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## LEGISLATION

### ORAL MODIFICATION OF WRITTEN CONTRACTS: THE RIGHT AND ITS RESTRICTION

#### *The Common Law*

Time out of mind until today, in all parts of the free world, one of man's most prized privileges has been his right to contract.<sup>1</sup> And, as an integral part of this right, men have been free to change, modify<sup>2</sup> or terminate<sup>3</sup> contracts they had previously made. These agreements of modification and termination, like other contracts, were effective only if they contained all the essential elements of a contract, such as mutual consent<sup>4</sup> and consideration.<sup>5</sup> But, when the required elements were present, these agreements could be written or oral and, at common law, were effective, in either form, to alter or discharge written contracts.<sup>6</sup> Only those contracts which

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<sup>1</sup> Contracts and the inherent, though frequently inarticulate, right to contract, have been recognized in systems of jurisprudence from earliest times. See ARISTOTLE'S CONSTITUTION OF ATHENS (Translation by Von Fritz and Kapp) 126 (1950); MAINE, EARLY LAW AND CUSTOM 390-391 (1883); THE CODE OF MAIMONIDES (Yale Judaica Series—1949); 3 HOLDSWORTH'S HISTORY OF ENGLISH LAW 412-454 (3d ed. 1927); Williston, *Freedom of Contract*, 6 CORNELL L. Q. 365, 366 (1921); Ordinance of 1787: THE NORTHWEST TERRITORIAL GOVERNMENT Art. II. "The general right to make a contract . . . is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." *Lochner v. New York*, 198 U. S. 45, 53 (1905). However, this right is qualified, not absolute, since it is subject to the paramount interests of the community. *Chicago, Burlington and Quincy R. R. v. McGuire*, 219 U. S. 549, 567 (1911).

<sup>2</sup> See *United States v. Ozmer*, 181 F. 2d 508 (5th Cir. 1950); *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N. E. 549 (1889); *Vidvard v. Cushman*, 35 Hun 18 (N. Y. 1885); *Keating v. Price*, 1 Johns. 22 (N. Y. 1799).

<sup>3</sup> See *Coletti v. Knox Hat Co.*, 252 N. Y. 468, 169 N. E. 648 (1930); *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198 (1890); *Parmly v. Buckley*, 103 Ill. 145 (1882). See RESTATEMENT, CONTRACTS § 402 (1932); 5 CORBIN, CONTRACTS § 1236 (1951).

<sup>4</sup> See *Utley v. Donaldson*, 94 U. S. 29, 47 (1876).

<sup>5</sup> See *Melville v. Kruse*, 174 N. Y. 306, 66 N. E. 965 (1903); *McCreery v. Day*, *supra* note 3. In New York, written contracts of modification or discharge are valid even without consideration. N. Y. PERS. PROP. LAW § 33(2). See also N. Y. NEG. INST. LAW § 203. "An agreement modifying a contract within this Article needs no consideration to be binding." UNIFORM COMMERCIAL CODE § 2-209(1) (Final Text Edition, November 1951).

<sup>6</sup> See *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 122 N. E. 378 (1919); see *Solomon v. Valfette*, 152 N. Y. 147, 151, 46 N. E. 324, 325

were required by the Statute of Frauds to be in writing<sup>7</sup> or which were under seal<sup>8</sup> were unaffected by these oral agreements. In all other instances, however, the validity of the oral contract was recognized. Furthermore, under a logical extension of this rule of recognition, those provisions in a contract, requiring all modifications to be written, were held to be ineffective since such provisions themselves could be repudiated, via oral agreement, by the parties.<sup>9</sup> Similarly, those contracting parties who sought to limit the possibilities of contract amendment, and who were rebuffed by the operation of this substantive measure, found no refuge under evidentiary rules. Because these unwritten agreements were necessarily reached at a time subsequent to the writing, and not prior to nor contemporaneous therewith, they were beyond the scope and prohibition of the parol evidence rule.<sup>10</sup> In the event of subsequent litigation therefore, the contents of these oral transactions could be established by parol evidence.

In spite of the fact that recognition of oral agreements, and the introduction of evidence showing their contents, was based on fundamental principles of contract,<sup>11</sup> and evidence<sup>12</sup> law, these modification agreements proved to be as vulnerable to mistaken or perjured claims as other oral contracts. The same possibility of incorrect or fraudulent allegations, which led to the creation of the Statute of Frauds, was here present. Yet, even though the parties took the precaution of preparing a written contract, that statute furnished no protection against changes in the large number of agreements whose subject matter was not specifically covered.<sup>13</sup> In fact, the only valid,

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(1897); *Blakeslee v. Board of Water Commissioners*, 121 Conn. 163, 183 Atl. 887, 894 (1936).

<sup>7</sup> *Clark v. Fey*, 121 N. Y. 470, 24 N. E. 703 (1890); *Hill v. Blake*, 97 N. Y. 216 (1884); see *Imperator Realty Co. v. Tull*, 228 N. Y. 447, 454, 127 N. E. 263, 265 (1920) (concurring opinion).

<sup>8</sup> *Cammack v. Slattery & Bro., Inc.*, 241 N. Y. 39, 148 N. E. 781 (1925); *I. B. Miller Contracting Corp. v. Carlton Co.*, 257 App. Div. 244, 12 N. Y. S. 2d 971 (1st Dep't 1939), *rev'd on other grounds*, 282 N. Y. 633, 25 N. E. 2d 980 (1940); *Cohen v. Jaffe*, 218 App. Div. 259, 218 N. Y. Supp. 135 (4th Dep't 1926); see *Tischler v. Kurtz*, 35 Fla. 323, 17 So. 661, 664 (1895). But see *RESTATEMENT, CONTRACTS* § 407, comment *c* (1932).

<sup>9</sup> *Wiener v. Compagnie Generale Transatlantique*, 61 F. 2d 893 (2d Cir. 1932); *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 122 N. E. 378 (1919); *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N. E. 549 (1889); see *Salinas v. Salinas*, 187 Misc. 509, 514, 62 N. Y. S. 2d 385, 390 (Sup. Ct. 1946); see *RESTATEMENT, CONTRACTS* § 407, comment *a* (1932).

<sup>10</sup> *Pechner v. Phoenix Insurance Co.*, 65 N. Y. 195 (1875); *Haight v. Cohen*, 123 App. Div. 707, 108 N. Y. Supp. 502 (2d Dep't 1908); *Allen v. Sowerby*, 37 Md. 410 (1872); see 3 *WILLISTON, CONTRACTS* § 632 (rev. ed. 1936).

<sup>11</sup> See notes 2, 3 and 6 *supra*.

<sup>12</sup> See note 10 *supra*.

<sup>13</sup> For an enumeration of those contracts required to be in writing, see N. Y. *PERS. PROP. LAW* § 31 and N. Y. *REAL PROP. LAW* § 242.

voluntary method by which the parties to a contract, which never had to be in writing, could protect themselves against improper claims, was by executing their contract under seal.<sup>14</sup> But, while this was the rule, it was not applied in a way which would have completely voided all oral or informal modifications of sealed instruments. On the contrary, the courts justifiably enforced certain types of such contracts. Among those upheld were primarily two classes of agreements: first, those informal agreements which had been performed and which the courts refused to overthrow,<sup>15</sup> and second, those agreements upon which one party had relied, and when such reliance proved detrimental, the defendant was estopped from denying its validity.<sup>16</sup> Enforcement of these oral agreements on the basis of performance or detrimental reliance necessarily limited the effect of a seal upon future contract modification. For all practical purposes, the seal successfully prevented only *executory* agreements from competently modifying or discharging written contracts.<sup>17</sup> Later, written executory agreements were authorized for this purpose in New York by a specific statutory provision.<sup>18</sup> But despite these limiting influences, the seal retained the power to nullify executory oral alteration<sup>19</sup> and since the possibilities of fraud still existed,<sup>20</sup> the desire of the law to negate any such occurrence presented a reason for the seal's retention.

Although the seal thus successfully filled a need of the contract-parties, its use for this preventative purpose was manifestly un-

<sup>14</sup> "Any written contract, *other than specialties . . .* can be rescinded or varied at will by the oral agreement of the parties. . . ." 6 CORBIN, CONTRACTS § 1295 (1951) (emphasis added). See 1936 LEG. DOC. NO. 65(C), REPORT, N. Y. LAW REVISION COMMISSION 351 (1936). "It is not the purpose of the law to permit such an instrument to be modified or changed by parol statements or agreements resting in fallible human memory, influenced, perhaps, by personal or property interests." *Rosenshine v. Lebovitz*, 139 Misc. 258, 259, 248 N. Y. Supp. 235, 236 (N. Y. City Ct. 1931). For discussion of inequities resulting therefrom, see *McCreery v. Day*, 119 N. Y. 1, 7-9, 23 N. E. 198, 199 (1890).

<sup>15</sup> *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458 (1890); *McCreery v. Day*, *supra* note 14. "[G]enerally a sealed contract may be modified or rescinded by a parol or simple written agreement which is wholly or partly executed. . . ." 1936 LEG. DOC. NO. 65(C), REPORT, N. Y. LAW REVISION COMMISSION 178 (1936).

<sup>16</sup> *Imperator Realty Co. v. Tull*, 228 N. Y. 477, 126 N. E. 263 (1920); *Harris v. Shorall*, 230 N. Y. 343, 130 N. E. 572 (1921); *Becker v. Becker*, 250 Ill. 117, 95 N. E. 70 (1911).

<sup>17</sup> See *French v. New*, 28 N. Y. 147, 149 (1863). "[A] sealed contract cannot be modified or discharged by an unsealed executory agreement." 1936 LEG. DOC. NO. 65(C), REPORT, N. Y. LAW REVISION COMMISSION 178 (1936). But see *Cammack v. Slattery & Bro., Inc.*, 241 N. Y. 39, 148 N. E. 781 (1925) (dissenting opinion).

<sup>18</sup> N. Y. CIV. PRAC. ACT § 342 (effective September 1, 1935).

<sup>19</sup> 1941 LEG. DOC. NO. 65(M), REPORT, N. Y. LAW REVISION COMMISSION 401 (1941).

<sup>20</sup> See *Legis.*, 26 CORNELL L. Q. 692, 698 (1941); *Recent Statutes*, 41 COL. L. REV. 553, 556 (1941).

satisfactory.<sup>21</sup> Dissatisfaction arose primarily because the seal, on its face, failed to reveal that its affixing could nullify changes which the parties might later desire to make. This hidden significance, therefore, was capable of causing as much harm to an unknowing person as it could bring benefit to a party who realized its effect. In addition, an unacquainted contractor never received any other notice of the real character of his contract for "[n]either at the time of the execution . . . nor subsequently when the question of modification arises, is there any indication from the instrument that it cannot be modified orally . . ." <sup>22</sup> When, therefore, the objection of "no notice" was combined with the spreading desire to reject other technical features of the seal, the stage was manifestly set for legislative action.

In New York, the legislature first moved to remedy this situation in 1941. Since that time, however, because of a well-reasoned fear that the spirit of the statutory remedy was being violated, a revision of considerable import was necessary. Both the original enactment and the recently approved revision have adopted the same approach to the problem; and, taken together, constitute an essential part in the barrier against fraud.<sup>23</sup> It will be the purpose here to examine and interpret these legislative enactments and the restraint placed on the right to modify orally or terminate written agreements, all in the light of the statute's common law antecedents.

#### *Legislative Action—Phase I*

The initial <sup>24</sup> act of the New York legislature nullified the legal effectiveness of the seal and reduced its function to that of authenticating documents.<sup>25</sup> In place of the seal, there was adopted the following provision:

[A]n executory agreement . . . shall be ineffective to change or modify, or to discharge in whole or in part, a written agreement . . . which contains a provision to the effect that it cannot be changed orally, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought. . . .<sup>26</sup>

By its express terms, the statute made the sole bar to modification or discharge, by way of an oral executory agreement, a provision

<sup>21</sup> See note 19 *supra*.

<sup>22</sup> 1941 LEG. DOC. NO. 65(M), REPORT, N. Y. LAW REVISION COMMISSION 402 (1941).

<sup>23</sup> Cowen, *Assault on Written Agreements*, 10 N. Y. CO. L. A. B. BULL. 11, 12 (1952).

<sup>24</sup> Previous enactments dealing with the efficacy of the seal, left undisturbed the rule that presence of a seal restricted oral, executory contract modification.

<sup>25</sup> 1941 LEG. DOC. NO. 65(M), REPORT, N. Y. LAW REVISION COMMISSION 353 (1941).

<sup>26</sup> N. Y. PERS. PROP. LAW § 33-c(1); N. Y. REAL PROP. LAW § 282(1) (contains similar provision).

in the contract forbidding such an occurrence. In this way, it vitalized provisions which were previously adjudged ineffectual for the purpose, since they themselves could be repudiated by the mutual action of the parties.<sup>27</sup> And, at the same time, it conferred an unchangeable status on contracts which contained a "no oral change" provision. The law overcame the lack of notice problem which characterized the seal by insisting that the words of prohibition be included in the contract. This not only made the agreement correspond more closely with the intention of the parties, but, also extended statutory protection only to those parties who contractually expressed their desire for its coverage.

It is equally important to notice that, as a consequence of the statute's exclusive concern with executory agreements, it was basically substitutional in nature, *i.e.*, requiring a provision rather than a seal. As such, it seemingly did not disturb the case law previously developed. Therefore, executed agreements of modification and those which rested on detrimental reliance would, even when the writing forbade oral modification, apparently still be recognized.<sup>28</sup>

But while the statute was substitutional and dealt with only executory agreements, its administrative life was short.<sup>29</sup> During this period however, it was held that a provision forbidding oral change or modification was effective to prevent termination of a contract.<sup>30</sup> As logical as this ruling was, a seemingly minor factual variation thereof proved the undoing of the law. The first case on the statute in the New York Court of Appeals dealt with such a situation and pointed up the incompleteness of the statute. There the court said, that, although the applicability of the statute was dependent upon its invocation by the parties, those contracting could, by so providing, forbid oral changes yet simultaneously permit oral discharge.<sup>31</sup> In other words, the protection of the statute was severable and would apply, in whole or in part, as the parties desired. However, application of this doctrine to the instant contract, which contained not only a "no oral change" clause but also provided for unilateral termination by

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<sup>27</sup> See note 9 *supra*.

<sup>28</sup> 1936 LEG. DOC. NO. 65(C), REPORT, N. Y. LAW REVISION COMMISSION 356 (1936).

<sup>29</sup> It covered the period from 1941 to 1952. During this limited period there was a seeming lack of litigation involving the statute. For representative cases, see *Central American Shipping & Trading Corp. v. Mercantile Ship Repair Co.*, 73 F. Supp. 779 (E. D. N. Y. 1947) (admiralty is not bound by such statutes); *Associated Indemnity Corp. v. Garrow Co.*, 39 F. Supp. 100 (S. D. N. Y. 1941); *Shine's Restaurant v. Waiter and Waitresses Union, Local No. 1*, 113 N. Y. S. 2d 315 (Sup. Ct. 1952); *Glasser & Son, Inc. v. Jonval Construction Co.*, 186 Misc. 253, 60 N. Y. S. 2d 25 (Sup. Ct. 1946); *Molina v. Barany*, 56 N. Y. S. 2d 124 (Sup. Ct. 1945) (assignment of contract is not a modification).

<sup>30</sup> *Siegel v. Goodman*, 186 Misc. 108, 59 N. Y. S. 2d 278 (Sup. Ct. 1945).

<sup>31</sup> *Green v. Doniger*, 300 N. Y. 238, 90 N. E. 2d 56 (1949). See 50 COL. L. REV. 700 (1950); 1 SYRACUSE L. REV. 517 (1950).

either on thirty days written notice, led to difficulty. The court felt that this contract could be abandoned by the mutual, oral consent of the parties since the clause permitting termination by one party, without consent, was inconsistent with the idea that the parties sought statutory protection against oral discharge. And, because it was inconsistent, it limited the applicability of the "no oral change" provision exclusively to modifications rather than to the usual combination of both change and discharge.<sup>32</sup>

Notwithstanding the benefits of contract flexibility provided by separable statutory protection, there was a well-founded fear that the purpose of the law was being frustrated.<sup>33</sup> Under these circumstances, it was obvious that, by alleging an abandonment followed by the adoption of an oral agreement, which incorporated a desired change, one party could obtain approval of an otherwise forbidden change. Fraudulent or mistaken claims of modification might successfully be made in spite of the presence of the preventative clause. However, the danger of fraud or mistake inherent in the interpreted statute was not its only weakness. Instead, this decision revealed that the old ogre of "no notice" which accompanied the seal, was still in the law.<sup>34</sup> Parties to a contract, which contained a "no oral change" provision, might be unaware that it had the effect of prohibiting oral termination. Thus, the same chance of injustice, based on the hidden significance of the clause, was to be found. This condition, however, soon elicited legislative action.

#### *Legislative Action—Phase II*

The legislative antidote for this situation may be found in an enactment which became law on September 1, 1952.<sup>35</sup> Under its terms, the applicability of statutory protection to a contract is still dependent upon the manifested intent of the parties. That is to say, those contracting must first include a provision against oral change or discharge in order to be protected.<sup>36</sup> Upon their failure to do so, the contract will be governed, with but one exception,<sup>37</sup> by the previ-

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<sup>32</sup> *Green v. Doniger*, *supra* note 31 at 245, 90 N. E. 2d at 59.

<sup>33</sup> *Id.* at 246-247, 90 N. E. 2d at 60-61 (dissenting opinion). 1951 LEG. DOC. NO. 65(N), REPORT, N. Y. LAW REVISION COMMISSION (1951) (proposed statute to overcome rule in *Green* case, *supra* note 31).

<sup>34</sup> 1952 LEG. DOC. NO. 65(E), REPORT, N. Y. LAW REVISION COMMISSION (1952).

<sup>35</sup> Laws of N. Y. 1952, c. 831, § 1 (effective Sept. 1, 1952), amending N. Y. PERS. PROP. LAW § 33-c; Laws of N. Y. 1952, c. 831, § 2 (effective Sept. 1, 1952), amending N. Y. REAL PROP. LAW § 282.

<sup>36</sup> N. Y. PERS. PROP. LAW § 33-c(1); N. Y. REAL PROP. LAW § 282(1) (effective Sept. 1, 1941). N. Y. PERS. PROP. LAW § 33-c(2); N. Y. REAL PROP. LAW § 282(2) (effective Sept. 1, 1952).

<sup>37</sup> N. Y. PERS. PROP. LAW § 33-c(4); N. Y. REAL PROP. LAW § 282(4) (effective Sept. 1, 1952).

ously discussed common law, which generally allowed modification.

But while the approach to the problem remained the same, the new law relies on more exact, specific definition to eliminate the frustration of protection exhibited under its statutory predecessor. The statute as it is presently constituted, may be divided into three general operating sections: first, it separates statutory protection into two distinct classes by requiring separate provisions to protect against either oral change<sup>38</sup> or oral termination;<sup>39</sup> second, it outlines, in detail, the precise impact of a "no oral termination" clause;<sup>40</sup> and, third, it acts to influence contractual provisions permitting unilateral termination upon notice.<sup>41</sup> Analysis of each of these sections is necessary in order to understand this method of correction and clarification.

### *Separation of Statutory Protection*

As previously mentioned, the theory that a "no oral change" provision prevented oral termination was inadequate. Under certain circumstances, *i.e.*, when there was evidence of contrary intention, it might recognize fraudulent claims; and, even standing alone, the clause gave no notice of its complete meaning.<sup>42</sup> Happily, however, these difficulties were removed by incorporating into the law the judicial theory of severable protection. Changes have been completely distinguished from terminations;<sup>43</sup> and, either, or both, may only be prevented by including a contract clause which specifically outlaws their effectiveness when unwritten.<sup>44</sup> In addition, a strong blow in the battle against ambiguity was struck by a legislative definition of the terms "change" and "termination." Change not only covers modifications or variations in contract terms, etc., but also includes partial discharges of the contract, which do not terminate all executory obligations under the agreement.<sup>45</sup> Termination, on the other hand, is the discharge of all executory obligations but needn't affect those accrued obligations which were unperformed at the date of the contract's termination.<sup>46</sup>

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<sup>38</sup> N. Y. PERS. PROP. LAW § 33-c(1); N. Y. REAL PROP. LAW § 282(1) (effective Sept. 1, 1941).

<sup>39</sup> N. Y. PERS. PROP. LAW § 33-c(2); N. Y. REAL PROP. LAW § 282(2) (effective Sept. 1, 1952).

<sup>40</sup> N. Y. PERS. PROP. LAW § 33-c(2), (3)(c), (4); N. Y. REAL PROP. LAW § 282(2), (3)(c), (4).

<sup>41</sup> N. Y. PERS. PROP. LAW § 33-c(4); N. Y. REAL PROP. LAW § 282(4).

<sup>42</sup> 1952 LEG. DOC. NO. 65(E), REPORT, N. Y. LAW REVISION COMMISSION (1952).

<sup>43</sup> See notes 38 and 39 *supra*.

<sup>44</sup> *Ibid.*

<sup>45</sup> N. Y. PERS. PROP. LAW § 33-c(3)(a); N. Y. REAL PROP. LAW § 282(3)(a).

<sup>46</sup> N. Y. PERS. PROP. LAW § 33-c(3)(b); N. Y. REAL PROP. LAW § 282(3)(b).

Concededly, complete definition is difficult, perhaps impossible; but, the statutory exposition of these terms must certainly act to benefit both the contracting parties and the courts. The parties, for the first time, are given a guide to the precise contract variations which may be outlawed by the use of either change or termination provisions. And, so acquainted, they may easily and correctly express their desires in the contract. If, however, difficulties of interpretation result in litigation, it would seem that the courts could help establish the intent of the parties by examining the contract in the light of the law's explanation.

### *Impact of a No Oral Termination Clause*

Broadly stated, the inclusion of a clause prohibiting oral termination prevents the contract from being discharged by any method except by a writing or by a particular type of executed accord and satisfaction.<sup>47</sup> More specifically however, a writing, setting forth the termination agreement, and signed by the party against whom it is sought to be enforced, or his agent, is necessary under several circumstances. Among such instances are: first, where discharge is sought by an executory agreement;<sup>48</sup> second, in cases of termination by mutual consent;<sup>49</sup> and third, where the contract specifically provides for termination or discharge on notice by one or either party.<sup>50</sup> The legislative desire for a writing is so strong that in the last of these instances, *i.e.*, where notice by a party is sufficient to terminate, an oral notice is ineffectual even though the contract fails to state that it be written.<sup>51</sup> Although the law demands a written notice while the parties seemingly would have been satisfied with an oral one, this cannot be interpreted as an actual case of legislative contract making. Instead, it represents the creation of a conclusive presumption that the clause forbidding an oral termination, which must be present before the notice need be written, is of paramount importance in the eyes of the contracting parties. And, because of this superior position, it will be followed rather than an incomplete provision, which fails to state how the notice is to be given, or instead of an inconsistent clause, which specifically permits oral notice. Furthermore, as an additional safeguard, no mutual assent of the parties, unless evidenced by a writing, will be effective to waive the requirement that such notice of discharge be written, even though the contract is silent on this need.<sup>52</sup>

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<sup>47</sup> See note 40 *supra*.

<sup>48</sup> N. Y. PERS. PROP. LAW § 33-c(2); N. Y. REAL PROP. LAW § 282(2).

<sup>49</sup> *Ibid.*

<sup>50</sup> N. Y. PERS. PROP. LAW § 33-c(3)(c); N. Y. REAL PROP. LAW § 282(3)(c).

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

<sup>52</sup> N. Y. PERS. PROP. LAW § 33-c(4); N. Y. REAL PROP. LAW § 282(4).

But, as already noted, a writing is not the only way in which the mutual consent of the parties may terminate a statutorily protected contract.<sup>53</sup> When the mutual consent to terminate is effected by an executed accord and satisfaction, “. . . other than the substitution of one executory contract for another . . . ,”<sup>54</sup> the contract is deemed terminated. By the inclusion of this provision, the enactment has recognized the widely held rule that satisfaction of a subsequent accord, by performance of its terms, discharges the duties of the parties under their prior contract.<sup>55</sup> The exclusion of the substituted executory contract as a satisfaction, however, represents, in this somewhat narrow field, the limitation of an otherwise accepted method of rendering satisfaction.<sup>56</sup> The cases have been designated as those in which the accord itself acts as the satisfaction and are found frequently in contracts of compromise, settlement or those which rescind previous contractual duties.<sup>57</sup> Nevertheless, the limitation imposed is not unreasonable. Not only do these contracts present an opportunity for false claims of a new and substituted oral executory contract, but even the rationale itself has been criticized as “stretching a point”<sup>58</sup> and as actually enforcing an executory accord.<sup>59</sup>

#### *Influence on Unilateral Termination Provisions*

When the instrument expressly permits unilateral termination of the contract on written notice of a party, the statute has automatic application.<sup>60</sup> In the presence of such a provision, the statute limits the common law right of the parties to mutually waive the require-

<sup>53</sup> See note 40 *supra*.

<sup>54</sup> N. Y. PERS. PROP. LAW § 33-c(2); N. Y. REAL PROP. LAW § 282(2). For typical cases dealing with the substitution of one executory contract for another, see *Moers v. Moers*, 229 N. Y. 294, 128 N. E. 202 (1920); *Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175 (1906); *Morehouse v. Second National Bank of Oswego*, 98 N. Y. 503 (1885); *Kromer v. Heim*, 75 N. Y. 574 (1879).

<sup>55</sup> “From time immemorial the acceptance of anything in satisfaction of the damages caused by a tort would bar a subsequent action against a wrongdoer. Accord and satisfaction was, likewise, a bar to any action for damages arising from a breach of a covenant.” Ames, *Specialty Contracts and Equitable Defences*, 9 HARV. L. REV. 49, 55 (1895); *Schnell v. Perlmon*, 238 N. Y. 362, 144 N. E. 641 (1924); see RESTATEMENT, CONTRACTS § 417(b) (1932).

<sup>56</sup> See cases cited in note 54 *supra*.

<sup>57</sup> RESTATEMENT, CONTRACTS § 418 (1932).

<sup>58</sup> 6 WILLISTON, CONTRACTS § 1847 n. 1 (rev. ed. 1938).

<sup>59</sup> 6 CORBIN, CONTRACTS § 1271 (1951). Executory accords are not enforceable. See *Moers v. Moers*, 229 N. Y. 294, 300, 128 N. E. 202, 203 (1920); *Kromer v. Heim*, 75 N. Y. 574, 576 (1879). Yet, “[t]he fact is that any accord executory can be turned into an enforceable contract by the device of calling it a substituted contract; and the court is likely to do this whenever justice seems to require it. . . . The rule to be adopted . . . is that an executory accord is an enforceable contract if it complies with the ordinary rules for the formation of a contract.” 6 CORBIN, CONTRACTS § 1271 (1951).

<sup>60</sup> N. Y. PERS. PROP. LAW § 33-c(4); N. Y. REAL PROP. LAW § 282(4).

ment that the notice be written.<sup>61</sup> Under the statute, such notice of termination, to be effective, cannot be oral, and any allegation of a waiver of this requirement will be ignored.<sup>62</sup> Here then is the only circumstance under which the statute is effective even though the parties have not sought its aid by specific contract invocation. Although admittedly, this derogation of a common law right is of narrow compass, it represents an example of legislative contract making. As such, it is a step toward the usual statutory requirement that all unexecuted alterations of written contracts be in writing.<sup>63</sup> Despite this minor rejection of the theory that the expressed intention of the parties should govern the applicability of the statute, it is submitted that, even apart from the present law, there is evidence of an unwillingness to increase the legislative role of contract making. For example, when the Law Revision Commission originally recommended statutory revision, they believed that ". . . where a contract provides for termination by one or either party on notice, such notice to be effective must be in writing, and waiver of the requirement . . . must be in writing."<sup>64</sup> However, when the proposal was later resubmitted, a writing was sought only for contracts which contained either a "no oral termination" clause<sup>65</sup> or a provision permitting written discharge alone.<sup>66</sup> As enacted therefore, the law does not cover those contracts which authorize unilateral termination without a writing. Since these had seemingly been covered by the first proposal and since their later exclusion was necessarily deliberate, it would seem to further evince a desire to retain the intention of the parties test.

### *Conclusion*

A fraudulent act is a heinous thing. Equally damaging, though less reprehensible, is the mistaken claim. While this similarity of result often makes them indistinguishable, the public interest demands protection against the successful accomplishment of either or both. Within the narrow field of oral, executory contract modification or

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<sup>61</sup> *Ibid.*

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

<sup>63</sup> The typical statute preventing oral modification provides that: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement and not otherwise." CAL. CIV. CODE § 1698 (1951). This statute applies to all written contracts, and not merely to those forbidding oral modifications. For a criticism of this type of statute, see 6 CORBIN, CONTRACTS § 1295 n. 30 (1951).

<sup>64</sup> 1951 LEG. DOC. NO. 65(N), REPORT, N. Y. LAW REVISION COMMISSION (1951).

<sup>65</sup> N. Y. PERS. PROP. LAW § 33-c(2); N. Y. REAL PROP. LAW § 282(2). See 1952 LEG. DOC. NO. 65(E), REPORT, N. Y. LAW REVISION COMMISSION (1952).

<sup>66</sup> N. Y. PERS. PROP. LAW § 33-c(4); N. Y. REAL PROP. LAW § 282(4). See 1952 LEG. DOC. NO. 65(E), REPORT, N. Y. LAW REVISION COMMISSION (1952).

termination, the instant statute constitutes the means of achieving this goal. But, although its purpose and its demand for a writing are akin to the Statute of Frauds, these enactments generally differ in one important respect. Here, it is not the nature of the subject matter which cloaks the statute 'round the contract; instead, it is the deliberate invocation by the parties which attaches the law's protection. Yet, in spite of this voluntary nature and its limited scope, the statute provides an important safeguard in the struggle against contract fraud.

The history of the law restricting contract modification, however, indicates that the statute has been concerned with more than the false claims of contracting parties. Although its creation was designed primarily to prevent fraud, a second, and quite important, reason motivated its adoption. The law presented the method of eliminating the anomalous lack of notice feature which characterized its predecessor, the seal. Strangely enough, judicial interpretation soon revealed that the legislative remedy itself suffered from the same ambiguity of no notice.

Now, the law has been rewritten; and its new, more definitive terminology sets forth, in a complete manner, the legal effect of a "no oral change or discharge" clause. Contracting parties may in the future safely insert such preventative clauses as they desire. And, the courts will be assured that such insertion was made with full knowledge of its effect and, as such, accurately represents the desired intention of the parties. In brief, with the difficulty of ambiguity seemingly removed, the statute stands ready to fulfill its primary purpose of protecting contracting parties from fraud.



## ARTICLE 66—AN EXTRAORDINARY REMEDY

### *Introduction*

Replevin was one of the earliest actions conceived by the law.<sup>1</sup> Originally it was believed that the action would lie only for the recovery of chattels illegally distrained,<sup>2</sup> and this limited scope was recognized by several states.<sup>3</sup> However, the weight of authority later

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<sup>1</sup> See *Three States Lumber Co. v. Blanks*, 133 Fed. 479, 481 (6th Cir. 1904); *Stone v. Church*, 172 Misc. 1007, 1008, 16 N. Y. S. 2d 512, 515 (County Ct. 1939).

<sup>2</sup> 3 BL. COMM. 147. A distrained chattel is one that is held as a pledge until the pledgor performs an obligation.

<sup>3</sup> *Wheelock v. Cozzens*, 6 How. 279 (Miss. 1842); see *Watson v. Watson*, 9 Conn. 140, 143 (1832).