

1914

A Treatise on the Law of Waiver

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Recommended Citation

Saul Gordon, *A Treatise on the Law of Waiver*, 1 Fordham L. Rev. 489 (1914).

Available at: <https://ir.lawnet.fordham.edu/flr/vol1/iss7/2>

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a dereliction legally defined and declared sufficient and never on the admissions or consent of the parties." (Bishop, *Marr., Div. & Separ.*, Vol. I, p. 1265). In the absence of proof of the plaintiff's allegations, the Court is forbidden to grant the separation. Yet "the parties may make an agreement, which will become an order of the Court, to do without sentence the thing prayed, or enter into any other reasonable form of separation and the Court will specifically enforce it." This is precisely the nature of separation agreements, and, strange as it may seem, they will be upheld on the ground of public policy above alluded to, or will be set aside under the tests set out in the cases cited.

BOOK REVIEWS

"A TREATISE ON THE LAW OF WAIVER," by Renzo D. Bowers
(The W. H. Courtright Publishing Co.)

This work does not, like so many others, thresh old straw. While the law of waiver has served as the subject of some admirable essays (see 28 *Am. & Eng. Encyc. of Law* (1st Ed.), 524, title "Waiver"; 29 *Am. & Eng. Encyc. of Law* (2nd Ed.), 1089, title, *Id.*), this is the first book, we believe, which is devoted exclusively to that topic. Hence, it is somewhat of a pioneer, and, as such, naturally excites the keenest interest. As a treatise, however, it must be confessed that the book is a disappointment.

Whether wisely or not, it has become customary for reviewers to refrain from commenting upon the style displayed in a treatise. But, at the risk of being accused of pedantry, we cannot forbear alluding to the carelessness in composition, which is evidenced in this work. The perspicuity of almost every page in the book might be improved, by the judicious elimination of pleonasm. Frequently, the sentences in the work rival in length, but not in brilliancy of construction, those of Burke, as the following one (Sec. 196) well indicates: "Privileged communications between a patient and his physician may be waived by the patient, or by his attorney, personal representative, though not by an executor in an action to revoke a will, heir at law, this however, being denied under a statute prohibiting a physician from testifying without the consent of

his patient, assignee of an insurance policy beneficiary, guardian of a minor, parents of a child treated by the physician; but not, however, by the husband of the patient, and it is even held that only the patient can waive the privilege."

Even more serious, perhaps, than the long and redundant sentences, which are so constantly indulged in, is the violation of the King's English (see *e.g.*, p. 21, where "either" is used instead of "any"; and p. 23, where a sentence in Sec. 8 seems meaningless, and p. 219, where two sentences in Sec. 220 are printed as one).

A distinguished jurist wisely has observed that "definitions are dangerous" (*Andrews Bros. Co. v. Youngston Coke Co.*, 86 Fed. Rep. 585, 588 *per* Lupton, J.). The truth of his observation is sustained by this work. In it (Sec. 1), "waiver" is defined as "the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit." Notwithstanding its length, this definition is too narrow; it ignores the qualification that an agreement to waive a right is void, if it is contrary to public policy (see *e. g.*, *Mabee v. Crozier*, 22 Hun. 264, where an agreement to waive usury, and not to set it up as a defense, was held void).

Again, the author falls into a curious error, by asserting (Sec. 2) that a waiver "may be shown . . . by the doing or forbearing (*sic!*) to do something inconsistent with the existence of a right or an intention to rely upon it." It is not a little surprising, at this late day, to note a writer apparently doubting (Sec. 4) that consideration is a detriment suffered by the promisee, at the request of the promisor. In dealing with waivers contained in bills and notes (Secs. 74, 75), the author ignores the section in the uniform Negotiable Instruments Law (Sec. 81 of the New York act relating thereto). Indeed, a careful examination of the chapter on commercial paper (p. 79, *et seq.*) fails to disclose a single reference to the uniform Negotiable Instruments Law, although, curiously enough, the works of Ryles and Chitty are referred to.

On page 342, the author states (Sec. 343), without qualification, that "a party cannot waive a tort and bring an action in *assumpsit* against the tortfeasor, except where the property has been converted into money or its equivalent." At page 348, however, this is shown not to be the universal rule.

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