the noxious acts is such an unequivocal act operating as a waiver: Dendy v. Nicholl (1858), 4 C.B.N.S. 376; Penton v. Barnett, [1898] 1 Q.B. 276.

Whether when, in the same action for rent, forfeiture is also claimed, the action will operate as a waiver has been doubted. But Bevan v. Barnett (1897), 13 Times L.R. 310, decides in the affirmative. That case has been distinguished—e.g., in Penton v. Barnett, supra—but not questioned, much less overruled; it recommends itself on principle and should be followed. At least such a proceeding is evidence of a waiver, and in the present case should be held to be a waiver.

The acts alleged as justifying forfeiture are not continuing acts so as to let in the exception. This action is itself a waiver, and bars forfeiture.

It was said that the claim for rent was abandoned at the trial; but, even if that were so, the forfeiture had already been waived and could not be reinstated: Bevan v. Barnett, supra. What was abandoned at the trial was not the claim for rent but (if anything) a claim for forfeiture on the ground of non-payment of rent.

Counsel for the appellants did, on the argument of the appeal, abandon the claim for rent; that was of no avail, and the plaintiffs should not be held to that position.

The claim for damages seemed to be well-founded. The changes made, it was admitted, could not lawfully have been made without the consent of the plaintiffs. The plaintiffs did consent to a certain defined change, but not to the change actually made. The defendants, then, were wrongdoers, and were not helped by the fact (if a fact) that the building was better as changed than it was before. The plaintiffs should have damages for the wrong done by the changes. The damages should be fixed at $200, subject to the right of either the plaintiffs or defendants to take a reference at their own risk as to costs.

As to subletting without leave, the damages, if the plaintiffs were entitled to any, would be purely nominal.

As to the claim for rent, the plaintiffs were in strictness barred; but it would be unjust to hold them to that position; and they should now be allowed to appeal on the ground that they were entitled to rent, and should have judgment for the two instalments of rent due before the commencement of the action, $730.

There should be no costs to either party down to and inclusive of the judgment at the trial. The plaintiffs should have the costs of the appeal if they were willing to accept a judgment barring them of the right to rent due before the action; but, if they desired judgment for the rent, they should as a term pay the defendants' costs of the appeal.