

1948

Herbert Wolfe, Shirley Wolfe, Elliott Wolfe, Kayla Wolfe, and Merrill Strong under Wolfe's Department Store v. Sarah White and James L. White : Brief of Appellants

Utah Supreme Court

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Shirley P. Jones; Rich & Strong; Attorneys for Plaintiffs and Appellants;

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**IN THE SUPREME COURT  
of the State of Utah**

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**ROBERT WOLFE, SHIRLEY WOLFE,  
his wife, ELLIOTT WOLFE, KAYLA  
WOLFE, and MERRILL STRONG, Co-  
partners, doing business under the firm  
name and style of WOLFE'S DEPART-  
MENT STORE and WOLFE'S DE-  
PARTMENT STORE, a copartnership,**

*Plaintiffs and Appellants,*

**vs.**

**SARAH WHITE and JAMES L. WHITE,  
her husband,**

*Defendants and Respondents.*

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**APPELLANTS' BRIEF**

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**FILED**  
**MAR 10 1948**

**SHIRLEY P. JONES and  
RICH & STRONG,**

*Attorneys for Plaintiffs.  
and Appellants.*

**CLERK SUPREME COURT, UTAH**

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# IN THE SUPREME COURT of the State of Utah

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HUBERT WOLFE, SHIRLEY WOLFE,  
his wife, ELLIOTT WOLFE, KAYLA  
WOLFE, and MERRILL STRONG, Co-  
partners, doing business under the firm  
name and style of WOLFE'S DEPART-  
MENT STORE and WOLFE'S DE-  
PARTMENT STORE, a copartnership,

*Plaintiffs and Appellants,*

vs.

SARAH WHITE and JAMES L. WHITE,  
her husband,

*Defendants and Respondents.*

Case No.  
7153

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## APPELLANTS' BRIEF

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This appeal is to review the action of the District Court of Salt Lake County, State of Utah, in sustaining defendants' general demurrer to plaintiffs' complaint and amendments thereto and its judgment dismissing the said complaint and amendments thereto and dismissing the above-entitled action, said judgment was entered and filed November 15, 1947. (R. 56, 57) Defendants filed special demurrers and motions to strike, but the same were overruled and denied by the trial court. (R. 56, 57)

## STATEMENT OF FACTS

This action arises from plaintiffs' claim that defendants breached certain terms of a written lease agreement under which defendants leased to plaintiffs property situated in the business district of Salt Lake City, Utah. Since the case below was disposed of upon general demurrer, we shall for the convenience of the court set forth the lease, the complaint, amendments thereto and exhibits verbatim.

The plaintiffs and appellants are the lessees, and the defendants and respondents are the lessors but hereafter will be designated merely as plaintiffs and defendants.

The lease is attached to the complaint as Exhibit "A," (R. 8), and reads as follows:

## EXHIBIT "A"

## L E A S E

THIS INDENTURE OF LEASE made and executed at Salt Lake City, Utah, on the 19th day of February, 1945, by and between SARAH WHITE, owner of the premises hereinafter described, and JAMES L. WHITE, her husband, of Salt Lake City, Utah, hereinafter referred to as "Lessors," and HUBERT WOLFE, SHIRLEY WOLFE, his wife, ELLIOTT WOLFE, KAYLA WOLFE and MERRILL STRONG, co-partners, all of Salt Lake City, Utah, doing business in Salt Lake City, Utah, under the firm name and style of "Wolfe's Department Store," which co-partnership is also bound in this lease as

"Wolfe's Department Store," a copartnership, by HUBERT WOLFE, managing partner, hereinafter referred to as "Lessees,"

### W I T N E S S E T H:

That said parties do mutually covenant, grant and agree to and with each other as follows:

#### (1)

Lessors do hereby grant, lease and demise unto the Lessees, for a term to commence on the 7th day of March, 1945, and to end on the 31st day of May, 1956, the following described premises located in Salt Lake City, Utah, to-wit:

The one-story building, basement and balcony, commonly designated as 248-256 South State Street, having dimensions of approximately 78 feet 3 inches on State Street, by 123 feet 6 inches in depth.

together with the use of the right-of-way immediately south of the Keeley store at 260 South State Street, and together with the use of the loading platform in the rear of the premises herein leased, it being understood that the buildings and parking space West of said loading platform are now leased to and are being used by Keeley's Incorporated and other tenants, who have the exclusive right to use said parking space. Said premises are to be occupied for the conduct of a mercantile business, which will not compete or conflict with the business now being conducted by Keeley's Incorporated at 260 South State Street.

(2)

The Lessees shall pay to the Lessors as rent for said premises during the term thereof as follows:

The total sum of Eighty Thousand One Hundred Thirty Dollars (\$80,130.00), payable in monthly installments of Five Hundred Fifty Dollars (\$550.00) each for the months commencing March 7, 1945 to June 6, 1946, a period of fifteen (15) months, the sum of Four Hundred Eighty Dollars (\$480.00) for the period commencing June 7th, 1946, and ending June 30th, 1946, and Six Hundred Dollars (\$600.00) per month for the nine years and eleven months period commencing July 1st, 1946 and ending May 31st, 1956, each in advance on the first day of each and every month during said period.

(3)

The rental for the last ten year term of this lease is fixed at Six Hundred Dollars (\$600.00) per month, upon the express condition that the Lessees will, and they hereby agree to, at their own expense, make permanent improvements to the building herein leased, including the installation of a first-class front therein, which improvements shall cost not less, but may cost more than, Ten Thousand Dollars (\$10,000.00). Said Ten Thousand Dollars (\$10,000.00) shall not include the cost of trade fixtures, or any other removable fixtures, but shall include only the cost of permanent improvements to the building. If it should develop that necessary permanent improvements can be made for less than Ten Thousand Dollars (\$10,000.00), then the rent for the last ten year term of this lease shall be increased Ten Dollars

(\$10.00) per month, or fraction thereof, for every thousand dollars, or fraction thereof, that the permanent improvements cost less than Ten Thousand Dollars (\$10,000.00), and for the purpose of determining the fact, Lessees agree at the completion of said permanent improvements to furnish Lessors with an itemized statement of the cost of permanent improvements made as aforesaid. The said permanent improvements are to be commenced on or before June 7th, 1946, or as soon thereafter as Government restrictions will permit. Rental shall be paid during the time said improvements are being made. All such permanent improvements and construction shall be completed free and clear of all liens and claims of contractors, sub-contractors, mechanics, laborers, material men and other persons having similar claims. All such permanent improvements shall upon installation become part of the realty and shall be surrendered to the Lessors in good order and condition as when constructed, reasonable wear and tear and damage by fire or other casualty excepted. After said permanent improvements are made, it is agreed that further structural changes shall not be made to said premises by the Lessees, without first obtaining the written consent of the Lessors, which consent Lessors covenant will not unreasonably be withheld.

(4)

Lessees shall also pay all charges for light, heat, electricity, gas and water consumed upon the demised premises during the term of this lease.

(5)

It is understood and agreed that the premises herein leased are presently leased to Daniel Stew-



art, doing business as "Stewart Novelty Company," until June 6, 1946, at Five Hundred Fifty Dollars (\$550.00) per month, and that this lease is made subject to that lease. It is further agreed that the Lessors shall collect the rents from Stewart Novelty Company for the term ending June 6, 1946, and providing the said rents are paid by Stewart Novelty Company, it is agreed that the Lessees will have no further obligation under this lease for the term ending June 6, 1946, and likewise will not be entitled to the possession of said premises for said term. If Stewart Novelty defaults in the payment of rent, however, then the responsibility of the Lessees for the term ending June 6, 1946 will commence, and in case of such default the Lessees agree to pay said rental in accordance with the terms hereof, and in such event will be entitled to all of the Lessors' rights and remedies against Stewart Novelty Company by reason of said default.

(6)

In consideration of the rental herein fixed, the Lessees agree to and do hereby accept said premises in the condition and state of repair they are now in, and *for the last ten years of this lease*, all improvements, upkeep and repairs, of every kind and nature whatsoever, regardless of the extent thereof and whether the same be ordinary or extraordinary, and regardless of how the same may be necessitated, except as hereinafter stated, including repair and upkeep of the heating plant and replacement of all glass, including plate glass broken, are to be made at the expense of the Lessees. If plate glass insurance is carried, it shall be carried at the expense of the Lessees.

(7)

Lessees agree that at the expiration of the term of this lease they will yield and deliver up the said demised premises to the Lessors, in as good order and condition as the same will be after the initial permanent improvements above contemplated are completed, reasonable use and wear thereof and damage by the elements excepted. Lessees agree to occupy said premises in a lawful manner and to keep the water pipes and their connections and sewage pipes and their connections upon said premises at all times in good condition and state of repair.

(8)

For the entire term of this lease the Lessors shall have the obligation to keep the roof of the leased premises in good condition and repair; to pay general taxes and lighting assessments levied against said property, all fire insurance premiums, and premiums on any other insurance the owner elects to carry.

(9)

Lessees covenant and agree not to assign, transfer, hypothecate or mortgage this lease, or any interest therein, without first obtaining the written consent of the Lessors, which consent Lessors covenant will not unreasonably be withheld. If such consent is given by the Lessors, it is understood and agreed that the Lessees shall continue to remain liable under all the terms, covenants and conditions of this lease.

(10)

If the rent above reserved, or any part thereof, shall be unpaid on the date whereon the same is due and payable, and for fifteen days thereafter, or if default shall be made in any of the covenants herein contained to be kept by the Lessees, their heirs, executors, administrators or assigns, it shall and may be lawful for the said Lessors, their heirs, executors, administrators, agents, attorneys or assigns, to take possession of the demised premises, and every part thereof, either with or without legal process, and without notice to quit to re-enter and the same again to repossess and enjoy as in their first and former estate.

(11)

Lessors shall not be liable for any damage occasioned by failure to keep said premises in repair and shall not be liable for any damage done, caused or occasioned by or from plumbing, gas, water, steam or other pipes, or the bursting, leaking or running of any washstand, tank, water closet or waste pipe, in, upon or about said building or premises, nor from any damage occasioned by water arising from acts or neglect of neighboring tenants.

(12)

If Lessees shall abandon or vacate said premises, the same shall be re-let by the Lessors for such rent and upon such terms as Lessors shall see fit, and if a sufficient sum shall not be thus realized, after paying the expenses of such re-letting and collecting to satisfy the rent hereby reserved, the Lessees agree to pay and satisfy all deficiency.

(13)

Lessees agree that if the estate created hereby shall be taken upon execution or any other process of law, or if the Lessees shall be declared bankrupt or insolvent, or any receiver be appointed for the business and property of the Lessees and be not discharged within 60 days, or if any assignment shall be made of the Lessees' property for the benefit of creditors, or if Lessees shall apply for reorganization or any extension agreement with their creditors under any federal or state law now in force or hereafter enacted, then and in that event Lessors shall have the option of terminating this lease, or in their discretion, or exercising any and all other remedies to which they may be entitled as a matter of law.

(14)

It is agreed that the rent and charges above reserved shall be a first lien on the furniture, fixtures and personal property of the Lessees, and that said property shall not be removed from said premises until the rent and other charges are fully paid.

(15)

No waiver of any breach of any covenant, condition or stipulation herein contained shall be taken to be a waiver of any succeeding breach thereof, and the acceptance of rent during any period in which the Lessees may be in default shall not be deemed to be a waiver of such default.

(16)

The Lessors covenant and agree that the Lessees upon paying the rental herein provided and

performing all of the covenants and agreements herein contained, shall and may in accordance herewith peacefully and quietly have, hold and enjoy said demised premises during the term hereof.

## (17)

If Lessors commence and successfully prosecute any action against the Lessees to protect or enforce any of Lessors' right hereunder, or if Lessors defend successfully in any action or proceeding by the Lessees against the Lessors, the Lessees will pay to Lessors a reasonable attorney's fee in each such action, and Lessees shall likewise receive a reasonable attorney's fee if they are successful in each such action.

## (18)

In the event that the demised premises shall be destroyed by fire or the elements before or after the commencement of the term herein specified, this lease shall wholly cease and terminate. In the event that said premises are rendered untenable by fire or the elements, Lessors agree to repair and restore said premises with reasonable dispatch. In case of such repairs the rent due hereunder shall abate during the making of the same.

## (19)

That the Lessees, their heirs, executors, administrators or assigns, shall have the right and option to lease said premises for a further term of ten years, commencing June 1st, 1956, on the same terms and conditions as apply to the period of the present lease, commencing June 7th, 1946,

except for rental and except that during said extended period Lessees shall not be obligated to make permanent improvements provided in paragraph 3 hereof. Said right and option to re-lease shall be exercised by the Lessees by serving written notice upon the Lessors, their heirs, executors, administrators or assigns, at least six months prior to May 31st, 1956, which notice shall be to the effect that said Lessees do then exercise said option. If such written notice is not served by the Lessees upon the Lessors within the time and in the manner stated, then said option shall expire. If said notice is served within the time and in the manner in this paragraph stated, the rental for the extended term shall then be fixed by agreement between the parties at a minimum of Six Hundred Fifty Dollars (\$650.00) per month, and at a maximum of Eight Hundred Fifty Dollars (\$850.00) per month, said determination to be made in accordance with the then going rate of rental and business conditions as they then exist. If and after said option is exercised by the Lessees, and if the parties cannot then agree on a rental between said minimum and maximum, then each shall appoint an arbitrator and the two so appointed shall choose a third and a majority of the three shall fix the monthly rental to be paid by the Lessees to the Lessors between the minimum and maximum herein stated, and their decision shall be binding upon the parties hereto.

(20)

No remedy herein conferred upon the Lessors shall be considered exclusive of any other remedy, but the same shall be cumulative and shall be in addition to every other remedy given

hereunder, or now or hereafter existing at law or in equity or by statute.

IN WITNESS WHEREOF the said Lessors and Lessees have hereunto executed this agreement the day and year first hereinabove written.

(Signed by the parties)

From the terms of the lease it will be noted that the defendants leased to the plaintiffs the building at 248-256 South State Street, Salt Lake City, Utah, which is now known as "Wolfe's Sportsman's Headquarters."

While the lease is dated February 19, 1945, the plaintiffs by the provisions of paragraph 5 were not, upon the occurrence of certain contingencies which did occur, to have any rights of possession or any obligations under the lease until June 7, 1946, some 15 months later than its date. On the date of the lease the premises were occupied by the Stewart Novelty Company under a lease ending June 6, 1946, and if the Stewart Novelty Company paid their lease rental, then the plaintiffs here were not to have any rights of possession or obligations under their lease until June 7, 1946. The Stewart Novelty Company paid its rent, and so plaintiffs did not become entitled to the possession of the leased premises and had no obligations under the lease until June 7, 1946, and then for a term of ten years ending May 31st, 1956, designated in the lease as the last ten years. It is important to bear these facts in mind. For the 15 months covered by the lease preceding June 7, 1946, the plaintiffs had

neither rights nor obligations, but defendants did have obligations.

In paragraph 6 of the lease the plaintiffs "agree to and do hereby accept said premises in the condition and state of repair they are now in," but under paragraph 8 the defendants who drew the lease made the following covenant: "For the entire term of this lease the Lessors shall have the obligation to keep the roof of the leased premises in good condition and repair." In other words, the plaintiffs only conditionally accepted the premises in the condition and state of repair they were in on February 19, 1945; that acceptance was modified, conditioned and limited by the express agreement of the defendants that plaintiffs had no responsibility for the roof and that defendants alone assumed that responsibility for the entire term of the lease. The plaintiffs accepted the premises 15 months before they ever went into possession only provided the defendants for that 15 months period and for the entire remaining term should keep the roof in good condition and repair.

In paragraph 6 the plaintiffs agreed that after they took possession or for the last 10 years of the lease they would make all improvements, upkeep and repairs, only "except as hereinafter stated," the exception being the roof as specified in paragraph 8. The plaintiffs even for the last 10 years of the lease, the period of their actual tenancy, had no obligations, ordinary or extraordinary, with respect to the roof. The defendants assumed and undertook the entire responsibility for the



roof both for the last 10 years and also for the earlier 15 months period when the plaintiffs had no rights or obligations under the lease or with reference to the premises. Under the lease the plaintiffs never had any obligation with reference to the roof and they accepted the premises only upon and subject to the aforesaid express liability of defendants for the roof. This further is made clear by the provisions of paragraph 3 wherein it is stipulated that for the last 10 years the rental of \$600.00 per month has been agreed upon if the plaintiffs will make certain permanent improvements including the installation of a first-class front which improvements shall cost not less than \$10,000.00. These improvements were to be commenced on or before June 7, 1946, (the beginning of plaintiffs' occupancy), and after they were completed the lease expressly forbade the plaintiffs from making any further structural changes on the premises without the consent of the defendants. Not only did the lease require the defendants to keep the roof in good condition for the entire term but it forbade the plaintiffs from making structural changes of any kind after the initial permanent improvements had been completed.

The plaintiffs in October of 1945, (R. 37), after the lease was signed but before they were entitled to possession conferred with defendant James L. White about the condition of the roof and Mr. White assured the plaintiff, Hubert Wolfe, that the roof had been put in good condition and that it was in excellent shape. The plaintiffs in preparation for their occupancy and to fulfill

the terms of the lease to make permanent improvements in the store front employed Mr. A. B. Paulson, a competent and qualified architect, (R. 3) who in turn applied to Mr. Tipton, Superintendent of the Bureau of Mechanical Inspection of Salt Lake City, for a permit to remodel the front of the leased property. Mr. Tipton, Exhibit "B," (R. 17), refused to grant the permit because the roof of the building was unsafe. Mr. Tipton stated that he had notified Mr. James L. White of this condition as early as January 22, 1946. Under date of April 29, 1946, Mr. Tipton also wrote to plaintiff, Hubert Wolfe, informing him that continued occupancy of the building would not be permitted until the unsafe conditions with reference to the roof were remedied. Exhibit "C," (R. 18)

The plaintiffs conferred with the defendants who refused to do anything with reference to the roof. Therefore, instead of the plaintiffs being able to take possession and occupy the premises on June 7, 1946, they were denied occupancy until the roof was fixed, and they were forced, because of the refusal of the defendants to do so, to correct the defective conditions in the roof to meet the requirements of the public officials and the Ordinances of Salt Lake City. Even after plaintiffs had commenced work on the roof the work was further delayed at the request of the defendant, James L. White, who asked the plaintiffs to suspend work so that he could have his own inspection made, and plaintiffs again told defendant White that it was satisfactory with them for him to make the roof safe in any manner that was ac-

ceptable to the city and at as little expense as it was possible for him to incur. (R. 33) This last delay at the request of the defendant White delayed the work until July 31, 1946, so that by reason of all of the circumstances instead of the plaintiffs being able to occupy the premises on June 7, 1946, actually they were not able to go into occupancy of their leased premises until November 9, 1946. (R. 19)

The plaintiffs in order to occupy their leased property at all were compelled to fix the roof themselves and bring this action against the defendants for defendants' refusal to comply with the terms of the lease.

The complaint was supplemented by a bill of particulars and amended by adding an additional paragraph, paragraph VIII. We shall now set forth the complaint, the amendments as a part of it, followed by the exhibits and bill of particulars, omitting all formal parts: (We have already set forth in full the lease which is Exhibit "A" of the complaint and shall not repeat that document here).

(R. 1) Plaintiffs complain of defendants and allege:

### I.

That all of the parties hereto are now and at all times herein mentioned were residents of Salt Lake County, State of Utah, and that the property involved herein and hereinafter described is situated in Salt Lake City, Salt Lake County, State of Utah.

## II.

That on or about February 19, 1945, at Salt Lake City, Utah, the defendant Sarah White as owner of the premises and the defendant James L. White, her husband, as lessors, leased by written lease, to the plaintiffs, Hubert Wolfe, Shirley Wolfe, his wife, Elliott Wolfe, Kayla Wolfe and Merrill Strong, copartners, doing business in Salt Lake City, Utah, under the firm name and style of Wolfe's Department Store and to Wolfe's Department Store, a co-partnership, as lessees, copy of which lease is hereby referred to, attached hereto as Exhibit "A" and hereby made a part hereof, for a term commencing on March 7, 1945 and ending on May 31, 1956, the following described premises located in Salt Lake City, Utah, to-wit:

The one-story building, basement and balcony, commonly designated as 248-256 South State Street, having dimensions of approximately 78 feet 3 inches on State Street, by 123 feet 6 inches in depth.

## III.

That said lease provided by paragraph three thereof that on or before June 7, 1946, lessees, plaintiffs herein, should commence at their own expense certain permanent improvements to the leased premises, including the installation of a first class front, which improvements were to cost not less than \$10,000.00 exclusive of trade fixtures or any other removable fixtures; and said lease provided further by the terms of paragraph six that the lessees, plaintiffs herein, accepted the premises in the condition and state of repair they

were in on the date of said lease to wit: on or about February 19, 1945, and that:

“For the last 10 years of this lease, all improvements, upkeep and repairs, of every kind and nature whatsoever, regardless of the extent thereof and whether the same be ordinary or extraordinary, and regardless of how the same may be necessitated, except as hereinafter stated, including repair and upkeep of the heating plant and replacement of all glass, including plate glass broken, are to be made at the expense of the Lessees.”

and that said lease further provided by paragraph eight that

“For the entire term of this lease the Lessors shall have the obligation to keep the roof of the leased premises in good condition and repair; to pay general taxes and lighting assessments levied against said property, all fire insurance premiums and premiums on any other insurance the owner elects to carry.”

and said lease provided further by the terms of paragraph seventeen

“If Lessors commence and successfully prosecute any action against the Lessees to protect or enforce any of Lessors’ rights hereunder, or if Lessors defend successfully in any action or proceeding by the Lessees against the Lessors, the Lessees will pay to Lessors a reasonable attorney’s fee in each such action, and Lessees shall likewise receive a reasonable attorney’s fees if they are successful in each such action.”

## IV.

That preparatory to and for the purpose of making the permanent improvements required by the terms of said lease as aforesaid, plaintiffs employed a competent and qualified architect, one A. B. Paulson of Salt Lake City, Utah, and the said A. B. Paulson on behalf of the plaintiffs applied to the proper officials of Salt Lake City Corporation, to wit: the Superintendent of the Bureau of Mechanical Inspection, for a permit to make said improvements and to remodel the front of said leased property and that under date of March 21, 1946, said A. B. Paulson received a letter from the said Superintendent of the Bureau of Mechanical Inspection, Salt Lake City Corporation, advising that the said application for permit was being held in abeyance because of the unsafe condition of the roof of said leased premises, copy of which letter is hereby referred to, attached hereto, marked Exhibit "B" and by this reference made a part hereof, and that under date of April 29, 1946, the plaintiff Hubert Wolfe received a further letter from said Superintendent of Bureau of Mechanical Inspection, Salt Lake City Corporation, refusing to allow the said leased premises to be occupied at all until the roof thereof was made safe, copy of which said letter is hereby referred to, attached hereto, marked Exhibit "C" and by this reference made a part hereof.

## V.

That by bill No. 51, 1940, the Board of City Commissioners of Salt Lake City, Utah, adopted the "Building Code" of 1940 and that said code and ordinance was in full force and effect in Salt Lake City at all times herein mentioned; that by

the terms and provisions of Section 201 of said Code it was provided that no person shall add to, enlarge, alter, repair or change any building or structure or cause the same to be done without first obtaining a building permit therefor from the Building Inspector of Salt Lake City, Utah; that by the terms and provisions of Section 301 to and including Section 305 of said Building Code the Office of Building Inspector was created and the Building Inspector authorized and directed to enforce the provisions of the Code, with all the powers of a police officer and with power and authority to enter any building or premises for purpose of inspection and to prevent violation of the Code, and that said sections also provide that any building or portion thereof found to be dangerous or unsafe or which violate the provisions of the said Code due to deterioration or other defects may be condemned by the Building Inspector, and that the Building Inspector shall serve notice on the owner in writing or to the person in charge of any building or premises setting forth what must be done to make such building safe, and that the person receiving such notice shall commence within forty-eight hours thereafter to make the necessary changes, repairs, or alterations and proceed diligently with such work and that no building shall be occupied or used for any purpose after the Building Inspector serves written notice of its unsafe or dangerous condition until the instructions of the Building Inspector have been complied with; that said Building Code contained the terms and provisions respecting roof construction and roof loads of buildings in said city and that all of said ordinances contain other and further relevant provisions applicable to the leased premises herein, and all of said ordinances are hereby referred to

and by this reference made a part hereof the same as if they were pleaded haec verba herein; and that by Bill No. 11 the City Commissioners of Salt Lake City, Utah adopted an Ordinance effective February 21, 1946, creating the Office of Superintendent of the Bureau of Mechanical Inspection and providing that such Superintendent shall have charge of the Bureau of Mechanical Inspection and exercise all the powers required of and conferred on the Building Inspector by the Uniform Building Code 1940 Edition of the Ordinances of Salt Lake City, which said Ordinances Bill No. 11 is hereby referred to and by reference made a part hereof in all its terms and provisions the same as if it were set forth haec verba herein.

## VI.

That it appears from said Exhibit "B" that the defendant James L. White was notified of the unsafe condition of the said roof by the Superintendent of the Bureau of Mechanical Inspection, Salt Lake City Corporation, January 22, 1946; and plaintiffs allege that plaintiff Hubert Wolfe on several occasions prior to June 7, 1946, and particularly in March and April of said year, notified and called to the attention of the defendant James L. White, the unsafe condition of said roof and the requirements and letters of the said public official of Salt Lake City Corporation, to wit: the Superintendent of said Bureau of Mechanical Inspection, and at the same times notified and called to the attention of the said James L. White to the fact that the plaintiffs were excluded from possessing said premises for the aforesaid reasons, and requested the lessors, defendants herein, to put the roof of said leased premises in a safe and proper condition and also so as to meet



the requirements of the said official of Salt Lake City Corporation, and so as to provide proper drainage facilities for said roof, and at the same time notified and advised the defendants that if proper action on their part was not taken to remedy the said conditions plaintiffs would themselves cause the roof to be made safe and in good condition and repair and seek to hold the defendants liable for the costs of the same and for their attorneys' fees thereupon incurred; that the defendants and each of them failed, neglected and refused to take any action towards complying with the requirements of the said Superintendent of the Bureau of Mechanical Inspection, the Building Code or Ordinances of Salt Lake City Corporation or towards placing said roof in good condition or repair or to make said roof safe or to provide drainage for said roof.

## VII.

That because of the failure, neglect and refusal of the defendants or either of them to comply with the said requirements of said Superintendent of the Bureau of Mechanical Inspection, Salt Lake City Corporation, the Building Code or Ordinances of Salt Lake City Corporation or to keep said roof of the leased premises in good condition and repair, and in order to occupy the leased premises at all and to make them tenantable, plaintiffs were compelled to and did comply with said requirements aforesaid and did place the said roof in good condition and repair and repaired the same to make it safe and in good condition and also so as to provide proper drainage; that in complying with said requirements aforesaid in putting said roof of the leased premises in good condition and repair and in making the

leased premises tenantable, when they were not otherwise tenantable, the plaintiffs were compelled to and did expend in excess of \$12,000.00, which was a reasonable sum therefor, and in addition were damaged and sustained financial loss by reason of the defendants' aforesaid refusal, failure and neglect in excess of the sum of \$8,000; to wit: in the total sum of \$20,121.58, all of which said expenditures are set forth in detail by Exhibit "D," hereby referred to, attached hereto and by this reference made a part hereof, and in addition by reason of defendants' aforesaid refusal, failure and neglect plaintiffs were compelled to and did employ attorneys to prosecute this action and have become obligated to pay said attorneys reasonable attorneys' fees, which plaintiffs on information and belief allege will be in excess of \$1,000.00, and that by reason of all of the aforesaid plaintiffs have been damaged by the acts and conduct of the defendants as aforesaid in the sum of \$21,121.58 and that the defendants are indebted to the plaintiffs in said amounts for their aforesaid violations of the terms of said lease and by their acts and conduct as aforesaid, and that no part of said sum has been paid to the plaintiffs or any of them.

(First Amendment) (R. 36)

### VIII.

That defendant, James L. White, drew the lease and expressly advised plaintiffs before they signed the same that by accepting the premises in the condition and state of repair they were then in they did not accept the roof which was provided for in paragraph 8 of the lease and was defendants' responsibility; that the plaintiffs accepted

the said leased premises in the condition and state of repair they were in on the date of the lease, to-wit: on or about February 19, 1945, only because the defendants agreed that for the entire term of the lease they would keep the roof in good condition and repair; that it was the agreement and understanding of the parties to the lease that for the entire term of the lease the defendants were to be solely responsible for the roof of the leased premises and would keep the same in good condition at all times regardless of its condition at the date of the lease, and that the plaintiffs had no responsibility whatsoever for the roof or for its safety, upkeep, maintenance, repair, or condition regardless of the condition that the same was in at the time the lease was entered into, and it was the intention of the parties that the lease express such understanding, and the lease was drawn and prepared by defendant, James L. White, and executed by the parties in the belief that it does so state; that the plaintiffs in accepting the premises in the condition and state of repair they were then in expressly excluded the roof, and the defendants expressly agreed that the roof was their responsibility and not the responsibility of plaintiffs; that the plaintiffs did not inspect the roof prior to or at the time of the execution of said lease and knew nothing about the condition of the roof, all of which was known to the defendants, and the lease was entered into with the knowledge on the part of both parties that the plaintiffs knew nothing concerning the condition of the roof; that in accepting the premises the plaintiffs did not accept an unsafe, defective, or unstable roof or a roof that was not in good condition and repair; that after the execution of said lease and on or about October, 1945, and before the plaintiffs attempted

to take physical possession of said premises the defendant, James L. White, assured the plaintiff, Hubert Wolfe, that he had put the roof in good condition and that it was then in excellent shape; that the said roof was not then in excellent shape; that after the said lease was entered into the roof commenced to sag, and plaintiff, Hubert Wolfe, called the same to the attention of the defendant, James L. White, which sagging gradually become worse, but the defendants failed, refused, and neglected to do anything to correct this condition or to place the roof in good condition and repair or to correct the unsafe condition thereof; that the defendants at all times failed, neglected, and refused to keep the roof of said leased premises in good condition and repair; that in January, 1946, the plaintiffs first learned that the roof was actually dangerous and unsafe, and that the plaintiffs then and there called the same to the attention of the defendants who refused to put the roof in good condition and repair; that the said roof was unsafe and was not in good condition and repair at that time in January, 1946, and became progressively worse so that when the plaintiffs were to take physical possession of the property June 7, 1946, the said roof had become so unsafe as to be dangerous to the life and limb of the plaintiffs, their patrons, customers, and any persons entering upon said leased premises; that the sagging of the roof became progressively worse and the roof was dangerous and unsafe because of the matters and things heretofore set forth in the complaint and exhibits herein and because the trussed rafters which form the roof framing were greatly undersized for the load they were carrying, the water from snow and rain would not drain off of the roof and would back up and drain into the store and basement and add to

the weight of the roof, the weight of the roof itself was too great for its supports, and on or about June 7, 1946, by reason of said conditions the roof had become dangerous and unsafe as aforesaid; that the defendants failed, neglected, and refused to keep the roof of the leased premises in good condition and repair, and the same was not in good condition and repair so that on or about June 7, 1946, by reason thereof there was great, grave, and imminent danger on said date of the roof collapsing and injuring persons in, upon, and about the leased premises, and that such condition rendered the premises untenable so that the plaintiffs could not occupy the same in safety or at all, and that on said date it was impossible to correct the unsafe and dangerous condition of the roof without the work, labor, and expenditures thereafter done and expended for that purpose as heretofore alleged by the plaintiffs in their complaint herein; that plaintiffs do not know when the said roof first became dangerous and unsafe but said unsafe condition became progressively worse from the date of said lease and at the time, to-wit: June 7, 1946, when plaintiffs were to take physical possession had become so bad as to render the said premises untenable, as aforesaid; that the plaintiffs frequently requested the defendants to put the roof in good condition and repair, but that the defendants and each of them failed, refused, and neglected to put the roof in good condition and repair, and the plaintiffs were compelled to put the roof in good condition and repair at their own expense as hereinbefore in their complaint alleged; that because and as a direct and proximate result of the defendants' failure, refusal, and neglect, as aforesaid, the plaintiffs sustained the damages and ex-

penses hereinbefore alleged and as set forth in their complaint, Exhibits, and Bill of Particulars in the sum of \$21,121.58, and were compelled to and did employ attorneys as heretofore alleged.

(Second amendment) (R. 51)

That the defendant James L. White is now and at all times herein mentioned was a member of the Utah State Bar and a practicing lawyer in Salt Lake City, Utah; that he drew the lease between the plaintiffs and defendants and in all matters and things pertaining thereto he represented and acted for both defendants, and that in the discussion pertaining to the lease and the advisability of having another attorney look over the lease prior to the signing of the same by the plaintiffs, the plaintiff Hubert Wolfe asked the defendant James L. White if there was anything in the lease that should be clarified by another attorney, and the defendant James L. White advised the said plaintiff that there was no such necessity and that the lease was in the usual form with the exception that the plaintiffs were responsible for everything in connection with the building except the roof which the defendant James L. White told the plaintiff was the responsibility of the defendants under the terms of the lease; that the said plaintiff then and there specifically called the attention of the said defendant to the provision of Paragraph 6 to the effect that "The lessees agree to and do hereby accept said premises in the condition and state of repair they are now in," and asked the said defendant if said provision should not be modified to read, "with the exception of the roof," so as to express the aforesaid understanding of the parties, and the said defendant then and there

advised the said plaintiff that that would not be necessary as it would only be a repetition of what was provided for in Paragraph 8, which said Paragraph 8 the defendant advised the plaintiff expressed such aforesaid understanding and provided that the sole responsibility for the roof for the entire term of the lease was the defendants' responsibility and was not under the terms of the lease the responsibility of the plaintiffs; that the said defendant James L. White specifically represented to the said plaintiff that the language of the lease with reference to the acceptance of the premises in the condition and state of repair they were then in did not include the roof and that the plaintiffs had no responsibility whatsoever for anything pertaining to the roof; that the said plaintiff then advised the said defendant that the plaintiffs would sign the lease if the roof was the sole responsibility of the defendants and if the language that the plaintiffs accepted the premises in the condition they were then in did not include the roof; that the said representations of the said defendant, as aforesaid, were made as an inducement to the plaintiffs to sign the lease; that the said defendant James L. White then and there advised the said plaintiff that he, the said James L. White, had drawn the lease to incorporate therein the aforesaid understanding of the parties, and that the lease did express the aforesaid understanding in all respects, and that the language of the lease as to accepting the premises in the condition and state of repair they were then in did not cover, refer to or include the roof; that the said James L. White knew and now knows that the plaintiffs signed the said lease because of said representations and in reliance thereon, and that the plaintiffs did sign said lease because of said representations and in reliance thereon, and that

the said defendants are now estopped to assert any other or different interpretation of the said lease, and that the said lease and the language thereof to the effect that the plaintiffs accepted the premises in the condition and state of repair they were then in should be interpreted to exclude the roof and all parts thereof from such acceptance on the part of the plaintiffs.

WHEREFORE, plaintiffs pray judgment against the defendants, jointly and severally, in the sum of \$21,121.58 and for such further reasonable attorneys' fees as plaintiffs may incur herein and for their costs here incurred.

Exhibit "B" (R. 17)

(Copy of Letter sent to A. B. Paulson  
from Mr. Wm. Y. Tipton.)

March 21, 1946

Mr. A. B. Paulson  
Continental Bank  
City

Dear Sir:

Concerning your application, dated March 20, 1946 for a permit to remodel the front of the property at 250 South State Street:

It has come to my attention that the rafters which form the roof framing have been overstressed and are sagging under the load they carry, also the girders between columns at the rear of the store are undersized and bowed.

Mr. James L. White, the owner, was notified of this condition January 22, 1946.



Obviously if the store is to be under continued occupancy this condition must be remedied and therefore your application is being held in abeyance until assurance is given that the roof condition will be taken care of.

A plan showing your proposal will be expected.

Sincerely,

Signed: Wm. Y. Tipton

Supt. B.M.I.

Exhibit "C" (R. 18)

Salt Lake City Corporation  
Bureau of  
Mechanical Inspection  
400 City & County Building  
Salt Lake City 1, Utah

April 29, 1946

Mr. H. Wolfe  
224 South State  
City

Dear Sir:

In regard to your future occupancy of the property at 250 South State Street;

March 20, 1946, Mr. A. B. Paulson, Architect, made application for a permit to remodel the front of this property, which application was held in abeyance until assurance was given that the roof would be structurally altered to make it safe.

It was called to the attention of Mr. Paulson and also Mr. White, the owner, that this condition prevailed.

I am now calling it to your attention as lessee.

Recently Mr. Hargreaves, the City's Chief Building Inspector, made an inspection of the roof truss system for the main fore-part of the store and he found that the trussess were not adequate both as to design and as to erection. Also that the main ceiling beams both for the front and rear part of the store are sagged and are evidently too light to carry the roof load. Also that the roof drainage system has proved to be inadequate.

These factors make it mandatory upon me to refuse to allow continued occupancy of this structure beyond this summer season for fear of future heavy snow loading which might cause total beam and truss failure and consequent collapse of the roof structure.

Sincerely,

/s/ Wm. Y. Tipton

Exhibit "D" (R. 19)

W O L F E ' S  
Salt Lake City, Utah

R O O F

*Actual Damages*

Roof actual cost .....	\$13,679.56
Plus Architects Fees 6% .....	820.77
	<hr/>
	\$14,400.33

Less estimate to  
eliminate Posts .....\$2,099.00  
Plus 6% A. F. .... 125.94

\$2,224.94

2,224.94

\$12,175.39

Overtime paid on Bldg. to rush construction because of delay & to get moved some time before Christmas 1,293.86

(See letter Cannon)

3 Months Rental to J. White ..... 1,800.00

Delayed occupancy (3 Mths.) on account of roof. Could and would have been moved by August 1st according to plan. Fixtures & mdse. purchased to coincide with this date.

4 Months rent old store \$375.00 per month, minimum rental ..... 1,500.00

Could have leased bldg. to Jack & Jill Shop if I could have vacated on schedule. \$375.00 per month for every month vacant.

Excess percentage rental paid on old store lease from August 1st to November 9th, date we moved to new store ..... 3,282.33

2½% from total sales

\$199,211.99 to \$ 200,000

\$19.70 19.70

2% from total \$200,000

to \$362,131.50 3,362.63

\$3,282.33

George Nelson (Investigation of Roof structure .....	45.00
Heath & Burbidge (Survey to establish corner for proof rafters .....	25.00
<hr/>	
ACTUAL DAMAGES .....	\$20,121.58
Plus Attorney fees & Court costs ....	1,000.00
<hr/>	
TOTAL .....	\$21,121.58

### BILL OF PARTICULARS (R. 30)

Plaintiffs supplementing their allegations of paragraph VII of their complaint herein and as an addition thereto and as a more detailed explanation of Exhibit "D" of their said complaint, file this as a bill of particulars for said purpose and show:

1. Plaintiffs prior to undertaking any work with reference to the roof of the leased premises consulted with the building inspector of Salt Lake City, A. B. Paulson, Slack Winburn and George Nelson, architects and structural engineers, to determine the quickest and cheapest way of conforming to the building inspector's demand to make said roof safe; that plaintiffs advised defendant James L. White of all of their findings and many times prior to June 7, 1946 asked him to make the roof safe and the said defendants always refused so to do; that plaintiffs thereupon engaged the Cannon Construction Company, competent building contractor, to undertake work on said roof, and it was the opinion of all of the aforesaid that the best, quickest and most economical method of making the said roof safe was to tear down the entire roof and salvage all of the lumber and material that it was possible to salvage and re-use all that could be re-used. This

was done and all the lumber and materials capable of being used were used at a great saving of material; that steel beam construction was used because it was easier to obtain steel due to the lumber shortage which prevailed at said time and because the use of steel was as cheap or cheaper than lumber, and the only kind of lumber obtainable at that time was so green as to render it unsuitable for this type of construction; that 60% or more of the old material in the roof was used in the work of fixing the roof as aforesaid; that since steel was used it was unnecessary to continue the use of eight center supporting posts in the middle of the store room, and they were eliminated and the added cost of \$2,224.94 has been deducted in Exhibit "D" from the cost of fixing said roof. This extra cost was paid by the plaintiffs and is not included in the complaint as a charge against the defendants. The elimination of the posts had nothing whatever to do with fixing the roof nor did they change the necessity for fixing the roof as it was eventually constructed. All of plaintiffs' fixtures were ordered and are not set up in place as though the posts were still present and the empty spaces where the posts would have been are still present in the store. The first item of actual damage in Exhibit "D" for \$12,175.39 is made up of the following:

1. The tearing out and removing of the old roof structure, salvaging all lumber possible for reuse into the new structure.
2. Sanding that portion of the floor where damage had occurred due to rain and sun which had occurred while the roof was off. Heavy rains fell during the period the roof was off and plaintiffs were unable by the exercise of

any precautionary measures to prevent damage to the floor due to this cause.

3. Structural steel trusses and their erection. (Note elimination of \$2,224.94 above).
4. Framing and sheathing of new roof structure.
5. New roof covering.
6. Lathing and plastering of ceiling under this portion of the building.
7. Electric wiring in this portion of the ceiling.
8. Installation of new roof drains. These drains replaced existing roof drains and located them properly so as to eliminate further damage to the roof from inadequate drainage and consequent further liability to the defendants for damage to the roof.
9. Minor sheet metal work for flashings.
10. Taxes, insurance, and contractor's fee.
11. Reinforcing beams on roof in rear of building.

2. The item of \$1,800.00 claimed in Exhibit "D" is because of plaintiff's inability to occupy the store at all for three months. Plaintiffs under their lease could have been in the store by August 1, 1946, but by reason of defendants' failure to fix the roof they were not able to move into their leased premises until November 9, 1946. The \$1,800.00 was paid defendants by the plaintiffs for the period August 1, 1946 to November 9, 1946 when they were denied all occupancy of the premises due to the defendants' violation of the lease and when plaintiffs would have been in oc-

cupancy had defendants complied with their obligations under the lease.

3. The two items of \$1,500.00 and \$3,282.33 set forth in Exhibit "D" were rent actually paid by the plaintiffs for their old premises and which they would not have had to pay had they been able to move into their premises on August 1, 1946 as they could have done except for defendants' dereliction as aforesaid. Plaintiffs had the old premises rented to a sub-tenant who would have taken them and paid the rent, but because of defendants' failure to keep the roof of the leased premises in good condition, plaintiffs were compelled to pay four months' rent on the old store at \$375.00 per month and a percentage of their total sales as set forth in Exhibit "D" which they would not have had to pay had they been able to occupy the leased premises according to the terms of the lease.

4. The other items of Exhibit "D" are self explanatory.

5. As shown by Exhibits "B" and "C" plaintiffs commenced their efforts to comply with their provisions of the lease in ample time to have had the building permit issued and the construction of the new front promptly under way and all of plaintiffs' construction could have been completed and in actual occupancy by August 1, 1946 had defendants complied with their obligations under the lease. Plaintiffs' fixtures were all ordered and delivered long prior to August 1 and ready to be installed, and plaintiffs were compelled to store said fixtures and all fall merchandise in storerooms in Salt Lake City for none of which damage plaintiffs are attempting to recover from defendants. Because of defendants'

failure and refusal as aforesaid plaintiffs were unable to get a building permit from the city until June 21 when they immediately started to work, but on or about July 5, 1946 defendant James L. White asked plaintiffs to suspend operations so that he could have his own inspection made and that plaintiffs thereupon told the defendant James L. White that it was satisfactory with them to make the roof safe in any manner that was acceptable to the city and at as little expense as it was possible for them to incur; to take his plans and submit them to the city building inspector, and that defendant James L. White again refused to do anything, insisting that the responsibility was not his to undertake any of said work. This last delay at the specific instance and request of the defendant James L. White delayed the work until July 31, 1946 and there was fully three months delay in securing occupancy of the premises due solely to the failure of the defendants to make the roof of said leased premises safe.

It is agreed that defendants demurrers and motions to strike may be considered if defendants so desire as applicable to this bill of particulars in order that rulings may be made by this court without additional delay.

### ASSIGNMENT OF ERRORS

The trial court erred in sustaining defendants' general demurrers to plaintiffs' complaint and amendments thereto and in dismissing the action.

### ARGUMENT

The trial court stated orally that the general demurrers were sustained because of the provisions of



paragraph 6 of the lease that "the lessees agree to and do hereby accept said premises in the condition and state of repair they are now in." The trial court was apparently of the opinion that this provision of the lease stands alone and is controlling, in spite of many other provisions that limit and modify it and in spite of the allegations of the complaint showing the true meaning of the acceptance.

The lease cannot be construed by reference to the foregoing provision alone, and to give it the construction given it by the trial court results in ignoring other provisions of the lease equally positive which clearly indicate that the lessees' acceptance of the premises in the condition and state of repair they were then in was only because the lessors agreed to take the sole responsibility for the roof. Properly construed we contend that the lease reads: "the lessees agree to and do hereby accept said premises in the condition and state of repair they are now in, except for the roof, which is no obligation of the lessees either for the period when they are out of possession or for the last 10 years of the lease, but for the entire term of the lease the roof is the sole obligation and responsibility of the lessors who shall have the sole obligation and responsibility for the entire term of keeping the roof of the leased premises in good condition and repair." When the plaintiffs were to go into possession and occupancy on June 7, 1946, the roof was not in good condition. The defendants had agreed that for the entire term of the lease the roof would be in good condition and that they would maintain it in good con-

dition. They did not maintain it in good condition, it was not in good condition, and defendants refused to put it in good condition. In fact the defendants refused to do anything at all with reference to the roof.

It appears to us that a mere reading of the lease and the allegations of the complaint demonstrates that the defendants violated the terms of the lease and that no citation of legal authorities should be necessary to demonstrate that fact. However, as we read the cases there is no authority whatever to sustain either the trial court in its position or the argument advanced by the defendants to the trial court. The defendants filed lengthy briefs in which they persistently and repeatedly inaccurately set forth the lessors' obligations with reference to the roof. They cited numerous cases involving only the word "repair" to the effect that keeping premises in "repair" meant only keeping the premises in the state of repair they were in at the time they were entered upon by the lessee. That, however, is not the situation or the question present here. More than repairs is involved. The complaint alleges that the plaintiffs never inspected the roof, knew nothing about the condition of it, had no concern with the roof because of the defendants' assertions and representations that plaintiffs had no responsibility for the roof and that they, defendants, would take care of it. The lease does not limit defendants duty merely to keeping the roof in repair. They are also required for the entire term to keep it in good condition. The lease says that the lessees obligations do not include the roof. The defendants expressly agreed

that for the entire term of the lease they would keep the roof not only in repair but in good condition. This obligation is unlimited and applies whether the work necessary to keep it in good condition requires structural changes or not. In fact no structural work except the original improvements including the store front could be done without consent of the lessors. The lessors refused to perform their obligations. The public authorities refused to permit further occupancy of the premises until certain requirements were met. It then became the duty and the right of the plaintiffs under both the lease and the law to meet those requirements and make the roof safe.

## THE COMPLAINT BOTH BEFORE AND AFTER THE AMENDMENTS STATED A CAUSE OF ACTION

1. The public authorities declared the roof unsafe and refused to permit occupancy of the premises until it was made safe, and that in and of itself was sufficient to justify the plaintiffs, upon defendants' refusal to do so, in fixing the roof and recovering therefor from the defendants.
2. The roof was in fact not in good condition and the plaintiffs had the right upon defendants' refusal to put it in good condition to do so themselves and hold the defendants liable.

We shall discuss these propositions in the order named.

## DEFINITIONS

Paragraph 8 of the lease provides: "For the entire term of this lease the lessors shall have the obligation to keep the roof of the leased premises in good condition and repair."

"For the entire term of this lease" means from February 19, 1945, to May 31, 1956, and includes a 15 months period during which the plaintiffs had no obligations under the lease and had no right to the possession of the premises. For this period as well as for the last 10 years of the lease the defendants agreed "to keep the roof of the leased premises in good condition and repair."

"To keep" means to maintain and preserve from risk or danger from the beginning to the end, *Tannenbaum vs. Sea Coast Tr. Company*, 198 A. 855, & Words and Phrases, under "to keep."

"Roof" is defined by Webster's New International Dictionary as "the cover of any building, including the roofing and all the materials and construction necessary to carry and maintain the same upon the walls or other uprights." The roof is not merely the exterior covering.

"Good condition" implies changing conditions, *City of New Bern vs. Atlantic*, 75 S.E., 807 (N.C.), and also means reasonably safe condition; sufficient or satisfactory for its purposes, *Missouri K. & T. R. Company vs. Smith*, 82 S. W., 788 (Tex.).

The building inspector's letters, Exhibits "B" and "C," (R. 17, 18), state that the rafters which form the roof framing have been overstressed and are sagging; that the girders are undersized and bowed and that the trusses of the roof truss system were not adequate, and that the ceiling beams both to the rear and front part of the store are sagged and too light to carry the roof load, also that the roof drainage system was inadequate.

"Rafters" according to Webster are the sloping timbers of the roof, and "girders" are the beam supports. The "trusses of the roof truss system" are the members forming the frame work of the roof, bracing the roof and the rafters. The "ceiling beams" are the horizontal members supported at the ends to carry the roof load.

1. THE PUBLIC AUTHORITIES DECLARED THE ROOF UNSAFE AND REFUSED TO PERMIT OCCUPANCY OF THE PREMISES UNTIL IT WAS MADE SAFE, AND THAT IN AND OF ITSELF WAS SUFFICIENT TO JUSTIFY THE PLAINTIFFS, UPON DEFENDANTS' REFUSAL TO DO SO, IN FIXING THE ROOF AND RECOVERING THEREFOR FROM THE DEFENDANTS.

The defendants drew this lease, (R. 36, 51), and had the duty to express the intention of the parties that the roof was the sole responsibility of the defendants for the entire term of the lease. It is our conviction that the lease does expressly so provide. The defendants drew the lease and because of that fact and also because they are the lessors the rule is well settled that any ambiguities will be construed against them and in favor of the

lessees (plaintiffs), *Teeter vs. Mid-West Enterprise Co.*, 52 Pac. (2), 810, (Okla. 1935).

In the case of *Farr vs. Wasatch Chemical Co.*, 105 Utah 272 on page 277, 143 Pac. (2) 281, this court said, "The language 'keep said premises tenantable' indicates that the parties understood the warehouse would be made tenantable." We accepted the premises only with the express understanding that for the entire term of the lease all parties understood that the roof "would be made" in good condition by defendants. If it was not in good condition at any time during the entire term of the lease, defendants agreed to put it in good condition. We did not, as defendants contend, accept the roof with the limited obligation upon the part of the defendants to keep it only in the condition in which it was on February 19, 1945. If the roof was not in good condition at that time, then it was defendants' obligation to make the roof in good condition and to maintain it in good condition. As we have already pointed out, "good condition" implies changing conditions and means reasonably safe and sufficient or satisfactory for its purposes. Under the lease we were not to have possession for 15 months, and by the express terms of the lease, the defendants agreed that the roof, when we did take possession, would be in good condition. They had agreed that during the 15 months period they would keep it, that is they would maintain it, in good condition. It was not in good condition when we attempted to take possession, defendants refused either to make it in good condition or to maintain it in good condition, and they

did not at any time maintain it in good condition or make it in good condition.

Under the language of the lease we had not right prior to June 7, 1946, to do anything at all with reference to the premises. Let us assume that prior to June 7, 1946, but subsequent to February 19, 1945, the city authorities of Salt Lake City had notified the defendants that the building must be vacated until the roof was made safe. There can be no question under such a situation that the defendants alone would have the obligation to comply with the requirements of the city authorities. We were not required to do anything with reference to improvements before June 7, 1946, and then our obligation with reference to improvements, upkeep and repairs excludes the roof and is only for the last 10 years of the lease.

Having neither the right nor the obligation to do anything with reference to the premises prior to June 7, 1946, it is clear that for that period we were under no duty whatever to do anything with reference to the roof or any other part of the premises, and had the city authorities required the roof to be made safe during that period it would have been absolutely no concern of ours whatsoever. The roof actually was unsafe during that period, so that when our right to possession came on June 7, 1946, the roof was not in good condition. The mere fact that the city authorities had not taken action did not change the fact that the defendants had not kept the roof in good condition. That we accepted the prem-

ises in that condition would be entirely immaterial. If the roof were unsafe, as it was, and we accepted the premises, that did not alter defendants' obligation to make it safe and especially is this true by reason of the fact that we had no obligation or right of possession whatsoever for the first 15 months. We accepted the premises in the condition they were then in only upon defendants' express agreement that the roof would be made and kept safe for the entire term of the lease, and particularly at the time we were to have the right of occupancy. The arrival of our time for occupancy of the premises did not lessen the defendants' responsibility for the roof. If anything, it increased it. Defendants had agreed that we might go into possession on June 7, 1946, but because of defendants' refusal to make the roof safe we were not able to occupy the leased premises for the purposes for which we had leased them.

After occupancy even the work that we were required to do, which expressly excluded the roof, (Par. 6 & 8) was limited to improvements, upkeep and repairs. We were expressly forbidden by the provisions of paragraph 3 to make any structural changes without the permission of the defendants. Neither before the time of our occupancy nor after that period arrived did we have any concern or obligation whatsoever with reference to the roof. This, it seems to us, appears clearly from the express language of the lease. Even if it were not clear ambiguities must be resolved in our favor and against the defendants.



Under paragraph 7 of the lease we agreed to occupy the premises in a lawful manner. When we attempted to occupy the premises we were confronted with the letter from the Superintendent of the Bureau of Mechanical Inspection of Salt Lake City, (Exhibit "C", R. 18), wherein he said speaking of the unsafe condition of the roof, "These factors make it mandatory upon me to refuse to allow continued occupancy of the structure beyond this summer season for the fear of future heavy snow loading which might cause total beam and truss failure and consequent collapse of the roof structure." He had already advised our architect that he had withheld issuance of the building permit for the remodeling of the front of the property because of the unsafe condition of the roof. (Exhibit "B", R. 17) Thus on June 7, 1946, when defendants had agreed we might enter into possession of the property we were refused a building permit and thus prevented from making the permanent improvements which we had agreed to make because of defendants dereliction, and we were also advised definitely that continued occupancy of the structure would not be allowed. We could not get a building permit, and we could not occupy the premises because the roof was unsafe. We could not lawfully occupy the premises unless and until the roof was made safe. We were under no duty or obligation to defy the public authorities. In fact we were under the contractual obligation not to do so. It would have been unlawful for us to attempt to occupy the premises. The public authorities had said that the roof was not safe and that we

could not occupy the premises. Whether it was safe or unsafe it was not our right to dispute the public authorities. They said the roof was unsafe and that ended the matter. The burden then was the defendants and not ours to satisfy the public authorities either by convincing them that they were wrong or by complying with their requirements. The defendants refused to do either. Clearly under the lease itself it was the defendants obligation if the roof ever became unsafe to make it safe regardless of when it became unsafe. "Good condition" implies changing conditions and also means reasonably safe condition; sufficient or satisfactory for its purposes. Everything the building inspector complained of was in the roof and an essential part of it. According to the public authorities the roof was not in good condition. The defendants never at any time attempted by any proper proceedings to remove the objections of the building inspector or to comply with his requirements. The public authorities required the roof to be made safe, and the defendants cannot in this proceeding question that action of those authorities. The presumption in this case is that the public authorities lawfully performed their duties and whether the defendants received oral or written notice is immaterial in the face of the allegations of the complaint that the public authorities notified the defendant, James L. White, as early as January of 1946 of the unsafe condition, and that we did the same thing ourselves frequently thereafter. We have pleaded the Ordinances of Salt Lake City which show that the building inspector was within

his right under those ordinances in refusing a permit to us and in requiring the roof to be made safe. The courts will not substitute their judgment for that of the municipal authorities in exercising their powers. "The court can do no more than to inquire whether an ordinance or law is unreasonable, oppressive or discriminatory, \* \* \*", *Kenyon Hotel vs. O. S. L. R. Company*, 62 Utah 364, 375, 220 Pac. 382. The court will not substitute its judgment for that of the public authorities even if it were so inclined. *Salt Lake City vs. Western Foundry Co.*, 55 Utah 447, 187 Pac. 829. It was not our duty to question the public authorities, and certainly we do not believe this court will substitute its judgment for that of the building inspector that the roof was unsafe.

Even if the lease had been silent as to the defendants' responsibility with reference to the roof, under general law they still would have had the obligation to comply with the requirements of the building inspector to make the roof safe. Unless the lease itself requires the tenant to do so the tenant is under no duty to make changes, structural or otherwise, or alterations or improvements ordered by the public authorities. That is the duty of the landlord. Even though the lease required the tenant to make repairs, New York held in the case of *Herald Square Realty Company vs. Saks*, 109 N.E. 545, (N. Y. 1915), that structural and permanent changes required by the public authorities were the obligation of the landlord. In that case the tenant had approved the building plans, agreed to make repairs and to keep the premises in good order and condition and to comply

with the laws and ordinances of New York. Later New York required certain show windows to be moved. The New York court held that this was an obligation of the landlord in spite of the tenant's agreement and approval of the plans as aforesaid. In the case of *DeMoines Steel Company vs. Hawkeye Amusement Company*, 174 N.W. 703 (Ia. 1919), the tenant constructed fire escapes which were required by the city ordinances. Even though these fire escapes were on the landlord's property not covered by the lease the court held it was the landlord's duty to comply with the law and with the ordinance covering the use of the property. (See also *Nelson vs. Eichoff*, 158 Pac. 370, where the Oklahoma court held that where premises become unsafe because of structural changes the landlord must fix them or there is an eviction. In that case the tenant agreed to make repairs.)

In the court below defendants cited numerous cases which they contended are contrary to the foregoing rule, but each and every one of the cases was clearly distinguishable upon its facts from the case at bar.

This court in the case of *Heywood vs. Ogden Motor Company*, 71 Utah 417, 266 Pac. 1040 (1928), answers many of the arguments made by the defendants below in the case at bar. In that case the lessor agreed to make certain repairs on the premises and agreed that the defendant might go into possession on December 1, 1924. The defendants were not able to go into possession on that date and as against the plaintiffs demand for rent for September, October and November, 1925,

nearly a year after defendants had gone into possession, the defendants claimed by way of setoff that they were kept from possession by the plaintiffs and asked for damages on account of being deprived of the leased premises for part of the month of December although they had already paid the rent for that month. They also asked for damages for discontinuance of an elevator by order of the public authorities. The trial court held that because defendants accepted the keys to the place they were placed in possession. This court, however, held that even though there was no express covenant of quiet enjoyment (there is such a covenant here, (R. 14) such a covenant was implied and because the plaintiffs had not done the work they were required to do, and by reason thereof, defendants were excluded from possession, there was a breach of the implied covenant of quiet enjoyment and that even though the defendants had paid the rent they were permitted to set it off against the plaintiffs' demand for rent for other months. This court held that the plaintiffs by their failure to do what they agreed to do on the premises had excluded the defendants from them. This court also said that the defendants should have been permitted to offer evidence of damage because the public authorities refused to permit the use of the elevator in the building.

We had the right to make the roof safe and hold the defendants for our damages upon their refusal to correct the unsafe conditions. "It is well established that upon the breach of a landlord of his covenant to repair, the tenant may make the repairs and recover the reasonable

expenses therefor from the landlord or charge it against the rent." (Citing numerous cases) 32 Am. Jur. p. 590, Sec. 715. (See also *Teeter vs. Mid-West Enterprise Company*, 52 Pac. (2) 810, supra, holding that where the landlord fails to make the repairs and they are substantial it is optional with the lessee to make the repairs at the expense of the landlord). The tenant may recover his actual damages to the extent that they are the natural, direct and proximate result of a breach of the covenant and such as may be reasonably supposed to be in contemplation of the parties at the time of the execution of the lease. 32 Am. Jur. p. 592.

It makes no difference whether or not the landlord knew of the ordinance or knew that he was violating it. In the court below the defendants contended that they received no written notice from the city authorities to make the roof safe. That does not relieve the landlord of responsibility. As pointed out by this court in the case of *Wilcox vs. Jameson*, 55 Utah 535, 188 Pac. 638, where the landlord has the responsibility he is liable, and his ignorance of the ordinance or failure of the city to notify him is immaterial. In the case at bar the owner had the obligation to make the roof safe both by lease and by ordinance, and lack of knowledge or notice is no defense for failure to comply with the requirements of the ordinance. If the city authorities had permitted us to occupy the premises after notifying us of the unsafe condition of the roof, we would have been civilly liable along with the landlord for any injuries sustained by persons upon our premises due to the unsafe con-

dition of the roof. In the case of *Knight vs. Foster* (N. C.) 79 S.E. 614, (a case cited by defendants in the court below), the court expressly said that if the landlord knew that the premises were in violation of law by disrepair both he and the tenant would be liable to a third person for any injuries due to the defective premises, and particularly if the landlord contracts to repair the very thing which is in disrepair. The court also said that fixing the gate in that case was a change and not a repair and that the duty was upon the landlord to make it but liability was also upon the tenant for injuries to third persons, that if the nuisance existed at the time of the demise both the tenant and the landlord are liable. Under the holding of the Knight case we could not safely occupy our leasehold without correcting the dangerous condition even had the city authorities been willing for us to do so.

Defendants argued below that because the roof required structural changes they were under no obligation to make them because structural changes are not "repairs." Such a contention is untenable and is directly contrary to the express terms of the lease itself, which does not confine defendants duty merely to "repairs." Defendants so far have carefully refrained from stating who was responsible for making the roof safe. We could not occupy the premises until it was made safe. Certainly there is nothing in the lease that places that burden upon us. Had the city required the roof to be made safe prior to June 7, 1946, clearly the defendants alone would have had the obligation, they having agreed to

keep the roof in a good condition for the entire term of the lease. The mere fact that we became entitled to possession on June 7, 1946, did not change the defendants' responsibility nor did it impose upon us any duty or obligation with reference to the roof. If it was not in good condition at that time, it was still the defendants' duty to put it in good condition. This they made no effort to do, and in order to get the benefit of our leasehold we were required to perform defendants' duty and seek redress in this action.

Because the city authorities said the roof was unsafe that fact alone required someone to make the roof safe. At the time the building inspector declared the roof to be unsafe we had neither the actual possession nor the right to possession of the premises. We couldn't have gone in and fixed the roof had we so desired. It was still in this condition when our right to possession under the lease accrued. Someone had the duty to fix the roof. Nothing in the lease required us to do so, and defendants had agreed that they would keep it in good condition for the entire term of the lease, so regardless of the condition of the roof at the time the lease was entered into or regardless of what was required to make the roof safe defendants had not kept it in good condition, and it was not in good condition when we had the right to take over. So far as we were concerned when the city authorities said the roof was unsafe that was conclusive. If there had been no roof at all on the premises and we had accepted them in the condition in which they were then in, the defendants under the terms of



this lease would have been required to have a roof in good condition upon the property at the time we took possession, June 7, 1946. By accepting the premises in the condition they were in we did not cancel the defendants' obligation assumed in the later provisions of the lease to see that there was a good roof on the premises when we became entitled to occupy them some 15 months later. As said by this court in the *Farr vs. Wasatch Chemical Co.* case, supra, the parties understood that the roof would be made in good condition and this good condition was to exist for the entire term of the lease and particularly at the time when we were to take over the occupancy of the premises. "Good Condition" implies changing conditions and means reasonably safe condition; sufficient or satisfactory for its purposes.

2. THE ROOF WAS IN FACT NOT IN GOOD CONDITION AND THE PLAINTIFFS HAD THE RIGHT UPON DEFENDANTS' REFUSAL TO PUT IT IN GOOD CONDITION TO DO SO THEMSELVES AND HOLD THE DEFENDANTS LIABLE.

The complaint originally was drawn upon the theory that the decision of the city authorities that the roof was unsafe was final and also that the roof in fact was unsafe. When the court sustained the general demurrer to this complaint, we amended by alleging other facts which it had not up to that time seemed necessary to allege. We then specifically alleged that the defendant, James L. White, drew the lease and expressly advised

us that in accepting the premises in the condition and state of repair they were then in we did not accept the roof because under paragraph 8 of the lease the roof was defendants' responsibility. We also alleged that plaintiffs accepted the premises only because the defendants agreed that theirs was the sole responsibility for the roof and that in accepting the premises the roof was excluded from that acceptance. We also alleged that the plaintiffs did not inspect the roof, knew nothing about the condition of it, and that this was known to the defendants, and that the lease was entered into with the knowledge on the part of both parties that the plaintiffs knew nothing concerning the condition of the roof; that in accepting the premises the plaintiffs did not accept an unsafe, defective or unstable roof; that on or about October 1945, the defendant, James L. White, assured the plaintiff, Hubert Wolfe, that he had put the roof in good condition and that it was in excellent shape. We alleged that the roof was not in excellent shape, and after the lease was entered into the roof commenced to sag and that the sagging became worse and this we called to the attention of the defendants who refused to correct the condition. We also alleged that the roof was unsafe and not in good condition and repair in January and became progressively worse, and that at the time we were to take possession in June it had become so unsafe as to be dangerous; that we do not know when the roof first became dangerous but that it did become dangerous and became progressively worse from the date of the lease until on June 7, 1946, the

premises were untenable because of the roof. We also alleged that the defendant, James L. White, is a member of the Utah Bar, and that upon being asked if there was anything in the lease that should be clarified the defendant, James L. White, advised the plaintiff, Hubert Wolfe, that there was no such necessity, and that it was unnecessary in paragraph 6 of the lease to put an exception as to the roof after the provision that the lessees accepted the premises, because that would only be a repetition of that which was provided for by paragraph 8, and that the said defendant expressly stated that paragraph 8 contained such an exception; that the defendant, James L. White, told the said plaintiff that the language with reference to the acceptance of the premises did not include the roof, and that such representation was made as an inducement to the plaintiffs to sign the lease, and that the plaintiffs signed the lease in reliance upon such representations. We then alleged that defendants are now estopped to assert any other or different interpretations of the said lease. (See paragraph VIII of the complaint, R. 36, 51)

We still believe that the lease does exactly what Mr. White represented to the plaintiffs it was intended to do. However, the trial court disregarded this interpretation of the lease and apparently in spite of defendants' general demurrers and the legal admissions consequent thereto, still felt that the language of paragraph 6 was controlling in spite of all the other modifying provisions of the lease. The trial court singled out one provision of the lease and gave no effect whatever to

the other provisions which should be read in connection with paragraph 6.

Be that as it may, the complaint as amended does definitely establish that the lease must be interpreted as we have indicated it should be. Every one of the defects pointed out by the building inspector were in the roof itself. The roof was not in good condition. Defendants agreed to keep it in good condition, and they did not do so. For our present purposes in view of the general demurrer the foregoing facts are established. That we are entitled to damages follows as a matter of law under all the authorities. The special demurrers and motions to strike were overruled, and we can complain only of the sustaining of the general demurrers. That it was error to sustain them we believe is established.

The defendants also asserted below that because of the provisions of paragraph 11 they were not liable in any event. That paragraph provides, "Lessors shall not be liable for any damage occasioned by failure to keep said premises in repair." We are not complaining of defendants' failure to keep the premises in repair. That paragraph did not exempt defendants from liability for failure to keep the roof in good condition, and it is that failure of which we are here complaining. In fact we interpret paragraph 11 to mean that defendants' will not be liable for our failure to keep the premises in repair. We do not believe it exempts defendants from liability they expressly assumed and with reference

to a part of the premises for which they had exclusive liability.

Defendants cited many cases construing similar provisions but none of them were applicable to the facts here, and none of them relieved a lessor of liability arising out of property over which he had assumed exclusive and entire control. For instance defendants cited a number of California cases, but they did not cite a later case from the Supreme Court of California, *Columbia Laboratories vs. California Beauty Supply Company*, 148 Pac. (2), 15 (1944). In that case the Supreme Court of California announced principles that do apply to the case at bar. On page 160 the Supreme Court of California says: "The rule that there is no implied obligation upon the landlord, in the absence of statute, to keep the demised premises in repair or fit for occupancy, applies only to the premises actually leased, and does not operate to free the landlord from liability to the tenant for injury arising from defects in other portions of the premises of which the lessor retains possession and control, (citing cases). In other words, the defendants' character as landlord does not exempt them from the consequences of their own negligence, although the injured party happens to be their tenant." That case involved a defective roof from fire occurring without fault of the landlord which caused the tenants' goods to be damaged by rain leakage. There was no express obligation on the part of the landlord to keep the roof in good condition, but the court held that the landlord having control of the roof was liable for failing to keep

it in good condition. Our case is stronger than the California case because here the landlord expressly assumed entire responsibility for the roof for the entire term of the lease. The simple answer to defendants' argument with reference to paragraph 11 is as indicated, that we are not complaining of defendants' failure to keep the roof in repair, we are complaining of defendants' failure to keep the roof in good condition.

Upon general demurrer the original complaint stated a cause of action as it likewise did after the amendments. The court erred in sustaining the general demurrers, and its judgment of dismissal should be reversed.

Respectfully submitted,

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