carpenters have used for various purposes. When it is employed to describe only the intending of the act and not the intending of the resulting injury, there is good authority for labeling the product "accidental injury."

EUGENE STEEL

LANDLORD AND TENANT

REDUCTION OF RENT — CONSIDERATION — ABATEMENT AFTER FIRE

The plaintiff lessee entered into a written lease with defendant lessor for a term of 20 years from August, 1928. The lease reserved an annual rental of $10,000 a year, payable in nine monthly installments starting on August 15 of each year. Plaintiff alleged that on November 16, 1934, the lease was modified in writing by the parties so that the rent reserved was reduced to the sum of $7,200 for the year beginning August 15, 1934. In May of 1935 a fire destroyed the premises. In November, 1935, the defendant lessor, having become bankrupt, listed a claim against plaintiff lessee for rent remaining unpaid at the time of the fire on the basis of the rent of $10,000 originally reserved in the lease. Plaintiff lessee set out the written agreement of November, 1934, reducing the rent to $7,200. Defendant lessor pleaded lack of consideration for the rent reduction. Judgment for the plaintiff lessee was affirmed by the Court of Appeals. This court held that the inability of the lessee to pay the higher rent, his imminent insolvency, and the desire of the landlord to retain the lessee as a tenant, constituted a valid consideration for the reduction in rent, and the lessor could not repudiate the contract. *Adams Recreation Palace, Inc.* v. *Griffith, Trustee*, 58 Ohio App. 216, 12 O. Op. 134, 16 N.E. (2d) 489 (1938).

In contract law the rule that payment of part of a debt is not satisfaction of the whole has long been considered elementary.[1] But like many harsh rules of law, this rule has been so amended by exceptions, both by statute and judicial decision, as to partially or wholly nullify its effect. So any consideration, however small and insignificant, has been held to satisfy the rule. Thus a subsequent agreement to pay part of a debt in satisfaction of the whole is supported by sufficient consideration if the debtor becomes bound to do anything he was not legally bound to do by the first agreement. Payment at a different time, in a different place, or in another manner other than was contemplated in the original agreement have all been held to constitute sufficient consideration to

[1] WILLISTON, CONTRACTS, sec. 120.

support an agreement to accept payment of a part of a debt in complete discharge of it. Also payment by a third person has been held to be sufficient consideration. Several states have changed the rule by statute.[2] Others have reached the same result by judicial decision.[3]

In the cases involving a reduction of rent from that reserved in the lease the courts have reaffirmed this general rule of consideration.[4] But here again, while the courts purport to require consideration for the rent reduction, they strive to relax the strictness of the rule. The cases, while numerous, show the recent origin of the problem. It was not until after 1850 that the problem became serious in England, and there is almost a total absence of cases in the United States before that date. In an early Irish case[5] it was said that it would be inequitable to decree the payment of the larger rent after the acceptance of the smaller sum for twenty years. In an Irish case[6] the court held such an agreement invalid for want of consideration, the promise being merely voluntary. This case has since been overruled.[7]

In the United States the history of the cases has been similar. The earlier cases allowed the lessor to recover the rent originally reserved in the lease.[8] But since 1890 the courts have almost uniformly found consideration for the agreement to reduce the rent, on widely divergent grounds. The earlier view was that the subsequent agreement operated as a surrender of the lease.[9] This view was also held in England and Ireland, but has been repudiated.[10] The courts who find a surrender do not explain what has taken the place of the old lease, and since the parties intend to continue bound by it, this argument does not seem to be either logical, or a desirable one to follow. Another view held by a few courts is that payment and acceptance of the reduced rent, with a receipt given, is evidence of a gift of the balance.[11] These courts ignore the fact that there has been no delivery, and the theory would seem to fail on that ground.

[2] Alabama, California, North Dakota, Oregon, South Dakota, Georgia, Maine, North Carolina, Tennessee (receipt good consideration), Virginia (part payment when accepted as payment in full extinguishes the debt).

[3] Illinois, Kansas, Massachusetts, Michigan, and Pennsylvania.

[4] *Liebreich* v. *Tyler State Bank*, 100 S.W. (2d) 152 (Texas Civil Appeals 1936). See 1 TIFFANY, LANDLORD & TENANT 1058 and cases cited.

[5] *Clark* v. *Moore*, 1 Jo. and Lat. 723 (1844).

[6] *Fitzgerald* v. *Partarlington*, 1 Jones 431 (1835).

[7] See *Berry* v. *Berry* [1929] 2 K.B. 316.

[8] 43 A.L.R. 1478.

[9] *Hyman* v. *Jockey Club*, 9 Colo. App. 299, 48 Pac. 671 (1897); *Nachbour* v. *Weiner*, 34 Ill. App. 237 (1889); *Bowman* v. *Wright*, 65 Neb. 661, 91 N.W. 580 (1902); *Copper* v. *Fretoransky*, 16 N. Y. Supp. 866, 42 N.Y. 472 (1892). This theory has been repudiated in California and New York.

[10] *Crowley* v. *Vitty*, 7 Exch. 319 (1852); *Re* Smith and Hartogs, *ex parte* Official Receiver, 73 L. T. Rep. 221 (1895).

[11] *McKenzie* v. *Harrison*, 120 N.Y. 260, 24 N.E. 458 (1890); *Doyle* v. *Dunne*, 144 Ill. App. 14 (1908). *Contra*, *Riley* v. *Kershaw*, 52 Mo. 224 (1873).

The approach most generally followed is the one the Ohio court followed in the principal case,[12] that the imminent insolvency of the lessee and his continued possession are sufficient consideration for the agreement to reduce the rent.[13] It is significant to note that almost invariably this problem has arisen about the time of some major economic depression, in periods of declining rental values. The cases fall into several fairly distinct periods: 1890-1905; 1920-1925; 1930 to the present time. Judges have been repeatedly faced with cases involving lessees who could no longer pay the larger rent of more prosperous years. This has resulted in an attempt to find some means of relaxing the strict rule of consideration to relieve these lessees of their burden. In the leading case of *Ten Eyck* v. *Sleeper*[14] the court said that mere inability of the lessee to pay is not sufficient consideration, but the lessee's continued occupancy, coupled with the fact that the depression of 1893 had caused property values to fall so that the property would be hard to rent, was consideration for the agreement to reduce the rent.[15] In *Hyman* v. *Jockey Club*, *supra*, the court said that the continuing tenancy of the lessee was sufficient consideration.[16] Thus it seems that the reasoning of the court is based on a theory of social expediency made necessary by the hardships of the time. This is aptly illustrated by a quotation from 43 A.L.R. 1451 at page 1466,[17] "If, in the course of performing a contract, unexpected obstacles are encountered, or new conditions arise that the parties could neither have contemplated nor reasonably foreseen, making the performance more onerous or less advantageous than was anticipated, and requiring, equitably, at least, a readjustment of the contractual relations, a subsequent agreement of the parties, providing that he who is called upon to meet the new difficulties or obligations shall be correspondingly compensated by an increase of remuneration, or a decrease of outlay, is to be deemed supported by a sufficient consideration." The court[18] took judicial notice of the depression of 1933, and held that the detriment to the lessee was sufficient consideration. It is clear from the opinions that the courts feel that the

[12] *Adams Recreation Palace* v. *Griffiths*, 58 Ohio App. 216, 16 N.E. 2d 489 (1938).

[13] *Ten Eyck* v. *Sleeper*, 65 Minn. 413, 67 N.W. 1026 (1896); *Hyman* v. *Jockey Club*, *op. cit.*; *Andre* v. *Graebner*, 126 Mich. 116, 85 N.W. 464 (1901); *Lindeke Land Co.* v *Kalman*, 190 Minn. 601, 252 N.W. 650 (1934); *Liebreich* v. *Tyler State Bank*, 100 S.W. (2d) 152 (Tex. Civil App. 1936).

[14] 65 Minn. 413, 67 N.W. 1026 (1896).

[15] Affirmed, *Lindeke Land Co.* v. *Kalman*, 190 Minn. 601, 252 N.W. 650 (1934).

[16] See WOOD, LANDLORD AND TENANT, 44; TAYLOR, LANDLORD AND TENANT, secs. 497-501.

[17] Quoted by the court in *Liebreich* v. *Taylor State Bank*, 100 S.W. (2d) 152 (Tex. Civil App. 1936).

[18] Note 17, *supra*.

acceptance of the reduced rent may be more advantageous to the landlord than the use of his legal remedies against a defaulting tenant.[19]

More clearly illustrative of the eagerness of the courts to find consideration for the subsequent agreement are the decisions upholding the validity of oral agreements to reduce the rent. Where the agreement is oral, however, the courts draw a sharp distinction between executed and executory agreements. In general it may be said that an executed oral agreement to reduce the rent is valid, and not within the Statute of Frauds, while an unexecuted oral agreement will not be enforced because of the Statute of Frauds. In Ohio the statute provides that all leases be in writing.[20] In the case of *Nonamaker* v. *Amos*,[21] it was held that where royalties of oil were to be paid to the lessor in lieu of rent, the amount of oil so paid could be varied at the will of the parties by oral agreement. Ohio Jurisprudence states that an agreement to reduce the rent under an existing lease does not involve the title to land or an interest therein, and does not have to be in writing.[22] Professor Williston is of the opinion that to hold an oral agreement valid would be inconsistent with the established rule of consideration, but he does not analyze the cases.[23] A recent New York statute expressly dispenses with the need for consideration in modifying agreements.[24]

Payment and acceptance with a receipt in full has been held to be a gift of the balance.[25] Oral agreements have been held binding irrespective of a written receipt (a) on the ground that the continuing tenancy of the lessee was pro tanto consideration for the agreement;[26] (b) on the ground that the general rule must not be applied to a case where the parties to a contract, still executory, agree to reduce the consideration and thereafter both sides execute it as modified;[27] (c) on the ground that the payment was by check;[28] (d) on the ground that upon the failure of the tenant to pay rent according to the lease, the

[19] 50 Harv. L. Rev. 1314. See 43 A.L.R. 1478 and 93 A.L.R. 1406, where the cases are collected and discussed. A promise by the lessee to renew the lease held to be sufficient consideration. *Huff* v. *Leeds*, 16 Ohio App. 342 (1922).

[20] Ohio General Code, sec. 8620.

[21] 73 Ohio St. 163, 76 N.E. 949 (1905).

[22] 24 Ohio Jur. Landlord & Tenant, sec. 332, embodied from 25 R.C.L. 564.

[23] 1 WILLISTON, CONTRACTS, sec. 120, page 258. But see Williston, "Law of Contracts Since the Restatement," 23 A.B.A.J. 172, 175 (1937).

[24] New York Personal Property Laws, sec. 33.

[25] *McKenzie* v. *Harrison*, 120 N.Y. 260, 24 N.E. 458 (1890); *Doyle* v. *Dunne*, 144 Ill. App. 14 (1908).

[26] *Hyman* v. *Jockey Club*, 9 Colo. App. 299, 48 Pac. 671 (1897); *Andre* v. *Graebner*, 126 Mich. 116, 85 N.W. 464 (1901).

[27] *Brackett Co.* v. *Lofgren*, 140 Minn. 52, 167 N.W. 274, L.R.A. (N.S.) 1918F 998 (1918); *Bowman* v. *Wright*, 65 Neb. 661, 91 N.W. 580 (1902).

[28] *Ossowski* v. *Wiesner*, 101 Wis. 238, 77 N.W. 184 (1898); *Eisenberg* v. *Battenfield Oil Co.*, 251 Mich. 654, 232 N.W. 386 (1930).

landlord had only the option of suing on the contract or treating it as abrogated and entering into an entirely new contract;[29] (e) on the ground that such an executed agreement is a waiver of the balance of the rent, a voluntary relinquishment of a known right, for which consideration is not necessary.[30] In California a statute provides for a waiver of the balance.[31]

From these cases then, it may be said that written agreements, and executed oral agreements, to reduce rent from that originally reserved, must be supported by consideration, but that the courts will find consideration in almost any benefit to the lessor, or detriment to the lessee. It is significant that almost without exception, every case since 1900 involving the two foregoing classes of cases has been held valid and binding upon the lessor.

In the principal case the court held that where the lease provides that in the event the property is rendered unfit for occupancy because of fire the rent for the remainder of the term should abate, and if a fire occurs at the end of the ninth month of the rent-year, the rent for the succeeding three months is abated, and the lessor may not recover the rent for the last three months, either on the theory that the entire annual rental should have been paid in the first nine installments, or on the theory that the lessor may so apply the payments made that the rent for the first three months of the annual term shall remain unpaid, and the irregular installments of rent applied to the rent for the last three months. On the second of the two theories the lessor relied on the case of *Felix* v. *Griffiths*, 56 Ohio St. 39, 45 N.E. 1092 (1897), which held that rent paid in advance cannot be recovered under the fire clause in this lease.

J. Ernest Stilwell

NEGLIGENCE

Liability of Manufacturers and Vendors

Ascertaining the liability of a manufacturer or vendor to those not in privity of contract with them has presented the courts with a difficult problem. In the recent Ohio case of *Sicard* v. *Kremer*, 133 Ohio St. 291, 13 N.E. (2d) 250, 10 Ohio Op. 367 (1938), the plaintiff, who owned a beauty-shop, purchased hair dye from a retailer to whom the

[29] *Conlan* v. *Spokane Hardware Co.*, 117 Wash. 378, 201 Pac. 26 (1921).

[30] *Hurlbut* v. *Butte-Kansas Co.*, 120 Kan. 205, 243 Pac. 324 (1926).

[31] California Code of Civil Procedure, sec. 2076, provides that objection to the amount of a tender must be made at the time the tender is made, or the person to whom the tender is made is deemed to have waived the balance. Applied in *Julian* v. *Gold*, 214 Cal. 74, 3 Pac. (2d) 1009 (1931).