

1965

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

Utah Supreme Court

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Dan T. Moyle; Jensen, Jensen & Bradford; Attorneys for Appellants;

Richards, Bird & Hart; Attorneys for Respondents;

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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.  
10248

FILED

1965

## RESPONDENTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE  
THIRD DISTRICT COURT IN AND FOR SALT  
LAKE COUNTY, HONORABLE JOSEPH G.  
JEPPSON, JUDGE.

RICHARDS, BIRD &  
HART &  
LON RODNEY KUMP  
716 Newhouse Building  
Salt Lake City, Utah  
*Attorneys for  
Respondents*

DAN T. MOYLE  
810 Deseret Building  
Salt Lake City, Utah  
JENSEN, JENSEN &  
BRADFORD  
900 Walker Bank  
Building  
Salt Lake City 11, Utah  
*Attorneys for  
Appellants*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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

vs.

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

Case No.  
10248

## RESPONDENTS' BRIEF

---

### STATEMENT OF THE KIND OF CASE

This is an action by landlords against tenants for unpaid rent, cleaning expenses, items removed and damages to the premises.

### DISPOSITION IN LOWER COURT

The case was tried to the court which rendered a judgment for the landlords.

### RELIEF SOUGHT ON APPEAL

Respondents seek to uphold the judgment of the trial court, and to have this appellate court

award them the sum of \$500.00 for attorney's fees in answering appellants.

## STATEMENT OF FACTS

Appellants' brief has not cited the page of the record supporting any statements under their statement of facts as required by Rule 75 [p] [2] [2] [d].

Appellants' statement of facts refers to three written leases. These are Exhibits 2, 3 and 4. Both defendants executed Exhibits 2 and 4. Defendant Eugene Callaghan did not sign Exhibit 3. Both defendants enjoyed uninterrupted possession of the home from March 1, 1957 up to July 29, 1963. (R 366 lines 7-22)

By the terms of the written leases executed by the parties, the defendants were to keep the home and real property in a clean and satisfactory condition and upon termination of the tenancy, to leave the premises, equipment and furnishings in as good a condition as when entered upon except for reasonable wear and tear or damage by the elements or fire. (paragraph No. 3 of Exhibits 2, 3 and 4)

By the terms of said written leases the defendants agreed to pay the plaintiffs for all damage or injury to the premises during their tenancy. (paragraph No. 3 of Exhibits 2, 3 and 4)

By the terms of said written leases the defendants agreed to pay for cleaning the premises upon the termination of the leases. (paragraph No. 4 of Exhibits 2, 3 and 4)

The written lease agreements between the parties provide that should the Lessor be compelled to commence or sustain an action to collect rent or for damages the Lessee shall pay a reasonable attorney's fee to the Lessor. (paragraph No. 8 of Exhibits 2, 3 and 4)

At paragraph No. 3 on page 3 of appellants' Statement of Facts they refer to making structural improvements to the property. There is no evidence in the record of any improvements made to the property by the appellants. The fact the appellants filed a counter claim alleging certain improvements to the property (R 6) does not establish as a fact that improvements were made. The trial court dismissed this counterclaim prior to trial (R 10).

Throughout appellants' brief they have controverted Findings of Fact made by the trial court. Rather than setting forth in this Statement of Facts the evidence supporting the facts as found by the trial court respondent will refer to the record under the points set forth under the argument.

## ARGUMENT

### POINT I.

THE EVIDENCE DOES SUPPORT A FINDING THAT THE DEFENDANT EUGENE CALLAGHAN WAS LIABLE FOR ALL CLAIMED DAMAGES.

The deposition of Eugene Callaghan was taken by his attorney on September 6, 1963. Defendants'



motion to open and publish this deposition was granted by the trial court. (R 371 line 10)

At the taking of his deposition Eugene Callaghan admitted that he and Mrs. Callaghan had been leasing property from Mr. and Mrs. Guy Wight at 3621 Highland Drive under three separate written leases. (page 3 of Eugene Callaghan deposition)

Eugene Callaghan admitted entering into another lease with the respondents for the period from the 1st of March, 1959 to the 29th of February, 1960. (page 8 of deposition)

The defendant Eugene Callaghan was shown a copy of the lease which he had not signed and was asked:

Q. Is this a copy of a lease which *you intended to execute* between yourselves and the Wights?

A. Yes, as far as I know that is.

Q. Do you know any reason why your signature does not appear thereon as a lessee when your name appears as one of the lessees in the typed part of the document?

A. I was not here. I was in Brazil at the time this was dated and it was not sent to me for my signature by Dr. Wight. (page 22 of Eugene Callaghan deposition.)

When Dr. Wight was questioned regarding the second lease he stated that he had discussed it with Mrs. Callaghan and she agreed that she would sign the lease and he would sign the lease and that they would not send it to Cyprus for Mr. Eugene Callag-

han's signature. (R 46 line 2-4) Dr. Wight testified that Eugene Callaghan indicated to him that he was happy that his wife and family were living in the home during this period. (R 46 line 17-19)

The evidence is uncontroverted that both defendants enjoyed possession of the home from their execution of the first lease until they surrendered the premises to the plaintiffs on July 29, 1963. (R 366 lines 20-22)

Appellants argue that the case should be remanded for elimination of all items of damage charged to the defendant Eugene Callaghan which occurred between the end of the first lease and the commencement of the third lease. The only law which appellants cite on this point is a general statement to the effect that the burden of proving agency rests on the party alleging it.

Appellants have overlooked numerous cases supporting the proposition that it is not essential to the validity of a lease for the purpose of binding the lessee that it be signed by the lessee, provided he accepts the lease and acts thereunder. *Jacobson v. National Tea Co.* (1924) 51 ND 889, 200 NW 910; *Holbrook v. Chamberlin* (1874) 116 Mass 155, 17 Am Rep 146; *William Wicke Co. v. Kaldenberg Mfg. Co.* (1897) 21 Misc 79, 46 NYS 937; *Carroll v. St. John's Catholic Total Abstinence & Mut. Relief Soc.* (1878) 125 Mass 565; *Fitton v. Hamilton City* (1870) 6 Nev 196; *Munford v. Humphreys* (1924) 68 Cal App 530, 229 P 860; *Means v. Dierks* (1950,

CA10 Kan) 180 F2d 306. These cases stand for the proposition that a lease signed by the landlord alone is binding on the tenant where he has accepted the lease and taken possession of the property.

In the *Fitton v. Hamilton City* case the Nevada Supreme Court said:

It is the plainest dictate of justice and right, that if one obtain possession and occupy premises under a lease, he should be holden to accept it subject to all the covenants and obligations of the instrument. *supra* 6 Nev. 200

In the case of *Spann v. Gulley* (1958) 233 Miss 62, 101 So. 2d 337 a formal lease was prepared by the lessor as requested by the lessee. The lessee remained in possession without notifying the lessor that the terms of the lease were unacceptable. The court upheld the action for rent for the period the premises were occupied stating that the lessees' were bound by the lease they had not signed because of their remaining in possession and failing to notify that any terms of the lease agreement were unsatisfactory.

In the case the defendant Eugene Callaghan executed the first lease agreement dated January 18, 1957. (Exhibit 2) The second lease agreement not signed by Eugene Callaghan specifically states that Eugene Callaghan and Edna S. Callaghan, his wife, are lessees. (Exhibit 3) The third lease dated May 10, 1960 is executed by both defendants. (Ex-

hibit 4) There never was any termination of both defendants quiet and peaceable enjoyment of the premises.

One further principle precludes the necessity for remanding this case to the trial court under this Point I. This is based upon the fact that the time the damages occurred is within the knowledge of the defendants and not the knowledge of the plaintiffs. Defendants resided at the premises and had possession of the premises during the full term of Exhibits 2, 3 and 4. Plaintiffs did not check for damages even though they might have been on the premises during the terms of the lease because they believed right up to the end of the tenancy that the defendants were going to purchase the premises. (R 103 lines 10-15) Mrs. Wight testified that she was not around this house more than half a dozen times in the six years that the defendants rented it. (R 154 line 27) She testified that the defendants had frequently told her that they were going to buy the home and for this reason she did not pay any special attention to their upkeep of the home. (R 160 lines 1-23)

## POINT II.

PLAINTIFFS DID PROVE THAT DAMAGES OCCURRED WHEN LEASES WERE IN EFFECT.

Mrs. Edna Callaghan admitted that they never turned possession of the premises back to the plaintiffs at any time during the period from March 1,

1957 to July 29, 1963. (R 366 lines 20-22) Appellants contend the case should be remanded to the trial court for a new trial to determine which damages occurred during a four month period from March 1, 1960 to June 30, 1960. This is the period between Exhibits 3 and 4, except Exhibit 4 is dated May 10, 1960 not June 30, 1960. Mrs. Callaghan testified that this period where they did not have a written lease was an accommodation for both parties. (R 366 line 11-14) Defendants did not turn the possession back to the plaintiffs at any time during this period. (R 366 line 20-22) The terms of the previous written lease applied during this hold over period. This is the way the parties themselves intended as exhibited by the defendants retaining possession and paying rent at the same amount as the previous written lease. (R 366 lines 17-19)

Appellants contend a fatal defect in the plaintiffs' case because there is no finding as to when any of the damage occurred. Appellants have overlooked that the findings specifically provide that the damages occurred during "their occupancy of the premises." Finding of Fact No. 5 made by the trial court is that defendants resided at the home as tenants from early 1957 until vacating the premises on July 31, 1963. (R 17) Finding No. 10, No. 11, No. 12, No. 14, No. 15, No. 16 and No. 17 provide that the damages or lost items occurred during defendants occupancy of the premises. (R 18 and 19) Finding No. 22 of the trial court provides that plaintiffs were not aware of many of the missing and damaged



items prior to the termination of the defendants tenancy. (R 20)

It is true that the evidence does not state the exact date of many of the damages. However if the damages occurred during a period during which a lease was not in effect (and it is respondents' position that a lease was in effect during all of the possession of the defendants — supported by the cases set forth in Point I) then the burden shifts to the defendants to establish that the damages occurred during the period no lease was in effect. This is based upon the principle set forth in the case of *Mott v. Good Roads Machinery Company*, 277 App. DIV. 677, 102 NY Supp. 2d 781, that the one who exclusively has the information runs the risk of a failure to produce.

This principle that defendants must produce evidence of when the damages occurred is particularly applicable in this case as this evidence lies peculiarly within their knowledge. Plaintiffs have established and the trial court has found that damages occurred during the period of defendants tenancy. Dr. Wight stated that he had no way of knowing when the damages occurred and that he did not maintain an inspection of the premises during the time the defendants were there. (R 103 lines 10-15)

### POINT III.

**DEFENDANTS WERE NOT CHARGED WITH NORMAL WEAR AND TEAR NOR WITH IMPROVEMENTS.**

In each of the applicable Findings of Fact the trial court expressly found that the damages were beyond reasonable wear and tear. (Findings 13, 14 and 17. (R 19-20) In view of the assertions in appellants' brief that the facts do not support the findings made by the trial judge respondent will set forth below each of the items awarded by the trial court and list after each award the places in the record supporting the finding made by the trial court.

Finding 9.

Rent for July 1963 .....	\$183.33
(R 47 lines 26-30) (R 48 lines 1-15)	

Finding 10.

Rug .....	200.00
(R 49 lines 9-29) (R 50 lines 16-23)	

Finding 11.

Water damage dining room .....	13.76
(R 54 lines 7-20) (R 55 line 9)	

Finding 12. Removed Items:

Screen Door Closures .....	6.15
(R 58 lines 13-21)	
Shields and Covers for Gable Lights .....	12.00
(R 59 lines 1-6)	
Screen for the Bar-Be-Que Pit .....	9.16
(R 59 lines 9-24)	
Navajo Saddle Blanket .....	35.00
(R 59 line 29 to R 60 line 11)	
Light Fixture in the Shop .....	10.95
(R 61 lines 3-6)	
Night Latch in the Shop .....	3.75
(R 61 lines 17-23)	
Screen Door in the Shop .....	10.50

(R 61 line 25 to R 62 line 4)	
Garage Door Handles .....	5.82
(R 62 lines 8-24)	
Window Lock in the Garage .....	3.25
(R 62 lines 25-30)	
Door Stop in the Garage .....	1.50
(R 63 lines 2-5)	
Check Ropes in the Garage .....	.60
(R 64 lines 18-23)	
Wire Clothes Lines and	
Turnbuckles .....	2.85
(R 64 lines 25-30)	
Bird Bath .....	4.50
(R 65 lines 1-6)	
Total Missing Items .....	\$105.13
Finding 13. Damaged Items:	
Curtain Rods .....	\$ 15.00
(R 57 lines 3-14)	
Broken Tile in the Bar-Be-Que Pit ..	4.28
(R 66 line 14 to R 67 line 7)	
Broken Sprinkler Head .....	2.00
(R 67 line 13 to R 68 line 13)	
Water Softener which was not	
useable .....	100.00
(R 68 line 25 to R 69 line 29)	
Electrical Outlets and Switches ....	1.45
(R 70 lines 5-16)	
Damages to the back wall lying	
along the East boundary of the	
property .....	30.00
(R 80 line 26 to R 81 line 27)	
Holes in the Rain Gutter	
on the Roof .....	2.50
(R 86 line 30 to R 87 line 20)	
Broken Lead Glass Window .....	10.00
(R 97 lines 5-10) (R 99 line 7)	
Burned Drain Board .....	45.00



(R 95 lines 2-6) (R 239 line 18)  
 Gaping hole in Wall of an  
 Upstairs Bedroom ..... 50.00  
 (R 71 line 11 to R 72 line 20)  
 Total items damaged or  
 broken .....\$258.43

Finding 14.

Yard Damage .....\$10.00  
 (R 84 lines 9-18) (R 411 lines  
 16-30)

Finding 15.

Water damage shop .....\$775.88  
 (R 56 lines 4-12) (R 56 lines  
 21-25) (R 117 line 19)

Finding 16.

Bedroom rug .....\$ 26.00  
 (R 143 lines 15 to 27)

Finding 17. Restoring Premises:

(R 77 lines 17-21)  
 (R 89 lines 11-16)  
 (R 90 lines 10-17)  
 (R 90 line 25 to R 93 line 6)  
 (R 96 line 22 to R 97 line 5)  
 (R 97 lines 18 to 21)  
 (R 132 lines 8 to R 133 line 23)  
 Spackle and Lumber ..... 79.39  
 (R 98 lines 1-4)  
 Paints and other miscellaneous  
 materials ..... 200.15  
 (R 99 lines 9-12)  
 Labor of a paper hanger ..... 25.00  
 (R 93 line 12)  
 Labor of Plaintiff Guy H. Wight  
 in repairing and restoring  
 premises ..... 300.00

(R 52 lines 11-19) (R 100 line 26 to R 101 line 14)	
Labor of Florence D. Wight in repairing and restoring premises ..	225.00
(R 142 line 15 to R 143 line 14)	
(R 144 lines 18 to 29) (R 148 lines 28 to 149 line 26) (R 181 lines 15 to R 182 line 9)	
Total of items in this Paragraph .....	\$829.54
Finding 18.	
Attorney's fees .....	\$568.64
(R 162 lines 11-22)	

The trial court found that by the terms of the written leases executed by the parties the appellants were to keep the home and real property in a clean and satisfactory condition and upon termination of the tenancy to leave the premises, equipment, and furnishings in as good as condition as when entered upon, except for reasonable wear and tear or damage by the elements or fire. (Finding 6) (R 17 and 18) This finding is supported by paragraph No. 3 of Exhibits 2, 3 and 4.

The trial court found that by the terms of the leases the appellants agreed to pay the respondent for all damage or injury to the premises during their tenancy. (Finding 7) (R 18) This finding is supported by paragraph No. 3 of Exhibits 2, 3 and 4.

The trial court found that by the terms of said leases defendants agreed to pay for cleaning the premises upon the termination of the leases. (Finding 8) (R 18) This finding is supported by paragraph No. 4 of Exhibits 2, 3 and 4.

In many instances the trial court did not grant the amount sought by respondent but instead granted less than the claimed damage:

Damaged carpeting from smoldering and spilling of a can of paint, requested \$300.00 (R 50 lines 16-23) v \$200.00 awarded;

Ruined water softener \$150.00 (R 69 line 29) v \$100.00 awarded;

Labor of Plaintiff Guy Wight \$600.00 (R 101 lines 1-14) v \$300.00 awarded;

Labor of Florence D. Wight \$525.00 (R 183 lines 10-15) v \$225.00 awarded;

Gaping hole in the wall of upstairs bedroom \$135.00 (R 172 lines 19-20) v \$50.00 awarded;

Restoration of yard \$450.00 (R 183 line 28 to R 185 line 7) v \$10.00 awarded.

The respondents having prevailed in the trial court are entitled to have the evidence on conflicting matters viewed in a light most favorable to them. *Weenig v. Manning*, 1 Utah 2d 101, 262 P 2d 491 and *Larson v. Evans*, 12 Utah 2d 245, 364 P 2d 1088. The case of *Jespersen v. Deseret News Pub. Co.*, (1951) 119 Utah 235, 225 P 2d 1050 involved an action by a landlord against a tenant for rent and damages. The court said:

This case being one brought to enforce the terms of a lease and no equitable issues being involved, this court can only review errors of law and not of fact. Art. VIII, Sec. 9, Constitution of Utah. (225 P 2d page 1052)

In spite of this law respondents believe it is necessary to answer specifically the shotgun charges made by appellants in this point. The most pernicious charge made by appellants is that "probably" they have been charged twice for all items. (Page 14 of Appellants' Brief) This charge is not supported when the record is carefully examined.

Appellants base this broad assertion on their contentions that \$45.00 awarded for the burned drainboard (Finding 13) (R 19) and \$1.45 for broken electrical outlets and switches (Finding 13) (R 19) were also included in the award for materials, Finding 17 (R 20).

Dr. Wight was asked whether or not any of the damaged or missing items which had been itemized in his testimony were included in the general figures for materials and he answered that there is no duplication. (R 98 lines 23-24) He explained what items were represented in these general figures and that he had at the trial invoices for many items. (R 99 lines 4-30)

Dr. Wight stated specifically that the \$200.15 figure awarded for paints and materials (and which appellants claim includes the burned drainboard and broken electrical outlets and switches) represents: "Just the paints and materials in the rooms I had to do over, because of damages to the walls I had to repair." (R 99 line 11-12) In Point No. III appellants have cited their evidence and completely ignored the evidence of respondents which support the findings of the trial court.

Appellants argue that the rug for which the trial court awarded \$200.00 in damage was worn out from years of tramping over it. (Page 12 of Appellants' Brief) Appellants overlook the testimony of a real estate agent who said this rug which covered all of four rooms of the downstairs of the house was in good condition. (R 33 line 28-30) Appellants' own expert witness admitted that the rug was of high quality and would appear to have another ten years of useful life. (R 237 line 3)

This is the rug which when the premises were surrendered to respondent had a large smoldered area in the living room and a can of paint spilled on it in the guest bedroom. (R 49 lines 14-22)

In arguing that this rug was worn out appellants overlook the fact that their witness estimated that this rug had been in use only five or six years. (R 236 lines 26-27)

Mr. Van Tassell, another witness called by appellants, admitted that the damaged rug was one of the reasons that he did not purchase this home from the respondents. (R 208 lines 13-14) He stated that it was a good rug and could have been used for some time in the home but for the damage. (R 209 lines 6-11)

Appellants object to being charged for a water softener. (Page 12 of Appellants' Brief) Plaintiffs testified the water softener was practically brand new when the tenancy started. (R 69 line 2) Doctor Wight testified that the water softener was not op-



erative when the premises were surrendered by defendants. (R 69 line 11-13) He stated that it was of a value of \$150.00 (R 69 line 29) and was not repairable. (R 70 lines 3-4) The trial court correctly awarded judgment in the sum of \$100.00 based upon this evidence. (R 19)

Appellants argue that "it is not at all uncommon for a landlord to have to redecorate a vacated apartment only after a few months of occupancy, in order to find a new tenant." (Page 16 of Appellants' Brief) This argument overlooks the fact that respondents were not seeking to have their premises redecorated but to recoup the damages which have been itemized previously in this point.

Dr. Wight expressly stated that he had not included any expenses which would be for normal wear and tear. (R 99 lines 19-30) He explained that he did not list costs on any items which could be attributed to normal wear and tear. (R 131 lines 14-28)

Dr. Wight testified that the house was in top condition both inside and outside when the appellants started their tenancy. (R 135 lines 15-25) He also stated that the house had been professionally cleaned including the rugs prior to the appellants moving in. (R 135 lines 26-27)

The repainting which was required was not due to the condition of the paint but the numerous nail and bolt holes which had been placed throughout the home. (R 144 lines 5-11) Mrs. Wight confirmed the fact that it would not have been necessary to repaint

the rooms, except for the hallway, if the appellants had not left so many holes and other damages to the walls. (R 159 lines 1-17)

The general statements from Corpus Juris Secundum defining “wear and tear” cited in appellants’ brief are not applicable to the facts of this case. The trial court expressly found that all items for which respondents have recovered were beyond reasonable wear and tear. Allowing the water to run over in the bathtub (R 54 lines 7-10); knocking out a hole in a wall (R 71 line 23); spilling a can of paint on the rug and allowing it to smolder (R 49 lines 16-19); allowing water to run from a broken pipe for 29 days (R 56 lines 21 to 25); constructing a fire on the front lawn of a landscaped home (R 83 lines 21 to 30); placing 42 nails in one panel door and 49 on two walls of a room (R 90 lines 28-29) is not reasonable wear and tear.

At page 20 of their brief respondents have confused the requirement for cleaning the premises upon the termination of the lease (Paragraph No. 4 of Exhibits 2, 3 and 4) with the paragraph which has an exception for reasonable wear and tear. When the lease specifically provides, as it does in this case, that the tenants will pay for cleaning at the termination of the lease there is no point in citing cases to the effect that reasonable wear and tear would affect their duty to do the cleaning.

Appellants cite a general statement from the American Law of Property to the effect that it was

error for the trial court to charge defendants with fire damage even though appellants were negligent. (Page 21 of Appellants' Brief) The trial court has not charged appellants for fire damage. The evidence shows that there was no fire which caused damage to the rug. (R 334 line 29 to R 335 line 3) Finding No. 10 specifically recognizes this evidence and states that the living room rug of the plaintiffs had smoldered without evidence of visible flame. (R 18)

Appellants quote a general statement of Corpus Juris Secundum concerning damage by the elements. (Page 22 of Appellants' Brief) This statement covers repairs made necessary by water from freezing to *outer portions* of the building. In this case the facts are that a pipe burst *inside* the building and sprayed the inside of the building for a period of at least 29 days. (R 56 lines 21 to 25)

Appellants argue that the respondents have been unjustly enriched to such an extent that it shocks the conscience. The facts do not support such unwarranted assertions. A review of the facts in the record which have been previously outlined in this portion of this brief is a sufficient answer to such a broad assertion as this.

#### POINT IV:

THE TRIAL COURT DID NOT REFUSE TESTIMONY OF SUBSEQUENT ORAL REVISION OR AMENDMENT OF WRITTEN CONTRACT.



In Point No. IV appellants contend that the trial court erred in refusing testimony regarding a verbal variance of the terms of the lease *pertaining to repairs*. Respondent can not understand how this would affect the findings or judgment of the trial court as respondents received no recovery for *repairs*.

Even assuming it might have something to do with damages the record clearly shows that the trial court did not exclude any testimony or strike any testimony from the record. The trial court merely commented that a question of defense counsel was not important as there was no consideration for it. (R 317 lines 12-13) No ruling was even made by the trial court. Appellants made no attempt to show any consideration for a modification of the lease. The record shows defense counsel evidently fully acquiesced in the trial court's statement and did not pursue the matter any further.

Respondent has no dispute with the law and case cited at page 24 of appellants' brief. There simply is no evidence of any agreement or of any consideration for a new agreement in the record, and appellants made no attempt to establish for the record.

## POINT V.

THERE IS NO EVIDENCE OF THE PLAINTIFFS HAVING WAIVED OR BEING ESTOPPED TO CLAIM DAMAGES.

In making this claim the appellants evidently assume that all of the damages occurred prior to execution of the third lease on May 10, 1960. (Exhibit 4) There is no evidence in the record that such is the case.

Appellants argue that because plaintiff Dr. Wight was on the premises during the tenancy that he was aware of conditions. This is contrary to the evidence (R 103 lines 10-15) and the findings of the trial court. (Finding 22 R 20)

Appellants next argue that if plaintiffs were aware of conditions they had a duty to object. The law does not so require. In Volume 32 of Am Jur Section 815 of Landlord and Tenant it is stated as a general rule that no action lies for a breach of a covenant to leave in good condition *until the expiration of the tenancy*. The reason for this rule is that although the tenant during the term allows the premises to become in bad condition he has a right to the premises and it cannot be said, because of their condition at any time during the term, that they will not be left in a proper condition at the end of the term.

## POINT VI.

APPELLANTS WERE NOT CHARGED WITH THE LOSS OF PERSONAL PROPERTY ABANDONED BY RESPONDENTS.

Appellants' argue that a saddle blanket, bird bath and sprinkler are personal property (Page 26) The evidence shows that the saddle blanket was a

rug in the upstairs hallway (R 60 lines 2-7), that the bird bath top was in the yard (R 65 line 4), and that the sprinkler was part of the system for watering the yard. (R 67 line 13 to R 68 line 13) The \$2.00 awarded for the sprinkler was not because the sprinkler was lost as erroneously argued by appellants but because of damage to the sprinkler. (Finding 13 described as broken sprinkler head) (R 19)

Appellants acknowledged in Paragraph No. 12 of the leases that all furnishing are received in good condition and they agree to return the same at the expiration of the lease in good condition, reasonable wear and tear accepted (Exhibits 2, 3 and 4) There is no evidence of any abandonment of these items by the respondents.

## POINT VII.

### FINDING 9 IS NOT CONTRARY TO THE EVIDENCE AND RENT WAS OWED TO RESPONDENT.

Appellants do not dispute that they owe rent for the month of July. They dispute this rent is owed to respondents. Appellants argument is that one Glen Van Tassel was entitled to this rent rather than the respondents. (Page 28 of Appellants' Brief)

Appellants could produce no evidence at the trial that they had paid Mr. Van Tassel the rent for this month. Mrs. Callaghan was asked directly whether or not she could produce a cancelled check showing that Mr. Van Tassel had been paid this rent

and she could not do so. (R 362 line 29 to R 363 line 1)

In Point No. VII the appellants rely on a purported agreement covered by Finding No. 21 made by the trial court. (R 20) In this finding the trial judge held that the uniform real estate contract was not supported by legal consideration and was not a binding agreement. (R 18) Mr. Van Tassel admitted he has no claim to the premises. (R 197 lines 26-28)

Defendants called Mr. Van Tassel as a witness and he did not testify as to receiving any rent from them. (R 190-221) He does not claim he is entitled to this rent. To the contrary he admits that he did not go through with the contract to purchase the home and he has no claim to the premises. (R 197 lines 26-28) (Exhibit 10 where Van Tassel releases any claims under the purported agreement to respondents.)

The rent for July of 1963 was owed to respondents as the trial court found. (R 18)

## POINT VIII

### PLAINTIFFS ARE ENTITLED TO A JUDGMENT FOR COSTS.

Plaintiffs Point VIII is based upon the erroneous assumption that plaintiffs did not file a memorandum of costs. The memorandum of costs is found in the record at page 440 and 441.

This memorandum was filed in the District Court within five days of the completion of the trial

in this action, and a copy of the memorandum of costs was served upon appellants by mailing them a copy on the day prior to filing with the District Court. (R 441)

## CROSS APPEAL

### POINT I.

THE ATTORNEY'S FEE AWARDED TO RESPONDENT IS INSUFFICIENT TO COVER THE FEES INCURRED IN THIS APPEAL.

The agreements executed by the parties provide for payment of a reasonable attorney's fees if respondents are compelled to commence an action for damage or rents. (Paragraph 8 of Exhibits 2, 3 and 4) Both parties agreed to attorney's fees in a sum set by the Utah State Bar Advisory Handbook. (R 162 lines 11-22) The trial court has awarded as reasonable attorney's fees the amount set forth in the Advisory Handbook for a default case presented without proof as to the reasonableness of attorney's fees in actions for the collection of money. Finding 18 (R 20)

The Advisory Handbook provides for a fee of \$500.00 for representing a respondent before the Supreme Court of Utah.

Respondent is aware of the rule that attorney's fees on appeal are discretionary with the Supreme Court. *Swain v. Salt Lake Real Estate and Investment Company* 3 Utah 2d 121, 279 P 2d 709 (1955) It is respectfully submitted that an additional fee of \$500.00 should be awarded to the respondent for



the purpose of covering their additional costs occasioned by this appeal.

### CONCLUSION

The judgment awarded to respondents by the trial court is supported by the facts in the record. Appellants have advanced no legal basis for remanding this case for further trial or eliminating any part of the judgment.

It is respectfully requested that this court affirm the judgment of the trial court and award an additional \$500.00 to the respondents for their attorney's fees incurred because of this appeal.

Respectfully submitted

RICHARDS, BIRD &  
HART &  
LON RODNEY KUMP  
716 Newhouse Building  
Salt Lake City, Utah  
*Attorneys for*  
*Respondents*