

ROBERT E. FERGUSON (PLAINTIFF).....APPELLANT.

1889

AND

*Oct. 25, 26.

HOWARD D. TROOP (DEFENDANT).....RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.

*June 12.

*Lessor and lessee—Eviction—Entry by lessor to repair—Intent—Suspension
of rent—Construction of lease.*

A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after except with the consent of the lessee. An action for rent under the lease was resisted on the ground that the lessor had been in possession of part of the premises after the specified time without the necessary consent whereby the tenant had been deprived of the beneficial use of the property and had been evicted therefrom. On the trial the jury found that no consent had been given by the lessee for such occupation and that the lessee had no beneficial use of the premises while it lasted.

Held, per Taschereau, Gwynne and Patterson JJ., reversing the judgment of the court below, 1. that the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the acts and conduct of the lessee.

2. The two months' limitation in the lease had reference to the entry by the lessor to commence the repairs and not to his subsequent occupation of the premises, and the lessor having entered upon the premises within the prescribed period he had a reasonable time to complete the work and his subsequent occupation was not wrongful.

Per Taschereau and Gwynne JJ. that assuming assent was necessary the evidence clearly showed that the lessor was on the premises after the 1st of July with the assent of the lessee; he had a right, therefore, to remain until such assent was revoked which was never done.

Per Patterson J., that interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving

PRESENT: Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

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the tenant of the use of a portion, does not necessarily work an eviction ; a tenant may be deprived of the beneficial occupation of the premises for part of his term, by an act of the landlord, which is wrongful as against him, but unless the act was done with the intention of producing that result it would not work an eviction.

Per Ritchie C. J. and Strong J., approving the judgment of the court below, that the jury having negatived consent by the lessee, and the evidence showing that the acts of the landlord were of such a grave and permanent character, as to indicate an intention to deprive the tenant of the beneficial enjoyment of a substantial part of the premises, they amounted to an eviction of the tenant which operated as a suspension of the rent.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict for the defendant and order a new trial.

By an indenture under seal made by and between Robert E. Ferguson and Alfred B. Sheraton, dated the 6th of May, 1882, Ferguson leased to Sheraton certain land in the city of St. John, with all buildings thereon, then occupied by one Warwick and T. and A. Likely, to hold for ten years, commencing on the 1st of May, 1883, that is, at the termination of the leases of said Likely and Warwick, for the sum of \$2,800 for each and every year and after the same rate for every part of a year, in four equal quarterly payments in each year, the first payment to be made on the 1st of August, 1883. The material part of this lease, so far as the present enquiry is concerned, is as follows :

“ It is also hereby mutually agreed upon by and between the parties hereto that the said Robert E. Ferguson and his legal representatives, agents and servants, if he or they should think proper or expedient, may enter upon the said land and premises herein demised for the purpose of repairing, altering or improving the same or any part thereof, at any time either between the date of this indenture and the first day of May, one thousand eight hundred and eighty-three, and for

two months thereafter, but not after that time except with the approbation or consent of the said party of the second part or his legal representatives. It is also to be fully and clearly understood by and between the parties hereto that the nature and extent of any repairs, alterations or improvements which the said Robert E. Ferguson or his legal representatives may make upon the said land and premises is to be left and is left entirely and unreservedly to the judgment and decision of the said Robert E. Ferguson and his legal representatives. (But the said Robert E. Ferguson may here state in outline [in parenthesis] what his present intentions are as to said alterations, repairs and improvements, namely, that he intends removing the structures in the rear of the front or main building on the said land and replace the same with a brick structure, with stone foundation, to connect with said main building, and that in the interior, floors may be laid and the walls and ceilings of shop flat, and the two flats over the shops, may be plastered or sheathed with boards in the said addition to the said main building. That stairways may be constructed from one flat to another on all the floors. That an elevator or hoist may be placed on the premises. That drain may be re-cut or new drain made from a point in said proposed addition through the said main building, under the floor of one of the shops in the same, to the front on said street, thence to the sewer leading to the 'main' on said street. And also, that the floor in premises occupied by said Warwick as aforesaid, in the shop part, may be renewed. And also, plumbing may be re-done and gas pipes put in said addition.) It is to be understood also that the said Alfred B. Sheraton and his legal representatives are to make at his and their own expense and risks any and all improvements and repairs which he or they may require during the term of this lease

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in or upon the said demised premises, over and above what the said Robert E. Ferguson and his legal representatives may make, as above indicated, and to keep the said premises, after such improvements are made, both those of said Robert E. Ferguson and his representatives, and Alfred B. Sheraton and his representatives, in good and sufficient repairs and condition during the term of this lease."

The defendant Troop and one H. C. Lawton, by an instrument under their respective hands and seals on and annexed to said lease, agreed with plaintiff as follows:—

"In consideration of the letting of the premises above described and of the sum of one dollar, to me in hand paid, the receipt whereof I, H. D. Troop, and I, H. C. Lawton, hereby acknowledge, I do hereby become surety for the punctual payment of the rent and performance of the covenants in the above written agreement mentioned to be paid and performed by the said Alfred B. Sheraton for himself, his heirs, executors, administrators and assigns, in the manner of above agreement, and if any default shall be made therein, I do hereby promise and agree to pay unto the said Robert E. Ferguson, his heirs, executors, administrators and assigns, such sum or sums of money as will be sufficient to make up such deficiency and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment or proof of demand being made. Given under my hand and seal this sixth day of May, one thousand eight hundred and eighty-two."

On this last instrument the present action is brought against the defendant Troop, the plaintiff alleging that Sheraton entered into and occupied the premises under the lease and became tenant of the plaintiff under the terms of the said lease, and then avers default in pay-

ment of rent, and that at the commencement of the suit there was due to the plaintiff \$1,400 for two quarters rent. To recover this amount the action was brought.

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To this defendant pleaded a number of pleas substantially that the tenant was evicted by the landlord from a portion of the demised premises, and the case turns upon whether or not there was an eviction.

The repairs were not completed by the first of July and the plaintiff claimed that the delay was caused by the tenant asking for additional improvements. The tenant, in giving evidence at the trial, denied that he ever verbally consented to plaintiff remaining after the 1st of July, but it was sworn that he had insisted upon everything being finished by October, in time for an exhibition which was to be held then.

The jury found that the property was not fit to be occupied up to the first of November and that no consent was given by the tenant or his surety for the plaintiff remaining in possession after the time stipulated. The tenant left the premises in September. On these findings of the jury a verdict was entered for the defendant and affirmed by the full court of New Brunswick.

There was a former trial of this case, the verdict in which was set aside and a new trial ordered (1).

Gilbert Q.C. for the appellant. There can be no eviction of a tenant unless it appears that the landlord had an intention to evict. *Upton v. Townend* (2); *Saner v. Bilton* (3).

Weldon Q.C. and *Barker Q.C.* for the respondent referred to the report of the case in the court below (1) and to the following cases. *Upton v. Townend* (2);

(1) 25 N.B. Rep. 440.

(2) 17 C.B. 30.

(3) 7 Ch. D. 815.

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Smith v. Raleigh (1); *Reeve v. Bird* (2); *Morrison v. Chadwick* (3); *Neale v. McKenzie* (4); *Egerton v. Page* (5); *Sherman v. Williams* (6).

SIR W. J. RITCHIE C.J.—It is clear beyond all doubt that by the acts of the landlord the tenant was deprived of the enjoyment of a considerable portion of the premises demised to him, and that in consequence thereof the lessee, after notice that he considered himself evicted, abandoned the premises. The question then is: Did the acts amount to an eviction of this part of the demised premises so as to operate as a suspension of the rent?

Williams J. in Upton v. Townend (7) says:—

Considering how frequently transactions of this sort are taking place it is somewhat remarkable that so little is to be found in the books upon the subject of eviction. There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction according to the intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises they would constitute an eviction.

Chancellor Kent, in a note to the 3rd vol. of the *Commentaries* (8) says:—

Any act of a grave and permanent nature done by the landlord with the intention and effect of depriving the tenant of the enjoyment of any portion of the demised premises is an eviction in the modern sense which suspends the entire rent while it lasts, and there cannot be a doubt that the question whether the act is of that character and done with that intent is for the jury.

Citing *Upton v. Townend & Greenlees* (9); *Royce v. Guggenheim* (10); *Skally v. Shute* (11). And he goes on

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| (1) 3 Camp. 513. | (6) 113 Mass. 481. |
| (2) 1 C.M. & R. 36. | (7) 17 C.B. p. 67. |
| (3) 7 C.B. 283. | (8) 13th edition p. 464. |
| (4) 1 M. & W. 747. | (9) 17 C.B. 30. |
| (5) 1 Hilton (N.Y.) 329. | (10) 106 Mass. 201. |
| (11) 132 Mass. 367. | |

to say, there can be no doubt that the eviction by the landlord of his tenant from a part of the premises creates a suspension of the entire rent (1).

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It is clear that the entry by the landlord up to the 1st of July was not with any such intention because it was under the express terms of the lease, so that we have to ascertain whether the acts subsequent to the 1st of July by the landlord were not of such a grave and permanent nature as to amount to an eviction.

If the subsequent acts of interference with the tenant's rights rendered it incompatible for him to hold according to the terms of his demise, and those acts were done with the intention of not permitting the tenant to enjoy for the time being the premises as he was entitled to enjoy them, and they were of a serious and continuous character, or as Chancellor Kent expresses it of a grave and permanent nature, then they would, in my opinion, amount to an eviction because the tenant would be thereby deprived of the occupation of the thing demised, and there would be a substantial interference in the enjoyment of the premises by the tenant whereby he would be deprived of the perfect and convenient use of the subject matter of the demise so as to entitle him to say he had not had the enjoyment of that to which he was entitled.

The plaintiff claims the right to continue in possession after the first of July by and with the consent of Sheraton and contended that he was to have four months from the first of May to make and complete his improvements; in fact he says that October was fixed upon though he was not to be bound at all as to time. This was unequivocally denied by the tenant and, as the learned Chief Justice in his charge says, the important question the jury had to decide was whether or not Sheraton gave permission to con-

(1) See the authorities cited in 1 William Saunders 208, note 2.

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tinue the work after the first of July 1883. So the great and material question was whether or not after the first of July 1883 Ferguson had the right to continue and make the improvements on the property. On this point the learned Chief Justice says:—

The parties are as far apart as can well be. Sheraton tells you that he gave no consent of that kind whatever; that during the period when Ferguson had a perfect right to be there—that is before the first of July—he remonstrated with him on the slow way in which he was carrying on the work, that he had not sufficient men employed to do the work within the time, and could not do it within the time, but Ferguson always said there was plenty of time and that he would have it done in time.

The learned Chief Justice goes on to say:—

That is the contention on the part of Sheraton. If there is any part of the evidence you desire read to you I will read it or cause it to be read for you. On the other hand Ferguson says that on or about the first of May, when Sheraton's term commenced, and when he had the right to go in as tenant, they had a conversation, that it was then spoken of that it would require at least four months to do the work instead of two—that is the work Ferguson desired to do there—and the first of October was spoken of, and Sheraton said he would like it done because the Exhibition would take place shortly after that time, and he says more, he says that he told him he could take his own time and did not confine him down to the first of October, and that it might require longer, and that he could take what time he liked. (Reads evidence of Sheraton from record.) (The stenographer reads direct examination of Ferguson from record and part of cross-examination from short-hand notes).

This question^e was left distinctly to the jury and the conclusion to be arrived at depended solely on whether the jury believed the plaintiff or the tenant, and the learned Chief Justice then goes on to say:—

3. Did the plaintiff continue his work on the property after the 1st July with the consent of Sheraton?

This is the important question; they are directly opposed in their testimony to each other, and you must judge between them which is the most likely to be correct. By the terms of the lease I think the fair inference is that two months were supposed to be long enough to make these intended improvements, and he gave himself that power,

but then he reserved another right conditionally, if Sheraton would give him permission to continue afterwards, after the 1st of July. It appears to me that putting that term there indicated that he rather thought he would get through his work during that time. They are directly opposed to each other on that, and you must consider which has given the most reasonable kind of evidence. It is always a hard matter to do, but you must find against one party or the other—see which is the most probable. It would seem to be a wild agreement for Sheraton to make, that he would allow the property to be occupied by his landlord for the period of five months to make these improvements, he having no beneficial use of the property at that time, and pay \$700 a quarter; and then on the other hand there was one expression of Sheraton's which did strike me as being a little singular, and which seemed to bear out Ferguson, that is about having it in time for the exhibition, and he stated that he was anxious to have it ready for October for the exhibition; you must weigh all these things. Then as to anything said by Sheraton after the 14th of August, you will bear in mind that after that notice he was acting under advice of counsel; he had consulted Dr. Barker, or at all events he was advised as to what his rights were, and it would be very singular that being in that position and coming fresh from Dr. Barker's with that notice in his hand, that he would make any admissions to cut down his rights in the matter; it is, however, for you to decide between these parties.

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To this question, No 3 the jury say he did not. Then the question is put: 4. Did Sheraton agree that plaintiff might have until the 1st of October to complete his work? To which the jury replied: he did not.

No. 6. Did Sheraton consent after giving notice of the 14th of August that the plaintiff should continue on and do the work? To which the jury replied, no.

The jury were also asked to find:—

1. Was the property fit to be occupied for the purpose for which Sheraton leased it between the 1st August and the 1st November, 1883? It was not.

2. Was the property fit to be so occupied between the 1st November 1883, and 1st February, 1884? It was not.

5. Did the defendant (Troop) in August, 1883, assent to, or request the plaintiff to remain and finish the work? No.

This question was left to the jury at the request of

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plaintiff's counsel and the plaintiff was expressly contradicted by Troop. This, perhaps, is more important in reference to the credit to be given to the plaintiff's evidence than as bearing on the case directly.

The Chief Justice says:—

You will bear in mind that there is no contradiction to the fact that he did remain after the 15th September, but there is evidence that although he did go out—it is contended on the part of Sheraton that even down so late as the former trial it was almost in the same condition as when Sheraton left on the 29th of October, and that it was not in a position for beneficial occupation—that is the front shop; that is one of the claims set up.

Upon these findings the Chief Justice ordered judgment to be entered for the defendant.

Under the lease it is my opinion that the landlord was bound to enter and finish the improvements before the first of July unless he could show a clear and express consent of the tenant that he should longer occupy; I think it would be quite unsafe and improper to allow the express terms of the lease, a sealed instrument, to be altered by any such loose conversations as plaintiff relies on; but when the jury have found in direct opposition to his testimony, and had the witnesses before them, and were, no doubt, well acquainted with both parties and chose to believe the tenant in preference to the landlord, it would be against all precedent to disturb their finding. The landlord relying on his claim of right to continue in possession until October, after the letter of the 14th of August, and doing so, and thus keeping the tenant intentionally out of possession from the 1st of July, or certainly from the 14th of August, until October, was in my opinion more than a mere trespasser and his acts were of such a permanent and continuous character as to show an intention of depriving the tenant of the beneficial and perfect enjoyment of a substantial part of the premises, at least for a time, and this was

such a wrongful dealing with the property that it could not be beneficially occupied by the tenant, and doing this under a claim of right, what intention could he have had but to deprive the tenant of the beneficial use, enjoyment and occupation of the property from the 1st of July to October as he claims he had a right to do? Sheraton might have chosen to rest on his rights but it certainly cannot be said that he did so after the letter of the 14th of August when he was acting under legal advice. If Sheraton had the right to leave the premises when he did we have no right to speculate on the motives which may have prompted him to remain quiescent until the 14th of August. The jury disbelieved the evidence of the plaintiff and believed the evidence of the tenant, and that evidence very clearly shows that Sheraton was deprived by the wrongful acts of the landlord of the beneficial occupation of a portion of the premises, and as the landlord had no right to occupy or continue to occupy after the first of July for the purpose of repairs, his acts amounted to an exclusion of Sheraton from the possession of the premises under a claim of right; such acts being of a grave and permanent nature can it be said that they do not clearly indicate an intention that the tenant should no longer continue to hold those portions of the premises of which the landlord was in possession because the tenant could have no beneficial enjoyment of them during the time he was occupying, as the jury found, wrongfully?

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I think, therefore, the tenant having been intentionally deprived of the possession of a part of the premises by the landlord the rent was suspended and the obligation to pay the rent ceased until the tenancy was restored.

The case was before the court on demurrer, has been twice tried and I should not be willing to send it

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to another trial unless I was satisfied there had been clear misdirection, or that there was no evidence to justify the verdict of the jury, of which, accepting the evidence of the tenant, there was ample. In my opinion there was been litigation enough. The charge of the learned Chief Justice on the second trial was entirely satisfactory.

STRONG J.—Concurred in the judgment of the court below.

TASCHEREAU J.—For the reasons given by my brother Gwynne I am of opinion that this appeal should be allowed with costs.

GWYNNE J.—The issues were brought down for trial at the circuit court for the city of St. John, in January, 1885, before Mr. Justice Fraser, who charged the jury that under the terms of the lease the plaintiff had a right to enter upon the demised premises to make repairs and alterations, and that it was not material whether the work took two months or four months, as with Sheraton's consent the plaintiff could remain after the 1st of July, and that it was for them to say whether down to the 14th of August he had this consent. He directed them that if the plaintiff began to make improvements he must continue to complete them, and he said that what the defendant claimed was that there had been an eviction of Sheraton, and he left it to the jury to say whether the plaintiff remained on the premises after the 1st day of July for the temporary purpose of making repairs or with the intention of permanently depriving Sheraton of the enjoyment of the whole or any part of the leased premises; and he directed them that in the latter case there had been an eviction but otherwise that it was

only a trespass. The jury upon this charge rendered a verdict for the plaintiff. Upon a motion to set aside this verdict and for a new trial the Supreme Court of New Brunswick set aside the verdict and granted the new trial upon the ground of misdirection in the above charge and held that, under the terms of the lease, the plaintiff had no right after the 1st of July, 1883, to enter at all upon the demised premises or to make any repairs thereon, and that if he did so, and in doing so excluded Sheraton from the beneficial occupation of any part of the premises, it would be an eviction to that extent—and that, in fact he had no right to undertake the making of any repairs unless he should finish them by the 1st of July—that this agreement in the lease might be altered as between Sheraton and the plaintiff so as to release the plaintiff from its terms, but that if this was done without the defendant's consent he would be discharged, and that, as to the defendant, the court was obliged to act solely on the written agreement (in the lease) as the defendant never consented to any alteration of it. The case accordingly came down again for trial at the St. John March Circuit of 1888, when the defendant claimed the right and was permitted to begin, which he did, by calling the tenant, Sheraton, as a witness on his behalf, for the purpose of establishing by him that he was evicted from a part of the premises by the plaintiff, whereby the rent reserved as issuing out of the whole of the demised premises became suspended. Upon this allegation of eviction the defence was wholly rested.

Sheraton testified that upon the 1st and 2nd of May, 1883, he entered into possession of the demised premises, and that their condition at that time was very bad. It will be convenient now, bearing in mind this statement, before proceeding further with his evidence,

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to draw attention to the terms of the lease under which he entered upon possession of the premises which, at the time of his entry, he admits to have been in a very bad condition. He was informed by the lease that one Likely was tenant of one part, and one Warwick was tenant of another part, of the premises until the 1st of May, 1883, when Sheraton's term was to commence, and it appears by Sheraton's lease that the leases, under which Likely and Warwick respectively held possession, were placed in Sheraton's hands for his perusal before he executed and accepted the lease to himself, and that he was informed that Warwick was the owner of all the shelving in the shop leased to and occupied by him, and of part of that which was in the rooms on the floors above that shop; and that he, as such owner, had a right to remove and take away that shelving. The demising clause in the lease to Sheraton witnesseth :—

That the said Robert E. Ferguson, for the consideration hereinafter mentioned, does hereby lease, demise, and let unto the said Alfred B. Sheraton, a certain parcel of land, situate on King street in the said city, known and distinguished on the map or plan of the city as lot No. 389, with all the buildings thereon standing, excepting as hereinafter specified, in regard to propositions for improvements, and a clause in the lease of one Warwick, now in possession of part of said demised premises, namely, that he is owner of all the shelving in the shop, and part of same in floors above said shop, (the fixtures belonging to and now found in that part of said demised premises, occupied at present by T. & H. Likely, belong to the said Robert E. Ferguson) to hold for the term of ten years, commencing the 1st day of May, 1883, (that is at the termination of the lease of the said Likely and Warwick) the said Alfred B. Sheraton agreeing to the terms and conditions of this the within lease, subject to the said existing leases and tenancies, (the said Warwick's and Likely's leases having been handed to the said Alfred B. Sheraton by the said Robert E. Ferguson to read and if he should think proper to copy the same previous to the execution and delivery of this indenture).

Now, with respect to the above words, "with all buildings thereon standing, excepting as hereinafter

specified, in regard to propositions for improvements," 1890
 it is to be observed that subsequent provisions in the FERGUSON
 lease leave it quite optional with the plaintiff, whether v.
 he should or not make any of the improvements which TROOP.
 are outlined, as the expression is, in the lease. Sheraton Gwynne J.
 enters into a covenant that he will at the expiration
 of the lease peaceably yield up to the plaintiff
 all and singular the premises, and all future erections, additions and
 improvements that may be made to and upon the same during the
 term of this agreement in as good order and condition, in all respects,
 (damage by fire and other unavoidable casualties alone excepted) as
 the same now are, or may be put into by the said Robert E. Ferguson
 or his legal representatives provided the said Robert E. Ferguson or
 his legal representatives do actually make the improvements herein-
 after outlined.

Then the clause in which they are outlined is as follows (1) :

This clause in the lease seems in very plain language to have left it entirely and unreservedly to the judgment and decision of the plaintiff, whether he should or should not make all or any of the suggested alterations and improvements thus outlined, and in case the plaintiff should eventually resolve not to make some or any of them there is no provision in the lease for any reduction in the rent, so that if the plaintiff should conclude not to make any of them, or some of them, the lessee would still be liable for the whole rent, and, in addition to furnishing the premises which had been occupied by Warwick with fixtures in lieu of those which he should remove under the clause in his lease in that behalf, would be obliged to make at his own expense such of the outlined alterations and improvements as the plaintiff should conclude not to make, and as should be necessary for the complete beneficial enjoyment of the demised premises by the lessee. Bearing in mind then, the statement of Sheraton, that at the time of his entering into possession of the demis-

(1) See p. 529.

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ed premises, on the 1st or 2nd May, 1883, they were in a very bad state of repair, and in view of the nature of the proposed alterations as outlined in the lease, we may safely conclude that such alterations, or some of them, were actually necessary, and that it was manifestly of the utmost importance to the lessee, and wholly in his interest, that the plaintiff should make the outlined alterations, and that to induce him to do so, and to enable him to complete them, the utmost facilities should be given to him by Sheraton, whatever length of time might reasonably be necessary for that purpose. These considerations afford, I think, some assistance in enabling us to construe the clause in the lease giving to the plaintiff license of entry upon the demised premises for the purpose of making the suggested alterations and improvements. That clause is as follows :

It is also hereby mutually agreed upon by and between the parties hereto, that the said Robert E. Ferguson and his legal representatives, agents and servants, if he or they should think proper or expedient, may enter upon the land and premises herein demised for the purpose of repairing, altering or improving the same, or any part thereof, at any time, either between the date of this indenture and the first day of May, 1883, or for two months thereafter, but not after that time except with the approbation or consent of the said party of the second part, or his legal representatives.

Now, the words in this clause,

at any time between the date of this indenture and the first day of May, 1883,

are wholly irrelevant and insensible, because during all that time the premises were under lease to Likely and Warwick, so that Sheraton could not, during that period, grant any license to the plaintiff to enter upon the premises for any purpose. We must, therefore, in order to construe the clause, leave out of it this period and these words ; and as the license purported to be granted by Sheraton could only operate from and after

the first day of May, 1883, we must read the clause as providing only from that day, and by a slight transposition and appropriate collocation of its members it will read thus :

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It is also hereby mutually agreed upon by and between the parties hereto, that the said Robert E. Ferguson and his legal representatives, servants and agents, if he or they should think proper or expedient, may, at any time within two months after the first day of May, 1883, but not after that time except with the approbation or consent of the said party of the second part or his legal representatives, enter upon the said land and premises herein demised, for the purpose of repairing, altering or improving the same or any part thereof.

Now, there is not a word in the clause prescribing any time within which the repairs, alterations or improvements which should be commenced should be completed. The clause does not say that the plaintiff may, within two months after the 1st May, 1883, enter and complete such repairs, alterations or improvements as he may make on the demised premises, but that within the period named he may enter upon the demised premises ; for what purpose ? solely for the purpose of repairing, altering and improving the premises. The license does not authorize an entry for any other purpose ; but whether the repairs, alterations or improvements to be undertaken consequential upon such entry would require six months or any lesser period for their completion, the lease does not profess to prescribe. The period within which the license to enter should operate (unless supplemented by further approbation or consent of the lessee) is limited, and the sole purpose for which such entry is permitted is defined, namely, for the purpose of repairing, altering or improving the demised premises ; but what these repairs, alterations or improvements should be is undefined, and necessarily so, for they are left to the sole judgment and will of the plaintiff ; and these being undefined and left to the judgment and will of the

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plaintiff, the time within which such as the plaintiff might resolve to undertake should be completed, must necessarily be undefined also ; and must, therefore, extend to such time as might be reasonably necessary for the completion of such repairs, alterations and improvements as should be undertaken. And this appears to me to be the true construction of the lease—namely, that the plaintiff could, after the 1st day of July, 1883, continue to enter upon the demised premises for the completion of repairs, alterations and improvements commenced within two months after the 1st day of May, 1883, and for such length of time as might be reasonably necessary for such completion without any further “ approbation or consent ” of the lessee beyond what was implied in the license granted by the lease.

Now Sheraton's evidence was adduced by the defendant for the purpose of establishing the eviction which the defendant had pleaded, and his examination-in-chief proceeded wholly upon the assumption that the plaintiff had no right whatever to enter upon the demised premises after the 1st July, 1883, or to make any repairs or improvements whatever thereon after that day, although for the purpose of completing work begun before the 1st day July, unless he should obtain the consent of Sheraton expressly given for that purpose and Sheraton swore that he never did give such consent. It may be said that every day that the plaintiff was occupied in executing repairs and improvements commenced by him he necessarily made a distinct entry upon the demised premises, but, as I have already said, the true construction of the lease appears to me to be that there was an implied license already granted by the lease without any further approbation or consent of the lessee to enter from day to day so long as was reasonably necessary for the completion

of repairs and improvements commenced within two months after the 1st of May, 1883; however, whatever may be the true construction of the lease in this respect, the words of the lease are

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But not after that time except with the approbation or consent of the said party of the second part (the lessee).

Now, such approbation or consent may be implied as well as expressed, and it may be implied from divers circumstances without a word being said for the purpose of conveying in express terms such approbation or consent, as for example, if during the progress of the work by the plaintiff, after the first of July, the lessee should make suggestions as to the mode in which he would like certain of the repairs and improvements (in progress of being made by the plaintiff) executed; or if he should, while repairs contemplated by the plaintiff were in progress of execution, request the plaintiff to undertake for the benefit of the lessee an improvement which the plaintiff had not contemplated, and which the plaintiff, upon such request of the lessee, should undertake to do, the completion of which would delay for an undefined period the completion of the works which the plaintiff had in progress of execution; or if, during the progress of the repairs and improvements by the plaintiff, the lessee should be urging him to expedite his work in order that the lessee might have the full enjoyment of the demised premises with the repairs and improvements completed by a distant specified day; or if the lessee was himself continuing to make repairs and improvements not within the improvements contemplated by the plaintiff during the same time, and after the 1st of July, as the plaintiff was proceeding with the repairs and improvements he was making; from all these and the like circumstances a jury might well imply that the plaintiff had the approbation of the lessee to continue with

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his work to completion after the first day of July, equally as if he had the lessee's express consent to that effect given verbally or in writing.

Now, Sheraton in his examination in chief says that the plaintiff continued working on the premises until the middle of August, when he applied for the rent due the 1st August, and that he, Sheraton, sent the rent and a letter dated the 14th August, which had been framed for him by counsel, and to which I shall have occasion to refer by and bye; he also said that he told the plaintiff several times after the first day of July that it would be worth a great deal to him, Sheraton, to have the place completed at the time of the exhibition in October, and that he impressed this upon the plaintiff, and that it would not be done at the rate the plaintiff was going on.

Being then asked if he ever assented to the plaintiff remaining in or on the premises for the purpose of making the repairs beyond the 1st of July, he answered "I do not know what you mean by assent; do you mean a verbal assent?" to which the counsel for the defendant, who was examining him, saying "yes" he answered "then I never did." Being then asked, "did he consent to it in any other way?" he answered, "the only way is that I did work myself after the 1st July, and I don't know how you would construe that."

Upon cross-examination he repeated that he was anxious to have all the work done in time for the exhibition in October and that he urged the plaintiff to get it done by that time—that he did so several times, and that the plaintiff repeatedly told him he would have the work done in time. He said further that it was in the month of July that he urged the plaintiff about getting the work done and that he was not prepared to say that he did not do so, also, in August. Being then asked again if he did not in any

way assent to the plaintiff staying on the premises after the 1st day of July he answered—"I explained that before; I distinctly deny ever giving him a verbal consent." Being then asked "if that is true what is the sense or meaning of wanting him to have the work done before the exhibition in October" he answered "You will have to draw your own inference from that, I cannot say;" and being asked, whether it was not in the month of August when a Mr. John Ferguson was working on the Likely building for Sheraton that he spoke to the plaintiff about getting done by exhibition time he answered:

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I cannot say, I do not know that I went to work in August, with the view of getting it done by that time but with the view of getting my work done; up to that time I had no idea of quitting the premises.

Sheraton also said that immediately after he had entered into possession under the lease the plaintiff began to make the repairs and improvements indicated in the lease, and that he commenced by taking down the wooden building in the rear. fronting on Market Street, that he took out the windows on the King Street front of the "Likely" building and cut down the work underneath the window so as to make an opening down to the level of the street, to enable cars to go in and out, which did go in and out, carting out the materials from the excavation under the new building to be erected in lieu of the wooden one taken down.

This work was done in order to make the excavation under the new building, which eventually, was excavated to the depth of 14 or 15 feet below the level of Market Street, upon which the new building fronted; in doing this work the fixtures in the "Likely" shop were taken down. These fixtures, including shelves, counters and certain show windows taken out of the

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Likely building to let the carts get through to the rear, Sheraton asked for and received the plaintiff's permission to take away to the Warwick shop, and to use them for the purpose of fitting up that shop which Sheraton was fitting up himself. With the fitting up of that shop the plaintiff had nothing to do, and, consequently, Sheraton would have to supply for fitting up the Likely shop, when it should be in a condition to be fitted up, such articles as he had been thus permitted to remove to the Warwick shop.

As to the upper window taken out of the front of the Likely shop by the plaintiff Sheraton contemplated having it put in differently from what it had been; his proposed alteration in that window required a difference in the glass.

Sheraton says that he asked the plaintiff if he should make the alteration whether the order could be included in an order of the plaintiff's, and he said he did not go down to one Thorne and cancel the plaintiff's order for glass, but he admitted that he did go to Thorne about the glass he intended to put in himself, but that he found his estimate too high and could not do it; he said, further, that he did not think he spoke to the plaintiff about altering that glass until after the first of July. Being asked if he did not offer to pay the plaintiff ten per cent. on the cost of the glass if the plaintiff should get it he answered, "I said if he spent \$1,000 on such improvements as I would indicate I would pay ten per cent., and that glass was part of it. I forget what else there was, but there was something about shelving, about the vault there was a separate understanding." It thus appears that Sheraton in the month of July contemplated, as necessary to the complete enjoyment of the demised premises for his purposes, certain improvements in addition to those then in progress of being made by the plaintiff requir-

ing an outlay of about \$1,000, upon which he expressed himself to be willing to pay 10 per cent. in addition to the rent, but he said that he and the plaintiff came to no conclusion about the \$1,000, as the plaintiff refused to do it. He admits that there was a separate understanding about a vault, what it was he did not state. He admitted also that at his request the plaintiff agreed to put in water closets, and that he thinks there was an agreement as to the cellar, but what it was either he does not state; neither vault, water closets or cellar are indicated in the lease. He also said that he was not prepared to swear that it was not at his request that the back wall of the front building was pulled down, but that he did not think it was.

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It appeared that the excavation to put in the water closets was in rock which had to be blasted, and he admitted that no one could deny that it would take more time and more expense to excavate the cellar and put in the water closets than if the foundation of the new building had been put on the rock. It is to be observed that to have placed the foundation on the rock would have been a compliance with the improvements as indicated in the lease, while the building of the water closets necessitated a deep drain from them.

Sheraton also said that both he himself and the plaintiff went on working until August; that about the 14th August, the date of the letter he sent to the plaintiff, he Sheraton, was working at the Likely buildings, fixing the ceiling—putting in joists—and that up to that time he did not know that he made any objection to the plaintiff remaining carrying on the works he was executing, beyond remonstrating about the time he was taking—that up to that time he had no idea of quitting the premises. He had already said, as we have seen, that during the month of July he was repeatedly urging the plaintiff to expedite his

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work, so that the alterations and improvements in progress of being made might be completed by the time of the exhibition in October. Now the suggestion of the plaintiff is, that in truth it was not any delay on the part of the plaintiff in proceeding with the repairs and improvements he was making that was the cause of Sheraton's sudden change of mind and conduct and of the letter of the 14th of August, but that Sheraton's failure in his business, by reason of his having been unable to negotiate an arrangement with his English creditors, was the sole cause of the letter of the 14th of August and of Sheraton from that date ceasing to execute the work which he himself had to execute and, until then, was executing, and of his finally, two days before the next quarter's rent becoming due, abandoning the demised premises as no longer of any use to him by reason of his failure in his business.

Up to that time he had no idea, as he himself admitted, of quitting the premises; and he said that he would not swear whether or not it had ever occurred to him that he was not going to stay on the demised premises until he found that his negotiations in England had failed. Being asked whether the whole cause of the difficulty with the plaintiff was not that if he could have gone on straight with his business there would have been no difficulty and that he would not have left his answer was "I would have sued him for damages." Being then asked what remained to be done on the 14th of August, that is which the plaintiff had to do except the furnishing of the stairways his answer was "all the stairs had to be built," but whether the stairs in the lower store were or were not almost finished on the 14th of August he could not remember.

Now, from the above, it may reasonably be inferred

that Sheraton's failure to come to an arrangement with his creditors, and the writing of the letter of the 14th of August, which was framed by counsel for Sheraton, were contemporaneous occurrences.

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Being then asked whether, after the letter of the 14th August, he did not on that day or the day after meet the plaintiff and have a conversation with him in relation to its contents he answered, "I do not remember." Being pressed with a repetition of the question whether he did not meet the plaintiff on King street and speak about the letter he answered still, "I do not remember." Being still pressed whether the plaintiff did not then ask him if he wanted him to quit work, he answered that he did not think he replied anything to him, as he was then acting under the advice of his counsel and held his tongue.

In this answer there is something which certainly seems to give great weight to the suggestion of the plaintiff as to the real cause of the difficulty being the fact of Sheraton's failure to arrange with his creditors, and his consequent determination as an unavoidable necessity that he should leave the premises, in which but for that failure he would have carried on his business, and not any wrong committed by the plaintiff, whether of the nature of eviction or of any other nature. We find Sheraton and the plaintiff working upon the premises during the whole of the month of July, Sheraton, as he himself says, repeatedly, during that period, urging the plaintiff to expedite his work so that the premises might be completed by the time of the exhibition in October. We find the plaintiff during this month executing at Sheraton's request or suggestion some work which the plaintiff had not undertaken to execute or contemplated executing himself, and which necessarily delayed the completion of the work he had contemplated executing, and was in progress for a

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period of time not specified. In the month of August they continue working, each at his own part of the work, which was in progress, and all that passes between Sheraton and the plaintiff was this urgency on the part of the former upon the latter to expedite his work when suddenly, and contemporaneously with Sheraton finding that he can make no arrangement with his English creditors, and that his failure in his business is inevitable, he consults counsel who drafts for him this letter of the 14th of August, and gives him advice as to his future conduct towards the plaintiff, which would seem to have been to the effect that he should be guarded as to having any conversation with the plaintiff upon the subject of the letter, for this, I think, is the fair inference to be drawn from Sheraton's last answer above stated.

The letter, which was written by Sheraton's counsel for his signature and signed by him, was in the shape of a notice addressed to the plaintiff in the terms following—and this is the first time that any idea of anything in the nature of an eviction had taken place appears to have occurred to Sheraton.

I hereby notify you that as you have not finished the improvements to the premises as you were to do, and thus kept me out of the possession of the premises, and evicted me from them, I pay the quarter's rent due the first August instant under protest, not waiving my rights, to avoid distress. I give you notice that I now claim your conduct amounts to an eviction, and that the rent is suspended and that I shall hold you liable for all damage which I have sustained or may by reason of my not being permitted to occupy the premises. I wish to inform you that the damage is serious and that you will be held responsible.

The first sentence in this letter would have been disingenuous in the extreme, it would have been unfounded in point of fact, if the language had proceeded from Sheraton himself, who had knowledge of the fact that all that had passed between himself and

the plaintiff up to the day upon which the notice was written was that Sheraton was repeatedly urging the plaintiff to expedite his work so that all that had to be done might be completed by the time of the exhibition in October, for that he was most anxious to have it all done in time for that exhibition, as he himself has sworn in his evidence, but it appears that the language was merely that of counsel putting a legal construction upon the terms of the lease apart from anything which had taken place between Sheraton and the plaintiff; while the notice insists that Sheraton had already been evicted, whereby the rent became suspended, it proceeds to say that he, nevertheless, pays the quarter's rent which fell due on the 1st of August although, by the eviction, if any such had taken place, the rent having thereby become suspended none was due or payable. Whether there had been an eviction, as insisted upon in that notice, is still the question in this action; for the determination of that question, we have, however, the light which has since been thrown upon the case by the evidence given by Sheraton himself in this action, from which the above passages have been extracted.

Now the plaintiff in most express terms contradicted the evidence of Sheraton as to there having been no express agreement between them as to the time the plaintiff should have for completion of his work. He said that prior to the month of May it was talked of between them that it would take four months to complete the contemplated work, and that in the month of May, when the work was first begun, they had another conversation upon the subject, which resulted in an agreement, that in consideration that Sheraton intended occupying the upper shop, as his doing so would make a longer time necessary, the plaintiff should have an additional month, namely, to the 1st of October.

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This, he said, came about in this way : in conversation Sheraton said that plaintiff would have plenty of time to do the work as he, Sheraton, had taken the Foster store for another year. He said that it would be better and easier to do the work in the summer, that this would go to the 1st of September ; then he spoke about occupying the upper store for gents' furnishing goods which he said were on the way. Plaintiff thereupon said that would naturally retard the work, which could not be carried on so well if Sheraton should occupy the upper store. They then named another month, namely, until the 1st October, and thereupon plaintiff said that he would try to get done by the 1st. of October, but that he did not like to be bound down to anytime as something might occur to prevent him, and that he then asked Sheraton if he was satisfied to that, and that he replied yes, he was satisfied. He said that this was their arrangement as to time, and that there was no other in reference to time except about the exhibition which he said came up.

This is the substance of so much of the plaintiff's evidence as was in direct contradiction to that of Sheraton. His original intention, he said, as to the rear building, was to lay its foundation on the rock, that is about eight feet below the level of Market street, and he proceeded to do so, but while he was excavating a trench for this purpose Sheraton requested him to excavate a cellar and to put in water closets, which he did; this necessitated an excavation under the building of a further depth of seven feet, and a deepening of the drain from the building, and as the excavation was all in rock it took until the 21st July to complete it. Sheraton also asked the plaintiff to build a vault which he agreed to do if Sheraton would supply the doors, which he agreed to do, but failing to do so the plain-

tiff did not build the vault. He said further that it was after the middle of July that Sheraton made to him the proposition of which he spoke as to certain improvements to be indicated by him to cost about \$1,000, and that plaintiff declined to make the advance for him. He said, further, that they both went on with their respective work upon the premises, Sheraton continually making suggestions to the plaintiff, until the 13th of August, on which day news came of Sheraton's failure to make arrangements with his creditors, and Sheraton knocked off his work as soon as he heard this news and never did any more, and the next day, namely, the 14th August, served plaintiff with the notice of that date. The plaintiff further said that at the time of his receipt of this notice the rear building was finished with the exception of some windows which had not yet been all put in, and that all plaintiff's work was completed except the stairs, which were not yet put up, and some other matters of a very trifling nature, and he said that upon receipt of the notice he went the next day to Sheraton and asked him what he meant by the notice; he said,

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I said to him, Sheraton, that note you wrote I can hardly tell what the meaning is, and I have taken it to my lawyer, and he advised me to come up and ask you if you want me to go on with the work or knock off, and he said, "I do not want to stop work," and I was going off with that, and then I asked him if he wanted me to go on with the work, and then he would not say anything one way or the other, and I went away.

The plaintiff, however, resolved to go on with the work. One Wetmore, who had a contract for the stairs, went on with them, and the plaintiff with the little trifling things of which he spoke, and which were additional to what he had outlined in the lease. Substantially, all was completed on the 14th of August except the stairs and the windows in the rear building on Market Street. In the middle of September the stairs

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and everything were completed except the windows in one row on the lower flat of the building on Market Street, which were not put in because Sheraton wanted to have doors there instead but had not gotten a permit from the city, which was necessary for the purpose, so plaintiff securely boarded up the spaces and finally, in the middle of September, left the premises and Sheraton in exclusive occupation thereof, which he did not leave until the 29th of October, when, as he himself said, "I then went out taking everything with me."

I have thus extracted the whole of the evidence which appears to me to have been at all material.

At the close of the evidence the learned counsel for the plaintiff contended, among other things, that under the terms of the lease the plaintiff had a right to enter for the purpose of making the contemplated improvements at any time before the first day of July, 1883, and that he was entitled to a reasonable time to make the improvements, taking into consideration the nature and character of the improvements.

This contention was overruled, as it needs must have been by the judge presiding at the trial upon the authority of the judgment of the Supreme Court granting the new trial; the question is, however, now open before us upon this appeal. Then he contended that if not entitled to the rent for the two quarters ending on first November, 1883, and the first of February, 1884, he was, at all events, entitled to the latter; and, further, that the evidence was uncontradicted that the plaintiff was continuing his work with Sheraton's consent from the 1st of July until the 14th of August, and that being so he was entitled to remain, if necessary, for the completion of his work, or at least until Sheraton should require him to leave; and that his offering to leave on receiving the letter of the 14th of August,

if Sheraton desired it, was all that was required; and he insisted that there was no intention on the part of the plaintiff to deprive Sheraton of the use of any portion of the premises; that the plaintiff was remaining merely to complete work he had undertaken; that Sheraton did not complain of his being there, and did not seek to make any beneficial use of the premises on which plaintiff was working until such work should be completed; that when the entry is lawful the mere remaining beyond a specified time for the purpose of completing work, to perform which the entry was made, is no eviction and that the non-completion of work by a landlord within a specified time agreed upon is no answer to a claim for rent reserved, but is the subject only of a cross-action; and he asked the learned judge to charge the jury that to constitute eviction there must be something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

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The learned judge charged the jury that after the 1st of July the plaintiff had no right to set a foot upon the property, and continue upon it, without the consent of Sheraton; that the right which he had under the terms of the lease was a right reserved to go in between the 1st of May and the 1st of July and make improvements; but that they had to be done by the 1st of July, and that if they were not completed, then he had no right to continue making them after the 1st of July without the consent of Sheraton, and upon this point, he said (1):

And he left it to the jury to say whether or not the occupation the plaintiff had, after the 1st of July, was with the consent of Sheraton or without his consent, and that if he did not consent, and the plaintiff went

(1) See p. 534.

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on doing the acts he did after the 1st of July, claiming he had a right to do it, then that would amount to an eviction; and he added that according to the view Mr. Gilbert, the plaintiff's counsel, took of the law, it would have to be done with the intention of depriving the tenant of the enjoyment of the property, but the learned judge said:—

That necessarily follows if a landlord claims a right to go in and make improvements, and his going in deprives the tenant of the beneficial use and occupation of the property, it seems to me that satisfies all the law requires to make out an eviction.

He then submitted certain questions to the jury upon their answers to which he would enter the verdict reserving leave to plaintiff's counsel to move to enter a verdict for the plaintiff, so that he might have an opportunity of moving the court upon all his points, and that the right of the parties should be reserved for the consideration of the court, and the verdict properly entered accordingly. The questions submitted the jury were as follows:—

1. Was the property fit to be occupied for the purpose for which Sheraton leased it between the 1st of August, and the 1st of November, 1883?
2. Was the property fit to be occupied between the 1st November, 1883, and the 1st February, 1884?
3. Did the plaintiff continue his work on the property after the 1st of July with the consent of Sheraton?

In submitting this question, he said:—

This is the important question, they (that is Sheraton and the plaintiff) are directly opposed to each other, and you must judge between them which is the most likely to be correct. It is always a hard matter to do, but you must find against one party or the other—see which is most probable.

4. Did Sheraton agree that the plaintiff might have till the 1st of October to complete his work on the property?
5. Did the defendant, in August, 1883, assent to or request the plaintiff to remain and finish the work?

After submitting these questions to the jury the

learned counsel for the defendant asked that the following question might be submitted to the jury, and the learned judge submitted it without any further comment or directions in addition to what he had already said in his charge to the jury.

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6. Did Sheraton consent, after giving the notice of the 14th August, that the plaintiff should continue on and do the work?

Every one of these questions, the jury answered in the negative, whereupon a verdict was entered by direction of the learned judge for the defendant, reserving leave to the plaintiff to move the court to have a verdict entered for the plaintiff for the whole amount claimed, or for such part, if any, as the court above should think fit, as had been agreed between the parties.

In pursuance of the case so reserved the plaintiff's counsel moved the Supreme Court of New Brunswick in the following term to enter a verdict for the plaintiff for the full amount claimed, namely, \$1,400, being two quarters rent, or at least for \$700, being the quarter's rent from the 1st of August to the 1st of November, on the ground that the tenancy being admitted, and the amount of rent also, and the non-payment thereof, and the defence being "eviction" by the landlord, the acts of the landlord relied on by the defendant as constituting an eviction are not such acts as in law amount to an eviction, and, therefore, the pleas are not sustained; or, for a new trial for misdirection, and that the verdict is against law and evidence, and the weight of evidence.

Upon that motion, the Supreme Court of New Brunswick made the rule following:

On hearing Mr. Gilbert Q.C. in support of an application for a rule to set aside the verdict for the defendant in this cause, and enter a verdict for the plaintiff pursuant to leave reserved, or for a new trial, and Mr. Gregory on the same side, and upon hearing Mr. F. E. Barker Q.C. contra, and Mr. Gilbert in reply, and the court having taken

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time to consider, it is ordered that the rule to set aside the verdict for the defendant, and to enter a verdict for the plaintiff, or for a new trial be refused.

It is from this rule of the court that the present appeal is taken. In the view of the points specially submitted to the court by the learned counsel for the plaintiff at the trial, and in view of the leave reserved upon the agreement of the parties that the whole case should be reserved, so that the rights of the parties might be determined by the court, and the verdict entered accordingly, the whole of the matters in controversy, including those specified in the motion in relation to a new trial, arise and are involved in the motion made upon the leave reserved.

Now there can be no doubt, I think, that the contention of the learned counsel for the plaintiff at the trial was well founded, namely, that the evidence was uncontradicted, and, in fact, was that of Sheraton himself, that between the 1st July and the 14th August the plaintiff was doing the work he was engaged in on the demised premises with the approbation or consent of Sheraton, within the meaning of the clause in the lease in that respect, even assuming the true construction of the lease to be that put upon it by the Supreme Court of New Brunswick when granting the new trial, and which was also the construction which the learned Chief Justice, who tried the case, put upon the terms of the lease.

Sheraton, it is true, denied having given any "verbal consent," but the manner in which he gave that evidence, and the stress which he always laid upon the word "verbal," when denying having given his consent to the plaintiff remaining at his work on the premises, showed a manifest intention to qualify his denial, and seemed to convey the impression that he himself well knew that the plaintiff's so remaining

was not against the will of Sheraton, but was with his approbation and implied consent. A slight consideration of some of the evidence thus given by Sheraton will show that the only inference possible to be deduced from facts of which he gave evidence was, that in remaining on the premises continuing to carry on the work in which he was engaged the plaintiff was doing so with the approbation and consent of Sheraton, although he may have been dissatisfied with the progress the plaintiff was making ; and that, in fact, the plaintiff's so continuing with his work was so much in the interest, and for the benefit, of Sheraton that if he had not done so Sheraton would have had just ground of complaint against the plaintiff, and it might be for very heavy damages.

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Sheraton says that some time in the month of July he told the plaintiff, while the latter was carrying on his work on the demised premises, that it would be worth a great deal of money to him to have the premises completed at the time of an exhibition which was to take place in the following October ; that he told the plaintiff several times in the month of July that he was most anxious that all should be done in time for this exhibition ; that he impressed this repeatedly on the plaintiff, and that it never would be done at the rate plaintiff was going on ; and to this language of his, he said, the plaintiff repeatedly said he would have it done in time ; and Sheraton was not prepared to say that something of the like was not said in August also. Then, again, it was while the plaintiff's work was in progress in July that Sheraton told the plaintiff of an alteration he, Sheraton, proposed making in the front window which the plaintiff had taken out in order to get at the rear to erect the rear building in lieu of the old wooden one ; and that he asked the plaintiff if his, Sheraton's, order for the glass which

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would be required for that alteration could be included in an order of plaintiff's. It was in July also while the plaintiff's work was in progress (both that indicated in the lease, and other work, namely, the water closets which Sheraton admitted the plaintiff had undertaken at his request, and the deepening of the drain necessary therefor, and the excavation of the cellar which, although he denied in one place that it was executed at his request, yet says in another, "I think there was an agreement as to the cellars, there was as to the water closets), that Sheraton made the proposition to the plaintiff that if the plaintiff would spend \$1,000 on such improvements as Sheraton should indicate he would pay the plaintiff 10 per cent. thereon.

Sheraton further said that he himself, at work which he had to do, and the plaintiff at the work he was doing, went on executing their respective work throughout July and into the month of August, until, in fact, about the 14th of August, when first he conceived the idea of leaving the premises and sent to plaintiff the notice of that date, and during all this time he said that he could not say he had ever made any objection to plaintiff remaining on the premises at the work he had in progress save remonstrating with him on the time he was taking, in other words, remonstrating with him on what appeared to Sheraton to be the slow progress he was making, and urging him to use greater expedition in order to have the premises completed at the time of the exhibition in October, and being asked what remained to be done on the 14th August (when the idea of leaving the premises first occurred to him), of the work the plaintiff was doing, all that he could specify was that the stairs had to be built.

Now, upon this evidence, it is very clear that the case did not turn simply upon the question whether Sherat-

on or the plaintiff was telling the truth, the former in asserting that he had never given his verbal consent to the plaintiff continuing with his work after the first of July or the latter in asserting that express verbal consent was given by Sheraton, first for four months, that is to the 1st September which was afterwards extended to the 1st October, and the learned Chief Justice, who tried the case, therefore erred in so submitting the case to the jury, and resting it as he did in very distinct terms upon the view the jury might take of the veracity of Sheraton and the plaintiff respectively upon this single point. He should, in my opinion, have drawn the attention of the jury in a marked manner to the above points which I have extracted from Sheraton's evidence, and have told them that his "approbation or consent" within the terms of the lease could be implied from Sheraton's acts and conduct equally as if an express verbal consent had undoubtedly been given as sworn to by the plaintiff; and that the acts and conduct of Sheraton above referred to, and admitted and testified by himself, were abundantly sufficient to establish such approbation and consent. It is, in my opinion, inconceivable that upon such a charge any jury could be found to render a verdict that the plaintiff had remained at his work subsequently to the first of July tortiously and against the will of Sheraton, or otherwise than with his approbation and consent. No jury could be so obtuse as to pronounce the plaintiff to have been continuing with his work all through the month of July and into the month of August tortiously to Sheraton and against his will, when the latter was, as he admits he was, during that period, repeatedly telling the plaintiff that he, Sheraton, was most anxious to have all done in time for the exhibition in October, and urging the plaintiff to go on more expeditiously than he appeared to Sheraton to be doing in order that

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all should be done by that time, and when, during the same period while the plaintiff's work was in progress, Sheraton was asking the plaintiff to do for him, at a cost of \$1,000, other work which Sheraton himself wanted to have done but which the plaintiff had not contemplated doing or undertaken to do; and when the plaintiff, also during the same period, was at Sheraton's request doing other work upon the premises than that indicated in the lease, which increased the cost to the plaintiff and caused delay in the progress of his work; for this is the substance of Sheraton's evidence as I have extracted it. A verdict rendered upon such evidence, pronouncing the continuance of the plaintiff at his work to have been, at any time subsequently to the 1st July, against the will of Sheraton, and tortious to him, could not possibly be permitted to stand. The contention of the learned counsel for the plaintiff was therefore well founded, to the effect that it was established by uncontradicted evidence, and that the evidence of Sheraton himself, that during all the time between the 1st of July and the fourteenth of August the continuance of the plaintiff on the demised premises, carrying on the works in which he was there engaged, was beyond all question with the approbation and consent of Sheraton. Under these circumstances it was quite irrelevant whether or not Sheraton after the 14th of August gave any further consent, for the learned Chief Justice stated his opinion to be, in which opinion I entirely concur, that if the plaintiff was working at the demised premises after the 1st of July, with the permission of Sheraton, that permission would continue and the plaintiff would be entitled to proceed with his work until the permission should be revoked and so countermanded. And this does not appear to have been ever done. The notice of the 14th August certainly did

not do so ; that notice simply insists upon an eviction of Sheraton having been already committed by the plaintiff, for which contention there was not in reality, as I have already shown, any foundation. Sheraton's complaints up to that time had not taken the shape of any objection to the plaintiff being upon the demised premises carrying on his work but were pointed solely to what Sheraton considered to be the "very slow and dilatory manner," as he called it in his evidence, in which the plaintiff had been proceeding with his work ; and he asserts in the notice that the non-completion of the work had already caused him great damage for which he would hold the plaintiff responsible. This intimation, instead of amounting to a prohibition to the plaintiff completing his work, would seem rather to be given by way of urging the plaintiff to expedite the completion of his work, further delay in which would naturally be calculated to enhance any claim for damages which Sheraton might have against the plaintiff by reason of delay in the completion by him of his work ; all of which that then remained unfinished, as specified by Sheraton himself was, as we have seen, the stairs. Again, Sheraton said that he could not remember whether or not he had had a conversation with the plaintiff in relation to the contents of the notice upon the 14th of August or the next day. After that time he said "I was acting under the advice of counsel and held my tongue," and he did not remember the plaintiff asking him if he wanted the plaintiff to stop working, adding "for the place would not be of much use to me if he stopped work ;" and the question being repeated and pressed whether he had not some conversation with the plaintiff in relation to the notice of the 14th August within a day or two after that date his only answer was, "I do not remember," and "I do not think I replied anything to him

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at all, as I was then acting under the advice of my counsel." The plaintiff, in his evidence, says that he had a conversation with Sheraton, which he detailed, within a day after the receipt by him of the notice, and that in that conversation he asked Sheraton if he wished him (the plaintiff) to knock off work, and that Sheraton replied he did not want to stop work, and that plaintiff asked him if he wished the plaintiff to go on with the work. This is the time probably which is alluded to by Sheraton when he said, "I was acting under the advice of counsel and held my tongue," for the plaintiff says that to that question Sheraton would not say anything one way or other. But laying aside the plaintiff's statement of the occurrence, and resting wholly upon Sheraton's evidence as I have done as to the work done in July, it is quite clear that Sheraton never did direct, or apparently wish, the plaintiff to proceed no further with his work after the 14th of August, or at any time; and that he entertained the opinion that not his proceeding with his work to completion, but his ceasing to do so, or delay in doing so, would have the effect of doing injury to him, for, as he himself observed, "the place would not be of much use to me if plaintiff stopped his work." The plaintiff accordingly did proceed with his work, and according to his own evidence, which is not in any respect disputed, he completed all that he intended doing by the middle of September, and left Sheraton in exclusive possession of the whole of the demised premises, and it is not pretended that from that time the plaintiff entered upon any part of the demised premises, or in any manner interfered with Sheraton's exclusive occupation of any part thereof during any part of the period for which the rent which is the subject of this action accrued due.

It was also quite irrelevant to the issue between the

parties whether or not the property was fit to be occupied for the purpose for which Sheraton leased it between the 1st of August and 1st of Nov., 1883, and between the 1st of Nov., 1883, and the 1st of February, 1884. There can be no doubt that the premises could not have been wholly occupied for the purpose for which Sheraton had leased them while the necessary repairs and improvements were in progress, both those which the plaintiff was engaged in making and those which Sheraton himself had to do in order to put the premises into that condition which was necessary for the complete enjoyment by Sheraton of the whole of the demised premises, but the plaintiff could not in any form of action be made responsible for any defect in the condition of the premises which could be attributed to the default of Sheraton himself, and that he had himself been in default in respect of the repairs and improvements he had to make, and was making, in order to put the premises into such a condition that he could beneficially enjoy them, there can be no doubt; for, from the 14th August, he ceased proceeding with the work in which he was then engaged and never did any more, having then conceived the idea, which he subsequently carried into effect, of wholly abandoning the premises. Moreover, the mere fact of the premises being in a bad condition during the period named could not itself afford any evidence of the plaintiff having evicted Sheraton from any part of the demised premises and having kept him evicted therefrom during the whole of the period named, all which is averred by the defendant in his pleas of eviction, and all is necessary to be proved in order to afford any defence to this action, for in the case of an eviction from a part of demised premises if that part be restored to the tenant before the falling due of the current rent at the time of eviction the rent as reserv-

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ed by the lease is payable. In the present case it is undisputed that the plaintiff, by the middle of September, 1883, completed all the repairs and improvements he contemplated making, the nature and extent of which was by the express terms of the lease left entirely and unreservedly to his judgment and decision, and that he then wholly abandoned any occupation which he ever had of any part of the demised premises, and thenceforward Sheraton had uninterrupted occupation of the whole of the said premises without any let or hindrance of the plaintiff. By abandoning such occupation Sheraton could not determine the tenancy or get rid of his obligation under his covenant to pay rent and to keep the premises, after the improvements should be made, both those of the said plaintiff and of Sheraton himself, in good and sufficient repair and condition. The defendant, therefore, has wholly failed to establish that he is discharged from liability as to any part of the rent sued for by reason of the defence of eviction set up in his pleas. It was argued before us that even though there was no eviction, nevertheless, the defendant was released and discharged from his guarantee by reason of the matters pleaded in the third of the pleas above set out, but such a case does not appear to have been urged at the trial, where the whole case was rested upon the alleged eviction; and indeed, in point of law there is no foundation for the contention before us that the defendant could be released and discharged from his guarantee by the matters therein alleged, assuming them to be true, for the defendant's guarantee is to pay the rent covenanted to be paid by the tenant during the continuance of the term demised by the lease, or so much thereof as the tenant should make default in paying, and nothing can discharge or release the defendant from this his covenant unless it be an actual release

executed to himself, or such acts and conduct of the lessor towards his tenant as should constitute a discharge or suspension of the rent as regards him, and the plea avers nothing which constitutes a determination of the tenancy or a discharge or suspension of the rent as reserved by the lease and payable by the tenant. If there was no eviction, there was no suspension of rent and no discharge of the liability of the defendant under his covenant to pay so much of the rent reserved by the lease as the tenant should make default in paying. So that in fact the whole case rested, as it was treated at the trial to rest, upon the question of eviction.

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In the view which I have taken it may be unnecessary to determine whether or not the judgment of the Supreme Court of New Brunswick is well founded, which, as I understand it, in substance declares the continuance by the plaintiff upon the demised premises after the 1st of July without Sheraton's consent, although for the sole and actual purpose of continuing to completion the repairs and improvements outlined in the lease and already commenced, would constitute an eviction in law and suspension of the rent. But I am of opinion that judgment cannot be supported. The judgment seems to me to go farther than any case hitherto decided, and I do not think that the court has given sufficient consideration to the fact that the plaintiff had really no more possession of the demised premises, or of any part thereof, than he would have had if he had been a mere stranger executing the work he was engaged in under a contract with Sheraton and, in such case, such possession could hardly be held to be sufficient to be the basis upon which eviction could be rested; so, likewise, I think it did not receive sufficient consideration that Sheraton was himself equally in possession of the same part of

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the demised premises as was the plaintiff, and for the like purpose of making repairs and improvements equally necessary for the beneficial enjoyment by him of the demised premises as were those which the plaintiff was making, so that it appears to me to be difficult to conceive what particular act of the plaintiff constituted an eviction of Sheraton from premises upon which and upon the same part of which he was himself making necessary repairs and improvements, equally as was the plaintiff.

For the above reasons I am of opinion that the appeal should be allowed with costs and a rule be ordered to issue in the court below setting aside the verdict for the defendant and directing a verdict and judgment to be entered for the plaintiff for the full amount of the two quarters rent claimed, namely, \$1,400, together with interest thereon from the commencement of action, and costs of suit.

PATTERSON J.—Robert E. Ferguson, the plaintiff, made a lease to Alfred B. Sheraton, dated the sixth of May, 1882, demising premises in the City of St. John for a term of ten years to commence on the first of May, 1883, at the yearly rent of \$2,800, payable in quarterly instalments of \$700. The defendant became surety for Sheraton. This action is brought to recover from the defendant, as such surety, two quarters' rent which fell due, according to the terms of the lease, on the first of November, 1883, and the first of February, 1884.

The defence relied on is that before either of these gales of rent became due the plaintiff evicted Sheraton from the demised premises, or that he evicted him from a part of the premises and Sheraton gave up possession of the rest.

At the trial of the action certain questions were given in writing to the jury and were answered in

writing. The learned Chief Justice who presided at the trial directed a verdict for the defendant with leave to move. The plaintiff moved to have the verdict entered for him or for a new trial. His grounds are fully set out in his notice of motion which I shall refer to by and by. The motion was refused, and this appeal is from that decision.

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There are some provisions in the lease to Sheraton which I find by no means easy to understand. They have been the occasion of much of the difficulties that have led to this litigation. There is a covenant by the lessee to yield up at the expiration of the lease—

All and singular the premises and all future erections, additions and improvements that may be made to and upon the same during the term of this agreement in as good order and condition in all respects—damage by fire and other unavoidable casualties alone excepted—as the same now are or may be put into by the said Robert E. Ferguson or his legal representatives, provided the said Robert E. Ferguson or his legal representatives do actually make the improvements herein-after outlined.

Nothing turns directly on this proviso which, as expressed, would seem to qualify the whole covenant. It would probably have to be read as touching only the subject immediately preceding it, viz., improvements made by the lessor, and it might be necessary so to understand it to make it consistent with the covenant to repair which comes farther on in the deed.

Following the proviso there is this remarkable stipulation :—

It is hereby mutually agreed upon by and between the parties hereto that the said Robert E. Ferguson and his legal representatives, agents and servants, if he or they should think proper or expedient, may enter upon the said land and premises herein demised for the purpose of repairing, altering or improving the same or any part thereof, at any time either between the date of this indenture and the 1st day of May, 1883, and for two months thereafter, but not after that time except with the approbation or consent of the said party of the second part

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or his legal representatives. It is also to be fully and clearly understood by and between the parties hereto that the nature and extent of any repairs, alterations or improvements which the said Robert E. Ferguson or his legal representatives may make upon the said land and premises is to be left and is left entirely and unreservedly to the judgment and decision of the said Robert E. Ferguson and his legal representatives. (But the said Robert E. Ferguson may here state in outline (in parenthesis) what his present intentions are as to said alterations, repairs and improvements, namely, that he intends—)

going on to specify works of considerable extent in removing structures, building others, altering, draining, &c., &c., and adding the following, which is what I have spoken of as the covenant to repair :

It is to be understood also that the said Alfred B. Sheraton and his legal representatives are to make at his and their own expense and risk any and all improvements and repairs which he or they may require during the term of this lease in or upon the said demised premises, over and above what the said Robert E. Ferguson and his legal representatives may make, as above indicated, and to keep the said premises, after such improvements are made, both those of said Robert E. Ferguson and his representatives, and Alfred B. Sheraton and his representatives, in good and sufficient repairs and condition during the term of this lease.

When the lease was made the premises, on which were two shops, were let to other tenants, T. & H. Likely having one shop and one Warwick the other. The terms expired only on the 1st May, 1883, when Sheraton's term was to begin. The parties to the lease apparently contemplated the possibility of the lessor doing part or the whole of his projected work on the premises during the existing terms of Likely and Warwick. The provision which, in form, imports a consent by Sheraton to his lessor entering upon the other tenants looks rather anomalous, but probably takes that aspect only from being inartificially expressed. Its purpose may have been to preclude any objection on Sheraton's part to the alteration of the premises between the execution of the deed and the

commencement of the term, as well as for at least two months longer.

For the plaintiff it has been argued that the limit of the two months from the first of May, 1883, was only in respect of the entry to commence the improvements, and that, having entered within that time, or afterwards with the consent of the lessee, the lessor was authorized to remain in occupation as long as might be reasonably necessary to carry the works to completion. There is, to my mind, a good deal in favor of that reading of the deed. The language employed—"if he or they should think proper or expedient to enter upon," &c., "at any time either between," &c.—bears strongly in that direction. It would have been easy to say that whatever works the lessor decided upon must be completed within the limited time, if that was what was meant. I see no good reason for inferring that a joint occupation by the lessor and lessee was contemplated.

The lessee could not well occupy the premises for the purpose of his business while the outlined improvements, or, at all events, while some of them, were in progress. The entry permitted by the agreement I should take to be practically, or for business purposes, an exclusion of the lessee, and I do not take the entry to be repeated from day to day while the improvements were going on. The lessor was at liberty to enter for the purpose of making the improvements. When they were made he would, of course, withdraw, but in the meantime there would not be repeated entries—the entry was once for all. One is inclined to ask: Why, if the tenant is excluded from the use of the premises while the landlord is making his improvements, should he continue to pay rent? The question does not touch the point of the construction of the permission to enter. Rent was to be paid for the whole term. Some part

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of the term, be it two months or more, was to be, or might be, occupied by the works done by the landlord. The tenant would enjoy the advantage of the improvements without increase of rent, but he was to pay rent for the whole term.

The plaintiff lost no time in beginning his building operations as soon as the tenancy of Likely and Warwick expired, but he did not finish them within the two months. I understand the evidence to be that he had not completed all that he had proposed to do even in February, 1884, but there is evidence that he had ceased work on the premises sometime in September, 1883.

The quarter's rent due on the 1st of August, 1883, was paid on the fourteenth of that month, the tenant giving at the same time the written notice that he claimed that the conduct of the plaintiff amounted to an eviction and that the rent was suspended; but the tenant, who had himself been making some alterations, did not retire from the premises until the end of October, two or three days before the November quarter's rent fell due.

The facts found by the jury, upon which the verdict for the defendant was directed, appear by the following questions put by the learned Chief Justice, and the answers appended by the jury.

1. Was the property fit to be occupied for the purpose for which Sheraton leased it between the 1st August and the 1st November, 1883? It was not.
2. Was the property fit to be so occupied between the 1st November, 1883, and 1st February, 1884? It was not.
3. Did the plaintiff continue his work on the property after the 1st July with the consent of Sheraton? He did not.
4. Did Sheraton agree that the plaintiff might have till the 1st October to complete his work on the property? He did not.
5. Did the defendant (Troop) in August, 1883, assent to, or request the plaintiff to remain and finish the work? No.



6. Did Sheraton consent, after giving the notice of the 14th August, 1890, that the plaintiff should continue on and do the work? No.

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Some of these answers are palpably contrary to the evidence. No. 3 in particular is irreconcilable, to my mind, with the evidence of Sheraton himself, who was careful to say only that he gave no verbal consent. He seems to me to have given his testimony with fairness and candor, not attempting to disguise his consciousness that he was proving a very distinct consent at dates later than the 1st of July though he may not have given it in so many words, or, as he puts it, giving no verbal consent. I shall not, however, take up time by discussing the findings, but shall, for the purpose of this argument, accept them as they appear, because they stop short, in my judgment, of establishing the eviction on which the defence is based.

The plaintiff's notice of motion was in these terms:—

TAKE NOTICE, that the plaintiff will move the court, on the first day of Easter Term next, or as soon after as counsel can be heard, as by leave reserved, to enter a verdict for the plaintiff for the full amount claimed, *i.e.*, \$1,400, being two quarters' rent, or at least for \$700, being the quarter's rent from the 1st of August to the 1st November, 1883.

On the ground—

The tenancy being admitted and the amount of rent also and the non-payment thereof, and the defence being "eviction" by the landlord, the acts of the landlord relied on by the defendant as constituting an eviction, are not such acts as in law amount to an eviction, and therefore the pleas are not sustained.

Failing above mentioned motion, 'motion will be made for a new trial, on the following grounds:

1st. Misdirection.

(a.) That the great and material question was: Whether or not after the 1st July, 1883, Mr. Ferguson had the right to continue and make improvements on the property.

(b.) In directing that Ferguson was bound to have the improvements he indicated completed before the 1st July unless Sheraton consented to an extension of time.

(c.) In not directing the jury that to constitute an eviction there must be something of a grave and permanent character done by the

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landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

(d.) In not directing the jury, that Ferguson having entered lawfully on the premises for the purpose of completing the indicated improvements, the mere remaining there for a longer period than the time contemplated for the purpose of completing the work he had commenced would not amount to an eviction, unless such remaining in was done with the intention of depriving the tenant of the enjoyment of the demised premises.

(e.) In not directing the jury, that Ferguson having lawfully entered for the purpose of making the indicated improvements, if he merely remained there for a longer period solely for the purpose of completing the work he had commenced, and with no other ulterior view, such remaining beyond such time would not amount to an eviction.

(f.) In not directing the jury, that as Ferguson had left the premises by the middle of September, Sheraton occupying a portion and no-ways hindered from occupying the whole from that time out, there could not be any eviction during the quarter from the 1st November to 1st February.

(g.) In not directing the jury, that Ferguson having lawfully entered for the purpose of making the improvements he had indicated, the fact of his remaining longer than he contemplated was no answer to an action to recover the rent, but that if Sheraton had sustained damage thereby he had his remedy in an action for damages.

(h.) In leaving to the jury the first and second questions, they being immaterial to the issues and tending to lead the jury to the conclusion that Ferguson was bound to complete all he had indicated, and to have them completed by the 1st July.

(i.) In not leaving to the jury the question : " Did Ferguson remain in contrary to Sheraton's wish after the 15th September ?"

I am strongly inclined to the opinion that the plaintiff is entitled to succeed upon all the grounds here taken. I do not propose to discuss them at any length, and I am sensible of the difficulties attending some of them, particularly as regards the construction of the two months limitation. If my view of that clause is correct no further question can be made on this record, whether Sheraton would or would not have any claim for damages or other relief by reason of any inconvenience or loss he may have been put to from the length of time taken up by the plaintiff's work. That time

may or may not have been unreasonable. No question of fact on that subject was submitted to the jury.

But setting aside for the moment this disputed question of construction, and adopting the findings of the jury that negative any consent by Sheraton or by the defendant to the occupation of any part of the premises by the plaintiff after the first of July, I am unable to see that an eviction, working a suspension of the rent, is established.

The doctrines settled by the most recent decisions may be taken from Wm. Saunders (1), under *Salmon v. Smith*, where it is said :

It is now well settled that that sort of eviction [i.e., expulsion by title paramount or by process of law] is not necessary to constitute a suspension of the rent, because it is established that if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord the whole rent is thereby suspended. An eviction may now be taken to mean this : not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the whole or of a portion of the demised premises. Therefore, the question of eviction or no eviction depends on the circumstances, and is in all cases to be decided by the jury.

The whole of this language is that of Jervis C.J. in *Upton v. Townend* (2) where the importance of the intent, as a fact found, is emphasized, as e.g. :

If that may, in law, amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character, and done with that intention.

There is no finding of this crucial fact in the present case. It is not involved in any of the facts found, and if I correctly apprehend the charge of the learned Chief Justice as reported to us I think the necessity for it cannot have been present to his mind. After quoting from the judgment delivered by Mr. Justice Palmer at a former stage of the case the learned Chief Justice went on to remark :—

(1) 1 Vol. p. 209 (f).

(2) 17 C.B. at pp. 64-65

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Now when he says permanent I do not understand that to mean permanent in this sense that it was to last as long as the lease lasted and put an end to it, but something that would deprive the tenant for a considerable time of the use and occupation of the property leased. If that was the effect of what Ferguson did, and it was done without the consent of Sheraton, well I should say that would amount in law to an eviction, because the tenant does not get what he was paying his rent for, because he does not get the beneficial occupation of the property for the term, let it be a quarter or less, or a month, and that would justify a jury in finding there was an eviction.

Now, I take it to be indisputable that a tenant may be deprived of the beneficial occupation of demised property for some part of his term by an act of the landlord which is wrongful as against his tenant but which does not necessarily amount to an eviction. Such an act may be what is spoken of in the passage quoted from the judgment of Jervis C.J. as a mere trespass. It may be an act which is not technically a trespass, as in the case of an entry to do repairs of the nature, *e.g.*, of those in *Saner v. Bilton* (1), but where, from the repairs occupying more time than anticipated, the tenant is kept out for an unreasonable time. The charge fails to distinguish such cases from acts which are not only of a grave and permanent character but which are also done with the intention of depriving the tenant of the enjoyment of the whole or of a portion of the demised premises. This oversight reappears in the judgment of the court in *banc* delivered by Mr. Justice Tuck, but there the fallacy is more in the application of the law than in the statement of the rule. After alluding to the former decision in the case which compelled the court to hold that the repairs and alterations were, by the terms of the lease, to be completed before the 1st of July, 1883, he said :

That being so, the next important question to determine is whether the plaintiff did upon the premises, after the first of July, what amounted to an eviction. That, in my opinion, was for the jury, with

proper direction as to what in law would constitute an eviction. If by the lease the plaintiff was bound to have the improvements completed and the premises tenantable by the first of July, and he failed in this and continued to occupy and make repairs, so that Sheraton, without his consent, and as the inevitable result of the plaintiff's action, was deprived of the beneficial use and occupation of the whole or some part of the demised premises, this would be evidence upon which a jury would be warranted in finding an eviction. Such acts would be evidence of an intention to evict, for a person is presumed to intend what must be the natural result of his own action.

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The cogent fact that the jury did not find, and were not asked to find, viz. whether or not there was an eviction, seems to be overlooked in these observations. The fact that the tenant was deprived of the enjoyment of the premises or of some part of them by the act of the landlord would, no doubt, be a fact admissible in evidence on the issue as to the intent with which the act was done, but it would be only one fact to be considered by the jury along with all the other evidence that bore on the issue.

There is no conclusive presumption from a certain effect following an act, or even necessarily following it, that the act was done with the intention to produce that effect. In this case, if the question had been left to the jury, with a proper direction as to the importance of the motive or intention, I should not anticipate a finding that the alleged acts were done with the intention of depriving the tenant of the enjoyment of the premises. The motive in entering on the first or second of May cannot be said to be in controversy. It was obviously for the purpose provided by the lease; and while one cannot say that the jury might not see or suppose there were reasons for attributing the delay in completing the works to a design to keep the tenant out, and not to accidental or unforeseen causes or honest miscalculations, or to the extension of the works in some respects at the instance of the tenant, of which

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there is evidence, I should not expect the former view to be taken. The evidence, as I read it, taking even that of Mr. Sheraton by itself, greatly preponderates in favor of the latter conclusion. I go so far as to consider that the issue of eviction or no eviction might properly have been withdrawn from the jury on the ground that the entry was in accordance with the terms of the lease, and that there was not, under the circumstances, evidence on which they could reasonably find that the prolonged occupation of the premises by the plaintiff was with the intention of depriving the tenant of the enjoyment of them.

It is only repeating what I have already said to remark that this holding does not touch the right of the tenant to compensation for loss or inconvenience which the landlord may have caused and may be unable to justify. Even in case of an eviction the tenant has that remedy in addition to the suspension of the rent, as was pointed out by Coltman J. in *Morrison v. Chadwick* (1).

Some proceedings on the part of the tenant Sheraton which have been proved in evidence have no bearing that I can perceive on the issue in the action, at least in favor of the defendant. The payment of the August rent when, if the finding of the jury has the effect attributed to it, the eviction took place in July certainly does not help the defence. The first inference from it, an inference pretty clearly indicated by direct evidence, that of Sheraton as well as others, is that Sheraton assented to what is now called an entry after the 1st July. I do not understand on what principle the contention which runs through the defence is based that a consent to exceed the time relied on as the limit under the lease, and not itself limited to any definite time, could be recalled at the will of the

tenant so as to make the continuance of the operations an eviction. Nor do I appreciate the importance attached by the defence to the fact of Sheraton having quitted the premises in October, 1883. The suspension of the rent, if there was any eviction from part of the premises, was anterior to and irrespective of the abandonment of the premises by the tenant, while at the same time the lease continued to subsist after the abandonment as well as before it. *Morrison v. Chadwick* (1). I should be disposed to ascribe these proceedings rather to the business difficulties that are said to have occurred to Sheraton in or about the month of August, 1883, than to any apprehension of their advantage with regard to the lease from the plaintiff. Those are, however, matters aside from the questions before us.

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On the grounds that on the correct construction of the lease the continuance of the plaintiff's occupation of the premises for the purpose of the additions and alterations for a reasonable time after the 1st July, 1883, was not wrongful ; and that even if that be not the correct construction of the document, there has been no eviction shown or found by the jury ; I am of opinion that the rule asked for by the plaintiff ought to have been granted and judgment given him for the amount claimed with costs, and that we should allow the appeal with costs.

Appeal allowed with costs.

Solicitor for appellant : *A. H. DeMill.*

Solicitors for respondent : *Weldon, McLean & Devlin.*