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Modification and Discharge of Contracts—New Statutes in New York

LEGISLATION

MODIFICATION AND DISCHARGE OF CONTRACTS—NEW STATUTES IN NEW YORK.—Two recent statutes have been enacted in New York which promise to have an appreciable effect on the law of contracts: the first dealing with the modification, change, and discharge of contracts without new consideration;[1] the second dealing with the discharge of contracts and other obligations by the accord and satisfaction.[2] In recent years, the legislature of New York has been encroaching upon the law of consideration to the extent of indorsing the juridical philosophy of Lord Mansfield.[3] Indeed, were it not for gubernatorial veto, New York would have eradicated the idea of consideration in written agreements.[4] Consonant with the trend away from the requirement of consideration,[5] the first of the aforementioned statutes aims to give binding

1. N. Y. PERS. PROP. LAW (1936) § 33 (2); N. Y. REAL PROP. LAW (1936) § 280. This is an amendment suggested by New York Law Revision Commission. See Leg. Doc. (1936) No. 65 (D).

2. N. Y. PERS. PROP. LAW (1937) § 33-a; N. Y. REAL PROP. LAW (1937) §§ 280, 281. These amendments were recommended by the New York Law Revision Commission. See Leg. Doc. (1937) No. 65 (K).

3. Pillans v. Van Mierop, 3 Burr. 1663, 97 Eng. Reprints 1035 (1765). Lord Mansfield's conception of contractual liability was interwoven with the law merchant. He conceived the non-existence of a *nudum pactum* in the law of merchants. Combining this with the principle that "the law of merchants and the law of the land is the same" he concluded that *nudum pactum* could not exist at common law. This was entirely inconsistent with the doctrine of consideration. This led him to suggest that consideration was only of evidentiary value and not needed for agreements in writing. In agreement with this theory are: MARKBY, ELEMENTS OF LAW (1896) 316; Holdsworth, *Modern History of the Doctrine of Consideration* (1922) 2 B. U. L. REV. 87; SELECTED READINGS ON THE LAW OF CONTRACTS (1930) 99, 100. Lord Mansfield's theory was soon overruled by Rann v. Hughes, 7 T. R. 350 n. *a*, 101 Eng. Reprints 1014 (1778). See note 4, *infra*.

4. The New York Legislature passed a bill amending N. Y. PERS. PROP. LAW (1936) § 33 (2) so that consideration would not be required in any written agreement to *create* any contract, obligation, or lease, or any mortgage or other security interest in personal or real property. 97 N. Y. L. J. No. 118, May 21, 1937. This bill was not approved by Governor Lehman. *Cf.* N. Y. PERS. PROP. LAW (1936) § 33 (2), *infra* page 449, with the above bill.

5. Lord Wright, *Ought the Doctrine of Consideration to Be Abolished from the Common Law?* (1936) 49 HARV. L. REV. 1225; Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 YALE L. J. 621; POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 271 *et seq.*; Holdsworth, *The Modern History of the Doctrine of Consideration* (1922) 2 B. U. L. REV. 87, 174; Ashley, *The Doctrine of Consideration* (1913) 26 HARV. L. REV. 429.

A contrary opinion can be found in Ballantine, *Is the Doctrine of Consideration Senseless and Illogical?* (1913) 11 MICH. L. REV. 423. For a general statement by an eminent jurist as to the effect the doctrine often has, see Dunlop Pneumatic Tyre Co., Ltd., v. Selfridge & Co., Ltd., [1915] A. C. 847, 855, where Lord Dunedin said, "I confess that this case is to my mind apt to nip any budding affection one might have for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which a person seeking to enforce has a legitimate interest to protect."

force to certain agreements modifying pre-existing contracts. It is as follows:

"An agreement hereafter made to change, modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in real or personal property, shall not be invalid because of the absence of consideration, provided that the agreement changing, modifying, or discharging such contract, obligation, or lease, or any mortgage or other security interest shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge."[6]

To understand the purpose and effect of the statute a review of the common law of New York is imperative. It has been established that a promise to perform or the performance of a previously existing legal obligation is not a valid consideration.[7] A familiar situation exemplifying this rule of common law exists where *A Co.* contracts with *X Co.* for the construction of a railroad by *X Co.*[8] *X Co.*, upon discovering that certain subsoil conditions, which the parties had not foreseen, will make the construction of the railroad extremely difficult or will greatly increase the cost of construction, refuses to carry on with the task unless *A Co.* promises to pay an additional compensation. *A Co.* promises to pay the additional compensation if *X Co.* will perform the terms of the original contract. At common law,[9] in New York,[10] *A Co.* would not

6. See note 1, *supra.*

7. The second agreement is declared invalid because it is no legal detriment to the promisee since, at the time this agreement was entered into, the promisee was already legally bound to perform; likewise, performance under the second agreement is not a legal benefit to the promisor because he was already entitled to performance under the first contract. Bartlett v. Wyman, 14 Johns. 260 (N. Y. 1817); Vanderbilt v. Schreyer, 91 N. Y. 392 (1883); Weed v. Spears, 193 N. Y. 289, 86 N. E. 10 (1908); McGovern v. City of N. Y., 234 N. Y. 377, 138 N. E. 26 (1923).

In New York, the law is the same where a *third* party is the promisee. Arend v. Smith, 151 N. Y. 502, 45 N. E. 872 (1897). This rule may have been modified to some extent by DeCicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807 (1917). In England and some American jurisdictions the rule is otherwise as to third parties; that is, the promise contained in the second agreement is enforced, thus determining that benefit to the promisor is equally as effective as detriment to the promisee. Abbot v. Doane, 163 Mass. 433, 40 N. E. 197 (1895); Scotson v. Pegg, 6 H. & N. 295, 158 Eng. Reprints 121 (Ex. 1861). Ames, *Two Theories of Consideration* (1899) 12 HARV. L. REV. 515. The adverse holding in New York, therefore, shows that only detriment to the promisee is consideration, except as limited by DiCicco v. Schweizer, *supra,* where the promise ran to two people. Thus in England, Massachusetts and other jurisdictions holding the same, if *A* has refused or hesitated to perform an agreement with *B*, and is requested so to do by *C*, who will derive a legal benefit from such performance and who promises to pay him a certain sum therefor, and *A*, thereupon undertakes to do it, the performance by *A* of his agreement in consequence of such request and promise by *C* is a good consideration to support *C*'s promise. But in New York, benefit, alone, to *C* is not sufficient consideration. *A* must at least suffer some technical detriment by assuming an additional task or giving up some privilege.

8. A similar fact situation may be found in King v. Duluth, M. & N. Ry., 61 Minn. 482, 63 N. W. 1105 (1895). For the purposes of this discussion, the facts will be varied.

9. In some jurisdictions the promise to pay additional compensation may be enforced under certain circumstances, *e.g.*, where an unforeseen and unanticipated difficulty increases

be bound to pay the extra amount because *X Co.* was already under the legal duty to perform in accordance with the original agreement. Stated in legal terminology, *X Co.* furnished no consideration for the promise of *A Co.* Thus, at a common law, in order to change, modify, or to discharge a contract by subsequent agreement, the latter required for its validity a supporting consideration.[11] Although this rule is correct under the *accepted theory* of consideration,[12] it defeats the intention of the parties and hardship results when all cases of change, modification, and discharge of an existing contract are placed within this scope.

This rule invalidating any modification or discharge without any new consideration, has always been the object of animadversion. It aroused antagonism because human sympathy ordinarily extends to a debtor in dire straits; yet, the law upheld the contention of the creditor who had breached his promise in spite of the fact that all canons of social and commercial honesty viewed the breach as unfair.[13] Theoretically, the promise to discharge or the discharge of the entire debt in satisfaction of a lesser sum can be defended on the theory that it is akin to a completed gift.[14] Pragmatically, the rule was com-

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the cost of construction. It may be pointed out in this connection that the distinction upon which this exception to the general rule rests was found in the equities arising from the circumstances of the particular case, rather than in strict legal principle. Though the facts in King v. Duluth, M. & N. Ry., 61 Minn. 482, 63 N. W. 1105 (1895) did not bring it within the exception which was there expressed, that case is generally thought of as the source of the exception. Lenz v. Schuck, 106 Md. 220, 67 Atl. 286 (1907).

10. There is some authority in New York that a promise of extra compensation made to a contractor who has encountered unforeseen difficulties may be enforced. Meech v. Buffalo, 29 N. Y. 198 (1864). In that case, however, the question before the court concerned the legality of an assessment made by the municipality to pay for the increased compensation in consequence of the enhanced cost of work. The case of McGovern v. City of New York, 234 N. Y. 377, 138 N. E. 26 (1923), although distinguishable, seems to indicate that New York would not have followed this exception. These cases are important today, in spite of the statute, when dealing with parol contracts of modification.

11. See note 7, *supra.*

12. See note 7, *supra.* The most common test which is applied to determine whether there is consideration for a promise is to find either a detriment to the promisee, which seems to be the New York rule as pointed out in note 7, *supra,* or benefit to the promisor. Ames, *Two Theories of Consideration* (1899) 12 HARV. L. REV. 515; Morgan, *Benefit to the Promisor as Consideration for a Second Promise for the Same Act* (1917) 1 MINN. L. REV. 383, 384. Williston, *Successive Promises of the Same Performance* (1894) 8 HARV. L. REV. 27.

13. 2 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) 103.

14. Where there is an executed modification, the courts ordinarily hold that the transaction is binding and that it cannot be reopened. See Nicoll v. Burke, 78 N. Y. 580, 585 (1879); Hiltop Sand Corp. v. Simpson, 225 App. Div. 467, 471, 233 N. Y. Supp. 348, 352 (2d Dep't 1929). It would seem to follow that, where the debtor pays a lesser sum in discharge of the greater, the creditor could not sue for that which the debtor had thought discharged. But the law did not recognize the release of part as a gift, thereby entitling the creditor to sue for the balance. To adhere to such a rule of law is absurd inasmuch as circumvention is easily attainable by the creditor taking the whole debt and

pletely out of harmony with the practices of business.[15] Historically, the rule as rationalized in terms of consideration was originally a misconception.[16] And oddly enough, constant recognition of the rule by the courts violated their own policy which was to encourage, wherever possible, extra-judicial settlements.[17]

It is interesting to note that a diversity of situations take root in the broad rule that the performance of the promise to perform that which one is legally bound to do is insufficient consideration for a promise. In some cases there is justification for its application. That is, surrounding circumstances militate against the enforcement of the subsequent promise primarily on grounds of public policy,[18] although the reason has been repeatedly expressed in terms

then returning part. No difficulty whatsoever could arise here. To be theoretically consistent, however, release of part could not be held a gift because the requirements of a valid gift would not be present, *viz.*, actual delivery by the donor to the donee with intent to make a gift. *Cf.* Gray v. Barton, 55 N. Y. 68 (1873), where the creditor made a valid gift of a debt due him. The creditor with intent to make a gift thereof received from the debtor one dollar, which was credited, and then the account was balanced by this entry: "Gift to balance account." The creditor was not allowed to recover the balance.

15. Lord Blackburn, on the verge of dissenting in Foakes v. Beer, 9 App. Cas. 605, 622 (1884) remarked, "What principally weighs with me . . . is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so." See ANSON, CONTRACTS (Corbin's Amer. ed. 1930) § 140.

16. Ames, *Two Theories of Consideration* (1899) 12 HARV. L. REV. 515. In this article Professor Ames traces the history of the rule that performance of a pre-existing duty is not consideration and he points out that it has not even continuity with the past to support it. See also ANSON, CONTRACTS (Corbin's Amer. ed. 1930) § 140.

17. That this policy of the courts has been followed is hardly disputable. An outstanding example of this policy is found in the law of evidence where an admission made during an attempted compromise is held inadmissible if the court finds that it would not have been made except for the purposes of negotiation. The rule has in view to encourage and facilitate the settlement of legal controversies. See White v. The Old Dominion Steamship Co., 102 N. Y. 661, 662, 6 N. E. 289, 291 (1886).

18. Three cases, which are regarded as the foundation of the rule that a promise to perform a pre-existing legal duty is no consideration, are an illustration of the close relationship between accepted theories of consideration and public policy. These cases seem to indicate that specific rules of consideration arose out of the current public policy of the day. The first case, Harris v. Watson, Peake 102, 170 Eng. Reprints 94 (N. P. 1791), decided solely on grounds of public policy, held that such agreements were unenforceable. In that case, Lord Kenyon said (at 103): "If this action was to be supported, it would materially affect the navigation of this kingdom. . . . This rule was founded on a principle of policy, for if sailors were in all events to have their wages, and in time of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make." Lord Ellenborough, in Stilk v. Myrick, 2 Camp. 317, 170 Eng. Reprints 1168 (N. P. 1809) doubted the wisdom of the reasoning in Harris v. Watson, *supra*, and held, upon a similar set of facts, that the agreement was invalid because it

of consideration. The cases which have been regarded as the foundation of the rule that a pre-existing legal duty is not sufficient consideration, involved promises of extra compensation to seamen bound by their articles to perform all duties incident to the voyage.[19] The fact situation in this type case presented a situation where enforcement of such a promise ran counter to a strong current of public policy expressed in the strict naval discipline of the time.

That public policy is at the basis of rule is made clear by another class of cases that fall within its scope. These are the cases of a promise to a person already under a legal duty to perform an act, other than that arising out of contract. Typical examples of this are a promise to pay a witness already under subpoena[20] and a promise to pay a public officer whose fees are fixed by law.[21] Great mischief would result if the law enforced the promise inasmuch as it would encourage evil practices in public affairs. It appears doubtful, however, that the statute will effect any change as to these public duty cases.[22]

Under the common law the rule that the performance of a pre-existing legal duty is not consideration could be avoided upon the flimsiest of pretexts. All that need be done by the party to whose advantage the new agreement redounds is to take care that he incurs some technical detriment and the promise will be enforced.[23] For example, in the aforementioned assumed case

lacked consideration. In Bartlett v. Wyman, 14 Johns. 260 (N. Y. 1817) the court held such an agreement unenforceable in that it was contrary to public policy and added (at 262): "The promise to give higher wages is void for want of consideration. The seamen had no right to abandon the ship at Beaufort, and the promise to pay them an extra price for abstaining from doing an illegal act was *nudum pactum.*"

19. See note 18, *supra.*

20. Willis v. Peckham, 1 Brod. & B. 515, 129 Eng. Reprints 821 (C. P. 1820).

21. Hatch v. Mann, 15 Wend. 45 (N. Y. 1835); Carpenter v. Taylor, 164 N. Y. 171, 58 N. E. 53 (1900).

22. See note 1, *supra.* This statute under discussion could be stretched to include these public duty cases if the word obligation is construed to include public duty. The statute reads, "An agreement . . . to change or modify . . . any . . . obligation . . . shall not be invalid because of the absence of consideration. . . ." On the other hand, the more tenable argument would seem to exclude these cases. Notwithstanding such argument in construing "obligation" to include public duty cases, inasmuch as such agreements would be against public policy, their enforcement is doubtful. Moreover, the word "obligation" in the statute seems to have been inserted to cover tort claims. See note 29, *infra.*

23. The earliest statement of this rule is found in the classical expression that the giving of a "horse, hawk, or robe" would be consideration. Pinnel's Case, 5 Co. Rep. 117 a, 77 Eng. Reprints 237 (K. B. 1602). Payment of a lesser sum by a negotiable check has been held consideration. Goddard v. O'Brien, 9 Q. B. D. 37 (1882); or at an earlier date, see Brooks v. White, 2 Met. 283, 287 (Mass. 1841); Bowker v. Childs, 3 Allen 434 (Mass. 1862); Foakes v. Beer, 9 App. Cas. 605 (1884); or the giving of a chattel mortgage, Jaffrey v. Davis, 124 N. Y. 164, 26 N. E. 351 (1891). These are common examples of the technical detriments which the promisee could secure from the promisor to make the second promise binding. That would be consideration because the obligor was under no pre-existing duty to pay by a negotiable check, or at an earlier date, or to give a chattel mortgage. The effect of this doctrine is well stated in Jaffray v. Davis,

if *X Co.* were to assume additional tasks, such as lengthening the platform of a station depot one inch or promising to complete the work one day earlier, this sufferance of detriment on its part might constitute a consideration.[24] Under a liberal interpretation, certain modifying agreements containing this technical detriment would be enforced. But often they fail of enforcement because they are held not to comply strictly with the technicalities which the existing law sets up.[25] Enforcement of promises modifying existing obligations has been successful in those cases where the courts have been able to find some new obligation undertaken or some privilege relinquished, thereby satisfying the highly impractical and technical doctrine of consideration.

What has the new statute actually accomplished? To clarify matters, let us return to our hypothetical case.[26] *X Co.* brings an action upon the promise of *A Co.* to recover the additional compensation. At common law there could be no recovery because *X Co.* furnished no consideration for the promise of *A Co.* inasmuch as it suffered no legal detriment by performing that which it was contractually bound to do. But under the statute *X Co.* can now recover if the promise is in writing and signed by *A Co.* The contract between the parties may be modified as to any of its terms, or may even be discharged by a subsequent agreement in writing and signed by the party against whom it is sought to be enforced.[27] Consideration, which *X Co.* would have formerly had to supply to enforce the promise, is definitely unnecessary. No longer do the parties have to undertake the process of rescinding the old contract.[28]

The wording of the statute suggests that it was intended to cover tort

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124 N. Y. 164, 171, 26 N. E. 351, 353 (1891), as to be so absurd as to hold that "a bar of gold worth $100 will discharge a debt of $500, while 400 gold dollars in current coin will not."

24. See note 23, *supra.*

25. Mayer v. Penfield, 150 App. Div. 66, 134 N. Y. Supp. 762 (1st Dep't 1912) is an example of a situation which creates unnecessary confusion in the law. In this case negotiations had been fully completed when the plaintiff-debtor was voluntarily promised an addition to his compensation provided that he closed the matter several days earlier than agreed upon. One of the judges dissenting, the court held that the plaintiff furnished no consideration for the promise; that he performed no services that entitled him to extra compensation. This particular case exemplifies the uncertainty and the lack of uniformity which predominated at common law.

26. See page 449, *supra.*

27. See note 1, *supra.*

28. Schwartzreich v. Bauman-Basch, Inc., 231 N. Y. 196, 131 N. E. 887 (1921), *rearg. denied,* 231 N. Y. 602, 132 N. E. 905 (1921). This decision announced what may be termed the "recission" exception to the rule that a promise to perform or the performance of a subsisting contractual duty is no consideration. In a situation where *A* is contractually bound to perform work, a subsequent agreement between the parties to the contract to change or modify it is not, standing alone, sufficient evidence of a rescission of the prior contract. Weed v. Spears, 193 N. Y. 289, 86 N. E. 10 (1908); Cosgray v. New England Piano Co., 10 App. Div. 351, 41 N. Y. Supp. 886 (2d Dep't 1896); *cf.* Galway & Co. v. Prignano, 134 N. Y. Supp. 571 (App. T. 1st Dep't 1912). In order to find a rescission there must be some additional evidence, McGowan & Connelly Co., Inc. v. Kenny-Moran Co., Inc., 207 App. Div. 617, 202 N. Y. Supp. 513 (1st Dep't 1924). Such findings are usually jury questions.

claims. It says, in pertinent part, "An agreement . . . to discharge in whole or in part . . . any . . . obligation . . . shall not be invalid because of the absence of consideration. . . ."[29] If, however, the word "obligation" is held not to cover tort claims, that would not narrow to any great degree the effect of the statute. The reason for this is that almost every claim that sounds in tort is disputed either as to liability or as to the amount of damage. Since the compromise of a claim as to which there is a *bona fide* dispute is supported by a sufficient consideration, no serious problem,[30] it seems, will arise.

Greatest support that can be given to the common law rule that a subsisting contractual duty bars enforcement of a subsequent promise to perform it, arises in the situation where a promisee who, without other reason than the necessitous condition of the promisor, refuses to perform unless the latter promises him more than he has agreed to take. In these "hold-up" cases the common law rule, which denied enforcement of the subsequent promise, achieved a desirable end. With the eradication of this rule in written agreements, it might seem that the door will be opened to unscrupulous individuals to exercise coercive methods and to over-reach the other party. To illustrate this particular point, let us assume that *X Co.* knows that *A Co.* must have the railroad completed within a certain time and that to enter into negotiations with another company would delay matters to such an extent that a postponed construction of the railroad would result in severe losses to *A Co.* With this knowledge, *X Co.* refuses to perform unless promised an additional compensation. Under the strain of economic compulsion, *A Co.* agrees to pay the additional sum if *X Co.* will carry on without delay. Under the common law this agreement could not be enforced because there would be no consideration for the promise. But under the statute, if the agreement is in writing and signed by the *A Co.*, the latter would be liable. It is highly questionable whether the existing law of duress would be a defense. However, uncertain as the law governing duress may appear to be,[31] there is a growing body of cases that point the way to an adequate treatment of the "hold-up"

29. See note 1, *supra*. The meaning of the word "obligation" in a statute depends upon the sense in which it is used. Good v. Farmer's Mutual Hail Ins. Ass'n 58 S. D. 106, 235 N. W. 114 (1931). There may be a contract obligation imposed by the operation of law (see note 20, *supra*), or even an obligation arising out of a tort. In the light of the circumstances which brought about the adoption of this statute, it would seem that the intention of the legislature was to make it applicable to modifications of existing obligations. An obligation arising out of or by operation of law is *not* capable of modification by the parties. An obligation arising out of a contract *is* capable of modification by the parties. Similarly an obligation arising from a tort is capable of modification.

30. Bandman v. Finn, 185 N. Y. 508, 78 N. E. 175 (1906); Byrne v. Padden, 248 N. Y. 243, 162 N. E. 20 (1928); Shuttinger v. Woodruff, 259 N. Y. 212, 181 N. E. 361 (1932).

31. The common law conception of duress, aided by the equitable treatment as to what constitutes undue influence, has been greatly expanded by the modern law. The modern tendency, in treating each case on its own special circumstances, invariably seeks the answer to the question, did the defendant have the freedom of exercising his own will? What a particular court will deem duress is, therefore, open to uncertainty and speculation. 5 WILLISTON, CONTRACTS (rev. ed. 1937) § 1603 *et seq.*

cases.[32] The trend of modern authority in America is strongly in favor of recognizing economic compulsion as legal duress.[33] To insure the proper safeguards, however, it might be wise to amend the present statute so as to definitely provide for such situations as they arise.[34]

By the legislation under discussion the parties to a contract can, if they see fit, modify or discharge their obligations by mutual agreement in writing without furnishing consideration. Similarly, one holding a claim *ex contractu*, or, possibly, *ex delicto*[35] may release such claim in whole or in part.

The language of the above statute is broad enough to cover any case of accord and satisfaction involving contracts and, perhaps, tort claims.[36] In order to bring the law of accord and satisfaction into harmony with the legislation liberalizing the law regarding the change, modification, and discharge

32. The strict common law concept of duress has been relaxed by the advent of the "Doctrine of Business Compulsion." 5 WILLISTON, CONTRACTS (rev. ed. 1937) §§ 1617, 1618. Anciently, duress in law by putting in fear could exist only where there was such a threat of danger as was deemed to sufficiently deprive a courageous or confident man of his free well. I CLARK, NEW YORK LAW OF CONTRACTS (1922) 122 *et seq.* The resisting power, under this old view, was measured not by the individual affected, but by the standard of a man of courage. This rule has been so expanded that duress may be implied when a payment is made to prevent great property loss and there seems no adequate remedy except to submit to an unjust demand. Minneapolis St. P. & S. Ste. M. R.R. v. Railroad Commission, 183 Wis. 47, 197 N. Y. 352 (1924). See also Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, 167 N. E. 69 (1929); Brown v. Worthington, 162 Mo. App. 508, 142 S. W. 1082 (1912); Van Dyke v. Wood, 60 App. Div. 208, 70 N. Y. Supp. 324 (1st Dep't 1901).

33. See note 32, *supra*. The doctrine of economic compulsion recognizes that to imperil a man's livelihood, his business, or financial condition is quite as coercive as to detain his property. Precisely what test shall be applied is indeterminable. Therefore, each case must be judged in the light of its particular circumstances. Jurisdictions supporting this doctrine are: Union P. R. Co. v. Public Service Commission, 248 U. S. 67 (1918); Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, 167 N. E. 69 (1929); Rose v. Owen, 42 Ind. App. 137, 85 N. E. 129 (1908); Dana v. Kemble, 17 Pick. 545 (Mass. 1836); Minneapolis St. P. & S. Ste. M. R.R. v. Railroad Commission, 183 Wis. 47, 197 N. W. 352 (1924).

34. In New York the law upon the doctrine of economic compulsion is somewhat unsettled. The leading case in New York in support of the rule that a threatened breach of contract is not duress is Doyle v. Trinity Church, 133 N. Y. 372, 31 N. E. 221 (1892). Where a representative of the State of New York by the way of threats caused the plaintiff to make payments additional to those called for by the contract, the court held that the uncertainty of the plaintiff's remedy made the threats duress. Horner v. State of New York, 42 App. Div. 430, 59 N. Y. Supp. 96 (3d Dep't 1899). There are several lower court cases in New York holding that a refusal to carry out the contract is duress where the legal remedy is inadequate or where none is available. Criterion Holding Co. v. Cerussi, 140 Misc. 855, 250 N. Y. Supp. 735 (Sup. Ct. 1931); Independent Beltozerkower Aid Society v. Surie, 187 N. Y. Supp. 59 (App. T. 1st Dep't 1921).

35. See note 29, *supra*.

36. "Any agreement . . . to discharge in whole or in part any contract . . . shall not be invalid because of the absence of consideration. . . ." See note 1, *supra*. An accord and satisfaction is one method whereby the parties may discharge a contract. This being true, it follows that the statute covers accord and satisfaction cases. See note 29, *supra*.

of contracts, the New York legislature recently enacted into law a new statute relating to the effect of an agreement to accept a stipulated performance in satisfaction of any obligation or claim at some *future* time.[37] Before a discussion of the statutory changes is taken up, it may be helpful to consider the common law conception of "accord and satisfaction". It is essential to clarity of reasoning to seek a meaning of firstly, an accord; secondly, a satisfaction; thirdly, the effect of an executory accord.

An accord is a bilateral contract[38] whereby the promisee agrees to accept *in the future,* in extinction or satisfaction of an obligation or existing contractual duty, something different from or less than that to which he is entitled.[39] An accord may be arrived at in any one of the following three ways: first, in the form of an offer for a unilateral contract of accord; second, in the form of a bilateral contract of accord, which is the true "executory accord"; third, in the form of a bilateral contract of accord *where satisfaction is simultaneous with the promise.* This can best be presented by reference to our assumed set of facts. For the purposes of this phase of the discussion assume that *X Co.* has completed the railroad and that *A Co.* owes it $100,000. *X Co.* writes to *A Co.* that it will accept a deed to certain surrounding property owned by *A Co.* in full satisfaction of the indebtedness. *A Co.,* in accordance with the offer, tenders the deed to *X Co.* In this case the offer of *X Co.* leads to a unilateral contract of accord. Acceptance of the deed is satisfaction and discharge of the debt. In this case *X Co.* makes it clear that only performance, not a promise, will be satisfaction; that is, it clearly evidences an intention not to relinquish its right or cause of action on the original claim until satisfaction has been received. At common law in New York, *A Co.* could tender the deed in accordance with the terms of the offer

37. See note 2, *supra.*

38. The word "accord", to avoid confusion, should be used in one sense only, to wit, where there are mutual promises to give and accept the proposed satisfaction. This is the true "executory accord." N. Y. PERS. PROP. LAW (1937) § 33-a (1) defines the executory accord as follows: "Executory accord as used in this section means an agreement embodying a promise express or implied to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property, and a promise express or implied to render such performance in satisfaction or discharge of such claim, cause of action, contract, obligation, lease, mortgage or security interest."

The contract of accord was recognized at a much earlier date than were simple contracts. At early common law, acceptance of anything in satisfaction of damages caused by a tort was a bar to the commencement of an action upon the original claim. Ames, *Specialty Contracts and Equitable Defenses* (1895) 9 HARV. L. REV. 49, 55. The enforcement of such an agreement is much older than the first case enforcing a simple contract. Since there was, at this time, no recognition of simple contracts, the accord was evidence of the fact that satisfaction which was received was taken in discharge of the claim in question. It made no difference whether the creditor asked for an act or a promise. All that was important was actual performance of the accord.

39. Shepherd, *The Executory Accord* (1931) 26 ILL. L. REV. 22; Williston, *Accord and Satisfaction* (1904) 17 HARV. L. REV. 459.

and *X Co.* could refuse to accept the tender of performance by revoking its offer prior to acceptance.[40] The withdrawal by the *X Co.* of its offer for a unilateral contract of accord at any time prior to its acceptance might leave *A Co.* in a very embarrassing and helpless condition. In order to prevent the expectations of the parties from being defeated and to eliminate the consequent injustice of the situation, the legislature passed the following statute:

"An offer in writing hereafter made, signed by the offeror, to accept a performance therein designated in whole or in part of any claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property, followed by tender of such performance by the offeree before revocation of the offer, shall not be denied effect as a defense or counterclaim by reason of the fact that such tender was not accepted by the offeror."[41]

This new law allows *A Co.* to tender the deed without having to fear a rejection by *X Co.* In all cases which the statute covers, it prevents revocation of the offer after performance has been tendered; it gives to a tender prior to revocation the effect of an acceptance of the offer.

In connection with the use of the word "tender" an interesting question of interpretation arises. An examination of the facts in the famous case of *Petterson v. Pattberg*[42] will throw some light upon the problem involved. In that case the creditor offered to satisfy a mortgage upon the payment of $780, on or before a certain date. Prior to the date set, the debtor knocked upon the door of the creditor's house and said, "I have come to pay off the mortgage."[43] The creditor then stated that his offer was no longer open. The court held that the creditor was legally justified in so doing inasmuch as he revoked his offer before he accepted the money. If the words used by the debtor amount to a tender,[44] under the new statute the creditor could not

40. Kromer v. Heim, 75 N. Y. 574 (1879); Petterson v. Pattberg, 248 N. Y. 86, 161 N. E. 428 (1928). The latter case stands for the proposition that the offeror may revoke his offer at any time prior to acceptance where his offer called for the performance of an act rather than a promise. See note 47, *infra*. The Kromer Case, which involves the question of accord and satisfaction, holds that an accord partly executed is ineffectual to bar an action for the balance of the performance.

41. N. Y. PERS. PROP. LAW (1937) § 33-b; N. Y. REAL PROP. LAW (1937) § 281. These are recommendations of the New York Law Revision Commission. See Leg. Doc. (1937) No. 65 (K).

42. 248 N. Y. 86, 161 N. E. 428 (1928); (1929) 29 COL. L. REV. 199; (1928) 42 HARV. L. REV. 128; (1928) 14 CORN. L. Q. 81; (1929) 27 MICH. L. REV. 465.

43. Petterson v. Pattberg, 248 N. Y. 86, 88, 161 N. E. 428, 429 (1928).

44. A tender has a definite legal significance. It imports, not merely the readiness and ability to pay over the money or to deliver the deed or other property, at the time and place mentioned in the contract, but also the actual production of the thing to be paid or delivered and an offer of it to the person to whom the tender is made. Kreiss Potassium Phosphate Co. v. Knight, 98 Fla. 1004, 124 So. 751 (1929). See Holmes v. Holmes, 12 Barb. 137, 144 (N. Y. 1851). An offer to pay what the offeror may conclude is the proper amount does not, it has been held, constitute a tender. Seid Pak Sing v. Barker, 122 Cal. App. 93, 10 P. (2d) 92, 95 (1932). From such authority, it may be inferred that Mr. Petterson's words might not constitute a tender. See 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 167; ANSON, CONTRACTS (Corbin's Amer. ed. 1930) § 428.

legally revoke his offer by refusing to accept the money. The reason for this is that the statute makes tender of performance equivalent to acceptance. Therefore, if it is determined that the debtor made a tender, the decision of *Petterson v. Pattberg*[45] is no longer law in New York because the statute[46] would be directly in point under such a set of facts. In that case it is important to note that the offer which the creditor made was for an unilateral contract of *accord* not merely for an unilateral contract. Equally significant is the fact that the statute under discussion does not, in any fashion, affect the present law pertaining to the formation and effect of unilateral contracts as distinguished from unilateral contracts of accord.[47] In such a case as *Petterson v. Pattberg* the creditor can, under the statute, protect himself in one way, *viz.*, revoke his offer before the debtor makes a tender.

Assume now, that *X Co. writes* that if *A Co.* will *promise* to deliver the deed to the desired property on or before a set date, *X Co.* will discharge the indebtedness it has against *A. Co. A Co.* promises to deliver the deed as requested. In this case the reply by *A Co.* creates a bilateral contract of accord or a true "executory accord." Examination of this type accord reveals a good bilateral contract in which there is a good offer, a valid acceptance, and consideration.[48] In spite of the fact that we have a perfectly valid contract, it was not enforceable at common law because of the well settled rule that an accord without satisfaction was ineffectual to bar a suit on the original cause of action.[49] No matter how unreasonable it may appear that an accord containing mutual promises, and based on a sufficient consideration, should not be given effect, the courts persisted in reiterating the statement that an accord executory is of no binding force until executed or satisfied.[50] Therefore, prior

45. See note 42, *supra.*

46. See note 41, *supra.*

47. N. Y. PERS. PROP. LAW (1937) § 33-b was not designed to change the law of unilateral contracts. Therefore, the law in New York, as to unilateral contract, seems to be that the promisor may revoke his offer at any time prior to complete performance by the promisee. Petterson v. Pattberg, 248 N. Y. 86, 161 N. E. 428 (1928). Some doubt has been expressed, however, concerning that case insofar as it holds that the offeror can revoke his offer at any time prior to *complete* performance by the offeree. See 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 167; Bacon, Book Review (1937) 5 FORDHAM L. REV. 526, 529.

48. The consideration for the accord is the mutual promises, by the debtor to perform and by the creditor to accept. "Since a promise is an act, one who defines consideration as any act or forbearance in exchange for a promise, will necessarily find a consideration in every case of mutual promises." Ames, *Two Theories of Consideration* (1899) 12 HARV. L. REV. 515.

49. Peytoe's Case, 9 Co. Rep. 776, 77 Eng. Reprints 847 (K. B. 1603). The rule in this case became common law rule in New York. Kromer v. Heim, 75 N. Y. 574 (1879).

50. This rule that an executory accord must be satisfied or executed to be binding was understandable at a time when simple contracts were not recognized. But, when assumpsit became well established, and mutual promises became consideration for each other, it would seem that the courts should have given effect to the executory accord which was a valid bilateral contract. See notes 38 and 48, *supra.* An excellent summary of the first cases involving the effect of accords after the enforcement of simple promises was established may be found in Shepherd, *The Executory Accord* (1931) 26 ILL. L. REV. 22, 29, 30.

to the statute, *A Co.* could neither sue on the accord nor could *A Co.* set it up as defense to an action brought upon the original claim. If, however, *A Co.* under this factual set-up, delivered the deed as he had promised, the accord would be satisfied and *A Co.* could base an action of its own to enforce it or set it up as a defense to an action commenced upon the original claim.[51] It would be a complete defense under a plea of accord and satisfaction.

A second part of the statute amplifies the rights of the parties. It reads:

"An executory accord, hereafter made, shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that the satisfaction or discharge of the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord was to occur at a time after the making of the accord, provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party."[52]

This section gives binding force to an agreement such as existed between *X Co.* and *A Co.* Any time after the agreement is entered into, *A Co.* is no longer placed in the uncertain position as to what *X Co.* may decide to do. *A Co.* now has a perfect defense to any action that *X Co.* may bring on the original claim. The statute does not make the executory accord a valid contract and therefore enforceable; instead, it says that an executory accord, which has always been a valid contract, is now enforceable either as a defense to an action commenced upon the original claim or as the basis of an action or as a counterclaim. The sole purpose of the section is to make executory agreements of accord binding upon both parties except as limited by subdivision 3 of the same section, which will now be quoted:

"If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord, or to assert his rights under the accord."[53]

The obvious purpose of this section is to entitle both parties to the same redress in the event that the executory accord is not performed according to its terms. Suppose that *A Co.* tendered the deed several days late or failed to carry out the terms of its agreement in some other manner, *X Co.* would not be bound to accept it nor would it be restricted to any action upon the executory accord but could proceed to sue upon the original obligation.

The legislature wisely foresaw that if such an agreement were to be given binding force, certain safeguards would be necessary. Clear and definite proof of the agreement is therefore preserved by requiring the promise to be in writing and signed by the party against whom it is sought to enforce the accord. Preservation of the original claim is accomplished by providing that

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The effect of the new statute is to give cognizance to the theory that an executory accord is enforceable. See note 52, *infra.*

51. Prior to the new statute the party promising to perform had to do so completely in order to defend an action brought upon the original claim. Kromer v. Heim, 75 N. Y. 574 (1879).

52. N. Y. PERS. PROP. LAW (1937) § 33-a (2); N. Y. REAL PROP. LAW (1937) § 280 (2).

53. N. Y. PERS. PROP. LAW (1937) § 33-a (3); N. Y. REAL PROP. LAW (1937) § 280 (3).

if the person against whom the claim is asserted fails to comply with the terms of the subsequent agreement the claimant may assert his rights either under the original claim or under the accord.[54]

The third type accord, *viz*, where the creditor treats the debtor's promise as satisfaction, is not covered by the statute for the very good reason that change in this respect is unnecessary. Thus, where *X Co. writes* to *A Co.* that it will treat the indebtedness as presently discharged and satisfied if *A Co.* will *promise* to deliver the deed to the property, the promise of *A Co.* to so deliver *immediately* discharges and satisfies the original claim. The distinction between this transaction and the transaction discussed above concerning the true executory accord is this: in this case the creditor immediately discharges the indebtedness upon receiving the promise of the debtor; that is, the creditor is performing an *act* in return for a promise, just the converse of the situation appearing in *Petterson v. Pattberg*—where the debtor performs the act in return for the promise. But where we have the executory accord, the creditor does not discharge the debtor until the latter performs that which he has promised to perform. When the debtor has performed his promise, he is discharged. This, it must be remembered was the rule at common law. Under the statute the two transactions are capable of having the same effect; in the case of the executory accord, under the statute, it is a defense although executory. Likewise, where the creditor treats the promise as satisfaction, the debtor, upon promising, has a defense to any action commenced upon the original claim or cause of action.

If this third type can rightfully be called an accord, the debtor's promise is satisfaction since that is precisely what the creditor asked for. One commentator has described the transaction as a case of substituted agreement.[55] It is analogous to a novation. The accord being simultaneously satisfied is a defense to an action brought upon the original claim.

A most important case which occurs not infrequently and which is greatly affected by the current changes is one like *Foakes v. Beer*.[56] It involves the situation where the creditor promises to forbear action upon the debt if the debtor will pay a lesser sum than is presently due. At common law the debtor would pay the lesser sum and if the creditor saw fit he could nevertheless sue for the balance in spite of his promise not to do so. The reason advanced was that payment of a lesser sum on the day in satisfaction of a greater sum, cannot be any satisfaction of the whole. Here it is possible for the debtor to promise to pay a lesser sum than is admittedly due, that is, to enter into a contract of accord. Payment on the stipulated day would seem to be a satisfaction since that act would be execution of the accord. It would seem that we had a perfect case of accord and satisfaction. But the courts have repeatedly held, in their blind adherence, to the decision of *Foakes v. Beer*,[57]

54. See note 53, *supra*.

55. Corbin, *Discharge of Contracts* (1913) 22 YALE L. J. 513.

56. 9 App. Cas. 605, 36 Eng. Reprints 194 (1884).

57. See note 56, *supra*. The rule in Foakes v. Beer that the giving of a lesser sum for a greater sum is not satisfaction has been described as ". . . evidently distasteful to the courts. . . ." Smith v. Ballou, 1 R. I. 496, 498 (1851). See criticism in Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351 (1891).

that although the accord may be executed, payment of a lesser sum is not, in law, satisfaction unless there is additional consideration, such as the giving of a "horse, hawk, or robe"[58] or as the modern law expresses it, the giving of a "peppercorn" or "tomtit."[59] Recognizing the absurdity of adhering to such a doctrine the legislature passed the above quoted sec. 32(2) of the New York Personal Property Law[60] under which the creditor may discharge the debt in whole or in part without having the debtor furnish consideration provided that the agreement to discharge is in writing and signed by the party against whom it is sought to enforce the promise. This convenient method of releasing an obligation differs from sec. 33-a[61] and b[62] in that the latter section looks forward to an agreement to accept a stipulated performance at a *future* date whereas the former, sec. 33(2),[63] has in view the *present* discharge or modification of duties and obligations. The latter statute is not in any way changed or modified by sections 33-a[64] and b;[65] instead, the existing law relating to discharge *in praesenti* is harmonized with discharge *in futuro*. Therefore, if the factual set-up in a particular case involves a present discharge, sec. 33(2)[66] is applicable; if, on the other hand, an agreement to accept at a future date a stipulated performance in discharge of an existing claim is involved, sec. 33-a[67] or b[68] will apply.

58. Pinnel's Case, 5 Co. Rep. 117 a, 77 Eng. Reprints 237 (K. B. 1602).

59. In Couldery v. Bartrum, 19 Ch. D. 394, 399 (1881), Jessel, M.R., said, "According to the English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take 16*s*, 6*d* in the pound; that was *nudum pactum* . . . that was one of the mysteries of the English Common Law."

60. See page 449, *supra*.

61. See page 459, *supra*.

62. See page 457, *supra*.

63. See note 60, *supra*.

64. See note 61, *supra*.

65. See note 62, *supra*.

66. See note 60, *supra*.

67. See note 61, *supra*.

68. See note 62, *supra*.