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needed order and respect for the judicial system, Congressional action seems imperative. It is submitted that Congress should, in addition to scrupulously abstaining from the future use of the word "maintained" without a clear cut definition, reword Section 16(b) of the Fair Labor Standards Act to dispel all of the current confusion which has attached to the problem of whether suits brought in state courts under the F. L. S. A. are removable to federal district courts or not. The F. L. S. A. is certain to come under Congressional scrutiny in connection with the now famous portal to portal question⁴² and such a rewording of Section 16(b) could be advantageously accomplished at the same time. A workable standard may be found in the eighth sentence of Section 28 of the Judicial Code⁴³ which permits removal of suits against common carriers under the Interstate Commerce Act⁴⁴ only when they involve more than \$3,000. This would provide sufficient federal decisions to which state courts could look for guidance thereby avoiding too many jurisdictional inconsistencies.

NOEL R. S. WOODHOUSE.

Insurance—Extension of Coverage by Waiver or Estoppel

Plaintiff insurer sought a declaratory judgment to determine its liability on an automobile liability policy. The policy contained the following: "This policy does not apply: (a) while the automobile is used as a public or livery conveyance. . . ." There was also a clause limiting the agent's power with respect to waiver and estoppel. Answering two issues submitted to it, the jury found (1) the automobile was used as a public conveyance, and (2) the agent knew it was to be so used when he issued the policy. Defendant abandoned a plea for reformation. The trial court disregarded the second issue and gave judgment for plaintiff. On appeal the Supreme Court affirmed, holding the submission of the second issue was inadvertent as it rested upon parol evidence which

Ky. 1943). See comment note 13 *supra* on these two cases. *Barron v. F. H. E. Oil Co.*, 4 Wage & Hour Rep. 551 (W. D. Tex. 1941). *Contra: Harris v. Reno Oil Co.*, 48 F. Supp. 908 (N. D. Tex. 1943). See also cases listed in note 41 *infra*.

⁴¹ Cases denying removal are listed first. *Apple v. Shulman Publications*, 65 F. Supp. 677 (D. N. J. 1943). *Contra: Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956 (D. N. J. 1940) (really a dictum, however, cited both pro and con often). *Duval v. Protes*, 51 F. Supp. 967 (E. D. N. Y. 1943). *Contra: Ellems v. Helmers, Inc.*, 65 F. Supp. 566 (E. D. N. Y. 1944). *Sheridan v. Leitner*, 59 F. Supp. 1011 (S. D. N. Y. 1944). *Contra: McCarrigle v. 11 W. Forty Second St. Corp.*, 48 F. Supp. 710 (S. D. N. Y. 1942). In each of these cases the judges were different and in the later of the two in each district the judge did not bother to distinguish or overrule the previous *contra* decisions.

⁴² *N. Y. Times*, Dec. 29, 1946, §E, p. 3, col. 3.

⁴³ 36 STAT. 1094 (1914), 28 U. S. C. A. §71.

⁴⁴ 41 STAT. 474 (1920), 49 U. S. C. A. §1 *et seq.*

varies the terms of the written agreement; and the first issue established exclusion from liability.¹

This case raises several questions of interest, an exhaustive analysis of which is beyond the scope of this note. They may, however, be briefly reckoned with. The first question is, What effect does a clause against waiver of policy provisions have on waivers which otherwise would result from that which leads to the issuance of a policy?

Provisions in an insurance policy which restrict the power of an agent relative to waiver do not become operative until the policy is issued.² Such provisions are a part of the contract, and it logically follows that they can have no operative effect until the policy issues. Thus, they can only apply to something which comes into existence after the inception of the contract. Restrictive provisions in the policy can have no effect upon what took place before the policy issued.³ The cases supporting these rules are, for the most part, cases involving waiver of conditions, the breach or nonexistence of which would forfeit the policy. There is a dearth of cases applying these rules to situations where an insurer issues a policy with knowledge of conditions which would render the policy merely ineffective for the purpose intended, rather than forfeited. But certainly no one could reasonably contend that the announced rules do not apply to the latter situation. To do so would be to assume that the insurer did not intend to execute a valid, effective contract embodying the intentions of the parties.⁴ Also, failure to apply the rules to such situations would give the insurer a legal license to perpetrate fraud on the insured, in view of the known fact that few persons read their policies.

The second question to be briefly examined is, Should the parol evidence rule operate to preclude the admission of evidence of the negotiations preceding issuance of a policy? Parol evidence is admissible where it is sought to reform an instrument,⁵ or to show fraud in connection therewith.⁶ Insurance policies can be reformed by parol evidence for mistake of one superinduced by fraud or *inequitable* conduct of the other.⁷ The argument in the foregoing paragraph is equally

¹ *Insurance Co. v. Wells*, 226 N. C. 574, 39 S. E. (2d) 741 (1946).

² *Smith v. Insurance Co.*, 208 N. C. 99, 179 S. E. 457 (1935); *Case v. Ewbanks*, 194 N. C. 775, 140 S. E. 709 (1927); *Aldridge v. Insurance Co.*, 194 N. C. 683, 140 S. E. 706 (1927); *Bullard v. Insurance Co.*, 189 N. C. 34, 126 S. E. 179 (1925); *Johnson v. Insurance Co.*, 172 N. C. 142, 90 S. E. 124 (1916); *VANCE, INSURANCE* (2d ed. 1930) §126 ("... limitations contained in the policy could have no effect as to transactions prior to the delivery of the policy...").

³ 16 *APPLEMAN, INSURANCE LAW AND PRACTICE* (1944) §9101; *VANCE, INSURANCE* (2d ed. 1930) §126.

⁴ *English v. Casualty Co.*, 138 Ohio St. 166, 34 N. E. (2d) 31 (1941).

⁵ *Hubbard v. Horne*, 203 N. C. 205, 163 S. E. 347 (1932) (mistake, fraud, surprise and accident furnish exceptions to the general rule).

⁶ *Trust Co. v. Knight*, 160 N. C. 592, 76 S. E. 623 (1912).

⁷ *Williams v. Insurance Co.*, 209 N. C. 765, 185 S. E. 21 (1936).

applicable here; *i.e.*, to allow an insurer to issue a policy with knowledge of facts rendering it ineffective for the purpose intended works a fraud on the insured. Since this is, in effect, a fraud on the insured, or at all events the evidence of estoppel in such a situation is evidence of inequitable conduct, and parol evidence is admissible where reformation is sought, such evidence should be allowed to show the insurer's knowledge when the policy was issued.⁸ And this should be, even though the plea for reformation is abandoned, as in the principal case, because the court may grant any relief consistent with the facts pleaded.⁹ Further, estoppel serves the same purpose in law as reformation does in equity. Since law and equity are combined under the code, there can be no valid reason to exclude parol evidence. The decision in the principal case places the insurer in an advantageous position. An unscrupulous company may issue a policy which it knows will not cover the risk intended. When loss occurs, it can bring suit for declaratory judgment on the policy, and if the insured does not ask for reformation, the company escapes all liability. It retains the premiums for which it has given no consideration. And this is the result even though an equitable remedy, declaratory judgment, is sought.

The final question, and the principal one to be considered is, Should the law allow the coverage of an insurance policy to be extended by waiver or estoppel? By waiver is meant implied waiver; it is assumed that express waiver upon consideration is a contract itself and presents no problem. The problem of extension of risk comes before the court when there is involved in a suit an insurance policy containing conditions and/or exceptions. The distinction between conditions and exceptions is not always clear. A provision is clearly a condition when it provides that upon a certain occurrence the policy will be void. An exception withdraws from coverage a risk which the insurer does not wish to assume. An exception always involves a risk while a condition may or may not involve a risk.¹⁰

According to some authorities, the general rule in the United States is that neither waiver nor estoppel can create a contract of insurance or so apply as to bring within the coverage of the policy property or a loss or risk, which by the terms of the policy is excepted or otherwise excluded.¹¹ An examination of the cases cited by these authorities in

⁸ *Midkiff and Brannock v. Insurance Co.*, 197 N. C. 139, 147 S. E. 812 (1929); *Gerringer v. Insurance Co.*, 133 N. C. 407, 45 S. E. 773 (1903); *Strause v. Insurance Co.*, 128 N. C. 64, 38 S. E. 256 (1901); *see Johnson and Stroud v. Insurance Co.*, 172 N. C. 142, 90 S. E. 124 (1916); *VANCE, INSURANCE* (2d ed. 1930) §136, note 86.

⁹ *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §401.

¹⁰ *VANCE, INSURANCE* (2d ed. 1930) §116 (distinction drawn between warranties, conditions and exceptions, and illustrated).

¹¹ *RICHARDS, THE LAW OF INSURANCE* (4th ed. 1932) §115; 29 *Am. Jur.*, *Insurance* §801 ("However, the doctrine of implied waiver or of estoppel is not

support of the proposition discloses the inherent weakness of the generalization.¹² Still, many cases have quoted this "general rule" with approval.¹³ But these cases reveal only the instability of the doctrine and a considerable amount of confusion attending it.¹⁴ And the conclusion is warranted that the cases do not support the doctrine that insurance coverage is not to be extended by waiver or estoppel. In fact, analysis of the cases supports the opposite conclusion as to estoppel.

Although it is apparent that whether extension will be allowed is largely dependent upon the facts of each case, some reasonably accurate generalizations may be made. Those cases which declare that waiver or estoppel will not extend coverage ordinarily are those in which the insurance policy has a field of operation beyond the risk not covered, and conditions occur which render the policy merely inoperative as distinguished from void or a nullity.¹⁵ This result is supportable on the

available to bring within the coverage of a policy risks not covered by its terms or risks expressly excluded therefrom.) ; *id.* §903; 45 C. J. S., Insurance §674; note (1939) 38 MICH. L. REV. 104 (1939).

¹² To illustrate, the following cases are cited in 29 Am. Jur., Insurance §903, footnote 2: *Miller v. Banker's Life Ass'n*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378 (1919) (elements of waiver not present); *Norton v. Catholic Order of Foresters*, 138 Iowa 464, 114 N. W. 893, 24 L. R. A. (n.s.) 1030 (1908) (elements of waiver not present, estoppel not considered); *Ridgeway v. Modern Woodmen*, 98 Kan. 240, 157 Pac. 1191, L. R. A. 1917A, 1062 (1916) (facts did not constitute waiver, general rule supported only by inference); *Bower & Kaufman v. Bothwell*, 152 Md. 392, 136 Atl. 892, 52 A. L. R. 158 (1927) (general rule supported only as to estoppel, waiver must have consideration); *Washington Nat. Ins. Co. v. Craddock*, 130 Tex. 251, 109 S. W. (2d) 165, 113 A. L. R. 854 (1937) (supports general rule as to waiver, not clear on estoppel); *Rosenthal v. Insurance Co.*, 158 Wis. 550, 149 N. W. 155, L. R. A. 1915B 361, Ann. Cas. 1916E 395 (1914) (supports general rule as to waiver but by dictum, evidence of waiver weak); *McCoy v. Northwestern Ass'n*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 (1896) (supports general rule).

¹³ *Carnes v. Assurance Corp.*, 101 F. (2d) 739 (C. C. A. 5th, 1939); *Insurance Co. v. Roberts*, 132 F. (2d) 798 (C. C. A. 8th, 1939); *Insurance Co. v. Raper*, 242 Ala. 440, 6 So. (2d) 513 (1941); *Assurance Soc. v. Langford*, 234 Ala. 681, 176 So. 609 (1937); *Insurance Co. v. Motor Co.*, 227 Ala. 449, 150 So. 486 (1933); *Insurance Co. v. Smith*, 200 Ark. 508, 139 So. (2d) 411 (1940); *Quillion v. Assurance Soc.*, 61 Ga. App. 138, 6 S. E. (2d) 108 (1939); *Insurance Co. v. Eviston*, 110 Ind. App. 143, 37 N. E. (2d) 310 (1941); *Richardson v. Traveling Men's Ass'n*, 228 Iowa 319, 291 N. W. 408 (1940); *Pierce v. Life Ass'n*, 223 Iowa 211, 272 N. W. 543 (1937); *Insurance Co. v. Brookman*, 167 Md. 616, 175 Atl. 838 (1934); *Carew v. Casualty Co.*, 189 Wash. 329, 65 P. (2d) 689 (1939); *McCoy v. Northwestern Ass'n*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 (1896).

¹⁴ Referring to the cases cited *supra* note 13:

In *Insurance Co. v. Raper*, the court cited the case of *Insurance Co. v. Scharnagel*, 227 Ala. 60, 148 So. 596 (1933) which held that denial of liability on another ground estops the company from setting up exception as defense. In *Assurance Soc. v. Langford*, the court said, "... a ground on which payment may be resisted may be waived." In *Insurance Co. v. Motor Co.*, *Insurance Co. v. Scharnagel*, *supra*, is again cited. In *Insurance Co. v. Smith*, elements of estoppel were lacking. In *Richardson v. Trav. Men's Ass'n*, the question of estoppel was not involved. In *Carew v. Casualty Co.*, support of the rule was by dictum. In *McCoy v. Northwestern Ass'n*, a weak case of estoppel is made out.

¹⁵ *Fidelity & Guar. Corp. v. Bilquist*, 99 F. (2d) 333 (C. C. A. 9th, 1938); *Insurance Co. v. Raper*, 242 Ala. 440, 6 So. (2d) 513 (1941); *Insurance Co. v. Smith*, 200 Ark. 508, 139 S. W. (2d) 411 (1940); *Quillion v. Assurance Soc.*, 61 Ga. App. 138, 6 S. E. (2d) 108 (1939); *Ridgeway v. Modern Woodmen*, 98 Kan.

ground that the insured received some protection as consideration for his premiums since the policy was merely suspended during the occurrence of the excluded risk, and would become effective again upon cessation of that condition. However, in the cases so holding, elements of estoppel have been totally lacking or very weak. Therefore, in most of the cases where the courts have said coverage cannot be extended by waiver or estoppel, the word "estoppel" has been dictum.

Undoubtedly a majority of the courts will allow extension of coverage by estoppel.¹⁶ Most of the cases deal with a situation where, under a policy of liability insurance, the insurer defends the action against the insured and is thereafter held estopped to deny liability on the policy. Although the courts do not mention extending the coverage, it is nonetheless true that that is the result accomplished.

This note is not concerned with the technical distinctions between waiver and estoppel, but with extension by one or the other or both.

240, 157 Pac. 1191, L. R. A. 1917A 1062 (1916); *Lumber Co. v. Insurance Co.*, 179 La. 779, 155 So. 22 (1934); *cf. Quinones v. Life and Cas. Co.*, 209 La. 76, 24 So. (2d) 270 (1945); *Insurance Co. v. Brookman*, 167 Md. 616, 175 Atl. 838 (1934); *Ruddock v. Insurance Co.*, 209 Mich. 638, 177 N. W. 242 (1920); *Casualty Co. v. Adams*, 159 Miss. 88, 131 So. 544 (1931); *Rosenberg v. Assurance Co.*, 246 S. W. 1009 (Mo. App. 1922); *Craddock v. Insurance Co.*, 130 Tex. 251, 109 S. W. (2d) 165; 113 A. L. R. 854 (1937); *Two Rivers Co. v. Casualty Co.*, 168 Wis. 96, 169 N. W. 291 (1918); *McCoy v. Northwestern Ass'n*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 (1896); anno. 113 A. L. R. 857.

¹⁶ *Claverie v. Casualty Co.*, 76 F. (2d) 570 (C. C. A. 4th, 1935); *Assurance Corp. v. Chicago and B. M. Co.*, 141 Fed. 965 (C. C. A. 7th, 1905); *Assurance Soc. v. Langford*, 242 Ala. 440, 176 So. 609 (1937); *Indemnity Ass'n v. Supply Co.*, 211 Ala. 84, 99 So. 787 (1924); *Knights v. Shoaf*, 166 Ind. 367, 77 N. E. 738 (1906); *Conner v. Insurance Co.*, 122 Cal. App. 105, 9 P. (2d) 863 (1932); *Insurance Co. v. White*, 106 Ind. App. 530, 19 N. E. (2d) 872 (1939); *Palumbro v. Insurance Co.*, 293 Mass. 35, 199 N. E. 335 (1935); *Lunt v. Insurance Co.*, 261 Mass. 469, 159 N. E. 461 (1928) (by implication); *Leverett v. Casualty Co.*, 247 Mich. 172, 225 N. W. 515 (1929) (distinguished from *Ruddock v. Insurance Co.*, 209 Mich. 638, 177 N. W. 242 (1920) on ground that estoppel occurred before loss); *Humphrey v. Polski*, 161 Minn. 61, 200 N. W. 812 (1924) (by implication); *Mann v. Assurance Corp.*, 123 Minn. 305, 143 N. W. 794 (1913); *Tozer v. Accident and Guar. Co.*, 94 Minn. 478, 103 N. W. 509 (1905), *aff'd on appeal*, 99 Minn. 290, 109 N. W. 410 (1906); *Cowell v. Indemnity Corp.*, 326 Mo. 1103, 34 S. W. (2d) 705 (1930); *Keck v. Insurance Co.*, 237 Mo. App. 308, 167 S. W. (2d) 664 (1942); *Rieger v. Guaranty and Acc. Co.*, 202 Mo. App. 184, 215 S. W. 920 (1919); *Royle v. Casualty Co.*, 161 Mo. App. 185, 142 S. W. 438 (1912), *former appeal*, 126 Mo. App. 104, 103 S. W. 1098 (1907); *Fairbanks v. Guaranty and Acc. Co.*, 154 Mo. App. 327, 133 S. W. 664 (1911); *Lipe v. Insurance Co.*, 142 Neb. 22, 5 N. W. (2d) 95 (1942); *Moore v. Fidelity and Guar. Co.*, 293 N. Y. 119, 56 N. E. (2d) 74 (1944); *Gerka v. Fidelity and Cas. Co.*, 251 N. Y. 51, 167 N. E. 169 (1929); *Draper v. Relief Ass'n*, 190 N. Y. 12, 82 N. E. 755 (1907); *Early v. Insurance Co.*, 224 N. C. 172, 29 S. E. (2d) 558 (1944); *Fidelity and Cas. Co. v. Blausey*, 49 Ohio App. 556, 197 N. E. 385 (1934); *Humes Const. Co. v. Casualty Co.*, 32 R. I. 246, 79 Atl. 1, Ann. Cas. 1912D, 906 (1911); *Ellis v. Casualty Co.*, 187 S. C. 162, 197 S. E. 510 (1938); *Ziegler v. Ryan*, 66 S. D. 491, 285 N. W. 875 (1939); *Mancini v. Thomas*, 113 Vt. 317, 34 A. (2d) 105 (1943); *Beatty v. Assurance Corp.*, 106 Vt. 216, 168 Atl. 919 (1933); *Lumber Co. v. Insurance Co.*, 159 Wis. 627, 150 N. W. 991 (1915) (by implication); *see Hargett v. Insurance Co.*, 12 Cal. App. (2d) 449, 55 P. (2d) 1258, 1261 (1938). 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* (1944) §9090, note 35; COOLEY'S *BRIEFS ON INSURANCE* (2d ed. 1927) Vol. 5, p. 393.

However, it may be pointed out that there are cases which declare that extension is not to be accomplished by waiver while it may be by estoppel.¹⁷ On the other hand, there are cases which declare that either or both waiver and estoppel may be invoked to prevent injustice.¹⁸ In *Fairbanks Canning Co. v. London Guar. and Acc. Co.*,¹⁹ where the insurer defended an action against the insured, pursuant to a clause in a liability policy, with full knowledge of facts upon which it could deny coverage, the court said: "Such action is sometimes said to constitute estoppel *in pais*; sometimes it is denominated an election of position which cannot afterwards be changed; sometimes it is said to be a contemporaneous construction of the contract by the party claimed to be bound; and yet again it is called a waiver. But in whatever way it may be designated it is such conduct on the part of the insurer as will cut him out of a defense he might have made. . . ." And in *Delaware Ins. Co. v. Wallace*,²⁰ where the policy contained a provision limiting coverage to property only while in a specified place, the court said: "There may be waiver of such provision, estoppel to assert it, or agreements affecting it. . . ." Further, there are those cases where waiver alone has been pleaded and coverage has been extended.²¹ Cases often arise where the policy sued on contains a provision relating to coverage as distinguished from cases where the policy in question, by necessary inference only, does not cover the particular loss. To avoid an inequitable and obviously unjust result which would occur if extension were not allowed, but confronted with the contention that coverage may not be extended by waiver or estoppel, the courts call such provisions, provisions for the benefit of the insurer which may be waived,²² an accepted

¹⁷ *Claverie v. Casualty Co.*, 76 F. (2d) 570 (C. C. A. 4th, 1935); *Indemnity Ass'n v. Supply Co.*, 211 Ala. 84, 99 So. 787 (1924); *Conner v. Insurance Co.*, 122 Cal. App. 105, 9 P. (2d) 863 (1932); *Knights v. Shoaf*, 166 Ind. 367, 77 N. E. 738 (1906); *Insurance Co. v. White*, 106 Ind. App. 530, 19 N. E. (2d) 872 (1939); *Palumbro v. Insurance Co.*, 293 Mass. 35, 199 N. E. 335 (1935); *Keck v. Insurance Co.*, 237 Mo. App. 308, 167 S. W. (2d) 664 (1942); *Draper v. Relief Ass'n*, 190 N. Y. 12, 82 N. E. 755 (1907); *Mancini v. Thomas*, 113 Vt. 317, 34 A. (2d) 105 (1943); *Beatty v. Assurance Corp.*, 106 Vt. 216, 168 Atl. 919 (1933).

¹⁸ *Insurance Co. v. Scharnagel*, 227 Ala. 60, 148 So. 596 (1933); *Leverett v. Casualty Co.*, 247 Mich. 172, 225 N. W. 515 (1929); *Rieger v. Guaranty and Acc. Co.*, 202 Mo. App. 184, 215 S. W. 920 (1919); *Fairbanks v. Guaranty and Acc. Co.*, 154 Mo. App. 327, 133 S. W. 664 (1911); *Royle v. Casualty Co.*, 126 Mo. App. 104, 103 S. W. 1098 (1907), *aff'd on appeal*, 161 Mo. App. 185, 142 S. W. 438 (1912); *Myton v. Casualty Co.*, 117 Mo. App. 442, 92 S. W. 1194 (1906); *Lipe v. Insurance Co.*, 142 Neb. 22, 5 N. W. (2d) 95 (1942) (action was to recover premiums paid on policy which excluded from coverage any one over 65, recovery denied because insurer waived age requirement and "waiver" ripened into "estoppel").

¹⁹ 154 Mo. App. 327, 133 S. W. 664 (1911).

²⁰ 160 S. W. 1130 (Tex. Civ. App. 1913).

²¹ *Casualty Co. v. Aarons*, 85 Colo. 591, 277 Pac. 811 (1929); *Insurance Co. v. Ransdell*, 259 Ky. 559, 82 S. W. (2d) 820 (1935); *Barker v. Insurance Co.*, 52 S. W. (2d) 285 (Tex. Civ. App. 1932).

²² *Quinones v. Insurance Co.*, 209 La. 76, 24 So. (2d) 270 (1945) (military clause).

risk subject to a condition subsequent,²³ a promissory warranty.²⁴ By so doing, each court has extended coverage without discussing the issue or even mentioning it.

Turning now to North Carolina, in *Johnson and Stroud v. R. I. Insurance Co.*,²⁵ a policy was issued on a building in process of erection. The policy excepted liability if the building was not enclosed and under roof. The court said, by way of dictum, that if the insurer issued the policy knowing of conditions existing at the time, it could not thereafter avoid liability on account of those conditions. Thus, had loss occurred before the building was enclosed, coverage would be extended. In *Midkiff and Brannock v. Insurance Co.*²⁶ a fire policy excepted liability while explosives were kept on the premises. Loss occurred while explosives were kept. The court said: "Conditions with respect to the property insured . . . existing at the time the policy was issued, . . . cannot be relied upon to defeat liability under the policy. When the policy was issued with such knowledge, it will be held that the company has waived the breach of the stipulations and provisions contained therein, which would otherwise render the policy void at its inception." The provision was not a condition working a forfeiture, as the court seemed to consider it, but was clearly an exception to liability. The keeping of explosives was material to the risk. So here extension was allowed. In *Early v. Insurance Co.*²⁷ it was said, by way of dictum, that the objection that liability is not within the terms of the policy may be waived. The case of *Royle Mining Co. v. Fidelity and Cas. Co.*²⁸ was cited which held that defense by the insurer of an action brought against the insured, by a third party, constituted waiver of an exception and estopped the insurer from thereafter asserting it. In *McCabe et al. v. Casualty Co.*²⁹ it was held that a provision in an accident policy limiting coverage to persons 18 to 65 years could not be waived. However, in that case the policy provided for a return of premiums to persons over 65, and this undoubtedly influenced the court's decision. Thus, it is seen that in North Carolina extension of coverage by waiver or estoppel is possible and has been allowed.

Extension of insurance coverage by waiver and/or estoppel should be allowed in proper cases. To do so merely accomplishes the purpose for which these doctrines were introduced into the law.³⁰

CLAUDE F. SEILA.

²³ *Keistler Co. v. Insurance Co.*, 124 S. C. 32, 117 S. E. 70 (1923) (clause providing for non-liability if building collapses except as result of fire).

²⁴ *Colby v. Insurance Co.*, 134 Me. 18, 181 Atl. 13 (1935) (clause providing for non-liability if car used without permission).

²⁵ 172 N. C. 142, 90 S. E. 124 (1916).

²⁶ 197 N. C. 139, 147 S. E. 812 (1929).

²⁷ 224 N. C. 172, 29 S. E. (2d) 558 (1944).

²⁸ 126 Mo. App. 104, 103 S. W. 1098 (1907).

²⁹ 209 N. C. 577, 183 S. E. 743 (1936).

³⁰ *Humes Const. Co. v. Philadelphia Cas. Co.*, 32 R. I. 246, 79 Atl. 1, Ann. Cas.