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Reletting on Abandonment by Tenant as Surrender by Operation of Law

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Among the very many difficult problems arising under the Statute of Frauds not the least troublesome has been that of surrender of estates by “operation of law.” The Statute (29 Car. II, c.3, §3,) provided that “no leases * * * shall * * * be assigned, granted, or surrendered, unless it be by deed or note in writing, * * * or by act and operation of law.” Under a number of varying situations it has been held that a surrender by operation of law had been accomplished. See 2 Tiffany, Landlord and Tenant, §190. In Lyon v. Reed, 13 M. & W. 285, Baron Parke, after referring to a number of such situations, said: “It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. It takes place independently, and even in spite of intention.”

Perhaps the most common situation giving rise to a claim of surrender by operation of law is the re-letting of the premises to a new tenant after a lessee has abandoned them before the end of his term, notice of intention to continue to look to the original lessee to make up deficiencies, if any, sometimes being given and sometimes not. Whatever may be said as to the proper holding on sound legal reasoning, it is certainly true that the courts are holding that such re-letting does not necessarily bring about a surrender by operation of law; particularly is this true where the lessor has given notice to the first lessee that the new lease is made on his account, or without prejudice to any claims against him on the original lease. Rucker v. Mason (Okla. 1916), 161 Pac. 195, 15 Mich. L. Rev. 357; Hickman v. Breadford (Iowa 1917), 162 N. W. 53.

If such surrenders are, as said by Baron Parke, founded upon estoppels and are wholly independent of intention, it would seem that cases of the above
character must be considered as incorrectly decided. The new lease must be
taken, at least as between the parties thereto, as valid; but how can it be
valid as against the lessor unless the first lease has somehow been gotten out
of the way? Can he be allowed to say that he has two present leases of the
same premises running along concurrently? But the courts are far from
agreement with Baron PARKER's doctrine that intention has nothing to do
with surrenders by operation of law. See Van Renssalaer's Heirs v. Pen-
niman, 6 Wend. 569; Smith v. Kerr, 108 N. Y. 31, 15 N. E. 70; Thomas v.
Zumbalen, 43 Mo. 471; Johnson v. Northern Trust Co., 265 Ill. 263, 106 N. E.
See also Nichells v. Atherstone, 10 Q. B. 944; Zick v. London United Tram-
ways, Limited [1908], 2 K. B. 126. And that surrenders by operation of law
do not necessarily rest upon estoppels at all is the opinion expressed in an
interesting note in 5 Irish Jurist 117. Cf. 2 Tiffany, Landlord and Ten-
ant 1322.

But whether the true explanation is estoppel or necessary implication from
certain facts not amounting to a technical estoppel, it is difficult to see how
in the usual case of re-letting after abandonment by a tenant before the end
of his term the old term can be said to be continuing. And the mere giving
of notice to the old tenant that the new lease shall not act as a release of
liability would seem to make no real difference. An agreement by the original
lessee may well produce a different result. Whatever may be said as to the
necessity for estoppel to bring about a surrender by operation of law, it
would seem quite proper to say that, where all the elements of an estoppel
to assert the continuance of the relation of landlord and tenant are present
there has been a surrender by operation of law. It is submitted that in the
type of cases under discussion there is such an estoppel.

The prevailing doctrine undoubtedly is due very largely to a desire on the
part of the courts to avoid imposing what seems to be a hardship upon the
landlord. It should be noted that a lease can be very easily so worded
that the lessor may be protected and at the same time avoid the difficulties
herein referred to. See, however, Whitcomb v. Brunt (N. J. 1917), 100 Atl.
175, where such a provision in a lease led to another very interesting dif-
ficulty, the lessor on re-letting getting a higher rent than provided for in
the original lease. It was held that the lessor did not need to account to
the first lessee for such excess.

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