FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER XIV.

OF WAIVER.

(Continued from page 184.)

§ 286. *Waiver by parol.*

In the following case it was held that the general officer of the company might waive by parol the condition that waiver must be endorsed on the policy. The company's secretary asked the insured to wait till the company got estimates for rebuilding. The insured delayed sending in his proofs in consequence. This was held waiver by the company.

Incumbrances to be notified in writing. One existed not notified, but the mortgagee afterwards insured his interest through the same person, agent for two companies; then the first insured renewed his insurance, paying renewal premium to the same person agent. All the policies and receipts were countersigned by that person, agent for two different companies. This was held sufficient to authorize the jury to find that the first insurers had knowledge of the incumbrance.[1]

§ 287. *Question whether there has been waiver, how regarded.*

Waiver is sometimes held to be a mixed question of law and fact. § 137 p. 275, Hilliard on New Trials.

Whether there is evidence to establish a waiver by the president of an insurance company of preliminary proof of loss under a policy is a question of law. *Ib.*

Hilliard on New Trials says that waiver is a question of law. It is very often so, at any rate.[2]

§ 288. *Silence not always a waiver.*

In *Mason* v. *Andes Insurance Co.*[3] it was held that if an insurance company, after a fire, get informal proofs, and ask for others in consequence, and again informal ones are delivered and the company is silent, the company, being sued, is not considered to have waived right to proper proofs—proper certificate of Justice of the Peace, etc. But otherwise it might be held, were it to go into correspondence with the assured on other subjects, as if contemplating to pay. So, in *Langel* v. *Mutual Insurance Co. of Prescott*,[1] it was held that mere silence of the insurance company, after particulars of loss handed in that are quite informal, is *not* fatal to nor a waiver by the company. But if the company go into a debate by writing on other grounds that are bad, perhaps it would be held a waiver. The same principle was affirmed in the case of *McMasters et al.* v. *The Westchester Co. Mutual Insurance Co.*,[2] where, after loss by fire of the property insured, the insured refused to pay, placing his refusal not upon defects in the preliminary proofs, but on a change of interest or ownership in the property. On the trial the insurer was not allowed to object to the preliminary proofs, it being held that he had waived the right to object to them. Upon the same principle it would appear that the insurer cannot go into denial of fulfilment of any other warranty.

§ 289. *The general principle.*

Waiver is as fairly to be admitted in insurance as in other contracts; yet corporation law is to be observed. It is elementary that "la condition est réputée accomplie quand celui à qui elle profite y renonce volontairement."[3] Of course, there lies the question always, What is such renunciation and who has power to make it?—just as fairly as where a default of accomplishment comes from the act of him who is to profit by non-accomplishment.[4]

Waiver can hardly be without the knowledge of the party alleged to have waived breach of covenant by his adverse party.[5]

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[1] Supreme Court, Pennsylvania, January, 1877, *State Ins. Co.* v. *Todd*, 21 Alb. L. J. 225.

[2] *Semble* the Court of Queen's Bench held it to be for the Court to say whether proof had been made of a waiver. *W. Ass. Co.* v. *Atwell* (*post*). But, perhaps, it meant to say that the jury had pronounced *without sufficient proofs*.

[3] 23 U. C. Com. Pleas, A. D. 1873.

[1] 17 U. C. Q. B. Rep. 524.

[2] 25 Wendell.

[3] De Savigny, vol. iii, p. 144.

[4] This is a kind of *dol*, and not to lead to profit.

[5] *Hunter* v. *Daniel*, Chancery, A. D. 1845, vol. iii, N. Y. Legal Observer. But see vol. ii N. Y. Legal Observer, A. D. 1843, p. 17. Forfeiture of a lease may be waived by the acceptance of rent subsequently accruing.