Modification of a Contract in New York: Criteria for Enforcement

This comment compares and evaluates the criteria for determining the validity of three classes of contract modifications in New York.

The initial discussion deals with informal modifications under consideration theory. Traditional consideration theory is said to allow enforcement of a contract modification only if it is supported by an additional consideration. In fact, the court of appeals never adopted this rule for New York. It enforced a larger group of modifications by requiring a direct showing of consent to the change; no one act was selected by the court to represent the consent of the parties. Only when the court believed that the requisite consent was lacking—for example due to economic coercion¹—would it state that the modification was unenforceable because it lacked additional consideration. Thus, the court enforced gratuitously modified contracts, that is, modifications where the promisor received nothing in exchange for his new promise.

Further indication that the court of appeals believed consideration theory was too limiting is illustrated by a discussion of formal modifications under seal. In 1937 and again in 1941, the court stated that the demands of the business community required the enforcement of all agreements that employed a formal enforcement device, the seal. By eliminating the requirement of a bargained-for exchange for original contracts, the gratuitous contract became enforceable. As a result, the gratuitous contract could become the subject of a modification, and the realm of enforceable modifications was expanded to include the modified gratuitous promise. However, the defense of non-consent, i.e., economic coercion, fraud or mistake, was available to negate the seal’s inherent presumption of enforceability.

¹ Economic coercion is a shorthand term to describe the defenses of undue influence and duress of goods.

While consent is also eliminated by fraud or mistake, practical considerations limit this comment to an analysis of the economic coercion cases in support of the conclusion that the court of appeals created a consent rule for informal modifications.

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The legislative response to these two earlier enforcement devices is embodied in section 33(2) of the Personal Property Laws, which created a third enforcement device for modifications; it required the terms of the modification to be included in a signed writing. The Law Revision Commission recommended this after it found fault with the earlier devices. The Commission believed that the consent rule created unnecessary uncertainty for the enforcement of contract modifications; the existence of consent, a prerequisite to enforcement, was always a question for future determination. However, the Commission failed to recognize that some questions must always be left to future determination, through an enforcement device or defenses to an enforcement device, if enforcement of nonconsensual agreements is to be avoided. No formal enforcement device can, per se, communicate to the court whether, in fact, an agreement was made voluntarily. The Commission also believed that the court of appeals' revival of the seal was unjustified, as it no longer effectively indicated that the parties intended an enforceable agreement; the form of the seal had degenerated to a printed “L.S.” In addition, the Commission did not believe that the gratuitous contract or the modified gratuitous contract should be enforced; it desired a return to consideration theory. The legislature, bowing to the Commission's desires, eliminated the seal as an effective enforcement device.

Section 33(2) did not have its intended effect. The court of appeals recognized that the defenses of nonconsent were necessary for the statute to create a system that did not enforce involuntary modifications. In addition, the court continued to enforce informal modifications under the consent rule. Certainty of contract did not achieve the absolute significance that the Commission hoped for. Yet, the court did not disagree with the Commission's aim of eliminating the enforcement of gratuitous agreements; perhaps they lacked the great business significance the court once thought they held.

The final section of the comment deals with section 33-c of the Personal Property Laws, which created a private statute of frauds that gave contracting parties the power to prohibit all modifications not included in a signed writing. This was necessary since the protective rule that formal contracts could be modified only in a writing was eliminated with the seal. Here, too, the Commission created a rule that elevated certainty of contract over other considerations. The statute was drafted without exceptions so that adopting parties could be certain

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2 See note 51 infra.
3 See note 50 infra.
4 See note 98 infra.
that oral modification was impossible. However, an exception should be created to prevent the statute from being used as a shield for fraud; one who promises to modify a contract to obtain performance by another and then uses the statute to protect himself from the reciprocal obligation should not be protected.

With an unwavering eye on increasing certainty of contract, the Commission proposed two statutes that could have had a damaging effect on the law of contract modifications in New York. The court of appeals avoided this result through judicial amendment of the statutes. The historic backdrop and present status of this problem will now be examined.

I. INFORMAL MODIFICATION: CONSIDERATION THEORY

An enforcement device is a signal, sanctioned by the state, that communicates to private parties and to enforcement agencies when an enforceable agreement has been made. When this signal is a standardized act, such as the affixation of a seal or signing of a document, the enforcement device is formal, its ultimate nature being predetermined by the state. When the signal is not standardized, as in the series of acts constituting a bargained-for exchange, the enforcement device is informal, its ultimate nature being determined by the parties' negotiations.

Consideration is an informal enforcement device. An original contract using this informal device is enforced only when the parties have established a bargained-for exchange. How can this bargain be changed? It was generally believed that the modification of a pre-existing contract was enforceable only when an additional consideration supported the change. This conclusion was consistent with the rule for enforcing informal original contracts and was supported by the same reasoning. An examination of the cases reveals that the court of appeals never adopted this rule, but rather enforced a larger set of informal modifications by requiring only a direct proof of the parties' consent to the change.

Bartlett v. Wyman introduced the traditional rule for informal modification. Wyman had shipped on the brig Regent with articles that specified wages of seventeen dollars a month. Wyman sued Bartlett, the ship's master, on a set of modified articles that increased his wages.

5 "Agreement" is defined to include original contracts and modifications.
6 The use of promissory estoppel to support original contracts in New York is limited. See 1 A. Corbin, Contracts § 193-209 (1950).
wages to thirty dollars a month. The court accepted Bartlett's claim that just before the crew demanded increased wages, "there was a rumour at Savannah that an embargo was about to be laid by congress [sic], which occasioned a rise in seamen's wages, and many other sailors, in the port of Savannah, left their vessels, and went on board of others." The Regent's crew then threatened to leave ship unless their wages were increased, and as a result Bartlett modified the shipping articles.

Expanding on one of the five grounds given by the court for its reversal of Wyman's jury verdict, later courts have cited the case as holding that: "[A] promise made to induce a party to do that which he is already bound by contract to perform is without consideration." They failed to state that the Bartlett court viewed the modification as tainted by economic coercion.

That same month another case was decided, Lattimore v. Harsen, which established a rule that is contrary to the traditional view of Bartlett. Harsen had a contract with Lattimore to build a cartway. They also agreed to a liquidated damages penalty if the contract were breached. The contract was later modified, and the court enforced this modification. The court in Lattimore did not mention the Bartlett decision; it enforced the modification, ostensibly because a waiver of the liquidated damages provided for in the original contract was a consideration for the modification. However, this could not constitute additional consideration, for whenever a contract is breached, the defaulting party takes the risk of paying damages. The risk in Lattimore was no greater, as a court is not bound by private penalties.

What then explains the apparent inconsistency in these decisions?

8 14 Johns. at 261. Wyman offered evidence that "there had been no difference, or dispute, between him [Bartlett] and his crew" that would have forced Bartlett into signing the articles. Id. at 260. When the articles were produced in court an indorsement was included that had been made without the crew's knowledge: "The seamen having demanded an increase of wages, and being apprehensive that they might desert if this was not done, these articles were drawn up as a mere matter of form; it is, however, understood that the articles signed in New-York [sic] are to bind, and those signed here to be of no avail. . . ." Id. at 261.

10 14 Johns. at 262.
11 14 Johns. 330 (Sup. Ct. N.Y. 1817).
12 In the words of the court, Lattimore "became dissatisfied with [the] contract, and determined to abandon it. The defendant then agreed, if they would go on and complete the work, he would pay them by the day for such service, and the materials found, without reference to the written contract." Id.
13 "[I]f [Lattimore] chose to incur this penalty, [he] had a right to do so, and notice of such intention was given to the defendant, upon which he entered into the new arrangement. Here was a sufficient consideration for this promise. . . ." Id. at 331.
It seems that the Bartlett rule rested on a finding of economic coercion. In Bartlett the rumor of an embargo had caused a general rise in seamen's wages, which left the ship's master no choice but to accede to the crew's demands. In Lattimore there was nothing to indicate a general rise in the market for contractors. In the light of Bartlett, suggests that the enforcement device for an informal modification is consent and that the existence of economic coercion negates this consent. The failure of the court to frame its decisions specifically in terms of consent theory helps to explain the notion that New York had two independent lines of authority in the area of contract modification.15

In 1921 the court of appeals moved closer to an explicit statement of a consent rule in Schwartzreich v. Bauman-Basch, Inc. Schwartzreich entered an employment contract with Bauman-Basch at a salary of ninety dollars per week, but before beginning work he received an offer of higher wages from another firm. Using this as leverage, Schwartzreich obtained a raise of ten dollars per week from Bauman-Basch. After Schwartzreich's discharge in December of that year, he brought an action for damages under the modified contract.

The court agreed that Bauman-Basch's defense of no additional consideration would have been controlling if the second agreement had been a modification. "Where, however, an existing contract is terminated by consent of both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration."17 Although the court used language from the Lattimore line of cases to support this statement, it cited no

14 This is not to suggest that it is impossible for there to have been economic coercion, but simply that there were no implications in the report of the case.
15 See, e.g., 1936 L.R.C. REPORT 248.
16 231 N.Y. 196, 131 N.E. 887 (1921).
17 231 N.Y. at 203, 131 N.E. at 889.
18 231 N.Y. at 202. 131 N.E. at 889.
19 See, e.g., 1936 L.R.C. REPORT 248.
20 231 N.Y. 196, 131 N.E. 887 (1921).
21 231 N.Y. at 203, 131 N.E. at 889.
22 231 N.Y. at 202. 131 N.E. at 889.

Several cases appeared after Lattimore that followed its scheme. In Hart v. Lauman, 29 Barb. 410, 416 (Sup. Ct. N.Y. 1859), the court said: "[W]hat took place between the parties, followed as it was by the plaintiff's quitting the work, was such a rescission of the original contract in respect to that portion of the work, as would have precluded the defendants from maintaining an action to recover damages for its nonperformance, afterwards. The parties were then in a situation to make a new agreement, for that part of the work, which would be binding, and would control, instead of the first agreement." See Stewart & Howell v. Keteltas, 36 N.Y. 388, 392 (1867); Spier v. Hyde, 78 App. Div. 151, 158 (1903).

In one very interesting court of appeals opinion the conceptual scheme of Lattimore was not followed, and the change in the original contract was enforced; Judge Wright stated: "It is conceded that the parties might have cancelled the agreement, and, if they could do this, they could certainly modify it." Meech v. The City of Buffalo, 29 N.Y. 198, 213-14 (1864). However, while the other members of the court agreed with Judge
precedent for the proposition that the rescission of an old contract and execution of a new contract could be simultaneous. Professors Corbin and Williston believed that this distinction between "modification" and simultaneous rescission plus "new" contract, rested on form and was without basis in substance.10

Looking to form, the court made one distinction to separate these two methods of changing a contract: "The determining factor is the rescission by consent. Provided this is the expressed and acted upon intention, the time of the rescission, whether a moment before or at the same time as the making of the new contract, is unimportant."20 However, the reported facts of the case do not support this proposition. There is nothing in Mr. Bauman's testimony for the defendant that

Wright's conclusion, Judge Johnson was moved to justify the conclusion on grounds more clearly in line with the Lattimore language: "But the first contract was not the one under which the work was done. It was commenced under the first contract, but was continued and completed under a new contract, which provided for the payment of an amount equal to both assessments." Id. at 218. It may have been that the good judge was disturbed by the suggestion that a contract could be modified without additional consideration.

The Lattimore and Bartlett lines seem to have been cited together only once. After discussing the Bartlett line of cases, the court of appeals explained that: "It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of Lattimore v. Harsen, 14 Johns. 330 (1817)." Vanderbilt v. Schreyer, 91 N.Y. 392, 402 (1883) (emphasis added). The court moved closer to Schwartzreich, implying that the real distinction between the two lines of authority is the existence of a good faith modification: "It necessarily follows from these authorities that the plaintiff had no right to impose, as a condition to the performance of his contract, that the payment of said mortgage should be guaranteed." Id. (emphasis added). However, the parties might have agreed that the defendant should guarantee performance of the contract and the court would have waived the requirement of an additional consideration by using the Lattimore line of cases. Yet, it still remained for the Schwartzreich court to bring the Lattimore and Bartlett lines to a direct confrontation by stating that the rescission and new contract could be created simultaneously; in addition, the court for the first time made clear that the Lattimore line was based on a consent rule.

10 "But unless the mutual rescission is distinctly antecedent in time to the new agreement, . . . the case falls exactly within the terms of the supposed general rule, there is no true rescission, and the distinction drawn is a distinction without a difference." Corbin, Hard Cases Make Good Law, 33 YALE L.J. 78, 80 (1923). "The plaintiff gets judgment, therefore, not because he had promised anything new or anything that he was not at the instant of the promise under an existing duty to do, not because there is a 'difference in principle' between a modification and this kind of a 'recission,' but because we want him to have the money that the defendant promised. To reach this result we should say in words, what we must say in effect, that on facts like these doing or promising to do what one is under an existing legal duty to do is a sufficient consideration for a promise." Id. at 81-82 n.11. See Williston, Consideration in Bilateral Contracts, 27 HARV. L. REV. 503, 516 (1914).

20 231 N.Y. at 203-04, 131 N.E. at 890.
approximates a statement of "rescission." Schwartzreich testified that Mr. Bauman had said "you do not want this contract any more because the new one takes its place." Apparently the court felt this was an "expressed" statement of rescission. If the court were not formalistic enough to require the exact term "rescission," it is difficult to see the difference in form between "modification" and rescission followed by a "new" contract. Certainly Mr. Bauman's statement could have been made if this had been a mere modification. Looking to substance, the court justified distinguishing modification from rescission plus "new" contract by stating that "where the new contract gives any new privilege or advantage to the promisee, a consideration has been recognized . . .". Yet, logically, this same statement could also be applied to a modified contract. It is true that the later reading of Bartlett required an additional consideration from the promisee to support a modification, but the court gave no reason for changing the rule for "new" contracts—it merely declared a difference in principle.

Thus, the court extended Lattimore to allow a simultaneous rescission of the original contract and the creation of a "new" contract. Yet, the Bartlett rule for "modification" agreements was not overruled. Although the court seemed to grant itself an unjustified discretion to enforce or defeat changes in contract terms simply by selecting one of two essentially identical categories, a careful examination of Schwartzreich demonstrates that the court was concerned with an important distinction.

When Schwartzreich was decided the old fear of enforcing a modification obtained by economic coercion had not been forgotten, and

21 Id. at 199-200, 131 N.E. at 88.
22 Id. at 200, 131 N.E. at 889.
23 The Commission also had trouble deciding what the court meant by the term "rescission": "Some evidence in addition to the making of the new contract is, therefore, necessary to a finding of rescission of the old contract. Such evidence will usually be statements made by the parties, but, as in the case under discussion, it may also be acts such as the discarding of the old writing and the execution of the new one." 1936 L.R.C. REPORT 255. Significantly, neither the Commission nor the court made any attempt to distinguish the type of act or statement that would separate a modification from the simultaneous rescission plus new contract.
24 231 N.Y. at 203, 131 N.E. at 889.
25 Triangle Waist Co. v. Todd, 223 N.Y. 27, 119 N.E. 85 (1918), was cited as authority for the rule that no additional consideration is needed to enforce the "new" contract. The facts of the Triangle case do not support that proposition. There the second agreement "gave the plaintiff [the promisor, not the promisee, as suggested by the Schwartzreich statement] an option to renew the employment for a second year. This was a right which the first agreement did not give; and hence, there was no lack of consideration for the larger rate of payment." Id. at 29, 119 N.E. at 85. Thus, Triangle nestles comfortably within the traditional statement of Bartlett; the facts of the Schwartzreich case lack this exchange of an additional consideration.
for this reason, the court stated that in deciding the question of enforceability "the determining factor [was] the rescission by consent."26 Through the word "consent" the court implied that a good faith agreement was the standard for deciding whether a modified contract was enforceable.27 If economic coercion were suspected, the court could invoke Bartlett and claim that the acts of the parties had created a modification which failed for lack of additional consideration. If economic coercion were not present, the court could invoke Lattimore and enforce the modified contract without additional consideration by calling it a simultaneous rescission followed by a new contract.

It may appear strange that the court did not bring Bartlett and Lattimore together to create a single rule for all changes in original contracts. However, a single rule based explicitly on the existence of consent to the change could well have stirred up dissent among the advocates of consideration theory. Furthermore, an explicit consent rule would have focused attention on the court's reluctance to define the elements of consent, a definition that would have been difficult to make at that time.28

26 231 N.Y. at 203, 131 N.E. at 890 (emphasis added). The term "consent" was used more than once: "Where, however, an existing contract is terminated by consent of both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration." Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 203, 131 N.E. 889 (1921).

27 At the time Schwartzreich was decided, "consent" was defined as a concurrence of wills. "[C]onsent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers." 1 Bouvwa, Law Dictionary 611 (8th ed. 1914). The definition of the term "consent" suggests that at the very least the court was thinking in terms of not enforcing modifications obtained by economic coercion: undue influence and duress of goods. The idea that a private agreement must be the result of a serious and determined act was the thrust of the undue influence defense in equity; the defense was initially aimed "at protection for the mentally or physically inadequate, whose inadequacy fell short of a total lack of legal capacity." Dawson, Economic Duress—An Essay in Perspective, 45 Mich. L. Rev. 253, 262 (1947). Later, during the nineteenth century, "[t]he test for the existence of undue influence became the presence or absence of 'free agency.'" Id. at 263. The idea that a private agreement must be the result of a freely given act was the essence of the duress of goods cases; "[i]t became necessary to demonstrate not merely that the means used were wrongful, by the tests of the criminal law or the law of tort, but also that the result was substantial interference with freedom of choice, at the particular time and place." Id. at 256.

28 The Schwartzreich case was at law, not equity. Even as much as seven years after the Schwartzreich decision the court suggested that in the area of economic coercion distinctions between law and equity remained: "[U]ndue influence and duress have legal definitions which are applied in the common-law courts . . . , but the use of these terms in equity is wider and less precise." Scheinberg v. Scheinberg, 249 N.Y. 277, 282, 164 N.E. 98, 99 (1928). The court may have been unwilling to tie itself down to the then existing definitions of duress or undue influence and at the same time been unwilling to create definite precedent broadening those defenses. "[T]he problem of the unequal exchange must be approached in terms of the specific conditions which affect the bargaining power and the motivations of individuals in particular transactions. This mode of analysis re-
What then are the implications of adopting consent as an enforcement device for informal modifications? Looking at the enforcement device as a limitation on the scope of enforceable modifications, the consent rule allows a greater number of modifications to be enforced than would an enforcement device of additional consideration. In addition, since the definition of a modification presupposes an enforceable original contract, the use of an “easier” rule for modifications than for original contracts raises the possibility that a seemingly enforceable modification will be invalid because the original contract was unenforceable. If the original contract is not examined, the court risks enforcing modified gratuitous contracts and thereby frustrating the guarding function of the bargained-for exchange requirement for original contracts. The court must also distinguish modifications from original contracts in order to avoid enforcing a gratuitous original contract as if it were a modification.

Viewing the enforcement device solely as a signal of the parties’ intention, the consent rule stands up well in an area heavily populated with nonprofessionals. The requirement of a bargained-for exchange in the original contract is based on the assumption that when the parties provide for such an exchange they intend to create a binding agreement. Yet, that is merely a prediction of their actual intention. Under Schwartzreich intent is never presumed; it must be proved. Had additional consideration been selected as the enforcement device the parties’ intent would again be presumed. Certain defenses would then be made available by the court to rebut the presumption of intent raised by the existence of additional consideration, thereby avoiding the enforcement of nonconsensual agreements. However, parties intending to create a valid modification without additional consideration would be prevented from doing so. An indiscriminate requirement of additional consideration then results in a demand that one party make a gift to the other, something not the product of private negotiation. This would be a substitution of the court’s judgment for that of the parties.29

quires a survey in each case, not only of the gains and losses involved in the transaction itself, but of the means employed in the bargaining processes that precede it.” Dawson, supra note 27, at 282.

29 Schwartzreich could be read as recognizing goodwill as sufficient consideration. For example, a price reduction on a contract between manufacturer and wholesaler might reflect a recent, general trend in the market. While the manufacturer could hold the wholesaler to their earlier agreement, he may consider it good business practice to modify the contract. Schwartzreich could also be read as reflecting the values of a changing society; since society may have been willing to sanction the use of leverage to obtain a modification, the court should follow suit by eliminating the requirement of an additional consideration. This would also require narrowing the defense of economic coercion.
While it may be that the consent rule elevated freedom of contract over certainty of contract, this was unavoidable. The certainty generated by the presumptions inherent in a preselected signal can never be obtained by amateurs, but only by knowledgeable professionals. Yet, the decision was criticized by the Law Revision Commission for the uncertainty that it generated for business transactions:

Whether the evidence shows an intention by both parties to rescind the old contract will in most cases be a question for the jury. Thus, until the jury decides, the contractual rights of the parties can only be described by a prediction of what a jury will do, always an uncertain process.30

Unless the court is willing to prohibit the enforcement of all informal modifications or to enforce all informal modifications regardless of the parties' actual intent, the contractual rights of the parties must always be uncertain; the actual intent of the parties, whether ascertained through an enforcement device of consent or by a defense to the presumption of enforceability, must always be a question for future determination. There is nothing that the parties can do at the time of modification to conclusively establish that the transaction had the consent of both parties. If in fact there are professionals to take advantage of the presumptions inherent in a preselected signal, certainty of contract can be increased for these persons. That the court recognized this possibility can be inferred from its revival of the seal, discussed in the next section. However, this device was used to supplement, not replace, the very flexible, informal enforcement device of consent.

II. Formal Modification: The Seal

The creation of a consent rule for modifications leads to questioning the bargained-for exchange requirement for original informal contracts. Yet, the court did not broaden the informal enforcement device and eliminate the consideration requirement; if it had, the gratuitous agreement would have been enforceable. Advocates of consideration theory claimed that gratuitous agreements were often made without consent to enforcement, and, even with such consent, were not important enough to be enforced. Had consent been selected as the enforcement device for all informal agreements, the parties' intent would have been a question for the jury, and this would have eliminated the need to preclude the enforcement of gratuitous agreements

30 1936 L.R.C. REPORT 255.
on the basis of a prediction. Whether such agreements were important enough to justify use of court time and money should have been determined by examining the needs of the business community.

The court did make the gratuitous agreement enforceable, however, by breathing new life into a crippled formal enforcement device, the seal. Under early New York case law the seal was an effective alternative to consideration as an enforcement device for modifications. This was altered by an 1830 statute which provided that the seal was only "presumptive evidence of sufficient consideration." The statute survived in basically the same form until September 1, 1935; throughout this period the court of appeals held that a sealed instrument could be defeated by evidence of want or failure of consideration. The court's interpretation of the 1830 legislation eliminated the seal as an effective enforcement alternative to consideration; in 1937 this interpretation was reversed.

This striking reversal was made in Cochran v. Taylor. Taylor gave Chenault a sealed option to purchase certain property, which he revoked a month later on the ground that it was without consideration. Chenault then assigned the option to Cochran, who subsequently notified Taylor that he had elected to purchase the property. When Taylor refused to perform, Cochran brought an action for specific performance.

The trial court's finding that the option was "nudum pactum" was affirmed by the appellate division. After reviewing the modifications of the seal legislation from 1818-1935, the court of appeals concluded that "[t]he question of sufficiency of consideration has always been open to inquiry and the statute is merely declaratory of the common law, but the consideration implied by the seal cannot be impeached for the

32 "In every action upon a sealed instrument, and where a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed." 2 N.Y. Rev. Stat. 406, pt. 3, ch. 7, tit. 3 (1829).
33 Lloyd, Consideration and the Seal in New York—An Unsatisfactory Legislative Program, 46 Colum. L. Rev. 1, 2 n.3 (1946).
34 The 1935 version of the statute eliminated the effectiveness of the seal as an enforcement device: "A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of a sufficient consideration. A written instrument, hereafter executed, which modifies, varies or cancels a sealed instrument, executed prior to the effective date of this section, shall not be deemed invalid or ineffectual because of the absence of a seal thereon." N.Y. Civ. Prac. Act § 342, later amended by N.Y. Laws 1403, ch. 708, § 1 (1935). For a complete history of the seal legislation in New York, 1935-1937, see Lloyd, supra at 7-9.
35 Lloyd, supra note 33, at 4-5.
36 273 N.Y. 172, 7 N.E.2d 89 (1937).
purpose of invalidating the instrument or destroying its character as a speciality.”

It held that the option was enforceable:

[I]n the face of the tremendous number of business transactions open to investigation by the courts, reason continues to dictate and necessity to require more forcefully than before that a party to a sealed instrument should be estopped to assert want of consideration. The court explicitly allowed the seal to be used as an enforcement device for original gratuitous contracts.

Since there were no decisions of the court pertaining to formal modifications, the rules for formal modifications can be obtained only by extending the reasoning of Cochran. There are two justifications for such an extension. As early as 1817, a sealed contract could be modified informally. Thus, an original gratuitous contract enforceable under Cochran could be informally modified under the consent rule in Schwartzreich; without any extension of Cochran beyond its facts, the modified gratuitous contract was enforceable. By extending the Cochran rule to modifications, the number of potentially enforceable modifications is not increased; this simply allows a formal as well as an informal modification of a formal original contract. Support for this extension is found in earlier New York case law, where the seal was held to be an appropriate enforcement device for modifications. In addition, language in Cochran suggested that the seal could be used to enforce a modification; the court referred to a “sealed instrument,” a phrase that is not limited to original contracts.

The court's policy statement established two criteria for the enforcement of a sealed agreement in the absence of consideration: a) The instrument must be the result of a “business transaction.” This term is not defined, but, whatever the meaning, it is clear from the second requirement that not all sealed “business transactions” will be protected. b) “[A] party to a sealed instrument should be estopped to assert want of consideration.” Where the parties did not attempt to establish consideration they have relied solely on the enforceability of the seal; and, as a result, lack of consideration is no defense. This implies that when a sealed instrument has recitals of consideration the parties

36 Id. at 180, 7 N.E.2d at 91 (citations omitted).
37 Id. at 179, 7 N.E.2d at 91.
40 This opinion has been interpreted to indicate that the court desired to revive the seal in New York, establishing an enforcement device for gratuitous promises. Lloyd, supra note 33, at 13. See also 1941 L.R.C. REPORT 357-60.
41 See text accompanying note 37 supra.
should not be estopped to assert insufficiency of consideration. The agreement will not be supported as if the parties had intended a purely voluntary promise.

In applying the *Cochran* rule to formal modifications, the pitfalls surrounding application of the consent rule to informal modifications are avoided. Only when a different rule is created for modifications, as compared to original contracts, must a court be concerned with the definition of a modification; only then does it risk expanding or limiting the number of potentially enforceable agreements by incorrect labeling and consequent mistreatment of an agreement. Since the *Cochran* requirements are applicable to original contracts as well as to modifications, the labeling of an agreement is irrelevant. This is true whether the agreement is a formal modification of an informal contract, a formal modification of a formal contract, or a formal original contract. If in either of the first two examples the original contracts were not enforceable, the agreement would be treated as an original contract, and thus the validity of the original contract would not affect the result.

The *Cochran* criteria for the enforcement of a sealed instrument were soon broadened by the decision in *United States Trust v. Frelinghuysen*, which eliminated the "business transaction" requirement. It is clear that *Frelinghuysen* created an enforcement device of very broad scope. The consideration theory on which *Schwartzreich* was based required a bargained-for exchange to be established in the original contract before a modification could be enforced under the consent rule; this categorically eliminated the enforcement of modified gratuitous contracts. In *Cochran*, the court required the sealed instrument to be gratuitous and the product of a "business transaction"; these requirements opened the realm of enforceable modifications to business gifts, options and other business transactions that lacked consideration in the original contract. When in *Frelinghuysen* the court eliminated the *Cochran* requirement of a "business transaction," all modifications of gratuitous contracts became potentially enforceable.

The court's selection of a formal enforcement device to support gratuitous agreements was aimed at the knowledgeable professional. There was only one act, the affixation of a seal, that entitled the gratuitous agreement to be enforced. If the court had created a consent rule for all informal agreements, the amateur would have obtained a similar power, for such a rule eliminates the need for prior knowledge of a selected signal. This does not imply that the court favored professionals. A formal instrument carries the presumption of enforceability, which

42 288 N.Y. 463, 43 N.E.2d 492 (1942).
can be defeated only by a successful defense of nonconsent. A consent rule for informal agreements never presumes intent, but rather requires that it be proved. The greater demands on court time and money necessitated by this requirement may have made it impossible to develop an informal consent device for amateurs. In addition, knowledge of the seal's magic would spread over time, and the unfairness associated with the formal device would diminish. Thus, the court's selection of a formal channel to extend enforcement to gratuitous agreements was a justified restriction on freedom of contract.

On the surface, it seems that the use of a formal enforcement device increased certainty of contract, since the affixation of the seal symbolized an enforceable agreement. Yet, the presumption of enforceability inherent in a formal agreement is rebuttable by the defenses of nonconsent. Thus, the increase of certainty of contract is inversely proportional to the scope of recognized nonconsent defenses. As long as these defenses are adequate, it cannot be said that the court achieved certainty of contract at the expense of enforcing nonconsensual agreements.

Although legislation deprived Cochran and Frelinghuysen of long term commercial significance, these decisions were important. The court of appeals emphatically stated that the realm of enforceable agreements should extend beyond the limits of consideration theory. The court selected a formal enforcement device to make this extension. While it apparently was willing to accept the consequent reduction of freedom of contract, it was not willing to increase certainty of contract at the expense of enforcing nonconsensual agreements.

III. Formal Modification: The Statute

A. An Introduction

A new formal enforcement device for modifications, section 33(2) of the Personal Property Laws, was established by the legislature in 1934

43 The Cochran court recognized that the presumption of intent inherent in the seal was rebuttable: "[T]he contract was enforceable by the assignee in an action for specific performance, in the absence of any available and satisfactorily established defense or counterclaim . . . ." 273 N.Y. at 184, 7 N.E.2d at 98. This statement was supported by citing Pomeroy: "This rule generally operates in favor of defendants . . . . The oppression or hardship may result from unconscionable provisions of the contract itself; or it may result from the situation of the parties, unconnected with the terms of the contract or with the circumstances of its negotiation and execution . . . ." 4 J. Pomeroy, Equity Jurisprudence § 1405, at 3333 n.6 (4th ed. 1919).

44 See note 43 supra.

45 This was recognized by the court in a caveat restricting the effect of its opinion to instruments executed and delivered prior to Sept. 1, 1935. Cochran v. Taylor, 273 N.Y. 180-81, 7 N.E.2d 91-92 (1937).
to remedy the flaws found in the consent rule and the seal by the Law Revision Commission. *Schwartzreich*'s consent rule for informal modifications had been misinterpreted, and thus criticized for its emphasis on form and its tendency to increase uncertainty in the enforcement of modifications. The revival of the seal in *Cochran* and *Frelinghuysen* was viewed as an unwarranted extension of the range of enforceable agreements. Consequently, the Law Revision Commission recommended a formal enforcement device for modifications included in a signed writing.

An examination of the court of appeals' and the Commission's recommendations revealed three objections to the court's revival of the seal as an effective alternative enforcement device. It was claimed that the seal had degenerated to a printed "L.S." which "to the average man ... conveys no meaning". This empirical statement cut deeply into the theoretical justification for enforcing a formal instrument—its special form was thought to give notice to the parties that they were creating legal rights and obligations. In addition, if the recital of a sealing were lacking, the character of the instrument had to rest on parol evidence of intent, established after execution of the instrument. Transbel Inv. Co. v. Venetos, 279 N.Y. 207, 18 N.E.2d 129 (1938). This would diminish the certainty hoped to be created by the enforcement of sealed instruments. Yet, the most important objection concerned the seal's scope of enforcement: "Concerning the broader question whether, and to what extent, a person should be able to bind himself by a promise without consideration, the Commission doubts the wisdom of any device that is applicable to all kinds of promises under all circumstances." 1941 L.R.C. REPORT 359-60.

In 1934 the New York legislature created the Law Revision Commission, N.Y. LAWS 1289, ch. 547, § 1 (1934), and charged it with the duty of examining "the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms." 1935 L.R.C. REPORT 7.

Before the Commission was created, the legislature adopted § 33(2), which created a statutory enforcement device for limited types of modifications: "A mutual agreement between a creditor or obligee and a debtor, obligor, surety or guarantor to extend or postpone to a fixed or determinable future time the payment of any debt or other obligation shall be valid without consideration other than such mutual agreement, provided that a note or memorandum of such agreement be in writing and signed by the parties thereto." N.Y. LAWS 606, ch. 142, § 1 (1934). The Commission approved of this basic policy as it would "make the requirement of consideration applicable to promises generally, making no distinction between sealed and unsealed promises, with express statutory provision that in specified cases a promise, in writing, shall not be unenforceable because of the absence of consideration." 1941 L.R.C. REPORT 360. Yet the Commission believed that the 1934 version of the statute was limited without justification: "If a written agreement between debtor and creditor extending the time for the payment of any debt or obligation be binding without consideration, why should a written agreement between the parties to a contract modifying other provisions of the contract require a consideration for its validity?" 1936 L.R.C. REPORT 74. As a result, the Commission recommended amending...
mission's interpretations of section 33(2) is necessary to determine the present boundaries of the realm of enforceable modifications and the degree to which uncertainty in the enforcement of modifications has been diminished. The success of this new enforcement device can only be measured by its ability to eliminate the flaws found in the earlier enforcement devices. The following discussion concludes that this simple solution for a difficult problem had limited success.

B. The Realm of Enforceable Modifications

Consideration theory required a bargained-for exchange in the original contract before the \textit{Schwartzreich} consent rule could be applied to a modification of the contract. The \textit{Frelinghuysen} rule for formal modifications eliminated this requirement and made all formal modifications of gratuitous contracts potentially enforceable. The enforcement device created under section 33(2) presents two interesting questions. Must the original contract have a bargained-for exchange to be capable of modification under the statute? What requirements will be established for the modification itself?

1. The Modified Gratuitous Contract. In \textit{Frelinghuysen} the court made original gratuitous contracts enforceable, a result that the Commission disliked.\textsuperscript{52} What then did the Commission expect under section 33(2) when either a gift contract or a "gratuitous" business contract was modified in writing and signed by both parties?\textsuperscript{53} Since these contracts could no longer be enforced as original contracts,\textsuperscript{54} is it reasonable to believe that once they were modified section 33(2) provided an enforcement device? The Commission wanted section 33(2) to require that the original contract be legally enforceable before the modification could be enforced.\textsuperscript{55} If this were not done, gratuitous contracts would become enforceable once modified.

\textsuperscript{52}"The Commission denies the desirability of enforcing gift promises or business promises where no consideration is intended. It has recommended that enforcement be denied such promises, to which recommendation the Legislature has acceded. The court has expressed its disapproval. It has affirmed the desirability of enforcing such promises, and has indicated its intention to enforce them . . . ." \textit{Lloyd, supra} note 33, at 22.

\textsuperscript{53}It is assumed that this is a gratuitous business promise not validated by any other subdivision of section 33.

\textsuperscript{54}The seal is no longer a valid enforcement device. \textit{See} note 33 \textit{supra}.

\textsuperscript{55}"[O]nce a binding contract had been made the parties thereto should be empowered
The statute, however, is open to several interpretations: 1) "An agree-
ment hereafter made to change or modify, or to discharge in whole or
in part, any contract . . . ." The term used is "any contract," not any
legally enforceable contract. Yet, it could be argued that the word
"contract" should be defined to include only enforceable promises.
2) "[S]hall not be invalid because of the absence of considera-
tion." Had the Commission desired to prevent the enforcement of
modified gratuitous contracts (where a bargained-for exchange is lack-
ing in the original contract) and still allow the enforcement of gratui-
tously modified contracts (where additional consideration is lacking
in the modification), the statute should have been phrased: "shall not
be invalid because of the absence of additional consideration," thereby
eliminating the traditional reading of Bartlett. As the statute now
reads, it can be argued that since a modification cannot be chal-
lenged for "the absence of consideration," the modified gift contract
and the modified gratuitous business contract are enforceable. It seems
likely, given the position taken by the court in Frelinghuysen, that it
would find this argument appealing. However, this question has yet to
be decided.

2. What Is the Definition of a Modification Under Section 33(2)?
If the original contract must have a bargained-for exchange to be modi-
fied under section 33(2), the court of appeals must also define modifica-
tion; whenever different rules are created for original contracts and
modifications this problem must be solved or the court risks limiting
or expanding the realm of enforceable agreements through inadver-
tence. The Commission's examination of Aldine Metal Products Corp.
v. Bogert & Carlough Co. resulted in an interesting statement on
this question. The Bogert Company had contracted with Aldine to
purchase window frames at an agreed price. Bogert then agreed in
writing to reimburse Aldine for the cost of purchasing production
tools. Bogert later broke this promise, and an action was brought to
recover damages for the breach. The trial court's decision to enforce
the modification was reversed by the appellate division and the re-
versal was sustained by the court of appeals. The Commission ignored
the procedural point raised by the appellate division and emphasized

56 296 N.Y. 710, 70 N.E.2d 535 (1946).
57 In fact, the agreement was made with Aldine's assignor, but for present purposes
that aspect of the case is not significant.
59 Id. at 898, 61 N.Y.S.2d at 72.
the appellate division's statement that section 33(2) "does not provide that an original promise made without consideration is enforceable."\textsuperscript{60}

The Commission suggested this was only one of many cases "where it will be difficult to determine whether an agreement constitutes a 'modification' of an existing liability or is the undertaking of a new obligation which must be supported by consideration to be enforceable."\textsuperscript{61} Since a definitive statement could only have proven arbitrary, no criteria were set out to determine what nexus was sufficient to make the second agreement a modification instead of an original contract. While the court refused to enforce this agreement, the reasoning behind a memorandum opinion speaks softly, if at all; certainly the Commission's reasoning could not be ascribed to the court. It will prove interesting to watch for signs of this reasoning in future opinions, for the definition of the requisite nexus will determine the range of agreements enforceable under section 33(2).

\textit{Feyh v. Brandtjen \& Kluge, Inc.}\textsuperscript{62} also impliedly asked the court to define a modification. Feyh ordered two printing presses from Brandtjen; the written contract included a price escalator clause, allowing price increases "to effective permitted legal prices prevailing on date of shipment."\textsuperscript{63} Delivery was delayed for eighteen months due to a strike in the Brandtjen plant, and when the presses were delivered Feyh was notified of a 1700 dollar price increase. Feyh signed the notes and chattel mortgage connected with the transaction, but when Brandtjen's agent changed the terms of Feyh's copy of the original contract Feyh did not sign.\textsuperscript{64} Six months after delivery Feyh brought suit to void the contract on the grounds of economic coercion.

Was the change in the original contract a modification under section 33(2)? The court of appeals' memorandum affirmed the appellate division ruling that the agreement was enforceable. Though Brandtjen argued that the agreement was supported by section 33(2),\textsuperscript{65} this should not have been accepted by the court. The original agreement anticipated the change in price and provided an escalator clause; thus, there is consideration for the change in the original contract.\textsuperscript{66} This

\textsuperscript{60} Id.
\textsuperscript{61} 1948 L.R.C. REPORT 654.
\textsuperscript{62} 3 N.Y.2d 971, 146 N.E.2d 794, 169 N.Y.S.2d 38 (1957).
\textsuperscript{63} 3 N.Y.2d at 972.
\textsuperscript{64} 207 Misc. 171, 174, 138 N.Y.S.2d 568, 570 (Sup. Ct. 1954).
\textsuperscript{65} 3 N.Y.2d at 973.
\textsuperscript{66} See Heyman Cohen \& Sons, Inc. v. M. Lurie Woolen Co., 232 N.Y. 112, 133 N.E. 370 (1921). Cardozo, J. stated: "We find no lack of consideration for the concession of an option. The privilege to order more is coupled with the promise and obligation to accept
is to be distinguished from a modification, a second agreement that was not anticipated by the original contract. Here, assent to the escalator clause was given in the original agreement, and no later assent was required. Calling such changes modifications could eliminate the requirement of a bargained-for exchange for all original contracts with an open-ended term, since they would be enforceable under section 33(2).67

However, even assuming that this was a modification, the agreement did not fulfill the conditions of the statute. Feyh did not sign the modified contract; he signed only the notes and the chattel mortgage. The signing of collateral obligations should not be construed to come within the meaning of the term “agreement” in the statute, when there was a written modification that could have been, but was not, signed. The presumption of intent inherent in section 33(2) was justified, since adopting parties understand the signing of a modification to be a legally binding act. The same awareness should not be attributed to the signing of a collateral obligation, especially when the promisee refused to sign the actual modification. In addition, requiring a signed writing reduces the chances of enforcing false modifications. If the signing of a collateral obligation which does not incorporate all the terms of the agreement is deemed to satisfy the statute, this protection would be severely reduced.

The cases demonstrate that it is no simple task to define a modification. To date, both the court and the Commission have refused, and accordingly, no conclusion can be reached regarding section 33(2)'s range of enforcement. The debate over enforcement of the modified gratuitous promise is still unsettled. Yet, despite the Commission's intention, the statutory language does not preclude the enforcement of such promises. Whether the present court will utilize this loophole is still not known.

C. The Defenses of Nonconsent

When section 33(2) was recommended, the Commission did not seem to recognize the necessity for the nonconsent defenses. The Com-
mission claimed that the consent rule in *Schwartzreich* greatly diminished certainty of contract, as “the contractual rights of the parties [could] only be described by a prediction of what a jury will do.” While it is true that the Commission's formal enforcement device increased certainty of contract in comparison with the consent rule, it is also true that it speaks only to professionals. Yet, even with a formal device the contractual rights of the parties remain somewhat uncertain, for to avoid enforcing nonconsensual agreements the presumption of consent must be rebuttable. Whether the presumption is rebutted is a jury question. This section demonstrates that the Commission, as well as the court, is now close to recognizing that the defenses of nonconsent should be available under the statute.

In 1948 the Commission studied the court's treatment of section 33(2). To justify the court of appeals' lack of reference to section 33(2) in a memorandum decision, the Commission stated: “[I]t seems obvious that an alleged gratuitous modification agreement should not be enforced in the absence of clear evidence that the creditor intended that the document bearing his signature should modify his rights.” If the Commission's statement is taken at face value, section 33(2) would lose its formal attire; the Commission seemed to require evidence of the parties' intent in addition to fulfillment of the statutory requirements before the modification would be enforced. If compliance with the statute is not sufficient, the enforcement device would create no more certainty of contract than does the consent rule. However, if the Commission's statement is read to sanction the defenses of nonconsent, certainty of contract would be increased, for the presumption of enforceability inherent in the formal enforcement device would be preserved.

The Commission's suggestion is supported by the statutory text, which states that certain modifications or discharges “shall not be

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68 1936 L.R.C. REPORT 255.
69 Pape v. Rudolph Bros., Inc., 282 N.Y. 692, 26 N.E.2d 817 (1940). In 1935 Rudolph signed a five year lease with a rent reserved of $3,600 per year for the first two years and $4,200 per year for the remaining three years. The rent was to be increased in May 1937, but Rudolph continued to submit its checks for the lesser amount. Each check had a notation on its face: "Endorsement of this check acknowledges payment of the following [together with a notation that the particular check was in payment of the rent due for a stated month]. If incorrect please return." *Id.* at 693 (brackets in original).

The lessor died in March 1937, and so the checks were endorsed and signed by the landlord's executors. In March 1938, when Rudolph was asked to make up the deficit, it claimed that the landlord had orally agreed to eliminate the rent increase. The executors later brought an action to recover the deficit. In the court of appeals, no mention was made of section 33(2). 1948 L.R.C. REPORT 650.
70 1948 L.R.C. REPORT 653 (emphasis added).
invalid because of the absence of consideration”; whether such agreements are unenforceable for reasons other than the absence of consideration is a question left open to the court. While the court of appeals has not discussed this question, the second circuit dealt with it in United States Navigation Co. v. Black Diamond Lines Inc.71 Black Diamond Lines orally agreed to let two steamers to U.S. Navigation Company for a minimum of two months, giving U.S. an option to renew for an additional three months. Black Diamond Lines later drew up written charter-parties which eliminated the option to renew. U.S. signed the agreement but included a formal protest and reservation of rights.72 After Black Diamond executed the written agreement, U.S. brought suit for breach of the oral agreement.

While the majority opinion does not rely on economic coercion in its interpretation of section 33(2), its unusual construction of the statute reflects its belief that economic coercion existed:73

Unless there was a rescission or an agreement to rescind implicit in the signed charters, which we have already held was not the case, the New York statute would not invalidate the oral charters. The statute at most validates the written contracts but they were not received in substitution for the oral one and effected at most a pro tanto rescission of the latter.74

Thus, the court invoked the Schwartzreich approach to avoid a seemingly inequitable result.

The court would have been wiser to construe section 33(2) to allow the defenses of nonconsent, as the Cochran court did with the seal. A rule for informal modifications is appropriately coupled with section 33(2) when the court is trying to save a formal modification that failed for lack of sufficient formality,75 but this modification failed for lack of consent. Proof of nonconsent should lead directly to a refusal

71 124 F.2d 508 (2d Cir. 1942).
72 “In view of your January 15th letter and your other statements that you will not let us have the use of these vessels when their current charters expire unless we sign the charter parties in the form demanded by you—which do not correctly state the periods and trading limits which we agreed upon—we return them herewith duly signed by us, under protest, and reserve our rights in the premises.” Id. at 510.
73 “Concededly there was opportunity under the original oral charters for two round voyages, only one of which libellant was granted under the terms of the written charter-parties [sic] that were imposed upon the latter against its will. . . . [It seems probable . . . that the new charters [Black Diamond Lines] forced upon the libellant were only signed by the latter because no other course was open if it was to have any use of the vessels, and it was under a duty to mitigate damages.” Id. at 509.
74 Id. at 511.
75 See subsection D infra.
to enforce a formal modification. Perhaps this is the price paid by the Schwartzreich court for its subtlety.

Judge Learned Hand's view of the fact situation, as stated in dissent, was substantially the same as the majority's:

The situation is the not uncommon one in which a party to a contract actually, but unwillingly, consents . . . .76

It was in the interpretation of section 33(2) that Judge Hand disagreed with his brothers, for he believed the statute had to be interpreted to sanction injustice:

[S]o far as I can now see, the statute should be held to cover charter-parties. For that reason, I think that the district court was right, though it is a rather curious irony that a statute, designed generally to avoid injustice, should in this instance operate so harshly.77

While it is not surprising that Judge Hand disagreed with the majority's rather liberal interpretation of the statute, it is surprising that he did not perceive that the statute allowed a defense of economic coercion.

From the preceding analysis it can be seen that the Commission and the judiciary have implicitly recognized that the nonconsent defenses should be allowed under section 33(2). With the appropriate case, the court of appeals should explicitly recognize this; whatever justification there may have been for the Schwartzreich court's subtleties has been eliminated. This conclusion is supported by the Cochran court's earlier explicit recognition of these defenses.

The Commission has now come almost full circle. The statute that was adopted to eliminate the uncertainty created by the Schwartzreich rule cannot itself escape some amount of uncertainty.

D. The Continued Viability of The Consent Rule

The Commission's criticism of the Schwartzreich rule suggests a lack of understanding.78 Whether a formal or an informal device is used the contractual rights of the parties should always, in part, be subject to a later determination.79 In addition, the increased certainty created by a formal device can only be achieved by knowledgeable professionals. The consent rule in Schwartzreich provides an informal enforcement device for the amateur. The statutory language

76 124 F.2d at 511 (emphasis added).
77 Id. at 512.
78 See text accompanying note 30 supra.
79 See subsection C supra.
does not preclude the enforcement of modifications that failed to fulfill the formal requirements of the statute. Yet, it would not have been shocking for the Commission to have eliminated the consent rule. This section examines cases in which the court used the consent rule to enforce modifications that did not fulfill the formal requirements of section 33(2); these cases substantiate the proposition that the consent rule offers a meaningful approach to an area heavily populated with amateurs.

In *Thompson v. Trinity Operating Co.* a contract to repair a building was orally changed by the parties. Trinity, the owner of

80 "[I]t might be unfortunate if this curative legislation were to be so interpreted as to restrain a court otherwise willing to make bold with some offer not satisfying the statutory conditions. The statute was not designed to inhibit evolution of the law of contracts in more liberal directions, e.g., along the lines of the doctrine of promissory estoppel." *Note, The New York Statute on Irrevocable Offers, 43 Colum. L. Rev. 487, 497 (1943).*

81 The law of negotiable instruments is a clear example of a field laced with rigid formalism: "Nevertheless, the cherished belief in the sacrosanct nature of formal requisites serves, as do most legal principles, a useful function. The problem is what types of paper shall be declared negotiable so that purchasers may put on the nearly invincible armor of the holder in due course. The policy in favor of protecting the good faith purchaser does not run beyond the frontiers of commercial usage. Beyond those confines every reason of policy dictates the opposite approach. The formal requisites are the professional rules with which professionals are or ought to be familiar. As to instruments which are amateur productions outside any concept of the ordinary course of business, or new types which are just coming into professional use, it is wiser to err by being unduly restrictive than by being over liberal. The formal requisites serve as a useful exclusionary device and as a brake on a too rapid acceptance of emerging trends." *Gilmore, The Commercial Doctrine of Good Faith Purchase, 63 Yale L.J. 1057, 1069 (1954).*

The law of contracts is to be distinguished, for freedom of expression—in terms of form and substance—is at least as important as certainty of contract. When the primary goal is to enforce private agreements, flexibility of form is necessary to increase the likelihood that the parties' intent will be enforced. Furthermore, a signed writing is not adaptable to all business transactions. Finally, the parties making these agreements are, by no means, all knowledgeable professionals. To employ formal rules to regulate conduct in a field riddled with amateurs is not appropriate. This conclusion is implicitly supported by the suggestion that: "If both situations are to be provided for, the attempt should not be made to do so with a single device. The formal device cannot be made applicable to the informal situation where the promisor is without knowledge. An attempt to do so must destroy its formality." *Lloyd, supra* note 33, at 36.


83 On July 27, 1948, after extended negotiations, Thompson wrote to the Trinity Operating Co. offering to repair a building owned by Trinity for 16,300 dollars. In addition, Thompson stated that, for three years after completing the repairs, he would replace any defective section of the concrete building, whether it had been repaired by him or not. Trinity accepted this offer and issued a work order on August 2, 1948. After Thompson started the construction job, he learned that some previously undiscovered loose and defective concrete had to be removed. As a result, Thompson asked Trinity for a new contract. On August 31, a conference was held in which the parties agreed that the work
the building, argued that the contractor was still liable on the guarantee, because the oral change was not enforceable under section 33(2). Even though the terms of the oral change were later reduced to writing, it is clear from the facts that the modification was not enforceable under the statute, for the writing had not been signed by both parties. Since the court nevertheless held that the contractor could recover on the modified contract, an informal means of enforcement must have been allowed.

Under the Schwartzreich rule the question of consent would have been determined by the jury. Of the three jury charges only one supported the contractor's case, and it endorsed the Schwartzreich rule. The court of appeals' acceptance of the jury verdict was thus an implied reaffirmation of the Schwartzreich rule.

The earlier discussion of Feyh v. Brandtjen & Kluge, Inc. concluded that enforcement of the modification was not based on the statute. How was the modification enforced? The court may have adopted the appellate division's analysis:

[T]he alleged modification, even if induced by duress, was not necessarily void, but merely voidable, and a party seeking to avoid such a contract must act promptly to repudiate it. . . . Respondent's long delay . . . constituted a waiver of the claim of duress and an affirmaion of the contract.

was to be done under a new contract with a cost plus system of compensation. Directly afterwards, Thompson wrote a letter to Trinity confirming the terms of the new contract and stating that the old contract had been cancelled. Thompson then proceeded with the construction work. On September 21, Trinity replied that it was prepared to treat the original contract as "modified" with regard to its price terms and to consider the three year guarantee included in the modification. Thompson stopped work on October 13, 1948, when Trinity notified him that he would be responsible for performance under the original contract. Thompson then brought this action on the second contract to recover payment for the repairs made on Trinity's building.

84 307 N.Y. at 641.
85 "Whether the evidence shows an intention by both parties to rescind the old contract will in most cases be a question for the jury." 1935 L.R.C. REPORT 255.
86 The trial judge charged the jury that there were three ways to view this situation: 1) The old contract was rescinded and a new one established that eliminated the three year guarantee, i.e., the Schwartzreich rule. 2) The first contract was modified to change only the price, and included the three year guarantee in the modification. 3) The parties did not agree to change the first contract; thus, no new contract was established and the guarantee continued. 307 N.Y. 641
88 See subsection III (B)(2) supra.
The emphasized statement suggests that the appellate division was thinking in terms of promissory estoppel theory.\textsuperscript{90} Even assuming that Feyh did not assent to the terms of the modification\textsuperscript{91} when the presses were delivered, Brandtjen did substantially rely upon Feyh's promise to pay\textsuperscript{92} and allowed Feyh to keep the presses. Feyh should have reasonably expected to induce this reliance by signing the notes and chattel mortgage.\textsuperscript{93} Feyh's six month delay in bringing the action probably cast doubt on the validity of his duress claim.

These explanations of two court of appeals memorandum opinions support the conclusion that the consent rule in \textit{Schwartzreich} is being used by the court to uphold modifications that fail to comply with the formal prerequisites of section 33(2).\textsuperscript{94} This result can be justified by an analysis of the statutory language. The statute states that certain agreements "shall not be invalid because of the absence of consideration" when included in a signed writing. The statute makes no attempt to preclude the enforcement of informal agreements, either under the consideration theory of \textit{Schwartzreich} or promissory estoppel theory; the choice of enforcing these informal agreements is open to the judiciary. The court of appeals has chosen to continue the enforcement of informal modifications, perhaps in recognition of the large number of amateurs attempting to modify a pre-existing contract. The statute then remains as a permissive device for the enforcement of formal modifications created by knowledgeable parties. This conclusion gains further support by the very existence of section 33-c of the \textit{Personal Property Laws}.

This statute gives private parties the power to preclude later oral modifications of their contract. Where a preclusionary clause has not been adopted, the court is free to enforce later informal oral agreements.

\textsuperscript{90} See \textit{Restatement of Contracts} § 90 (1932).
\textsuperscript{91} For support of this assumption see subsection III (B)(2) \textit{supra}.
\textsuperscript{92} While the judge at special term claimed that the "defendant was not misled by the plaintiff's inactivity, nor did it change its position in reliance upon it," 207 Misc. 171, 176, 138 N.Y.S.2d 568, 573 (Sup. Ct. 1954), his opinion was overruled by the court of appeals.
\textsuperscript{93} While injustice could have been avoided by giving a cause of action to Brandtjen for Feyh's use of the presses, the complicated question of incidental damages probably dissuaded the court from that solution. See Fuller & Perdue, \textit{Reliance Interest in Contract Damages} (Pts. 1-2), 46 Yale L.J. 52, 373 (1937).
\textsuperscript{94} A third memorandum opinion, Truman v. Berlanti Constr. Co., 11 N.Y.2d 1071, 184 N.E.2d 192, 230 N.Y.S.2d 223 (1962), may also support this conclusion. However, the fact situation is not stated by the majority opinion in the lower court; the only facts reported are in Judge Steuer's dissent, 14 App. Div. 2d 514, 515, 217 N.Y.S.2d 207, 209 (1961), and they are somewhat ambiguous.
\textsuperscript{95} For a full discussion see section IV \textit{infra}.
IV. SECTION 33-C: THE PRIVATE STATUTE OF FRAUDS

With the elimination of the seal as an effective enforcement device, the protective rule that a sealed instrument could not be modified unless it was in writing was destroyed.106 Realizing that such a preclusive rule was still needed, the Commission recommended section 33-c of the Personal Property Laws, which allowed private parties to prohibit oral modification of a contract.98 Through the statute the Commission sought to prevent false modifications,99 to increase certainty of contract,100 and to communicate to the adopting parties the effects of the preclusion.101

In 1952 the court of appeals suggested in Green v. Doniger102 that the statute did not clearly "bring to the attention of the parties the effect of their acts."103 Green's oral employment contract with Doniger was reduced to a writing, which eliminated Green's bonus provisions. The written contract stated that "it may be terminated by either of us at any time upon thirty (30) days written notice to the other; and it shall not be considered modified, altered, changed or amended in any respect unless in writing and signed by both of us."104 Green later notified Doniger that he intended to terminate the contract; Doniger replied that it would be "unnecessary for him [Green] to terminate the written contract pursuant to said clause."105 They then agreed to abandon the written contract and reinstate the earlier oral contract. Green brought the present action under the modified contract.

The court had to decide whether section 33-c prohibited enforcement of the oral modification. It said that the second clause—"shall not be considered modified, altered, changed or amended in any re-

96 "Except as otherwise expressly provided by statute, the presence or absence of a seal upon a written instrument hereafter executed shall be without legal effect." 1941 L.R.C. REPORT 361.
97 Id. at 358.
98 "An executory agreement hereafter made shall be ineffective to change or modify, or to discharge in whole or in part, a written agreement or other written instrument hereafter executed which contains a provision to the effect it cannot be changed orally, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought." Id. at 361-62. Adopted as N.Y. GEN. OBLIGATIONS LAW § 15-301.
99 The Commission sought to permit "a party to a written agreement to protect himself against the danger of false claims of an oral modification." 1941 L.R.C. REPORT 359.
100 It sought to "definitely fix the character of the instrument as of the time of its execution." 1952 L.R.C. REPORT 41.
101 It sought to "bring to the attention of the parties the effect of their acts." Id.
102 300 N.Y. 238, 90 N.E.2d 56 (1949).
103 1952 L.R.C. REPORT 41.
104 Id. at 242, 90 N.E.2d at 58.
105 Id.
Contract Modifications

spect unless in writing and signed by both of us”\textsuperscript{106}—“appears on first reading to be such as to invite the protection afforded by subdivision 1 of Section 33-c.”\textsuperscript{107} But since the application of section 33-c depended upon the parties’ intent,\textsuperscript{108} the court felt free to conclude that the termination clause established a “less formal procedure for discharge or termination,”\textsuperscript{109} which took precedence over the statutory preclusion.

The written contract required thirty days written notice for unilateral termination. Green did not comply with this, perhaps because of Doniger’s statement that it could be ignored. The court said this termination was bilateral and thus outside the requirements for unilateral termination. The termination and simultaneous creation of a new contract was then enforced under a consent rule.\textsuperscript{110} Was this result justified? Certainly Green did not appear as an overly attractive plaintiff.\textsuperscript{111} The sole dissenter claimed that this decision frustrated the purpose of section 33-c;\textsuperscript{112} thus, the court realized that its distinction between modification and rescission followed by a new contract placed the effectiveness of section 33-c in question.

This case could be read broadly to suggest that when the section 33-c clause conflicts with other contract provisions the court will presume that the parties intended to allow oral modification. This interpretation of the statute is based on broad policy considerations, for it is quite unlikely that Green and Doniger had the sophisticated intent of allowing rescission followed by a new contract, while prohibiting modification. This does not imply that the court disliked the statute’s preclusive effects, but that it would grant this power only when the

\textsuperscript{106} Id.
\textsuperscript{107} Id. at 244, 90 N.E.2d at 59.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 245, 90 N.E. at 59.
\textsuperscript{110} “Whether there was actually a waiver of the notice and a mutual consent to the abandonment involves questions of fact which should be tried before a jury.” Id. Once again the court has distinguished a modification from a simultaneous rescission plus new contract, based on form not substance. This was recognized by the appellate division: “there was no abandonment of the written contracts in the sense that the engagement or enterprise was called off or abandoned, but in substance there was simply a change in the terms of an uninterrupted and continuing employment.” 274 App. Div. 476, 479, 84 N.Y.S.2d 587, 590 (1948).
\textsuperscript{111} “The kind of oral arrangement which plaintiff alleges he made with defendant for successive years, setting aside written agreements just made and substituting oral agreements requiring nothing different or more from plaintiff but granting him increased compensation, makes his case suspect.” Id.
\textsuperscript{112} “The legislative purpose and design in enacting subdivision 1 of section 33-c of the Personal Property Law are frustrated, I very much fear, if we sustain the position taken by the plaintiff-appellant.” 300 N.Y. at 246, 90 N.E.2d at 60.
intent to adopt was clearly stated in the first contract. The case can also be read as warning that the statute's language was vague; as a result, adopting parties did not understand its implications. To correct this problem the statutory text would require several separate sections, each with a narrow and clearly defined thrust. Whatever the court's reason for this decision, the Commission was not slow to react. In 1952 the Commission published a study of Green v. Doniger. They recognized that the statute led to confusion "when the agreement containing the stipulation described in the statute also contains other provisions purporting to govern discharge of the agreement." The Commission recommended that section 33-c be amended to create a panoply of prohibitions that contracting parties could adopt according to their specific purposes.

Prior to the amendment, section 33-c operated nonselectively to exclude oral change, modification and discharge. The amendment gave contracting parties the choice of prohibiting oral change, or oral termination, or both. The Commission distinguished "change" from "termination"; change did not become termination "unless all executory obligations under the agreement or instrument [were] discharged or terminated." In addition, a termination did not become a change "even though accrued obligations remaining unperformed at

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113 1952 L.R.C. REPORT 141. "Even where the contract contains no such independent provisions, it is possible that the stipulation against oral change may not have been understood by both parties as precluding total discharge or termination by methods recognized at common law. That is, a distinction may be made by the contracting parties between change or partial discharge and termination or total discharge, and they may wish to guard against oral claims with respect to one or the other, or with respect to both. If to avoid the situation that arose in Green v. Doniger, a bar to termination or total discharge by any means not involving clear evidence of assent of both parties may be needed." 1952 L.R.C. REPORT 143.

114 "A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such an executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." N.Y. LAWS ch. 831, § 2 (1952), now N.Y. GEN. OBLIGATIONS LAW § 15-301.

115 "A written agreement or other written instrument which contains a provision to the effect that it cannot be terminated orally, cannot be discharged by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the discharge is sought, or by his agent, and cannot be terminated by mutual consent unless such termination is effected by an executed accord and satisfaction other than the substitution of one executory contract for another, or is evidenced by a writing signed by the party against whom it is sought to enforce the termination, or his agent." Id.

116 (a) "A discharge or partial discharge of obligations under a written agreement or other written instrument is a change of the agreement or instrument for the purpose of subdivision one of this section and is not a discharge or termination for the purpose of subdivision two, unless all executory obligations under the agreement or instrument are discharged or terminated." Id.
the date of the discharge or termination [were] not affected by it."117
In these definitions, the drawing of a definite line was more significant
than its placement; the line gave the parties notice of future effects at
the time the instrument was drafted.

In addition to clarifying the implications of section 33-c for the
adopting parties, the Commission also probably desired to clarify a
few points for the court of appeals. First, to eliminate the possibility
that the court of appeals might once again use the Schwartzreicth
rhetoric to skirt this formality, the Commission provided that the
agreement "cannot be terminated by mutual consent unless such
termination is effected by an executed accord and satisfaction other
than the substitution of one executory contract for another. . . ."118
Here, the Commission demonstrated a desire to reduce controversy
by eliminating the requirement of a signed writing for an accord and
satisfaction, while making certain that this did not become a loophole
for enforcing executory oral modifications simply through an allega-
tion of accord and satisfaction. Second, the Commission established a
rule for a contract that had conflicting clauses. When a contract pro-
hibits oral discharge and allows discharge by simple notice, the re-
quirement of a signed writing is imported for the notice provision.119
Finally, the Commission prohibited "waiver" of a written notice
requirement unless such "waiver" was also included in a signed
writing.120

The Commission probably hoped that these changes in the statute
would accomplish one of its basic goals, the increase of contractual
certainty.121 This aim can be supported in theory. These formalities
are made available to create certainty of contract and to protect against
false claims of modification. It must be assumed that the parties were
familiar with the course of business in their respective areas; the
possibility of having to modify orally should have been estimated and

117 (b) "A discharge or termination of all executory obligations under a written agree-
ment or other written instrument is a discharge or termination for the purpose of sub-
division two even though accrued obligations remaining unperformed at the date of the
discharge or termination are not affected by it." Id.

118 See note 115 supra.

119 (c) "If a written agreement or other written instrument containing a provision that it
cannot be terminated orally also provides for termination or discharge on notice by one
or either party, both subdivision two and subdivision four of this section apply whether or
not the agreement or other instrument states specifically that the notice must be in
writing." Id.

120 "If a written agreement or other written instrument contains a provision for
termination or discharge on written notice by one or either party, the requirement that
such notice be in writing cannot be waived except by a writing signed by the party
against whom enforcement of the waiver is sought or by his agent." Id.

121 1952 L.R.C. REPORT 41.
compared with the desirability of having the statutory protection. If there is a bargained-for exchange in the original contract, these questions are presumed to have been discussed at the bargaining table. Thus, there is a strong case for recognizing no oral modifications, for with each exception the certainty provided by the statute diminishes.

The position that the Commission presumed the court of appeals took—preferring freedom of contract to certainty of contract—can also be supported in theory. The problem could be viewed as analytically similar to allowing a modification when section 33-c has not been adopted. Whenever a modified contract is enforced, some earlier overt manifestation of the parties' intent is changed. In the present case, however, two earlier statements of intent are changed if oral modification is allowed: one provision is procedural or formal—that later changes be in writing and signed—while the other is substantive—that which relates to some element of the parties' business agreement. In neither instance were the parties able to predict the path of future events. Why then prevent the light of future experience from being shed upon their contractual relations? Whether the court, in fact, disagreed with the Commission—preferring freedom of contract to certainty of contract—cannot be determined now; the new version of section 33-c has not been interpreted by the court.122

However, there is one exception to the statute that both court and Commission should acknowledge, that is, where an oral promise was made with a fraudulent intent and the promise was relied upon by the promisee. A statute that was enacted to allow "a party to a written agreement to protect himself against the danger of false claims of an oral modification"123 should not be construed to sanction fraud. If the exception is broadened to include cases where there was a fraudulent promise without reliance, the exception would be more a punishment to the promisor than compensation to the promisee. By keeping the exception narrow, the purposes of the statute are more likely to be fulfilled.

In Bakhshandeh v. American Cyanamid Co.124 the court of appeals was asked to make such an exception to the old version of section 33-c. Bakhshandeh's contract with American Cyanamid Company provided for termination by either party upon ninety days notice and prohibited

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122 The N.Y. Supreme Court, Special Term, did suggest an interesting interpretation of 33-c(4), the waiver prohibition. It claimed that the party who inserts a clause for his benefit is free to waive it, irrespective of the statutory prohibition. Arrow Plumbing Co. v. Dare Construction Corp., 212 N.Y.2d 438, 441 (Sup. Ct. 1961).

123 1941 L.R.C. REPORT 359.

oral modification. In May, 1951 American Cyanamid Company mailed notice of termination to Bakhshandeh. Bakhshandeh brought an action to recover damages for breach of a modification that eliminated termination until March, 1952. In the supreme court at special term, the doctrine of promissory estoppel was suggested, for Bakhshandeh continued to spend time and resources in Iran\textsuperscript{125} as a result of American Cyanamid’s negotiations with him and oral promise not to terminate the employment contract. In addition, the supreme court hinted that American Cyanamid made the promise with a fraudulent intent.\textsuperscript{126}

To justify excepting a fraudulent oral modification from section 33-c the court said:

If this plaintiff can establish his averments to the satisfaction of a trial court he will bring himself within an ancient doctrine of equity according to which and despite the Statute of Frauds or any other exclusionary rule “an oral collateral promise” may be so tainted with fraud that the promisor is held.\textsuperscript{127}

This exception can be justified by construing the term “executory agreement” in section 33-c to exclude oral promises that have been relied upon in a definite and substantial way.

In the appellate division, Bakhshandeh broadened his argument by claiming that part performance of the new agreement should render section 33-c inapplicable; if he had restricted the exception to part performance induced by fraud, his case would have been stronger. The court replied that part performance must be “unequivocably referable” to the modified contract,\textsuperscript{128} but this does not look to the intent of the promisor. This requirement can be fulfilled only when the modification has so many terms differing from the original that performance under the modification could not be confused with performance under the original. This solution diminishes the problems of proof in searching for fraud under the special term’s suggestion, while

\textsuperscript{125} 12 Misc. 2d 742, 743, 177 N.Y.S.2d 374, 375 (Sup. Ct. 1958).

\textsuperscript{126} “The possibility of the application of the doctrine of promissory estoppel is not to be disregarded in relation to the claimed oral agreement. . . . It is to be noted in addition that during the time as claimed when defendant was engaged with plaintiff in continuing negotiations and discussions, prior to the time when as claimed the oral agreement was made, the defendant was then negotiating with the person who displaced the plaintiff as its successor.” Id. at 744, 177 N.Y.S.2d at 376-77.

\textsuperscript{127} Id. at 744, 177 N.Y.S.2d at 377 (citations omitted).

\textsuperscript{128} “That part performance, in order to avoid the statute, must be ‘unequivocably referable’ to the oral agreement sought to be enforced. That element is here absent because what plaintiff claims to have done under the oral agreement could very well have been done in his own self-interest in the performance of the original contract.” 8 App. Div. 2d 35, 38, 185 N.Y.S.2d 635, 638 (1959) (citations omitted).
it extends statutory protection to those promisors who fortuitously did not drastically change the original contract. The court of appeals affirmed the appellate division's decision for American Cyanamid Company.

Whether Bakhshandeh simply had a weak case on the facts or whether the court disliked the promissory estoppel exception cannot be determined from this case. However, this exception has been employed by the supreme court, special term, in its interpretation of the amended version of section 33-c. In *Meadow Brook National Bank v. Feraca*,, the court held that the plaintiff was estopped from claiming liability for its loans, as the plaintiff had told the defendants that an oral termination was valid. Though the original contract adopted section 33-d(4), the court held that the prohibition of an oral waiver did not include an estoppel:

Waiver and estoppel represent distinct concepts of law. . . . Such an estoppel would not be in conflict with section 33-c of Personal Property Law, since it would not constitute an oral modification of a written contract, but the application of an ancient equitable principle whereby a person whose conduct had induced reliance thereon may not thereafter bring an action which is inconsistent with that conduct.

The court then denied the plaintiff's motion for summary judgment. The Commission never defined section 33-c(4)'s prohibition against oral waiver. Given its desire to create certainty of contract, it may have hoped to preclude use of promissory estoppel as an escape from the statute. By suggesting that there is a clear distinction be-

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130 The defendant's attorney attempted to create a very narrow exception to the statute—allowing an oral termination of liability where the promisor explicitly stated that § 33-c would not apply. This is to be distinguished from the broader exception of enforcing oral termination where the promisor had a fraudulent intent but there was no explicit representation regarding the application of section 33-c.
131 The motion to treat the denials as sham was struck down on the ground that the complaint did not allege the instrument could be terminated orally and therefore section 33-c was not applicable. The motion for summary judgment allowed the court to consider the affidavits and proofs, which led into the above discussion.
132 *Id.* at 619, 224 N.Y.S.2d at 850.
133 This conclusion is strongly supported if the draftsmen of section 33-c(4) were familiar with J. Ewart, *Waiver Distributed* 38 (1917): "Waiver, then, does not necessarily involve intention, and does not depend 'upon what one himself intends to do.' Closer examination would convince the writer that he is dealing with contract, election, and release on the one hand, and estoppel on the other, and that he could find no case of 'waiver' which cannot be placed under one or other of these heads."
tween waiver and estoppel, the court concluded that section 33-c(4) did not eliminate the estoppel exception. An examination of the precedents cited by the court leads to the conclusion that while there is no clear distinction between waiver and estoppel, the statute should not be construed to eliminate the estoppel exception; higher equitable principles must prevail. Whether proof of the promisor's fraudulent intent is sufficient or, as in the instant case, proof of a specific representation by the promisor that the oral change or termination will not be effected by the contractual prohibition, can only be determined by later cases. As the Meadow Brook case was not appealed, the court of appeals was not called upon to express its opinion. Yet, given the court's treatment of the enforcement devices, it seems unlikely that the court would now place certainty of contract above strong, equitable considerations, especially when this would defeat a stated purpose of the statute.

**Summary**

The world of contract modifications, as seen through the eyes of the Law Revision Commission, was unnecessarily vague. While the Commission was correct in suggesting that the Schwartzreich rule for informal modifications created uncertainty for contracting parties, it failed to recognize the reason for this result. The presumption of consent inherent in a formal enforcement device creates certainty of contract, but this presumption is only valid for the professional. Thus, to insure that only consensual agreements are enforced and that the amateur has some means of obtaining enforcement, an informal enforcement device must be available. This may explain why the court of appeals' revival of the seal in Cochran and Frelinghuysen supplemented the consent rule for informal modifications and did not displace it. But, even for formal modifications, certainty of contract was not an absolute, for the presumption of enforceability was rebuttable by the defenses of nonconsent. The court refused to create certainty at the expense of enforcing nonconsensual agreements.

134 See note 133 *supra*.

135 In Imperator Realty Co. v. Tull, 228 N.Y. 447, 457, 127 N.E. 263, 266 (1920), Cardozo, J. stated when asked to create an exception to the public Statute of Frauds: "The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong.... The Statute of Frauds was not intended to offer an asylum of escape from that fundamental principle of justice." Through similar reasoning an exception could be made to the private Statute of Frauds, section 33-c.

136 See note 130 *supra*.

137 See text accompanying note 123 *supra*. 
From the Commission's criticism of the _Schwartzreich_ rule one could conclude that the Commission supported the adoption of section 33(2) with the hope of obtaining absolute certainty of contract. Such a hope, however, is unrealistic. There would be little justification for creating an enforcement device with an irrebuttable presumption of consent; even professionals may be victims of force, fraud, or mistake. As a result, the nonconsent defenses have been recognized under the statute. Even reading the Commission's criticism of _Schwartzreich_ narrowly, it is not well founded. So long as modification attempts by amateurs exist in significant numbers, the informal rule and the concomitant uncertainty are justified.

The Commission also viewed the world of contract modifications as too broad. It believed that the court erred when it revived the seal and consequently allowed gratuitous agreements to be enforced. Whether the court still believes that such agreements are needed by the business world is not known. To date, the court has not allowed the modified gratuitous promise to be enforced under the statute.

Section 33-c, the fraternal twin of section 33(2), gave private parties the power to prohibit all modifications not included in a signed writing. Here, too, the Commission made a blind stab at creating certainty of contract. This statute also speaks to knowledgeable parties. How does one protect the amateur who signs a contract with the preclusive clause and then performs under an oral modification? The courts should at least create an exception where the other party agreed to an oral modification. A statute that was designed to eliminate fraud should not become a shield for wily professionals.

The court of appeals' reaction to these statutes should provide a lesson for the Law Revision Commission. While certainty of contract is important, it is not the only goal of contract law. Accordingly, a simple but inadequate solution to a difficult problem must soon become the object of judicial amendment.\(^{138}\)

\(^{138}\) The effect of the Uniform Commercial Code on these two statutes is beyond the scope of this comment. For the Commission's analysis see 1956 L.R.C. REPORT 172-73, 175-76.