

1965

# Guy H. Wight and Florence D. Wight v. Eugene Callaghan and Edna Callaghan : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

GUY H. WIGHT and  
FLORENCE D. WIGHT, his wife,  
*Plaintiffs-Respondents,*

vs.

EUGENE CALLAGHAN and  
EDNA CALLAGHAN, his wife.  
*Defendants-Appellants.*

Case No.  
No. 10248

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APPELLANTS' BRIEF

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Appeal from the Judgment of the Third District  
Court in and for Salt Lake County, Honorable Joseph  
G. Jeppson, Judge.

UNIVERSITY OF UTAH

APR 29 1965

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GUY H. WIGHT and  
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APPELLANTS' BRIEF

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STATEMENT OF THE KIND OF CASE

This is an action by landlords under three separate and distinct leases for claimed breach of covenant in allegedly failing to restore premises to as good condition as when entered upon.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a judgment for the plaintiffs, defendants appeal.

## RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment against them, and judgment in their favor as a matter of law; or, that failing, a new trial and a decree to the effect that Eugene Callaghan can only be held liable for breach, if any, of covenants contained in the leases which he executed; that the trial court be required to determine which items of claimed damage, if any, arose during the time that Edna Callaghan, alone, was liable, and which items of claimed damage are normal wear and tear for which neither Defendant is liable. The trial court should be further required to eliminate from the judgment those items of claimed damage for which Defendants are charged twice in the Findings and Judgment and eliminate the judgment for loss of personal property abandoned by Plaintiffs. Appellants also seek reversal of the order dismissing, without trial, their counterclaim; or, in lieu thereof, that the value of the improvements, the subject of the counterclaim, be offset against any sum recovered by Plaintiffs.

## STATEMENT OF FACTS

On January 18, 1957, Plaintiffs leased to Defendants, under a written lease, for a two-year term, at \$225.00 per month, an old farm house, remodelled some 20 years previously, located at 3621 Highland Drive, Salt Lake County, Utah.

On February 25, 1959, a new lease was made, covering the same premises, for a one-year term

at \$175.00 a month. This lease was signed only by Guy H. Wight as Lessor and Edna S. Callaghan as Lessee. This lease expired February 29, 1960.

On May 10, 1960, a third lease was executed to take effect July 1, 1960, and to expire June 30, 1963, at \$200.00 a month, rent payable for 33 months only, though the term of the lease was 36 months. This lease was signed by both Plaintiffs and both Defendants.

During the time Defendants were in possession, they made certain structural improvements to property, intending to buy it. Defendants filed a Counterclaim for \$4,602.35 for major improvements to the property. On motion of Plaintiffs this was dismissed by the Court prior to trial.

Plaintiffs, during the period of occupancy by Defendants, entered the premises from time to time and made repairs of various natures.

After Defendants vacated the property in July, 1963, Plaintiffs brought this action claiming Defendants breached the covenant in the leases requiring restoration of the premises in as good condition as when entered upon, except for reasonable wear and tear or damage by the elements or by fire.

Upon trial, the Court found the issues in favor of Plaintiffs and entered judgment in their favor for \$183.33 rent for July, 1963, \$105.13 for items claimed to be missing, \$258.43 for items claimed to be damaged, \$10.00 for lawn seed, \$775.88 for al-



leged damage by water from a burst pipe during the fall of 1959 or winter of 1960, \$26.00 for cleaning a dirty rug, \$829.54 for painting and papering and restoring premises, \$568.64 for attorney's fee, and \$65.50 costs.

Plaintiffs, in their Complaint, claimed \$6.00 for unpaid sewer charges, but this claim was not supported by evidence and no judgment was rendered thereon.

## ARGUMENT

### Point I:

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT DEFENDANT, EUGENE CALLAGHAN, WAS LIABLE FOR ANY CLAIMED DAMAGES EXCEPT SUCH AS MAY HAVE ACCRUED BETWEEN MARCH 1, 1957, AND MARCH 1, 1959, OR AFTER JULY 1, 1960, AND NO DAMAGES ARE SHOWN TO HAVE OCCURRED DURING THOSE PERIODS OF TIME.

In this action, judgment was entered against both Defendants for the entire damages claimed. The findings do not, for the most part, establish when the claimed damage occurred, except that it was sometime between the commencement of the first lease and the termination of the third. Eugene Callaghan signed the first lease and the third, but he did not sign the second, and inasmuch as this is an action for breach of covenants in a lease, he can only be charged for breach of covenants, if any, in

those contracts to which he was a party. From the expiration of the first lease, March 1, 1959, until the commencement of the term under the third lease, July 1, 1960, there was no lease in existence to which Eugene Callaghan was a party, and it was during this period of time that the greatest item of alleged damage occurred. (R. 19 Par. 15.) In fact, the only alleged damages identified as to time, occurred during this period.

At the trial, Plaintiffs endeavored to establish that the second lease was signed by Mrs. Callaghan as agent for her husband, but the proof submitted does not support such claim.

At the time the three leases were offered in evidence, counsel for Defendants objected to the admission of the second lease, Exhibit 3. To this objection, counsel for Plaintiffs stated (Tr. 44 Line 20) :

It is our position it is continuing, and the wife did have authority to sign for the husband and did sign it and the lease was fully executed by both parties, the husband and the wife, and that the defendant husband is bound by his wife signing on the lease.

This statement by Plaintiffs' counsel is a desperate effort to tie both the parties to the second lease, but unfortunately for Plaintiffs, it is not the law. A purported agent who does not claim to be an agent and does not purport to execute in behalf of the principal and who does not have either real or apparent authority does not bind the purported

principal. Mrs. Callaghan did not purport to bind her husband. She did not execute the lease in his behalf by herself as a purported agent. She did not claim to have nor did she have either real or apparent authority. She did not, therefore, bind her husband to the second lease.

At the trial, counsel for Plaintiffs, after having made the incorrect statement of the law quoted above, passed on without showing the claimed authority. The Court thereupon, in an apparent effort to assist Plaintiffs' attorney (as the Court seems to have done several times during the course of the trial), reminded him that he had not furnished proof of authority for Mrs. Callaghan to bind her husband. The Court said (Tr. 45 Line 13) :

Mr. Kump, on number three, if you want to show agency so the contract would be binding on those who did not sign, I will expect you to put in proof. The mere fact it is admitted (in evidence) does not mean it is binding on the ones who did not sign it.

To this, Mr. Kump, counsel for Plaintiffs, replied (Tr. 45 Line 18) :

I appreciate that, your honor.

Thereupon, counsel for Plaintiffs, responsive to the Court's prompting, cross-examined his own client, Dr. Wight, in an effort to prove agency. This effort was futile. Dr. Wight explained that not only was the matter not discussed with Mr. Callaghan, but

he, Dr. Wight, and Mrs. Callaghan specifically agreed that the signature of Mr. Callaghan was not necessary. Dr. Wight testified (Tr. 45-46), that he did not discuss the matter at all with Mr. Callaghan. He testified:

We discussed it with Mrs. Callaghan and she agreed she would sign the lease and I would sign the lease and we would not send it to Cyprus for Mr. Callaghan's signature.

Counsel tried to get Dr. Wight to say that Defendant Eugene Callaghan had confirmed the lease by letter. This effort was also fruitless (Tr. 46). Had there been any letter of confirmation, we may be sure it would have been offered in evidence. Counsel then probed for payment of rent by Mr. Callaghan, but Dr. Wright testified (Tr. 46 line 24) :

Mrs. Callaghan always paid the rent.

It is elemental that the burden of proving agency rests on the party alleging it, and that agency is not presumed, but is a question of law which must be established by proven facts. (See West's Digest System, *Principal and Agent*, Key 19, and numerous cases cited therein.) Plaintiffs have not met this burden of proof and for that reason, if for no other, Defendants' appeal should be granted and the case remanded for elimination of all items of damage charged to Defendant Eugene Callaghan for purported damage occurring between the end of the first lease and the commencement of the third.



## Point II:

PLAINTIFFS HAVE NOT PROVEN THAT CLAIMED DAMAGES OCCURRED DURING PERIODS LEASES WERE IN EFFECT.

Any claimed damage occurring during the period when no lease was in effect, that is, between March 1, 1960, and June 30, 1960, as to defendant Edna Callaghan and between March 1, 1959, and June 30, 1960, as to Defendant Eugene Callaghan, would not be breach of covenant in a lease, but tort. Plaintiffs do not plead in tort, and had they done so, their claim would have been barred by the Statute of Limitations, this action having been filed August 27, 1963, more than three years after the alleged tort could have occurred. Any claim in tort would thus have been barred by the provisions of Sec. 78-12-26 (1), Utah Code Annotated 1953. Consequently, any claim for damages occurring within these time limits must be disallowed. This points up a fatal defect in Plaintiffs' case. Except for the water damage, which allegedly occurred during the winter of 1959-1960 (Findings, Par. 15, R. 19), there is no finding as to when any of the alleged damage occurred. Dr. Wight testified that he did not know whether any of the items purported to be missing were there when the last lease was signed (Tr. 58, line 6; Tr. 103 line 13). The Court cannot assume that damage occurred during the leased period. That is a fact which Plaintiffs had the burden to prove and failed to prove. If for no other reason, the case

should be remanded to the trial court for a new trial to determine what, if any, of the claimed damage occurred during the period the leases were in effect.

### Point III:

**DEFENDANTS SHOULD NOT BE CHARGED WITH NORMAL WEAR AND TEAR; NOR WITH IMPROVEMENTS BEYOND MERE RESTORATION.**

By the Findings of Fact (R. 18-20) upon which the judgment is based, the Defendants are charged with: the expense of cleaning a dirty rug, \$26.00; the cost of replacing worn out and missing check ropes in the garage 60¢; a missing door stop in garage, \$1.50; a worn out water softener, \$100.00; paints and labor in redecoration; etc. It is Defendants' contention that the damage claimed by Plaintiffs is merely normal wear and tear that can be expected from 6½ years' occupancy.

Before discussing specific items of claimed damage, let us see what the record reveals as to the status of the property at the inception of the lease. The home was purchased by Plaintiffs in 1937 (Tr. 40). It had been an old farm house (Tr. 40), remodelled before its purchase by Plaintiffs. (Tr. 41.) They lived in it until 1954 to 1956 (Tr. 41), a period of 17 to 19 years. Then it was occupied for nine months by an employee of the Plaintiffs (Tr. 171), an unmarried woman (Tr. 41), who had another girl liv-

ing with her (Tr. 42). The record is not clear as to the length of time it was vacant prior to its occupancy by this employee who moved in March, 1956. Plaintiffs testified as to different times that they moved out; Dr. Wight said in 1953 (Tr. 104) or 1954 or 1956 (Tr. 41). His testimony does not appear to be very reliable. Defendants moved in during February, 1957.

The nature of the home must be deduced from little items. It had no tile, only linoleum on the kitchen drain (Tr. 95); the drawer pulls on the kitchen cabinets were dime-store glass pulls (Tr. 57). One of them was broken (Tr. 339). The glass door in the kitchen cabinet was broken (Tr. 326). The plaster was in bad shape, and "sloughed occasionally and had done so before" on most of the walls, as testified to by the Plaintiff, Dr. Wight (Tr. 99). The plaster had come off in one place (Tr. 299). The rug on the living room floor had been down for 16 years (Tr. 106 line 16 and Tr. 138), and was pitted and stained with brown spots (Tr. 246 and 257). The yard was overgrown (Tr. 271) and by Plaintiffs' own admission there was debris in the yard left by the Plaintiffs (Tr. 113 lines 6-7). The home was in poor repair (Tr. 274; Tr. 250 lines 17-19; Tr. 252 lines 12-14). Only the basement bedroom and bath had been painted within the previous 3 or 4 years (Tr. 118 lines 2-6). Elsewhere the paint was 16 or 17 years old (Tr. 152-153). It needed to be cleaned and decorated (Tr. 246). The shop was a rough workshop lined with 5 inch flooring (Tr. 119) until

its extensive remodelling and conversion into an office by Defendant (Tr. 120). There was a water softener at least 2 or 3, or more likely, 8 or 9 years old (Tr. 125). There was trouble of some undisclosed nature in the basement, admitted by Plaintiffs, requiring "rebuilding" every 5 or 6 years (Tr. 132). Obviously this was no immaculate mansion; and it should be pointed out that most of the references to the transcript, hereinabove referred to, are from the testimony of the Plaintiffs themselves.

During the term of occupancy of the property by Defendants, the Defendants paid to Plaintiffs \$15,400.00 in rents, and expended \$1,560.63 in maintenance of the property (Tr. 318), not to mention the expenditure by Defendants of \$4,602.35 in making improvements and alterations to said premises (R. 6). During this same time, Plaintiffs charged off \$4,000.00 in depreciation on this property on their income tax return (Tr. 107), and received \$775.88 plus \$74.00 (Tr. 116-117) from an insurance company for damages, the same damages which are here charged to Defendants. Yet they expect to have their cake and eat it too, by compelling Defendants to restore the property not merely to the same, but to better condition than before their occupancy. Dr. Wight testified that he replaced the old linoleum drainboard with tile (Tr. 95-96). The place was completely renovated throughout, all at the expense of the Defendants. To restore it to the condition at the commencement of the tenancy would have required merely old paint, a worn out rug, debris in



the yard, dime store hardware and "sloughing" plaster.

Now, let us examine specific items. The Court allowed Plaintiffs \$200.00 for damage to the living room rug. A spot 2 x 4 feet in front of the fireplace was burned until the nap was gone (Tr. 50). Plaintiffs both testified that this rug was 16 years old before Defendants moved in (Tr. 106 lines 17-18 and Tr. 138). The Plaintiffs offered in evidence a piece of the rug, to-wit: the burned spot and the area around it. This was not admitted in evidence, but various witnesses were asked to testify as to the condition of the area around the burn, to show, from this unburned portion, that the rug still had some useful life. But, this portion of the rug had always been covered either by a piano (Tr. 276), or, as Dr. Wight admitted, by a Navajo rug (Tr. 413 and Tr. 423), so obviously it would not be subject to wear. Dr. Wight himself testified that this portion of the rug was not worn like the remainder (Tr. 427). Elsewhere, Dr. Wight admitted, the rug showed "considerable wear." On the stairs this same rug (Tr. 139) had holes worn clear through (Tr. 428).

It is obvious that this rug was worn out, from 15 or 16 years of tramping over it by Plaintiff and his family, 9 months by a tenant and 6½ years by Defendants. That rug rendered service far beyond the usual time. An expert, Mr. Gray, testified that the normal useful life of carpet, "of a very good grade" is 15 years. (Tr. 228). An expert in the rental business testified carpet only lasted 10 to 15 years

before it became shabby and had to be replaced. This carpet had already served its full term of usefulness before Defendants moved in. That it was completely worn out 6½ years later is only normal wear and tear. Only a small area was burned. Yet the trial court awarded judgment of \$200.0 as to this same rug.

Defendants are charged \$100.00 for a water softener. This, too, by Plaintiffs' admission, was old when Defendants moved in (Tr. 69 lines 3-4), though Plaintiffs also claimed that it was practically brand new (Tr. 69 line 2). Water softeners are expendible, and this one was worn out when the Callaghans moved in. It broke down shortly after they moved in (Tr. 340), at which time Dr. Wight repaired it temporarily, but it did not last and had to be repaired repeatedly (Tr. 340), before it was finally abandoned as worn out.

Judgment was *twice* rendered against Defendants because of a claimed burn on the linoleum drainboard. This drainboard was old, cracked and deteriorated when Defendants moved in (Tr. 340). Mrs. Callaghan waxed and shellacked it to try and preserve it, but apparently not to the satisfaction of Dr. Wight. He replaced it with tile, for which Defendants were charged not just once, but twice; once, for \$45.00 in Finding 13 (R. 19), and again by inclusion of the same item in the list making up the \$200.15 item in Finding 17 (R. 20). Dr. Wight so testified (Tr. 96 lines 12-13).

Defendants are charged for breakage of items broken by Plaintiffs. The judgment includes \$1.45, for broken electrical outlets and switches and \$10.00 for broken glass window. Mrs. Callaghan testified (Tr. 342 and Tr. 343), that Dr. Wight himself broke these and her testimony is nowhere controverted. These electrical outlets and switches were also charged to Defendants twice — once in Finding 13 (R. 19) and again by inclusion in the miscellaneous figure for materials, \$200.15, Finding 17 (R. 20). See Dr. Wight's testimony (Tr. 68 lines 17-24). How many other items are charged twice, included in both Finding 13 and Finding 17 it is impossible to determine, because the lists, constituting the \$79.39 item and the \$200.15 item were not offered in evidence and what they included can only be guessed at. Certain it is that some items, as shown above, are included twice and probably all of them are. The Plaintiff, Dr. Wight, testified (Tr. 89 lines 22-25) that the "lumped figure" included the material for "all of the things that were done on the inside of the house." The case should be remanded for clarification of Finding 17 and elimination of the duplicate charges.

Judgment was rendered against the Defendants for \$829.54 for renovation, painting and decorating (R 20). This work was done entirely by the Plaintiffs themselves, except for \$25.00 paid to a paperhanger. Dr. Wight claimed Mrs. Wight put in 18 days cleaning and 12 days for painting and spackling (Tr. 181-182). She herself testified to only 7½

days cleaning and that included one day spent cleaning the exterior porch and flagstones. (Tr. 146.) She also testified that this cleaning consumed as much time as did the painting (Tr. 145 lines 22-23). If she spent  $6\frac{1}{2}$  days interior cleaning and an equal time painting, she spent far less time than her husband testified to, and her testimony should have greater weight because he was not there all the time. He "left her off every morning" while he went on (Tr. 182 line 3).

What was the nature of her "cleaning?" She said (Tr. 148), that she scrubbed and waxed the kitchen floor four different times; that

after a certain period of work up there, I would get down on my hands and knees and scrub that floor and wax it again. (Tr. 148 lines 13-14.)

One cannot consider such a statement without a mental question, "If she scrubbed it clean, ready to be waxed the first time, why do it again, and if not yet clean, why did she wax it?" If this is typical of her other cleaning, it is no wonder that it took her  $7\frac{1}{2}$  days. One is led to wonder how much the Court allowed for the second, third and fourth scrubbing and waxing. The findings do not show this. This standard of cleanliness is not required of a vacating tenant. They were required only to restore as it was before, less reasonable wear and tear.

Furthermore, Mrs. Wight testified that she spent \$300.00 worth of time during August, 1962,



during the term of the lease (Tr. 149). The judgment allowed her \$225.00 (R. 20). The Findings do not show whether this \$225.00 was for services in August, 1962, or services after defendants vacated, nor whether she was awarded judgment for the 2nd, 3rd and 4th scrubbing and waxing or only for the first. There is no finding as to the rate per hour, so it cannot be determined if the rate was reasonable. If any allowance was made for time spent in 1962, such must be disallowed. A tenant is not liable for work done by a landlord without the tenant's request. 51 CJS 1093, Sec. 368 n 20, and cases cited. The trial court should be required to be specific as to the items for which judgment was rendered against Defendants.

There is no testimony as to what Dr. Wight was doing all this time, except that he painted the walls after his wife washed and spackled them and painted the woodwork (Tr. 147 lines 19-22). Assuming that he painted and redecorated throughout — that is only what is customary in the rental business. It is not at all uncommon for a landlord to have to redecorate a vacated apartment after only a few months of occupancy, in order to find a new tenant. Mr. Noall, a disinterested witness engaged in the rental business, testified rental property must be repainted every 3 to 5 years (Tr. 165). Apparently, he felt tenants required a higher standard than Dr. Wight who felt that painting every 20 years was sufficient (Tr. 125). Mrs. Wight testified that the only time the place was repapered and repainted was

“approximately 4 or 5 years after we bought it in 1937 (Tr. 40), so it was repainted in 1941 or 1942. After that the only repainting, by Mrs. Wight’s own admission (Tr. 143), was painting the laundry and basement. Here we have paint 15 or 16 years old when Defendants moved in, plus 6½ years’ occupancy, a total of 21½ to 22½ years. Even by Dr. Wight’s own 20-year standard, repainting was long past due. Mr. Wheat, a painter of long experience (Tr. 297), who examined the premises when the Defendants first moved in, testified that even then, in 1957, there were

water marks on the walls, underneath the windows, the paper started peeling off, plaster was in evidence in a few places, and the woodwork was chipped in several places. (Tr. 298 lines 22-25.)

He did some painting then, as did Mrs. Callaghan also (Tr. 299). Six and a half years later, Defendants are charged with complete renovation. The judgment of the Court subjects the Defendants to the expense of restoring the property to the condition it was in 1941 or 1942, not 1957, and no allowance whatever is made for normal wear and tear.

Judgment was rendered against Defendants for \$26.00 for cleaning a rug in an upstairs bedroom. One can well imagine that a rug should be cleaned after 6½ years’ use, and the cost appears to be reasonable, but cleaning this rug was not Defendants’ responsibility. In normal wear and tear it is expected

that rugs will get dirty. The leases (Exhibits 2, 3 and 4) specifically provided that the tenants were to clean curtains and blankets, linens and drapes, if furnished; but nothing is said about carpets or rugs. If it was intended that Defendants should be required to clean the rugs, the lease should have so provided. Itemization of specific items to be cleaned negatives the claim that other items not mentioned were also to be cleaned. There is no authority for the Court to amplify the provisions of the lease to favor the lessor. Rather the rule of law is directly to the contrary. Corpus Juris summarizes the law thus:

In case of doubt or uncertainty as to the meaning of a lease, ordinarily it is to be construed most strongly against the lessor and in favor of the lessee. (51 CJS 859 Sec. 232 1.)

The inclusion of this charge in the judgment was error.

It is appropriate, at this point, to discuss what the courts have considered to be normal wear and tear. Corpus Juris Secundum defines "wear and tear" as follows:

Ordinary wear and tear, excepted in a tenants covenant to repair, includes the usual deterioration from the use of the premises in the lapse of time, in spite of ordinary care for their preservation, but not the total or partial destruction of the building or an appurtenance thereof by a sudden or unexpected catastrophe.\*\*\*

In general, the ordinary reasonable use and wear of property by a tenant within an exception to a tenant's covenant to make good all damages, breakage, etc., has relation to the depreciation in the condition of building or property which it undergoes, during the tenant's occupation, when the tenant, in the case of a residence, at least, does nothing in connection with the use more than to come and go and perform the acts usually incident to creating and maintaining conditions for living in the ordinary way. (51 CJS 1102.)

Except for the loss caused by the freezing of the pipes, and a fire loss, both of which will be discussed later, Plaintiffs have shown no sudden or unexpected catastrophe. The property received the ordinary care for its preservation required under the law, as defined by C.J.S., *supra*. The expenditure of \$1,560.63 by tenants for maintenance of the property during the term of the tenancy (Tr. 318) testifies to that fact. Plaintiffs have not shown any unusual acts by Defendants. As a matter of fact, Defendants hoped to buy the place, until just the last few months of tenancy, so they certainly would do nothing to destroy it.

But property does depreciate with the passage of time. Dirt accumulates, paint deteriorates, some breakage occurs in normal use and fixtures wear out. The law recognizes this depreciation and allowance is made for it in the income tax laws. This depreciation allowance is intended roughly to equal the normal wear and tear. Plaintiffs put their own



estimate of this wear and tear at \$650.00 to \$800.00 per year. (Tr. 107.) Simple arithmetic produces a depreciation figure of \$4,225.00 to \$5,200.00 for the 6½ years' term. Their total cost for restoration of the property to far better condition than it was at the commencement of the term, was substantially less than what they claimed on their income tax return as normal depreciation.

If the need for cleaning, repapering and repainting is not a result of normal wear and tear, it is hard to conceive what those words would include. The courts have held that repapering and refinishing are not the responsibility of the tenant, even under a covenant to keep in repair. It was held in *Smith vs. Maxfield*, 9 Misc. 42, 29 NY Supp. 63, that

A covenant to repair and make good any damage occurring through neglect of the tenant, does not obligate him to restore the premises, upon the termination of the lease, to a condition better than they were in at the commencement thereof.\*\*\* Tenant was not bound to make extensive renovations and was not liable to pay the landlord for making the same at the termination of the lease, where they consisted of *re-papering* and *refinishing* the woodwork. (Emphasis added.)

Except for the ordinary wear and tear incident to 6½ years' occupancy, there are only two major items of damage — the damage from the freezing of the water pipe (Finding 15, R. 19) and the burning of the rug (Finding 10, R. 18). Plaintiffs were

reimbursed for these losses by insurance (Tr. 116-117), but judgment for them was also rendered against the Defendants. Defendants do not claim that they were entitled to the insurance proceeds, but they do contend that they were not liable, under the terms of the leases, for these items of damage. The lease specifically exempts the Defendants from liability for:

reasonable wear and tear or damage by the elements or by fire. (Exhibits 2, 3 and 4.)

It is because such exceptions are customary in leases that landlords customarily protect themselves by insurance, as Plaintiffs did here.

It was error for the Court to charge Defendants with the fire damage, regardless of whether any negligence is traceable to the Defendants. The rule of law is set forth in Vol. 1, *American Law of Property*, page 350, sec. 3.79, n 10 as follows:

An exception of damage by fire includes damage caused by lessee's negligence.

In support thereof, *American Law of Property* cites *General Mills vs. Goldman*, 184 F 359 (C.C.A. 8th 1950); *Slocum vs. Natural Products Company*, 292 Mass. 455, 198 NE 747; Brewer "An Inductive Approach to the Liability of the Tenant for Negligence," 31 B.U.L. Rev. 47 (1951) I L. Rev. Dig. 17.

The same rule applies to the damage from the freezing and bursting of the water pipes. Damage

by the elements "includes all injury by wind, rain, snow, *frosts* and heat, as well as ordinary decay from natural causes." (Emphasis added.) *Edwards vs. Ollen Restaurant Corp.* (1950) 198 Misc. 853, 98 NYS. 22 815.

To the same effect is *Corpus Juris Secundum*:

Ordinary wear and tear and damage by the elements, excepted from the lessee's covenant to repair, covers repairs made necessary by water, which from freezing or otherwise, has caused outer portions of the building to be out of repair. (51 CJS 1102 n 33.)

CJS cites in support *Mills vs. U. S.* 52 Ct. Cl. 452.

The premises, as a whole, were in very much better condition when Defendants vacated than when they took possession. It is not disputed that the Defendants, with the approval of Plaintiffs, expended a very substantial sum in increasing the size of the living room, adding a room in the attic, installing a gable window and converting a workshed into an office. To charge Defendants with every conceivable item of damage, down to a 60¢ rope, but deny them any consideration for the \$4,602.35 claimed by them to have been expended in improvements (R. 6), constitutes unjust enrichment to the Plaintiffs to such an extent that it shocks the conscience. Defendants contend that the Court erred in dismissing Defendants' Counterclaim — but even if the value of these improvements was not available as a counterclaim, their value, as contributing to the over-all condition

of the premises, should have been considered by the Court as a set-off. Because of this over-all improvement of the property to a much better condition at the end of the leased term than at the beginning, the judgment should be reversed and the action dismissed.

#### Point IV:

#### THE TRIAL COURT ERRED IN REFUSING TESTIMONY OF SUBSEQUENT ORAL REVISION OR AMENDMENT OF WRITTEN CONTRACT.

In the course of the trial, the Defendants attempted to prove, from the statement of Plaintiff, that there had been a verbal variance of the terms of the lease pertaining to repairs. During the direct testimony of Defendant, Edna Callaghan, her counsel, after questioning her as to variance by Plaintiff during the first lease, then started to question her as to agreements by Plaintiffs during the term of subsequent leases. He said (Tr. 317 line 10):

You do not recall any discussion with regard to cleaning and decorating by Dr. Wight after . . .

at which point he was interrupted by the Court with the words,

I do not know it is important, no consideration for it. He either had a duty or he didn't. What he said didn't make much difference.



It is entirely legal for parties verbally to waive requirements of a written agreement, and a lease requiring a tenant to make all repairs is not binding where there was a subsequent separate agreement by the landlord to make repairs himself.

In 51 CJS 1089, n. 54, the rule is stated:

A provision in a lease as to who shall make repairs does not prevent parties from entering into a new and binding agreement governing the matter.

In support thereof, CJS cites *Zimmerman vs. Home Building and Loan Association*, 170 A 703, 111 Pa Super 345.

Lease provision requiring tenant to make all repairs is not binding where there was subsequent separate agreement by landlord to repair ceiling.

Defendants' testimony on this point was erroneously excluded.

#### Point V:

**PLAINTIFFS WAIVED AND ARE THEREBY ESTOPPED TO CLAIM DAMAGES OCCURRING PRIOR TO EXECUTION OF THE THIRD AND LAST LEASE:**

Plaintiffs, knowing full well the condition of the property at the termination of the second lease, had a duty at that time to complain to Defendants

about the condition of the premises if they were not satisfied therewith, and by going ahead with the execution of the third lease, they waived any claim for prior damages and estopped themselves from thereafter complaining of or seeking damages for what theretofore might have occurred.

Defendants, in asserting that Plaintiffs knew the condition of the premises, are mindful of the fact that the Court found that Plaintiffs were not aware of the missing items and damaged items prior to the termination of the tenancy June 30, 1963 (P.22 of Findings, R. 20); but this finding is directly contrary to the evidence. It appears from the evidence that Dr. Wight was frequently in and about the premises. The water damage was discovered by Dr. Wight in March 1960, after the execution of the second lease and prior to execution of the third, and part of the damage, the dining room ceiling, was repaired by him at that time (Tr. 54). In the fall of 1959, he was there turning off the water and the sprinkler system (Tr. 121), and he had to go inside to do it. As a matter of fact, Mr. Van Tassell testified that Dr. Wight had a key (Tr. 20, line 8), though Dr. Wight denied it (Tr. 187). Yet it is obvious from the testimony that he went and came at will, often without even announcing his presence (Tr. 395, see also Tr. 188). Mrs. Callaghan testified he was there very often, in fact every day, some of the time. (Tr. 313). Dr. Wight himself testified that he had been there, "a great many times" (Tr. 188 line 8). He was there when the doorway was cut in the attic

and pointed out the place to be cut (Tr. 71). In the face of the admissions by Dr. Wight, that he was there "a great many times," it was error for the Court to find that he was not fully aware of the condition of the premises; and, if he was aware of the condition, then if he objected thereto he had a duty to say so. Yet he made no complaint (Tr. 314), and let Defendants enter into a third lease believing that all was well. He thereby waived any right thereafter to complain and is estopped to assert a claim for damages.

#### Point VI:

**DEFENDANTS CANNOT BE CHARGED WITH THE LOSS OF PERSONAL PROPERTY CLAIMED TO HAVE BEEN LEFT BY PLAINTIFFS ON LEASED PREMISES.**

The Court awarded damages against Defendants for \$35.00 for loss of a saddle blanket, \$4.50 for a bird bath, and \$2.00 for a sprinkler claimed to have been left in the garage (Tr. 47 line 27). These items are all personal property. The premises were rented unfurnished by the express terms of the first lease (Exhibit 2). This lease states:

It is provided that Lessors shall remove the contents of all buildings.

The evidence that these items were on the premises when Defendants took possession is very weak. Allen Rydman, a young man who worked in the yard in 1956 and was a witness for Plaintiffs, testified that

the bird bath was there the previous autumn (Tr. 436), but did not testify that it was there when Defendants took possession. Defendants testified that none of these items were there when they moved in.

But suppose these items were on the premises when Defendants took possession. They had no responsibility toward them! In view of the provisions of the lease requiring removal of all property, Defendants would be justified in considering anything left behind as abandoned by Plaintiffs as worthless.

It is well settled that personal property may be abandoned and ownership of it thereby lost. (I CJS 13, Note 5.)

Not only did Defendants owe no duty to Plaintiffs as to this personal property inasmuch as all personal property was specifically excluded from the provisions of the lease, but the loss thereof, if wrongfully caused by Defendants, would not be a breach of covenant in a lease, but a tort. None of the leases included any personal property. Plaintiffs have not pleaded tort. They did not claim tort in their pleadings and any judgment based on tort would be beyond the scope of the pleadings and void.

### Point VII:

**FINDING 9 IS CONTRARY TO THE EVIDENCE. JULY 1963 RENT WAS NOT OWED TO PLAINTIFFS.**



In Finding 9 (R. 18) the Court found that when Defendants vacated the property, July 31, 1964, they owed \$183.33 to the Plaintiffs, and judgment is rendered against Defendants including this amount (R. 22). The date in the finding is wrong, but this is immaterial. What is material is the finding that Defendants owed \$183.33 to Plaintiffs.

Exhibit 1, admitted in evidence was a signed agreement dated July 10, 1963, providing for sale of the property by Plaintiffs to Glen Lane Van Tassell, to take effect July 1, 1963. In pursuance of this contract, an escrow was executed by sellers and buyers and by the Valley State Bank, escrow holder (Exhibit 9). The contract (Exhibit 1), and the Escrow (Exhibit 9) were in full force and effect until August 10, 1963, and were then terminated by a Mutual Agreement (Exhibit 10). Dr. Wight admitted (Tr. 110-111) that this agreement (Exhibit 1) was to take effect upon termination of Defendants' lease. The lease terminated on June 30, 1963. The contract of sale took effect, July 1, 1963. The rent for July came due on the same date. By reason of the contract of sale, Van Tassell was entitled to the rent for July. At this point, there was no further privity of agreement between Plaintiffs and Defendants, after termination of the lease and after the contract of sale went into effect. The later mutual release of the contract of sale would not transfer to Plaintiffs any obligation that had arisen in the meantime, without an express assignment from Van Tassell to Plaintiffs. There is no transfer from Van

Tassell to Plaintiffs of this right of the July rent, and the inclusion of this item in the judgment was error.

### Point VIII:

PLAINTIFFS ARE NOT ENTITLED TO A JUDGMENT FOR COSTS, NOT HAVING FILED A MEMORANDUM OF COSTS AS REQUIRED BY RULE 54 (d) (2), RULES OF CIVIL PROCEDURE.

There is included in the Findings (R. 20), and by the Judgment (R. 22), \$65.50 for costs. There is nothing in the record to substantiate this judgment. Defendants have no way of knowing what items made up this total. The Plaintiffs did not file the Memorandum of Costs required by Rule 54 (d) (2), Utah Rules of Civil Procedure, and this item should be stricken from the judgment.

### CONCLUSION

The judgment awarded to Plaintiffs by the trial court is, according to the Findings of Fact, composed of the following items:

- (a) Rent claimed to be due for July, 1963,
- (b) Damage to rug by fire and damage caused by frozen water line,
- (c) Cleaning, papering, painting, replacement of broken or missing items, including abandoned personal property,

(d) Attorney's fees and costs.

It is the sincere contention of Defendants that none of these items are properly charged against Defendants.

(a) The rent for July, 1963, was not payable to Plaintiffs. There was, at that time, no privity of agreement between Plaintiffs and Defendants, and Plaintiffs showed no assignment or transfer to them of this chose in action

(b) The damage by fire and by freezing was a risk assumed by Plaintiffs as lessors, by the express terms of the leases. To protect against this, they carried insurance which fully compensated them for the loss. But even if they had had no insurance, no liability would attach to the Defendants because of the express terms of the lease relieving Defendants from liability for damage by fire and the elements.

(c) The miscellaneous claims of Plaintiff are either for items of personal property, claimed by Plaintiffs to have been left on the property, and as to which Defendants had no responsibility, or items of normal wear and tear, as discussed in Point III above. Defendants are not liable for loss of personal property nor for normal wear and tear.

(d) Defendants, not being liable for the other items of claimed damage, are not liable for attorney's fees nor for costs, and the decision of the district court should be reversed, and the case remanded with instructions to dismiss Plaintiffs' Complaint.

Defendants also, at this time, again point out to the Court their additional contentions:

First: That no judgment can be granted against Defendant, Eugene Callaghan for alleged breach of covenants in a lease to which he was not a party.

Second: That Defendants can be held liable for breaches of covenants only when the alleged breaches occurred during periods when leases were in effect, and this Plaintiffs have failed to show.

Third: The judgment, as rendered, charges Defendants twice for many items of claimed damage, and for items of damage contained on lists not in evidence, the contents of which were not disclosed.

Fourth: The Court erred in excluding testimony vital to Defendants' case.

Fifth: Plaintiffs, by leading Defendants into execution of the third and last lease, without objecting to any claimed damage occurring prior thereto, waived any claim they might have had for alleged damages theretofore committed, and are estopped to claim damage for breach of covenants on any leases except the last.

Sixth: Defendants, at their own expense, made valuable and permanent improvements to Plaintiffs' property, and the value of these improvements should be offset against any sum that might be awarded to the Plaintiffs.

In the event the Court does not completely reverse the decision of the lower court and order dismissal of Plaintiffs' Complaint, then upon the basis of any of Defendants' other contentions as set forth in the six preceding paragraphs, the case should be remanded to the lower court for a new trial, with instructions to eliminate: the rent for July, damage from fire and freezing, normal wear and tear, duplications, and, as to Defendant Eugene Callaghan, all items of claimed damage which arose during the time when no lease executed by him was in effect; and if the Court finds a waiver or an estoppel, that all items of claimed damage prior to the execution of the last lease, be likewise eliminated.

Respectfully submitted,

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