

1/22/69

First Supplement to Memorandum 69-32

Subject: Study 47 - Oral Modification of a Written Contract

One of the alternatives noted in Memorandum 69-32 for dealing with Civil Code Section 1698 would be to revise Section 1698 to adopt the substance of the official text of the Uniform Commercial Code and to revise the California version of the Uniform Commercial Code to conform to the official text. As noted in Harold Marsh's letter, the official version of the Uniform Commercial Code is based on the New York statutory provisions. Further investigation reveals that the New York statutory provisions are the result of a series of recommendations by the New York Law Revision Commission. Attached as Exhibit I is the latest recommendation of the New York Law Revision Commission on this subject, together with the New York statute as amended in 1952 in response to that recommendation.

It should be noted that the New York statute does not contain the provision that the requirement that any modification or rescission be in writing on a form that must be separately signed by the other party. In its exhaustive study of the Commercial Code, the New York Law Revision Commission noted this addition and commented:

The added provision as to a printed clause, in subsection (2), is designed to prevent entrapment of one party by a printed required-writing clause in the other party's printed form; the former is not bound by the clause unless he signs it separately. This type of provision is frequently used in Article 2. Whether it will bring about more deliberation in signing forms, more "reality of consent", or will make the required-writing clause a dead letter because not separately signed, only experience will tell. [1 Study of the Uniform Commercial Code, N.Y.L. Revision Comm'n 643 (1952)]

In this connection, Mr. Cook's research discloses that all states but California have enacted the official text of the Uniform Commercial Code section.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

**RECOMMENDATION OF THE LAW REVISION COMMISSION
TO THE LEGISLATURE****Relating to Change, Discharge or Termination of Contracts
Prohibiting Oral Change or Termination**

Under former section 342 of the Civil Practice Act, a sealed instrument could not be modified or discharged by an executory agreement unless such agreement was in writing and signed by the party to be charged. In 1941, on recommendation of the Law Revision Commission, section 342 was amended to abolish completely the effect of the seal except as a means of authenticating instruments. (See Leg. Doc. (1941) No. 65 (M), 1941 Report, Recommendations and Studies of the Law Revision Commission, pp. 345-414.)

The Commission believed that a method more appropriate than the use of the seal for permitting a party to a written agreement to protect himself against the danger of false claims of an oral modification would be to make binding a stipulation to this effect contained in the original written agreement, for this device would clearly bring to the attention of the parties the effect of their acts and definitely fix the character of the instrument as of the time of its execution. In connection with the amendment to section 342 of the Civil Practice Act the Commission therefore recommended provisions making such stipulations effective. These provisions were enacted as section 33-c of the Personal Property Law and section 282 of the Real Property Law.* They provided that:

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 that it cannot be changed orally, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

Under this provision, a stipulation against oral change operates to prevent either a change or a total or partial discharge by oral or unsigned executory agreement. A difficulty arises, however, when the agreement containing the stipulation described in the statute also contains other provisions purporting to govern discharge of the agreement. This was illustrated by the decision in *Green v. Doniger*, 300 N. Y. 233 (1949). It was alleged in that case (1) that a written contract of employment was abandoned, and (2) that a new oral agreement changing the written contract had

* These sections were renumbered in 1944 as subdivision 1 of section 33-c and subdivision 1 of section 282, and amended to provide for the signing of the executory agreement by the agent of the party against whom enforcement of the change, modification or discharge is sought. See Leg. Doc. (1944) No. 65(F); 1944 Report, Recommendations and Studies of the Law Revision Commission, pp. 103-120.

been entered into, identical with the written contract except for the addition of certain bonus payments. The written contract in that case contained a prohibition against oral modification and a provision for termination in the following language:

This constitutes the entire agreement and understanding between us and 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.

The Court of Appeals, three judges dissenting, affirmed the order of Special Term, denying the motion of defendant for judgment on the pleadings, and stated:

The statutory clause, which when inserted in a contract subjects it to the control of subdivision 1 of section 33-c, is a simple clause prohibiting oral change. The effect of the statute, however, is broader than that. Not only is oral change prohibited, but there may be no change, modification, or discharge, in whole or in part, without a writing signed by the party to be charged. Whether the statute shall apply to a given contract depends upon the intent of the parties as expressed by the inclusion or exclusion, in some form, of the statutory clause prohibiting oral change. In the present case such a clause in the written contracts evidences the intent of the parties that the statute shall have at least a limited application. The scope of that application, however, appears to be intentionally limited to modifications or changes to the exclusion of discharges, since the parties have set up their own less formal procedure for discharge or termination.

Whatever may be the requirements for the termination of the contract by one party—in this instance thirty days' written notice—an abandonment of a contract not under seal by mutual consent has always been considered effective to discharge its obligations (*Rodgers v. Rodgers*, 235 N. Y. 408, 410) even when a new contract containing one or more of the same terms is simultaneously entered into. (*Schwartzreich v. Bauman-Basch, Inc.*, 231 N. Y. 196, 205.) The problem of 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.

A partial discharge of a contract, discharging some but not all of its obligations, is in effect a change. The present form of the statute is therefore appropriate to give effect to the intent of the parties to the extent that it makes a stipulation against oral change effective to preclude a change or partial discharge by executory contract unless the executory contract is in writing and signed by the party against whom it is sought to enforce the change or the partial discharge. In the light of the present statute, however, a provision in the contract prohibiting oral change becomes ambiguous and may cause injustice, where

the contract contains independent provisions with respect to total discharge, or termination, of the contract. 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. 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.**

The purpose of the statute is to permit parties to a contract to protect themselves from false claims either of oral change or of oral termination of the contract. To accomplish this purpose, the Commission believes that the statute should be amended to make it clear that (a) where there is a stipulation against oral change there can be no change or partial discharge of the contract by executory contract unless the executory agreement is in writing and signed by the party against whom it is sought to enforce the change or partial discharge, and (b) where there is a stipulation against oral termination of the contract, the contract cannot be discharged by executory agreement unless the executory agreement is in writing and signed by the party against whom it is sought to be enforced, and a termination by mutual assent or abandonment may be accomplished only by a writing or by an executed accord and satisfaction other than the substitution of one executory contract for another. (See *Moers v. Moers*, 229 N. Y. 294 (1920).) This rule should apply to preclude any oral transaction purporting to discharge or terminate all executory obligations under the agreement or other instrument, even though the transaction does not affect accrued obligations remaining unperformed, such as payment for services already performed under the agreement to be terminated, or accrued rent under a surrendered lease.

The Commission also believes that the statute should provide that where the contract provides for termination by one or either party on written notice, the requirement that the 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. Where a provision for termination on notice is included in a contract which also provides that it cannot be terminated orally, the provision for termination on notice should be construed to require written notice, whether or not the notice provision also specifies a writing.

** It was stated in the dissenting opinion in *Green v. Doniger* that To hold that one party may accomplish a change in the amount of compensation to be paid to him under a written contract containing such a clause by the simple expedient and device of calling the change an abandonment, would be to annul the statute and render its operation nugatory.

A bill amending sections 33-c of the Personal Property Law and 282 of the Real Property Law to deal with the problem illustrated in *Green v. Doniger* was recommended by the Commission in 1951. (See 1951 Senate Int. No. 1084, Pr. No. 1099, Assembly Int. No. 1289, Pr. No. 1304; Leg. Doc. (1951) No. 65 (N.)) The bill passed the Legislature, but was disapproved by the Governor. The bill was criticized on the ground that parties who stipulate against oral change may not intend to preclude oral termination as well, and a stipulation in a contract should not be operative to preclude oral termination or discharge unless the stipulation refers expressly to termination. This criticism is met in the bill proposed this year by provisions dealing separately with stipulations against oral change and stipulations against oral termination.

The Commission therefore recommends:

I. That section 33-c of the Personal Property Law and section 282 of the Real Property Law be amended to read as follows:

§ 33-c.

§ 282. When written agreement or other instrument cannot be **[modified]** *changed* by oral executory agreement, or *discharged or terminated by oral executory agreement or oral consent or by oral notice.* 1. **[An executory agreement hereafter made shall be ineffective to change or modify, or to discharge in whole or in part, a]** *A written agreement or other written instrument [hereafter executed] which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge] is sought or by his agent.*

2. *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 by his agent.*

3. (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.*

(b) *A discharge or termination of all executory obligations under a written agreement or other written instrument is a discharge or termination for the purpose of subdivision two*

even though accrued obligations remaining unperformed at the date of the discharge or termination are not affected by it.

(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.

4. 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.

[2.] 5. If executed by an agent, any agreement, evidence of termination, notice of termination or waiver, required by this section to be in writing, which affects or relates to real property or an interest therein in any manner stated in section two hundred forty-two or section two hundred fifty-nine of the real property law, shall be void unless such agent was thereunto authorized in writing.

6. Subdivision one of this section applies to agreements or instruments executed on or after September first, nineteen hundred forty-one. Subdivisions two, three and four apply to agreements or instruments executed on or after September first, nineteen hundred fifty-two. Subdivision five applies to agreements, evidences of termination, notices of termination or waivers with respect to agreements or other instruments executed on or after April fifth, nineteen hundred forty-four.

II. The following provision to be included in the bill enacting such amendments:

The amendments of section thirty-three-e of the personal property law and section two hundred eighty-two of the real property law made by this act do not restrict the operation of the provisions of those sections as they existed prior to the effective date of this act with respect to executory agreements of the kind described in those sections as so existing, or written agreements or instruments containing a provision of the kind described in those sections as so existing, which were made prior to the effective date of this act.

Dated, December 18, 1951.

BY THE LAW REVISION COMMISSION:

JOHN W. MACDONALD,
Executive Secretary
and Director of Research

CHAPTER 831²

AN ACT to amend the personal property law and the real property law, in relation to change or termination of certain written agreements

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section thirty-three-c of the personal property law, as last amended by chapter five hundred eighty-eight of the laws of nineteen hundred forty-four, is hereby amended to read as follows:

§ 33-c. When written agreement or other instrument cannot be [modified] changed by oral executory agreement, or discharge or terminated by oral executory agreement or oral consent or by oral notice. 1. [An executory agreement hereafter made shall be ineffective to change or modify, or to discharge in whole or in part, a] A written agreement or other written instrument [hereafter executed] which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change[, modification or discharge] is sought or by his agent.

2. 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 by his agent.

3. (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.

(b) A discharge or termination of all executory obligations under a written agreement or other written instrument is a discharge or termination for the purpose of subdivision two even though accrued obligations remaining unperformed at the date of the discharge or termination are not affected by it.

(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.

² See Act and Recommendation relating to Change, Discharge or Termination of Contracts Prohibiting Oral Change or Termination, *supra*, p. 135.

EXPLANATION — Matter in *italics* is new; matter in brackets [] is old law to be omitted.

4. 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.

[2.] 5. If executed by an agent, any agreement, evidence of termination, notice of termination or waiver, required by this section to be in writing, which affects or relates to real property or an interest therein in any manner stated in section two hundred forty-two or section two hundred fifty-nine of the real property law, shall be void unless such agent was thereunto authorized in writing.

6. Subdivision one of this section applies to agreements or instruments executed on or after September first, nineteen hundred forty-one. Subdivisions two, three and four apply to agreements or instruments executed on or after September first, nineteen hundred fifty-two. Subdivision five applies to agreements, evidences of termination, notices of termination or waivers with respect to agreements or other instruments executed on or after April fifth, nineteen hundred forty-four.

§ 2. Section two hundred eighty-two of the real property law, as last amended by chapter five hundred eighty-eight of the laws of nineteen hundred forty-four, is hereby amended to read as follows:

§ 282. When written agreement or other instrument cannot be [modified] changed by oral executory agreement, or discharged or terminated by oral executory agreement or oral consent or by oral notice. 1. [An executory agreement hereafter made shall be ineffective to change or modify, or to discharge in whole or in part, a] A written agreement or other written instrument [hereafter executed] which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change [modification or discharge] is sought or by his agent.

2. 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 by his agent.

3. (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.

(b) A discharge or termination of all executory obligations under a written agreement or other written instrument is a discharge or termination for the purpose of subdivision two even though accrued

obligations remaining unperformed at the date of the discharge or termination are not affected by it.

(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 be in writing.

4. 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.

[2.] 5. If executed by an agent, any agreement, evidence of termination, notice of termination or waiver, required by this section to be in writing, which affects or relates to real property or an interest therein in any manner stated in section two hundred forty-two or section two hundred fifty-nine of the real property law, shall be void unless such agent was thereto authorized in writing.

6. Subdivision one of this section applies to agreements or instruments executed on or after September first, nineteen hundred forty-one. Subdivisions two, three and four apply to agreements or instruments executed on or after September first, nineteen hundred fifty-two. Subdivision five applies to agreements, evidences of termination, notices of termination or waivers with respect to agreements or other instruments executed on or after April fifth, nineteen hundred forty-four.

§ 3. The amendments of section thirty-three-e of the personal property law and section two hundred eighty-two of the real property law made by this act do not restrict the operation of the provisions of those sections as they existed prior to the effective date of this act with respect to executory agreements of the kind described in those sections as so existing, or written agreements or instruments containing a provision of the kind described in those sections as so existing, which were made prior to the effective date of this act.

§ 4. This act shall take effect September first, nineteen hundred fifty-two.

(Note.—These are amendments recommended by the Law Revision Commission. See Leg. Doc. (1952) No. 65 (E). Their purpose is to clarify the effect of provisions in a written contract which (a) prohibit oral change, (b) prohibit oral termination or (c) provide for termination by written notice. They also remove an inconsistency between the language of the Personal Property Law, section 23-e and Real Property Law, section 282, and the decision in *Green v. Daviger*, 300 N. Y. 235 (1949) that a clause prohibiting oral change does not preclude an abandonment of the contract where the contract contains other provisions expressing the intent of the parties as to the manner of terminating the contract.

Under the decision in *Green v. Daviger*, the present rule is that a provision in a written contract prohibiting oral change is operative to prevent discharge by oral executory agreement in the absence of provisions indicating a different intent. The amendments limit this rule to a partial discharge, which does not discharge or terminate all executory obligations under the agreement or instrument. A new provision is added stating that a clause in a written agreement or other written instrument prohibiting oral termination is operative to prevent a discharge of the entire agreement by oral executory agreement and also to prevent termination of the agreement by mutual consent not evidenced by a writing or effected by an executed accord and satisfaction involving more than the substitution of one executory contract for another. (See *Moore v. Moore*, 229 N. Y. 294 (1920).) This provision applies to a transaction purporting to terminate all executory obligations under the agreement, even though the transaction would not affect accrued obligations remaining unperformed. The provision is made operative even where the agreement or other instrument provides for termination on notice, without specifying that the notice must be in writing.

The amendments also provide that if a written agreement or other written instrument provides for termination on notice and either requires that the notice be in writing or contains a provision prohibiting oral termination, any waiver of the requirement that the notice be in writing must be in writing signed by the person against whom it is sought to enforce the waiver.

The amendments do not change the effect of the existing statute as to written agreements or other written instruments now governed by the statute.)