 175 Cal. 293, 165 Pac. 927.

¹¹⁵ (1919) 43 Cal. App. 315, 185 Pac. 399.

¹¹⁶ *Ramirez v. United Firemen's Insurance Co.* (1920) 46 Cal. App. 451, 189 Pac. 309; *Hutchings v. Southwestern Automobile Insurance Co.* (1929) 96 Cal. App. 318, 274 Pac. 79 (swearing to proofs of loss); *McCollough v. Home Insurance Co.* (1909) 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862, also holding that a non-waiver agreement pending negotiations that action taken in investigating and ascertaining the amount of loss should not be regarded as a waiver of the conditions of the policy did not apply to the proof conditions.

¹¹⁷ "Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground."

¹¹⁸ *Williams v. Hartford Insurance Co.* (1880) 54 Cal. 442, 35 Am. Rep. 77. And see *Hutchings v. Southwestern Automobile Insurance Co.* (1929) 96 Cal. App. 318, 274 Pac. 79. This principle is embodied in CAL. CIV. CODE §2635, although it is not cited in the cases. The section reads: "All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived."

proofs are false in some respect to the knowledge of the insurer which filled out the blanks and procured the insured to execute them, the falsity cannot be taken advantage of.¹¹⁹ The insurer caused the false statement to be made.¹²⁰

None of the California cases squarely present the question whether the insurer is liable who, while in no way responsible for failure to perform either the notice-of-loss or proof-of-loss condition, nevertheless agrees to pay, there being present no prejudicial reliance or change of position.¹²¹ When this case is presented, the court will be squarely faced with a problem similar to that previously considered in connection with conditions operative after the making of the contract and before the loss.¹²² By hypothesis the insurer is under no liability on the contract by reason of the breach of condition nor under any obligation to return the premium. The promise is without consideration. However, if this type of waiver is permissible at all, there is stronger ground for its application in this type of case, since the defense may be considered much more technical than when the condition is of any other type. Disregarding "waiver," the court might conceivably under circumstances like those in *Gillon v. Northern Assurance Co.*,¹²³ accept a dilution of the prejudicial reliance element of promissory estoppel and consider the furnishing of proofs, which was made a condition of the new promise, to be a sufficient change of position.

On the ground that if the promisor is not going to perform his promise, it is useless for the promisee to perform the condition and hence the promisor is liable despite the unfulfilled condition,¹²⁴ the insured is excused from making proofs by a denial of liability on the part of

¹¹⁹ *West Coast Lumber Co. v. State Investment and Insurance Co.* (1893) 98 Cal. 502, 33 Pac. 258.

¹²⁰ *Clark v. Casselman* (1917) 177 Cal. 82, 169 Pac. 1005, is not in point. No proofs were made. Denying liability to the insured, the insurer paid the mortgagee, who was protected under the "standard" or "union" mortgage clause, and took an assignment of the mortgage which it sought to enforce. Obviously, as was held, by paying the mortgagee who was in substance separately insured and not affected by breaches on the part of the mortgagor, the insurer did not "waive" as to the mortgagor the failure to file proofs.

¹²¹ *Gillon v. Northern Assurance Co.* (1900) 127 Cal. 480, 59 Pac. 901, merely holds that if the insurer, after the time for proofs of loss has expired, expressly promises to pay provided that the insured will file proof, a suit brought three days after compliance is premature, since the contract calls for payment only after the lapse of 60 days from the making of proof. In other words the promise had read into it by implication the time provision of the policy.

¹²² *Supra* pages 22 *et seq.*

¹²³ *Supra* note 121.

¹²⁴ *WILLISTON, CONTRACTS* (1920) §767.

the insurer before the time for making proofs has expired.¹²⁵ The principle in substance is that the insurer has caused the insured to fail because he has led the insured to believe that the proofs either will be useless or will not be received. In the case of *Wilkinson v. Standard Accident Insurance Co.*¹²⁶ reliance is placed on section 1440 of the Civil Code,¹²⁷ which is believed to codify a principle of the common law.

c. Contractual Period of Limitation

In *Case v. Sun Insurance Co.*¹²⁸ the loss was payable 60 days after completion of all the requirements looking toward the most ample proof. The policy also provided that no suit should be maintained except within 12 months of the fire. So many requirements were called for by the insurer that the insured was unable to comply fully until 13 months had elapsed. Action was brought within a month later. By the literal terms of the contract, if a solecism be permitted, the cause of action did not accrue until it was barred. The court allowed recovery, relying on *Spare v. Home Mutual Insurance Co.*,¹²⁹ which by a marvelous piece of construction decided that by the terms of the policy the period of limitation did not begin to run until the proofs were completed. Either of two other solutions is more satisfactory. Conventional stipulations for limitation have occasionally been denounced as illegal¹³⁰ but are usually upheld where a reasonable time is allowed for bringing suit.¹³¹ It might be held that the provision under the circumstances of the case decision was invalid as allowing no resort to the courts. The other solution is that suggested in *Fitzpatrick v. North American Accident Insurance Co.*,¹³² namely that since the insurer

¹²⁵ *Bank of Anderson v. Home Insurance Co.* (1910) 14 Cal. App. 208, 111 Pac. 507; *Buxton v. International Indemnity Co.* (1920) 47 Cal. App. 583, 191 Pac. 84; *Lee v. United States Fire Insurance Co.* (1921) 55 Cal. App. 391, 203 Pac. 774; *Farnum v. Phoenix Insurance Co.* (1890) 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233 (award of arbitrators); *Wilkinson v. Standard Accident Insurance Co.* (1919) 180 Cal. 252, 180 Pac. 607 (denial coupled with refusal to furnish proof blanks).

¹²⁶ *Supra* note 125.

¹²⁷ "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

¹²⁸ (1890) 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48.

¹²⁹ (1883) 17 Fed. 568.

¹³⁰ *Union Central Life Insurance Co. v. Spinks* (1904) 119 Ky. 261, 83 S. W. 615, 84 S. W. 1160, 69 L. R. A. 264.

¹³¹ *Tebbetts v. Fidelity & Casualty Co. of New York* (1909) 155 Cal. 137, 99 Pac. 501.

¹³² (1912) 18 Cal. App. 264, 123 Pac. 209. In this case the court found that ample time to sue remained after the insurer's demands had been complied with. Hence suit brought more than twelve months after the fire was too late. The Case decision is explained as based on the principle suggested.

makes it impossible for the insured to comply with the provision, he cannot take advantage of the failure. A similar principle is applied in *Perry v. Magneson*¹³³ where the surety on a contractor's bond by holding out hope of amicable adjustment caused the plaintiff to refrain from suit.¹³⁴

CONCLUSION

The above study of the California cases reveals few where the actual holding has been adversely criticized. The writer, however, has felt free to criticize the reasoning employed in the belief that erroneous argument in judicial opinions will lead to incorrect results in later cases. A greater discrimination in the various types of conditions seems desirable.

The technical character of insurance contracts with their numerous and intricate provisions, seldom studied by the ordinary layman, and if at all, with a sense of mystification, has naturally aroused the sympathy of both courts and juries. However, the insurers will insist, with reason, that there is a substantial and meritorious purpose back of each provision, that risk conditions are necessary for a proper classification of risks and an equitable apportionment of premiums among different classes of risk, that premium conditions are essential to the financial stability of the insurer, and that proof conditions are necessary for the discovery of fraudulent losses and excessive claims. They will assert that a proper respect for such provisions will lead to the eventual public good by the lowering and proper distribution of rates and the prevention of fraudulent losses and their collection. Admitting the force of such assertions, it still remains that justice may frequently require relief from the operation of such conditions. However, it is a matter of notoriety that juries, when left free, will almost always decide in favor of the insured. The reading of numerous cases leads to the uneasy feeling that many an unmeritorious plaintiff has succeeded by reason of the sympathy or prejudice of the jury. While insurers in common with the rest of the community must undergo the hazards of jury trial, it is suggested that the evil may be somewhat lessened by a clearer perception and formulation of the rules of law by the courts.¹³⁵

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¹³³ (1929) 207 Cal. 617, 279 Pac. 650.

¹³⁴ See *Hart v. Citizens Insurance Co.* (1893) 86 Wis. 77, 56 N. W. 332, 21 L. R. A. 743, 39 Am. St. Rep. 877.

¹³⁵ As was stated at the beginning of this paper, a future article will be directed to the agency problems involved in the subject.