Nobody would imagine that one party to a contract could "waive" it. Even if performance of all its stipulations rested upon one party, the contract could not be "waived" by the other party—unless, of course, you choose to substitute the word "waived" for released. But, nevertheless, almost everybody appears to think that performance of some of the stipulations of a contract may be "waived" by the party for whose benefit they were inserted. All the stipulations cannot be "waived," but some of them may. That will not do. The defence to an action for non-performance of some term in a contract may be:—

1. Cancellation of the clause by subsequent agreement.
2. Release from performance.
3. Estoppel to require performance.
4. Accord and satisfaction, or acceptance of substituted performance.

And the idea seems to be that there is, also, the defence of "waiver." If so, what are its elements? Will "waiver" be established by proof of the emission of a few words by the waiverer (is that the correct term?)—words which do not amount to contract or release, and words which are not followed by any consequential action? No case known to me so declares. Every well-decided case of modification of contract by "waiver" can be put upon better ground.

Suggestion to the contrary may be found in cases in which some minor incident of the contract has been omitted—cannot performance of a trifling detail be "waived"? When A says to B, "You need not print the labels in red unless you like," he means one of two things—either (1), "If you do not, I shall not pay you," or (2), "I shall pay you all the same." And if he means the second of these, you may, if you wish to speak colloquially, say that A "waived" the colour of the ink; but you ought to say, that by a new contract the old one had been modified.

The obscuring, and sometimes vitiating, effects of the introduction of "waiver" into the law of contracts is often very obvious. I shall content myself with two instances.