

# Modification and Discharge of Claims in New York

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to be pre-empted without a clearer determination of congressional policy than we find here." <sup>66</sup> The Supreme Court's statement of five years ago still seems relevant: "The . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." <sup>67</sup>



## MODIFICATION AND DISCHARGE OF CLAIMS IN NEW YORK

The field of modification and discharge of claims in New York is today unsettled <sup>1</sup> despite the fact that the common-law doctrines have been largely superseded by statutes.<sup>2</sup> This note will point out the common-law doctrines, the statutory changes, and the areas in which the common law has been left untouched. The subjects herein considered include modification, release, and accord and satisfaction.

### *Rescission*

A contract may be terminated by rescission. If the parties to an existing contract, either orally or by a writing mutually agree to terminate their duties under it, they have rescinded it.<sup>3</sup> Neither party is then under any duty to perform his part of the contract.<sup>4</sup> Each promise, in the case of a bilateral contract, provides the necessary consideration.<sup>5</sup> Termination may be effected even if the parties immediately enter into a new contract on almost identical terms.<sup>6</sup> Today the

<sup>66</sup> *Id.* at 646.

<sup>67</sup> *Garner v. Teamsters Union*, 346 U.S. 485, 488 (1953).

<sup>1</sup> See, *e.g.*, *Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 247 N.Y. 435, 160 N.E. 778 (1928); *Langlois v. Langlois*, 5 A.D.2d 75, 169 N.Y.S.2d 170 (3d Dep't 1957); *Pape v. Rudolph Bros., Inc.*, 257 App. Div. 1032, 13 N.Y.S.2d 781 (4th Dep't 1939) (per curiam), *aff'd mem.*, 282 N.Y. 692, 26 N.E.2d 817 (1940); *Armour & Co. v. Schlacter*, 159 N.Y.S.2d 135 (County Ct. 1957).

<sup>2</sup> See, *e.g.*, N.Y. DEBT. & CRED. LAW § 243; N.Y. PERS. PROP. LAW §§ 33(2), 33-a, 33-b, 33-c.

<sup>3</sup> 5 CORBIN, CONTRACTS § 1236 (1951).

<sup>4</sup> *Ibid.*

<sup>5</sup> RESTATEMENT, CONTRACTS § 406, comment *a* (1932). The term "abandonment" has been used interchangeably with rescission, and the effects are the same. See *Rodgers v. Rodgers*, 235 N.Y. 408, 139 N.E. 557 (1923).

<sup>6</sup> *Schwartzreich v. Bauman-Basch, Inc.*, 231 N.Y. 196, 131 N.E. 887 (1921). As between a modification of a contract and an abandonment of it "very little difference may appear. . . . There is . . . a marked difference in principle. Where the new contract gives any new privilege or advantage to the promisee, a consideration has been recognized, though in the main it is the same contract." *Id.* at 203, 131 N.E. at 889.

parties may so abandon any contract, even orally, with but one exception which will be treated later.<sup>7</sup>

### *Modification*

If the parties prefer merely to modify the contract, consideration is needed.<sup>8</sup> The promise of each of the parties to forego a portion of his rights under the contract constitutes sufficient consideration,<sup>9</sup> but sufficient consideration is lacking if the attempted modification agreement only changes the duties of one of the parties.<sup>10</sup> Today, by statute, the parties can effect a modification even if consideration is lacking, provided the modification agreement is reduced to writing.<sup>11</sup>

At common law, an oral modification of an unsealed written contract was valid<sup>12</sup> even if the contract contained an express provision that it could not be orally modified.<sup>13</sup> The theory was that "those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived."<sup>14</sup> If, however, the contract was under seal, it could not be modified orally.<sup>15</sup> However, a partially executed modification will be enforced.<sup>16</sup>

In 1941, the legal effect of the seal was abolished in New York except as otherwise expressly provided by statute.<sup>17</sup> At the same time, section 33-c of the New York Personal Property Law was enacted.<sup>18</sup> This section prohibits an executory oral agreement from changing, modifying, or discharging a written contract which contains a prohibition against oral change. The statute was designed to furnish to contracting parties the same protection against possible fraudulent modification that had existed previously by sealed contracts.<sup>19</sup> It was essentially a "barrier against fraud."<sup>20</sup> Moreover,

<sup>7</sup> See text accompanying note 30 *infra*.

<sup>8</sup> *Cohen v. Commercial Travelers Mut. Acc. Ass'n of America*, 47 N.Y.S.2d 402 (Sup. Ct. 1944); see Note, 14 ALBANY L. REV. 186, 189 (1950).

<sup>9</sup> 6 WILLISTON, CONTRACTS § 1826 (rev. ed. 1938).

<sup>10</sup> *Ibid.*

<sup>11</sup> N.Y. PERS. PROP. LAW § 33(2).

<sup>12</sup> See *Bandman v. Finn*, 185 N.Y. 508, 78 N.E. 175 (1906) (dictum).

<sup>13</sup> *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378 (1919).

<sup>14</sup> *Id.* at 387, 122 N.E. at 381.

<sup>15</sup> *Cammack v. J. B. Slatery & Bro., Inc.*, 241 N.Y. 39, 148 N.E. 781 (1925); *Cohen v. Jaffe*, 218 App. Div. 259, 218 N.Y. Supp. 135 (4th Dep't 1926).

<sup>16</sup> *Ibid.*

<sup>17</sup> Laws of N.Y. 1941, c. 329, § 2.

<sup>18</sup> Laws of N.Y. 1941, c. 329, § 5. For an application of this statute, see *Martens v. General Foods Corp.*, 276 App. Div. 1053, 96 N.Y.S.2d 330 (4th Dep't 1950) (mem. opinion).

<sup>19</sup> 1941 LEG. DOC. NO. 65(M), REPORT, N.Y. LAW REVISION COMMISSION 345, 401-02 (1941); see also 36 CORNELL L.Q. 131, 132 (1950).

<sup>20</sup> Legislation, 27 ST. JOHN'S L. REV. 171, 174 (1952).

under a sealed contract, while the parties had precluded themselves from orally modifying,<sup>21</sup> this preclusion was perhaps unknown and unwanted. The presence of the seal did not expressly indicate to the parties the prohibition against oral modification.<sup>22</sup> But before section 33-c can be invoked, the contract itself must contain an express prohibition against oral modification.

In 1949, section 33-c was greatly limited by *Green v. Doniger*.<sup>23</sup> In that case, there was a written contract which stated that it could not be "modified, altered, changed or amended" by the parties. It was also provided that either party could terminate the contract upon thirty days written notice. They then orally agreed to terminate the contract, and entered into an oral agreement which contained substantially the same provisions as the original contract. The Court of Appeals, relying on *Schwartzreich v. Bauman-Basch, Inc.*,<sup>24</sup> held that, while the parties could not have orally modified the original contract, they could abandon it and enter into a new one. The court reasoned that since the termination provision in the contract was inconsistent with section 33-c, the parties had decided not to rely on that section to effect a termination.

*Green v. Doniger* was widely criticized.<sup>25</sup> Three years later, section 33-c was amended<sup>26</sup> to its present form.<sup>27</sup> Under the amendment, as before, oral change may be prohibited by the contract.<sup>28</sup> Moreover, the contract may provide against oral termination.<sup>29</sup> If oral termination is expressly prohibited, the parties may not mutually abandon the contract unless there is a writing signed by the party against whom the termination agreement is sought to be enforced<sup>30</sup>

<sup>21</sup> See text accompanying note 16 *supra*.

<sup>22</sup> 1941 LEG. DOC. NO. 65(M), REPORT, N.Y. LAW REVISION COMMISSION 345, 359 (1941). From 1935 to 1941, parties to a sealed contract could modify it only if the modification agreement was reduced to writing even though unsealed. LAWS OF N.Y. 1935, c. 708, § 1, as amended, LAWS OF N.Y. 1941, c. 329, § 2.

<sup>23</sup> 300 N.Y. 238, 90 N.E.2d 56 (1949). The case was decided by the bare majority of one.

<sup>24</sup> 231 N.Y. 196, 131 N.E. 887 (1921). See note 6 *supra*.

<sup>25</sup> See 50 COLUM. L. REV. 700, 702-04 (1950); 36 CORNELL L.Q. 131, 136 (1950); 6 N.Y.U. INTRA. L. REV. 72, 76 (1951). *But see* 1 SYRACUSE L. REV. 517, 518-19 (1950).

<sup>26</sup> LAWS OF N.Y. 1952, c. 831, § 1. The amendment was to "avert the effects of . . . *Green v. Doniger* . . . , thus indicating a strong policy in favor of the right of contracting parties who have entered into a written agreement to eliminate oral changes . . ." *Arranbee Doll Co. v. Model Plastic Corp.*, 282 App. Div. 660, 661, 122 N.Y.S.2d 137, 139 (1st Dep't 1953) (separate mem. opinion).

<sup>27</sup> N.Y. PERS. PROP. LAW § 33-c (Supp. 1958).

<sup>28</sup> A partial discharge of an obligation under the contract which would leave any obligation executory is considered to be a change. N.Y. PERS. PROP. LAW § 33-c(3)(a) (Supp. 1958).

<sup>29</sup> N.Y. PERS. PROP. LAW § 33-c(2) (Supp. 1958).

<sup>30</sup> *Ibid.*

or an "executed accord and satisfaction."<sup>31</sup> If, as in *Green v. Domiger*,<sup>32</sup> the contract may be unilaterally terminated *only* by written notice to the other party, *only* a writing is sufficient to effectuate the termination.<sup>33</sup> Although one may ordinarily waive a contractual right,<sup>34</sup> the statute expressly states that the condition as to written notice cannot be waived.<sup>35</sup>

It is to be noted that in the case of a mutual abandonment by accord and satisfaction, the satisfaction can be anything but another executory contract.<sup>36</sup>

At common law, if before complete performance by both parties there had been such a breach that the innocent party could be discharged, the innocent party could rescind the contract<sup>37</sup> either orally or by a writing. Today, by statute,<sup>38</sup> if a written contract expressly provides that it can not be orally terminated, the contract cannot be discharged by an oral executory agreement. Oral renunciation would not apply to this situation since renunciation operates only where there has been a breach of some duty. Section 33-c applies where no right of action has accrued.

At common law, if there was an attempted oral modification of a contract under seal, the parties would not be liable to the extent that the modification remained executory.<sup>39</sup> The modification, however, would be operative to the extent that it was executed.<sup>40</sup> Today, if a written contract contained a provision against oral modification, again the modification agreement would be operative to the extent that it was executed.<sup>41</sup> However, it would seem that the performance under the alleged oral modification agreement would have to be so unequivocal so as not to be attributable to anything but the oral modification.<sup>42</sup> If it is so unequivocal, then the party claiming that the oral modification was prohibited would be estopped from so claiming.<sup>43</sup>

<sup>31</sup> Technically, this phrase is superfluous. An executed accord is a satisfaction. See text accompanying note 66 *infra*.

<sup>32</sup> 300 N.Y. 238, 90 N.E.2d 56 (1949).

<sup>33</sup> N.Y. PERS. PROP. LAW § 33-c(4) (Supp. 1958).

<sup>34</sup> See, *e.g.*, *Thomson v. Poor*, 147 N.Y. 402, 409-10, 42 N.E. 13, 15 (1895); *Catholic Foreign Mission Soc'y of America v. Oussani*, 215 N.Y. 1, 8, 109 N.E. 80, 82 (1915) (dictum).

<sup>35</sup> N.Y. PERS. PROP. LAW § 33-c(4) (Supp. 1958).

<sup>36</sup> See text accompanying note 94 *infra*.

<sup>37</sup> See *M. Ufland & Co. v. McMahan*, 215 App. Div. 267, 269, 213 N.Y. Supp. 519, 520 (4th Dep't 1926).

<sup>38</sup> N.Y. PERS. PROP. LAW § 33-c(2) (Supp. 1958).

<sup>39</sup> See text accompanying note 16 *supra*.

<sup>40</sup> *Imperator Realty Co. v. Tull*, 228 N.Y. 447, 127 N.E. 263 (1920); *McKenzie v. Harrison*, 120 N.Y. 260, 24 N.E. 458 (1890); *McCreery v. Day*, 119 N.Y. 1, 23 N.E. 198 (1890).

<sup>41</sup> *B. S. Martins Corp. v. Greenmont-on-Hudson, Inc.*, 281 App. Div. 750, 118 N.Y.S.2d 299 (2d Dep't 1953) (mem. opinion). *Accord*, *Alcon v. Kinton Realty, Inc.*, 2 A.D.2d 454, 156 N.Y.S.2d 439 (3d Dep't 1956).

<sup>42</sup> *Bright Radio Lab., Inc. v. Coastal Commercial Corp.*, 4 A.D.2d 491, 166 N.Y.S.2d 906 (1st Dep't 1957).

<sup>43</sup> See *Bakhshandeh v. American Cyanamid Co.*, 12 M.2d 742, 744, 177 N.Y.S.2d 374, 376 (Sup. Ct. 1958).

*Discharge*

An underlying principle in the area of modification and discharge of claims is that part payment, or the promise of part payment, of a matured and liquidated debt is insufficient to effect a discharge even with the creditor's assent, for want of consideration to support the creditor's promise to discharge.<sup>44</sup> This doctrine, referred to as either *Pinnel's rule*<sup>45</sup> or the rule in *Foakes v. Beer*,<sup>46</sup> is firmly entrenched in American jurisprudence.<sup>47</sup> However, it has been greatly criticized<sup>48</sup> and narrowly limited.<sup>49</sup> Situations not falling within the doctrine include payment before the debt is due,<sup>50</sup> and payment at a different place<sup>51</sup> or in a different medium than that called for by the contract.<sup>52</sup>

In 1936, section 33(2) of the New York Personal Property Law was enacted.<sup>53</sup> Under this section, any discharge of a debtor is valid even if consideration is lacking, provided that the discharge is in writing and signed by the creditor.<sup>54</sup> Thus, section 33(2) changed the doctrine of *Foakes v. Beer*.<sup>55</sup>

If the creditor wanted to discharge the debtor, at common law he could give him a release. A release was a discharge under seal of an existing obligation,<sup>56</sup> effective only upon delivery.<sup>57</sup>

After the seal was no longer considered conclusive evidence of consideration,<sup>58</sup> there arose a need for a substitute for the common-

<sup>44</sup> *Foakes v. Beer*, 9 A.C. 605 (H.L. 1884); *Pinnel's Case*, 50 Co. Rep. 117a, 77 Eng. Rep. 237 (K.B. 1602); see Note, 6 FORDHAM L. REV. 448, 460-61 (1937).

<sup>45</sup> *Pinnel's Case*, *supra* note 44; see POLLOCK, CONTRACTS 150 (13th ed. 1950); 1936 LEG. DOC. NO. 65(D), REPORT, N.Y. LAW REVISION COMMISSION 81, 119 (1936).

<sup>46</sup> *Foakes v. Beer*, *supra* note 44. See 1936 LEG. DOC. NO. 65(D), REPORT, N.Y. LAW REVISION COMMISSION 81, 119 (1936); Note, 26 U. CINC. L. REV. 626 (1957).

<sup>47</sup> See Note, 4 VAND. L. REV. 175 (1950).

<sup>48</sup> See, e.g., *Jaffray v. Davis*, 124 N.Y. 164, 167-71, 26 N.E. 351, 352-53 (1891); Notes, 4 KAN. L. REV. 128 (1955), 4 VAND. L. REV. 175 (1950).

<sup>49</sup> WHITNEY, CONTRACTS § 53 at 133-34 (5th ed. 1953); 1936 LEG. DOC. NO. 65(D), REPORT, N.Y. LAW REVISION COMMISSION 81, 119-20 (1936); Note, 26 U. CINC. L. REV. 626, 627-28 (1957); see Notes, 6 FORDHAM L. REV. 448, 452-53, 460 (1937), 4 VAND. L. REV. 175-76 (1950).

<sup>50</sup> *Pinnel's Case*, 5 Co. Rep. 117a, 77 Eng. Rep. 237, 238 (K.B. 1602) (dictum); WHITNEY, *op. cit. supra* note 49, § 53 at 133.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Jaffray v. Davis*, 124 N.Y. 164, 26 N.E. 351 (1891); *Pinnel's Case*, *supra* note 50, at 237.

<sup>53</sup> Laws of N.Y. 1936, c. 281, § 1.

<sup>54</sup> N.Y. PERS. PROP. LAW § 33(2).

<sup>55</sup> See Legislation, 6 FORDHAM L. REV. 448, 460-61 (1937).

<sup>56</sup> 6 WILLISTON, CONTRACTS § 1820 (rev. ed. 1938).

<sup>57</sup> *Ibid.*

<sup>58</sup> Laws of N.Y. 1936, c. 685, § 1.

law release.<sup>59</sup> This was satisfied by the enactment of section 243 of the New York Debtor-Creditor Law, which provides that "a written instrument . . . which purports to be a total or partial release . . . shall not be invalid because of the absence . . . of a seal."<sup>60</sup>

Another method whereby a creditor may discharge a debtor is by giving him a receipt stating that all of the debt has been paid.<sup>61</sup> In this situation, the receipt might be deemed evidence of a gift.<sup>62</sup> The debtor will also be discharged if the creditor intentionally cancels his promissory note.<sup>63</sup>

There exists an apparent conflict between section 33(2) of the Personal Property Law and section 243 of the Debtor-Creditor Law. The former would effectuate a discharge upon signing. The latter, since it is a substitute for the common-law release, would seem to be effective only upon a delivery.<sup>64</sup> This gives rise to a problem as yet unresolved, namely, the status of the debtor subsequent to a writing discharging him, but prior to its delivery to him. However, from the history of the two statutes, it would seem that *in this situation* section 243 would apply where a cause of action has already accrued. The application of section 33(2) would then be limited to a modification agreement and not to where a cause of action has already accrued.<sup>65</sup> Thus, for a creditor to discharge a debtor today, a delivery would be needed.

### *Accord and Satisfaction*

A debtor's obligation can also be discharged by an accord and satisfaction. An accord has been defined as an agreement whereby one party undertakes to give or perform, and the other to accept in satisfaction of a claim something other than that to which he believes himself entitled.<sup>66</sup> The execution of the accord is the satisfaction.<sup>67</sup> The doctrine applies only where there has been a breach of some

<sup>59</sup> WHITNEY, CONTRACTS § 53, at 134 (5th ed. 1953); see 1936 LEG. DOC. NO. 65(C), REPORT, N.Y. LAW REVISION COMMISSION 65, 77-78 (1936).

<sup>60</sup> LAWS OF N.Y. 1936, c. 222, § 1; see Note, 14 ALBANY L. REV. 186, 188 (1950).

<sup>61</sup> *McKenzie v. Harrison*, 120 N.Y. 260, 24 N.E. 458 (1890).

<sup>62</sup> *Ibid.*

<sup>63</sup> N.Y. NEGOTIABLE INSTR. LAW § 200(3).

<sup>64</sup> 1936 LEG. DOC. NO. 65(C), REPORT, N.Y. LAW REVISION COMMISSION 65, 79 (1936). The common-law release was only effective on delivery. See text accompanying note 57 *supra*.

<sup>65</sup> 1936 LEG. DOC. NO. 65(C), REPORT, N.Y. LAW REVISION COMMISSION 65, 78-79 (1936); 1936 LEG. DOC. NO. 65(D), REPORT, N. Y. LAW REVISION COMMISSION 81, 159-286 (1936).

<sup>66</sup> *Reilly v. Barrett*, 220 N.Y. 170, 172-73, 115 N.E. 453, 454 (1917); 6 WILLISTON, CONTRACTS § 1838 (rev. ed. 1938).

<sup>67</sup> *Ibid.*

duty,<sup>68</sup> either contractual or tortious.<sup>69</sup> If the creditor accepts the satisfaction, the debtor's liability is completely extinguished.<sup>70</sup>

One problem in this area is to determine what constitutes the satisfaction. The difficulty is to ascertain whether it is the debtor's promise, or the performance of his promise, which will extinguish his liability. If it is performance, a second problem arises, namely, what is the position of the parties subsequent to the promise but prior to the satisfaction?

In determining whether it is the debtor's promise or his performance that constitutes the satisfaction, the controlling factor is the intention of the parties.<sup>71</sup> To aid in ascertaining their intention, certain presumptions are indulged.<sup>72</sup> Thus, if *D* owes *C* the liquidated sum of 100 dollars and *C* promises to accept five books from *D* in satisfaction, it is presumed, in the absence of a contrary intention, that *only* acceptance of the five books by *C* will extinguish *D*'s liability.<sup>73</sup> But since accord and satisfaction is subject to the doctrine of consideration, *D* could not promise to pay or pay *C* 75 dollars.<sup>74</sup> On the other hand, if there were a writing signed by *C* discharging *D* after *D*'s promise or payment of 75 dollars, there would be a satisfaction.<sup>75</sup> Even if *D* owed *C* no liquidated sum but has concededly breached a duty to *C*, the performance and not the promise is presumed the satisfaction.<sup>76</sup> If, however, there is a bona fide dispute as to whether *D* has breached any duty to *C*, then *D*'s promise is presumed to be the satisfaction.<sup>77</sup> The debtor's promise is also presumed to be the satisfaction if the agreement is reached in open court.<sup>78</sup>

<sup>68</sup> 6 WILLISTON, *op. cit. supra* note 66, § 1842; Shepherd, *The Executory Accord*, 26 ILL. L. REV. 22 (1931).

<sup>69</sup> Reilly v. Barrett, *supra* note 66, at 173, 115 N.E. at 454 (dictum); 6 CORBIN, CONTRACTS §1276, at 88-89 (1951).

<sup>70</sup> 6 CORBIN, CONTRACTS §1276 at 88 (1951).

<sup>71</sup> Blair & Co. v. Otto, 5 A.D.2d 276, 280, 171 N.Y.S.2d 203, 207 (1st Dep't 1958); Goldbard v. Empire State Mut. Ins. Co., 5 A.D.2d 230, 234, 171 N.Y.S.2d 194, 199 (1st Dep't 1958).

<sup>72</sup> See Goldbard v. Empire State Mut. Ins. Co., *supra* note 71, at 234, 171 N.Y.S.2d at 200; RESTATEMENT, CONTRACTS § 419 (1932).

<sup>73</sup> *Accord*, Kromer v. Heim, 75 N.Y. 574 (1879).

<sup>74</sup> Goffe v. Jones, 132 App. Div. 864, 117 N.Y. Supp. 407 (1st Dep't 1909). See Kromer v. Heim, 75 N.Y. 574 (1879); RESTATEMENT, CONTRACTS § 417, comment c (1932); Comment, 12 ARK. L. REV. 160, 161 (1958).

<sup>75</sup> N.Y. PERS. PROP. LAW § 33(2).

<sup>76</sup> Reilly v. Barrett, 220 N.Y. 170, 115 N.E. 453 (1917); Rubin v. Siegel, 181 App. Div. 181, 168 N.Y. Supp. 744 (1st Dep't 1918).

<sup>77</sup> Ostrander v. Ostrander, 199 App. Div. 437, 191 N.Y. Supp. 470 (3d Dep't 1921).

<sup>78</sup> Yonkers Fur Dressing Co. v. Royal Ins. Co., 247 N.Y. 435, 160 N.E. 778 (1928). In a recent case, the court construed the debtor's oral promise to be the satisfaction, although the agreement was technically not made in open court. After the opening statements had been made and the jury impanelled, the agreement was entered into in the judge's chambers. The judge then discharged the jury, and the case was stricken from the calendar. Langlois v. Langlois, 5 A.D.2d 75, 78, 169 N.Y.S.2d 170, 174 (3d Dep't 1957), 9 SYRACUSE L. REV. 341, 343-44 (1958).



There are also borderline cases as to what constitutes the satisfaction. In *Moers v. Moers*,<sup>79</sup> the agreement settled all the differences between the parties. The debtor's promise was held to be the satisfaction. The case has been interpreted as holding that if all the differences between the parties are included in the agreement, a presumption arises that the debtor's promise itself was intended as the satisfaction.<sup>80</sup> However, it would seem that in the *Moers* case, the intention of the parties was manifestly that the debtor's promise be the satisfaction.<sup>81</sup>

At common law, if the creditor had agreed to accept the promise of new performance as the satisfaction, the promise itself would have discharged the debtor's original obligation.<sup>82</sup> The creditor's cause of action on the original obligation would be extinguished.<sup>83</sup> If there had been a bilateral agreement under which the creditor would accept the new performance, until he did accept it the debtor's obligation on the original claim still remained. This is the executory accord.<sup>84</sup> Anytime before the creditor accepted the new performance, he could refuse to do so and bring an action on the original claim.<sup>85</sup> The debtor's obligation on the original claim would remain even if the creditor had accepted part of the new performance<sup>86</sup> and even if the debtor was willing to tender the full performance.<sup>87</sup> The same would

<sup>79</sup> 229 N.Y. 294, 128 N.E. 202 (1920).

<sup>80</sup> See *Blair & Co. v. Otto*, 5 A.D.2d 276, 281, 171 N.Y.S.2d 203, 207-08 (1st Dep't 1958); 1937 LEG. DOC. NO. 65(K), REPORT, N.Y. LAW REVISION COMMISSION 201, 219 n.24 (1937).

<sup>81</sup> "It [the agreement] . . . makes manifest the intention of the parties that the original action and all disputes and controversies between them were merged into it." *Moers v. Moers*, 229 N.Y. 294, 301-02, 128 N.E. 202, 204 (1920).

<sup>82</sup> *Moers v. Moers*, *supra* note 81; *Morehouse v. Second Nat'l Bank*, 98 N.Y. 527 (1885); *Hartwig v. American Malting Co.*, 74 App. Div. 140, 77 N.Y. Supp. 533 (1st Dep't 1902). Much confusion in the area of accord and satisfaction is due to the diversity of language. For example, the above situation has been variously referred to as an executed bilateral accord [see 1937 LEG. DOC. NO. 65(K), REPORT, N.Y. LAW REVISION COMMISSION 201, 212-13, 218 (1937)]; sometimes as a superseding agreement [see *Langlois v. Langlois*, 5 A.D.2d 75, 77, 169 N.Y.S.2d 170, 173 (3d Dep't 1957); *Atterbury v. James F. Walsh Paper Corp.*, 261 App. Div. 529, 531, 26 N.Y.S.2d 43, 45 (1st Dep't), *aff'd mem.*, 286 N.Y. 578, 35 N.E.2d 928 (1941), 16 ST. JOHN'S L. REV. 126 (1941)]; sometimes as an accord [see RESTATEMENT, CONTRACTS § 418 (1932)]; and sometimes as a compromise [see *Reilly v. Barrett*, 220 N.Y. 170, 173, 115 N.E. 453, 454 (1917)].

<sup>83</sup> *Morehouse v. Second Nat'l Bank*, *supra* note 82, at 533.

<sup>84</sup> *Ford v. Beech*, 11 Q.B. 852, 116 Eng. Rep. 693 (Ex. 1848); see *Allen v. Harris*, 1 Ld. Raym. 122, 91 Eng. Rep. 978 (K.B. 1701); *Shepherd, The Executory Accord*, 26 ILL. L. REV. 22, 25 (1931).

<sup>85</sup> *Larscy v. Hogan & Sons, Inc.*, 239 N.Y. 298, 146 N.E. 430 (1925); *Reilly v. Barrett*, 220 N.Y. 170, 115 N.E. 453 (1917); see *Rubin v. Siegel*, 181 App. Div. 181, 168 N.Y. Supp. 744 (1st Dep't 1918).

<sup>86</sup> *Larscy v. Hogan & Sons, Inc.*, *supra* note 85, at 301, 146 N.E. at 431; see *Reilly v. Barrett*, *supra* note 85, at 173, 115 N.E. at 454.

<sup>87</sup> *Kromer v. Heim*, 75 N.Y. 574 (1879); see *Noe v. Christie*, 51 N.Y. 270 (1873).

be true if the creditor offered to accept the new performance when the debtor tendered it, as in a unilateral contract.<sup>88</sup>

Today in New York, the debtor's promise can be taken as the satisfaction, and is valid even though oral.<sup>89</sup> But whenever performance is intended as satisfaction, if the agreement is in writing it can be used by the debtor as the basis of an action, counterclaim, or defense.<sup>90</sup> If, however, the debtor defaults on the agreement, the creditor can bring an action, at his option, on either the original claim or the new agreement.<sup>91</sup>

If a written contract provides that it cannot be terminated orally, section 33-c states that one of the two ways that it may be terminated is by an "executed accord and satisfaction."<sup>92</sup> Thus, the parties may enter into an agreement which, under ordinary circumstances, would give rise to an accord and satisfaction.<sup>93</sup> The general rules of accord and satisfaction are, however, modified to the extent that the parties cannot make another "executory agreement" the satisfaction.<sup>94</sup> If an executory agreement could be the satisfaction, one party could claim that the parties had mutually abandoned the contract and entered into another one on substantially the same terms. He could thus argue that an accord and satisfaction had been reached.

Where the debtor owes the liquidated sum of 100 dollars, if he gives his negotiable instrument for 75 dollars the debt is not discharged<sup>95</sup> unless the instrument itself is accepted as the satisfaction.<sup>96</sup> Otherwise, the debtor's negotiable instrument is presumed to be accepted as conditional and not as absolute payment.<sup>97</sup>

However, assume there is a *bona fide* dispute as to the amount of the debt. The creditor claims the debt is 100 dollars and the debtor claims it is 75 dollars. The debtor can send the creditor a 75-dollar check with the condition "in full payment of my debt" written on the check or in an accompanying letter. If the creditor cashes the check, the debtor is discharged.<sup>98</sup> The creditor cannot cross out

<sup>88</sup> *Ibid.*

<sup>89</sup> See *Langlois v. Langlois*, 5 A.D.2d 75, 78, 169 N.Y.S.2d 170, 174 (3d Dep't 1957).

<sup>90</sup> N.Y. PERS. PROP. LAW §§ 33-a, 33-b.

<sup>91</sup> N.Y. PERS. PROP. LAW § 33-a(3).

<sup>92</sup> N.Y. PERS. PROP. LAW § 33-c (Supp. 1958).

<sup>93</sup> *Singer v. Slatex, Inc.*, 166 N.Y.S.2d 108 (App. T. 1st Dep't 1957) (per curiam).

<sup>94</sup> N.Y. PERS. PROP. LAW § 33-c(2) (Supp. 1958).

<sup>95</sup> *Shanley v. Koehler*, 80 App. Div. 566, 80 N.Y. Supp. 679 (1st Dep't 1903), *aff'd mem.*, 178 N.Y. 556, 70 N.E. 1109 (1904).

<sup>96</sup> *Accord*, *Stewart v. Union Mut. Life Ins. Co.*, 155 N.Y. 257, 49 N.E. 876 (1898); RESTATEMENT, CONTRACTS § 448 (1932).

<sup>97</sup> *Church E. Gates & Co. v. National Fair & Exposition Ass'n*, 225 N.Y. 142, 157, 121 N.E. 741, 745 (1919); see *Hall v. Stevens*, 116 N.Y. 201, 207, 22 N.E. 374, 376 (1889).

<sup>98</sup> *Accord*, *Fuller v. Kemp*, 138 N.Y. 231, 33 N.E. 1034 (1893); see *Byrne v. Padden*, 248 N.Y. 243, 162 N.E. 20 (1928). "The debtor may be wrong in his contention. That he honestly believes in the correctness of his position is

the condition, cash the check, and then bring an action for the remaining 25 dollars.<sup>99</sup> However, if no condition is attached, the creditor can cash the check and then bring an action for the 25 dollars.<sup>100</sup> In such a case, the 75 dollars becomes a payment on account.<sup>101</sup>

But if the debtor *admittedly* owed the 100 dollars, at common law the creditor could cross out the condition and sue for the remaining 25 dollars.<sup>102</sup> Today in *Pape v. Rudolph Bros., Inc.*,<sup>103</sup> the same result has been reached even with section 33(2) and section 243. Since the creditor had not crossed out the writing, the debtor claimed that the words on the check constituted a written release under section 243.<sup>104</sup> The Appellate Division held that the indorsement on the back of the check by the creditor did not constitute such a release.<sup>105</sup> No reasons were given for the holding.<sup>106</sup> However, even if the creditor had crossed out the condition, the debtor would not be discharged.<sup>107</sup> Since a release is a consensual transaction, the crossing out of the condition would negative a consent to the release.

### Conclusion

At common law in New York, the intention of the parties attempting to effect a discharge or modification was often thwarted by the doctrines of the seal and of consideration. The courts gave paramount importance to historical rules which bore little or no relation to socio-economic reality. The doctrines of consideration and the seal have been whittled away in the area of modification and discharge of claims as in other areas of contract law. If the parties clearly attempt to bring themselves within the statutory protection, their intention should not be frustrated by technical rules. The statutes should be liberally construed to effectuate the purpose for which they were enacted, namely, the abolition of such technical rules and the fulfilling of the parties' intention.

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enough." *Schuttlinger v. Woodruff*, 259 N.Y. 212, 217, 181 N.E. 361, 362 (1932).

<sup>99</sup> *Accord*, *Fuller v. Kemp*, *supra* note 98.

<sup>100</sup> *Hempstead Bus Corp. v. Carcards, Inc.*, 169 N.Y.S.2d 823 (Sup. Ct. 1957).

<sup>101</sup> *Ibid.*

<sup>102</sup> *Hudson v. Yonkers Fruit Co.*, 258 N.Y. 168, 179 N.E. 373 (1932); see *Fuller v. Kemp*, 138 N.Y. 231, 237, 33 N.E. 1034, 1035 (1893).

<sup>103</sup> 257 App. Div. 1032, 13 N.Y.S.2d 781 (4th Dep't 1939) (per curiam), *aff'd mem.*, 282 N.Y. 692, 26 N.E.2d 817 (1940).

<sup>104</sup> *Ibid.* But see *Horan v. John F. Trommer, Inc.*, 137 N.Y.S.2d 26 (Sup. Ct.), *aff'd mem.*, 283 App. Div. 774, 128 N.Y.S.2d 595 (1st Dep't 1954).

<sup>105</sup> *Ibid.*

<sup>106</sup> As a result of the *Pape* case, there were suggestions that Section 243 be amended. The Law Revision Commission recommended no change. See 1948 LEG. DOC. NO. 65(R), REPORT, N.Y. LAW REVISION COMMISSION 643, 645 (1948).

<sup>107</sup> See *Pape v. Rudolph Bros.*, *supra* note 97. *Contra*, *Armour Co. v. Schlacter*, 159 N.Y.S.2d 135 (County Ct. 1957).