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## LANDLORD AND TENANT - LIABILITY OF SUBTENANT FOR RENT AFTER SURRENDER OF HEAD LEASE

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LANDLORD AND TENANT — LIABILITY OF SUBTENANT FOR RENT AFTER SURRENDER OF HEAD LEASE — Plaintiff, as assignee of the original lessor, sued the defendant, sublessee, for rent. On September 3, 1930, the head lease was surrendered to the owner, subject to all subleases. The defendant was in

possession until about January 4, 1933. At that time he learned of the surrender and vacated the premises. *Held*, the lessee's surrender of the head lease to the owner did not terminate either the rights or obligations of the sublessee. The doctrine of merger is inapplicable. *Metropolitan Life Ins. Co. v. Hellinger*, 272 N. Y. 24, 3 N. E. (2d) 621 (1936).

At common law, surrender of a lease operated to merge the lesser interest in the greater reversion.<sup>1</sup> However, a voluntary surrender will not be allowed to cut off the rights of third parties.<sup>2</sup> Since the doctrine of merger is merely a technical rule of law, it is equitable that it should not be allowed to cut off the rights of subtenants. On the other hand, to hold that the subtenants' obligations are cut off is both inequitable and inconsistent.<sup>3</sup> This apparent inconsistency has been founded on the argument that since the original lessee parted with the reversion, he lost the rights to rents which were incident to it; and that the landlord does not hold the reversion to which the rents were incident at the time of the surrender, for it merged in his greater reversion.<sup>4</sup> This line of thought left the landlord remediless.<sup>5</sup> There still exists a real danger against which the landlord must protect himself. An agreement with the subtenant that he will attorn, secured before acceptance of the surrender, is the most practical method. After this precaution it is unlikely that there will be any trouble, for most tenants will have no objection to a change in the landlord. Some landlords prefer to take from the lessee an assignment of the rentals under the sublease. The sublessee can then be sued on this contract. A less common way to prevent merger is to transfer the head lease to a third person to hold in trust for the landlord. When the landlord has neglected to protect himself, the courts make various attempts to avoid an illogical and unjust result.<sup>6</sup> Where the sublessee has remained in possession with knowledge of the

<sup>1</sup> 1 TIFFANY, REAL PROPERTY, 2d ed., § 59 et seq. (1920).

<sup>2</sup> 2 TIFFANY, LANDLORD AND TENANT 1349 (1912). Where the surrender occurs because of a violation of the lease, the sublessee's rights are also surrendered. The sublessee is charged with notice of the terms and conditions in the first lease. *Shannon v. Grindstaff*, 11 Wash. 536, 50 P. 123 (1895); 39 HARV. L. REV. 656 (1926). For further discussion and cases involving the effect of surrender of the original lease on rights of sublessee, see note, 7 L. R. A. (N. S.) 221 (1906); 52 L. R. A. (N. S.) 978 (1914).

<sup>3</sup> 13 COL. L. REV. 245 (1913).

<sup>4</sup> "Since, in the case of a sublease . . . there remains an estate in the lessee, intervening between the reversion and the estate or interest in the sublessee, there is no privity of estate between the subtenant and the former lessor, and as there is no privity of contract, the former is not liable to the latter for rent." 52 L. R. A. (N. S.) 976 (1914) and the cases there cited.

<sup>5</sup> Nor can there be recovery for the reasonable value for use and occupation. *Buttner v. Kasser*, 19 Cal. App. 755, 127 P. 811 (1912), noted in 26 HARV. L. REV. 458 (1913).

<sup>6</sup> Under the most recent English statute, surrender causes a subtenant to hold directly from the landlord. 8 & 9 Vict., c. 106, § 9 (1845). The New York statute, 7 N. Y. Consol. Laws (Birdseye, 2d ed., 1918), L. 1909, c. 52, § 226, p. 7427, follows the earlier English statute, 4 Geo. 2, c. 28, § 6 (1730). That statute protects the landlord only when the surrender was made for the purpose of acquiring a new lease.

surrender, his act has been held to amount to an attornment.<sup>7</sup> In permitting recovery of rents in *Beal v. Boston Spring Car Co.*,<sup>8</sup> the court said that, where the parties intended, the rent and reversion could be separately assigned. The principal case seems to fall into the group which hold that merger will not occur contrary to the intention of the parties.<sup>9</sup> The opinion of the intermediate court<sup>10</sup> cited several New York cases which hold that the surrender of the head lease does not defeat the rights of the sublessee.<sup>11</sup> Under the orthodox rule it does not follow from such decisions that the sublessee's obligations are not cut off.<sup>12</sup> These decisions do show, nevertheless, that the New York court is looking to the practical relationship between the landlord, who owns the land, and the subtenant, who is in possession of the land. Formerly too much stress was put on the lack of technical privity of contract and estate between the landlord and subtenant. It is disappointing to find that the few recent decisions still adhere to the rigid rule requiring privity between the parties.<sup>13</sup> However, it seems that there is no justifiable reason for permitting the subtenant to remain in possession without paying rent to the owner of the land. The New York court in the principal case has departed from precedents and textbooks to reach a desirable result. It is to be hoped that other states will reach the same conclusion either by statute or by judicial action.

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<sup>7</sup> *McDonald v. May*, 96 Mo. App. 236, 69 S. W. 1059 (1902).

<sup>8</sup> *Beal v. Boston Spring Car Co.*, 125 Mass. 157, 28 Am. Rep. 216 (1878).

<sup>9</sup> *Hessel v. Johnson*, 129 Pa. St. 173, 18 A. 754 (1890). On second appeal the same position was taken. 142 Pa. St. 8, 21 A. 794, 11 L. R. A. 855 (1891). This position was also taken in *Weiss v. Mendelson*, 24 Misc. 692, 53 N. Y. S. 803 (1898).

<sup>10</sup> *Metropolitan Life Ins. Co. v. Hellinger*, 246 App. Div. 7, 284 N. Y. S. 432 (1935).

<sup>11</sup> *Ashton Holding Co. v. Levitt*, 191 App. Div. 91, 180 N. Y. S. 700 (1920); *Eten v. Luyster*, 60 N. Y. 252 (1875).

<sup>12</sup> Note in 18 A. L. R. 963 (1921).

<sup>13</sup> *First State Bank of Keota v. Wadley*, 103 Okla. 147, 229 P. 165 (1924); *Leckie v. Dunbar*, 177 Okla. 355, 59 P. (2d) 275 (1936); *Lesser v. Pomin*, 3 Cal. App. (2d) 117, 39 P. (2d) 451 (1934); *Moline v. Portland Brewing Co.*, 73 Ore. 532, 144 P. 572 (1914).