

occasioned a nuisance on the premises. The defendant (the tenant) thereupon complained to the health inspector, and requested him to abate the nuisance. The inspector did cause the nuisance to be abated, and charged the costs and expenses incurred to the tenant, who paid them, and deducted them out of his next month's rent, claiming to be entitled to do so under R.S.O., c. 205, s. 104, which reads as follows: "(1) Any costs or expenses recoverable from an owner of premises under this Act, or under any provision of law in respect of the abatement of nuisances, may be recovered from the occupier for the time being of such premises; and the owner shall allow such occupier to deduct any moneys which he pays under this enactment out of the rent from time to time becoming due in respect of said premises, as if the same had actually been paid to such owner as part of said rent: Provided, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuses truly to disclose the amount of his rent and the name and address of the person to whom rent is payable; but the burden of proof that the sum demanded from such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall be on such occupier.

"(2) Nothing in this section contained shall affect any contract between any owner or occupier of any house, building, or other property whereby it is, or may be, agreed that the occupier shall pay or discharge all rates and dues, and sums of money payable in respect of such house, building, or other property, or affect any contract whatever between landlord and tenant." 47 Vict., c. 38, s. 27.

The plaintiff thereupon brought this action to recover the month's rent kept back to meet these expenses, alleging that the defendant had caused, and should, therefore, pay for abating the nuisance, and citing s. 62 of the same Act, which reads as follows: "All reasonable costs and expenses incurred in abating a nuisance shall be deemed to be money paid for the use and at the request of the person by whose act, default, or sufferance the nuisance was caused, and such costs and expenses shall be recovered by the municipal council, or local board of health, or person incurring the same, under ordinary process of law, and the court shall have power to divide costs, expenses, and penalties between persons by whose acts or defaults a nuisance is caused, as to it may seem just." 47 Vict., c. 38, s. 34.

R. A. Bayly for the plaintiff.

T. H. Pardom for the defendant.

MCKENZIE, J.J.: My findings in this case are as follows:

(1) The nuisance in question was caused by the defendant.
(2) There is no special stipulation on the part of the plaintiff to pay for removal of same.

(3) The special clause in the lease that the defendant will, on its determination, remove all ashes and refuse from the demised premises, and leave the same in a cleanly condition fit for the reception of an incoming tenant, might fairly be held to cover the cleaning of sediment from bottom of cesspool, th