

NOTES

LANDLORD AND TENANT—RENT—AGREEMENTS TO REDUCE RENT.
—During the depression years, there was a widespread tendency among tenants to seek reduction of the previously established rental for the premises they occupied, basing their pleas on a general shrinkage of incomes. Many of these requests were complied with, landlords realizing that rentals stipulated in boom days before the crash were far above the price for which other premises were available. But, today, with the upturn in business activity, landlords might well wonder whether they can recoup the losses occasioned by reduced rents, by suit against the tenant for the unpaid difference between the original and reduced figures.

Primarily, a single question is presented—whether the promise to reduce, and the silent acceptance of a lesser amount for a period of time, are in their nature legally binding upon the landlord.¹ This primary question resolves itself into several secondary problems, which, in turn, will be determined by fundamental requirements of consideration, estoppel, discharge, and so on.

The question may, of course, arise under varying circumstances. The tenancy may have been a periodical one, indefinite as to duration;² or it may have been a tenancy for a fixed term, with a specific rental fixed in the original lease,³ or, finally, it may have been a combination

1. It is not within the scope of this note to discuss the various remedies provided for the recovery of unpaid rental, inquiry being directed mainly at whether the landlord has any action at all for the difference between the original and reduced rentals, or whether he is precluded from claiming any more than that agreed upon subsequent to the creation of the tenancy.

2. This would include all periodical or "year to year" tenancies, whether of month to month or year to year varieties. See TIFFANY, REAL PROPERTY (2nd Ed.) p. 228 *et seq.*

Month to month variety: *Breidt City Brewery Co. v. Weber*, 90 N.J.L. 641, 101 Atl. 382 (E. & A. 1917); *Abbey v. Weingart*, 71 N.J.L. 92, 58 Atl. 87 (Sup. Ct. 1904); *Maier v. Champion*, 97 N.J.L. 493, 117 Atl. 603 (E. & A. 1922); *Steffens v. Earl*, 40 N.J.L. 128 (Sup. Ct. 1878).

Year to year variety: *Snowhill v. Snowhill*, 23 N.J.L. 447 (Sup. Ct. 1852).

3. A tenancy for years embraces all tenancies for a fixed period, whether for a fixed number of weeks or months, or for a year or longer. So long as the period is a fixed one, it is a tenancy for years. *Newhoff v. Mayo*, 48 N.J.Eq. 619 (E. & A. 1891). LITTLETON, sec. 58; COKE ON LITTLETON, 45-b.

of these two types—a periodical tenancy growing out of a holdover after the expiration of a fixed term.⁴ There are other variations,⁵ but the three enumerated embrace nearly all the situations likely to be encountered.

Before examining the basic question of consideration, which arises throughout the inquiry, it is well to dispose of several collateral problems which may be presented, and some of which have been previously treated.⁶

The first of these is the question of the subsequent alteration of a previously existing contract. It is settled beyond dispute that any contract, written or oral, may be modified by subsequent oral agreement (and, of course, by written agreement), and this, even though the subsisting agreement provides that its terms may not be altered except in writing.⁷ Thus, no real difficulty is presented by the objec-

4. *Maier v. Champion*, 97 N.J.L. 493, 117 Atl. 603 (E. & A. 1922); *Haynes v. Aldrich*, 133 N.Y. 287 (1892).

5. *E.g.*, Tenancies at will, at suffrance. See TIFFANY ON REAL PROPERTY, (2nd Ed.) p. 214, *et seq.*; WILLIAMS ON REAL PROPERTY (23rd Ed.) pp. 543, 544, for a discussion of tenancies at will; and TIFFANY, *op. cit.*, p. 241 *et seq.*; 2 BLACKSTONE 150, for a discussion of tenancies at suffrance.

6. II NEW JERSEY LAW REVIEW 64, 67.

7. This rule is, of course, subject to statutory provisions which require a writing for enforceability.

On the general rule, see *Troth v. Milville Bottle Works*, 89 N.J.L. 219, 98 Atl. 435 (E. & A. 1916); *Church v. Florence Iron Works*, 45 N.J.L. 129 (Sup. Ct. 1883); *Maryott v. Renton*, 21 N.J.Eq. 381 (E. & A. 1869); *Tompkins v. Tompkins*, 21 N.J.Eq. 338 (Ch. 1871); *McKinstry v. Runk*, 12 N.J.Eq. 60 (Ch. 1858).

For the proposition that subsequent oral modification is effective though the original contract forbids it, see *Frank Wirth, Inc., v. Essex Amusement Corp.*, 115 N.J.L. 228, 128 Atl. 757 (E. & A. 1935); *Denoth v. Carter*, 85 N.J.L. 95, 88 Atl. 835 (Sup. Ct. 1913); *Headley v. Cavileer*, 82 N.J.L. 635, 82 Atl. 908 (E. & A. 1911). "No matter how stringently such clauses may be worded, it is always open for the parties to agree, orally or otherwise, upon proper consideration, that they shall be partially or entirely disregarded, and another agreement substituted." *Headley v. Cavileer*, *supra*, this note.

For the proposition that a mortgage, which is required to be under seal, may be modified by subsequent oral agreement, at least to the extent of postponing time for payment, see *Tompkins v. Tompkins*, *supra*, this note.

These rules are not to be confused with the parol evidence rule, which is concerned with parol agreements made simultaneously with or previous to the

tion that the modification upon which the tenant relies is oral, and not written, as was the existing lease. Nor should we be concerned with the question of whether the parties intended the reduction agreement to be reduced to writing before they should be bound, as this is essentially a factual problem and varies with each case.⁸

Any subsequent agreement, however, being in its nature a new contract, must of necessity have its own distinct legal effect, and must partake of all the characteristics of a binding and enforceable agreement. Little difficulty is presented, in the present study, with most of the requisites, such as offer and acceptance, competence of the parties, legality, or form, the material element being that of consideration. Since most of the situations fail to disclose any new *quid pro quo*, the agreement can only be valid, if at all, by reason of some antecedent obligation.

Taking up, first, the commonest relationship, the periodical tenancy, the question is—if the tenant should threaten to vacate (other than by the giving of proper notice for the recurring period date) unless the landlord reduce the rent, can the latter be bound to his promise, without more? The only possible consideration here is the promise by the tenant to pay rent—an antecedent agreement. Helm points out that the cases allowing recovery on a promise supported only by an antecedent act or obligation involve situations where the parties are bound by an implied promise arising from the antecedent act, the later promise being important only as evidence of the recognition by the parties of the existing obligation.⁹ Periodical or year to year tenancies, of whatever variety they be, are indefinite in duration, and the mutual obligations thereunder continue until terminated by the giving of proper notice.¹⁰ This does not satisfy Helm's analysis,

contract is issue, and not with *subsequent* agreements. *Naumberg v. Young*, 44 N.J.L. 331 (Sup. Ct. 1882); *Perth Amboy Nat'l Bank v. Mahler*, 110 N.J.L. 228, 164 Atl. 284 (E. & A. 1932); *McGabe v. Standard Motor etc. Co.*, 106 N.J.L. 227, 147 Atl. 466 (E. & A. 1929).

8. See, on the general subject, *Bladis v. Ulrick*, 118 N.J.Eq. 445, 179 Atl. 630 (Ch. 1935), commented on in II NEW JERSEY LAW REVIEW 64; *Donnelly v. Currie Hardware Co.*, 66 N.J.L. 380, 49 Atl. 428 (Sup. Ct. 1901); *Water Comm'rs v. Brown*, 32 N.J.L. 504 (E. & A. 1866).

9. HELM ON CONTRACTS, p. 258 (1926).

10. *Steffens v. Earl*, 40 N.J.L. 128 (Sup. Ct. 1878).

for the agreement to reduce rent, instead of constituting recognition of the existing obligation, is an attempt to modify it. The tenant, prior to the agreement, is entitled to possession, and is under a duty to pay a certain rental. If the landlord should agree to accept less, he cannot be bound thereby—he receives nothing for the promise. He has a *right* to the stipulated rental, not a mere *power* or *privilege*, as is the case with forfeiture.¹¹ If he is to surrender that right, there must be a new consideration, however slight,¹² to support the promise.

It might appear from the language of some cases, and of the *Restatement of the Law of Contracts*,¹³ that if the agreement to modify is itself accepted as a discharge, that will suffice to bind the parties. But is this unqualifiedly true? In *Lorentowicz v. Bowers*,¹⁴ \$750 of a \$1,000 note, given in payment for a purchase of goods, remained unpaid. The payee agreed to take back the goods, which the maker claimed were unsatisfactory, upon payment of an additional \$100, and to discharge the maker from further liability. It was held that the jury was justified in finding that there was an intent to accept the new promise, of itself, as a satisfaction of the old obligation, and this being the fact, that it cancelled the prior rights.¹⁵ But does this mean that

11. Suppose, for example, the tenant covenants not to sublet, and later on, violates the covenant, so that the landlord may exercise the power or privilege to declare the rest of the term forfeited. But if the landlord does not so elect, and accepts rent, knowing of the breach, he waives the power.

This is not true in case of a *right*—as where *A* owes *B* \$50, and *B* accepts \$25, "waiving" the rest. The waiver cannot bind *B*.

12. A promise to do that which one is already bound to do is an unreal consideration. *Shaefer v. Brunswick Laundry Co.*, 116 N.J.L. 268, 183 Atl. 175 (E. & A. 1935); *Haynes Auto Repair Co. v. Wheels, Inc.*, 115 N.J.L. 447, 180 Atl. 836 (E. & A. 1935); *Durant v. Block*, 113 N.J.L. 509, 174 Atl. 889 (E. & A. 1934); *Decker v. Smith & Co.*, 88 N.J.L. 630, 96 Atl. 915 (E. & A. 1915); *Watts v. Frenche*, 19 N.J.Eq. 407 (Ch. 1869); *Clyne v. Helmes*, 61 N.J.L. 358, 39 Atl. 767 (Sup. Ct. 1898); *Chambers v. Niagara Fire Ins. Co.*, 58 N.J.L. 216, 33 Atl. 383 (Sup. Ct. 1895).

13. RESTATEMENT OF THE LAW OF CONTRACTS, sec. 418: "If the subsequent contract is itself accepted as a discharge of the old obligation, breach of the subsequent contract does not revive the old obligation."

14. 91 N.J.L. 225, 102 Atl. 630 (E. & A. 1917).

15. To the same effect, see *N. J. Terra Cotta Co. v. Goodman, etc., Corp.*, 103 N.J.L. 113, 134 Atl. 759 (E. & A. 1926). Here, too, plaintiff sued to recover an unpaid balance on the original contract to purchase goods. The defendant

the parties, by making a new agreement for the payment of a sum lesser than that which is due, without more, are precluded from relying on the original agreement? So to conclude would be to disregard the elementary principle that "you can't pay a larger sum with a lesser sum."¹⁶ In all of the cases where the new agreement (whether executed or not) is held to constitute an accord, or a novation, the *facts* disclose that the prior obligation was unliquidated; or, if liquidated, in *bona fide* dispute.¹⁷

However, if the tenant were to give the landlord proper notice

pleaded a subsequent agreement to reduce the price because *the goods did not comply with the specifications*; *Morecraft v. Allen*, 78 N.J.L. 729, 75 Atl. 920 (E. & A. 1910), pointing out that where damages are *unliquidated*, a fair settlement and compromise of a claim which has some legal merit, though less in amount than was claimed, is favored by the courts if intended to be final, and effects a novation of the old agreement.

16. *Primer's Case*, 5 Coke 117a, 77 Eng. Rep. 237; *Fitch v. Sutton*, 5 East. 230; *Foakes v. Beer*, 9 App. Cas. 605; *Cumber v. Wane*, 1 Strange 426; *Chicago, M. & St. P. Ry. Co. v. Clark*, 178 U.S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099 (1899); *WILLISTON ON CONTRACTS* (Rev. Ed.) sec. 120 *et seq.*; 4 *PAGE ON CONTRACTS*, (2nd Ed.) sec. 2516.

For a criticism of this rule, see Ames, *Two Theories of Consideration*, 12 *HARVARD LAW REVIEW*, 515, 521. Professor Ames attacks the rule by pointing out that if *A* owes *B* \$1000, *A* can relieve himself of liability by getting *B* to agree to take some article of merchandise; why then should not *A* be able to pay *B* \$500 and be relieved of liability if *B* agrees? But in the former case, just as in the case where the existing claim is unliquidated, or is in *bona fide* dispute, there is a translation of the obligation, and no one can say that the new obligation is not the equivalent of the former; in the latter case, where the obligation is to pay a liquidated sum, and the new promise is to accept less, yet, since there is no *bona fide* dispute as to the amount due, how can *A* bind *B* to his promise? *B* cannot be said to have waived (*supra*, note 11), and though he may voluntarily forbear from suit, the litigation arises when he is no longer willing to be generous. See generally, *O'Connor v. Meskill*, 39 Atl. 1061 (Ch. 1898).

17. Since the tenant can terminate the tenancy by giving proper notice for the recurring period date, it is only a difference in degree if he gives notice of willingness to pay only a reduced rental, for such notice implies that if the landlord does not agree, the tenant will leave, and this he has a perfect right to do. Therefore, the landlord's promise, or even, perhaps, his silent acceptance of the rent thereafter, ought to bind him, for here, the tenant is doing something he is not legally bound to do.

for the recurring period date of the tenancy, that thereafter he would be willing to pay only a lesser sum than had previously been set, and the landlord were to agree to the reduction, it is entirely consistent to decide that he is bound by his promise.¹⁸ The situation in such case would not be one of modification or alteration of an existing agreement, but one of termination of the existing agreement, and the creation of a new one. The element of consideration would not be involved.

In the case of an existing lease for years, the landlord cannot be bound by a promise to reduce rent, unless there is a new consideration. The tenant cannot terminate a lease for years by the mere giving of notice.¹⁹ When the lease is made, the tenant buys the property for a definite period; the landlord agrees to accept the purchase price in installments, in the form of rent. Notice how this differs from the first situation, that of the periodical tenancy, in that the latter can be ended by the mere giving of notice.²⁰

It may seem a harsh and useless rule which distinguishes two situations which, for practical purposes, appear identical, but in its

18. The tenant has expressed unmistakably that he will remain only if a lesser sum is accepted. If the landlord says nothing, and accepts the lesser amount, what other conclusion can be reached except that the parties have entered into a new agreement, *after the termination* of the old one? The old one having been ended, the tenant is no longer bound to pay anything under it. His new promise to pay rent is consideration for the use of the premises thereafter.

"Consideration" is not essential to effective termination of the tenancy; but it is essential that the notice be proper, and for the recurring period date. One month's notice is required in case of a periodical tenancy of the month to month variety; six months' notice in case of one of the year to year variety; one week's notice in case of one of the week to week variety, etc. *Steffens v. Earl*, 40 N.J.L. 128 (Sup. Ct. 1878).

19. The obligation to pay rent under a lease for a fixed term continues until the tenancy is terminated either by surrender, eviction, forfeiture, or by the expiration of the term. *Haynes v. Aldrich*, 133 N.Y. 287, 31 N.E. 94; *Kutter v. Smith*, 2 Wall. 491, 17 L. Ed. 830; *Snowhill v. Reed*, 49 N.J.L. 292, 10 Atl. 737 (Sup. Ct. 1887), *reversed on other grounds*, 51 N.J.L. 162, 16 Atl. 679 (E. & A. 1888); *Waters v. Williamson*, 59 N.J.L. 337, 36 Atl. 665 (Sup. Ct. 1896).

20. *Steffens v. Earl*, 40 N.J.L. 128 (Sup. Ct. 1878); *Finkelstein v. Herson*, 55 N.J.L. 217, 26 Atl. 688 (Sup. Ct. 1893); *Zabriskie v. Sullivan*, 80 N.J.L. 673, 77 Atl. 1075 (Sup. Ct. 1910).

support, it may well be pointed out that a slight consideration will be sufficient to support an agreement to reduce the rental called for by an existing lease,²¹ and this, too, is a practical consideration. A promise by the tenant to pay one day earlier than provided for in the lease will support an agreement to reduce rent. The tenant's promise, in such case, is not merely to pay rent, which he was already bound to do, but is to pay it before the due date, which he is not legally bound to do.²²

The question of modification of an existing lease for years, then, will appear to be governed by the same rules applicable to ordinary contract situations, where the amount due is both liquidated and undisputed. An excellent analogy is afforded by the familiar "hold-up" cases, wherein a contractor refuses to proceed with the erection of a building unless he is paid more than the stipulated consideration. Some of the building contractor cases hold that where unexpected difficulties are encountered, a "hold-up" for more money will be enforced.²³ It is to be noted, however, that in such cases the obstacle encountered is one which the parties did not contemplate as within the purview of the contract, as, where the builder agrees to blast limestone at a certain price per cubic foot, but discovers that traprock, which is much harder and breaks into small fragments unsuitable for building purposes, underlies a thin surface outcrop of limestone. In that situation it is clear that the parties intended the price to be set for blasting limestone; the contractor is not bound to blast anything but limestone

21. "Yet any consideration for the new undertaking, however insignificant, satisfies this rule." *Levine v. Blumenthal*, 117 N.J.L. 23, 186 Atl. 457 (Sup. Ct. 1936), *aff'd*, 117 N.J.L. 426, 189 Atl. 54 (E. & A. 1937), *citing* *Coast Nat'l Bank v. Bloom*, 113 N.J.L. 597, 174 Atl. 576, 578 (E. & A. 1934).

22. "For instance, an undertaking to pay part of the debt before maturity, or at a place other than that where the obligor was legally bound to pay, or to pay in property, regardless of its value, or to effect a composition with creditors by the payment of less than the sum due, has been held to constitute a consideration sufficient in law. The test is whether there is an additional consideration adequate to support an ordinary contract, and consists of something which the debtor was not legally bound to do or give." *Levine v. Blumenthal*, *supra*, note 21. See also, *Haynes Auto Repair v. Wheels, Inc.*, *supra*, note 12.

23. *Osborne v. O'Reilly*, 42 N.J.Eq. 467, 9 Atl. 209 (Ch. 1887); *Marten v. Brown*, 80 N.J.L. 43, 76 Atl. 1009 (Sup. Ct. 1910); *aff'd*, 81 N.J.L. 599, 80 Atl. 476 (E. & A. 1911).

at the agreed price. Hence, an agreement to pay more if the contractor agrees to blast traprock is supported by consideration, the contractor is doing something he is not legally bound to do.²⁴

This principle has been sought to be applied to landlord and tenant agreements, the reasoning involved being, essentially, that the rental is determined on the basis of existing economic conditions, and that if, by reason of an unforeseen depression, the tenant cannot pay, he is not bound to pay, and his promise to pay, though a lessor amount, will support an agreement to reduce the rent.²⁵ The fallacy is obvious. The distinction above pointed out is highly refined, and can in justice be applied only where it is clear that the situation complained of was not contemplated by the parties. Careful analysis of the "unforeseen difficulty" cases, at least insofar as recognized in New Jersey, discloses that the subsequent agreement is binding only where the unforeseen condition is such as gives a legal right to the contractor to refuse to perform, and that right is exercised to the extent of abrogating the existing contract before the creation of the new one.²⁶ An economic depression, however severe, can hardly be recognized as a basis for allowing debtors to escape liability, in the absence of express provi-

24. *Osborne v. O'Reilly*, *supra*, note 23.

25. The principle involved is applied in *Long v. Hartwell*, 34 N.J.L. 116 (Sup. Ct. 1870); *Halpern v. Shurkin*, 98 N.J.Eq. 28, 129 Atl. 487 (Ch. 1925); *Frank Wirth, Inc., v. Essex Amusement Corp.*, 115 N.J.L. 228, 178 Atl. 757 (E. & A. 1935), noted in II *NEW JERSEY LAW REVIEW* 67.

26. In *Osborne v. O'Reilly*, *supra* note 23, the plaintiff agreed to blast limestone, a soft rock, which blasted into blocks, suitable for use in building. Instead, traprock and flint were encountered, both of which resisted steel drills, and blasted into small fragments, useless for building purposes. The court said, at p. 481, "That there was ground to claim a *right* to abandon the work and *rescind the contract* for the reasons already given, is manifest." (Italics added.)

In *Marten v. Brown*, *supra*, note 23, the plaintiff agreed to do the carpentry work in the erection of a building, in a "workmanlike manner." The masonry was to be done by another contractor. Upon commencing work, it was found that the foundation and other masonry was poorly built, necessitating greater expense than if it had been done properly. This too, is clearly sufficient ground for rescission. But if, for example, the cost of building materials had risen, and no provision for that contingency had been made, it is difficult to see how the builder would be justified in refusing to proceed. Or, as in *Shaefer v. Brunswick Laundry Co.*, *supra*, note 12, if the work is interrupted by a strike, that is not sufficient.

sion to that effect. Further, the factual situation in most instances reveals that the old agreement is not abrogated, but is continued in force, the covenant to pay a stipulated rental being the only provision which the parties attempt to alter.²⁷

The third situation, where the tenancy is a periodical one of uncertain duration, but has followed an expired term for years, is more complex than the first two. Unless the agreement to reduce rent was made about the time the term for years expired, the rules applicable to the first two categories will control.²⁸ But suppose that a month before the expiration of the lease, the tenant informs the landlord that he will not remain, except under a reduced rental. In such case it is not disputable that if the landlord acquiesces, and the tenant remains, the agreement will be binding. When the lease ended, the tenant was under no obligation at all—the relationship was terminated.²⁹ The agreement reached by the parties a month before resulted in the creation of a new tenancy, independent of the old one, governed by the same principles applicable to an agreement expressly creating a periodi-

27. In *Levine v. Blumenthal*, *supra*, note 21, the only alteration was that the rental was to continue at \$175 per month, instead of increasing the second year.

In *Torrey v. Adams*, 254 Mass. 22, 149 N.E. 618 (1925), the only change was that the landlord secured a promise from the tenant to pay additional rent (the principle involved here is identical).

In *Von Alberti v. Bierman*, 117 N.J.L. 431, 189 Atl. 387 (E. & A. 1936), the agreement alleged was only to reduce the rental after a holdover.

In *Trust Co. v. Doherty*, 117 N.J.L. 433, 189 Atl. 54 (E. & A. 1936), the facts were essentially the same.

28. If the agreement is made after the expiration of the term, the provisions of the former lease will automatically become incorporated into the newly-created periodical tenancy. *Trust Co. v. Doherty*, *supra*, note 27. In holding over, the tenant is a wrongdoer, and in no position to dictate terms, the election to treat him as a tenant being solely the landlord's. *Condon v. Barr*, 47 N.J.L. 113 (Sup. Ct. 1885); *Den. v. Adams*, 12 N.J.L. 115 (Sup. Ct. 1830). The situation, therefore, will be as if a tenancy, reserving the original rental had been created upon the expiration of the term.

29. In the case of a lease for years (for a fixed term), the term, and hence the relationship, ends with the expiration of the period for which the lease was made; nor is notice of any kind required to effect such termination. *Williams v. Mershon*, 57 N.J.L. 242, 30 Atl. 619 (Sup. Ct. 1894).

cal tenancy.³⁰ The tenant was never a holdover. He is now in possession solely by virtue of the new agreement, irrespective of any previous transaction between the parties.³¹

Now, if no word had been spoken before the lease ended, and the tenant had remained after the expiration of the term, and thereafter requested a reduction, the landlord's acceptance of a lesser sum, of itself would not bind him. He could at any time (before the bar of the Limitation of Actions statute had fallen) institute suit for the unpaid balance. In holding over (and this implies that the landlord's consent to a continuance of possession was not first obtained),³² the tenant became a trespasser—a wrongdoer. True, if the landlord should elect to treat him as a tenant, a tenancy is created,³³ but the election is the landlord's alone.³⁴ The trespasser is in no position to dictate terms. The tenancy arising out of the holdover is molded and shaped by the terms of the expired lease, including the provision for rent.³⁵ Any agreement to reduce, therefore, must be supported by a new consideration, if it is made under these circumstances.³⁶

30. As to the creation of a periodical tenancy by express agreement, see *Montalvo v. Levinston*, 94 N.J.L. 87, 110 Atl. 128 (Sup. Ct. 1919).

31. Thus, the question of consideration, other than the present promise to pay rent, cannot arise. The cases requiring such new *quid pro quo* do so because the tenant is still bound by some previous transaction. But here, the obligations under the lease ended, and the parties were free to arrive at any conclusion as to the rental thereafter.

32. *Condon v. Barr*, *Den v. Adams*, both *supra*, note 28. Holding over is defined as "The act of keeping possession by the tenant, without the consent of the landlord, of premises which the latter, or those under whom he claims, had leased to the former, after the term has expired." *BOUVIER'S LAW DICTIONARY*, (Rawle's 3rd. Ed.).

33. *Crawford v. Kline*, 74 N.J.L. 203, 65 Atl. 441 (Sup. Ct. 1906).

34. *Condon v. Barr*, *Den v. Adams*, both *supra*, note 28.

35. When a tenant remains in possession with the landlord's consent after the expiration of an estate for years, without any new agreement, he is regarded as continuing the relation upon the terms of the original tenancy and is liable for rent as though a new lease reserving the same rent had been formally made. *Trust Co. v. Doherty*, 117 N.J.L. 433, 189 Atl. 54 (E. & A. 1936), *following* *Yetter v. King Confectionery Co.*, 66 N.J.L. 491, 49 Atl. 678 (Sup. Ct. 1901).

36. *Cf.*, note 31, *supra*. There, no old obligation existed when the new agreement went into effect. Here, however, when the agreement is made, the tenant has already bound himself to pay the former rental by holding over.

It will be seen from the illustrations above that the problem may be resolved into two general rules:

1. Where the tenant, at the time the agreement is made, has no right or justification to terminate the tenancy, a consideration, other than the promise to pay the reduced rental is required;³⁷ and

2. Where the tenant, at the time of the agreement, has the right or power to terminate the existing relationship (or is no longer under any obligation) no new consideration, other than the promise to pay the reduced rental, is required, provided, that if the tenant is still obligated at the time of the agreement, he must give the landlord proper notice, as though he were terminating the tenancy, of his intention to pay only a reduced rental.³⁸

TRUSTS—RETENTION OF CONTROL BY SETTLOR—DOCTRINE OF TENTATIVE TRUSTS.—The concept of tentative trusts adopted in some jurisdictions arises upon the death of a person who has during his life attempted to make a voluntary declaration of trust and at the same time retain control over the *res*, which usually is a bank deposit,¹ with the intention that the balance should pass to the beneficiary upon his death. The donor attempts to accomplish this result by depositing his

Thus, the parties are modifying the existing contract, and a new consideration must be shown.

37. *E.g.*, where the lease for years is still in force, *supra*, notes 19, 20; or where the tenant from year to year seeks his reduction without giving proper notice, *supra*, note 12.

38. *E.g.*, where the new agreement is to take effect on the termination of the existing lease, *supra*, note 31; or where the periodical tenant does give proper notice, *supra*, note 17.

1. *Stevenson v. Earl*, 65 N.J.Eq. 721, 55 Atl. 1091 (E.&A. 1903) involved an employee's deposit fund. Deceased had the right to deposit and withdraw from it during his lifetime and by agreement with the company it was to pay the balance at his death to his wife. Held—Wife had no present interest in the fund during his life and the gift was purely testamentary in character and violates the Statute of Wills.