the beneficial owners to avoid the statutory liability. *Corker v. Soper* 53 F. (2d) 190 (C.C.A. 5th 1931); 45 Harv. L. Rev. 580 (1932). There, since, the holding did not consist of a majority of the shares, obviously no centralization of control of the company was intended. The parent company in the principal case can be distinguished in that its primary purpose was to centralize control. In both cases, however, the fact that the holding companies were inadequately financed to meet the contingent liability attaching to bank stock can be considered as indicating an attempted evasion of the statute. To determine when a holding company is so inadequately financed as to justify a disregard of the corporate entity to the extent of holding its stockholders personally liable, its assets must be carefully scrutinized. Since the purpose of the statute is to provide a "secondary" protection to depositors, equalling the stock of the depositary bank, it should not be considered an evasion if the assets of the holding company are sufficient to satisfy that contingent liability on the bank shares held. Thus, where a holding company has a wide and diversified portfolio consisting of many strong operating companies amply sufficient to satisfy any contingent liability on bank stock held, there should be no reason to hold its shareholders personally liable. And it is conceivable that a parent company, whose sole assets are stocks in a large number of subsidiary banks widely distributed geographically, would be adequately financed to protect creditors of failing banks by converting some of the stocks of their solvent banks into cash. But, as a practical matter, since the double liability clause would render a bank-stock holding company insolvent whenever it became necessary to pay an assessment on more than one-half the shares held, there is always present a real risk that such a company will have inadequate assets.

The difficulty of determining whether or not there is adequate financing and the desire to effectuate as completely as possible the protection to bank depositors intended by the statute may well justify a definite rule that, whenever the assets of a holding company consist solely of bank stocks, its shareholders assume the contingent statutory liability.

It is perhaps unfortunate that the courts in such cases rationalize their decisions in terms of disregarding the corporate entity. When it is considered that the issue is primarily one of statutory policy, to speak of disregarding the corporate entity is not only unnecessary, but tends to obscure the real issue. See Douglas and Shanks, Insulation from Liability through Subsidiary Corporations, 39 Yale L. J. 193, 212 (1929).

Criminal Law—Merger of Conspiracy into Completed Offense—[New Jersey].—Defendant, indicted for conspiracy to commit embracery, defended on the ground that the crime of embracery having been committed, the conspiracy had merged into the completed crime. *Held*, the conspiracy did not merge into the completed offense. *State v. Simon*, 113 N. J. L. 521, 174 Atl. 867 (1934).

At common law the doctrine of merger prevented conviction of a misdemeanor where a felony arising out of the same acts was proved. *Rex v. Cross*, 1 Ld. Raym. 711 (K.B. 1701); *Lutterell's Case*, 6 Mod. 77 (Q.B. 1703). The courts probably applied this rule in order to secure for the king the property forfeited on conviction of a felony, by forcing the prosecutors to try the felony. Clark, Criminal Law (Mikell's 3d ed. 1915), §§ 9, 10; 1 Wharton, Criminal Law (12th ed. 1932), § 26. Moreover, persons indicted for misdemeanors had certain advantages in trial, such as the rights to have counsel, a

copy of the indictment, and a special jury, which persons indicted for felonies did not have. 1 Bishop, Criminal Law (9th ed. 1923), § 787 (2); Miller, Criminal Law (1934), § 13; 1 Wharton, Criminal Law (12th ed. 1932), § 39. Consequently two felonies or misdemeanors do not merge. *Waldeck v. U.S.*, 2 F. (2d) 243 (C.C.A. 7th 1924); *Orr v. People*, 63 Ill. App. 305 (1896); *People v. Coney Island Jockey Club*, 68 Misc. 302, 123 N.Y.S. 669 (1910); 2 Wharton, Criminal Law (12th ed. 1932), § 1632. The principal case comes within this rule. Since a conspiracy to commit a felony may often be only a misdemeanor, under this rule proof of the felony would prevent conviction of the conspiracy.

In this country, where the estates of felons are not subject to forfeiture and where no distinction is made between the rights of a defendant on trial for a misdemeanor and the rights of a defendant on trial for a felony, there are two theories of the doctrine of merger as applied to conspiracy cases.

(1) The acts alleged to constitute the conspiracy are said to be part of the completed offense. See *State v. Setter*, 57 Conn. 461, 468, 18 Atl. 782, 783 (1889); *People v. Thorn*, 21 Misc. 130, 47 N.Y.S. 46 (1897). From this it would follow that punishment for both conspiracy and completed crime would place the defendant in double jeopardy for the same offense. This theory furnishes the background of statements that, if the defendant were convicted of both crimes, the sentence should be apportioned. *Regina v. Button*, 11 Q. B. Rep. 929 (1848) (wherein the English court repudiated the doctrine of merger); *People v. Palmisano*, 132 Misc. 244, 229 N.Y.S. 462 (1929). Actually, however, the conspiracy is a substantive crime involving acts not a part of the felony, and therefore punishable separately. *Carter v. McClaughry*, 183 U.S. 365 (1902); *Wilson v. State*, 74 S.W. (2d) 1020 (Tex. Crim. App. 1934).

(2) Merger of conspiracy into the completed felony has been assimilated to merger of attempts into completed crimes. See dissenting opinion in *Johnson v. State*, 29 N. J. L. 453 (1861); *Hartman v. Commonwealth*, 5 Pa. 60, 67 (1846); Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393, 399 (1922). But attempts are punished only because the defendant has demonstrated a wrongful intent with serious enough overt activity to make him considered dangerous to the state. Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 Yale L. J. 53 (1930). There being no completed crime to prosecute, the state must proceed on what it has; if the crime is completed, there is no necessity for resorting to the attempt as a basis of prosecution. *People v. Lardner*, 300 Ill. 264, 133 N.E. 372 (1921). The crime of conspiracy, however, is designed to protect the state not from incomplete offenses, but from anti-social combinations. The combination may be more dangerous than any of the ends which it contemplates. *Sneed v. U.S.*, 298 Fed. 911 (C.C.A. 5th 1924). Criminal liability for a conspiracy ought not to be taken away by its success. *Heike v. U.S.*, 227 U.S. 131 (1913).

Occasionally in particular cases there are reasons for desiring to prosecute the conspiracy rather than the felony. Thus, the statute of limitations may have run against the completed felony but not against the conspiracy, *U.S. v. Rabinowich*, 238 U.S. 78 (1915); or the punishment for the conspiracy may be more severe than that for the completed felony, *State v. Setter*, 57 Conn. 461, 18 Atl. 782 (1889). In such cases the legislature seems to have sanctioned a separate conviction for the conspiracy. *Cf. People v. Arnold*, 46 Mich. 268, 9 N.W. 406 (1881).

The generally established American rule denies that a conspiracy merges into a

successful felony. *State v. Effer*, 25 Del. 92, 78 Atl. 411 (1910); *Commonwealth v. Walker*, 108 Mass. 309 (1871); *Johnson v. State*, 29 N. J. L. 463 (1861); *People v. Tavormina*, 257 N.Y. 84, 177 N.E. 317 (1931); *contra*, *Commonwealth v. Barnett*, 196 Ky. 731, 245 S.W. 874 (1922). Michigan has abolished the merger doctrine by statute. Mich. Comp. Laws (1929), § 17297. Considering the advantages which flow to the state from having both avenues of prosecution open, the general American rule seems to be well-founded.

Mortgages—Receiver's Claim for Rent against Lessee Subsequent to the Mortgage—[New Jersey].—A lease was executed subsequent to a mortgage. After default on the mortgage, the mortgagee filed a bill to foreclose. The tenant was not made a party to the foreclosure proceedings in which defendant was appointed receiver. The receiver distraining for rent, the tenant sought to enjoin the distraint proceedings on the ground that the lease had been terminated by the appointment of the receiver. *Held*, the lease was not terminated, for the appointment of the receiver did not constitute an eviction. *Walgreen Co. v. Moore*, 173 Atl. 587 (N.J. Eq. 1934).

A tenant is bound by the terms of his lease until he has been evicted. Neither the filing of the bill nor the appointment of a rent receiver amounts to an eviction. *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 130 N.E. 295 (1921); *Knickerbocker Oil Corp. v. Richfield Oil Corp.*, 234 App. Div. 199, 252 N.Y. Supp. 1017 (1931). It was argued that the possession of the receiver is the possession of the mortgagee, see *Bermes v. Kelley*, 108 N.J. Eq. 289, 154 Atl. 860 (1931); *New York Trust Co. v. Shelburne*, 110 N.J. Eq. 187, 159 Atl. 522 (1932); 2 Clark, Receivers (2d ed. 1929), § 963, and since the mortgagee claims under a paramount title, 2 Jones, Mortgages (8th ed. 1928), § 982, this amounts to an eviction of the tenant. See *Keenan v. Jordan*, 204 Ia. 1338, 217 N.W. 248 (1925); *Hoogestraat v. Donner*, 209 Ia. 672, 228 N.W. 632 (1930).

But the receiver is not in the position of the mortgagee, for the receiver acts not as an agent of the mortgagee, even though he be entitled to possession, but as an officer of the court to preserve the *status quo* during litigation. *Desiderio v. Iadonisi*, 115 Conn. 652, 163 Atl. 254 (1932); *Chicago Title and Trust Co. v. McDowell*, 257 Ill. App. 492 (1931); Tefft, Receivers and Leases Subordinate to the Mortgage, 2 Univ. Chi. L. Rev. 33 (1934).

Furthermore, even though it is conceded that the receiver is in the position of a mortgagee entitled to possession, it does not necessarily follow that there has been an eviction of the tenant, which will excuse his obligation to pay rent. A mere notice by the mortgagee to the tenant to pay rent to him has been held not to be such a hostile assertion of paramount title as to constitute a constructive eviction. *Wilton v. Dunn*, 17 Q.B. 294 (1851); *Towerson v. Jackson*, [1891] 2 Q.B. 484; *Drakford v. Turk*, 75 Ala. 339 (1883); 2 Jones, Mortgages (8th ed. 1928), § 982; 1 Tiffany, Landlord and Tenant (1912), § 73; 3 Tiffany, Real Property (2d ed. 1920), § 614. To have a defense on the ground of constructive eviction the tenant must attorn to the mortgagee either by payment of rent after notice or other acts indicating assent to the mortgagee's claim. *West Side Trust & Sav. Bank v. Lopoten*, 193 N.E. 462 (Ill. 1934); *Anderson v. Robbins*, 82 Me. 422, 19 Atl. 910 (1890); *Adams v. Bigelow*, 128 Mass. 365 (1880).

Moreover, the eviction argument defeats itself by its own premise. The receiver being considered in the position of the mortgagee, it becomes immaterial whether or not the tenant has been evicted, for eviction is a defense merely to the mortgagor's claim