

with a set-off to defendant under Rule 1132. Plaintiff appealed on the ground that damages should have been allowed for breaches of the covenants mentioned.

R. B. Matheson, Ottawa, for plaintiff.

M. J. Gorman, K.C., for defendant.

BOYD, C.:—There is no ground to disturb the finding of the Master as to the first ground of appeal. Granted that the piano hoist put in at the expense of the tenant and with the permission of the landlord was a tenant's fixture, and was removable by him at the end of the term. It was not so removed, but was left on the premises, and it thereby became permanently affixed to the property, and as a part of the freehold could not be disturbed by the tenant after the expiry of his term and his relinquishment of possession. His conditional right to remove disappeared by his inaction and he simply went out and left the building in its changed state to be the landlord's property. It was not competent for the landlord to remove his piano hoist and put in a smaller hoist and to have the building restored to its former condition and seek to charge this to the tenant on the theory that the tenant had committed a breach of the covenant to leave the premises in good repair, because he had not restored them to the original condition. The original condition had been structurally changed at the expense of the tenant, and he went out, abandoning any possible right he might have to remove what he had put in, on the ground of its being a tenant's fixture, and thereby he left the premises in good repair. That is the result of the cases, the last of which is *Stack v. T. Eaton Co.*, 4 O. L. R. 335, 338, 1 O. W. R. 511.

And equally well founded appears to be the Master's judgment on the other point appealed. The covenant not to assign without leave was broken when an assignment was made to the company without the written consent of the landlord—but, knowing this, the landlord verbally assented to the change, and afterwards received his rent from the new-comer. That operates as a waiver of the covenant and an election by the landlord to treat the illegal occupier as a lawful tenant. This is an election for all purposes—he cannot afterwards claim . . . damages on a breach of the covenant such as here set up. It appears that the company was assessed as a separate school supporter, and a larger assessment for taxes was thereby imposed upon the demised