

1940

James Latses and James Sdrales v. Nick Floor, Inc. : Plaintiffs' Abstract of Record

Utah Supreme Court

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Allen T. Sanford; E. A. Rogers; Attorneys for Appellants;

Willard Hanson; Stewart M. Hanson; L. E. Cluff; Attorneys for Respondent;

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In the Supreme Court of the State of Utah

JAMES LATSES and
JAMES SDRALES,

vs.

NICK FLOOR, INC.,

Appellants,

Respondent.

Case No. 6237

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH.

HONORABLE PETER C. EVANS, Judge.

PLAINTIFFS' ABSTRACT OF RECORD

ALLEN T. SANFORD,
E. A. ROGERS,

Attorneys for Appellants.

WILLARD HANSON,
STEWART M. HANSON,
L. E. CLUFF,

Attorneys for Respondent.

FILED

MAR 22 1940

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In the Supreme Court of the State of Utah

JAMES LATSES and
JAMES SDRALES,

vs.

NICK FLOOR, INC.,

Appellants,

Respondent.

Case No. 6237

PLAINTIFFS' ABSTRACT OF RECORD

COMPLAINT

Tr. Page

1

Plaintiffs complain and allege:

1. That W. P. Noble Company and the defendant are now, and at all times hereinafter mentioned were, corporations duly created, organized and existing under and by virtue of the laws of the State of Utah.

2. That on or about the 25th day of September, 1933, W. P. Noble Company, a corporation, Ford E. Hovey and Willard H. Dressler, Trustees, William Frederick Bragg, Robert Russell Bragg, Frederick Ingham Bragg, Laura Lillian Harkins and Laura I. Bragg, leased, demised and let to the defendant the premises situate, lying and being in Salt Lake City, Utah, and described as follows, to-wit: 79 West 2nd South Street, Salt Lake

City, Utah, from month to month, at a monthly rental of \$70.00, payable monthly in advance. That on or about the first day of May, 1935, by mutual agreement, the rental was fixed at \$90.00 per month.

3. That by virtue of said lease said defendant went into possession of said premises and it still continues to hold and occupy the same.

4. That on the 31st day of May, 1939, said premises were conveyed by warranty deed by W. P. Noble Company, Ford E. Hovey and Willard H. Dressler, Trustees, William Frederick Bragg, Robert Russell Bragg, Frederick Ingham Bragg, Laura Lillian Harkins and Laura I. Bragg to the plaintiffs and the plaintiffs are now, and ever since the 31st day of May, 1939, have been, the owners of said property.

5. That on the 2nd day of June, 1939, the plaintiffs made demand in writing of said defendant to deliver up and surrender to them the possession of said premises and said demand was served upon Nick Floor, President of Nick Floor, Inc., and a copy of said demand is hereby annexed, marked Exhibit A, and made a part hereof as if the same were plead haec verba; that the defendant has refused and neglected, after such demand, to quit possession of said premises and still does refuse; that the monthly value of the rents and profits of said premises is the sum of \$150.00.

WHEREFORE, plaintiff prays judgment:

1. For the restitution of said premises and for damages for the rents and profits of said premises.

2. That such damages may be trebled as damages for the occupation and unlawful detention and holding over of the same, amounting to the sum of \$450.00 per month, beginning July 1, 1939.

3. For costs of this action.

ALLEN T. SANFORD,

E. A. ROGERS,

Attorneys for Plaintiff.

Complaint duly verified by James Latses.

EXHIBIT A.

NOTICE TO VACATE PREMISES

Nick Floor, Inc.,
79 West 2nd South Street,
Salt Lake City, Utah.

NOTICE IS HEREBY GIVEN that the undersigned, James Latses and James Sdrales, have purchased the property and premises now occupied by you at the above address and that they are now the owners thereof.

YOU ARE HEREBY NOTIFIED to vacate said premises and deliver up possession thereof to the undersigned owners on or before July 1,

1939, and in the event of your failure to comply with this notice to vacate, the undersigned will hold you liable in triple rents and damages as provided by law.

Dated this 2nd day of June, 1939.

(Signed) JAMES LATSES,
(Signed) JAMES SDRALES,
Owners.

TITLE OF COURT AND CAUSE.

DEMURRER

7 Comes now the above named defendant and demurs to plaintiffs' complaint, and for grounds of demurrer, alleges:

1. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

2. That said complaint is uncertain in this, that it is impossible to determine from said complaint how or by what means the plaintiffs obtained title to the premises pretended to be described in said complaint.

3. That said complaint is ambiguous in this, that it cannot be determined from said complaint the nature of the right of the said plaintiffs or either of them to maintain said action or to get possession thereof.

4. That said complaint is ambiguous and uncertain in this, that said complaint does not state any fact or facts, showing by what right or claim of right that the said plaintiffs or either of them have in and to said premises, and that the said notice, as set forth in said complaint and made a part of it, is uncertain and indefinite and not the basis of any claim or right.

5. That said complaint fails to show any right, title, or interest of the plaintiffs or either of them that could be the basis of a cause of action against this defendant, and is uncertain and indefinite for that reason.

6. This defendant demurs to said complaint because the same is indefinite and uncertain in failing to disclose any right in and to the plaintiffs or either of them to the possession of said premises.

WILLARD HANSON,
Attorney for Defendant.

RECEIVED copy of the foregoing Demurrer
this 26th day of August, 1939.

Attorneys for Plaintiffs.

CERTIFICATE

I, Willard Hanson, Attorney for the above named defendant, hereby certify that this demur-

rer is filed in good faith and not for the purposes of delay.

WILLARD HANSON,

Attorney for Defendant.

10 Minute Order, Sept. 6, 1939. Demurrer overruled.

TITLE OF COURT AND CAUSE.

ANSWER

11 Now comes the above named defendant, and without waiving the demurrer heretofore filed but expressly reserving the same, for answer to plaintiffs' complaint, admits, denies and alleges as follows, to-wit:

1. Admits paragraph one of said complaint.
2. Admits that on or about the 25th of September, 1933, the W. P. Noble Company, a corporation, the Stock Yards National Bank of South Omaha, a corporation, and the Fred Bragg Estate, who were then the owners, in the possession and entitled to the possession of said premises, and had good right to lease the same, leased unto this defendant, as hereinafter set forth, the premises, 79 West Second South Street, Salt Lake City, Utah, described in plaintiffs' complaint; this defendant denies that said lease was from month to month, and denies that the same was otherwise than as hereinafter set forth, and denies each and every allegation set forth in said paragraph two of the complaint not herein specifically admitted.

3. Answering paragraph three of the complaint, this defendant admits that by virtue of a lease it went into possession of said premises, and that by virtue of a lease it still continues to hold and occupy the same, but denies that it went into possession of said premises by virtue of any lease from month to month, and says that it went into possession of said premises under a lease, as hereinafter set forth.

4. Answering paragraph four, this defendant says that it has not knowledge or information thereof sufficient to form a belief and for that reason denies the same.

5. Answering paragraph five, this defendant admits that on the 2nd of June, 1939, the plaintiffs served upon the defendant the notice, of which Exhibit "A" is a copy, and admits that the defendant has refused to quit possession of said premises and admits that the defendant still holds possession of the same, as hereinafter set forth.

Denies each and every allegation in said complaint contained not hereinbefore admitted, denied or qualified.

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Further answering said complaint, and as a defense thereto, this defendant alleges that on or about the 25th day of September, 1933, it entered into a certain written agreement with the Stock Yards National Bank of South Omaha, a corporation, the W. P. Noble Company, a corporation, and the Fred Bragg Estate, herein called the les-

sors, whereby the said lessors leased to this defendant the certain premises designated and numbered as 79 West Second South Street, Salt Lake City, Utah, being the same premises described in plaintiffs' complaint; that a copy of said lease so made is hereunto annexed, made a part hereof and marked Exhibit "1".

This defendant further alleges that the said W. P. Noble Company mentioned in said lease, Exhibit "1", is the same W. P. Noble Company, a corporation, set forth in paragraph two of plaintiffs' complaint, and this defendant says that it is informed and believes and therefore alleges that the other parties mentioned in said paragraph two in plaintiffs' complaint, to-wit: Ford E. Hovey and Willard H. Dressler, Trustees, William Frederick Bragg, Robert Russell Bragg, Frederick Ingham Bragg, Laura Lillian Harkins and Laura I. Bragg, are the other lessors mentioned in said lease, Exhibit "1", as lessors.

This defendant further alleges that under and by virtue of said lease aforesaid, Exhibit "1", it was to have and to hold said premises from the 25th of September, 1933, for and during and until the 25th of September, 1936, a term of three years, upon an agreed rental of \$75.00 per month, and with the further agreement, as in said lease set forth, that for and in consideration of the expenditure of \$1,000.00 on or before the 1st of May, 1935, in permanent improvements in and on said

store and basement so leased to this defendant, said defendant was to have and occupy said premises for an additional five years from September 25th, 1936, with an agreed rental of \$90.00 per month during said 5 year period; that is to say, said lease was to continue until the 25th of September, 1941, upon the expenditure by said defendant of \$1,000.00 upon said leased premise on or before the 1st of May, 1935, and the payment of a monthly rental from September 25th, 1936 until September 25th, 1941, of \$90.00 per month.

This defendant further says that prior to said 1st day of May, 1935, it duly expended \$1,000.00 in permanent improvements on said store and basement, as in said lease provided; that it has duly paid the rental of \$90.00 per month for each and every month as in said lease provided, and has, during all of said time, continued to occupy said leased premises and has complied with all of the terms and conditions of said lease.

This defendant further says that under and by virtue of the terms of said lease aforesaid, it has a right to the possession of said premises and a right to occupy the same and that said lease does not expire until the 25th of September, 1941.

Further answering said complaint, and as a further defense thereto, this defendant alleges that if said plaintiffs purchased said premises, as

alleged in plaintiffs' complaint, they had due notice before said purchase of said lease and that the defendant was occupying said premises at said time, and that notice of said lease was duly recorded in the office of the County Recorder of Salt Lake County prior to said alleged purchase by the plaintiffs, and plaintiffs had full knowledge of said lease at all times prior to and at the time of said alleged purchase.

This defendant further alleges that it is provided in said lease that either party agrees to pay all costs and attorney's fees and expenses incurred by the other that shall arise from enforcing the covenants of this lease, and that it has been compelled to and has employed attorneys to defend said action and to enforce the covenants of said lease, as in said lease set forth, and has obligated itself to pay therefor the sum of \$500.00, which this defendant alleges is a reasonable attorney's fees to be paid to this defendant by said plaintiffs.

WHEREFORE this defendant prays that the plaintiffs take nothing by their said complaint; that defendant be decreed to have the right to occupy said premises, as in said lease, Exhibit "1" provided; that the complaint of plaintiffs be dismissed and that this defendant be allowed the sum of \$500.00 as attorney's fees for enforcing the terms and covenants of said lease; that it be allowed its costs, and that it be

given such other relief as may be just and proper in the premises.

WILLARD HANSON,
STEWART M. HANSON,
Attorneys for Defendant.

Duly verified by Nick Floor.

EXHIBIT "1"

LEASE

16 The Stock Yards National Bank of South Omaha, the W. P. Noble Company, both corporations, and the Fred Bragg Estate, all by A. H. Ball, Agent, of Salt Lake City, Salt Lake County, State of Utah, LESSORS, hereby remise, release and let to Nick Floor, Incorporated, of Salt Lake City, Salt Lake County, State of Utah, LESSEE, his executors, administrators and assigns, that certain store room and basement under the same, known, designated and numbered as 79 West Second South Street, City of Salt Lake, County of Salt Lake, State of Utah.

TO HAVE AND TO HOLD the said premises, together with the appurtenances unto the said Lessee, his executors, administrators and assigns, from the 25th day of September, A. D. 1933, for and during and until the 25th day of September, A. D. 1936, a term of three years.

And the said Lessee covenants and agrees to pay to said Lessors, their heirs, administrators, successors and assigns, as rental for said prem-

ises, the sum of twenty-seven hundred dollars, payable in sums of Seventy-five Dollars per month, monthly in advance, on the 25th day of each and every month during said term.

And the said Lessee further agrees to deliver up said premises to said Lessors at the expiration of said term in as good order and condition as when the same were entered upon by said Lessee, reasonable use and wear thereof and damage by the elements excepted. Said Lessee has the right to assign said lease to any responsible person or corporation satisfactory to Lessors.

And said Lessee further covenants and agrees that if said rent above reserved or any part thereof shall be unpaid for thirty days after the same shall become due, or if default be made in any of the covenants herein contained to be kept by said Lessee, or if said Lessee shall vacate such premises, it shall and may be lawful for said Lessors, their legal representatives or assigns, without notice or legal process, to re-enter and take possession of said premises and every and any part thereof and re-let the same and apply the net proceeds so received upon the amount due under this lease.

Also that the said Lessee will pay all plumbing bills, gas and electric light charges, and either party agrees to pay all costs and attorney fees and expenses incurred by the other that shall arise from enforcing the covenants of this lease.

The Lessee accepts the said lease and the premises in the condition and state of repair they are now in and agrees to occupy the same in a proper manner and keep the water pipes and their connections, sewage pipes and their connections upon said premises, at all times, in good condition and state of repair. Lessors are to keep the plate glass windows insured.

The Lessors shall not be liable for any damage occasioned by failure to keep premises in repair and shall not be liable for any damages done or occasioned by or from plumbing, gas, water, steam or other pipes, or sewage, or the bursting, leaking or running of any washstand, tank, water closet or water pipe, in, above, upon or about said building or premises, nor from damage occasioned by water arising from act or neglect of co-tenant or other occupant of the same building.

It is hereby expressly covenanted by the Lessee that the rent and charges above reserved shall be a first lien on the furniture, fixtures and personal property of said Lessee and the said furniture, fixtures and personal property shall not be removed from said premises until said rent and charges are fully paid.

The Lessee is to be furnished heat free of charge by tenants occupying the up-stairs portion of said building in which said store is situated and in case said up-stairs is unoccupied, then by Lessors.

For and in consideration of the expenditure by Lessee in permanent improvements in and on said store and basement to the extent of one thousand dollars (\$1000.00), said improvements to be completed on or before the first day of May, 1935, an option, under the same terms as herein set forth, for an additional five years is hereby granted, said option to be exercised on or before thirty days prior to the expiration of the three year period herein mentioned. In case said option is exercised, a monthly rental of Ninety Dollars (\$90.00) shall be paid in advance each month during said five year period.

Any fixtures placed in said store that can be removed without material injury to building, may be removed by Lessee provided same are not said permanent improvements.

WITNESS the hands and seals of said Lessors and said Lessee at Salt Lake City, Utah, this 25th day of September, A. D. 1933.

STOCK YARDS NATIONAL BANK OF
SOUTH OMAHA,

W. P. NOBLE COMPANY: FRED
BRAGG ESTATE,

By (Sgd.) A. H. Ball, Agent.

NICK FLOOR INCORPORATED,

By (Sgd.) Nick Floor, Lessee, President.

Signed in the presence of:

(Sgd.) Bill M. Dodas.

Attest: (Sgd.) A. B. Floor, Secretary.

TITLE OF COURT AND CAUSE.

REPLY

19 For their answer to defendant's answer these plaintiffs admit, deny and allege as follows:

1. These plaintiffs admit that on or about the 25th day of September, 1933, a pretended lease was signed by A. H. Ball covering the premises known as 79 West 2nd South Street, Salt Lake City, Utah, and that the said lease signed by said A. H. Ball is Exhibit 1 and that same is attached to defendant's answer, but these plaintiffs allege that the said A. H. Ball had no right or authority to enter into said lease for the said W. P. Noble Company, Ford E. Hovey and Willard H. Dressler, Trustees, and the heirs of the Fred Bragg Estate, or any of them, and that said pretended lease is void under and by virtue of the provisions of Sections 33-5-1, and 33-5-3, Revised Statutes of Utah, 1933.

2. These plaintiffs further allege that the said defendant did not expend in permanent improvements in and on said store and basement the sum of \$1,000.00, or any other sum, and that said defendant, at no time, exercised, in any way, the pretended option in said pretended lease.

3. These plaintiffs deny each and every material allegation in defendant's answer not herein **admitted.**

A. T. SANFORD,

E. A. ROGERS,

Verification waived. *Attorneys for Plaintiffs.*

TITLE OF COURT AND CAUSE.

AMENDMENT TO AND ADDITIONAL ANSWER TO THE ANSWER OF THE DEFENDANT HERETOFORE FILED AND A
REPLY TO THE REPLY OF
PLAINTIFFS.

24 Now comes the above named defendant, and without waiving the demurrer heretofore filed but expressly reserving the same, and with leave of court first had and obtained and without waiving any admissions, denials or allegations of its answer heretofore filed, now files this its amendment to and as an addition to the answer heretofore made, and admits, denies and alleges as follows, to-wit:

1. That the plaintiffs, and each of them, by virtue of their pretended purchase of the premises known as 79 West Second South Street are in the same position and subject to the same rights, remedies and defenses as the original owners of said premises, to-wit: W. P. Noble Company, Ford E. Hovey and Willard H. Dressler, Trustees, and the heirs of the Fred Bragg Estate.

2. That the said plaintiffs, and each of them, are estopped from denying that the said A. H. Ball had no right or authority to enter into said lease for and on behalf of the said owners, or any of them, for the reason that said lease was made and entered into on or about the 25th day of Sep-

tember, 1933, at a monthly rental of \$75.00 which was later increased to \$90.00, as heretofore set forth in defendant's answer, and that the said owners, and each of them, accepted the said monthly rental of \$75.00 and later the sum of \$90.00 from the said 25th day of September, 1933, to and including the time of the pretended purchase by the plaintiffs herein, and that the said owners of the said premises as aforesaid knew of the existence of said lease aforesaid with this defendant, and they, and each of them, knew and were aware that this defendant has expended in excess of the sum of \$1,000.00 in permanent improvements in and upon said premises, and that said owners, and each of them, having accepted said rents as aforesaid and knowing of the said permanent improvements made in and upon said premises by this defendant, are now estopped to deny that the said A. H. Ball had any right or authority to enter into said lease.

3. That the plaintiffs, and their predecessors in interest, that is, the former owners of said premises, knew of the existence of said lease aforesaid, and accepted the said rents as heretofore referred to and knew and were aware of the permanent improvements made in and upon said premises by this defendant, and the owners of said premises were informed and well knew of said lease and the terms thereof as aforesaid, and by accepting said rents for a long period of time, to-

wit, in excess of five years, and being informed and well knowing of the permanent improvements made in and upon said premises by this defendant, and being informed and well knowing that this defendant would not make said permanent improvements in and upon said premises if this defendant had not had a long term lease, and being aware of the terms of the said lease as aforesaid, the owners of said premises have ratified and approved the said lease and any and all actions taken by their said agent, A. H. Ball, in connection with said lease and said leased premises.

4. That the owners of said premises as aforesaid, accepted the rents and benefits under and by virtue of said lease as aforesaid for a period of over five years, and the owners of said premises knew, or in the exercise of reasonable care should have known, of the permanent improvements made in and upon said premises, and knew, or in the exercise of reasonable care should have known, that this defendant would not have made said permanent improvements in excess of the sum of \$1,000.00 had it not had a long term lease of said premises, and the owners of the premises in question, and each of them, were negligent, (when learning of said lease and said permanent improvements), in accepting said benefits as aforesaid, and in not informing or advising this defendant that the said A. H. Ball had no right

or authority to enter into said lease for them, and in not cancelling said lease and declaring the same to be null and void, and in permitting this defendant to expend large sums of money and make permanent improvements in and upon said premises.

- 26 5. Further answering said complaint, this defendant alleges that the said owners of said premises as aforesaid held the said A. H. Ball out as their agent, servant and employe, and held the said A. H. Ball out as their agent, servant and employee to enter into leases for and on their behalf and clothed him with apparent authority to represent them, and each of them, and to make leases and accept the benefits therefrom for and on behalf of them, and each of them, and that as a result thereof the said owners, and each of them, were and would be bound by the acts and conduct of the said A. H. Ball, and that all of said acts performed by the said A. H. Ball were done for and on behalf of the said owners of said premises and with their knowledge, consent and approval, and as heretofore set forth clothed the said A. H. Ball with apparent authority to act and represent them, and each of them, and by reason thereof the above referred to owners, and each of them, are estopped from denying the authority of said A. H. Ball to represent them, and from attacking the validity of said lease agreement as aforesaid.

6. Further answering and replying to plaintiff's reply herein, this defendant denies that said lease aforesaid is void under and by virtue of the provisions of Section 33-5-1, Revised Statutes of Utah 1933, for each and all of the reasons heretofore set forth and referred to, and that said lease is valid and is the lease of the said owners aforesaid for and because of all of the aforesaid reasons.

WILLARD HANSON,
STEWART M. HANSON,
Attorneys for Defendant.

Duly verified by Nick Floor.

TITLE OF COURT AND CAUSE.

PLAINTIFF'S SECOND REPLY

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Come now the plaintiffs above named and for their reply to the amendment to and additional answer to the answer of the defendant heretofore filed and reply to the reply of the plaintiffs, admit, deny and allege as follows:

1. Plaintiffs admit the allegations of the first paragraph.

2. With reference to the allegations of the second paragraph, they admit the alleged lease provided for a rental of \$75.00 a month, which was later increased to \$90.00 a month, and that the owners received said monthly rental of \$75.00

and later the sum of \$90.00, from said 25th day of September, 1933, down to and including the time of the purchase by the plaintiffs, and plaintiffs deny each and every other allegation of said paragraph 2.

3. As to the allegations of the third, fourth and fifth paragraphs, plaintiffs deny each and every allegation therein contained.

WHEREFORE, plaintiffs pray that the defendant take nothing by its answer, reply and pleadings, and that plaintiffs have judgment as prayed for in their complaint.

ALLEN T. SANFORD,
E. A. ROGERS,

Attorneys for Plaintiffs.

Duly verified by James Latses.

TITLE OF COURT AND CAUSE.

37 The above case came on regularly to be heard on the pleadings before the court without a jury at Salt Lake City, Utah, before Honorable P. C. Evans, presiding judge, on the 21st day of November, 1939, Allen T. Sanford and E. A. Rogers, attorneys at law, appearing for the plaintiffs, and Willard Hanson, Stewart M. Hanson and L. E. Cluff, attorneys at law, appearing for the defendant, which hearing was continued from day to day until the 24th day of November, 1939, when the

case, upon the evidence adduced by both parties and upon the filing of written briefs, was submitted for decision. Upon the filing of briefs by both parties, upon the evidence adduced and upon the pleadings and upon due consideration thereof, and the court being sufficiently advised in the premises, now makes and files the following

FINDINGS OF FACT

1. That on September 25th, 1933, the Stockyards National Bank of South Omaha, a corporation, the W. P. Noble Company, a corporation,, and the Fred Bragg Estate, by and through their agent, A. H. Ball at Salt Lake City, leased, demised and let to Nick Floor, Inc., a corporation, that certain storeroom and basement known as No. 79 West Second South street in Salt Lake City, Utah, and being part of what is known or called the Eagle Block or building situate at the southeast corner of the intersection of Second South and West Temple streets in Salt Lake City, Utah.

2. In the complaint of the plaintifffs it is alleged that the W. P. Noble Company, a corporation, Ford E. Hovey and William H. Dressler, Trustees, William Frederick Bragg, Robert Russell Bragg, Frederick Ingham Bragg Laura Lillian Harkins and Laura I. Bragg, on or about September 25th, 1933, leased, demised and let to the defendant Nick Floor Inc., the

premises described as "79 West Second South street, Salt Lake City, Utah, from month to month, at a monthly rental of \$70.00 payable monthly in advance. That on or about the 1st day of May, 1935, by mutual agreement, the rental was fixed at \$90.00 per month, and that by virtue of said lease, said defendant went into possession of said premises and still continues to hold and occupy the same," that on May 31, 1939, the premises by the parties above named by warranty deed were conveyed to the plaintiffs, who then became and ever since have been, the owners thereof, and that on June 2nd, 1939, they in writing demanded of the defendant possession of the premises, which it refused to deliver up. The defendant by its answer denied the lease as set forth in the complaint of plaintiffs, and each and every part thereof, and denied that it went into or was in possession of the premises under or in pursuance of such a lease as in the complaint alleged, and averred possession under terms and conditions of a written lease as pleaded and set forth in the answer, a copy of which was attached thereto and made a part thereof, which lease was denied by the plaintiffs by their reply, and by them averred that A. H. Ball, who pretended to have executed said lease for and on behalf of the owners and as pleaded in the answer, had no authority to do so, and that such lease, under the statute of frauds, Section 33-5-1 R. S. Utah 1933, was absolutely

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void. To such reply the defendant filed an additional and amended answer pleading an estoppel and ratification on behalf of the predecessors in interest of the plaintiffs, as well as to the plaintiffs themselves, to which a further reply was filed by the plaintiffs denying the alleged estoppel and ratification.

- 39 3. Upon the evidence adduced the court finds that no such lease, either in substance or effect, as in the complaint of the plaintiffs alleged, was at any time made or entered into or had any existence whatever, that no evidence of any kind was given or adduced by the plaintiffs or by anyone for or on their behalf of the making of any such lease as in the complaint alleged, or under what terms or conditions the defendant had entered or was in possession of the premises, and the court, for want of any evidence to support such allegation or the making of any such lease, to establish which the plaintiffs had the burden of proof, finds such issue against the plaintiffs and in favor of the defendant, and that the defendant was not given or put in possession of the premises in question in pursuance of such a lease and as so pleaded and set forth in the complaint of the plaintiffs, and that the defendant at no time possessed or occupied the premises in virtue or in pursuance of such a lease; but that the defendant was given and was put in possession of the premises and occupied the same in virtue and in pursu-

ance of the written lease so pleaded by the defendant in its answer, that it had made valuable and permanent improvements on the premises, and paid the rentals thereof under and in pursuance thereof for a period of over five years and nine months, when the defendant was served with notice to vacate and surrender the premises up to the plaintiffs; and that by the terms and conditions of such lease, the defendant was entitled to possess and occupy the said premises for an additional period of two years and over three months, unless the plaintiffs, under and by virtue of the lease pleaded by them had the right, which they had not, on June 2, 1939, to terminate the tenancy of the defendant and require it to surrender the premises up to the plaintiffs, for that no such alleged lease from month to month was proven or established by the evidence.

- 40 4. The premises in question, 79 West Second South street, consisted of a storeroom and basement at the northwest corner of what is known as the Eagle block or building situate at Second South and West Temple streets in Salt Lake City, the Eagle building itself consisting on the first floor of eight or ten storerooms with basements, chiefly fronting on Second South street and some on West Temple street, and a rooming house or hotel on the second and third floors of said building.

5. The court further finds that on September 25th, 1933, the owners of the Eagle building, including the storeroom and basement in question, were the corporation and persons as stated in the written lease pleaded by the defendant, a copy of which was attached to its answer and made a part thereof; that at such time, W. P. Noble Company was the owner of one-half of the said building and block, the Stockyards National Bank of South Omaha the owner of one-fourth thereof, and the Bragg Estate the owner of one-fourth thereof. For many years prior to September 25, 1933, fifteen or twenty or more, the said owners and the immediate predecessors of the plaintiffs, had one H. T. Ball, a resident of Salt Lake City, in their employ as their agent in managing, handling and caring for the said Eagle Block or building, to procure tenants therefor and to demise, lease and let various parts thereof to different tenants, and who in such particular and for such purpose at divers times had entered into written leases for a term of years as the admitted agent for and on behalf of the said owners, collected the rentals of premises so leased by him, paid the taxes on the building, made and kept it in repair, kept the premises insured, and remitted the rentals each month to the various owners, some residing in San Francisco, California, others in Wyoming and some in Omaha, Nebraska; that on September 25, 1933 and when the said written lease was executed

and delivered and under which the defendant went in possession of the premises in question, all of the said owners then were and ever since have been non-residents of the state of Utah, except Miss Mayme Noble, the president of the said W. P. Noble Company, who was a resident of Salt Lake City, Utah, but all the other officers of the said Company resided at San Francisco, California. For a long time, a Mr. Gunter, an attorney at law at Salt Lake City, was in the employ of the said owners, and drew written leases, some for a term of years, to be signed by H. T. Ball as agent for and on behalf of said owners and witnessed the said leases as a witness. H. T. Ball died in June, 1930. For several years prior to his death, his son A. H. Ball, with the knowledge of the then owners and predecessors of the plaintiffs, aided and assisted his father in the management of the premises and in collecting the rentals. When H. T. Ball died, the predecessors of the plaintiffs employed his son A. H. Ball to take care of the premises and to manage and control the same, to lease and let them, collect the rentals, keep the premises repaired and insured, pay the taxes and to manage, control and handle the premises just as his father had. He did so. After the death of H. T. Ball, attorney Gunter prepared written leases, some for a term of years, to be and which were signed by A. H. Ball for and on behalf of the said predecessors of the plain-

tiffs. Attorney Gunter died just prior to the making of the written lease September 25, 1933. L. E. Cluff, an attorney at law, at Salt Lake City, was thereupon employed by the *predecessors of the plaintiffs* to take the place of attorney Gunter. Cluff drew up the lease to be and which on September 25, 1933, was signed by A. H. Ball, as agent for and on behalf of the predecessors of the plaintiffs. Cluff also as attorney for the predecessors in interest, drew up other written leases for a term of years to be signed and which were signed by A. H. Ball, as agent for and on behalf of the predecessors of the plaintiffs, and it was the lease so prepared by attorney Cluff and signed September 25, 1933, under and in pursuance of which the defendant went into possession and occupied the premises in question continuously up to and including the time when the plaintiffs served written notice upon it to vacate the premises and up to and including the commencement of this action. A written lease for a term of years signed either by H. T. Ball or by A. H. Ball for and on behalf of the immediate predecessors in interest of the plaintiffs was given the tenant, who immediately occupied the premises leased and demised to the defendant. Each and all the owners and immediate predecessors in interest of the plaintiffs had knowledge and knew that the defendant continuously occupied and was in possession of the premises from September 25, 1933, and

until and after the premises were sold to the plaintiffs, a period of about four years and nine months, and that the said predecessors for the first three years received a monthly rental of \$75.00 and thereafter \$90.00, and as provided by the said lease signed September 25, 1933. While there is no positive or direct evidence that the immediate predecessors of the plaintiffs and the then owners of the premises saw the written leases or a copy thereof executed by H. T. Ball, or by A. H. Ball, for and on behalf of the said predecessors in interest, or any positive and direct evidence that such predecessors saw the lease or a copy thereof prepared by attorney Cluff and signed by A. H. Ball as the agent for and on behalf of the predecessors in interest of the plaintiffs, yet from the proven facts, that H. T. Ball in his lifetime and after his death, his son A. H. Ball, had the exclusive management and control of the Eagle block or building, including the storeroom and basement here in question, with power and authority to lease the premises, collect the rentals, pay the taxes, keep the premises in repair and insured, remit the rentals to the various owners and predecessors in interest of the plaintiffs, that attorney Gunter in his lifetime and after his death, attorney Cluff, were employed by and represented the owners in connection with the leasing of the premises by H. T. Ball and thereafter by his son A. H. Ball, and that such predecessors in interest well knew that the defendant was in possession of

the premises in question continuously from September 25, 1933 and until the premises were conveyed to the plaintiffs May 31, 1939, and from all other facts and circumstances in evidence, the only reasonable inference or inferences deducible are, and so the court finds, that the said H. T. Ball had right and authority to give and execute leases prepared by their counsel and to be executed by H. T. Ball as agent for and on behalf of said predecessors in interest, and that at the death of the said H. T. Ball, A. H. Ball had the same right and authority to do so, as his father had done, and that the said predecessors in interest at no time made any objection or raised any question as to the want of authority, either on behalf of H. T. Ball or on behalf of A. H. Ball, to sign written leases for and on behalf of the said predecessors in interest, and well knew that the defendant entered the possession of the premises in question September 25, 1933, and continuously occupied the same and received the rentals therefrom and the benefits of the premises so occupied by the defendant and made no question whatever as to the authority of A. H. Ball to execute written leases, or the lease in question, until after the premises were conveyed to the plaintiffs, and while all of the predecessors in interest of the plaintiffs may not have known in detail all of the terms and conditions of the lease so signed and executed by their admitted agent A. H. Ball, yet

well knew that the possession of the defendant was something more than a mere lease from month to month, and that their said attorneys and their said agents substantially handled, managed and leased the premises as they saw fit and to the best interest of said predecessors. The court further finds without dispute that the defendant, in virtue of the written lease attached to its answer and under which it was put in possession of and occupied the premises, on or before May 1, 1935 and in accordance with the terms and provisions of the said lease, made permanent improvements in said storeroom and basement so let and occupied by it, to the reasonable value in excess of the sum of \$1,000.00, to-wit, more than \$1,700.00, by putting in a maple hardwood floor, building new stairways, putting in toilets and partitions, installing electric wiring, building and putting in new doors, putting in a valuable plate glass window in front of the building, doing plumbing work and making sewer connections, putting in tiling and panel work, constructing a cement stairway, putting up valuable and permanent awnings, doing inside and outside painting in preservation of the premises, laying and gluing to the floor valuable and durable linoleum, and making other valuable improvements and as in the additional answer of the defendant alleged, all of which improvements were attached to the building itself and were to be and to become part thereof, and were so intended

to be when made, none of which may be removed without injury to the premises to which they are attached or without injury to the fixtures or permanent improvements themselves; and that such improvements were made in consideration that the defendant, as stipulated and provided in the said lease executed and delivered to it, was to be and was given an additional extension of time for
 45 a period of five years from September 25, 1936, or to and including September 25, 1941, and of the payment of \$90.00 a month rental instead of \$75.00 for such additional five-years' period from September 25, 1936, and that the defendant as rental on said premises paid to the predecessors in interest of the plaintiffs and until the commencement of this action the sum of \$90.00 a month instead of \$75.00, which payments were so received by the predecessors in interest without any objection and without any claim made by them, or any of them, that the possession or occupation of the defendant was without right or a mere tenancy from month to month.

6. Miss Mayme Noble, president of the W. P. Noble Company and who resided in Salt Lake City, visited the premises several times while said permanent improvements were being made, had knowledge of the nature and character thereof, and that they were made and being made by the defendant in accordance with the said lease, and at no time did she make any objection thereto, or

any claim that such improvements were made or being made for any purpose other or different from that as claimed by the defendant and in accordance with the lease. In addition to such permanent improvements, the defendant also at great expense, in the neighborhood of something like \$5,000.00, installed what may be called trade fixtures in carrying on its business on said premises conducting a beer and soft drink parlor and refreshments, called the "Golden Gate Beer Garden," which trade fixtures were so installed with the intention to be removed at the expiration of the term of the defendant's lease and which can and may be removed without injury to the premises or to the fixtures themselves; and from all the facts and circumstances in evidence, the court finds that the only reasonable inference deducible therefrom is that the predecessors in interest of the plaintiffs in the ordinary course of business knew and had knowledge of the making of such improvements and of the extension of the 5-year period of the lease in consideration thereof and of paying the additional rental of \$90.00 a month instead of \$75.00. Furthermore the court finds, and it so is shown without dispute, that the plaintiffs themselves before they purchased the property, at different times visited and examined the premises in question, made known to the defendant that they contemplated purchasing the Eagle building or block, including the storeroom and

basement occupied by the defendant, inquired of Nick Floor, the manager of the defendant and in charge of the premises in question, concerning the occupation thereof by the defendant and the circumstances thereof, and were told by Nick Floor the nature and character of the lease of the defendant and as alleged in the defendant's answer, and were shown either the original lease or a copy thereof, and were shown and pointed out the permanent improvements made by the defendant on such premises as aforesaid and as hereinbefore enumerated, and that such permanent improvements were made in consideration of the defendant having been given an extension of five-years' period of its lease and as the lease itself provided, and the payment of \$90.00 rental instead of \$75.00 a month, and that the said plaintiffs and each of them, before they purchased the premises, had actual and full knowledge of the defendant's said lease and of the defendant's possession and occupation in virtue and in pursuance thereof; and that the predecessors in interest of the plaintiffs and the plaintiffs themselves likewise had constructive notice of the defendant's lease by an affidavit made and filed by the manager of the defendant and recorded in the office of the County Recorder of Salt Lake County, Utah, a month before the sale and conveyance of the premises by the predecessors of the plaintiffs to the plaintiffs, giving notice to the world

of the description of the premises, of the lease and of the terms and conditions thereof made, executed and delivered by the predecessors in interest by A. H. Ball, their agent, to the defendant, for a period of eight years and until September 25, 1941. Neither of the plaintiffs testified or claimed that they, or either of them, before they purchased the premises, did not have both actual and constructive notice of the defendant's lease, or that they had not full knowledge of the possession and occupation by the defendant of the premises in question and the nature and character thereof under and in pursuance of the lease, or of the permanent improvements made by the defendant in virtue thereof in value in excess of \$1,700.00.

7. The court further finds that the option for an extension of the additional five years of the defendant's lease and as therein provided, was exercised by the defendant before thirty days prior to the expiration of the 3-year period of the lease, or more than thirty days prior to September 25, 1936, which notice was given to the said A. H. Ball, the agent of the said predecessors in interest of the plaintiffs, and who as aforesaid, had the exclusive management, control and charge of said premises, and who visited and inspected the premises and the permanent improvements so as aforesaid made by the said defendant and as they were being made, and who testified that the said im-

provements in value were in excess of the sum of \$1,000.00 and were made in virtue and in pursuance of the said lease so executed and delivered to the said defendant.

47 8. The court further finds that the permanent improvements, as well as the movable fixtures so made by the defendant in the premises aforesaid were made in good faith and on reliance of the said lease so as aforesaid executed and delivered to it, and that it is quite incredible that the defendant, or another under similar conditions, would have made such permanent and valuable improvements and put in the trade fixtures, as was done by the defendant, on a mere lease from month to month or one subject to termination as such.

9. In view of the provisions of the said lease so as aforesaid delivered to the defendant and pleaded by it in its answer and because of the provisions of such lease that, either party agreed to pay all costs and attorneys' fees and expenses incurred by the other that might arise from enforcing the covenants of the lease, and of the allegations in the defendant's answer that if the plaintiffs' complaint be dismissed the defendant be allowed \$500.00 attorney's fees, and it in open court having been stipulated by the parties such to be a reasonable attorney's fees for the purpose as in the said lease provided, the court finds the

sum of \$500.00 a reasonable attorney's fee to be paid by the said plaintiffs to the said defendant.

CONCLUSIONS OF LAW

48 From the foregoing findings of fact the court makes the following conclusions of law :

1. That the plaintiffs to recover were required to do so upon the case made by their complaint and not upon one which may have been developed by proof, and as no such case as alleged by the plaintiffs was established by evidence and as no judgment may be rendered in favor of the the plaintiffs except on proof establishing the cause of action as alleged by the plaintiffs in their complaint, it follows that the complaint against the defendant should and must be dismissed for want of evidence to sustain the cause of action as alleged in the complaint.

2. Nor are the plaintiffs entitled to support their cause of action by recourse to the alleged lease in the defendant's answer and the evidence adduced by it in support thereof, for that the plaintiffs by their verified replies to the defendant's answer denied the existence, validity and binding effect of the lease as so alleged in the defendant's answer, and the plaintiffs in substance and effect averring that such lease so alleged by the defendant had no binding or legal effect and under the statute of frauds was absolutely void; and, in such case, a plaintiff may not aid

his cause by recourse to material allegations of his adversary, and which, as here, by replies was specifically denied, and controverted by evidence.

3. And further, from part performance by the defendant and from benefits received by the predecessors in interest of the plaintiffs, from acquiescence and from actual and apparent authority conferred on their agents and as in the findings set forth and who had the exclusive charge, management and control of the premises in question and as more particularly heretofore found, the said plaintiffs and their predecessors in interest, and each of them, are estopped from claiming or **asserting** that the lease so executed and delivered to the defendant by the admitted agent of the said predecessors in interest of the plaintiffs, was or is void under the statute of frauds or otherwise and unenforceable, as contended and urged by the plaintiffs and that to permit the plaintiffs to so use the statute of frauds would be to permit a perpetration of a fraud upon the defendant; and particularly when, and as heretofore found, they, before they purchased the premises, had actual knowledge, as well as constructive notice, of the terms and conditions of the defendant's lease, and that the defendant in virtue thereof had been in and claimed possession of the premises for nearly six years and in good faith had made valuable and permanent improvements in the premises and as in the findings found.

49 4. The conclusion is, therefore, that the plaintiffs are not entitled to take anything upon their complaint and that the same be dismissed, and that the defendant have and recover its costs and expenses herein incurred, including the sum of \$500.00 as attorney's fees.

5. That the plaintiffs were not entitled to a restitution of the premises and as in their said complaint alleged, nor for damages in withholding the possession of the premises from the plaintiffs, and that the defendant was not guilty of a forcible entry or detainer of the possession of the premises or wrongfully and unlawfully withholding the possession thereof from the plaintiffs and as in their said complaint alleged.

Dated this 30th day of January, 1940.

P. C. EVANS

District Judge.

JUDGMENT

50 This cause came on regularly to be heard on the pleadings in the above entitled cause before the court, presided over by Honorable P. C. Evans and without a jury, on the 21st day of November, 1939, Allen T. Sanford and E. A. Rogers, attorneys at law, appearing for the plaintiffs, and Willard Hanson, Stewart M. Hanson and L. E. Cluff, attorneys at law, appearing for the defendant, and the court having heard the evidence ad-

duced by both parties in the said cause and considered the same and the briefs filed by the respective parties, and the court being sufficiently advised in the premises herewith made findings of fact and conclusions of law in favor of the defendant and against the plaintiffs, and it appearing therefrom that the plaintiffs are not entitled to a restitution of the premises as in their said complaint alleged, and that the defendant had not wrongfully or unlawfully withheld possession of the premises from the plaintiffs and that the defendant was not guilty of a forcible entry or unlawful detainer of the premises, as in the complaint of plaintiffs alleged;

NOW THEREFOR IT IS ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree, that the said plaintiffs take nothing by their said complaint and that the same and their cause of action be dismissed on merits, and that it hereby is ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree that the defendant is entitled to hold and remain in possession of the premises described in the complaint of plaintiffs in the above cause as and in accordance with the lease as alleged in its answer therein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree that the above named defendant have and recover and is given judgment against the

above named plaintiffs, and each of them, in the sum of Five Hundred (\$500.00) Dollars as and for attorney's fee, and judgment for costs to be taxed as by law in such case made and provided.

The premises herein referred to are described as the storeroom and basement at No. 79 West Second South street, being the northwest corner of what is known and called the Eagle block or building, situate at the intersection of Second South and West Temple streets in Salt Lake City, Utah.

Dated this 30th day of January, 1940.

P. C. EVANS,

District Judge.

RECEIVED copy of the foregoing proposed Findings of Fact, Conclusions of Law and Judgment this 26th day of January, 1940.

ALLEN T. SANFORD,

E. A. ROGERS,

Attorneys for Plaintiffs.

TITLE OF COURT AND CAUSE.

NOTICE OF APPEAL

To the above named Defendant, and to Willard Hanson, Stewart M. Hanson, and L. E. Cluff, its attorneys:

You, and each of you, WILL PLEASE TAKE NOTICE that the above named plaintiffs,

56 James Latses and James Sdrales, hereby appeal to the Supreme Court of the State of Utah from that certain judgment made and entered in the above entitled court in this action, on or about the 30th day of January, 1940, in favor of the defendant and against the plaintiffs, wherein it was ordered, adjudged and decreed the plaintiffs take nothing by their complaint and that defendant have judgment against the plaintiffs for the sum of \$500.00 and costs.

This appeal is taken upon questions of both law and fact and from the whole of said judgment.

A. T. SANFORD,
E. A. ROGERS,
Attorneys for Plaintiffs.

Received copy of the foregoing NOTICE OF APPEAL this 8th day of February, 1940.

WILLARD HANSON,
STEWART HANSON,
L. E. CLUFF,
Attorneys for Defendant.

TITLE OF COURT AND CAUSE.

CLERK'S CERTIFICATE

I, WILLIAM J. KORTH, Clerk of the above entitled Court, do hereby certify that the above

and foregoing and hereto attached files contain all the original papers filed in this court in the above entitled case, including the original Bill of Exceptions and Notice of Appeal, together with full, true and correct copies of original orders made by the court. The whole constituting the Judgment Roll therein. And that the same is a full, true and correct transcript of the record as it appears in my office.

57 And I futher certify that an Undertaking on Appeal, in due form, has been properly filed and that the same was filed on the 8th day of February, A. D. 1940.

And I further certify that said Judgment Roll is this date transmitted to the Supreme Court of the State of Utah, pursuant to such appeal.

WITNESS my hand and the Seal of said Court at Salt Lake City, Utah, this 6th day of MARCH, A. D. 1940.

WILLIAM J. KORTH,
Clerk Third District Court.

By Alvin Keddington,
Deputy Clerk.

TITLE OF COURT AND CAUSE.

BILL OF EXCEPTIONS

BE IT REMEMBERED, that the above entitled case came on regularly for trial before the

Honorable P. C. Evans, District Judge, sitting without a jury on the 21st day of November, 1939, Allen T. Sanford and E. A. Rogers appearing as counsel for the plaintiffs, and Willard Hanson, Stewart M. Hanson and L. E. Cluff appearing as counsel for the defendant, and the following proceedings were had:

It was stipulated that the ownership of the property involved is as alleged in the complaint and that said owners continued to be the owners until transfer of interest to the plaintiffs on the 31st day of May, 1939. It was also stipulated that Ned J. Bowman, if present, would testify that the rental value of said premises from June, 1939, up to the present time is, and was, \$150.00 per month.

ROBERT GOULD-SMITH, a witness produced on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

66 My name is Robert Gould-Smith. I reside in
 San Francisco and have resided there for nine
 years. I am secretary and treasurer of the W. P.
 Noble Company, a Utah corporation, and have so
 acted since before 1930. I represented the W. P.
 69 Noble Company to the extent of disbursing such
 money as was for dividends, corresponding with
 Mr. Ball; such moneys as were remitted to me by
 the agent I handled and disbursed to the various
 owners. There was never any written authoriza-

tion to Arthur Ball to give any lease. Mr. Ball, Sr. died June 30, 1930, and after his death his son, Arthur Ball, collected the rents. Mr. Ball, Sr. had prior to his death, acted as agent for the Eagle Block.

CROSS-EXAMINATION

71 Arthur Ball, Sr. was agent for Mr. Noble for a good many years, presumably from 1909. I was living in the State of Nevada at that time but was connected with the Noble Company. After the death of Ball, Sr. his son was employed by me and Mr. Gunter. Mr. Gunter was an attorney who died September 23, 1933. I was living in California from 1930 up to May 1939. During that period of time I came to Salt Lake two or three times a year. Occasionally I would go down with Arthur Ball, Jr. and look at the Eagle Block. He was agent for the building. I employed him to look after the building, collect the rents and repairs, and so forth. He had no right to execute any lease. When he got a tenant he would say, "I have got a tenant for such and such a place." People would go to Arthur Ball to find out what rooms they could get and he rented it. Since 1933 Arthur Ball, Jr. represented the building and he was to report to me all matters of importance. I think I took an oath as secretary and treasurer of the company. I don't remember the exact date. Mr. Ball, Sr. was not employed by me. Mr. Ball, Jr.

76 had no authority. He was to collect the rents, look after the building and do minor repairs, referring to us any matters of importance and getting our consent before doing it. His employment was verbal shortly after the demise of his father. About a week or ten days after the death of Ball, Sr. Mr. Gunter and I employed Arthur Ball, Jr. to act as the representative of our Company in handling the Eagle Block, as I have indicated. He commenced in July, 1930. Mr. Gunter and I were consulted in all matters of importance. After Mr. Gunter's death Arthur Ball was here and he consulted me by mail frequently, and occasionally I would come to Salt Lake and we would go over matters together. I have a good many of the letters that he wrote.

82 MR. SANFORD: We object to the witness producing the letters as not proper cross examination.

Q. (by Mr. Hanson) That is what I want to get at, the letters you received from Mr. Ball over the course of time in which he was agent.

A. There they are.

85 MR. ROGERS: We object to that upon the ground that those letters are immaterial, and this is improper cross examination.

THE COURT: The objection may be overruled.

The witness produces the letters.

WITNESS: I haven't any copies of all the letters that I wrote to Mr. Ball. When I came to Salt Lake I seldom went inside the building. I would look at the exterior and talk about it and discuss little matters, such as whether a window sill needed fixing or that a floor had to be put in, or such details as that. When I went down in 1934 or 1935 the only change I noticed was that the building looked a little older. I can't say I noticed a sign "Golden Gate" above the door at 79 West 2nd South. The whole front had not been changed to the extent that it was noticeable .

(Questions were propounded by Mr. Hanson relative to changes in the building, to which objection was made on the ground that it was improper cross examination and the objection was overruled by the court.)

89 Q. (by Mr. Hanson) You never noticed that change at all?

MR. SANFORD: We object to that as irrelevant and immaterial, not cross examination.

THE COURT: The objection may be overruled.

WITNESS: In walking around the exterior of the building and looking at it, any changes made were so slight that they were not noticeable. Mr. Ball received a salary of sixty dollars a month. He sent statements each month of the amounts collected. Mr. Ball reported by number usually. He may have reported the name of the

tenant. I have produced certain letters, but I cannot find the letters or the monthly statements for 1932. In 1930 the tenant at 79 West 2nd South failed and went through bankruptcy, and I understand that Mr. Cluff was the attorney for the bankrupt. I received the letter in Exhibit 2. I don't know whether I replied to it. I fancy I did. However, Mr. Gunter was here and the matter was looked after. Mr. Hanson read to the witness

91 Exhibit 2, which is as follows:

"Mr. R. Gould-Smith
1365 Taylor Street
San Francisco, California

"Dear Mr. Smith:

"I sent you the statement for October and I hope that it meets with your approval.

"I collected all the rent for October, except No. 207. The lady at No. 207 was in an automobile accident and was in the hospital, but she has returned and opened her place again. I have collected the rent since I sent you the last statement and it will show in the new statement.

"The government closed No. 77, and the city commission will not grant No. 79 a license for six months. Mr. Gunter is taking care of this part. 77 is trying to open again. I talked it over with Mr. Gunter, and I told him that I hoped No. 77 and No. 79 would not open up again as I have another tenant who says he wants both places. As he is in a different line of business I believe our

troubles will be solved if he rents the places. However, I will know by the 20th or sooner what No. 77 and No. 79 are going to do. I am working and scheming to get rid of these two tenants.

“I have paid Mr. Tobin \$1,500.00 on the heating plant and have made arrangements to take care of the taxes. If we get the rents all paid up for November, December and January, we will be able to send out money in February. The heating plant works successfully and everyone seems to be pleased with it. You will hear from me before the first of the month regarding the arrangements we have made with No. 77 and No. 79. If they don’t pay their rent for this month their lease will be automatically broken.

“Hoping everything is going along fine with you, I am,

“Respectfully yours,
(Sgd.) Arthur H. Ball.”

WITNESS: I don’t know what reply I made to that letter, but it was not that I hoped he could lease No. 79. I wanted it rented.

96 Q. (by Mr. Hanson) Yes, and that is your recollection of what you wrote him, isn’t it—you can answer that “Yes” or “No”. I understand that is what you say, that your recollection is, what you wrote him, you hoped he would find a satisfactory tenant for 79?

MR. ROGERS: Now, may we have an objec-

tion to this on the ground that it is irrelevant, immaterial and improper cross examination?

THE COURT: Yes, and the objection may be overruled.

WITNESS: I probably wrote him that I hoped he would get a tenant.

Q. (by Mr. Hanson) Now, when he mentioned in that letter that if they didn't pay the rent by a certain time their lease would be automatically broken, what did you assume he referred to?

MR. ROGERS: We object to that as being incompetent, irrelevant and immaterial and improper cross examination.

THE COURT: The objection may be overruled.

Q. But you cannot find any authority, written authority, you haven't found, given to Mr. Ball, Sr., have you?

MR. ROGERS: We object to that, your Honor, on the ground it is incompetent, irrelevant and immaterial, and improper cross examination.

THE COURT: The objection may be overruled.

99 Q. When did your examination cover what period, then?

MR. ROGERS: May we have the same objection, your Honor?

THE COURT: Yes, let it be understood to this general line of examination.

Q. Your examination covered what period?

A. My connection with the company started after the death of Mr. Ball, Sr., and we employed Arthur Ball, Jr. to collect, make repairs, report to me and Mr. Gunter all matters of importance, which he did, apparently in most cases. It was important whether or not leases had been given. He didn't give any lease; he had no right to give a lease. He never mentioned anything in regard to a lease. I do not know who the tenant is in Exhibit No. 1. I never heard it.

Q. A lease to Gust Pulos, Nick Spelotes and Gust Balkos, from the 5th of May, 1932, until the 15th day of May, 1935. I say that is the term of the lease as you look at it?

MR. ROGERS: It is understood that we have an objection to this line of examination as all immaterial?

101 MR. HANSON: I will agree with you now that you have an objection to all this line of testimony, without repeating it to each question, unless there is something special you want to object to, you don't need to repeat it, but you have it to all of this line.

WITNESS: I received the letter of October 20, 1933, signed by Arthur H. Ball, which has been marked as part of Defendant's exhibit 4; I have produced a copy of a letter which I apparently wrote to him.

102 Mr. Hanson read the letter of October 20, 1933, as follows:

“Mr. R. Gould-Smith
1365 Taylor Street
San Francisco, California

“Dear Mr. Smith:

I have delayed sending the report for September on the Eagle Building, hoping I would have something definite to say with respect to 79 West 2nd South.

“I saw Mr. Cluff again yesterday, and he advises me that there is a car to be disposed of before final settlement can be made to the creditors. He thinks that this will be done within a day or two now.

“We have a good man in No. 79 now, and I feel that things will be all right on the corner now. Business still seems to be about the same, but have hopes that better times are on the way.

“Am working hard on the collections and getting to see the tenants daily in the effort to get some money out of them in order to have some money to meet the taxes.

“Trusting that you are well, I am,

“Respectfully yours,
(Sgd.) Arthur H. Ball.”

Q. When he said, “We have a man in No. 79 now, and I feel that things will be all right on the corner now,” what did you understand him to mean?

MR. ROGERS: We object to that as being incompetent, irrelevant and immaterial, and improper cross examination. It speaks for itself.

THE COURT: The objection may be overruled.

104 MR. HANSON: And I will agree with you gentlemen you may have an objection to all of this line of examination.

(Question is read again to witness)

A. I can only give you an impression. My impression was that he had secured a tenant that was capable of paying the rent. He was getting tenants for the building. Whenever there was a vacancy he was open to approach for rental purposes. That is all it was good for. I don't know whether I replied to that letter; I haven't a copy of it. Just before Mr. Ball wrote the letter of October 20, 1933, the tenant had been in the grocery business and I learned this from Mr. Ball. The tenant failed, ran behind in his rent, and I understand that Mr. Cluff acted as his attorney and recovered for the Eagle Block a part of the back rent. In some cases Mr. Ball was keeping me advised as to who the tenants were, but not in all cases. I have produced a copy of the court proceedings in regard to the bankruptcy. Mr. Ball sent it to me so that I would know the claim he was making. I see his signature, "Eagle Building & Renting Company, by Arthur H. Ball, Agent,"

108 There was no such thing, to my knowledge, as the

Eagle Building & Renting Company. Mr. Ball was making an effort to put in a claim for rent for the amount due the W. P. Noble Company, and the other owners of the building. He was agent for the owners. I did not write and tell him he was not the agent, or could not sign it that way.

MR. HANSON: I wish to formally introduce in evidence Exhibit 4 and 4-A (Exhibit 4, letter from Smith to Ball, Exhibit 4-A, letter from Ball to Smith.)

MR. SANFORD: We make the same objection, incompetent, irrelevant and immaterial, not cross examination.

THE COURT: The objection may be overruled.

MR. HANSON: In that same connection I wish to offer Exhibit 1, which was the lease I have referred to and examined the witness about.

MR. SANFORD: Let me see it. We make the general objection that it is incompetent, irrelevant and immaterial, and not part of the cross examination.

THE COURT: The objections may be overruled, and the exhibits may be received.

MR. HANSON: I wish to offer this letter of December 5, 1934, and the reply to it, of December 7, 1934. It is a part of the same correspondence.

110 MR. SANFORD: No objection, except the general objection.

THE COURT: They may be received.

Q. Now, I show you a letter—it is the envelope that is marked “Exhibit 7”—but there is an envelope addressed to you, apparently from Mr. Ball, and a letter under date of December 3, 1935. Is that all of the letters that you received, is that the only letter you received in 1935?

A. I can't answer that question positively “Yes” or “No”. I cannot say that Exhibit 7 is the only letter I received from Mr. Ball in 1935. The conversation referred to in the letter of December 3, 1935, with reference to fire insurance policies, took place in Salt Lake City.

(Exhibit 7-A was received in evidence over plaintiffs' objection.) The letter of December 8, 1937, is a copy of a letter I wrote A. H. Ball in reply to his letter asking about the taxes. The other letters are from Mr. Ball. (Exhibit 9 was received in evidence over plaintiffs' objection.)

The letters under date of January 14 and up to November 10, 1938, are copies of letters which I sent to Mr. Ball.

(Exhibit 10-A letters from Smith to Ball, was received in evidence over plaintiffs' objection.)

I received the letters of March 4, 1939, and May 8, 1939, from Mr. Ball.

(Exhibit 11 letters from Ball to Smith was received in evidence over plaintiffs' objection.)

I inspected the letter signed by Mr. Ball and addressed to Mr. Dressler. I don't know that I wrote to Mr. Ball about the matter. I might have.

(Exhibit 12 Dresslers letters was received in evidence over plaintiffs' objection.)

Mr. Ball got another tenant after the grocery store went bankrupt and wrote me, "I have a good tenant now." He also sent me statements showing that the tenant was paying \$75.00 a month. Each statement showed the rental. When I received the statement and the letter I knew there was a tenant in that building that Mr. Ball had got who was paying \$75.00 a month. I received exhibit 14 in due time. I didn't notice that rent on 79 had jumped from \$75.00 to \$90.00 a month. The first time I noticed that was after this suit was started. I didn't notice the defendant's rental during a period of nearly four years. It was after this suit was started that I learned that the rent had been jumped to \$90.00.

122 (It was stipulated that the witness took the oath of office as director and secretary and treasurer of the W. P. Noble Company; that at the same time Mayme Noble took the oath of office as director and president of the company, the 24th day of February, 1926.) I did not attend a directors' meeting in San Francisco or in California. I attended one in Salt Lake City in May of this year. Prior to that I attended a directors' meeting in Salt Lake City. I don't remember the date. Miss Noble was present. I can't say definitely who else was present. Mrs. Gould-Smith was a director.

(It was stipulated that File No. 7203, W. P. Noble Company, constituted the original Articles of Incorporation, and the oaths of office of the directors, and all of the records of the W. P. Noble Company, as shown by the County Clerk's
124 Office of Salt Lake County.)

My attention is called to an affidavit made by L. C. Robinson on the 24th day of February, 1926. I recognize his signature; I notice that he swears, under oath, that there was no president, no vice-president, that there was no general manager; that L. C. Robinson was secretary and treasurer; that on that very day Mayme Noble took the oath of office of director and president; that on the 18th day of February, 1926, I took oath of office of director, secretary and treasurer. There is an affidavit signed by Edith Gould-Smith on October 25, 1922. I don't know whether she was present at that meeting. I presume that I acted as
128 secretary at that meeting. I haven't any records in my possession of a meeting. I know that prior to May of this year we had a meeting and elected officers. Mayme Noble was elected president. I was elected secretary and treasurer. The board was reorganized after Mr. Robinson left Salt Lake City. The meeting was held at 629 East South Temple Street. I don't know how it was I took the oath of office down in California, as a director, before the 24th day of February, 1926.

My impression is that we held a meeting at Salt Lake City prior to February 18, 1926.

(Objection was made by plaintiffs' counsel to this line of examination, upon the ground that it was incompetent, irrelevant and immaterial, and not proper cross examination. The court overruled said objection.)

131 I don't recall anything else that transpired at that meeting. I don't recall any meetings from 1926 up until May of this year. I have no minutes of any meeting. I do not know of the record of any proceedings of the Board of Directors, acting as such. I know that it required four directors to hold a meeting; that whenever a meeting was held there would be a quorum. I don't know of anything that came before the company that needed a meeting between 1926 and May of this year. The whole transaction and management of this business and affairs, as far as Salt Lake was concerned, was not left to Arthur Ball. Miss Noble talked frequently with Arthur Ball about matters and Ball paid me the money that was to be distributed, and I distributed it. Mr. Ball distributed to me only that portion that would go to the Noble Company. I presume he sent the Stockyards Bank their portion, and I presume that he sent to the other interests their portion. I do not find the reports for 133 1931 or 1932. I did have them. I didn't furnish them to you. I brought all I had. Exhibit 15 is the report of December 15, 1929, and the rest is

for 1930. That is Ball's monthly report. The little check marks and figures are mine.

(Exhibit 15 was received in evidence over plaintiffs' objection.)

The little pencil notations on exhibit 16 are mine.

(Exhibit 16 was received in evidence over plaintiffs' objection.)

35 Exhibit 17 is for the year 1934, and the notations in pencil are mine.

(Exhibit 17 was received in evidence over plaintiffs' objection.)

Exhibit 18 is the reports for 1935.

(Exhibit 18 was received in evidence over plaintiffs' objection.)

(Exhibits 19 and 20 were received in evidence over plaintiffs' objection.)

137 Exhibit 21 consists of reports for 1938. The little pencil notations are mine, and signed usually by Mr. Ball.

(Exhibit 21 was received in evidence over plaintiffs' objection.)

I think exhibit 22 concludes the reports.

(Exhibit 22 was received in evidence over plaintiffs' objection.) (Exhibits 15-22 are monthly statements by Ball.)

Exhibit 23 was among the papers which I furnished you and which Mr. Ball sent to me in the course of the business of the company.

(Exhibit 23 Tax statement and letters was received in evidence over plaintiffs' objection.)

141 The pencil notations on exhibit 13 are in my writing. The check marks on exhibit 14 are in my writing. The additions to exhibit 13 are mine. I added the collections for February, 1933. Also for March. May has been added, \$609.00. June, 1933, is \$483.00; July, \$390.00; August, \$468.50; September, \$385.00. I added up October. I also added the rent at No. 79. at \$75.00 per month. I didn't look closely at the rent of each case. I had before me a sheet showing the different rentals for those months. I did not observe that the rent for 79 had been increased \$15.00, commencing September, 1936. I will tell you how I failed to observe it. In examining these statements which I received monthly, very often there was a variation in the amounts paid by different tenants. I did not happen to observe when the change took place, that it was raised from \$75.00 to \$90.00. I didn't observe the month it was changed at all. Frequently the tenants would be behind in a part of their rent and it would be made up. Mr. Ball did not always state this in his reports. In some cases I made a notation of "Rent Reduced". I didn't go over the reports very carefully at all. Mr. Ball looked after the borrowing of money here with my consent. I would take the matter up with the board of directors. I spoke to my wife and Miss Noble. I would give Ball my consent to borrow

the money and the bank would let him have it on my letter. I never took up the matter of borrowing money with the board of directors. Whenever Mr. Ball wanted insurance he would report to me and he and I would act. Whenever he wanted repairs, if it were for a large amount, he would report to me and we would act upon it, and that was true of the entire handling of the business. He would take the matter up with me and no one else. Ball paid the taxes out of the rentals if there was enough money; if there wasn't we would borrow it. On my instructions the bank would let him have the money, and my instructions to him were to pay the note from the rentals received. He was working under instructions. I think there was a clause in the warranty deed that the plaintiffs should have immediate possession.

RE-DIRECT EXAMINATION

BY MR. SANFORD:

I had a conversation with Mr. Ball at the Noble residence in April, 1933. Miss Mayme Noble was present. I asked Mr. Ball to come up to the Noble residence. We talked about the Eagle Building. I told him it would be bad policy to give any leases, that we might want to sell, and we wanted only tenants from month to month.

RE-CROSS EXAMINATION

BY MR. HANSON:

I told Mr. Ball what I thought and how we

150 should conduct the business from that time on. He did not say to me, "I have given leases," and I did not ask him if he had given any. We discussed the building, the times, the low rentals, the possibility of a sale. I told him that I wanted to keep the building free and intact; that there might be a chance to sell it. I cannot tell what time in April it was. I don't know how Mr. Ball ran that personal account of his. I didn't sign any notes for the Noble Company for money that he borrowed.

The deposition of W. H. Dressler, a witness for the plaintiff was read into the record and, in substance, it is as follows:

DIRECT EXAMINATION

151 My name is Willard H. Dressler, age 61 years; permanent address Omaha, Nebraska; temporary address, Long Beach, California; I am the same W. H. Dressler named as grantee, together with Ford E. Hovey in a conveyance from the Stockyards National Bank of South Omaha. I don't think I wrote a letter to A. H. Ball after his father's death that I desired or requested said A. H. Ball to collect the rents and look after the property and carry on with the Eagle Block as his father had done. I did not inform A. H. Ball, either orally or in writing, that he could enter into a lease, or leases, upon the Eagle Block, or any portion of it, other than from month to month. After the sale of the Eagle Block in 1939,

A. H. Ball informed me that he had entered into a written lease at 69 (79) West 2nd South Street with Nick Floor, Inc. I didn't have any information from anyone prior to June, 1939 of any such lease. I commenced to handle business connected with the Eagle Block before the death of A. H. Ball, Sr. (H.J.Ball) I first met the present A. H. Ball about November 12, 1937. I was in Salt Lake City and talked with A. H. Ball personally about the Eagle Block on November 12, 1937, November 4, 1938, and September 6. 1939.

ANSWERS TO CROSS-INTERROGATORIES

54

A one-fourth interest was conveyed to me from the Stockyards National Bank of South Omaha in October, 1929. A. H. Ball of Salt Lake City, Utah, was in charge of the building. I did not make any change in the persons or agents who were looking after the renting of the building and collecting the rents. I did nothing towards finding out who the tenants were, what rent was being paid, etc. I received a monthly financial statement, showing the amount of rent collected and its disposition. I am attaching the statement of January, 1939. The others are in the same form. I was not acquainted with the father of A. H. Ball. So far as I know the father collected the rents, looked after the repairs, and disbursed the remainder to parties of interest. After his death his son looked after the renting of the building,

collection of the rents and the disbursing of same. Mr. Gunter, an attorney, was not my attorney in looking after the building and employing agents. I attach copies of letters which I wrote to Mr. Ball as far back as December 24, 1938. I have letters written to A. H. Ball as far back as December 23, 1938. Prior correspondence with Mr. Ball is in Nebraska. I have no letters from Mr. Walker T. Gunter. I did not give A. H. Ball any instructions whatever regarding the renting of the building. I did not instruct A. H. Ball to enter into a lease from month to month. A. H. Ball did not give me any information concerning the leasing of the premises at 79 West 2nd South Street. Mr. Gunter, attorney at Salt Lake City, did not advise me concerning leases. I have no attorney in Salt Lake. The first information I received of any lease was a notice dated June 9, 1939, purported to have been signed by the new owner. It came through the United States mails. Copy of said original notice is attached hereto.

I commenced handling the business of the building in question immediately after I became interested as an owner. A. H. Ball was looking after my interest in renting the building. I did not make any inquires concerning the tenants or the amount of rent they were paying. I dealt with A. H. Ball. I did not deal directly with any of the tenants of said building. I made no inquiries as to what leases the tenants had or what rentals were

being paid. I came to Salt Lake City first about November 12, 1937. I met A. H. Ball at that time. I went to the Eagle Block with Mr. Ball. He showed me the building from the exterior and the ground that went with it. I did not see a single tenant and I do not think we even went into the building. I first saw the building in the early twenties. From the time I became interested in the building and up until the time that I disposed of my interest, A. H. Ball collected the rent from the tenants and remitted same to the various owners, as their interest appeared. No one, other than A. H. Ball, had anything to do with the renting of said building or the collection of the rentals. I did not make any inquiry of A. H. Ball as to the nature of the tenancy of any tenant in the building, or as to the character of leases he had given until after the sale of the premises in 1939. I saw the building twice. I do not know if the defendant was a tenant in said building. If I ever saw the sign, "Golden Gate Beer Garden", I do not recall it. I do not think I saw the sign, "Nick Floor, Inc.", and I made no inquiries as to the nature of the tenancy of the defendant. I did not see the improvements that the defendant had placed upon said premises. I did not go into the premises occupied by said defendant. I did not know that his rental was increased from \$75.00 to \$90.00 per month. On June 12, 1939, I wrote a letter from Omaha, Nebraska, addressed to Arthur H. Ball, at

Murray, Utah. I acquired an interest in the property in question prior to May 15, 1935. At no time did I make any inquiry as to who the tenants were, what rent was being paid and what the nature of the tenancy was. The Stockyards National Bank conveyed a one-fourth interest to me, and others, as trustees for liquidation. I do not continue to hold such interest as a trustee. In the early twenties I inquired as to who had charge of the building as agent for the owners. I never did make any inquiries as to who the tenants were or as to the nature of their tenancy.

ROBERT GOULD-SMITH, Recalled

CROSS EXAMINATION

BY MR. HANSON:

165

I did not have the seal of the company in California. The seal was lost a good many years ago. I never saw it. I think it did have a seal, at one time. I looked for it in the company's office in Salt Lake City but I couldn't find it.

It was stipulated that exhibit 24, consisting of letters, copies of letters and telegrams between Mr. Ball and Mr. Dressler, which were attached to Mr. Dressler's deposition, be marked for identification.

Exhibit A, a warranty deed executed by the W. P. Noble Company, conveying an undivided one-half interest in the property to the plaintiffs, was offered and received in evidence.

Exhibit B, a deed executed by Ford E. Hovey and Willard H. Dressler, Trustees, conveying an undivided one-fourth interest in the property to plaintiffs was offered and received in evidence.

Exhibit C, a warranty deed conveying an undivided one-fourth interest in the property to plaintiffs, the grantors being William Frederick Bragg, Mary C. Bragg, his wife; Robert Russell Bragg and Hazel F. Bragg, his wife; Frederick Ingham Bragg and Laura Lillian Bragg Harkins, and Hazel Bragg and Leonora I. Bragg, was
170 offered and received in evidence.

(Plaintiffs' Rest)

172 ARTHUR H. BALL, a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HANSON:

My name is Arthur H. Ball. I live in the County. I have lived in Salt Lake City all my life. I am a married man, employed at Arthur Frank's Store in Salt Lake City. I have been employed there for fourteen years. I have been acquainted with the Eagle Block for 17 or 18 years. I am the son of H. T. Ball who had charge of the building at one time. The building is on the southeast corner of 2nd South and West Temple. There are three stories on half of it and two stories on the other half. Seven portions of the building

face on 2nd South, on the ground floor. These portions were occupied by different firms. The corner one has been occupied by the defendant, Nick Floor, Inc. It is known as 79. The next one is 77 on the ground floor. It is occupied by a store that has imported food stuff for sale. 75 is an entrance upstairs to a hotel. 75½ is a restaurant, known as the Plaza Cafe. The next is a soft drink place; the one above that is the Busy Bee restaurant; the next is a Barber Shop the one east of there is the Stadium Cafe. I was agent for the building after my father passed away. I assisted him prior to his death.

Q. And what did you do?

MR. ROGERS: Now, may we have an objection to this, your Honor, on the ground that it is incompetent, irrelevant and immaterial?

THE COURT: Yes, and the objection may be overruled.

I collected the rents and helped him look after the property. I was familiar with the work my father did in connection with the building.

Q. And what did he do?

MR. ROGERS: We make the same objection, your Honor.

176

THE COURT: Perhaps you have in mind that all this line is subject to the objection that it is immaterial.

MR. ROGERS: And incompetent and irrelevant.

THE COURT: Well, not necessarily incompetent.

MR. ROGERS: Well, I think it is.

THE COURT: It may be irrelevant or it may be immaterial. However, you may have the benefit of all of that objection, and it may be understood, if you so desire.

My father collected the rents and looked after all the property. He gave leases in writing. Everyone had a lease when I took hold of the property; I mean on these different stores. There were seven there with leases in writing, all executed by my father.

Q. And all of those written leases executed by your father?

MR. SANFORD: We object to that as not the best evidence, a conclusion, immaterial and irrelevant.

178 THE COURT: The objection may be overruled.

Attorney Walker T. Gunter was acting with my father in the handling of the affairs of the building. Walker T. Gunter would prepare the leases. I saw his signature on them.

Q. In what capacity?

A. He witnessed them.

MR. ROGERS: That clearly is incompetent.

THE COURT: The objection may be overruled.

I collected the rents while my father was sick, I would say for a year and a half. Immediately following my father's death I had a conversation with the lawyer about the building.

Q. And what conversation did you have?

MR. ROGERS: We object to that your Honor, upon the ground that it is incompetent, irrelevant and immaterial.

MR. HANSON: Your Honor, they, themselves, put Mr. Gunter in here as one of the men who had charge of these matters. Mr. Smith's own testimony made that very clear.

THE COURT: The objection may be overruled.

When my father was sick, Mr. Gunter told me to go ahead and collect the rents like my father had done, and put them in the bank, and I did that. I talked to the lawyer after my father had passed away, and he said, "Wait until everything is all fixed all over," and we made out the statements and he okehed them, and I sent them away. That was in June of 1930.

Q. And to whom did you send those statements?

MR. ROGERS: It is understood, your Honor, that we have our general objection to all of this line?

THE COURT: Yes, I think it will answer the purpose because it is directed to the same point.

I sent the statements to the W. P. Noble Company, Charles L. Brome in care of the Bragg Estate, and the Stockyards National Bank of South Omaha. C. L. Brome, a lawyer over in Wyoming, was handling it for the Bragg Estate. I did business for those heirs through him. I sent them to the Stockyards National Bank in care of C. L. Dressler, and for the Noble Company I sent them to Mr. Smith in San Francisco. I collected the rents while my father was sick, made out the statements and sent them as described, one-half to the W. P. Noble Company; one-fourth to the Bragg Estate, and one fourth to the Bank in Omaha. Whatever expenses were paid were shown on the statements. I saw Mr. Gunter, as a rule, every day, sometimes in connection with the estate. I knew Mr. Smith a good many years ago when he lived here. Mr. Smith was here for the funeral of my father. I had a conversation with him at Miss Noble's house. We went over the details of the Eagle Building and Mr. Smith told me to go ahead and collect the rents, and they would decide later what they were going to do. Walker T. Gunter wrote a letter to each one of them and they wrote him back and advised. I saw the letters. I read the letters, or he read the letters to me. I saw a letter signed by Mr. Smith, who sits here in court.

Q. Now what did that letter say.

MR. ROGERS: We object to that upon the ground that it is incompetent, irrelevant and immaterial.

THE COURT: I am inclined to think the objection is well taken.

MR. HANSON: On what ground, your Honor?

184 THE COURT: Well, it wouldn't be the best evidence.

MR. HANSON: That is not the objection he made.

THE COURT: Well, if it is on the ground it is irrelevant, of course, the objection should be overruled.

MR. HANSON: That is the objection made, that it is irrelevant and immaterial.

MR. ROGERS: We will make the objection that it is not the best evidence.

MR. HANSON: I can't show it all at one time, but we will show this, that Mr. Gunter died; we will show that we have made a search for all effects through Mrs. Gunter and that we can find nothing there, or any of this correspondence. We will show that, your Honor.

THE COURT: Upon that assurance, that objection will be overruled.

The letter advised Mr. Gunter that I, knowing all about the property, and he advised it would be logical to have me go and handle the work, the same as my father had, on that under-

standing. Mr. Gunter said, "That is fine." From then on I handled it as my father had. I saw letters from the Stockyards National Bank and from the attorney representing the Bragg Estate, which said, as I have told you. I made out several written leases, one on 75, and there was one lease on 73, if I remember right. I executed the lease (Exhibit 1). It was given to Gust Pulos, Nick Spelotos and Gust Balkos on 79 West 2nd South. I gave a lease on 75½ for three years, and I gave a lease to the man who had the restaurant for three years. This was in '31 or '32. I do not recall any other leases I gave prior to the one in question. Louis Scarcelli occupied 79 immediately prior to the defendant, as a grocery store and meat market. He didn't have a written lease. He failed and went into bankruptcy. I presented a claim on behalf of the heirs in the name of the Eagle Building Rent Account. 79 was vacant for some time. I had difficulties over that period of time in renting. There was a vacancy at 69. The tenants who came to see me wanted leases in writing.

Q. Could you rent store buildings down there on 2nd South to any extent, without giving written leases?

MR. SANFORD: Just a minute, that is calling for a conclusion. His testimony is he gave only two leases during the whole time.

THE COURT: The objection may be overruled.

They would demand written leases. Mr. Floor came to me about a month after the place there had failed.

Q. Just tell us the conversation you had with Floor regarding the rental of it.

MR. ROGERS: Our objection goes to all of this, we assume?

THE COURT: Yes, it may be so understood.

The signature at the bottom of exhibit 25 is my father's signature. The signature of H. T. Ball on exhibit 26 is my father's signature. They were leases on some portion of this building, executed by my father.

191 MR. HANSON: I offer first exhibit 25, and also exhibit 26.

MR. ROGERS: Just a moment. May we have an objection, your Honor, as to exhibits 25 and 26, that they are incompetent, irrelevant and immaterial?

THE COURT: Let the objection be overruled.

The signature of H. T. Ball on exhibit 27 is my father's signature. That is an old lease on 79 West 2nd South, dated February 23, 1927, and expiring June 1, 1930.

MR. HANSON: We offer this one in evidence. Now, this, your Honor, is a written lease on these same premises, for a number of years,

executed by his father, and that was in force at the time his father died and no renewal made after that. I will find out if any renewal was made after that, but I offer it on the same theory as the other.

MR. ROGERS: We object to exhibit 27, your Honor, on the ground that it is incompetent, irrelevant and immaterial.

THE COURT: Let the objection be overruled.

1111 193 Scarcelli failed about May of 1932. He failed before his lease expired. The place remained idle until the defendant company went in. For several months. Mr. Floor approached me about August of 1933. He said he wanted to rent the place. Prior to Mr. Gunter's death, the lawyer prepared the leases and signed them as a witness. After his death I consulted Mr. Cluff. I wrote letters and suggested that Mr. Cluff represent me to Mr. Brome of the Bragg Estate, the Stockyards National Bank, and Mr. Smith, and they said it was all right. I had a conversation in Mr. Cluff's office and Floor said he wanted a lease for several years. He wanted to be protected in the length of time he stayed there. He may have said he wanted to open a grocery store or meat market and that if they changed the prohibition law so that beer could be sold, he might want to open a beer parlor. He said that if he opened up a beer parlor he would have to make a number of changes,

and I told him if he made any changes he would have to pay for them, if he got a lease. At first he wanted a lease for five years, with an extension of a couple of more years. I objected. I only wanted to give it to him for five years. He said what he was going to do, and would pay the rent, and I thought I could get the property rented so I could get some revenue to pay the expenses, so I gave it to him. Defendant's exhibit 28 is the lease prepared for the defendant company by Cluff's office. I signed it as agent and Floor signed it for Nick Floor, Inc.

MR. HANSON: We wish to offer this lease in evidence.

MR. ROGERS: If the court please, we object to exhibit 28 on the ground that it is incompetent, irrelevant and immaterial. The first objection is that there has been shown no written authority upon the part of Mr. Ball to execute the lease. Secondly, that the lease, upon its face, shows that the parties named as lessors in the lease were not the owners of the property at the time the lease was given.

198

THE COURT: Well, let the objection be overruled.

Mr. Floor went into possession right away. I received \$75.00 a month and remitted it to the different owners. I changed from remitting to the Stockyards National Bank after a time and sent statements to W. H. Dressler. I presume Mr.

Dressler and Mr. Hovey acquired the interest of
 the Stockyards Bank. I received a letter saying
 that the bank had to have the property set aside.
 I think it was just after the lease. At the time
 I made the lease out I did not know that the in-
 205 terest of the Bank had ben conveyed to Dressler
 and Hovey. I sent the money directly to Dressler
 in '34, '35, '36, '37 and '38. I received a letter
 from Mr. Dressler every month when I sent the
 statements. Some of these letters I gave to Mr.
 Cluff, some of them were lost when our house
 caught on fire. That was in '34 or '35. There
 were some letters from Mr. Hovey. Mr. Gunter's
 family moved away from here after his death.
 They went through his papers and I went over
 and got what was over there . The letters from the
 Stockyards Bank and from Smith were destroyed.
 They were all put in a garbage can and burned.
 I saved some of the letters. I don't know what be-
 came of them. I didn't save any of the letters
 about me going ahead with the Eagle Block. They
 were received inside of a month or six weeks
 208 after my father's death. All the papers and ef-
 fects of Mr. Gunter, as far as I know, have been
 destroyed. After the first three years Mr. Floor's
 rent was raised from \$75.00 to \$90.00 a month, the
 other two years. The balance of the five years.
 He had three and two and then they were to de-
 cide what increase there was to be for the other
 two. I remitted the \$90.00 every month to the

different parties. Mr. Smith was here several times. We walked over to the Eagle Building and he saw the building and looked at it from the outside, and he said, "You go on and carry on the work as you are, and do the very best you can." Before Mr. Floor went in, some of the outside portion of 79 was in cement. Below the glass some of was in cement. Mr. Floor took off the wood and cement and put on all tile, I think, in front and on the side, on West Temple, just a little strip there under the windows, at his own expense. It helped the appearance some. I pointed that out to Mr. Smith. I told Mr. Smith I thought I had a very good man in there where I was sure I would have the rent, and he said "That is fine." None of the heirs of the Fred Bragg estate ever come, or Mr. Hovey. Mr. Dressler first came in the Fall of '36 or the Spring of '37. I showed him the property. He said it needed a lot of improvements, and I said, "Yes," and he said, "You go ahead and do the very best you can." Nothing was said about any leases or who was occupying it. I don't think anything was said to Mr. Smith about leases. I told Mr. Dressler that a party had a lease on it. I wrote him a letter, I think, along last May. Prior to that I told him on one of his visits here. I told him that all the other leases had expired; the only one there who had a lease was 79. I had a conversation with Mr. Smith at the Noble home about two years ago. I had one every year

when he was here. I had one about in '37. He said not to have any more leases, that they had figured from the letters they had had from Mr. Hovey and Mr. Dressler they were going to sell the property. That was in April or May of 1938. In the Spring of 1933, Mr. Smith did not tell me not to give any written leases. I looked after all the details of the building, such as getting insurance, paying the taxes, looking after repairs. At no time did the owners make any objection as to the way the building was being handled, or to the remittances sent. Occassionally I had to borrow money from the bank. I would borrow it in the name of "Eagle Building Rent Account, A. H. Ball, Agent.". I had no authority from Mr. Dressler or from the Bragg Estate to borrow money. I made arrangements about the length of the loans, and paid them off myself. I received Exhibit 30, a letter addressed to me, in '31 or '32. The signature, "Charles L. Brome", is the attorney who did business with me for the Bragg Estate. I sent all the statements to him and received all my correspondence from him so far as the Bragg heirs were concerned.

(Exhibit 30 was offered and received in evidence over plaintiffs' objection.)

218 I received a letter from Mr. Dressler, (Exhibit 29) in due course of the mails.

(Exhibit 29 was offered and received in evidence over plaintiffs' objection.)

I am acquainted with Miss Noble. I would go to her house occasionally and meet Mr. Smith there. Miss Noble did not give me any instructions regarding the building. I explained to her what was being done and she made no objections to the way it was being handled by me.

CROSS EXAMINATION

BY MR. ROGERS:

My father had been an employee of W. P. Noble personally for 17 years, or more. I think he looked after Mr. Nobel's business for 30 years or more. He handled the business at the Eagle Building for 17 years, and for Mr. Noble prior thereto for 13 years. Mr. Gunter had been employed as attorney for the Noble Company for a great many years before my father's death. Mr. Gunter handled legal matters connected with the Eagle Block as long as my father had charge of the building. That would be 17 years or more.

222 I do not recall a conversation between Mr. Gunter, Mr. Gould-Smith and myself shortly after the death of my father. I think there was a conversation with Mr. Gould-Smith in the presence of Mr. Gunter right after my father had passed away. Mr. Gould-Smith did not tell me that he wanted me to take up with him and Mr. Gunter everything of importance that came up in connection with the Eagle Block. He said to just take and handle the property the same way my father

had. That conversation occurred over nine years ago. Those were the only instructions that Mr. Gould-Smith gave me with reference to the Eagle Building. I did not advise Mr. Gould-Smith of every little detail that came up in connection with the building. I wrote him every month and told him what I had done, or what needed to be done. I talked to the lawyer and Mr. Smith always wrote back and said "All right." I advised Mr. Gould-Smith of things to be done in connection with the building. I consulted with Mr. Gunter all the time. I wrote Mr. Gould-Smith concerning the employment of Mr. Cluff about a week or two after Mr. Gunter's death. I haven't a copy of the letter. That is one of the letters that was destroyed in the fire. I tried to keep the correspondence and papers with reference to the Eagle Block together. They were kept in a box at my home on "I" Street. I have not any correspondence here, or anywhere else that had to do with the Eagle Building prior to May of this year. The things I produce here are old leases from years and years ago. Once when Mr. Dressler was here he said "Is that leased?" I said, "We have got a very good man in there and I am getting the rent every month." I didn't tell him I had given him a written lease which might, by its terms, run for a period of 8 years. Mr. Dressler didn't ask me how long the lease was for. That was in '36 or '37.

I received exhibit D (a letter from W. H. Dressler) shortly after June 12, 1939.

(Exhibit D was offered and received in evidence over defendant's objection.)

I don't know whether or not there was a notice with Mr. Dressler's letter similar to the document shown me. I found out what he had reference to. I noted this language, "On the face of it, it looks like a racket." Also, "Before I take any action at all, I want you to give me the facts," and also this language, "Does Nick Floor, Incorporated, have a written lease as outlined in the notice? If so, when does it expire, and who signed it on behalf of the owners of the Eagle Block?" I had told Mr. Dressler two years before that there was a lease upon these premises.

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ARTHUR H. BALL, Recalled.

DIRECT EXAMINATION

BY MR. HANSON:

I wish to make a correction in my former testimony. The letter I received from Mr. Smith was received at my home. That's the one about handling the property as my father had handled it. I took the letter to Mr. Gunter and he kept it. That is when he showed me the letters I referred to this morning. My wife also saw the letter from Mr. Smith.

I also wish to correct the signing of the lease. It was back-dated to the 18th of September, but

the lease wasn't executed until November. Mr. Floor had gone into possession before the lease was signed. After I came back from Chicago the lease was made and signed, and dated back.

ELIZABETH BALL, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HANSON:

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My name is Elizabeth Ball. I am the wife of Arthur Ball. I have lived at 4253 Highland Drive since two years last June. I have been married to Mr. Ball for 27 years. I am the office secretary of the Salt Lake Council, Boy Scouts of America. I helped Mr. Ball make out the reports each month and took dictation for any letters he desired to write. The letters and reports in typewriting were made by me under Mr. Ball's direction. Art's father died in June, 1930. I think Art's father looked after the Eagle Block for 27 years. Art looked after the building when his father was in the hospital. I followed the routine that he had followed in making up the reports. I recall a letter coming to the house from Mr. Smith. I have met Mr. Smith. The letters came two or three months after the Senior Ball's death. I read it. I do not know where the letter is. There were some papers in our attic and the roof burned

and things got water-soaked and were thrown away.

Q. What was the contents of that letter, as you remember it?

MR. ROGERS: Just a moment. We object to it as incompetent, irrelevant and immaterial.

THE COURT: The objection will be overruled.

The letter stated that he was very sorry on the death of Art's father, and he asked if Art would continue to carry on the work that his father had previously done. That is all there was in it.

CROSS EXAMINATION

238-9 BY MR. ROGERS:

This letter was received in 1930, in August or September. My attention was not again directed to this letter until within the last week or so. We hadn't given the matter any thought. After a period of a little over 9 years I purport to give the contents of the letter. I can give the real substance of it. I don't think it mentioned the Eagle Block. I couldn't say. I don't remember. I talked to Arthur about it at noon today. I didn't talk to him about the letter two weeks ago. I haven't talked with anyone about it in the last 9 years.

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ARTHUR BALL, Recalled.

CROSS-EXAMINATION

BY MR. ROGERS:

The letter from Mr. Gould-Smith was received by me in August or September, 1930. I showed it to Mr. Gunter. Mr. Gunter had received letters from the other owners before I got this letter. I had seen them, a letter from Mr. Brome in July, 1930, a letter from Mr. Dressler in about July, 1930. I saw both letters on the same occasion. That was a week before I got a letter from Mr. Gould-Smith. If Dressler was here in '36, the Fall of '36, it was then that I told him about having leased 79. If he was here in the Spring of '37, it was in '37 that I told him. I would say that I used the word "leased" in my conversation with Dressler. That I told him the only lease in effect on the Eagle Building was 79. I am sure Mr. Dressler understood me. I did not know, for a number of years prior to May, 1939, that some of the owners of the building were desirous of selling it. I first learned of it in '37.

I looked over Exhibit E this morning. I didn't tell Mr. Dressler in this letter that there was a lease on this place. Mr. Dressler writes a letter exhibiting surprise. I got the impression from the letter that Mr. Dressler knew nothing about the lease, that he considered that this thing was a racket. I don't know why I didn't tell him in my letter of July 15, 1939 that I had previously told

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him about the lease in '36 or '37. I don't remember whether or not I stated this morning that Mr. Floor was to pay \$75.00 per month for three years, \$90.00 a month for two years, and after that he and I were to agree upon the rental. The lease was back-dated from some time in October. I said it started September 18th, but the lease says the 25th. I think the letter from Brome was written in long hand. I think it was signed "C. L. Brome." I can't say whether the Bragg Estate was mentioned in his letter. I would say that Dressler's letter was typewritten. I couldn't say whether the Stockyards National Bank of South Omaha was mentioned. Mr. Hovey's name was not mentioned in this letter. The Brome letter stated that I, being familiar with the property, to go on and carry on how my father had, or words to that effect. That's all I can recall. The letter from Dressler said about the same way.

255 The conversation with Mr. Gould-Smith in Mr. Gunter's office, with reference to my employment on the Eagle Building, occurred in 1930. He said, "You go ahead and handle the building just like your father had, temporarily, until after we decide what we want to do. There were several conversations with Mr. Gould-Smith after my father's death. I think before Mr. Smith left for home he said, "You go right on and do the things just like your father had." Two months after that he wrote and told me to go ahead and carry on

as my father had done. I don't remember a conversation with Mr. Gould-Smith at the Noble residence in April, 1933. If he was here, there was some conversation, but I couldn't say what the words were. I don't remember whether in April, 1933, at the Noble residence in the presence of Miss Noble, Mr. Gould-Smith said in substance, or effect, "Conditions are uncertain. We don't want to tie the Eagle Block up in any way, because we may wish to sell, or conditions may improve." They were not words to that effect, or in substance to that effect. I don't recall there was a conversation at that time. There were some conversations at that time, but the exact words I don't remember. Conditions were disturbed and unsettled in 1933. I knew in 1937 that some of the owners wanted to sell. I knew I had given a lease on these premises which expired in 1941. I received the original of Exhibit F. On May 29, 1936, I knew some of the owners wanted to sell. After the conversation with Mr. Dressler in '36 or '37, I didn't call the attention of anybody to the fact that I had given a lease upon these premises. I thought I had notified Mr. Gould-Smith. I testified this morning that I hadn't. I do not remember any conversation with Mr. Gould-Smith at the Noble residence when Miss Noble was not there. I was quite familiar with the premises at 79 West 2nd South during this period of time. The changes made in the building were in front, and consisted

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of putting in some tiling around the front entrance.

263 NICK FLOOR, a witness produced on behalf of the defendant, beng first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HANSON:

Ny name is Nick Floor. I am President of the defendant company. I procured the lease on this building. I live in Salt Lake City. Since I got the lease I have been spending all my time selling beer, and such as that. Prior to that I was in the butcher shop business in Garfield, meat market and general merchandise. I was out to the Garfield Smelter for eighteen years, and mining and livestock. In 1933 I learned there was a vacancy at 79 West 2nd South Street. I went to the next door, 77, and inquired who was the man in charge. Then I went further up, what used to be a pool hall, and asked them. They told me A. H. Ball. I went to see the trustee in bankruptcy in the Beason Building. The trustee said that Mr. Ball was the agent. I went to see Mr. Ball. I explained to Mr. Ball what I wanted the place for.

Q. And what did you tell him?

266 MR. ROGERS: Now, may we have an objection, your Honor, to all of this, upon the ground that it is incompetent, irrelevant and immaterial.

THE COURT: The objection may be overruled.

I met Mr. Ball and he told me he had a place for rent. The place wasn't fit for what I wanted it. I took that up with Mr. Ball. The floor in the back of the building had holes in it. It wasn't level. I went into possession on the 25th of September. I was promised a lease and option of purchase by Mr. Ball. Mr. Ball told me to bid on the stock of merchandise, that it would be better for me to bid to get the groceries in there, and then I could get the lease. I intended to open a beer parlor if it was legalized, otherwise a meat market and grocery store. Mr. Ball was in Chicago and that delayed the matter until he got back. It was the 18th of November when the lease was made. Mr. Ball wanted it dated from the time I took possession. I was paying \$75.00 a month at first. I opened a beer parlor after the prohibition law was changed. It was not suitable for a beer parlor unless alterations was made. The cement on the outside was all cracked up and falling off; the building had not been painted and it looked bad. I began repairs and alterations in March or April of 1934. The biggest alterations were made to the Granite Mill & Fixture Company from Sugar House. I was getting ready to exercise my option that required the expenditure of \$1000.00. I went to different firms for different work. I had a contract given for this tile work with Elias

Morris & Sons, also another contract with Benardis Electric Shop. Elias Morris & Sons placed the tile on the outside. I had competitive bids.

Q. And was Elias Morris & Sons Company in your opinion, the best bid?

A. Yes, it was the best bid.

MR. ROGERS: We assume we have a general objection to all of this?

MR. HANSON: Yes, I agree that you may.

I accepted the bid of Elias Morris & Sons. The place was closed up for about two months while the work was being done. Exhibit 31 is the bill rendered by Elias Morris & Sons for the tile work and I paid it with a check. (The defendant offered exhibit 31, consisting of four papers,—the bill, two checks and a cash item of one dollar).

273 MR. ROGERS: We make the general objection, your Honor, to this exhibit.

THE COURT: The objection may be overruled.

All the tile work done on this place was done and paid for by me. The Granite Mill & Fixture Company did a lot of alterations inside of the building. They put in a new floor, put a partition in the middle, two lavatories and two stairways; and then a lot of alterations on the doors, and put in a new plate glass. Then they put a paneling all around the building on the inside. Then they put in a floor and on top they put a hardwood maple floor. I had a bid from the Utah

Builders, on the same alterations. (Exhibit 32, receipted bill from Granite Mill & Fixture Company, was offered in evidence by defendant.)

The booths and cigarette case should come out, also some tables and a box.

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MR. SANFORD: We object to this as uncertain and indefinite, and there is nothing to show here what was done in the way of improvements. I object to each and every item of it on that ground. The main item, alteration of the rear room and basement, is too indefinite and uncertain, and we cannot tell whether they are alterations or improvements. Mere alterations to suit his particular trade are not improvements. He said he did these things to fit his business.

THE COURT: The objection will be overruled.

MR. ROGERS: And we make the general objection, also, your Honor.

The floor was old and worn out, with holes in it. You could see down into the basement. I replaced that floor, had it leveled, put in another floor, and on top of that put in a hardwood maple floor—twenty-eight feet long by twenty feet wide. I put stairs in there, and I cut another stairway down. There was an old broken toilet on the main floor. The stairway could not be used at all the way it was. I replaced that, and I erected two lavatories downstairs and put in two toilets. I put linoleum on the floor and carpet on the stair-

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way. which we have taken out as it is kind of worn out now. I connected the sewer with those toilets. I made another connection. There was an old pipe which was busted, which is about 55 feet long. We put a new pipe; also a trap to catch the water dropping down. I made changes in the door and the transom on the West Temple side. I changed the steps, that is, new cement with three steps instead of one. The entire space occupied by me is 68 feet long and twenty feet wide. I changed the partition in the room,—made it an arch shape. I have paid out \$775.00 for these alterations.

Q. Go ahead, if there is something you want to explain.

MR. SANFORD: We object to that as showing what the alterations cost, because they are alterations made to suit his own convenience, and not improvements to the building.

The COURT: The objection may be overruled.

I put five sets of booths in the front room, amounting to \$237.50; I put in a new baseboard, also paneling. The wall was just a brick wall with paper on. I repapered the entire walls, and put in paneling about four feet high. The paneling is made out of pressed wood. The glass is not included in the \$775.00. It included the toilet and plumbing down below. There was additional paneling that run to \$25.00 or more; there was

an additional charge for changing doors in rear room, \$15.00, and a pair of swinging doors, \$5.00. The total is \$820.00. I can take out the five sets of booths. That is not part of the \$820.00. The item, "Repair and set in place a transom and screen, \$22.50", is on the front. That makes \$842.50. The item, "Furnish and set in place one partition with swinging door, \$85.00" should be in. The \$22.50 for the repair of the transom and screen, the partition with swinging doors, \$85.00, and the change in the north window, \$65.00, makes \$992.50. I have an item, "six tables at \$12.00." I can take them out.

The checks have been marked exhibit 33 in this case, all made payable to the Granite Mill & Fixture Company. Those checks cover \$1398.64. Then the item that should be deducted from Exhibit 32 for booths is \$388.59.

MR. HANSON: Then we offer to you Exhibit 33, consisting of fifteen checks.

MR. ROGERS: We make the same objection your Honor.

THE COURT: The objection may be overruled.

I put in switchees, upstairs and downstairs, and also a large switch to carry the heavier load on the building, and then I put in a new set of up-to-date lamps. The electric wires were insulated. I paid \$181.85.

MR. SANFORD: It is understood that we have our general objection to this, and the additional objection that it is not in the way of improvement.

THE COURT: The objection may be overruled.

On a slip is oil, \$2.10 and groceries, \$1.85, which amounts should be added to the checks.

MR. HANSON: We will ask that this slip be attached to the exhibit, and we offer now exhibit 34.

MR. Sanford: We object to it as incompetent, irrelevant and immaterial.

THE COURT: The objection may be overruled.

I paid \$56.25 for two awnings.

MR. HANSON: We now offer Exhibit 35 (bill from Spere Tent and Awning Co. for two awnings) in evidence.

MR. SANFORD: We object to that as incompetent, irrelevant and immaterial, and not an improvement.

297 THE COURT: The objection will be overruled.

I spent \$68.04 for linoleum and carpet. The linoleum was glued onto the floor, and I paid for that \$68.04, as shown by the checks.

MR. HANSON: I wish to offer Exhibit 36 (bills and checks for linoleum and carpet) in evidence.

MR. SANFORD: We object to it as incompetent, irrelevant and immaterial, and upon the face of it not an improvement to the building.

THE COURT: The objection will be overruled.

I spent \$61.00 for painting on the outside. Exhibit 37 is the bill rendered for the painting.

MR. HANSON: We offer the exhibit No. 37.

MR. SANFORD: I object to it as incompetent, irrelevant and immaterial, and they are put on as a trade advertising fixture.

THE COURT: The objection may be overruled.

I have the different checks for the different things. I put cement down in the gent's lavatory, at a cost of \$31.00.

MR. HANSON: We will offer exhibit 38 (bill for cement.)

MR. SANFORD: We object to it as incompetent, irrelevant and immaterial, not an improvement.

THE COURT: The objection may be overruled.

I paid \$5.71 for a ventilator. Exhibit 37 is the bill and check for it.

(Exhibit 37 was offered and received in evidence over plaintiffs' objection).

I paid Sunset Paint Co. for paint, \$3.34; paid Parley Havenor for surfacing the floor, \$5.50, and one cash check paid different small items —

hinges and one thing and another. I paid \$75.00 out in cash. Perschon Paper Company, \$13.41; for screen doors \$23.49, paid on July 12th; also \$6.01 to Morrison-Merrill & Co. for lumber and fixing the basement door; \$5.00 for paper hanging; I paid Evans and Davis \$18.75 for paint; \$3.75 to Perschon for some more paint.

During the time this work was being done I saw Mr. Ball. I was telling him that I was going to do this and that, and it was all right.

Q. Any objection made on his part to the work that was being done?

A. No.

MR. SANFORD: I object to that as immaterial.

THE COURT: The objection may be overruled.

MR. HANSON: We wish to offer exhibit 40 at this time, your Honor, consisting of three checks which represent payments as he has described, either for paint or for work done in connection with the painting.

MR. ROGERS: We make the same general objection, your Honor, as we have heretofore made.

THE COURT: The objection may be overruled.

Mr. Ball said he thought I was doing the work fine.

MR. ROGERS: May we have the general objection, your Honor?

111 109

THE COURT: Yes.

Mr. Ball was very well satisfied. Miss Noble came down a couple of months after I opened the place. After I opened the place up as a beer parlor, I put up a sign on the building, "Golden Gate Beer Parlor, Nick Floor Incorporated." These changes had been made and the tile work done when Miss Noble came down. I had never met Miss Noble before. She came in alone and introduced herself as one of the owners of the building. I showed her all over the building. She liked it. I pointed out to her the tiling I had done. She was pleased. She said, "It certainly looks fine." She came three or four times. I told her, "That is why I have a long lease."

The signature on exhibit 41 is my signature. I made that affidavit and caused it to be recorded on May 1st of this year.

(Exhibit 41 was received in evidence over plaintiffs' objection)

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I took the lease down to Mr. Knowlton, an attorney, and he prepared the affidavit. I heard rumors that the new owners were threatening to break my lease. I had talked to the plaintiffs, Latses and Sdrales, about this lease many times; first, about the 5th day of May.

Q. Now, at that time, what did you say, if anything, about having a lease?

MR. SANFORD: I object to it as incompetent, irrelevant and immaterial.

THE COURT: The objection may be overruled.

I told Mr. Latses that I had heard he had figured on purchasing the building. He said, "I don't know anything about it." I said, "Well, this building has been offered to me." He said, "Why don't you buy it?" and I said, "Well, they brought the price down to thirty-five thousand dollars, and I offered them thirty-one thousand, but we didn't close the deal." I showed him the building and pointed out the crack in the corner. He said, "If it is worth thirty-two, it is worth thirty-five." I said, "I have in the neighborhood of a three year lease here yet, anyway." A few days later I met them both at the Hogle place.

MR. ROGERS: We understand we have our general objection?

THE COURT: Yes.

It was stipulated that the expenditures were made at the times indicated for the amounts paid therefor, and that the amounts were reasonable.

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H. ARNOLD RICH, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HANSON:

My name is H. Arnold Rich. I have been a

practicing attorney in this state for a number of years. In this case, after noting the extent of the pleadings and the matters involved, my opinion is that \$500.00 to \$650.00 would be a fair fee.

MR. ROGERS: If the court please, may we have our objection that it is incompetent, irrelevant and immaterial?

THE COURT: Yes.

NICK FLOOR, Recalled.

DIRECT EXAMINATION

321 BY MR. HANSON:

Q. For everything you spent, including booths, cigarette case, and everything else in the way of permanent improvements, and those things you could take out with you?

MR. SANFORD: I object to that as irrelevant and immaterial, especially as to fixtures.

MR. HANSON: I am going to simply eliminate the other things and only put in a lump sum.

MR. SANFORD: I don't see the materiality of what he spent for fixtures.

THE COURT: He may answer.

With checks and statements I can show \$2420.74. Then checks only, without statements, \$275.31, makes a total of \$2696.05. Out of all that, I can take the booths in the rear room, cost \$430.00, and the others in the front, \$275.00; one cigarette case, \$25.00, and some repairs made

which would be another \$5.00. That would be \$735.00, leaving \$1961.05.

Q. For and on matters that would have to remain if you left?

A. Yes, sir.

MR. SANFORD: I object to that as calling for a conclusion of the witness, and not being the test, what would have to remain if he left. The lease says, "permanent improvements."

THE COURT: The objection may be overruled.

Q. Mr. Floor, is there anything else, if you left, that you intend to remove or claim you could remove, excepting the things you have indicated in this \$735.00?

MR. SANFORD: I object to that as incompetent, irrelevant and immaterial. It has nothing to do with the terms of the lease.

THE COURT: The objection may be overruled.

There are some lighting fixtures amounting to \$52.50 that I could remove. The paneling is attached right into the wall; is a part of the wall; is four and a half feet high. I showed Mr. Ball what was being done.

MR. ROGERS: May we have our objection to this?

326 THE COURT: You may, but he already testified about that.

Q. Did he make any objection to any of it?

A. No.

MR. ROGERS: I object to that as incompetent, irrelevant and immaterial. It means nothing.

THE COURT: He may answer.

About two months before my first lease expired I told Mr. Ball. "The option lease will start, which will be \$90.00." He said, "Yes, just about." I said, "Is there anything else for me to do to comply?" He said, "No, everything is all right; go right ahead." I paid \$90.00 up to and including May 27, 1939. After that I was informed by Mr. Ball to pay the rent to the new owners. They accepted the rent for the month of June, but after that they refused to take it. I have offered them the cash in the presence of people, but they would not accept it.

Exhibit 42 (letter from Dressler to Ball) was offered by the defendant.

MR. ROGERS: We object to it, your Honor, on the ground that it is incompetent, irrelevant and immaterial.

THE COURT: The objection may be overruled.

It was stipulated that Mr. Golden W. Robbins, an attorney, would testify that the value of the services was worth at least as much as Mr. Rich had testified.

CROSS EXAMINATION

BY MR. SANFORD:

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I got a license to conduct a dance hall in 1934. I conducted the dance hall until 1937, without interruption. In order to conduct a dance hall, I had to have a maple floor, and I had to have the floor smoothed or sanded. I put that in as one of my items for permanent improvements. I think I done it twice. When my license for conducting a dance hall was not renewed I put linoleum over that. I haven't got the specifications for the different items in the bill for \$775.00. The maple floor covers twelve by twenty-two feet. The additional bill for maple flooring was for a better quality of flooring, and they had to exchange it and charge the difference. When I went in there, there was, and still is, a stairway leading down on the east side. The steps were broken. I put in another stairway directly west of the one that was originally there, and that one goes down to the men's toilet in the southwest corner, on the main floor. That toilet on the main floor was cracked and leaking. I thought, for my business, I would rather have it downstairs. The bill for \$775.00 includes the change of the toilet to the place downstairs. They had to make a connection downstairs with the sewer system. I put up a sort of a frame work for a stairway down to the toilet room. The frame work could be removed.

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The men's toilet room is about six by eight, the women's toilet room a little smaller. I put linoleum on the floor. It was charged as a part of the bill. I don't know how much it was. It was in there a couple of years. I took it out because it was partly worn out. Then I put in a concrete floor in the men's toilet. I put a trap under the drain board leading from the bar so as to catch the water from the bar. That was included in the \$775.00 bill. The pipe leading from that down to the pipe leading from the sewer is 50 or 60 feet. I put it in to take the water coming from the bar. That is included in the \$775.00 bill. It was a 2-inch pipe. I have installed a paneling around the building. There was one uniform color on the wall down to the baseboard. I had the same panel work put in the old closet, adjoining the north end of the bar. It was about four and one-half feet high. That is all included in this bill. I don't know that the panel work is simply grained on the plaster. When I went in there, there was a partition dividing the front from the back. It was seven or eight feet high, with a square opening. I wanted to increase the size of the dance hall, so I moved that partition north about three feet. Moving that partition is included in the bill for \$775.00. I built it higher, clear up to the ceiling, to make a complete separation of the room. For the purpose of conducting a dance hall I thought it would be better to have a complete separation

of the rooms. I made some changes in the transom over the doors to suit my convenience. It was included in this bill. I also changed the hanging of the transom in front—it was hanging from the top and opening at the bottom—and I changed it so it is hanging at the bottom and opening at the top. I put chains in to hang it when I opened it, and a screen to the outside. I don't think this item is on the bill for \$775.00. There is an item on the same bill explaining it, "Repair and hanging two transoms, \$7.30." The two screens are for those transoms. The bill for \$15.00 is for enlarging the floor, or changing it from fir to maple. The bill for additional paneling in the front room, \$25.00, is from the door to the left on the front, near the book case—that would be a matter of twenty feet. The pair of doors are downstairs in the basement, leading to the toilets. The doors are not in use, but they are charged to the contract. I had one set of arches over booths. It is included on the Granite Mill bill, Exhibit 32. The item, "Repair and set in place a transom and screen, \$22.50," is on those transoms with the two doors and the chains. The item, "Furnish and set in place one partition with swinging doors, \$85.00," are the two swinging doors we talked about. One pair of doors, \$5.00, was for the toilet. There was an old broken door into the toilet upstairs. It could not have been mended. The swinging doors are down in the basement. They would

not be worth more than \$5.00. There was wiring in the basement when the building was built. I installed a compressor—an air compressor—for cooling frigidaire and keeping the beer. The old wiring was not sufficient to stand the pressure. I had to install heavier wiring, and it had to be put in a conduit, or pipe. The conduit is about 70 feet long. I installed electric lights in each booth. There are five booths in the front, six in the back. The bill from the Granite Mill & Fixture Company was for the five front booths. This bill includes an extension for the lights going to ten of the booths. The bill includes all the chandeliers, four in the front and three in the back. Globes are not included in the bill. There was an electric fixture in each booth. There is about 120 feet of conduit. There were no awnings when I went there. The awnings are hung right above the windows on the west side, and one for the door. I have not taken them off for the winter. They are good for three or four years yet. I call the awnings permanent improvements.

In exhibit 36, the cost of the linoleum and laying it is \$50.14, and the other item, stair carpet at \$1.45, and padding for fifteen steps, \$3.75. The linoleum is laid under the five booths. There is a tile floor in the center. For the purpose of the booths I thought I would rather have linoleum. It is pretty well worn now. I am going to put another one in soon. The 9½ yards of stair car-

pet and padding for fifteen steps, amounting to \$17.90, is on the ladies' stairway. I took it off about two weeks ago; it is worn out. I included that in my permanent improvements.

Exhibit 39 is the bill for the ventilator, to let the air circulate in the basement.

366 Exhibit 27, contract painting, three coats, \$61.00, was done April 14, 1934. That was the painting of the exterior. The Sunset Paint Company bill for \$3.34 was for paint used on the inside. Evans & Davis did some painting, and they put paper on the ceiling. I bought the paper from the Perschon Paint & Paper Company, \$13.31. I have papered four or five times since that. It needs papering about every year. I charged the papering done in 1934 as a permanent improvement. The items of \$13.31, \$18.75, \$3.75 and \$5.00 are for paper and for the hanging of it, which has been covered since. I have produced check number 793, Morrison-Merrill & Company, \$23.49, screen doors. They are on the southwest doors to the ladies' entrance. Check No. 599 to Morrison-Merrill & Company for \$6.01 is for the lumber to fix the basement door.

I started negotiations for the purchase of the building the latter part of 1937 with Mr. Bowman and some other real estate company in the McCornick Building. I started negotiations for the lease about the 15th of September, 1933. I had an attorney when we fixed the lease. I showed the

lease (Exhibit 28) to my attorney. My attorney was Horace Knowlton.

372 On one part of Exhibit 32 (the bill of the Granite Mill & Fixture Company) there is an item, "Change north window, \$65.00." I took out a post and made one window clear across. I got an allowance for the glass that was there. I think Mr. Ball got the glass, because he told me he wanted them. The glass in the first place was \$100.00 and there was an allowance for that. There was an allowance of about \$35.00. Mr. Ball didn't get it.

374 It comes to my recollection, a couple of years ago somebody broke the glass, and Mr. Ball wanted those pieces. Maybe it was 1936 or 1937. I don't carry insurance for the plate glass window. The company does, the company that owns the building; the lease provides for it.

I had a conversation with Mr. Latses along in May in front of the place, and shortly after that a conversation with both plaintiffs at Hogles. In the conversation in front of my place, I told Mr. Latses that I had a lease. I told him I was negotiating to purchase the building about a year and a half. Mr. Latses asked me if the building aint worth thirty-five thousand dollars, and I told him I don't think so because it needs a lot of repairs. I took him over and showed him a corner that was tipped—it was about three quarters of an inch

crack. I don't know how much it would cost to repair that crack.

Mr. Latses did not tell me that Mr. Ball told him I didn't have any lease. In the conversation at Hogles they asked me which was good stocks to buy and they asked me if I had heard any more rumors about they threatened to break my lease. They examined the lease with their attorney and found out the lease could be broken in two or three different ways. I told them about it at Hogles. I think they told me that one of the ways it could be broken was that Ball said I had no lease, that I had not put in the thousand in improvements, and that I never notified him I wanted an extension. I never took up negotiations for the purchase of the building with Mr. Ball. I never met Walker T. Gunter, the lawyer.

The defendant rests.

ROBERT GOULD-SMITH Recalled

DIRECT EXAMINATION

BY MR. SANFORD:

I did not receive a letter from Mr. Gunter suggesting that Mr. Ball be appointed to succeed his father in handling the affairs of the Eagle Block. I did not write to Mr. Ball, Jr. at any time stating that it would be all right for him to go ahead and handle the business or the rentals of the Eagle Block just as his father had done. I did

not have any information that Ball, Senior, had given written leases. Mr. Ball did not point out to me any tile work in front of 79 West 2nd South Street. I never told Mr. Ball in any conversation not to make any more written leases. I didn't know that there were ever any written leases.

CROSS EXAMINATION

BY MR. HANSON:

386 Mr. Ball, Senior, reported to me from the time I took my oath of office until his death, acting as agent. Mr. Ball, Senior, sent me a monthly statement of income and expenses.

RE-DIRECT EXAMINATION

BY MR. SANFORD:

There was a difference as to calling upon me for suggestions, or comparison, as between the two. When anything occurred of any importance, he reported it to me. He would consult with me first as to the expenditures before it was done.

RE-CROSS EXAMINATION

387 BY MR. HANSON:

Mr. Ball, Senior, consulted with Mr. Gunter, and he informed me of anything important. I said Mr. Ball. Mr. Ball, Jr. took it up with me direct with me.

MISS MAYME NOBLE, produced as a witness on behalf of the plaintiffs, in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROGERS:

My name is Mayme Noble. I reside at 629 East South Temple Street. I am the president of the W. P. Noble Company. I remember a conversation in April, 1933, between Mr. Gould-Smith and Arthur Ball at my residence with reference to the conduct of the Eagle Block. Mr. Smith said, "I would rather you wouldn't make any leases because I don't approve of it, because on account of the low rent, and we might possibly want to sell." I was at 79 West 2nd South Street once and saw Mr. Floor there. It was in July, but I don't know the year. I never had any conversation with Mr. Floor in which the word "lease" was mentioned.

CROSS EXAMINATION

BY MR. HANSON:

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Mr. Floor told me there had been a great many improvements made. I saw some of them. He showed me the new floor. That is about all I remember. He did not speak to me about a ladies' dressing room. He showed me the front room and the back room. I didn't notice the paneling. He did not point out the tiling. I saw the tiling. I did not talk to Mr. Floor about it. I do not think he made a beautiful corner out of it. I don't think the tile work, plate glass and cement adds much to it. Mrs. Gould-Smith and I went in one after-

noon. I did not talk about how beautiful he had made the place. We went in to get a glass of beer.

ARTHUR H. BALL, called as a witness on behalf of the plaintiffs, having been heretofore duly sworn, testified as follows :

DIRECT EXAMINATION

BY MR. SANFORD :

When Mr. Floor entered the building there was a men's toilet in the southwest corner, just west of the stairway down stairs. It was a room large enough to have a toilet, a urinal and a wash basin. They were in good condition.

Mr .Floor did not consult with me as to the improvements which were being made. He did inform me that he had put in permanent improvements. I saw him installing trade fixtures and things of that sort. The only thing he consulted with me about was the tiling on the front.

CROSS EXAMINATION

BY MR. HANSON :

397 I never used the toilet room, or where the toilet room was, before it was removed downstairs. It had leaked several times and I had it fixed with new washers. I knew the toilet was over there. I knew the changes that were being made, and what he was doing in the way of additions for his business. He had to have a room for the men and room for the women. There was no

new floor in. He put in a maple floor in the back room for his own convenience. It was necessary to connect with the sewer for those toilets. All new wiring, by ordinance, has to be insulated. The wires were over there before. He was fixing up the place to suit himself. After it was done he commenced to pay me the \$90.00 a month. I think he was making these changes to improve his own place for his own business.

RE-DIRECT EXAMINATION

BY MR. SANFORD:

401 The wiring that was in there was ample for the lights that had been in there before. When he put in instruments that required a greater force of electricity and new wiring, he had to put in conduits under the new ordinance. They were not required to make any change until they installed heavier wiring. There was more or less repairs every month or so.

Plaintiffs Rest
Defendant Rests

CERTIFICATE

THIS IS TO CERTIFY, that on the 4th day of March, 1940, within the time allowed by law and the order of the Court therefor, the plaintiffs presented the foregoing Bill of Exceptions for

settlement and asked that the same be settled, allowed, and ordered filed as part of the records in this case and, upon stipulation heretofore filed in this matter, the same is hereby settled, allowed and signed as a true and correct Bill of Exceptions in said case.

I further certify that the foregoing Bill of Exceptions contains a full and correct transcript of all the evidence offered and produced at said trial and all Exhibits offered and received in evidence at said trial, together with all orders and rulings made by the court, together with all proceedings had during said trial and exceptions thereto.

Dated this 4th day of March, 1940.

P. C. EVANS,

(SEAL)

Judge.

ATTEST:

WILLIAM J. KORTH,

Clerk.

By R. A. Hogensen,

Deputy Clerk.

TITLE OF COURT AND CAUSE.

ASSIGNMENT OF ERRORS

Come now the plaintiffs and appellants above named and, upon the record heretofore transmitted and filed in this court, assign the following manifest errors committed by the trial court

upon which the appellants rely for reversal of the judgment of said court, from which judgment this appeal is taken, namely:

1. The court erred in overruling plaintiffs' objection to the following question:

Q. How often did you come over to Salt Lake City? (Tr. 75, Ab. 45.)

2. The court erred in overruling plaintiffs' objection to the following question:

Q. Had you ever given written authority to Mr. Ball, Sr. to enter into leases? (Tr. 79, Ab. 46.)

3. The court erred in requiring the witness Gould-Smith, upon cross examination, over plaintiffs' objection, to produce the correspondence between himself and A. H. Ball. (Tr. 82-83-85, Ab. 46.)

4. The court erred in overruling plaintiffs' objection to defendants cross examining the witness Gould-Smith with reference to improvements placed in 79 West Second South Street. (Tr. 82-88, Ab. 47.)

5. The court erred in overruling plaintiffs' objection to the following question:

Q. * * * * I understand that is what you say, that your recollection is, what you wrote him, you hoped he would find a satisfactory tenant for 79?

6. The court erred in overruling plaintiffs' objection to the following question:

Q. Now, when he mentions in that letter that if they didn't pay the rent by a certain time their

lease would be automatically broken, what did you assume he referred to? (Tr. 97-98, Ab. 50.)

7. The court erred in overruling plaintiffs' objection to the general line of cross examination with reference to written authority given to Mr. Ball, Sr. (Tr. 98-99-100-101, Ab. 50-51.)

8. The court erred in overruling plaintiffs' objection to the following question:

Q. When he said, "We have a good man in No. 79 now and I feel that things will be all right on the corner now, what did you understand him to mean? (Tr. 103-4, Ab. 52.)

9. The court erred in overruling plaintiffs' objection to the general line of cross examination with respect to Gould-Smith's knowledge of Ball's conduct with reference to the Eagle Block. (Tr. 105-8, Ab. 53.)

10. The court erred in overruling plaintiffs' objection to the admission of defendant's exhibits 5, 4, 4-A, 2, 6, 7, 7-A, 8, 9, 10, 1, 3, 4, 5, 10-A, 11, 12, 13, 14. (Tr. 109-116-120, Ab. 54-56.)

11. The court erred in overruling plaintiffs' objection to the admission of Exhibits 15, 16, 17, 18, 19, 20, 21, 22 and 23. (Tr. 135-136-137, Ab. 59.)

12. The court erred in overruling plaintiffs' objection to the following question:

Q. And what did you do? (Tr. 176, Ab. 68.)

13. The court erred in overruling plaintiffs' objection to the following question;

Q. And what did he do? (Tr. 176, Ab. 68.)

14. The court erred in overruling plaintiffs' objection to the following question: (Tr. 177, Ab. 69.)

Q. And all of those leases had been executed by your father?

15. The court erred in overruling plaintiffs' objection to the following question:

Q. And what conversation did you have? (Tr. 180, Ab. 70.)

16. The court erred in overruling plaintiffs' objection to the general line of cross examination of A. H. Ball. (Tr. 180-1, Ab. 70.)

17. The court erred in overruling plaintiffs' objection to the admission in evidence of defendant's exhibits 25, 26, 27, 28, 29 and 30. (Tr. 191-198-199-217-218, Ab. 74-76-79.)

18. The court erred in overruling plaintiffs' objections to the following question:

Q. What was the contents of the letter, as you remember it? (Tr. 237, Ab. 84.)

19. The court erred in overruling plaintiffs' objection to the following question, and the examination which preceded it:

Q. And what did you tell him? (Tr. 266, Ab. 88.)

20. The court erred in permitting, over plaintiffs' objection, the examination of Nick Floor as to the improvements made. (Tr. 271, Ab. 90.)

21. The court erred in permitting the introduction in evidence, over plaintiffs' objection, of defendant's exhibits 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40. (Tr. 273-276-295-297-298-300-301, Ab. 90 to 96.)

22. The court erred in overruling plaintiffs' objection to the following question:

Q. Any objection made on his part to the work that was being done? (Tr. 307, Ab. 96.)

23. The court erred in permitting the introduction in evidence, over plaintiffs' objection, of defendant's exhibit 41. (Tr. 331, Ab. 102.)

24. The court erred in overruling plaintiffs' objection to the following question:

Q. Now, at that time, what did you say, if anything, about having a lease? (Tr. 314, Ab. 97.)

25. The court erred in overruling plaintiffs' objection to the general line of examination of Nick Floor concerning conversations with plaintiffs. (Tr. 316, Ab. 98.)

26. The court erred in permitting, over plaintiffs' objection, evidence concerning a reasonable attorneys' fee. (Tr. 320, Ab. 99.)

27. The court erred in overruling plaintiffs' objection to the following question:

Q. Did you show him? (Tr. 325, Ab. 100.)

28. The court erred in permitting, over plaintiffs' objection, the introduction in evidence of defendant's exhibit 42. (Tr. 328, Ab. 101.)

29. The court erred in making Finding of Fact No. 1, because the evidence shows that the Stockyards National Bank of Omaha, and the Fred Bragg Estate had no interest in No. 79 West 2nd South Street, Salt Lake City, on September 25, 1933, and had had no interest therein for several years prior thereto, and the evidence conclusively shows that A. H. Ball had no authority, written or otherwise, from any of the owners of said property to lease same for a longer period than one year. (Tr. 37, Ab. 22.)

30. The court erred in making Finding of Fact No. 2, because, defendant being in possession under a void lease, was a tenant from month to month.

31. The court erred in making Finding of Fact because the evidence shows an entry under a void lease with payments of rent from month to month, which made defendant's possession a monthly tenancy and which plaintiffs' had a legal right to terminate by the giving of thirty days' notice.

32. The court erred in making its fifth Finding of Fact, because the ownership, as set forth in said fifth Finding, is contrary to the stipulated evidence and because the acts and authority of H. T. Ball were not an issue in the case and because there is no evidence that H. T. Ball ever had any written authority to make leases for longer than one year, and because there is no evidence that

any of the owners of the Eagle Block ever knew that H. T. Ball had made written leases for more than a year. Said Finding is erroneous, in that under the undisputed evidence, H. T. Ball had no authority to act upon any matter without the consent of Walker T. Gunter, and the undisputed evidence is that A. H. Ball consulted Gould-Smith upon all matters of importance (except upon the purported lease). Said Finding is erroneous because the testimony shows that H. T. Ball did not give a written lease for a longer period than three years and at a minimum rental of \$100.00 per month, and that the undisputed facts show that A. H. Ball greatly exceeded the authority assumed by his father. Said Finding is erroneous because there is no testimony that Ford E. Hovey authorized W. H. Dressler to authorize A. H. Ball to make said lease; there is no testimony that C. L. Brome had any authority from the heirs of the Bragg Estate to authorize A. H. Ball to make said lease. Said Finding is erroneous because the evidence shows that considerably less than \$1,000.00 was expended in permanent improvements.

33. The court erred in making Finding No. 6, because the testimony proves that neither Hovey nor the Bragg heirs ever saw or heard of the improvements; that Dressler, Gould-Smith and Mayme Noble did not see them until long after they were installed, and that said improvements did not total the sum of \$1,000.00.

34. The court erred in making Finding No. 7, because the evidence shows that no notice of exercise of the option was given to A. H. Ball.

35. The court erred in making Finding No. 8, because the matter of good faith upon the part of the defendant was not an issue in this case.

36. The court erred in making Finding No. 9, because the matter of attorneys' fees was not an issue.

37. The court erred in making Conclusion of Law No. 1, because same is contrary to law.

38. The court erred in making Conclusion of Law No. 2, because same is contrary to law, in that occupancy of premises under a void lease where rent is paid monthly renders the possession a tenancy from month to month.

39. The court erred in making Conclusion of Law No. 3, because the elements of estoppel are lacking, both as to plaintiffs' and their predecessors in interest.

40. The court erred in making Conclusion of Law No. 4, because said lease was void, in that A. H. Ball had no authority to enter into same and defendant was not entitled to attorneys' fees because same were a personal covenant on the part of predecessors in interest of plaintiffs and did not bind plaintiffs.

41. The court erred in making Conclusion of Law No. 5, because the evidence established that

the lease in question was void and that defendant was guilty of unlawful detainer.

42. The court erred in rendering judgment against the plaintiffs and in favor of the defendant, in that the evidence showed that the purported authority given to A. H. Ball did not come from all of the owners of said property; that said purported authority was so vague and uncertain that it was not sufficient under the law to constitute any authority, and that the provision for attorneys' fees in said purported lease was a personal covenant of predecessors in interest of plaintiffs, and was not binding upon plaintiffs, and no estoppel existed in favor of defendant.

WHEREFORE, plaintiffs pray that because of the manifold errors herein assigned, the said judgment herein be vacated and set aside, that plaintiffs be granted a new trial herein and their costs.

ALLEN T. SANFORD,
E. A. ROGERS,
Attorneys for Plaintiffs.

Received copy of the foregoing Assignments of Error this 9th day of March, 1940.

STEWART M. HANSON,
WILLARD HANSON,
L. E. CLUFF,
*Attorneys for Defendant
and Respondent.*

Filed 3-11-40.