

BRAIDWOOD V. DUNN.

1917, March 15, 16. Supreme Court, Auckland.
Stout, C.J.

*Landlord and tenant—Fixtures—Removal of—
Construction—Covenant as to removal—Hold-
ing over—Applicability of covenant.*

By an agreement in writing premises were leased for a term of seven years, and it provided that the tenant should be entitled at the end of the term or within one week thereafter to remove all fittings and fixtures erected or supplied by him so far as the same could be removed without injury to the buildings. During the term certain tenant's fixtures were put on the premises. The lessee assigned his lease to the appellant who entered into possession and paid rent and continued in possession after the expiration of the term. Before the end of the term the lessor sold the fee to N. and thereupon and after the end of the term the appellant paid rent to N. at the rate provided by the agreement and continued in possession.

The appellant then sold his interest in the tenancy to the respondent. N. accepted rent from the latter and afterwards gave him notice to quit as the tenancy had become a monthly one. The question was whether N. had the right to claim the fixtures or had the respondent the right to remove them.

HELD.—That the respondent had a right to remove fixtures.

A. L. Denniston for appellant.

Johnstone for respondent.

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v.

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STOUT, C.J.—The facts in this case are not in dispute. In 1907 one Moore, in writing, agreed to lease to one Gardiner certain premises in the suburbs of Auckland. The term was for seven years from the 5th August, 1907. The agreement contained the following provision:—“And the said premises so repaired, amended, cleansed, maintained, and kept as aforesaid (fair wear and tear and damage by fire or other inevitable accident excepted) will at the expiration or sooner determination of the said term peaceably and quietly surrender and yield up to the landlord or other the person or persons entitled to the immediate reversion therein: Provided that the tenant shall be entitled at the expiration or sooner determination of the said term or within one week thereafter respectively to remove from the said premises all fittings and fixtures erected or supplied by him so far as the same can be removed without injury to the buildings if all rent then due shall have been paid.”

During the continuance of the term certain tenant's fixtures necessary to the tenant in carrying on his business were put on the premises. Gardiner assigned his lease to the appellant, who entered into possession and attorned to the landlord and paid rent. He continued in possession after the expiration of the term. Before the end of the term the lessor sold his fee to one Nigro. After the end of the term in the agreement the appellant paid rent to Nigro at the rate provided by the agreement to lease which had all along been paid, and continued in possession. The appellant then sold his interest in the tenancy to the respondent. Nigro accepted rent from the respondent and afterwards gave him notice to quit, as the tenancy had then, by operation of law under our Property Law Act, 1908, become a monthly tenancy.

Nigro claimed the fixtures as his because they had not been removed during the seven years' term or within one week thereafter.

The question is, Had Nigro the right to claim the fixtures, or has the respondent the right to remove them?

The question really turns on whether the principle laid down in *Weeton v. Woodcock* (7 M. and W. 14) and subsequent cases is to be applied to this case. It was there laid down that if there is a right to remove fixtures during the term, that right may be exercised if the tenant keeps possession and has a right to consider himself a tenant. This principle was approved in *Leader v. Homewood* (5 C.B.N.S. 346: 141

E.R. 221). Willes, J., in delivering the judgment of the Court, said: “The law as to the limit of time within which a tenant is allowed to sever from the freehold the fixtures which are usually called ‘tenant's fixtures’ is by no means clearly settled. According to the older authorities, the rule was that he must sever them during the term. But in *Penton v. Robart* (2 East. 88) it appears to have been considered that the severance might be made even after the expiration of the tenant's interest, if he has not quitted possession. However, in *Weeton v. Woodcock* (7 M. and W. 14) the rule was laid down that the tenant's right continues only during the original term and ‘such further period of possession by him as he holds the premises under a right still to consider himself as tenant.’”

The case of a tenant holding over was called an “excescence” on the original term. In *Ex parte Brook in re Roberts* (10 Ch.D. 100 at p. 107), James, L.J., said: “The word ‘excescence’ *ex vi termini* means something growing out of the original term, such as a tenancy at will after its expiration.” The word “excescence” was used by Baron Parke in *Mackintosh v. Trotter* (3 M. and W. 184). In the judgment of the Court (James, Baggally, and Thesiger, L.J.J.) in *Ex parte Brook*, delivered by Thesiger, L.J., it is said: “It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy.” In *Barff v. Probyn* (64 L.J.Q.B. 557) it was recognised that even if there was tenancy by sufferance there might be a right to remove, and a quotation is made from *Leader v. Homewood* (see p. 559). Mr. Justice Charles, in fact, assumed that if the relationship of landlord and tenant existed, though on sufferance, the right to remove would exist.

In this case there is a tenancy created by the payment of rent under our Property Law Act, 1908. It is a tenancy that can be ended, and was ended, by one month's notice.

In my opinion the right to remove existed on two grounds: (1) there was a continuance of the tenancy — an “excrecence” — and (2) the monthly tenancy was on the same terms as the old, and that would include the provision already quoted appearing in the lease.

It was said by Lord Mansfield that holding over by consent is a tacit renovation of the contract: *Right v. Darby* (1 T.R. 159: 99 E.R. 1029 at p. 1031); see also *Dougal v. McCarthy* (1893, 1 Q.B. 736).

In *Smith's Leading Cases* (11th ed., Vol. 2, p. 125) it is said: “Where the party so occupying pays rent according to the terms of the agreement, either past or future, and thereby becomes tenant from year to year, the inference is irresistible, *in the absence of anything to show a different understanding*, that the parties intend the occupation to continue upon such of the terms of the agreement as are not inconsistent with such tenancy.”

If there had been an agreement between the parties and a fresh lease issued, then it might well have been contended that the landlord had leased all the fixtures on the land and that the fixtures were his, and that they had been abandoned by the tenant. But that is not what happened. The tenancy went on and was subject to the right to remove the fixtures.

The case of *Leschallas v. Woolf* (1908, 1 Ch. 641) was referred to, but that case does not apply. The main point in that case was whether the words “with all and singular the fixtures and articles belonging thereto” included tenants’ as well as landlords’ fixtures. The Court held they did. That case may not be reconcilable with *Lambourne v. McLennan* (1903, 2 Ch. 268), but the facts in this case make a consideration of these two cases unnecessary. From either point of view, whether the tenancy is deemed a continuation of the prior tenancy or a new tenancy created by law, the right to remove the fixtures remained. It cannot, therefore, be said that the appellant sold something to the respondent to which he had no title, and the Magistrate should have given judgment for the defendant.

The appeal must be allowed, with £5 5s. costs, and judgment must be entered by the Magistrate for the defendant with such costs as he considers reasonable and proper.

Judgment accordingly.

Solicitors: for appellant: *A. Hanna*, Auckland; for respondent: *Stewart and Johnston*, Auckland.