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John S. Ewart

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PROFESSOR WILLISTON'S REVIEW OF WAIVER

By JOHN S. EWART*

MY book *Waiver Distributed Among the Departments Election, Estoppel, Contract, and Release*, with its denial of the existence of waiver as a distinguishable legal concept, was received by the reviewers with very encouraging encomiums. But even though blessed by Dean Pound's "Foreword," it failed to attract the general attention of the profession, and the courts continued to say waiver, waiver, waiver, waiver, instead of election, estoppel, contract, and release.

I did not mean, of course, that there is no such word as *waiver*. *Suction*, used colloquially, is a useful word, but if you should ask a physicist to explain the operation of suction as a force, he would tell you that, apart from other forces known by their appropriate titles, there is no such force. Similarly, *waiver* and its derivatives are useful conversational words, but lawyers ought to say that they have no peculiarly legal signification—they do not represent legal concepts. For that reason, we ought not to say that the word *waiver* has a colloquial and a technical sense. It has no technical sense. And it ought not to be used as though it had.

A great deal of existing misconception arises from non-observation of that fact. An assertion that something was waived is frequently taken to mean that something recognized by law as a waiver has happened, although what is really meant is that some act known to the law as election, estoppel, contract, or release has terminated the existence of the something. No one would think of disapproving Cowper's line, "She rather waives than will dispute her right." But if we are told that, as a matter of law, she had waived it, our informant might well be asked whether he meant that she had executed a release; and, if not, what had she done? Read a sentence in Mr. Bishop's valuable work *On Contracts*:¹

"The doctrine of waiver rests on one, or other, or on all in combination, of the following three principles, as the special facts and nature of the particular case indicate: namely, the principle

*Of Ottawa, Canada, Bar; author of *Ewart on Estoppel and Ewart, Waiver Distributed Among the Departments, Election, Estoppel, Contract, and Release*.

¹Page 330.

of contract by mutual concurrence of the wills; the principle of contracts created by law; and the principle of estoppel."

There being no "doctrine of waiver," and the "three principles" being quite capable of producing their effects without intermediately giving their support to doctrine of any kind, the sentence ought to have been framed in this way:

"Applications of the principles of contract and estoppel sometimes effectuate the extinction, the elimination, the termination, the surrender, or the waiver (as one may choose to express it) of rights."

In other words, contract and estoppel are the effective technical agents which produce a result that colloquially may be expressed by the employment of a variety of words. One of these is waiver. Surrender is another. But nobody would say that *the doctrine of surrender* rests on the principles of contract and estoppel. If anyone did, he would be no more inaccurate than was Mr. Bishop.

PROFESSOR WILLISTON

A severe test of the validity of my idea is furnished by the treatment of the subject by Professor Williston of Harvard, in his monumental work, *The Law of Contracts*. If he has made clear the existence of *waiver* as a technical actuality, *peccavi*. If, on the contrary, he has failed, I need fear no other.

Commencing discussion of the subject, Professor Williston says plainly that "Performance of a condition may also be excused by waiver."² He is conscious, however, of the difficulties which that assertion involves.

"Waiver," he says, "is a troublesome term in the law." He disapproves its usual definition as "an intentional relinquishment of a known right," saying that it is "open to criticism for more reasons than one,"³ and asserting "the impossibility of an adequate definition of waiver as a legal term without some narrower restriction than is usually imposed upon it."⁴

But he offers no definition of any kind. He will not even say "whether waiver may be intentional, and whether the right waived must be known," for that must "depend in great degree upon

²Williston, *Contracts* p. 1310.

³*Ibid.*

⁴*Ibid.* p. 1311.

which of the various things called waiver the discussion is about, as will appear from the following sections."⁵

Although we are not told, precisely, what is intended by "narrower restriction," it is said that:

"In view of these different meanings of the word waiver it is obviously idle to attempt to define the requirements of a valid waiver unless its use is first confined to some one or more of its ordinary applications wherein the requirements of the law are identical."⁶

And the application intended is, perhaps, sufficiently indicated by the fact that the references on subsequent pages to "narrower restriction" all occur in connection with one clearly defined class of cases—the class referred to in this article under the marginal heading No. 3. I am not sure that the same intention applies to the class of cases dealt with under heading No. 4. We shall see. If contention for the existence of *waiver* be confined to these classes, it is, I think, well on the way to disappearance altogether.

ANALYSIS

Under the heading "*Different meanings of the word waiver,*" Professor Williston says that the necessity for "narrower restriction" "will be evident if the different meanings with which the word is commonly used in connection with contracts are considered."⁷ And he proceeds to an analysis of "the various meanings^{7a} given to the word"—an analysis that yields no fewer than eight that "are called waiver." I had found four, and I am not sure that the eight will not reduce to that number as we proceed. They are as follows:

No. 1. When parties to a contract agree, for sufficient consideration, to vary it or to substitute another for it, courts frequently refer to the original contract, or some terms of it, as having been waived.

"This," Professor Williston says, "should be called a collateral promise or substituted contract or accord, which rescinds rather than waives the inconsistent terms of the prior obligation."⁸

That is my view. And we note that in these cases waiver means contract—one of the four.

⁵Ibid.

⁶Ibid. p. 1314.

⁷Ibid. p. 1311.

^{7a}"Distinct and different things."

⁸Ibid.

No. 2. When a man exercises a right of choice between two rights or remedies, the courts sometimes say that the unselected alternative was waived. That is wrong, for as Professor Williston says:

"One who elects one alternative is often said to waive the other; but, unless 'waive' is given a very broad meaning, the expression is inexact, since he could not have both. His only right was to make a choice."⁹

I agree, and I pass the observation on to Professor Vance of Yale, who may, however, reply by asking his Harvard brother (probably the only man who knows the answer). How, then, can it be said, as the brother indicates,¹⁰ that "In choosing the one, he necessarily *surrenders* the other?"¹¹ In my impartial view, he neither waives nor surrenders (the same thing) "the other." His only right was to make a choice." And we note, therefore, that in these cases waiver means election—one of the four.

On a later page,¹² under the heading "*Waiver of conditions in subscriptions to stock*," is the following:

"Conditions in a subscription to stock which have been complied with cannot be asserted if the subscriber with knowledge of the facts indicates his desire to proceed with his contract."

That is no doubt true; but why put it under the heading *Waiver*? It is a clear case of election.¹³

No. 3. We have come now to the class of cases to which, as I understand him, Professor Williston intended to apply his "narrower restriction" of the word *waiver*:

"A promise or permission express or implied in fact, supported only by action in reliance thereon, to excuse performance in the future of a condition, or to give up a defence not yet arisen, which would otherwise prevent recovery on an obligation."

This is followed by the hesitating statement that

"If waiver can be given any legal meaning narrower than the surrender of any right or defence by any means, this kind of surrender may properly be given the name."¹⁴

⁹Ibid. p. 1319.

¹⁰Ibid. p. 1318; see also p. 1329.

¹¹Ibid. p. 1318.

¹²Ibid. p. 1384.

¹³*Retraxit* is enumerated as a ninth, but probably Professor Williston intended to eliminate it, for he offers no comment upon it, and upon a later page (1348) indicates that No. 8 (*Laches*) is "the last of the meanings suggested" for waiver.

¹⁴Ibid. p. 1312.

Waiver, here, it will be observed, is said to be a "kind of surrender." It is not, therefore, a technical term. It would be quite as correct to say that surrender is a kind of waiver; and, still more correct, that they are sometimes interchangeable terms. Professor Williston frequently employs the word *surrender* as the equivalent of waiver.¹⁵

Explaining why the term *waiver* should be employed, it is said that

"The promise is binding and the permission effective though without consideration; and though there is often said to be an estoppel and the case said to be distinguishable from waiver, there is not a true estoppel here for there is no misrepresentation of an existing fact. It may be called a promissory estoppel."¹⁶

And so it is not waiver at all. It is promissory estoppel—whatever that may be. Pursuing the same subject on a subsequent page, however, "the doctrine of waiver" is once more applied:

"The peculiarity of the doctrine of waiver used in the narrow sense which seems desirable is that effect is given to a promise express or implied in fact, when, in reliance thereon, action has been taken by the promisee though no consideration is given in exchange for the promise. . . . Wherever the promisee has allowed a legal excuse to arise relying upon express or implied statements of the promisor that the latter would not avail himself of the excuse, there is waiver. This is a principle distinct from the ordinary equitable estoppel, since the representation is promissory, not a misstatement of an existing fact."¹⁷

But waiver is again dethroned (for the same reason as before) by the statement on a later page that "the basis of waiver is promissory estoppel."¹⁸ And we are thus led to the pronouncement that

"The fundamental basis of waiver, so far as there may be said to be a distinct legal principle going by that name, is promissory estoppel."¹⁹ And again, "Waiver, as that word is used in the cases, is not generally based on contract but on promissory estoppel."²⁰

If it be true that the effective principle is that of promissory estoppel, there can be no reason for introduction of the word *waiver*—unless, indeed, as one of such colloquial words as sur-

¹⁵Ibid. pp. 1312, 1349, 1351-52, 1359, 1390.

¹⁶Ibid.

¹⁷Ibid. pp. 1332, 1334.

¹⁸Ibid. pp. 1334-35.

¹⁹Ibid. p. 1339.

²⁰Ibid. p. 1338.

render, extinguish, terminate, etc. And so, instead of saying, with Professor Williston, that:

"Wherever the promisee has allowed a legal excuse to arise relying upon express or implied statements of the promisor that the latter would not avail himself of the excuse, there is waiver," we ought, assuming that the statement is in other respects satisfactory, to say:

"Wherever the promisee has allowed a legal excuse to arise, relying upon express or implied statements of the promisor that the latter would not avail himself of the excuse, the promisee is bound by his statement upon the principle of promissory estoppel."

To this may be added, if one wishes:

"and in this way the promisee may be said to have waived performance, or released the promisor from performance, or surrendered the right to enforce performance, or extinguished or eliminated the condition,"

as one pleases; provided, of course, that these added words are to be considered as a colloquial interpretation of the technical pronouncement. No reason can be given for selection from among them of "waiver" as carrying technical signification.

PHRASEOLOGY

Why, in any case, should we resort to such a phrase as "promissory estoppel?"²¹ If a man may be estopped in the case of a promise as well as in the case of a representation of fact, all that we need say in either case is that he is estopped. There is no more reason for employment of the phrase *promissory estoppel*, in the one case, than for the phrase *factual estoppel*, in the other. And if a man cannot be estopped in the case of a promise, it is merely playing pranks to put *promissory* before *estoppel* and declare that he can. One's sense of scientific accuracy rebels against the statement that a promise by itself is not sufficient because there is no consideration; and that estoppel by itself is not sufficient because there is no misrepresentation of fact; but that in combination they are sufficient although both defects remain unremoved. There must be some better solution than that. Professor Williston himself suggests one. I shall take the liberty of offering another. Meanwhile, observe that we are rather palpably passing from waiver into estoppel—one of the four.

²¹I gather that Professor Williston himself is not quite pleased with the term, for he followed its earliest use with the words "or something equivalent," p. 308.

FRAUD

On previous pages, when referring to the class of cases under consideration, Professor Williston says that an exception to the rule

“that a seal or consideration is needed in order to extinguish an intangible contractual right” occurs “where the assertion of such a right seems fraudulent after conduct inducing the other party to suppose the right would not be asserted.” In such cases “courts of equity at least have held that the right is lost.”²²

So that neither waiver, nor waiver based on promissory estoppel is necessary to the extinguishment, in equity, of a contractual right. And are we, then, to say that waiver is based upon promissory estoppel, and promissory estoppel is based upon fraud? Or should we not say that as fraud is the sufficient ground for declaring the inability to enforce a right, it is fraud that must be defined, explained, and applied? The result having been ascertained, the inability may be expressed in any non-technical language that may be handy.

CONSIDERATION

Perhaps a better solution than is proffered by waiver or promissory estoppel may be found in the view that neither consideration nor estoppel is necessary to alteration of contract; that all that is necessary is agreement. In so suggesting, I am not departing altogether from Professor Williston, for although on one page (1315) he declares that—

“Whether the agreement is made before or after breach, therefore, there must be consideration to support it,” on later pages (1332–3,) he says:

“There has been a distinct tendency of courts of equity to enforce promises where something resembling a fraud would otherwise be perpetrated. . . . Thus where before expiration of the time originally fixed for performance the time is extended, though without consideration, performance within the extended time is sufficient; where the contract requires a written order as a condition of liability, an oral order when fulfilled may impose liability.”

And to these he adds other illustrations, saying at one place “but it is troublesome to find a sufficient consideration.”²³

²² Williston, *Contracts* pp. 1310-11.

²³ *Ibid.* p. 1356; and see p. 1380.

Parties to a contract may, without new consideration, agree to cancel it, and to enter into a new one upon terms the same as before, with the exception, let us say, of the substitution of "2 July" for "1 July." Consideration would surely be as little necessary were they to arrive at the same result by agreeing that the date in the old contract should be changed. If there were a contract for the sale and purchase of a dog for \$50, delivery and cash on 1 July, surely it could be changed to \$49, delivery and cash on 2 July, without new consideration?

Should we balk at this if the alteration appeared to benefit one of the parties and not the other? Suppose a contract to build a rabbit-hutch and to deliver it on 1 July: would a consideration by the carpenter be necessary to support a change to 1 August? And if the fact turned out to be that delivery had been postponed at the request of the purchaser because the rabbits had not arrived, would it be necessary that a consideration should be supplied by him? We must get away from ideas of that sort, and recognize that a change in the terms of a contract is the same thing as cancelling the old one and entering into a new one embodying the change, and that in neither case is a new consideration a necessary factor.

Would that view hold if the contract had been partially performed? Yes. The alteration in the case of the sale of the dog from \$50 and 1 July, to \$49 and 2 July would not be affected by the fact that, by the same contract, a cat was to be delivered in May, and that the feline had already been handed over and paid for.

VARIETY

And so there appear to be no fewer than seven competitive methods of dealing with these cases: (1) Joining the majority, we may content ourselves with waiver; or (2) we may prefer promissory estoppel; or (3) fraud; or (4) contract; or (5) we may indulge in duplications, and say waiver resting upon promissory estoppel; or (6) waiver resting upon fraud; or (7) we may ascend to a triplication, and say waiver resting upon promissory estoppel, resting upon fraud. Upon the whole, there is probably little doubt that waiver by itself is not sufficient; and that the word is useful only, as are several others, for the purpose of expressing colloquially a result arrived at by the operation of estoppel (reduced from promissory estoppel), fraud, or contract.

No. 4. Differentiating between performance of the conditions of a contract, dealt with in No. 3, and performance of the obligation itself, the fourth class of cases is stated as

"A promise or permission express or implied, supported only by a promissory estoppel, to excuse performance of an obligation not due at the time when the promise is made."²⁴

As already said, I am not sure that Professor Williston intended that this class of cases should be regarded as one to which waiver in its "narrower restriction" ought to be applied. Following hard upon his reference to the No. 3 class, he declares with reference to the No. 4, but with obvious hesitation, that—

"Such a promise when effectual may perhaps also fairly be called waiver; for here also the discharge is binding, though there is neither consideration nor seal."²⁵

But why call it waiver when the man, *ex hypothesi*, is estopped by estoppel of the promissory variety? Indeed, the *ratio decidendi* may be neither the one or the other, for Professor Williston adds the following:

"It may, however, sometimes operate as a fraud to enforce liability on a promise after the promisee has stated that performance need not be made. And though an excuse of the promisee from liability seems inconsistent with the general doctrine that a promissory estoppel is not a substitute for consideration either in creating or discharging obligations, there are many cases where liability is held discharged in the case supposed. This may be called waiver of liability as distinct from waiver of a condition or excuse."²⁶

Is this another case of waiver resting upon fraud? And if so, may we not dispense with waiver? or employ it, if at all, in some such locution as:

"Because of his fraud, the promisee is unable to enforce, or is precluded or estopped from enforcing, or has surrendered or extinguished or waived his right to enforce, performance."

Waiver functions only as a colloquial term.

No. 5. The remaining four, like the first two, of the eight classes of cases appear to have, in the opinion of Professor Williston, no claim to rank as waiver cases. He states the fifth in this way:

²⁴Ibid. p. 1312.

²⁵Ibid.

²⁶Ibid. p. 1336.

"A promise express or implied without consideration to give up a defence which has already arisen, or to be liable in spite of an excuse which has already freed the promisor; and where, therefore, there can be no promissory estoppel of the sort suggested in case 3."²⁷

Of this class of cases Professor Williston truly says:

"As the promisor, *ex hypothesi*, is already freed from liability, his agreement is, on exact analysis, a new undertaking."²⁸ And the question, therefore, is:

"Whether such an undertaking can ever be enforced without the same consideration that is necessary to support promises generally . . . It is confusing the issue to speak of waiver here, without some definition of the boundaries of the doctrine, as if some special principle permitted defences to be so surrendered."²⁹

Noting that consideration is not necessary in the case of a promise to pay a debt barred by the statute of limitations, Professor Williston says that it may be suggested that other defences of a technical character may be waived without consideration,³⁰ but he disapproves the suggestion, declaring that it "seems unsatisfactory for several reasons."³¹ And he dismisses the subject with the remark that:

"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."³²

Waiver in these cases, then, seems to be contract—one of the four.

No. 6. The sixth case is that of:

"A promise express or implied without consideration to release or discharge an obligor from a duty which has already arisen. Here also there is no promissory estoppel."³³

Of this class Professor Williston says:

"Methods provided by the law for discharging an obligor from a contractual liability already arisen are properly considered under the head of the Discharge of Contracts. The normal methods

²⁷Ibid. p. 1313.

²⁸Ibid. p. 1342.

²⁹Ibid. pp. 1342-43.

³⁰Ibid. p. 1343; and see 1 Williston, *Contracts* pp. 339-43; 2 Williston, *Contracts*, pp. 2222-25.

³¹ 1 Williston, *Contracts* pp. 407-08.

³² 2 Williston, *Contracts* p. 1345.

³³Ibid. p. 1313.

are release or accord and satisfaction. It is sure to lead to confusion of thought to apply the word waiver to such a situation."³⁴ "In a parol transaction there is no magic in a word. A 'waiver' of an accrued right can only mean an agreement to surrender for nothing. Such an agreement has no more validity than any other parol promise without consideration."³⁵

Not quite in harmony with this, it is said that:

"If a so-called waiver, which is merely promise, unsupported by consideration or promissory estoppel, to give up a matured right or a defence, is ever valid (save in a few exceptional cases like the Statute of Limitations) it can only be so where the promisor clearly manifests an intent to promise with full understanding of the facts."³⁶

Would it be impious to suggest that some supporter of *waiver* as a legal principal might endeavor to produce harmony by saying that:

"In these cases the doctrine of waiver rests upon the principle of release, or the principle of accord and satisfaction"?

If waiver, according to Mr. Bishop, rests on contract and estoppel, and, according to Professor Williston, rests sometimes on promissory estoppel, and sometimes on contract, and, by my suggestion, sometimes on fraud, why may it not rest upon any other, or indeed every other, principle in the law? If the word has the appearance of being operative only when under-propped by some self-effective agency, may I not be right in saying that the appearance is an illusion due to non-observation of the fact that the word merely expresses colloquially the effect produced by the principles referred to as its props? In any case, we may at least note that waiver has no application to cases of the No. 6 class. What we have are release and accord and satisfaction—really contracts.

No. 7. The seventh of the cases is that of:

"Actual or prospective prevention of performance of a promise or condition, or words or conduct showing that even though such promise or condition be performed, the counter-performance due will not be furnished."³⁷

Of the first of these cases Professor Williston says:

"It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance either of an obli-

³⁴Ibid. p. 1345.

³⁵Ibid. p. 1346.

³⁶Ibid. p. 1348.

³⁷Ibid. p. 1313.

gation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure."³⁸

But why not agree with those who might be tempted to say that: "the inability to take advantage of the failure is due to the doctrine of waiver, which in cases of this class rests upon the principle of fundamental justice?"

Of the second of the cases, Professor Williston says:

"It is an old maxim of the law that it compels no man to do a useless act, and this principle was applied in the time of Coke, if not before, in the case of a conditional promise. If the promisor is not going to keep his promise in any event, it is useless to perform the condition, and the promisor becomes liable without such performance."³⁹

But, once more, was not the case one of waiver resting upon "an old maxim of the law?" Whether yea or nay, we may at the least note that in these cases Professor Williston agrees that waiver is inapplicable to them. Question as to its meaning therefore does not arise.

No. 8. The eighth case is that of:

"Laches destroying a right to equitable relief, which once existed."⁴⁰

Of this, Professor Williston says:

"Courts of equity refuse to give relief to a plaintiff who has been guilty of such delay in asserting a right of action after it has arisen as to make the assertion unjust."⁴¹ He adds that "when waiver is given" the meaning of laches, it cannot be admitted that intention is a necessary element."

But he does not indicate approval of that application of the word. The "doctrine of laches," he says, "is an equitable limitation of rights given by the law." When dealing with the subject of election, however, he says:

"In other cases the failure to act promptly deprives the party having the right of election of any choice . . . the mere lapse of time may destroy the election."⁴²

And would it be correct to say that:

"Failure to act promptly is a waiver of the right to elect, waiver in this case resting upon the doctrine of laches?"

³⁸Ibid. p. 1305.

³⁹Ibid. p. 1463.

⁴⁰Ibid. p. 1313.

⁴¹Ibid. pp. 1346-47.

⁴²Ibid. p. 1320.

CERTAIN CASES CONSIDERED

Passing from examination of the eight classes of cases, Professor Williston proceeds to consider "various groups of things commonly dealt with under the head of waiver."⁴³

He refers, first, to cases in which "contractors have failed to complete the agreed work by the time fixed in the contract." Of these cases he says:

"If prior to the time the owner has extended it, and the builder relying thereon fails to use the utmost diligence to finish the work within the time originally agreed upon, there is a waiver in the strict sense of the word. . . ."⁴⁴

But as we have already seen,⁴⁵ Professor Williston holds that in such cases the basis of waiver is promissory estoppel, and it is difficult to think of anything in the way of a definition of "waiver in the strict sense of the word" which would include a definition of promissory estoppel, and indicate the relation between the thing and its prop. I confess my inability.

Professor Williston next deals with some cases in connection with which the word *waiver* might well have been employed in its colloquial sense, and by mistake as a technical term, but its introduction does not appear to have been necessary,⁴⁶ except when quoting an English case.⁴⁷ Further on, the word comes into service as the equivalent of an agreement to surrender,⁴⁸ or as an acceptance of purchased but defective goods,⁴⁹ or rather, perhaps, as a colloquial word indicative of the effect of agreement and acceptance. A heading on this later page is, however, more specific:

"In some cases acceptance of title waives right of damages for inferior quality."

But what follows is a discussion as to whether "taking title to the goods indisputably proves an assent to accept the goods in full satisfaction of the seller's obligation as to the quality of the goods,"⁵⁰

⁴³Ibid. p. 1349.

⁴⁴Ibid. p. 1350.

⁴⁵Ante. p. 420.

⁴⁶Ibid. pp. 1351-59.

⁴⁷Ibid. p. 1355.

⁴⁸Ibid. p. 1359.

⁴⁹Ibid. p. 1362.

⁵⁰Ibid. p. 1363. That the point for examination in such cases is assent or agreement and not waiver, is indicated, when treating a closely analogous case, by the statement that "While merely taking title to the goods does not warrant the conclusion *that the buyer has agreed* to take the goods in

—a discussion that does not involve the use, even on a single occasion, of the word *waiver*. And after ten pages, a new subject is introduced with the words:⁵¹

“Though the mere acceptance of title to the goods should not necessarily be regarded as an *agreement to accept the goods in full satisfaction* of the seller’s obligations, by the express terms of the contract such a result might be brought about.”⁵²

Very evidently, when Professor Williston used the word “waiver” in the heading, he did not attach to it any technical signification. He meant to say that:

“In some states acceptance of title is regarded as *an assent to accept in full satisfaction*,” &c., to which any one might add, if he wished: “whereby the purchaser necessarily surrenders, or gives up, or loses, or waives (as you please) all right to claim damages for defects in quality”—a colloquial interpretation of the technical pronouncement.

When dealing with the parallel case of “waiver of the condition of payment in a cash sale,”⁵³ the word is similarly employed, for, after some discussion of the subject, the author says as follows:

“An analysis of the situation upon principle makes it evident that the real question is, Does the seller assent to give the buyer the incidents of ownership?”⁵⁴

SUMMARY

The conclusions arrived at in the foregoing examination may be summarized as follows:

1. Professor Williston asserts broadly that “performance of a condition may also be excused by waiver.”

2. Of the eight “distinct and different things” that “are called waiver,” Professor Williston agrees that six ought not to be so termed. No. 1 is contract. No. 2 is election. No. 5 is contract. No. 6 is release or accord and satisfaction. No. 7 is “fundamental justice” or “an old maxim of the law.” And No. 8 is “an equitable limitation of rights given by the law.”

3. Cases of the No. 3 class are introduced by the hesitating statement,

full satisfaction of all the seller’s obligation, the retention and use . . .” (pp. 1360-1). Nevertheless the word *waiver does afterwards intrude itself* (p.1362).

⁵¹Italics now added.

⁵²Williston, Contracts p. 1372.

⁵³Ibid. 1391.

⁵⁴Ibid. 1393.

"If waiver can be given any legal meaning narrower than the surrender of any right of defence by any means, this kind of surrender may properly be given the name."

But that is followed by the assertion that "the basis of waiver is promissory estoppel," and at the bottom of that appears to be fraud. Seven methods of dealing with the cases of the class may be suggested. From among them ought to be eliminated waiver, propped and unpropped, and its combinations, leaving the field to estoppel (reduced from promissory estoppel), fraud, and contract; with contract for choice.

4. Probably Professor Williston intended the No. 4 class of cases to be regarded as one to which waiver in its "narrower restriction" ought to be applied; but his language is merely that the promise in question "may perhaps also fairly be called waiver." Once more, however, it is waiver based on props, which of themselves are sufficiently effective. The promise may perhaps "be called waiver," but not waiver with any technical signification.

5. Well aware of the enviably distinguished position which Professor Williston occupies, I have been specially careful to represent his views with precision. If in any respect I have fallen short, I think that I am clearly justified in saying that he neither offers us a definition of waiver as a distinguishable legal concept, nor does he supply us with an example of its unaided application to any class of cases. By itself it produces no effect. Its alleged props act directly and not mediately. "Waiver based on promissory estoppel" means estoppel. And the effect may be indicated by the word surrender, or waiver, or extinction—any colloquial word you like.

6. The word *waiver* when mistakenly intended to carry a technical signification almost always means election, estoppel, contract, or release.