

# Michigan Law Review

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Volume 65 | Issue 3

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1967

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George E. Palmer

*University of Michigan Law School*

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### Recommended Citation

George E. Palmer, *Reformation and the Statute of Frauds*, 65 MICH. L. REV. 421 (1967).

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# REFORMATION AND THE STATUTE OF FRAUDS

George E. Palmer\*

THERE is unnecessary confusion and difference of opinion over the effect of the statute of frauds as a bar to reformation that would otherwise be available in connection with bargain transactions. Both the confusion and the conflict could be eliminated if it were clearly perceived that a decree of reformation is not the enforcement of an oral contract. Instead, it is a correction of the writing in question, or more basically a recognition that the legally significant agreement is the one the parties intended to express or describe in the writing. It is a separate question whether the writing as corrected complies with the statute of frauds so as to make the agreement enforceable.

Once this is recognized the statute of frauds should never prevent reformation. Yet the present *Restatement of Contracts* says that it does where the contract is executory,<sup>1</sup> a position based upon the erroneous conception that reformation amounts to enforcement of the oral agreement. The broad position taken by the *Restatement* has very little support in the American cases, and it seems appropriate to review the whole problem since the American Law Institute is now engaged in a revision of the *Restatement*.<sup>2</sup>

## I. REFORMATION OF EXECUTORY CONTRACTS

The principal difference of opinion has been over the effect of the statute of frauds on reformation of executory contracts. Most of the cases involve contracts for the sale of land, which are regarded as executory until delivery of a deed. Where reformation is refused it is usually for the reason already mentioned: that to grant such relief would constitute enforcement of an oral and unenforceable agreement.<sup>3</sup> There are two connected errors in this reasoning. First, it confuses reformation with enforcement of the contract, a confusion that may be caused in part by the fact that a party com-

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\* Professor of Law, University of Michigan. A.B. 1930, J.D. 1932, University of Michigan; LL.M. 1940, Columbia University. Editorial Board, Vol. 30, *Michigan Law Review*.—Ed.

1. RESTATEMENT, CONTRACTS § 509 (1932). For a fuller discussion of the section, see note 46 *infra* and accompanying text. The section is traceable to the views expressed by Williston. See 3 WILLISTON, CONTRACTS § 1555 (1920); note 49 *infra*. Corbin's views, on the other hand, support the position taken herein, that the statute of frauds should not prevent reformation otherwise available. 2 CORBIN, CONTRACTS §§ 335-43 (1950). See also Comment, 35 YALE L.J. 739 (1926).

2. At the time this is written no public proposals have been made in reference to the problem. Tentative Drafts Nos. 1 and 2 of the *Restatement of Contracts Second* (1964, 1965) have been issued but they cover only the first 132 sections.

3. An example is *Wirtz v. Guthrie*, 81 N.J. Eq. 271, 87 Atl. 134 (1913).

monly seeks in a single action to obtain both reformation and enforcement of the contract as reformed. But reformation and enforcement are separate matters, as is illustrated by the fact that they frequently occur in separate proceedings, as well as by the fact that a court may sometimes find a basis for reformation and yet conclude that the writing as reformed is still insufficient to comply with the statute of frauds so that the agreement remains unenforceable.<sup>4</sup> It is the writing as reformed that is to be tested against the statute for the purpose of determining enforceability.<sup>5</sup>

The separation of reformation from enforcement can be illustrated also in connection with insurance policies. When there has been a mistake in expressing the terms of an insurance contract, to the detriment of the insured, it usually is not discovered until after loss has occurred, and reformation is sought for the immediate purpose of enforcing the contract as reformed. But should the insured discover the mistake before loss, discover, for example, that a fire insurance policy does not correctly describe the premises meant to be insured, he would be entitled to reformation. The reformation decree operates independently of any action to enforce the contract as reformed; if no loss occurred in the case supposed there would never be such an action.

The second and more fundamental error lies in a misconception both of the significance of reformation and of the reasons underlying the remedy. In its most extreme form the misconception was expressed as follows by the Pennsylvania court: "where a written agreement is varied by oral testimony the whole contract in legal contemplation becomes parol."<sup>6</sup> In its commoner form courts tacitly assume that the oral term fully retains its oral character, that nothing of legal significance has occurred by virtue of the fact that the parties attempted to express the term in the writing. Only so can courts persist in asserting that the statute of frauds is violated because an oral agreement is being enforced. But this denies the cen-

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4. This was the situation in *Cripe v. Coates*, 124 Ind. App. 246, 116 N.E.2d 642 (1954), as well as in *Carson v. Davis*, 171 Ill. 497, 49 N.E. 701 (1898). Of course the court may dismiss the action, as in *Ham v. Johnson*, 55 Minn. 115, 56 N.W. 584 (1893), on the ground that a decree for reformation would be a useless act. The important point is that in determining the issue of enforceability the court treats the writing as corrected.

5. "Until the memorandum document is made to say what the parties intended it to say, invocation of the Statute of Frauds is premature." *Tenco, Inc. v. Manning*, 59 Wash. 2d 479, 485, 368 P.2d 372, 375 (1962). See also the cases cited notes 43 and 44 *infra*.

6. *Safe Deposit & Trust Co. v. Diamond Coal & Coke Co.*, 234 Pa. 100, 111, 83 Atl. 54, 58 (1912). The Pennsylvania Supreme Court adhered to this view in *Roberts v. Roesch*, 306 Pa. 435, 159 Atl. 870 (1932).

tral significance of reformation. When it is found that the parties intended to express a certain term in their written agreement, but mistakenly failed to do so, the legal effect is to treat the term as part of the writing.<sup>7</sup> There are two legally significant facts: first, the oral agreement reached by the parties, and second, their attempt to put the agreement into effect by expressing it in a duly executed writing. If the terms they intended to insert in the writing were sufficient to satisfy the statute of frauds, as is nearly always the case, their attempt would have made the contract enforceable had this not been frustrated by mistake. To say that reformation amounts to enforcement of the oral agreement overlooks the significance of the second operative fact, that is, the *act* of the parties by which they sought to turn the oral understanding into a legally enforceable agreement through expression in the writing. In the view of most judges, equity performs a proper role when it corrects the consequences of mistake so as to make the situation correspond, not merely to what the parties intended, but to what they also *attempted* to effectuate.<sup>8</sup>

When reformation becomes an issue it will be an uncommon case in which there was an oral agreement that the parties intended to put into effect as such—ordinarily, they either did not reach final agreement until the writing was signed, or if they did, they did not intend it to be effective until and as expressed in the writing. Quite apart from the statute of frauds, the theory that through reformation the court enforces an oral agreement will not hold up since no enforceable oral agreement was usually intended. Both of the mis-

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7. While specific performance is not a matter of right, we can see no reason why a court of equity, empowered to reform a deed or mortgage, may not, under the proofs here presented, reform and grant specific performance of this contract. By so doing, we do not decree performance of an oral contract. The contract as made by the parties is in writing. As reformed it is still a written contract, made so by the decree of the court.

Lane v. Neifert, 240 Mich. 475, 481, 215 N.W. 302, 304 (1927).

"There is no making of a new contract in such a case. There is but the making of a new instrument, either to correctly express the contract or to carry it into effect." Calhoun v. Downs, 211 Cal. 766, 770, 297 Pac. 548, 550 (1931), quoting from Oatman v. Niemeyer, 207 Cal. 424, 278 Pac. 1043 (1929). In the *Oatman* case the court reformed a deed that was ineffective as written because of indefiniteness in the description of the land. In the *Calhoun* case the court reformed a contract for the sale of land by inserting the name of the broker and the amount of his commission in blanks mistakenly left by the parties.

In *Butler v. Threlkeld*, 117 Iowa 116, 90 N.W. 584 (1902), the court considered and explicitly rejected the argument that reformation which added an option to purchase to a lease constituted enforcement of an oral contract. *Accord*, *Olson v. Erickson*, 42 Minn. 440, 44 N.W. 317 (1890).

8. This point is made in 9 WIGMORE, EVIDENCE § 2418 (3d ed. 1940), where it is said that "the process of reformation consists in making the instrument state what the parties supposed that it represented—in short, in making it represent what they *are* doing, not what they have already agreed to do."

conceptions alluded to are dispelled in the simple statement that reformation is not enforcement of the oral contract. It is not enforcement at all because that is a separate matter. And when enforcement occurs, if it does, it is the written contract as reformed that is being enforced.

Once the role of reformation is properly understood, a court should be prepared to reform a contract for the sale of land so as to add land to the description<sup>9</sup> or to eliminate land from the description;<sup>10</sup> to correct such a contract at the request of either party when the writing describes the wrong tract;<sup>11</sup> or to add terms mistakenly omitted, such as an option to purchase omitted from a lease,<sup>12</sup> or a promise to refund the purchase price of land on stated conditions.<sup>13</sup> The fact that the writing is unenforceable as it stands, because some essential term is wholly omitted or stated too indefinitely to be enforceable, should not of itself bar reformation.<sup>14</sup> If

9. See *Trout v. Goodman*, 7 Ga. 383 (1849); *Lane v. Neifert*, 240 Mich. 475, 215 N.W. 302 (1927); *Hugo v. Erickson*, 110 Neb. 602, 194 N.W. 723 (1923); *Cokins v. Frandsen*, 141 N.W.2d 796 (N.D. 1966); *Langer v. Stegerwald Lumber Co.*, 262 Wis. 383, 55 N.W.2d 389, *reh. denied*, 262 Wis. 391a, 56 N.W.2d 512 (1952), 36 A.L.R.2d 679 (1954) (lease). In another case the court reformed a lease so as to include more land in a clause by which the lessee surrendered rights under an earlier lease. *Commissioners of Lewes v. Breakwater Fisheries Co.*, 13 Del. Ch. 234, 117 Atl. 823 (Ch. 1922), *aff'd per curiam*, 14 Del. Ch. 433, 128 Atl. 920 (Sup. Ct. 1923).

10. *Olvey v. Jones*, 137 Tex. 639, 156 S.W.2d 977 (1941); *Tenco, Inc. v. Manning*, 59 Wash. 2d 479, 368 P.2d 372 (1962).

11. This was done in the following cases: *Krabbenhoft v. Gossau*, 337 Ill. 396, 169 N.E. 258 (1929) (reformation sought by purchaser); *Conaway v. Gore*, 24 Kan. 389 (1880) (deed delivered but treated the same as an executory contract); *Olson v. Erickson*, 42 Minn. 440, 44 N.W. 317 (1890) (reformation sought by purchaser); *Mosby v. Wall*, 23 Miss. 81 (1851) (reformation sought by purchaser); *Miller v. Vanicek*, 106 Neb. 661, 184 N.W. 132 (1921) (reformation sought by vendor); *Chapman v. Milliken*, 136 Wash. 74, 239 Pac. 4 (1925) (reformation sought by vendor).

12. *Butler v. Threlkeld*, 117 Iowa 116, 90 N.W. 584 (1902).

13. *Hickman v. Cave*, 115 Kan. 701, 224 Pac. 57 (1924); *accord*, *Murphy v. Rooney*, 45 Cal. 78 (1872).

14. In the following cases it was held that reformation was proper when an essential term had been mistakenly omitted from a contract for the sale of land: *Calhoun v. Downs*, 211 Cal. 766, 297 Pac. 548 (1931); *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344 (1909); *McMee v. Henry*, 163 Ky. 729, 174 S.W. 746 (1915); *Popplein v. Foley*, 61 Md. 381 (1884); *Atwood v. Mikeska*, 29 Okla. 69, 115 Pac. 1011 (1911); *Hughes v. Payne*, 22 S.D. 293, 17 N.W. 363 (1908). In *Pettyjohn v. Bowler*, 219 Minn. 55, 17 N.W.2d 82 (1944), the purchaser obtained reformation of an executory contract to sell land so as to correct a misdescription which, as written, was too indefinite to be enforceable. The court said: "A contract is sufficiently certain to be enforced if it can be made certain by reformation."

In *Cripe v. Coates*, 124 Ind. App. 246, 116 N.E.2d 642 (1954), the court said it would reform a mistaken description of land that was too indefinite to make the agreement enforceable, but then held that the description as reformed was still too indefinite. Earlier decisions of the Indiana Supreme Court were in conflict on the point. In *Gigos v. Cochran*, 54 Ind. 593 (1876), involving a contract to sell land in which the description of the land was held to be too uncertain to satisfy the statute of frauds, there is a dictum that the writing would be reformed on a proper showing of mistake, lacking in that case. But in *Lee v. Hills*, 66 Ind. 474 (1879), where mistake

the parties intended to omit the term, or to state it in the indefinite language used, there is no basis for reformation since the writing reads as they intended it should.<sup>15</sup> But if a term was mistakenly omitted or expressed, reformation should be ordered even though the effect may be to make enforceable an agreement that until reformation was not enforceable.

As the footnotes demonstrate, there is solid authority for ordering reformation in the foregoing situations, nearly all of which involved contracts for the sale of land.<sup>16</sup> In situations involving other sections of the statute of frauds, such as the provision relating to contracts to answer for the debt or default of another, the fact that the contract is executory has not usually prevented reformation.<sup>17</sup> In an important recent decision from New York, concerned with a

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was alleged in omitting an essential term from a memorandum of a contract to sell goods, it was held that the writing could not be reformed. The *Gigos* case was not cited. In *Cripe v. Coates* the court cited the *Gigos* case but not *Lee v. Hills*. Another case in accord with *Cripe v. Coates* on similar facts is *Carson v. Davis*, 171 Ill. 497, 49 N.E. 701 (1898).

Another instance of judicial refusal to allow reformation to be limited by the nature or shortcomings of the writing as it stands is *Pinkham v. Pinkham*, 60 Neb. 600, 83 N.W. 837 (1900). An instrument in the form of a deed, which recited that it was "to take effect" after the death of the grantor, was held to be testamentary and ineffective because it was not executed in conformity with the statute of wills. The grantee then sought and obtained reformation of the instrument to correspond with the intent of the grantor to make a present conveyance reserving a life estate. The court rejected the argument that this was in conflict with the rule prohibiting the reformation of wills. The right to reformation was not governed by the form in which the writing was mistakenly executed.

15. In *Hughes v. Payne*, 22 S.D. 293, 117 N.W. 363 (1908), the purchaser sought reformation of a contract for the sale of land so as to add essential terms omitted by mistake. On demurrer it was held that the bill stated a case for relief. The case was then tried and the evidence showed that the terms were intentionally omitted, perhaps in the mistaken belief that the writing as executed was legally sufficient. Reformation was refused: "It is not what the parties would have intended, if they had known better, but what they did intend at the time, informed as they were." *Hughes v. Payne*, 27 S.D. 214, 130 N.W. 81 (1911). The decision is quite proper but it would be wrong to conclude that this is because the mistake was one of law. If the parties intend to express certain terms in a written contract but fail to do so, reformation is and should be available whether the mistake is one of fact or law. But reformation is not permissible to insert terms intentionally omitted. This was settled in England at an early date. *Irnham v. Child*, 1 Bro. C.C. 92, 28 Eng. Rep. 1006 (Ch. 1781); *Townshend v. Stangroom*, 6 Ves. Jr. 328, 332, 31 Eng. Rep. 1076, 1078 (Ch. 1801); accord, RESTATEMENT, CONTRACTS § 504, comment (1932); 2 CORBIN, CONTRACTS § 340 (1950); 5 WILLISTON, CONTRACTS § 1549 (rev. ed. 1937). *Contra*, *Harper v. Gleaton*, 170 Ga. 40, 152 S.E. 70 (1930).

16. There must be many cases in which, without discussion, it was taken for granted that the statute of frauds did not bar reformation, once the necessary proof was presented. Examples are *Living v. Tyo*, 81 Colo. 58, 253 Pac. 385 (1927); *Trout v. Goodman*, 7 Ga. 383 (1847); *Mosby v. Wall*, 23 Miss. 81 (1851); *Hugo v. Erickson*, 110 Neb. 602, 194 N.W. 723 (1923); *Olvey v. Jones*, 137 Tex. 639, 156 S.W.2d 977 (1941).

17. *Enfield v. Hamilton*, 110 Conn. 319, 148 Atl. 353 (1930); *Neininger v. State*, 50 Ohio St. 394, 34 N.E. 633, 40 Am. St. Rep. 674 (1893). Other cases to the same effect are cited in CORBIN, CONTRACTS § 343 (1950).

contract which could not be performed within one year, the Court of Appeals took the position that the statute of frauds would not prevent reformation of an executory contract so as to enlarge the plaintiff's rights.<sup>18</sup> It adopted the view expressed by Chancellor Kent as early as 1817,<sup>19</sup> and disapproved *sub silentio* some later lower court decisions to the contrary.<sup>20</sup> The scope of the decision is not as yet entirely clear, but it is possible that it was not meant to extend to the case in which no enforceable contract is expressed in the writing.<sup>21</sup>

Decisions of varying scope, refusing reformation of executory contracts because of the statute of frauds, have appeared principally in Connecticut,<sup>22</sup> Idaho,<sup>23</sup> Maine,<sup>24</sup> New Jersey,<sup>25</sup> North Carolina,<sup>26</sup>

18. *Brandwein v. Provident Mut. Life Ins. Co.*, 3 N.Y.2d 491, 496, 146 N.E.2d 693, 695 (1957):

[I]t is settled that neither the Statute of Frauds nor the parol evidence prohibition forbids reformation of a written contract to include material orally agreed upon but, because of mutual mistake or unilateral mistake plus fraud, not inserted in the writing.

Under the written contract the plaintiff insurance agent's right to "collection fees" on policies he had written was to end when the agreement ended, but the plaintiff alleged that the actual agreement gave him the right to such fees so long as premiums on the particular policies should continue to be paid. The court held that the complaint stated a cause of action for reformation.

19. *Gillespie v. Moon*, 2 Johns. Ch. R. 585 (N.Y. 1817). The case involved a deed which mistakenly conveyed more land than the contract called for, a situation in which no American court would deny relief. See note 51 *infra*. But Kent took in much more territory than this in asserting that reformation could be based on "parol evidence." See note 45 *infra*.

20. *Oram v. Kirchik*, 58 N.Y.S.2d 431 (Sup. Ct. 1945); *Atlantic Metal Prods. v. Minskoff*, 267 App. Div. 1002, 48 N.Y.S.2d 436 (1944), *aff'd without opinion*, 295 N.Y. 566, 64 N.E.2d 277 (1945). The contract in the second case was for the sale of goods and reformation was sought by the seller. Without further statement of the facts the Appellate Division denied relief on the ground that "an executory agreement, within the Statute of Frauds, may not be reformed by a court of equity to include therein a material provision omitted therefrom." *Id.* at 1002, 48 N.Y.S.2d at 437. The Court of Appeals report shows that the writing contained no promise by the defendant-buyer to purchase goods from the plaintiff, whereas the latter contended that under the agreement meant to be embodied in the writing the defendant was to buy his "requirements" from the plaintiff until a stated date. The broad position taken by the Appellate Division is in conflict with the language of *Brandwein v. Provident Mut. Life Ins. Co.*, 3 N.Y.2d 491, 146 N.E.2d 693 (1957). The decision in the Court of Appeals, narrowly read, seems to constitute a refusal to reform where "the unreformed instrument was not a binding agreement," to use the court's description of the defendant's argument. It is an open question whether *Brandwein* was meant to disturb this. Such a limitation on reformation is found in a few decisions, see note 35 *infra*.

21. See note 20 *supra*.

22. *LeWitt v. Park Ecclesiastical Soc'y*, 103 Conn. 285, 130 Atl. 387 (1925) (land contract, refusing reformation so as to except a right of way from the vendor's obligation to convey an unencumbered title); *Osborn v. Phelps*, 19 Conn. 63 (1848). Reformation was ordered however in *Bryant Elec. Co. v. Stein*, 95 Conn. 211, 111 Atl. 204 (1920), on facts not easily distinguishable from those in *Osborn v. Phelps*, *supra*, except that the error in the later case, consisting of a reversal of the names of the parties, could more easily be described as a "clerical error." It would seem that the only importance of the fact that the error is "clerical" is that it shows the manifest

Rhode Island<sup>27</sup> and Pennsylvania.<sup>28</sup> An early Michigan opinion<sup>29</sup> expressing this view has since been repudiated,<sup>30</sup> and a modern attempt in Washington to find limitations imposed on reformation by the statute of frauds<sup>31</sup> has probably been eliminated by a later decision.<sup>32</sup> As previously pointed out, the reason usually given for denying relief is that reformation would constitute enforcement of an oral and unenforceable agreement. If this reason is valid it would seem to apply to any situation in which a party seeks to correct the

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injustice of refusing reformation. The decisions refusing reformation of a contract for sale of land are also difficult to reconcile with the Connecticut court's willingness to reform the contract of a surety at suit of the creditor. *Enfield v. Hamilton*, 110 Conn. 319, 148 Atl. 353 (1930).

23. *Allen v. Kitchen*, 16 Idaho 133, 100 Pac. 1052 (1909) (land contract). The decision was explicitly limited to a case in which the contract as written was unenforceable under the statute of frauds, there because of indefiniteness of the description of the land. The court said that if the written executory contract were "valid and binding on its face" it would decree reformation so that the writing would "speak the truth." *Id.* at 148, 100 Pac. at 1057.

24. *Elder v. Elder*, 10 Me. 80 (1833) (land contract). The opinion suggests that the court was limiting decision to a case in which it is sought through reformation to add to a contract, in that case so as to include land mistakenly omitted from the description: "It is one thing to limit the effect of an instrument, and another to extend it beyond what its terms import." *Id.* at 89.

25. *Davimos v. Green*, 83 N.J. Eq. 596, 92 Atl. 96 (1914) (land contract, refusing reformation so as to insert an essential term omitted by mistake); *Vogt v. Mullin*, 82 N.J. Eq. 452, 89 Atl. 533 (1913) (land contract, refusing reformation so as to except a right of way from the promise to convey an unencumbered title); *Wirtz v. Guthrie*, 81 N.J. Eq. 271, 87 Atl. 134 (1913) (land contract, refusing reformation so as to add land to the description).

26. *Davis v. Ely*, 104 N.C. 16, 10 S.E. 138 (1889) (land contract). The court refused to add land to the description through reformation, with some suggestion that the result might be otherwise if reformation were sought to cut down the amount of land.

27. *Macomber v. Peckham*, 16 R.I. 485, 17 Atl. 910 (1889) (land contract, refusing reformation to add land to the description).

28. *Roberts v. Roesch*, 306 Pa. 435, 159 Atl. 870 (1932); *Safe Deposit & Trust Co. v. Diamond Coal & Coke Co.*, 234 Pa. 100, 83 Atl. 54 (1912) (land contract, refusing reformation to correct an indefinite description).

29. *Climer v. Hovey*, 15 Mich. 18 (1866) (land contract, refusing reformation to correct a misdescription). Only one judge (Campbell) put his decision on the supposed effect of the statute of frauds. Judge Cooley left that question open.

30. *Lane v. Neifert*, 240 Mich. 475, 215 N.W. 302 (1927) (land contract, reformation ordered so as to add land to the description).

31. *Fosburg v. Sando*, 24 Wash. 2d 586, 166 P.2d 850 (1946) (land contract, refusing reformation so as to correct an indefinite description). The decision (if it can be called such, for actually no ground for reformation was shown) was limited to a case in which the contract is incomplete and therefore "void" as written. In an earlier Washington case the court had reformed an incorrect description of the land. *Chapman v. Milliken*, 136 Wash. 74, 239 Pac. 4 (1925).

32. *Tenco, Inc. v. Manning*, 59 Wash. 2d 479, 368 P.2d 372 (1962) (land contract, reformation granted to eliminate part of the land described). Although the decision in *Fosburg v. Sando*, *supra* note 31, was not expressly overruled, the general position taken in *Tenco* is inconsistent with that decision. The court said: "Until the memorandum document is made to say what the parties intended it to say, invocation of the Statute of Frauds is premature." The court's statement was taken from *Shattuck, Contracts in Washington, 1937-1957: Part II*, 34 WASH. L. REV. 345, 360-61 (1959).



writing so as to change unperformed obligations on either side. The distinction sometimes drawn between adding to and cutting down the amount of land described in a contract for the sale of land would be inappropriate. If the contract describes less land than intended, reformation in favor of the purchaser according to this theory constitutes enforcement of the oral agreement for a larger tract, since the purchaser would be entitled to specific performance of the agreement as reformed. If the contract describes more land than intended, the result of reformation in favor of the vendor would be to give him the right to specific performance of a contract calling for the amount of land covered by the oral agreement. In fact, only a very few cases take the broad position that no executory contract will be reformed.<sup>33</sup> Others distinguish between extending and limiting the scope of the contract, as in the land contract situations just described, by granting reformation that limits the scope of the writing, while refusing relief when this would enlarge its scope.<sup>34</sup> And still other cases confine the refusal of reformation to situations in which the writing is incomplete and for that reason unenforceable.<sup>35</sup>

Some of the American cases refusing reformation rely upon nineteenth century English decisions to the same effect.<sup>36</sup> English decisions granting reformation are reported as early as 1650,<sup>37</sup> but

33. *LeWitt v. Park Ecclesiastical Soc'y*, 103 Conn. 285, 130 Atl. 387 (1925); *Wirtz v. Guthrie*, 81 N.J. Eq. 271, 87 Atl. 134 (1913).

34. *Elder v. Elder*, 10 Me. 80 (1833); *Davis v. Ely*, 104 N.C. 16, 10 S.E. 138 (1889); *Macomber v. Peckham*, 16 R.I. 485, 17 Atl. 910 (1889). It is possible that this distinction would be drawn in Massachusetts, in view of the fact that it has been drawn with respect to reformation of deeds. *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418 (1869); text accompanying note 59 *infra*; see *Collins v. Stanbon*, 254 Mass. 339, 150 N.E. 90 (1926). However the reason given by the Massachusetts court for distinguishing between the two situations with respect to deeds would seem inapplicable to executory contracts.

The inadequacy of an attempted distinction between extending and restricting the scope of a contract is illustrated by *Hickman v. Cave*, 115 Kan. 701, 224 Pac. 57 (1924), where the situation would be incapable of useful analysis in such terms. Reformation was granted, as it will be in Kansas, without reference to the statute of frauds. *Conaway v. Gore*, 24 Kan. 389, 391-92 (1880).

35. *Allen v. Kitchen*, 16 Idaho 133, 100 Pac. 1052 (1909); *Fosburg v. Sando*, 24 Wash. 2d 586, 166 P.2d 85 (1946); *but cf.* note 32 *supra*. As to the situation in New York see note 20 *supra*, and for Indiana see note 14 *supra*. This limitation on reformation is discussed with approval in 35 CORNELL L.Q. 390, 394 (1931).

36. Examples are *Vogt v. Mullin*, 82 N.J. Eq. 452, 89 Atl. 533 (1913); *Safe Deposit & Trust Co. v. Diamond Coal & Coke Co.*, 234 Pa. 100, 83 Atl. 54 (1912); *Davis v. Ely*, 104 N.C. 16, 10 S.E. 138 (1889).

37. *Thin v. Thin*, 1 Ch. Rep. 162, 21 Eng. Rep. 538 (1650), reforming a deed at suit of the grantee, beneficiary under a marriage settlement, to add words "probably omitted by the negligence or slip of the clerk that ingrossed it." In *Taylor v. Beversham*, 2 Ch. Cas. 194, 22 Eng. Rep. 908 (1675), a deed was reformed at suit of the grantor so as to exclude land contained in the description by mistake. These decisions came before enactment of the English Statute of Frauds of 1677.

the development of doctrine took place principally in a series of decisions beginning in 1739.<sup>38</sup> Several of these cases involved transactions coming within the statute of frauds,<sup>39</sup> but there is nothing in the opinions to suggest that this was regarded as a barrier to reformation. In *Joynes v. Statham*,<sup>40</sup> decided in 1746, the lessee sought specific performance of a written contract to lease land for a term coming within the statute of frauds. On proof that an agreement by the lessee to pay taxes had been mistakenly omitted from the writing, it was held that his bill should be dismissed unless he accepted specific performance on the terms of the actual agreement. Lord Hardwicke added that if the lessor had been suing for specific performance of the actual agreement, he "might have been allowed [this] benefit." In 1802, however, this suggestion was rejected in *Woollam v. Hearn*,<sup>41</sup> when the court adopted the position that remained a part of English law for well over a century. Mistake in integration of contracts coming within the statute of frauds could be asserted as a defense to specific performance of the agreement as written, it was held, but not as a basis for reformation of the writing and specific performance of the agreement as reformed. Thereafter, the English courts also developed a doctrine that seemed to operate independently of the statute of frauds; as usually stated, the court would not decree "specific performance of a written contract with a parol variation."<sup>42</sup>

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38. *Townshend v. Stangroom*, 6 Ves. Jr. 328, 31 Eng. Rep. 1076 (Ch. 1801); *Calverley v. Williams*, 1 Ves. Jr. 210, 30 Eng. Rep. 306 (Ch. 1790); *Shelburne v. Inchiquin*, 1 Bro. C.C. 338, 341, 350, 28 Eng. Rep. 1166, 1167-68, 1172 (Ch. 1784); *Baker v. Paine*, 1 Ves. Sr. 456, 27 Eng. Rep. 1140 (Ch. 1750); *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. Sr. 317, 27 Eng. Rep. 1055 (Ch. 1749); *Joynes v. Statham*, 3 Atk. 388, 26 Eng. Rep. 1023 (Ch. 1746); *Langley v. Brown*, 2 Atk. 195, 203, 26 Eng. Rep. 521, 525 (Ch. 1741); *Simpson v. Vaughan*, 2 Atk. 31, 26 Eng. Rep. 415 (Ch. 1741).

39. In *Langley v. Brown*, *supra* note 38, at 203, 26 Eng. Rep. at 525, it appeared that a grantor may have mistakenly failed to retain a life estate in his conveyance of a fee. The grantor was dead, but had he been alive Lord Hardwicke said that he would have been entitled to reformation. In *Baker v. Paine*, *supra* note 38, on a bill for accounting filed by a seller of goods, Lord Hardwicke allowed reformation of the written contract and recovery on the contract as reformed. The statute of frauds was not mentioned but it seems likely that the contract was covered by the section pertaining to contracts for the sale of goods for a price of ten pounds or more. Statute of Frauds, 1677, 29 Car. 2, c. 3, § 17.

40. 3 Atk. 388, 32 Eng. Rep. 1023 (Ch. 1746). The terms of the decree appear in 6 Ves. 328, 334 note, 31 Eng. Rep. 1076, 1081 note (Ch. 1801).

41. 7 Ves. 211, 32 Eng. Rep. 86 (Ch. 1802).

42. *May v. Platt*, [1900] 1 Ch. 616, 622; 5 WILLISTON, CONTRACTS § 1553 (rev. ed. 1937). Story observed that "it is extremely difficult to perceive the principle, upon which such decisions can be supported." 1 STORY, EQUITY JURISPRUDENCE § 161 (3d ed. 1843). The idea appeared in some American cases, usually mixed in with a discussion of the statute of frauds in such fashion as to make it difficult to isolate the court's reason for refusing to reform. An example is *Davis v. Ely*, 104 N.C. 16, 10 S.E. 138 (1889), where the court refused to reform an executory contract for the sale

Both of these limitations on reformation were probably removed from English law by a decision of the Privy Council in 1923,<sup>43</sup> and therefore American decisions stemming from *Woollam v. Hearn* are clearly in need of reexamination. The view of the Privy Council was that the jurisdiction of equity to reform is "outside the prohibition of the statute"; the application of the statute is to be determined with respect to the writing *as reformed*. This is the essential position taken in a significant number of American decisions.<sup>44</sup> It is supported both by the policies underlying reformation and by the historic role of equity in cases involving the statute of frauds. It is everywhere accepted that the statute does not affect relief based upon rescission for mistake, and this seems also to have been the original view of the English chancery with respect to reformation. It was also the view adopted by some American judges, notably Chancellor Kent, during the formative period of American law. In a case in which he reformed a deed to eliminate land from the description Kent wrote:

I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract, in writing, founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively, by bill, or as a defence.<sup>45</sup>

of land, but suggested that reformation might be granted "in aid of actions for damages." *Id.* at 23, 10 S.E. at 140. It would seem that a refusal to reform on the ground that this constitutes enforcement of an oral agreement would apply equally to enforcement at law and in equity. This was the position taken in *LeWitt v. Park Ecclesiastical Soc'y*, 103 Conn. 285, 299, 130 Atl. 387, 391 (1925). The North Carolina court seems therefore to have been acting under the influence of a supposed rule against specific performance of a written contract "with a parol variation." It is believed that there is no such limitation on reformation in present American law.

43. *United States v. Motor Trucks, Ltd.*, [1924] A.C. 196. This change was foreshadowed in *Craddock Bros. v. Hunt*, [1923] 2 Ch. 136 (C.A.). The English cases are discussed in Keeton, *Rectification of Instruments for Mistake in England*, 14 N.Y.U.L.Q. REV. 319 (1937). In the opinion of the editor of POLLOCK, CONTRACTS (13th ed. Winfield 1950), this decision means that "a good deal of controversial and rather perplexed learning . . . has been swept away." *Id.* at 420.

44. *Owens v. Lackey*, 277 Ala. 537, 542, 25 So. 2d 423, 426 (1946); *Conaway v. Gore*, 24 Kan. 389 (1880); *Comstock v. Coon*, 135 Ind. 640, 35 N.E. 909 (1893); *McMee v. Henry*, 163 Ky. 729, 174 S.W. 746 (1915); *England v. Universal Fin. Co.*, 186 Md. 432, 437, 47 A.2d 389, 391 (1946); *Lane v. Neifert*, 240 Mich. 475, 215 N.W. 302 (1927); *Olson v. Erickson*, 42 Minn. 440, 44 N.W. 317 (1890); *Tenco, Inc. v. Manning*, 59 Wash. 2d 479, 368 P.2d 372 (1962).

45. *Gillespie v. Moon*, 2 Johns. Ch. R. 585, 596 (N.Y. 1817), where a deed was reformed so as to cut down the amount of land conveyed. Two years later Kent reformed an executory contract for a lease so as to enlarge the plaintiff-lessee's rights and decreed specific performance of the contract as reformed. Although he was able to rest the decision on the peculiar facts of the case he took note of *Woollam v. Hearn* with the statement:

It is surprising that the *Restatement of Contracts* should have taken the position in 1932 that no executory contract can be reformed if the contract is required to be in writing under the statute of frauds.<sup>46</sup> This is opposed to the great weight of American authority, it reflects an earlier English rule which had been rejected by the Privy Council before the *Restatement* was adopted, and the reason given to support the position does not bear examination. The reason given is that "when a writing is reformed the result is that an oral agreement is enforced . . . . The Statute bars enforcement of an executory oral promise within its scope not less when an incorrect writing is made than when no writing is made."<sup>47</sup> The faults in this kind of statement have already been discussed. A sufficient answer was given by Justice Brewer in 1880 when he was on the Kansas Supreme Court:

Another claim of counsel is, that the statute of frauds presents an insuperable obstacle to the plaintiff's recovery. . . . But [the authorities cited] . . . run along the line of the doctrine of specific performance; while the case at bar comes under the head of the reformation of contracts. The difference between the two is marked

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I am not sufficiently instructed, at present, to admit the soundness of this distinction which holds parol evidence admissible to correct a writing as *against*, but not in *favour* of a plaintiff, seeking specific performance of a contract.

Kiesselbrack v. Livingston, 4 Johns. Ch. R. 144, 148 (N.Y. 1819). In this passage, as well as in his opinion in *Gillespie v. Moon*, Kent talked in terms of the use of "parol evidence," but elsewhere in the opinion in *Kiesselbrack* he recognized that the issue turned on the statute of frauds.

Story accepted Kent's views. 1 STORY, EQUITY JURISPRUDENCE §§ 156-61 (3d ed. 1843). The English distinction between affirmative and defensive relief was considered and rejected also in *Ring v. Ashworth*, 3 Iowa 452, 459 (1856), as "unsupported by either reason or justice." See also *Osborne v. Phelps*, 19 Conn. 63, 75-83 (1848) (Ellsworth, J., dissenting).

It should be remembered that the application of the statute of frauds to suits in equity has never been unqualifiedly accepted. Chancery began to enforce specific performance in cases of part performance only a few years after the English Statute of Frauds was enacted. Pomeroy, *Specific Performance*, 36 Cyc. LAW & PROC. 523, 642-43 (1910); see generally Costigan, *Has There Been Judicial Legislation in the Interpretation and Application of the "Upon Consideration of Marriage" and Other Contract Clauses of the Statute of Frauds?*, 14 ILL. L. REV. 473 (1919). Costigan was of the opinion that the reason why Chancery held that the statute did not apply to such cases was "because its framers never intended that it should." Costigan, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329, 343 (1913).

46. RESTATEMENT, CONTRACTS § 509 (1932). Deeds are excepted from the general rule, as well as cases of "part performance," meaning presumably such part performance as will take the case out of the statute of frauds for the purpose of specific performance. In the 1937 edition of his treatise, Williston, the Reporter for the *Restatement of Contracts*, favored the distinction sometimes drawn between complete and incomplete instruments, see note 35 *supra*, and seemed to suggest that the *Restatement's* prohibition on reformation is limited to the latter—but under the language it clearly is not. 5 WILLISTON, CONTRACTS § 1555 (rev. ed. 1937). Evidently Williston's views changed between the preparation of the *Restatement* and the 1937 edition of his treatise. See note 49 *infra*.

47. RESTATEMENT, CONTRACTS § 509, comment a (1932).

and substantial. One aims to enforce a parol contract as though it were in writing; the other seeks simply to conform the written to the real contract. One would avoid the necessity of any writing; the other would simply correct the writing. The principles which control the one are essentially different from those which control the other. If a parol contract were sought to be enforced, the arguments and authorities of counsel would be in point. But the reformation of a deed already made, the correction of a contract already in writing, involve very different considerations. . . . *It would undervalue the whole doctrine of the reformation of contracts and deeds, if the case were to be treated as though no written contract had ever been made.*<sup>48</sup>

The *Restatement's* view that a case of mistake in integration is "to be treated as though no written contract had ever been made," to use Brewer's words, ignores the decisions, the function of reformation, and the reasons justifying the remedy despite the statute of frauds. The position taken in the *Restatement* seems to be directly traceable to Williston, who wrote: "Where the only effect of a refusal to reform a contract is the loss of an executory bargain which the parties intended to make, it seems impossible to give relief on any principle that would not justify the entire destruction of the Statute."<sup>49</sup> This is a serious overstatement. Reformation of an executory contract because of mistake in integration does not lead to the enforcement of an oral contract which the parties never attempted to express in writing. The statement discards as of no significance a fact that most courts have found *is* significant, that is, the attempt of the parties, frustrated through error, to put their agreement in a form that would make it legally effective under the statute.

## II. REFORMATION OF DEEDS

Where there is an oral agreement for the sale of land,<sup>50</sup> followed by a deed which mistakenly conveys more land than the agreement

48. *Conaway v. Gore*, 24 Kan. 389, 391-92 (1880). (Emphasis added.)

49. 5 WILLISTON, CONTRACTS § 1555 (rev. ed. 1937). The same statement appeared in Williston's first edition. 3 WILLISTON, CONTRACTS § 1555 (1920). There, he simply divided the cases into two groups, those granting and those refusing reformation of executory contracts, and concluded that the "latter cases seem sound." In the revised edition issued in 1937 he distinguished between cases in which the writing contains all the essential terms required by the statute and those in which it does not, see note 35 *supra*, and approved reformation in the first group. But the section retained the language quoted in the text, condemning reformation of *all* executory contracts. The result of course is a serious and inescapable contradiction in the *Williston* text. The *Restatement* followed the views expressed in the first edition.

50. If the contract was in a writing that complied with the statute of frauds and correctly stated the terms of the agreement, there will be no difficulty in reforming the deed should it mistakenly fail to conform to the written contract. There is no room in such a case for the argument that the reformation decree has the effect of enforcing an unenforceable contract.

called for, there is no dissent from the view that the deed will be reformed in accordance with the agreement.<sup>51</sup> The fact that the oral agreement was unenforceable under the statute of frauds does not stand in the way of reformation. The assertion sometimes made in connection with executory contracts, that reformation amounts to enforcement of the oral agreement, will have no weight in this situation since reformation can be based squarely on the prevention of unjust enrichment. Through mistake the grantee has received something to which he is not entitled and his retention of the benefit is unjust. The fact that the oral agreement determines the existence and measures the extent of the enrichment does not bring the relief given into conflict with the statute of frauds. The principle is the same as that applied when a party obtains restitution of his performance under an oral and unenforceable contract which the defendant has refused to perform.<sup>52</sup>

Reformation is not limited however to the prevention of unjust enrichment, as the cases dealing with executory contracts demonstrate.<sup>53</sup> This is demonstrated also in connection with deeds, for by the overwhelming weight of authority a deed will be reformed so as to *enlarge* its scope,<sup>54</sup> whether it mistakenly covers less land than intended,<sup>55</sup> or omits some interest such as an easement that was meant

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51. *Hoffman v. Chapman*, 182 Md. 208, 34 A.2d 438 (1943); *Goode v. Riley*, 153 Mass. 585, 28 N.E. 288 (1891); *Gillespie v. Moon*, 2 Johns. Ch. R. 585 (N.Y. 1817); *Boone v. Scott*, 166 Va. 644, 187 S.E. 432 (1936). Cases are collected in 2 CORBIN, CONTRACTS § 337 (1950); 6 POWELL, LAW OF REAL PROPERTY § 903 (1958); 5 WILLISTON, CONTRACTS § 1552 (rev. ed. 1937); Annot., 86 A.L.R. 448 (1933).

52. If the vendor under an oral contract for the sale of land refuses to perform, it is everywhere agreed that the purchaser is entitled to restitution of payments made on the price. *Rochlin v. West Constr. Co.*, 234 N.C. 443, 67 S.E.2d 464 (1951); 2 CORBIN, CONTRACTS § 325 (1950).

53. The only case I have seen in which a court explicitly used unjust enrichment as a limit on reformation is *Wirtz v. Guthrie*, 81 N.J. Eq. 271, 279-80, 87 Atl. 134, 137 (1913). In refusing to reform an executory contract for the sale of land in favor of a vendor who also sought specific performance, the court pointed out that the plaintiff was not seeking restitution of a benefit obtained by the other through mistake; instead he was seeking to obtain the benefit of a "parol contract." Such a limitation would apply in any event only when the statute of frauds is involved. When it is not, the role of reformation is clearly not limited to the prevention of unjust enrichment.

54. In one of the earliest English cases on the subject, a deed was reformed in favor of the grantee to supply words omitted by mistake. *Thin v. Thin*, 1 Ch. Rep. 162, 21 Eng. Rep. 538 (1650). That however was before enactment of the English Statute of Frauds of 1677.

55. *McDonald v. Yungbluth*, 46 Fed. 836 (C.C.S.D. Ohio 1891); *Dennis v. Hines*, 262 Ala. 541, 80 So. 2d 616 (1955); *Stubbs v. Standard Life Ass'n*, 125 Colo. 278, 242 P.2d 819 (1952) (mortgage); *Wykle v. Bartholomew*, 258 Ill. 358, 101 N.E. 597 (1913); *Noel's Ex'r v. Gill*, 84 Ky. 241, 1 S.W. 428 (1886); *Hitchins v. Pettingill*, 58 N.H. 386 (1878); *Tilton v. Tilton*, 9 N.H. 385 (1838); *Beardsley v. Duntley*, 69 N.Y. 577 (1877); *Kutsenkow v. Kutsenkow*, 414 Pa. 610, 202 A.2d 68 (1964); *Blodgett v. Hobart*, 18 Vt. 414 (1846) (mortgage).

to be included.<sup>56</sup> Even where there is a defective description or a complete misdescription, so that none of the land included in the oral agreement is transferred by the deed, numerous cases have ordered reformation.<sup>57</sup>

But this overwhelming weight of authority is opposed by Massachusetts,<sup>58</sup> since the decision in *Glass v. Hulbert*<sup>59</sup> its courts have refused reformation so as to add to a deed, although they are willing to cut down its scope.<sup>60</sup> The theory of the Massachusetts court is

56. *Spirt v. Albert*, 109 Conn. 292, 146 Atl. 717 (1929) (reformed to include right of way over adjoining land); *Hayes v. Flesher*, 34 Idaho 13, 198 Pac. 678 (1921) (water right added); *Gilbert v. Smith*, 49 S.W.2d 702, 86 A.L.R. 445 (Tex. Comm'n App. 1932) (reformed to include mineral interests in adjacent land).

57. *Wall v. Arrington*, 13 Ga. 88 (1853) (mortgage); *Finch v. Green*, 225 Ill. 304, 80 N.E. 318 (1907) (deed); *McLennan v. Johnston*, 60 Ill. 306 (1871) (deed); *Comstock v. Coon*, 135 Ind. 640, 35 N.E. 909 (1893) (deed); *Conaway v. Gore*, 24 Kan. 389 (1880) (deed); *Peterson v. Grover*, 20 Me. 363 (1841); *Judson v. Miller*, 106 Mich. 140, 63 N.W. 965 (1895) (deed); *Olson v. Erickson*, 42 Minn. 440, 44 N.W. 317 (1890) (executory contract); *Davenport v. Sovil*, 6 Ohio St. 459 (1856) (mortgage). In *Oatman v. Niemeyer*, 207 Cal. 424, 278 Pac. 1043 (1929), the grantee obtained reformation where through mistake the description of the land had been entirely omitted.

In many of the cases cited in the two preceding notes, reformation could be based upon the prevention of unjust enrichment, but this will not explain the decisions cited in the present note. If an oral agreement calls for the conveyance of a tract containing two hundred acres, but by mistake in description the deed transfers title to only one hundred acres, the vendor will be enriched if he is permitted to retain, or to enforce payment of, the full price. Reformation of the deed in favor of the grantee prevents this unjust enrichment, but enrichment would be prevented also if the grantee were allowed to rescind the transaction and obtain restitution of the price paid or cancellation of his obligation to pay. If the judicial attitude were that the policy of the statute of frauds is outweighed only when reformation is required in order to prevent unjust enrichment, courts would need to consider whether the enrichment could be prevented by rescission—a course that clearly does not run counter to the statute of frauds. This has not been considered. Reformation has been ordered in favor of the grantee, with the result that he realizes his contract expectations.

As to the cases cited in the present note, a typical example is *Conaway v. Gore*, in which the purchaser had paid the full price but the deed erroneously described the wrong tract so that the purchaser obtained no title to the land which was the subject matter of the oral contract, and presumably no title to any land since there is nothing in the report to indicate that the vendor owned the land actually described in the deed. Clearly the purchaser would be entitled to restitution of the price paid, and this would be the only action available on a theory of unjust enrichment. In entering a decree for reformation the court allowed relief sought by the purchaser as a means of realizing his contract expectations. To the same effect is *Judson v. Miller*, *supra*, in which reformation was granted at suit of the *grantor*, whose ultimate objective also was to enforce his contract expectations.

58. There is an early dictum to the same effect in *Maine. Elder v. Elder*, 10 Me. 80, 90 (1833). See also *Westbrook v. Harbeson*, 2 McCord Eq. 112 (S.C. 1827).

59. 102 Mass. 24, 3 Am. Rep. 418 (1869). The decision has been followed in more recent Massachusetts cases. *Wareham Sav. Bank v. Partridge*, 317 Mass. 83, 56 N.E.2d 867 (1944); *Collins v. Stanbon*, 254 Mass. 339, 150 N.E. 90 (1926).

60. The scope of a deed was limited in *Goode v. Riley*, 153 Mass. 585, 28 N.E. 228 (1891), by excising land erroneously included in the description. The course of decision in Massachusetts has been erratic. In one case the court enlarged the interest of one grantee at the expense of his co-tenant without mentioning *Glass v. Hulbert*. *Franz v. Franz*, 308 Mass. 262, 32 N.E.2d 205 (1941). More commonly the reach of *Glass v.*

that reformation in such circumstances amounts to specific enforcement of the oral agreement and that this is not permissible under the statute of frauds unless the facts bring the case within the equitable doctrine of part performance. Payment of the price and entry into possession of the land omitted from the deed have not been regarded as part performance for this purpose by the Massachusetts court,<sup>61</sup> although in one case the doctrine was applied when the purchaser had in addition made minor improvements and paid taxes on the omitted portion.<sup>62</sup>

The reasoning of the Massachusetts court is almost universally rejected as to deeds, even by courts that give the same reason for their refusal to reform executory contracts.<sup>63</sup> To take some extreme examples, in both Connecticut and Pennsylvania reformation of an executory contract is refused even to cut down the scope of the agreed conveyance,<sup>64</sup> whereas after conveyance a deed will be reformed to enlarge the scope of the grant.<sup>65</sup> For the most part there has been no attempt in these decisions to answer the reasoning of *Glass v. Hulbert*. Occasionally, it is suggested that the part performance test is satisfied by payment of the price and entry into possession,<sup>66</sup> but relief has been given when the grantee did not obtain

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*Hulbert* has been limited by emphasizing form and disregarding substance. In *Kennedy v. Poole*, 213 Mass. 495, 10 N.E. 635 (1913), the parties intended an absolute deed but instead executed a mortgage by way of deed with a defeasance clause. The court reformed by striking out the defeasance clause. In *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290 (1871), a deed reserving certain mineral rights was reformed so as to limit the scope of the reservation.

This disregard of substance was rejected in a Rhode Island case which refused reformation so as to add land to an executory contract to sell: "[I]f the effect of the change is to enlarge the scope or operation of the contract, it does not matter whether the change is made by striking out words or adding them." *Macomber v. Peckham*, 16 R.I. 485, 492, 17 Atl. 910, 912-13 (1889).

61. This was stated by way of dictum in *Glass v. Hulbert*, 102 Mass. 24, 34, 3 Am. Rep. 418, 421 (1869), and not disputed in *Andrews v. Charon*, 289 Mass. 1, 193 N.E. 737 (1935), although it is apparent in the latter case that the purchaser's 13 years' occupancy of the entire tract as his home was a principal reason for decreeing reformation in his favor.

62. *Andrews v. Charon*, *supra* note 61.

63. An example is *Judson v. Miller*, 106 Mich. 140, 143, 63 N.W. 965, 966 (1895), where the court distinguished between "executory" and "executed" contracts. Subsequently Michigan changed its position with respect to executory contracts so as to allow reformation, even to add land to the description. See notes 29 and 30 *supra*.

64. *Lewitt v. Park Ecclesiastical Soc'y*, 103 Conn. 285, 130 Atl. 387 (1925) (refusing reformation so as to except a right of way from the vendor's obligation to convey an unencumbered title); *Roberts v. Roesch*, 306 Pa. 435, 159 Atl. 870 (1932) (refusing reformation of a contract that included too much land in the description).

65. *Spirit v. Albert*, 109 Conn. 292, 146 Atl. 717 (1929) (reforming deed to include right of way over other land); *Kutsenkow v. Kutsenkow*, 414 Pa. 610, 202 A.2d 68 (1964) (reforming deed to add land to the description).

66. *Beardsley v. Duntley*, 69 N.Y. 577 (1877); *Cradock Bros. v. Hunt*, [1923] 2 Ch. 136 (C.A.). In each case however the court said that reformation was supported on other grounds as well.



possession of the omitted portion, and it is reasonably clear that the decisions as a whole do not rest on an application of the part performance doctrine.<sup>67</sup>

The prevailing attitude has been that there is no distinction in principle between adding to and subtracting from the conveyance; as said by Williston in his justification of the *Restatement's* rejection of *Glass v. Hulbert*, the distinction is "without logical merit; since even though reformation involves a diminution of the property conveyed, it nevertheless involves the creation of a conveyance based merely on oral evidence."<sup>68</sup> This statement ignores unjust enrichment as a separate basis for reformation when too much land has been conveyed: far from creating a conveyance the decree partially annuls a conveyance. Still, the distinction made in *Glass v. Hulbert* should be rejected, and if the only significance of Williston's statement were to offer an unsatisfactory reason for the rejection no harm would be done. But the statement rests upon a misconception paralleling that which led the *Restatement* to disregard the decisions and reject reformation of executory contracts. There the misconception was that reformation constitutes enforcement of the oral contract, here it is that reformation gives effect to an oral conveyance. Each idea is equally unacceptable, for as already seen the role of reformation is to correct the instrument so that it reads as the parties intended it should. The justification for doing this despite the statute of frauds is that the oral agreement was coupled in the one case with an attempt to express it in a written contract and in the other with an attempt to carry it out in a written conveyance. As to the reasoning in *Glass v. Hulbert*, it is true that reformation enlarging the scope of the grant has the effect of carrying out the oral agreement, but not by ordering the grantor to convey after his refusal to do so. It corrects what the grantor did at a time when he had not refused, but instead thought that he had made the promised conveyance.

In addition to being theoretically unsound, the Massachusetts distinction contradicts common sense, as is demonstrated when the addition to one conveyance and the subtraction from another are both involved in a single proceeding, due to the occurrence of both types of mistake in related transactions. Assume that A contracts to

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67. *McDonald v. Yungbluth*, 64 Fed. 836 (C.C.S.D. Ohio 1891); *Hitchins v. Pettin-gill*, 58 N.H. 386 (1878).

68. *RESTATEMENT, CONTRACTS*, Appendix at 230 (Tent. Draft No. 9, 1930). Essentially the same opinion is expressed in 2 *CORBIN, CONTRACTS* § 337 (1950). The *Restatement* provides for reformation of deeds without regard to whether this reduces or enlarges the scope of the grant. *RESTATEMENT, CONTRACTS* § 509 (1932).

sell Blackacre to B and an adjoining tract called Whiteacre to C, but the deed to B mistakenly includes ten acres of land forming a part of Whiteacre and the deed to C mistakenly omits the same ten acres. If the problem is approached in terms of reformation the situation can be set right only by reforming each deed, yet in Massachusetts, under *Glass v. Hulbert*, while the deed to B can be reformed so as to cut down its scope the deed to C cannot be reformed so as to enlarge its scope. Such a result is scarcely tolerable and it is unlikely that it would be tolerated in that state although no decision has been found. Other courts have sometimes solved the problem through decreeing that B holds the ten acres as constructive trustee for C and ordering a conveyance accordingly, and it is probable that this would be the solution in Massachusetts.<sup>69</sup> Yet such a solution would bring home the absurdity of adhering to *Glass v. Hulbert*: it would put the court in the position of refusing reformation in a suit by C against A, but achieving the results of reformation under another name in a suit by C against A's grantee. In every decision found, C has succeeded in recovering the ten acres from B, either by reformation of the deeds or through the use of constructive trust.<sup>70</sup>

### III. REFORMATION OF A MEMORANDUM

In *Friedman & Co. v. Newman*<sup>71</sup> the New York Court of Appeals introduced a limitation on the use of reformation that had not appeared during the previous two hundred year history of the remedy. The parties had agreed orally on a sale of ten shares of bank stock at \$1,160 a share, but through a stenographic error the written "confirmation" of the transaction, signed by both parties, listed the price as \$1,060 a share. The court dismissed the seller's action seeking reformation of the writing and recovery of damages for the buyer's breach of the agreement as reformed.<sup>72</sup> It distinguished between a writing

69. Constructive trust was used in *Cole v. Fickett*, 95 Me. 265, 49 Atl. 1066 (1901); *Craddock Bros. v. Hunt*, [1923] 2 Ch. 136 (C.A.); *Leuty v. Hillas*, 2 De G. & J. 110, 44 Eng. Rep. 929 (Ch. 1858). The Maine decision is particularly significant because a dictum in an early case from that state expresses the same view found in *Glass v. Hulbert*. *Elder v. Elder*, 10 Me. 80, 90 (1833). An indication that Massachusetts would not adhere to the consequences of *Glass v. Hulbert* in the situation discussed in the text is furnished by *Franz v. Franz*, 308 Mass. 262, 32 N.E.2d 205 (1941).

70. Reformation of both deeds was decreed in *Jenkins v. Bates*, 230 Miss. 406, 92 So. 2d 655 (1957); *Birchett v. Anderson*, 160 Miss. 144, 133 So. 129 (1931); *Kreiger v. Rizzo*, 105 Pa. Super. 429, 161 Atl. 483 (1932). The relief has taken this form also where the descriptions are by mistake completely interchanged. *McMahon v. Tanner*, 122 Utah 333, 249 P.2d 502 (1952).

71. 255 N.Y. 340, 174 N.E. 703 (1931).

72. The court also held that the buyer could not recover damages for breach of a contract to sell the shares at \$1,060 a share. There was no such contract the court

that "integrates" an oral agreement and one that merely "evidences" the agreement. The first type of writing is a "jural act"<sup>73</sup> which in some circumstances at least will be reformed for mistake in integration. Since, in the court's opinion, the writing in issue was not an integration, it was unnecessary to determine what those circumstances were.<sup>74</sup> The second type of writing is not a "jural act" and because of this it will never be reformed even though there was a mistake in describing the terms of the agreement in the writing. Reformation would give the memorandum "an evidentiary force which in its actual form it did not have."<sup>75</sup> Why this should not be done is left unexplained, and certainly an explanation is called for since reformation of an "integrated" contract gives the writing a legal force "which in its actual form it did not have."<sup>76</sup>

Under the New York decisions a "note or memorandum" may be sufficient to satisfy the statute of frauds even though it is not an expression of the agreement to which the parol evidence rule applies.<sup>77</sup> The distinction drawn in the *Friedman* case seemingly is

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said. The memorandum was merely evidence of such a contract which was overcome by other evidence. It was therefore unnecessary for the court "to exercise such equitable powers as it might have to defeat an unconscionable assertion by the defendant of a legal right." *Id.* at 344, 174 N.E. at 704.

73. The term may have been borrowed from Wigmore, who regarded the parol evidence rule as concerned with the constitution of "jural acts," which he defined as "conduct having jural effectiveness." 9 WIGMORE, EVIDENCE §§ 2401, 2426 (3d ed. 1940).

74. The case would of course present some of the issues previously discussed; specifically, whether an executory contract will be reformed, and whether any distinction is to be drawn between enlarging and limiting the scope of the writing. These problems are discussed in a good comment on the *Friedman* case in 40 YALE L.J. 795 (1931).

75. 255 N.Y. at 346, 174 N.E. at 705.

76. This typifies almost the entire opinion, which contains numerous statements boldly asserting that there is a distinction without explaining why this should make a legal difference. Thus: "Equity has at times power to reform an instrument which conclusively embodies the intent of the parties; it has no power to reconstitute an evidentiary writing." *Id.* at 347, 174 N.E. at 706. A writing does not conclusively embody the intent of the parties when it is subject to reformation. Reformation "reconstitutes" the writing whether it was meant to conclusively embody intent or to serve only as evidence thereof. The reason for reforming is the same in each case: to make the writing read as the parties intended it should.

77. *Mesibov, Glinert & Levy v. Cohen Bros. Mfg. Co.*, 245 N.Y. 305, 157 N.E. 148 (1927); *N. E. D. Holding Co. v. McKinley*, 246 N.Y. 40, 157 N.E. 923 (1927). In the first case Cardozo spoke of the "difference . . . between a contract in writing, and a note or memorandum of a contract. The one is subject to the parol evidence rule; the other may be shown by parol to be inaccurate or incomplete . . ." 245 N.Y. at 313, 157 N.E. at 150. See generally 2 CORBIN, CONTRACTS § 508 (1950).

The usual statute of frauds follows section 4 of the English Statute of Frauds of 1677 in providing that either "the agreement" or some "memorandum or note thereof" shall be in writing. The section in the English statute covering sales of goods (§ 17) refers only to a "note or memorandum" in writing, and this language was adopted in § 4 of the Uniform Sales Act, which covers sales and contracts to sell choses in action as well as goods. This section was contained in N.Y. PERS. PROP. L. § 85. Since the decision in the *Friedman* case, New York has adopted the Uniform Commercial

between writings to which the parol evidence rule applies and those to which it does not.<sup>78</sup> The only sense to such a distinction is in relation to transactions not covered by the statute of frauds. As to these, reformation is in theory limited to situations in which the parol evidence rule precludes recognition and enforcement of the actual agreement until reformation is obtained.<sup>79</sup> If this is not the case, that is, if the parol evidence rule is inapplicable, reformation could be refused simply because it is not needed for such enforcement.<sup>80</sup> But when the New York court universalized this limitation on reformation, by making it applicable to contracts covered by the statute of frauds, the effect was to bar enforcement of the true agreement, as occurred in the *Friedman* case. A theoretical limit on reformation, derived from the simple fact that the remedy is not needed in order to achieve the legal result sought, is turned into a limit on the remedy which prevents achievement of that result.

If this is to be done it should be for reasons found in the language or policy of the statute of frauds, but none are suggested by the New York court. The truth is that the language and policy of the statute favor equal treatment of the two classes of cases, those in which the writing was intended as an integration and those in which it was merely evidentiary. It is a close and difficult question whether the writing in the *Friedman* case was an "integration," whether, that

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Code, in which § 2-201 covers sales of goods and § 8-319 covers sales of securities. Under present New York law, combining the decision in *Friedman* with the enactment of the Uniform Commercial Code, the result in that case would still obtain as to a contract for the sale of securities but not as to a contract for the sale of goods. As to the latter § 2-201 of the Code provides that the writing "is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing." It is reasonably clear that this section changes the result in *Friedman* as to sales of goods, although § 2-202 of the Code, dealing with the parol evidence rule, creates some ambiguity. Actually, the substance of § 2-201 was enacted in New York in 1960 by the amendment of § 85 of the Personal Property Law. The study of the New York Law Revision Commission leading to such enactment is N.Y. Legis. Doc. No. 65 (F) (1960). The 1960 changes were replaced in 1962 by the foregoing sections of the Uniform Commercial Code.

78. This appears from the court's statement that the memorandum "is not subject to the parol evidence rule, for it does not integrate, but merely evidences, the oral agreement." 255 N.Y. at 343, 174 N.E. at 704.

79. The parol evidence rule is never a bar to reformation when it is established that a writing mistakenly fails to express the terms the parties intended to express therein. Palmer, *Reformation and The Parol Evidence Rule*, to be published in a subsequent issue of 65 MICH. L. REV.

80. The emphasis on this being a theoretical limitation is because it is believed a court will not in fact act this way. If a party asks for reformation in order to enforce the actual agreement, there would be little sense in the court trying to determine what may be a difficult question of integration if it is going to make no difference in the result. Of course, if something turns on the answer, such as the right to jury trial, the question must be answered.

is, the parties intended that it should be looked to exclusively for the purpose of ascertaining the terms of the agreement.<sup>81</sup> The answer to the question seems to have no real bearing on the application of a statute "for prevention of frauds and perjuries."<sup>82</sup> The significant facts in either event are that the parties reached an agreement which they attempted either to embody or to describe in a writing. It is this attempt, prevented of complete fulfillment by mistake, that justifies reformation despite the statute of frauds. The statute should be applied to the writing as reformed; in the one case the writing then expresses the terms of the actual agreement, in the other it evidences those terms.

Decisions from other states have ignored the distinction made in the *Friedman* case and there is no reason to believe it will have influence outside of New York. There are cases granting reformation where the writing would not be regarded as a "jural act" under the New York view, although no point was made of the fact.<sup>83</sup>

#### IV. CONCLUSION

The statute of frauds should not prevent reformation in any case in which it is found by clear and convincing evidence that through mistake a writing fails to express the terms the parties to an agreement intended to express in the writing. This should be true whether the contract was executed or executory, whether the effect is to enlarge or restrict the scope of the instrument, whether the writing was intended to integrate the terms of the transaction or merely provide evidence of those terms, and whether or not the writing before reformation was sufficient to satisfy the requirements of the statute.

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81. Thus Corbin is of the opinion that the writing in the *Friedman* case was an integration, to which the parol evidence rule would apply. 2 CORBIN, CONTRACTS § 342 (1950).

82. The quoted language is from the title of the English Statute of Frauds of 1677. 29 Car. 2, c. 3. In 1953 the New York Law Revision Commission recommended that the rule of the *Friedman* case be eliminated by statute as to contracts not to be performed within one year. N.Y. Legis. Doc. No. 65 (O) (1953). An accompanying study by Professor Braucher states that "any distinction between a formal contract and a mere memorandum should result in greater readiness to correct the less formal document." *Id.* at 46. The recommendation was made again in 1957 but no legislation has resulted. N.Y. Legis. Doc. No. 65 (A) (1957).

83. *McMee v. Henry*, 163 Ky. 729, 174 S.W. 746 (1915); *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344 (1909); *Hughes v. Payne*, 22 S.D. 293, 117 N.W. 363 (1908). The distinction is disapproved in the following discussions of the *Friedman* case: 2 CORBIN, CONTRACTS § 342 (1950); 16 CORNELL L.Q. 390 (1931); 44 HARV. L. REV. 866 (1931); 29 MICH. L. REV. 1085 (1931); 40 YALE L.J. 795 (1931). Williston called the distinction "ultra-technical." 5 WILLISTON, CONTRACTS § 1552 n.2 (rev. ed. 1937).