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## MODIFICATION OF LEASES BY AGREEMENT TO REDUCE RENT

LESLIE WHIDDEN

IT has been commonly accepted as the law in Illinois that a lessor's agreement to reduce the rent of an unexpired lease is binding upon him to the extent that he has already received and accepted as full payment the lesser amount of rent. A number of cases in the appellate courts of Illinois have so held. Except by way of dictum, however, the Supreme Court of Illinois has not directly decided the precise question. If it may be assumed that the Supreme Court would render a decision on such a problem, when presented therewith, on the basis of accepted principles of common law, the result might easily be contrary to the present understanding. Not only are the appellate court cases not in strict accord with common law principles, but they are inconsistent with similar cases dealing with reduction of liquidated claims in other than rent cases.<sup>1</sup> While some other states likewise give the lessee this special benefit which he would not be likely to receive were he a debtor otherwise than as lessee, such states are probably still in the minority.

It is not proposed here to commend the common law for keeping a debtor bound in spite of an expressed willingness of the creditor to forgive the debt. It is only intended to show that the cases in which the lessee has been so excused from payment of his debt, and which purport to be based on accepted common law principles, are in fact based on false logic.

Leases are sometimes under seal, sometimes simple writings, sometimes verbal. While the parol evidence

<sup>1</sup> Hart v. Strong, 183 Ill. 349, 55 N. E. 629 (1899); Morrill v. Baggott, 157 Ill. 240, 41 N. E. 639 (1895); Hayes v. Massachusetts Mutual Life Ins. Co., 125 Ill. 626, 18 N. E. 322 (1888); Davidson v. Burke, 143 Ill. 139, 32 N. E. 514 (1892); Farmers & Mechanics Life Ass'n v. Caine, 224 Ill. 599, 79 N. E. 956 (1907); Curtiss v. Martin, 20 Ill. 557 (1858); Kushner v. Perlman, 189 Ill. App. 59 (1914).

rule could not prevent a proper parol modification of a prior written contract, it was a principle of the common law that a sealed contract could not be varied by parol—that a parol agreement to vary a contract under seal could not be pleaded in a court of law to defeat a recovery on the original undertaking. Coke stated the rule to be that “when a duty accrues by the deed in certainty . . . as by covenant, bill, or bond, to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high a nature. . . .”<sup>2</sup> This rule was applied whether the modifying parol agreement was executed or executory, for its basis lay in the formality of the sealed contract; it was not applied to simple written contracts.<sup>3</sup>

In some states the common law value of a seal has been eliminated by statute,<sup>4</sup> in others its effect is so modified that a sealed instrument is only presumed, in the absence of evidence to the contrary, to have been made for sufficient consideration and to be valid for that reason.<sup>5</sup> In states where the seal raises only a presumption that the agreement is supported by consideration, that presumption has been held to be rebuttable.<sup>6</sup> It has been suggested that the latter result has been reached in Illinois.<sup>7</sup> The cases seeming to uphold this conclusion depend upon the Illinois Negotiable Instruments statute of 1874,<sup>8</sup>

<sup>2</sup> *Blake's Case*, 6 Co. Rep. 43b, 77 Eng. Rep. 319 (1605); *Rogers v. Payne*, 2 Wils. K.B. 376, 95 Eng. Rep. 871 (1768).

<sup>3</sup> *Hayford v. Andrews*, Cro. Eliz. 697, 78 Eng. Rep. 932 (1599).

<sup>4</sup> *Williston on Contracts* (Rev. ed., 1936), I, 659-662, § 218, and cases there cited.

<sup>5</sup> *Ibid.*

<sup>6</sup> *In re McLaughlin's Estate*, 182 Mich. 707, 151 N. W. 745 (1915); *Gardner v. Watson*, 170 Cal. 570, 150 P. 994 (1915).

<sup>7</sup> *Williston on Contracts* (Rev. ed., 1936), I, 660, § 218: “In Illinois under a statute of different form a similar result has been reached.”

<sup>8</sup> Ill. State Bar Stats. (1935), Ch. 98, ¶ 10. “In any action upon a note, bond, bill, or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions, if such instrument was made or entered into without a good and valuable consideration, or, if the consideration upon which it was made or entered into has wholly or in part failed, it shall be lawful for the defendant to plead such a want of consideration, or that the consideration has wholly or in part failed. . . .”

which was broad enough in its language to appear to apply to all instruments. The statute has, however, been construed by the Illinois Supreme Court<sup>9</sup> to apply only to negotiable instruments; and it has been said by the Illinois Supreme Court, referring to the same words in an older statute (1827) that "a lease although it may be, in part, for the payment of money, or for the performance of covenants, is not such an instrument in writing as is contemplated by the statute."<sup>10</sup>

It follows that where the seal, having lost its common law value, does not add dignity to an instrument, a modifying agreement, though not under seal, is "matter of as high a nature" and so is effective if otherwise valid. This result should, strictly, not follow where the seal has retained its value, but the tendency has been to permit modification of sealed instruments by agreements not under seal even in such jurisdictions.<sup>11</sup>

In Illinois parol agreements to modify sealed instruments have been upheld where executed.<sup>12</sup> An executory parol agreement apparently is no more effective now to modify a sealed contract if the seal retains its common law value than it was in the time of Coke.<sup>13</sup>

However, to say that it is only where the parol agreement is executed that it will be effective to modify the sealed contract does not necessarily mean that an executed parol agreement will always be effective. Even in cases where the prior contract is not under seal, the modifying parol agreement, being in effect a new contract, requires for its validity a new consideration to support it. The consideration need not be adequate to the promise but must be of some value in the eye of the

<sup>9</sup> *Chicago Sash Mfg. Co. v. Haven*, 195 Ill. 474, 63 N. E. 158 (1902).

<sup>10</sup> *Dunbar v. Bonesteel*, 3 Scam. (Ill.) 32 (1841).

<sup>11</sup> *Tuson v. Crosby*, 172 Mass. 478, 52 N. E. 744 (1899); *Hamilton v. Hart*, 109 Pa. St. 629 (1885); *Hydeville Co. v. Eagle R. R. & Slate Co.*, 44 Vt. 395 (1872).

<sup>12</sup> *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. 673 (1892); *Gum v. Tibbs*, 134 Ill. App. 280 (1907); *Warder, Bushnell & Glessner Co. v. Arnold*, 75 Ill. App. 674 (1897).

<sup>13</sup> *Chapman, use, etc. v. McGrew*, 20 Ill. 101 (1858).

law.<sup>14</sup> The question is not the amount of consideration but whether there was any,<sup>15</sup> and it must have been within the contemplation of the parties at the time of modification. That the new agreement for some reason not anticipated by the parties becomes beneficial to one of them does not raise a consideration to support his promise to perform.<sup>16</sup>

Because the modifying agreement is a new and separate contract, its consideration must be in addition to that which supported the original contract, for the debtor incurs no legal detriment by doing part or all of what he is already bound to do, nor does the creditor thereby receive a legal benefit.<sup>17</sup> So where a liquidated sum of money is due, a promise by the creditor to discharge the whole debt in return for payment of part of the amount due is not binding because not supported by consideration.<sup>18</sup>

The requirement of consideration in settlement of liquidated claims has been attacked by law writers<sup>19</sup> and some states have by statute made payment of part of a debt a valid discharge of the whole if such is the intent of the parties.<sup>20</sup> A marked attempt has been made on the part of the courts to relax the requirement in rent cases, and this has been effected by declaring consideration to be present where in the usual sense there is none, by finding an estoppel or a waiver, by stating that execution of

<sup>14</sup> Anson on Contracts (Callaghan & Co., 1887), Part II, Ch. II, § 4, p. 88.

<sup>15</sup> *White v. Walker*, 31 Ill. 422 (1863).

<sup>16</sup> *Loach v. Farnum*, 90 Ill. 368 (1878).

<sup>17</sup> *McKinley v. Watkins*, 13 Ill. 140 (1851); *Barnett v. Barnes*, 73 Ill. 216 (1874); *Loach v. Farnum*, 90 Ill. 368 (1878); *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722 (1892).

<sup>18</sup> *Cochran v. Nat. Casualty Co.*, 261 Mich. 273, 246 N. W. 87 (1933); *Aston v. Elkow*, 271 N. W. 742 (Mich., 1937); *Williston on Contracts* (Rev. ed., 1936), I, 415, § 120 and cases there cited. This has been the unquestioned rule in Illinois in other than rent cases. *Hayes v. Mass. Mut. Life Ins. Co.*, 125 Ill. 626, 18 N. E. 322 (1888); *Knights Templars & Masons Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066 (1904); *Farmers & Mechanics Life Ass'n v. Caine*, 224 Ill. 599, 79 N. E. 956 (1906); *Woodbury v. U. S. Casualty Co.*, 284 Ill. 227, 120 N. E. 8 (1918); *Janci v. Cerny*, 287 Ill. 359, 122 N. E. 507 (1919).

<sup>19</sup> Ames, "Two Theories of Consideration," 12 Harv. L. Rev. 515 (1899).

<sup>20</sup> Ga. Code, ¶ 4329; Me. Rev. Stat., Ch. 84, ¶ 59; Va. Code, ¶ 2858.

the parol agreement ends inquiry into the question of consideration, and by considering a receipt in full as a gift of the unpaid balance.

The Supreme Court of Minnesota in 1934<sup>21</sup> affirmed its decision in *Ten Eyck v. Sleeper*,<sup>22</sup> stating that "the great and unforeseen depression (1893), resulting in the lessee's inability to pay, and the probability that the premises would become vacant, impaired in value and not readily rentable, would constitute consideration for an agreement for reduced rental." Such consideration is, to say the least, unconventional. There is no new detriment to the promisee nor additional legal benefit to the promisor, for the result of the new agreement, if it is carried out, is that the lessee has paid for the use of the premises only part of the rent which he was by the terms of the lease bound to pay, while the lessor receives nothing to which he was not already entitled. There is nothing more here to support the lessor's promise to reduce the rent than a promise by the lessee that he will do part of what he was already bound to do.

Occasionally a modification of a sealed contract will be upheld on the ground of estoppel.<sup>23</sup> And whether it is termed equitable or promissory estoppel, this is probably the only correct basis for giving effect to the modification, by parol, of a sealed contract. This will explain why it is that an executed parol agreement modifying a sealed contract will be given effect to preclude a recovery on the original contract, while an executory parol agreement will not. If one owing a duty under a sealed contract is led by verbal agreement with the other party to the contract to give a substituted or altered performance, it would be a harsh law that would allow the recipient of such performance to demand as well the performance for

<sup>21</sup> *Wm. Lindeke Land Co. v. Kalman*, 190 Minn. 601, 252 N. W. 650 (1934).

<sup>22</sup> 65 Minn. 413, 67 N. W. 1026 (1893).

<sup>23</sup> *White v. Walker*, 31 Ill. 422 (1863); *Warder, B. & G. Co. v. Arnold*, 75 Ill. App. 674 (1897); *Yockey v. Marion*, 269 Ill. 342, 110 N. E. 34 (1915).

which he contracted. But if the parol agreement is executory, it may be held ineffective without any injustice, since neither party has changed his position in reliance thereon. This is true whether there is or is not consideration for the verbal agreement. And the same principles underlie the decisions recognizing the effect of a verbal waiver of a condition required by a sealed contract.<sup>24</sup>

In the case of estoppel, as in the case of consideration, however, it is not correct to say that just because the modification will only be effective where the parol agreement is executed, it will always be effective when executed. It should be held effective only in those cases of executed agreements where one party to a contract has been led into a prejudicial position in reliance upon the promises or statements of the other. No estoppel will arise when the party acting upon a representation does only what he was legally bound to do.<sup>25</sup> So where a lessee, relying upon the promise of the lessor that he will accept less rent, pays the lesser sum, he is doing only what he was already obliged by the terms of the lease to do. This is not, then, such a change of position as would require the doctrine of equitable estoppel or promissory estoppel to be invoked. Hence, without consideration and without an estoppel, an agreement to modify either a sealed or an unsealed contract would not be entitled to recognition, whether it had or had not been executed.

It is conceivable that if a lessor agrees to accept a smaller sum and does accept it, he should be precluded from asserting that there was such a breach as would entitle him to forfeit the lease under a clause giving him that right in case of nonpayment of rent, and he might likewise be precluded from claiming interest on the unpaid balance,<sup>26</sup> but he should not be precluded from de-

<sup>24</sup> *Becker v. Becker*, 250 Ill. 117, 95 N. E. 70 (1911); *Chicago & Eastern Illinois R. Co. v. Moran*, 187 Ill. 316, 58 N. E. 335 (1900).

<sup>25</sup> *Bigelow on Estoppel* (Little, Brown & Co., 3rd ed., 1882), 550; *Organ v. Stewart*, 60 N. Y. 413 (1875).

<sup>26</sup> *Cf. Irving Trust Co. v. Compania Mexicana de Petroleo*, 66 F. (2d) 390 (1933).

manding the balance of the rent unpaid.<sup>27</sup> The lessee is not in a worse position legally because of a delay on the part of the lessor in enforcing his right,<sup>28</sup> except insofar as the lessor might demand damages for delay. The delay might be excused, therefore, but not the debt itself.

Nor is the situation aided by considering the unpaid portion of the rent waived, for while a condition which furnishes no material part of the consideration or exchange value may be waived, even in cases of sealed contracts,<sup>29</sup> "an agreement by parol cannot dispense with an obligation."<sup>30</sup> Again, the payment on the precise day it is due may, as a condition, be waived and such waiver may be treated as a continuing license to delay payment, which license may be revoked at any time with reasonable notice,<sup>31</sup> but this is quite a different matter from waiving a debt. An attempted waiver of a debt is something akin to a discharge of a debt by exoneration before breach. Exoneration, a parol discharge without consideration, was recognized in some early English cases,<sup>32</sup> but has generally not been regarded as the law in this country,<sup>33</sup> and apparently never applied to sealed instruments.<sup>34</sup>

Occasionally a court flatly states that where the agreement to reduce the amount of rent required by a lease has been executed on both sides, there can be no inquiry into the question of consideration. In *Brackett Company v. Lofgren*,<sup>35</sup> for example, the court said:

<sup>27</sup> See Williston on Contracts, §§ 690, 1831.

<sup>28</sup> *Thomson v. Poor*, 147 N. Y. 402, 42 N. E. 13 (1895); *Williams v. Wheeler*, 8 C.B. (N. S.) 299 (1860); *Plevins v. Downing*, 1 C.P.D. 220 (1876).

<sup>29</sup> *Fleming v. Gilbert*, 3 Johns. 528 (1808), and cases there cited.

<sup>30</sup> *Hayford v. Andrews*, Cro. Eliz. 697 (1599); Williston on Contracts (1st ed.), II, 1336, § 690; *Ibid.* (Rev. ed.), III, 1992, § 690; A.L.I. Restatement of the Law of Contracts, § 297, comment (c).

<sup>31</sup> *First Lutheran Church v. Rooks Creek Evangelical Lutheran Church*, 316 Ill. 196, 147 N. E. 53 (1925); *Fox v. Grange*, 261 Ill. 116, 103 N. E. 576 (1913); Williston on Contracts (1st ed.), II, 1334-5, § 689; *Ibid.* (Rev. ed.), III, 1990, § 689; A.L.I. Restatement of the Law of Contracts, §§ 88 (1), 297, 308.

<sup>32</sup> Williston on Contracts (1st ed.), III, 3150, § 1830 and cases cited, n. 43.

<sup>33</sup> *Ibid.*, III, 3152, § 1831 and cases cited, n. 52.

<sup>34</sup> *Ibid.*, III, 3159, § 1836, and cases cited, n. 81.

<sup>35</sup> 140 Minn. 52, 167 N. W. 274 (1918).



After an agreement has been fully executed on both sides the question of consideration becomes immaterial. . . . This lease was executory at the time the agreement to reduce the rent was made. The parties saw fit to execute it on both sides, in accordance with the modified terms, for the period in controversy. To the extent that it was so executed it became a closed incident, and the amount rebated cannot now be recovered.

The Minnesota court cited in support of its decision the Illinois case of *Snow v. Griesheimer*,<sup>86</sup> where it was said, So long as the contract contained in the lease under seal remained executory, the plaintiff had a right to repudiate the parol agreement and claim the full amount of rent contracted for. The rule of law, however, is one that defeats the intention of the parties, and while it should be enforced in every case to which it applies, it is not to be extended to other cases to which it does not properly apply. If the parties have executed the contract as modified, . . . the contract as executed will not be disturbed.

But in *Snow v. Griesheimer* there was a bona fide dispute as to the amount of rent due. The dispute arose out of an agreement to reduce the rent in consideration of repairs to be made by the tenant. Hence, there was a compromise and settlement with adequate consideration.

Such cases as *Bracket Company v. Lofgren* apparently ignore the fact that while the modifying agreement may be executed on both sides by the lessor's permitting the lessee to remain in possession and by the lessee's paying the reduced rent called for by the new agreement, still the original lease has not been, and could not be supplanted by the new agreement, because the latter is invalid for lack of consideration in that the lessee has suffered no detriment in performing only in part the requirements to which the lease bound him.

The original lease still stands unless it has in some way been rescinded. If by action of the parties it has been cancelled, so that neither party is bound, for however short a time, and then a new agreement with a lesser rent is made in place of it, the mutual promises in the new agreement are sufficient consideration to support the new

<sup>86</sup> 220 Ill. 106, 77 N. E. 110 (1906).

agreement and it will stand in place of the old contract.<sup>37</sup> But if the new agreement was merely a modification of the old contract, then there must, to support it, be some new legal consideration, for if the lessee pays less and suffers no detriment and the lessor making the same performance secures no legal benefit, there is no rescission, and regardless of whether the new agreement is executed, it has not changed the original agreement which is still unexecuted. "The rule still obtains in the majority of the states that the payment by the debtor and the receipt by the creditor of a part of a liquidated demand is not a satisfaction of the whole, although the creditor agrees to accept it as such,"<sup>38</sup> and so are the holdings in other than rent cases.

On principle the second agreement is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion.<sup>39</sup>

Nor can the modification of the lease be upheld on the ground of accord and satisfaction, for the amount of rent due is specified in the lease; hence, it is liquidated and cannot be in dispute, lacking the presence of some collateral circumstances<sup>40</sup> which would in itself furnish consideration. For, as was said by Ellenborough, "There must be some consideration for the relinquishment of the residue; something collateral, to shew a possibility of

<sup>37</sup> See *Noble v. Ward*, L. R. 1 Exch. 117 (1865), where the court made it clear that both parties must be free from contractual obligations before a new contract, reducing the obligation of one party, is made. For where it is agreed to cancel a contract and make a new one giving one party an added advantage in return for the same performance to which the other party was already bound the parties are never free from the original obligation. For a recent case wherein the court failed to recognize this, see *Long Mercantile Co. v. Saffron*, 104 S. W. (2d) 770 (Mo. App., 1937).

<sup>38</sup> 1 R.C.L. 184, § 15.

<sup>39</sup> *Williston on Contracts* (1st ed.), I, 275, § 130; *Ibid.* (Rev. ed.), I, 443, § 130, and cases cited, n. 3.

<sup>40</sup> *White v. Walker*, 31 Ill. 422 (1863); *Snow v. Griesheimer*, 220 Ill. 106, 77 N. E. 110 (1906).

benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum."<sup>41</sup> And in the recently decided case of *Aston v. Elkow*,<sup>42</sup> the Michigan court said, "We have many times held that part payment of a past-due, liquidated, and undisputed claim, even though accepted in full satisfaction thereof, does not operate to discharge the debt, but constitutes a discharge pro tanto only."<sup>43</sup>

The rule that payment of part cannot discharge the whole debt even though the creditor agrees, while supported by the weight of authority,<sup>44</sup> has in some jurisdictions been changed by decision<sup>45</sup> and in others by statute.<sup>46</sup> However, though criticized, the rule has the virtue of consistency.

It has also been stated that the amount by which the rent has been reduced is a gift.<sup>47</sup> It is interesting to follow the course of the Illinois cases in this respect. In *Goldsborough v. Gable*,<sup>48</sup> where a parol agreement to reduce the rent called for by a lease under seal had been executed, the Supreme Court, in speaking of the oral agreement to reduce the rent called for by the lease, said: It simply purports to obligate appellee to pay and appellant to receive \$50, where they were already obligated, the one to pay and the other to receive \$70. There is, thereby, neither in fact nor in presumption of law, injury or loss to appellee, or gain or benefit to appellant. It follows that it is an agreement, as clearly as one can be, without any consideration to support it,—a mere

<sup>41</sup> *Fitch v. Sutton*, 5 East 230, 102 Eng. Rep. 1058 (1804).

<sup>42</sup> 271 N. W. 742 (Mich., 1937).

<sup>43</sup> See also *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034 (1893); *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367, 73 N. E. 61 (1905); *Galowitz v. Hendlin*, 150 N.Y.S. 641 (1914); L.R.A. 1917A 719, note; 21 L.R.A. (N. S.) 1005, note; 11 L.R.A. (N. S.) 1018, note; 20 L.R.A. 785, note.

<sup>44</sup> *Williston on Contracts* (1st ed.), I, 257, § 120, n. 41; *Ibid.*, (Rev. ed.), I, 415, § 120, n. 3, and cases there cited.

<sup>45</sup> *Clayton v. Clark*, 74 Miss. 499, 21 So. 189 (1897); *Frye v. Hubbell*, 74 N. H. 358, 68 A. 325 (1907).

<sup>46</sup> Georgia, Maine, Virginia, California.

<sup>47</sup> *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458 (1890); *Zindler v. Levitt*, 116 N. Y. S. 726 (1909); *Holmes v. Holmes*, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444 (1902); *Leddel's Executors v. Starr*, 20 N. J. Eq. 274 (1869).

<sup>48</sup> 140 Ill. 269, 29 N. E. 722 (1892).

nudum pactum; and so it is binding upon neither of the parties, and is unsusceptible of being enforced in this suit. . . . It is impossible to say that the agreement was made as an adjustment of a dispute in regard to a doubtful right, for appellee's own testimony shows that there was no fact in dispute between him and appellant. His testimony is only that he claimed that the rent should be reduced and that appellant resisted the claim at first, but finally yielded to the extent shown by the agreement. It cannot be held that appellant is in any way estopped by the agreement, since it is not shown that appellee has, in consequence of it, done that which he would otherwise not have done, whereby he will be injured if the agreement be not carried out. Nor can it be held that the agreement has the effect of an executed gift as to the difference between the \$50 and the \$70 per month, because there was executed no receipt or release for the amount, and there was no proof of any action of the parties equivalent thereto.

Since, as pointed out by the court, the question of the result in case there had been receipts in full or a release was not in issue, no receipts or release having been given, whatever the court said on that point was dictum. Even so, it would be logical to presume that the court meant such a receipt or release as would be effective at common law, that is to say, under seal.<sup>49</sup>

The Illinois Appellate Court, in *Doyle v. Dunne*,<sup>50</sup> said: That Dunne is liable in this action for the difference between the amount he has paid and the amount reserved by the lease, is deduced by the plaintiff's counsel from the doctrine of such cases as *Loach v. Farnum*, 90 Ill. 368, and *Goldsborough v. Gable*, 140 Ill. 269, which hold that a parol agreement to reduce rent, entered into by a lessor without consideration, is a mere nudum pactum, not binding, and not susceptible of being enforced; from such cases as *Chapman v. McGrew*, 20 Ill. 101; *Alschuler v. Schiff*, 164 Ill. 298; and *Ryan v. Cooke*, 172 Ill. 302, which hold that an instrument under seal cannot be modified by parol, and from those cases which hold that the payment of a less sum where a greater liquidated and undisputed sum is due, is not a satisfaction of the greater sum.

<sup>49</sup> Release not under seal has been held ineffective in *Farmers & Mechanics Life Ass'n v. Caine*, 224 Ill. 599, 79 N. E. 956 (1907); *Benjamin v. McConnell*, 4 Gilm. (Ill.) 536 (1847).

<sup>50</sup> 144 Ill. App. 14 (1908).

But as the Supreme Court noted in *Snow v. Griesheimer*, 220 Ill. 106, the rules of law thus laid down, even in executory contracts, defeat the intention of the parties and should not be unduly extended.

And in the cases cited on leases the doctrine is simply that so long as the contract contained in the lease under seal remained executory, the plaintiff had a right to repudiate the parol agreement and claim the full amount of rent contracted for, while in the *Snow* case the converse is explicitly recognized, that "If the parties have executed the contract as modified, so that nothing remains to be done by either party, it is no longer executory and the contract as executed will not be disturbed." . . . And the opinion in *Goldsborough v. Gable* suggests the difference between that case and the present one, and the ground on which the finality of the settlement of rent charges between the parties in the case at bar should be sustained, when it says: "Nor can it be held that the agreement has the effect of an executed gift as to the difference between the \$50 and the \$70 per month, because there was executed no receipt or release for the amount, and there was no proof of any action equivalent thereto." . . . It is the actual executed waiver and release of the difference in the rents, not the "agreement" made without consideration, which was thus sustained as a gift by the trial judge when he declined in a suit begun almost a year after the contract of lease had terminated and expired by its terms, and the accordant surrender of the premises, to hold the lessee liable for money from the payment of which the evident intention and understanding of the parties—as understood by both of them—was that he should be and had been released.

But as already pointed out, the executed modifying agreement in the *Snow* case rested on sound consideration, that is, the making of repairs by the tenant in return for the reduction in rent, and the statement in *Goldsborough v. Gable* regarding receipts and releases was dictum, and may not have meant a receipt or release not under seal.

In *Levy v. Greenberg*,<sup>51</sup> the Appellate Court, referring to the *Snow*, *Goldsborough*, and *Doyle* cases, said, ". . . we are disposed to regard the reductions in rental as gifts of separate and distinct items each month, and when the

<sup>51</sup> 261 Ill. App. 541 (1931).

same were paid and accepted, we believe the gift in each case is complete and irrevocable. . . .”

In *Hymen v. Anschicks*,<sup>52</sup> the Appellate Court again said, “It is well settled that an executed parol agreement may be shown to defeat a recovery upon an instrument under seal. *Yockey v. Marion*, 269 Ill. 342; *Snow v. Greisheimer*, 220 Ill. 106; *Worrell v. Forsyth*, 141 Ill. 22; *Doyle v. Dunn*, 144 Ill. App. 14.”

In the *Yockey* case where a bill was filed to construe a will and an antenuptial contract, the court said,

An executed parol agreement may be shown to defeat a recovery upon the instrument under seal, and although the parol agreement may have been without consideration it may become a basis for an equitable estoppel, if by means of it one of the parties has been led into a line of conduct prejudicial to his interests if the contract should be enforced.

But it will be noticed that the Supreme Court did not say that every executed parol agreement without consideration may be shown to defeat a recovery upon an instrument under seal, as apparently was assumed by the Appellate Court in the *Hymen* case, for the court in the *Yockey* case merely said that such agreement might become the basis for an equitable estoppel; and as has been shown already no estoppel can arise from payment of what is already due. Likewise in the *Worrell* case, also relating to an antenuptial agreement, the court stated only that a parol agreement if executed could defeat recovery upon a sealed instrument if an equitable estoppel had arisen by the reliance of one of the parties thereon in moving to his detriment. The *Snow* and *Doyle* cases have already been considered.

It is apparent, then, that the appellate court decisions are based on particular phrases taken from the Supreme Court cases and not on Supreme Court decisions. In the only Supreme Court case intimating that the unpaid portion of the rent might be made the subject of a gift by delivery of a receipt in full, the statement was dictum.

<sup>52</sup> 270 Ill. App. 202 (1933).

The statement was not even in affirmative language. The court did not say that if a receipt in full had been given it would have constituted a gift and therefore it was not called upon to state what kind of a receipt—sealed or unsealed—would have such effect.

Let it be conceded that it might be desirable to permit a discharge by a receipt not under seal, still the common law knew no such discharge, nor would the common law have given effect to it as a gift. At common law, title to a chose in action could be passed only by deed.<sup>53</sup> While gifts of choses in action have been recognized without a formal written assignment in modern times, it will be found on inspection of the cases that this is, in general, true only in cases where the right of action is embodied in an instrument in writing which gives the possessor control of the chose in action and where the obligor has a right to the surrender of the instrument as a condition to his payment.<sup>54</sup> In such cases the gift may be made where there is a donative intent by a delivery of such instrument to the donee. A receipt is not a deed which can pass title, it is not such an instrument as embodies the debt—like a stock certificate, bond, or note of a third person, nor is the obligor's duty so conditioned upon the delivery of such a writing that possession thereof might be said to give the possessor exclusive control of the debt. A receipt is merely a statement of fact, made by the creditor, which he is not estopped to dispute. Since it is an informal, non-depositive writing, it may be modified, explained, or contradicted by parol.<sup>55</sup> Nor does this violate the parol evidence rule, which protects only the state-

<sup>53</sup> *Irons v. Smallpiece*, 2 B. & A. 551, 106 Eng. Rep. 467 (1819); *Williston on Contracts* (1st ed.), I, 257, § 120; *Ibid.* (Rev. ed.), I, 416, § 120, and cases there cited.

<sup>54</sup> *Hopkins v. Manchester*, 16 R. I. 663, 19 A. 243, 7 L. R. A. 387 (1889); *Cook v. Lum*, 55 N. J. L. 373, 26 A. 803 (1893); *Mangan v. Howard*, 238 Mass. 1, 130 N. E. 76 (1921); *Philip Mechem*, "Gifts of Corporation Shares," 20 Ill. L. Rev. 9 (1925).

<sup>55</sup> *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113 (1903); *Murphy v. Halleran*, 50 Ill. App. 594 (1893); *Hartford Life Ins. Co. v. Sherman*, 123 Ill. App. 202 (1905); *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287 (1888).

ment of a promise, not the statement of a fact.<sup>56</sup> So the common law rule remains that if the unpaid debt is to be considered released, the release must be under seal,<sup>57</sup> and it would seem that the requirement of a seal must still be complied with except in those jurisdictions where a seal has lost its value.<sup>58</sup> If the receipt is sealed, it could be given the effect of a release.<sup>59</sup> If it is unsealed it must be supported by consideration, and the consideration must be something more than a payment of part only of what is already due.<sup>60</sup>

It has been demonstrated that according to established principles of common law a contract can be modified only by another contract, which requires as one of its elements legal consideration, or if it be a deed, by an instrument also under seal in jurisdictions where, as in Illinois, the seal still has its common law efficacy. Consequently, a promise to change the amount of rent due under a lease should, depending on the nature of the lease, be supported by a new consideration or be under seal.

Although it be granted that they have the power to do so, are the courts justified in changing or ignoring these principles to effect what they consider a desired result? While apparent justice may be done in some cases by enforcing a subsequent unsupported promise, does such result justify creating inconsistency and uncertainty in

<sup>56</sup> *Presbyterian Church v. Cooper*, 112 N. Y. 517, 20 N. E. 352 (1889); *McCourt v. Peppard*, 126 Wis. 326, 105 N. W. 809 (1905); *Stewart v. Chicago & E. I. R. Co.*, 141 Ind. 55, 40 N. E. 67 (1895). But see *Seyferth v. Groves & S. R. R. Co.*, 217 Ill. 483, 75 N. E. 522 (1905), holding a refusal to take a dollar consideration when tendered equivalent to payment and that the option was binding despite a subsequent revocation.

<sup>57</sup> *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514 (1892); *Farmers & Mechanics Life Ass'n v. Caine*, 224 Ill. 599, 79 N. E. 956 (1907); *Benjamin v. McConnell*, 4 Gilm. (Ill.) 536 (1847).

<sup>58</sup> *Wabash Western Ry. v. Brow*, 65 F. 941, (1895); *Winter v. Kansas City Cable Ry. Co.*, 160 Mo. 159, 61 S. W. 606 (1900).

<sup>59</sup> *Jackson v. Sec. Mutual Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198 (1908).

<sup>60</sup> *Foakes v. Beer*, L.R. 9 A.C. 605 (1884); *Chicago, M. & St. P. R. R. Co. v. Clark*, 178 U. S. 353, 44 L. Ed. 1099 (1900); *Knights Templars & Masons Life Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066 (1904); *Farmers & Mechanics Life Ass'n v. Caine*, 224 Ill. 599, 79 N. E. 956 (1906); *Janci v. Cerny*, 287 Ill. 359, 122 N. E. 507 (1919); *Curtiss v. Martin*, 20 Ill. 557 (1858).



the law? Over a long period of time there has evolved a method of protecting parties to contracts and donors and donees of gifts. If one intends to change his contract, why should he not observe the established laws of contracts, and if his intention be to make a gift, why should he not observe the customary legal procedure for that purpose? If it be said that laymen are not acquainted with legal requirements and that the courts should protect them against their legal mistakes, it might be suggested that one function of the lawyer is to advise.

Where a rule of law has been long established, courts are usually reluctant to abolish it unless changing conditions have clearly eliminated the reason for the rule. The theory of consideration is the reason on which depends the rule that an undisputed, liquidated debt cannot be cancelled by payment of part alone. It follows that before the rule could be considered eliminated, one must first admit the false premise that the theory of consideration itself has been abandoned.

In Illinois where the seal has, except as to negotiable instruments, retained its common law value, an adequate modification may be made with ease by committing the new agreement to writing and following the signature by the word "Seal." Why not take advantage of the simplicity thus afforded by requiring in this state that modification of a sealed instrument be under seal, and that a writing not under seal be modified either by an instrument under seal or by a parol agreement supported by legal consideration, or at least an estoppel, and so do away with the confusion and uncertainty attendant upon the task of trying to find consideration where there is none, or a gift or release where none was legally made, or perhaps even intended? It is to be hoped that a Supreme Court decision directly on the point may soon clarify the situation.