

The rent was paid up to the 1st June, 1904, after which plaintiffs refused to receive any rent accruing due subsequent to the assignment.

This action was commenced on 10th October, 1904 . . . and on 31st January, 1905, the premises were vacated and the keys tendered to plaintiff S. S. Lazier, who refused to receive them; they were, however, left in his office. . . .

It follows, I think, from the express wording of sub-sec. 2 of sec. 34 of ch. 170, that when the assignee elects to retain the premises, the effect of the section is to prevent a forfeiture, and, as said in *Kennedy v. Macdonell*, 1 O. L. R. at p. 254, "places the assignee in the same position as respects the lease as the assignor would have been in had the assignment not been made, the landlord being entitled to the full amount of the rent reserved by the lease."

The assignment to defendant Armstrong and his election to retain the premises . . . make him liable on all the covenants in the lease; and, while the statute gives him the right of election . . . it confers no power on him to assign the lease without the consent of the lessors. He may, therefore, be liable to plaintiffs for the rent of the premises for the remainder of the term, unless such consent is obtained.

Armstrong becoming, as it were, statutory assignee of the leased premises for the 8½ years, under the terms of the lease, plaintiffs are entitled to recover the rent only under and by virtue of the covenants in the lease, and the amendments thereto, under the agreement of 21st November, 1902, and they cannot recover for use and occupation.

As, after the assignment, defendant Armstrong went into possession under the terms of the lease, it follows that defendant H. C. Woods cannot be made liable for use and occupation, and the action must be dismissed as against him.

As all the evidence has been given, I will allow plaintiffs to amend their statement of claim as against defendant Armstrong as they may be advised: defendant Armstrong to plead to the amended statement of claim; and, after the amendments are made, I will hear counsel.

Costs reserved.