

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 Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Jesse R. S. Budge; H. M. Mulliner; Attorneys for Respondents;

Recommended Citation

Brief of Respondent, *Wolfe et al v. White et al*, No. 7153 (Utah Supreme Court, 1948).
https://digitalcommons.law.byu.edu/uofu_sc1/823

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Case No. 7153

In the Supreme Court

OF THE

State of Utah

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 co-partnership,
Plaintiffs and Appellants,

vs.

SARAH WHITE and JAMES L. WHITE,
her husband,
Defendants and Respondents.

BRIEF OF RESPONDENTS

JESSE R. S. BUDGE,
H. L. MULLINER,
Attorneys for Respondents.

FILED

APR 2 1948

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.

Machine-generated OCR, may contain errors.

CLERK, SUPREME COURT, UTAH

INDEX OF POINTS ARGUED

	Page
Covenant "to keep" does not obligate "to place" in repair.....	9
Lessors obligated to make only ordinary repairs to roof.....	16
Acts of Building Inspector imposed no obligation on lessors.....	23
Lessees seek to recover for structural improvements.....	31
The claimed breach of covenant of quiet enjoyment.....	34
Lessors exempt from liability.....	38
Conclusion	47

INDEX OF CASES

Texts

Am. Jur. Vol. 32, pp. 231, 236, 391-2.....	37
Am. Jur. Vol. 32, p. 585.....	9
Am. Jur. Vol. 32, p. 526.....	47

Cases

Buchanan v. Tessler, (Ga.) 148 S. E. 614.....	38
Bullock v. Coleman, (Ala.) 33 So. 884.....	43
Cadman v. Hy-Grade Foods Products Corp. (Mass.) 33 N. E. (2) 759	14
Clark v. Yukon Inv. Co. (Wash.) 145 Pac. 624.....	26
Columbia Laboratories v. California etc. Co., (Cal.) 148 Pac. (2d) 15	43
Dougherty v. Taylor & Norton Co., (Ga.) 63 S. E. 929.....	20
Dwight v. Ludlow Mfg. Co., 128 Mass. 280.....	21
Farr v. Wasatch Chemical Co., Utah, 143 Pac. (2d) 281.....	10, 48
Franklin Fire Ins. Co. v. Moll, (Ind.) 58 N. E. (2d) 947.....	41
Freiot v. Jones, 204 N. Y. S. 446.....	18
Fuche v. City of Cedar Rapids, (Iowa) 139 N. W. 803.....	19
Gralnick v. Magid, (Mo.) 238 S. W. 132.....	39
Gulf City v. City of Galveston, (Tex.) 7 S. W. 520.....	19
Halloran Judge Tr. Co. v. Heath, 70 Ut. 124.....	43
Herald Square etc. Co. v. Saks, (N. Y.) 109 N. E. 545.....	27
Haywood v. Motor Co., 71 Utah 417.....	44
Higgins v. Menckton, (Cal.) 83 Pac. (2d) 516.....	40
Houston v. Springer, 2 Ralle (Pa.) 97.....	18
Inglis v. Garland, (Cal.) 64 Pac. (2d) 501.....	40
Kingsted v. Wright etc. Co., (Minn.) 133 N. W. 399.....	13
Knight v. Foster, (N. C.) 79 S. E. 614.....	26
Lurcott v. Wakely, (1911) 1 K. B. 905.....	18
May v. Gillis, (N. Y.) 62 N. E. 385.....	18
Nixon v. Gammon, (Ky.) 229 S. W. 75.....	11-19
Pecarre v. Grover, 5 La. Ct. of App. 676.....	42
Plaza Amusement Co. v. Rothenberg, (Miss.) 131 S. W. 351.....	20, 25
Pratt v. Grafton Electric Co., (Mass.) 65 N. E. 63.....	26
Robinson v. Wilson, (Wash.) 183 Pac. 331.....	16, 47
St. Joseph etc. Co. v. St. Louis etc. Co., (Mo.) 36 S. W. 602.....	9
Stone v. Sullivan, (Mass.) 15 N. E. (2d) 476.....	37, 44
Tiffany L. & T. p. 86.....	47
Van Leeuwen v. Huffaker, 78 Utah 521.....	22
Victor A. Harter Co. v. Lee, 132 N. Y. S. 447.....	26
Walker v. Cosgrove, (Ky.) 273 S. W. 450.....	20
Warm Springs Co. v. Salt Lake City, 50 Utah 58.....	37
140 West Thirty-Fourth Street Corp. v. Davis, 285 N. Y. S. 987.....	19

In the Supreme Court

OF THE

State of Utah

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 co-partnership,
Plaintiffs and Appellants,

vs.

SARAH WHITE and JAMES L. WHITE,
her husband,
Defendants and Respondents.

Case No.
7153

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is an action for breach of covenant contained in a lease agreement. A general demurrer to the complaint as amended was sustained, and from the judgment dismissing the action, plaintiffs have appealed.

It is alleged in the complaint that on February 19, 1945, appellants and respondents entered into said agree-

ment by the terms whereof, respondents leased to appellants that certain building at 248-56 South State Street in Salt Lake City for the term commencing *March 7, 1945*, and ending May 31, 1956 with the privilege of renewal for an additional ten years. The lease is made a part of the complaint and contains among others the following provisions:

“(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, materialmen 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.

“(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. (Italics ours.)

“(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.* (Italics ours.)

“(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.*” (Italics ours.)

In the complaint, it is alleged in substance, that preparatory to making the permanent improvements required by paragraph three, Lessees employed a qualified architect, who made application to the Building Inspector for a permit to make said improvements, and that the Building Inspector notified said architect under date of March 21, 1946, that it had been called to the Inspector’s attention:

“*That the rafters which form the roof framing have been overstressed and are sagging under the load they carry, also the girders between the columns at the rear of the store are undersized and bowed.*” (Italics ours.)

and that the application for permit would be held in abeyance until assurance was given that “*the roof condition will be taken care of,*” and the Inspector states in said letter: “*A plan showing your proposal will be expected.*” (Italics ours.)

It is then alleged that the Building Inspector sent another letter to Lessees under date of April 29, 1946, stating that the *trusses* of the roof truss system “*were*

not adequate both as to design and as to construction." 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,"* and that *"the roof drainage system has proved to be inadequate."* (Italics ours.)

The provisions of the Building Code, particularly Sec. 201 and Secs. 301 to and including 305 are made a part of the complaint and that in Sec. 301, it is provided that any building or portion thereof found to be dangerous or unsafe or which violates the provisions of said Code *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 said building safe, and that the person receiving such notice shall commence within forty-eight hours to make the necessary changes, repairs or alterations and proceed diligently with such work and that no building shall be occupied after the service of said notice until the instructions of the Building Inspector have been complied with.*

It is alleged that Lessors were notified by the Building Inspector *"of the unsafe condition of said roof"* on January 22, 1946, and by Lessees on several occasions prior to June 7th, and of the requirements and letters of the Building Inspector, but that Lessors failed to meet said requirements and to put said roof in safe condition, and that

"in order to occupy the leased premises at all and to make them tenatable, plaintiffs were com-

pelled to comply with said requirements aforesaid and did place 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” (Italics ours.) (Br., p. 22, par. 7.)

By what appellants have designated a “Bill of Particulars,” they allege that in the opinion of certain architects, engineers and contractors employed by them “the best, quickest and most economical method of making said roof safe was to tear down the entire roof” and that as steel was “easier to obtain” than wood, steel construction was used. (Br., p. 33.) Further, “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.” (Br., p. 34.) By “Exhibit D” attached to the complaint, (Br., pp. 31-33) the items of cost aggregating the damage claimed by appellants are set forth, from which exhibit it appears that a new roof of steel beam construction was substituted for the old wood roof at a net cost of \$12,175.39. Other items bring the total damage prayed for to \$21,121.58. The complaint contains some additional allegations which in no sense constitute a part of plaintiffs’ cause of action (to which we shall hereafter make reference), but the foregoing are in substance all allegations, including all provisions of the lease which are pertinent to the present inquiry.

Under the agreement:

(a) Lessees “accept said premises in the condition and state of repair *they are now in.*” (Par. 6.)

(b) “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 . . . are to be made at the expense of the Lessees.” (Par. 6.) (Italics ours.)

(c) Lessors agree that “for the entire term of this lease, Lessors shall have the obligation to keep the roof of the leased premises in good condition and repair.” (Par. 8.)

(d) “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, etc.” (Par. 11.)

ARGUMENT

We must test the sufficiency of the complaint by a determination of Lessors’ obligation under the lease and by ascertaining whether, under the facts alleged, a breach is shown.

First, what was Lessors’ obligation?

“Lessors agree that ‘for the entire term of this lease, lessors shall have the obligation to keep the roof of the leased premises in good condition and repair.’ ” (Par. 8.)

This is the sole and only covenant of Lessors upon which Lessees can rely and must be construed together with the following provisions:

“At their own expense, (to) 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. . . . 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.” (Par. 3.)

“In consideration of the rental herein fixed the Lessees *agree to and do hereby* accept the 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* and whether the same be *ordinary or extraordinary* and *regardless of how the same may be necessitated except as hereinafter stated* . . . are to be made at the expense of the Lessees.” (Par. 6.)

The nature and character of the “permanent improvements” mentioned in paragraph 3 are nowhere specified, but were left to the judgment and discretion of the Lessees. The words, “except as hereinafter stated” in paragraph 6 refer, of course, to the above-quoted provision of paragraph 8 relating to the roof.

Now having all these provisions in mind, let us ascertain: (a) What was the legal obligation of the Lessors; and (b) Does the work performed by the Lessees fall within the Lessors’ obligation?

COVENANT "TO KEEP," DOES NOT OBLIGATE "TO PLACE," IN REPAIR

The written covenant of the landlord to make repairs may not be extended beyond its fair intent or enlarged by construction (36 C. J. 135), and the word "repair" *has reference to the condition of the premises at the time of the letting* and requires the Lessors only to keep the premises in the condition *in which they were at the time of the lease* (36 C. J. 142), that is to say, *in the condition in which the Lessees accepted them*. The covenant "to keep in repair" and "to keep in as good repair as they are now in" mean the same. (32 Am. Jur. 585.)

In *St. Joseph etc. Co. v. St. Louis etc. Co.*, (Mo.) 36 S. W. 602, the lease provided:

"The party of the second part, moreover . . . will keep said demised railroad equipment and property in *good order and repair, etc.*" (Italics ours.)

Of course this means the same as *good condition and repair*. It cannot have any other meaning. Says the court:

"A covenant to keep leased premises in repair imposes upon the tenant the obligation 'to keep' the premises in as good repair as when the agreement is made. *Middlekauf v. Smith*, 1 Md. 329 (and other cases). Covenants 'to keep in repair' and 'to keep in as good repair as they now are' are held to amount to the same thing."

"To keep the roof in good condition and repair" did not imply an obligation to do anything to make the

building tenantable or fit for use, but only to do such repair work as might become necessary *after* the date of the lease to keep the roof in as good condition as *when it had been accepted*, that is, as of February 19, 1945.

In *Farr v. Wasatch Chemical Company*, Utah
....., 143 Pac. (2d) 281, the lease provided:

“Lessor shall *keep the floor* and roof in good repair, except as to damages caused by Lessee, at her expense so as to keep said premises tenantable; all other repairs and alterations after occupancy shall be done at the Lessee’s expense.” (Italics ours.)

The Lessor sued for the rent and for \$174.00 expended in repairing the floor broken by Lessee’s heavy machinery. The Lessee by way of defense alleged in its answer an oral agreement:

“The plaintiff, being apprised and knowing the nature and kind of business in which the defendant was engaged, covenanted and agreed with said defendant to *place* that certain warehouse existing upon the above said premises in *good and serviceable condition* for the immediate occupancy and benefit and use of the said defendant, and further the said plaintiff specifically agreed to repair and *maintain* the roof, *elevator and floors* of the above warehouse in *good, safe and serviceable condition*.” (Italics ours.)

The court held that said allegations set forth a collateral obligation of the Lessor to *place* in repair which covenant was additional to, outside of, and beyond the

covenant of the landlord as contained in the lease, and that evidence was proper to sustain such additional agreement. In other words, the court held, in effect that the written covenant "to keep" did not include the covenant "to place" in good repair.

Let us quote briefly from the case of *Nixon v. Gammon*, (Ky.) 229 S. W. 75. In that case, the lease contained the provision that the landlord should make all "extraordinary repairs" and that

"The said Lessee further agrees that he will keep said premises in *good condition and repair* and at the termination of the lease to surrender them to the Lessor in as good condition as they are now, ordinary wear and tear from reasonable use thereof excepted."

It differs from the case at bar in that the obligation "*to keep in good condition and repair*" was on the Lessee instead of the Lessor, and it applied to the entire premises, rather than to just the roof. The last clause of the covenant, "to surrender the same to the Lessor etc." is not important because it did not affect the Lessee's obligation to "keep said premises *in good condition and repair*." The court remarks:

"By this clause, Lessee agreed to keep up *all ordinary repairs* to that part of the building which he occupied, and Lessor was only required to keep up extraordinary repairs. 'Ordinary repairs' are such as result from ordinary wear and tear of the building and its decay, but 'extraordinary repairs' is something greater than this. It is such repairs as are made necessary by some unusual or unforeseen

occurrence which does not destroy the building, but merely renders it less suited to the use for which it was intended. The word 'repair' does not include the word 'rebuild' and the courts have never so held."

Could anything be plainer than this statement of the law or more applicable to the case at bar? Our case, however, is even stronger because here Lessees *accepted the premises* in the condition they were in February 19, 1945, and agreed to make all "*improvements*" and all *extraordinary repairs* of whatsoever kind or character and regardless of the nature and extent thereof and *however necessitated*, while Lessors, under the construction placed upon the language of the lease by the Kentucky court, agreed to make only ordinary repairs to the roof, which the Lessees had *accepted*. Can it with reason be contended that the obligation to keep an accepted roof in good condition and repair obligated the Lessor to destroy the roof and the understructure support thereof and substitute one of steel beam construction? Would not such substitution be an "*improvement*" or an "*extraordinary repair*" within the obligation of the Lessees? Will the court impose an unjustified obligation on the Lessors in order that the Lessees may escape the consequences of their *acceptance of the roof* (as part of the premises), as it was, and of their specific covenant to make at their own expense all *improvements* and all *extraordinary repairs*, however necessitated? There is no allegation in the complaint that the roof as accepted *ever became out of repair*. There is no possible basis

for any such claim. The letters of the Building Inspector upon which appellants rely show nothing of the kind. Those letters show that the criticism offered was that the roof trusses "*were not adequate, both as to design and as to erection.*" His criticisms do not intimate that there was any change in the roof from the time it was accepted until the time of inspection.

In *Kingsted v. Wright etc. Co.*, (Minn.) 133 N. W. 399, the obligation of the landlord was "to *keep* the premises in *good repair*" and it was held that the landlord was not required to improve the property by the construction of a drain to carry water, which in wet weather flowed into the basement. The court remarks:

"This did not impose upon him an obligation to make improvements or betterments. . . . The defendant took the premises in their condition when the contract was made, the building was not then out of repair and the covenant for repairs can be referred only to *such defects in the building as subsequently arose*, injury or damage arising from the elements or natural decay incident to the property and its use." (Italics ours.)

While the court remarks that "the building was not then out of repair" the same is true as to the roof, in the case at bar so far as Lessees are concerned, for they are estopped from claiming otherwise by their acceptance of the premises."

There is a studious avoidance by appellants of the phrase "*keep in good condition and repair*" as used in the lease. They seek to substitute the term "place" in

a condition, and in a different condition from that accepted. 32 *Am. Jur.* pp. 673-4 points out that these terms express entirely different obligations, also that different covenants in the same contract dealing with “*condition as accepted*,” and “*condition as agreed to be kept*”, are clearly distinguishable. To quote:

“A covenant to keep leased premises in ‘repair’ imposes upon the tenant the obligation to keep them in as good repair as at the commencement of the term. . . . It would seem clear that under a covenant . . . to keep premises in such repair as the same are in at the commencement of the term, he is not liable for defects arising from the original construction of the building.”

In *Cadman v. Hy-Grade Foods Products Corporation*, (Mass.) 33 N. E. (2d) 759, the action was for failure to return the premises “in good tenantable condition” as stipulated. Actually they were not in that condition when returned because they required a new floor under-structure. Plaintiff demanded a strict technical interpretation of this covenant. Says the court:

“All the plaintiff’s exceptions are based upon their contention that the defendant was obligated to surrender the premises at the end of the term in good tenantable repair, regardless of their actual condition at the time the term began.”

While in that case it was admitted in the lease that the premises were then in “good condition,” it is the same here because of appellants’ acceptance of the condition as of February 19, 1945. The court then remarks:

“There was evidence from which it could have been found that the conditions above described were substantially the same at the beginning as at the end of the term.

“The phrases ‘*in good tenantable repair*’ and ‘*in good condition*’ appearing in such lease do not have a fixed or technical meaning which is always the same regardless of the character or use of the building to which they refer.”

Later on the court remarks in referring to the good condition at the commencement of the lease:

“The standard there set is the actual state of repair, whether good or bad, in which the premises were at the time of the letting, not a degree of repair measured by the abstract standard of *goodness*.

. . .

“It is proper in the construction of the language of a lease to read together different provisions therein dealing with the same subject matter, and where possible all the language used should be given a reasonable meaning.

. . .

“When, however, this covenant is read with the earlier admission in the lease that the premises were ‘*in good condition*’ at the time of its execution, uncertainty as to the meaning of the phrase ‘*in good tenantable repair*’ disappears and all the language of the lease respecting the condition of the premises as to repair may be given significance. Thus read, the intention of the parties is adequately manifested that the actual condition of the building in respect to good tenantable repair existing when the term began should be the condition as to good tenantable repair in which the building was required

to be when delivered up to the plaintiffs at the end of the term, except as to the effect of reasonable wearing and use.”

Applying this reasoning to the case at bar, here is an agreement by the Lessees accepting the premises, (including the roof) in the condition they were in on February 19, 1945. Lessors’ covenant is referable to that condition, and they were obligated only to keep the roof in such condition. Are they required to pay the cost of destroying the roof and its supporting understructure and constructing a new roof and understructure of different materials?

LESSORS OBLIGATED TO MAKE ONLY ORDINARY REPAIRS TO THE ROOF.

Except for Lessors’ covenant in paragraph 8, they would have no obligation whatever to make any repairs.

There is no *implied* covenant of the Lessor either that the premises are fit for occupancy or that they are safe for use. (32 *Am. Jur.* 516 and cases there cited.) The authorities are to the effect that only by express warranty can the Lessor be held responsible for the condition of the premises, either at the date of the lease or during the term. Otherwise he is not a guarantor of the fitness of a building for the use for which it is leased. *Robinson v. Wilson*, (Wash.) 183 Pac. 331. In this case, the court quotes from Tiffany on “Landlord and Tenant” p. 86 as follows:

“It is agreed by the authorities at the present time that as a general rule there is no obligation on

the part of the Lessor to see that the premises are at the time of the demise in a condition of fitness for use for the purposes for which the Lessee may propose to use them. A Lessee, like the purchaser of a thing already in existence, is presumed to take only after examination. The maxim, *caveat emptor*, applies, and if he desires to protect himself in this regard, he must exact of the Lessor an express stipulation as to the condition of the premises. Accordingly a landlord is not bound, as a general rule, in the absence of special stipulation, to make repairs or improvements on the premises in order to render them safe or fit them for the tenant's use."

A covenant to repair or to keep in repair is referred to in the cases as a "general covenant" and is construed to obligate the Lessor to make only *ordinary repairs* as distinguished from a larger or "special covenant" to make repairs that are *unusual or extraordinary*. Here the Lessor makes only a general covenant; but the Lessee makes the larger covenant.

By their "Bill of Particulars" appellants clearly reveal what is tacitly admitted by Exhibit "D" attached to their complaint that Lessees did not undertake to *repair* the roof or to *keep* it in good condition (the obligation of the Lessors), but they removed the entire roof and supporting structure constructed of wood, and substituted therefor one of steel beam construction. Unless Lessors' obligation "to keep the roof in good condition and repair" imposed a duty on them to build such a new structure [roof], Appellants have very clearly admitted that they have no cause of action. The question of law is just that simple and there is no necessity for the

court to attempt to find a way through the jungle of immaterialities, inconsistencies and unwarranted assumptions contained in appellants' brief.

The courts have interpreted the "general covenant" to be restricted as follows:

In *May v. Gillis*, (N. Y.) 62 N. E. 385, the court says:

"We think the words 'all inside and outside repairs' import merely a general covenant. Under this clause the defendant was bound to make all ordinary repairs, but was not called upon to make those which were extraordinary."

And in *Freiot v. Jones*, 204 N. Y. S. 446, the court said:

"The obligation of a landlord to repair the demised premises rests solely upon express contract. The covenant to repair will not be implied nor an express covenant be enlarged by construction. The only covenant to repair expressed in the lease is 'also landlord to do outside repairs, tenant to keep inside in repair.' This does not refer to extraordinary repairs such as were necessary after the fire. It is a general covenant to make ordinary repairs only and under it the landlord was not obligated to restore the building after the fire."

See also *Houston v. Springer*, 2 Ralle (Pa. 1828) 97.

The covenant of the Lessors in the case at bar is one to make necessary repairs to the roof then on the building as it had been accepted, not to reconstruct the roof.

In *Lurcott v. Wakely*, (1911) 1 K. B. 905, it is said:

"A roof falls out of repair; the necessary work is to replace decayed timbers by sound wood; to

substitute sound tiles or slates for those which are cracked, broken or missing; to make good the flushings and the like. . . . I agree that if repair of the whole subject matter has become impossible a covenant to repair does not carry an obligation to renew or replace.”

See also *Nixon v. Gammon*, (Ky.) 229 S. W. 75, heretofore cited.

In *140 West Thirty-Fourth Street Corp. v. Davis*, (1936) 285 N. Y. S. 957, it is held that a structural improvement, such as a new floor that a Building Department required to be laid, was held not within a Lessee's covenant to make all repairs, inasmuch as only ordinary repairs, and not the possibility that a structural improvement might be required, were contemplated.

“ ‘Repair’ means to restore to a sound or good state after decay, injury, dilapidation or partial destruction and is synonymous with ‘mend’ and ‘renovate,’ but generally does not mean to alter or change condition or to replace with new or different material. *Mozingo v. Wellsberg*, 131 S. E. 717; 101 W. Va. 79.”

“As used in a lease in which the Lessee promises to keep the building in repair, the word ‘repair’ will be held to mean to mend, not to make a new thing, but to refit, make good or restore an existing thing, and when we speak of repairing a thing the very expression presupposes something in existence to be repaired. *Wattles v. South Omaha Ice & Coal Co.*, 59 N. W. 785; citing numerous cases.”

See also *Gulf City v. City of Galveston*, 7 S. W. 520, 521, 59 Tex. 660; *Fuche v. City of Cedar Rapids*, 139 N.

W. 803, 158 Iowa 392, 44 L. R. A. (N. S.) 590; *Dougherty v. Taylor & Norton Co.*, 63 S. E. 929, 930, 5 Ga. App. 773; *Plaza Amusement Co. v. Rothenberg*, (Miss.) 131 S. W. 351.

In *Walker v. Cosgrove*, (Ky. 1925) 273 S. W. 450, tenant agreed to take good care of said property, to cause or permit no waste, to make all ordinary repairs. The court said:

“If the property was in bad shape and the drainage pipes were in a dilapidated condition at the time appellee Cosgrove leased the premises from Perkins, we do not think he was obligated under his contract to restore the waste pipe. It was not the duty of the tenant to add a drain pipe where none had been before or make new one that was decayed and useless at the time he went into possession, but only to make ordinary repairs such as resulted from and were made necessary by and from reasonable use of the premises.”

The Lessors in this case were under no obligation to take care of roof drainage, even if, as alleged in the complaint, appellants requested respondents to put the roof in proper condition “so as to provide proper drainage”, if it necessitated changing of the roof from its condition at the date of the lease. The covenant “to keep the roof in good condition and repair” implies the existence of the roof as it had been accepted and the Lessor became obligated only if such roof afterwards became out of repair. As before stated, the covenant cannot be extended or enlarged.

In *Dwight v. Ludlow Mfg. Co.*, (Mass.) 128 Mass. 280, 282, the landlord contracted to "repair and renew" so far as necessary the gutter of a ~~mill~~^{mill}. Held he was obligated to make such repairs and renewals as were necessary in order that the *existing gutter* should do all that it was capable of doing when in good condition according to its *original construction*, and did not require the Lessor to build a new gutter of a different construction, even though the original plan was defective.

In complaining of our interpretation of the lease, counsel declare:

"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." (Br. 39).

Counsel realize that they are on narrow footing if they must rely on the lease itself, so they assert that it

is alleged in the complaint that "*plaintiffs never inspected the roof, knew nothing about the condition of it . . .*" and that defendants asserted and represented that they "*would take care of it.*" This same argument is repeated on page 55 of appellants' brief with the added remark that in October, 1945 (eight months after the lease was signed) "James L. White assured the plaintiff, Hubert Wolfe, *that he had put the roof in good condition and that it was in excellent shape.*" These statements are substantially the same as the allegations of the complaint (See App. Br. pp. 24-25) and constitute a manifest effort to avoid the consequences of appellants' written stipulation that they "*accept the premises in the condition they are now in,*" that is, as of February 19, 1945. There is no allegation that there was any fraud when the agreement was signed or that the lease agreement was, for any consideration, modified by any oral stipulations by the Lessors. The agreement measures the obligations of the parties notwithstanding conversations (if any there were) whether before or after the lease was signed. This proposition is elementary.

In *Van Leeuwen v. Huffaker*, 78 Utah 521, 530, it is said:

"The appellant's contention is that the uncontradicted evidence being to the effect that the broker Davis agreed to accept \$300 as a full commission in the event he succeeded in closing the deal, therefore in any event the trial court should not have granted judgment for more than \$300. This contention cannot be sustained because whatever was said between Davis and Huffaker concerning the amount of the

commission, prior to and at the time of the signing of the written listing contract, was merged in the written contract. *Halloran-Judge Trust Co. v. Heath et al.*, 70 Utah 124, 258 P. 342, 64 A. L. R. 368. The writing defines the rights of the parties with respect to the amount of commission which is to be paid, and any evidence tending to vary or contradict the terms of the written instrument is incompetent, in the absence of fraud, mistake, or misrepresentation, none of which is claimed in this case, and hence must be disregarded by the court."

And in *Halloran Judge Trust Company v. Heath*, 70 Utah 124, 135, it is said:

"Nothing is better settled in the law, where there is a contract in writing, than that all preliminary negotiations are merged in the written contract."

Likewise any statement of White after the lease was signed that he had fixed the roof would be immaterial. No liability could attach by reason of such a remark.

ACTS OF BUILDING INSPECTOR IMPOSED NO OBLIGATION ON LESSORS

The Building Inspector might point out the things he wanted changed (which he did not do) but he could in no way change the contract between the parties as to who would be obligated to pay for such changes.

Assuming then that the Lessors' only obligation was to "keep the roof in good condition and repair" having reference to the condition of the roof at the date of the lease and to the Lessees' acceptance of the building in its then condition, not to construct a new roof, where in the

complaint is it alleged that the roof had become out of repair after March 7, 1945? We search the complaint in vain for any such allegation. The lease required the Lessee to make "permanent improvements . . . including the installation of a first class front . . . which improvements shall cost not less, but may cost more than \$10,000," and it is alleged that preliminary to making said permanent improvements, the Lessees applied for a permit and that the Building Inspector said (See letter March 21, 1946):

"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 the columns at the rear *are undersized and bowed.*" (Italics ours.) (App. Br., p. 29.)

It is also alleged that he states:

"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." (App. Br., p. 30.)

It is also alleged that after Hargreaves, the chief Building Inspector, had made an inspection his criticism was (letter of April 29, 1946; App. Br. pp. 30-31.) "*that the roof truss system for the main forepart of the store*" and "*the trusses were not adequate both as to design and as to erection,*" but these criticisms which are relied upon by the plaintiffs do not constitute ground for complaint against the Lessors. They relate to "design and construction" of the "*trusses*" and of the *overstressing* of the "*rafters which form the roof framing and to the*

“undersized” girders which are “bowed.” It is nowhere alleged that any of these conditions occurred after the lease was made, and, of course, if they existed when the lease was entered into they were conditions which the Lessee expressly accepted. None of the so-called defects complained of by the Building Inspector imposed any duty on the Lessors when the Lessees accepted the building as it was, and when the Lessees expressly agreed that 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 ordinary repairs to the roof) were to be made by the Lessees. The improvements which were to cost \$10,000.00 or more and which the Lessees were obligated to make were undoubtedly structural improvements and so regarded by the Lessees, for the lease itself provides (Paragraph 3):

“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.”

“‘Structural change’ is such a change as to affect a substantial and vital part of the premises as would change its characteristic appearance, the fundamental purpose of its erection or the uses contemplated or a change of such nature as would affect the very realty itself—extraordinary in scope and effect or unusual in expenditure. *Paye v. City of Grosse Point*, 271 N. W. 826, 279 Mich. 254.”

See also *Plaza Amusement Co. v. Rothenberg*,

(Miss.) 131 So. 350.

So in seeking the permit, the Lessees intended to make permanent improvements which if they desired, could include construction of a new roof of steel beam construction but which had nothing at all to do with the repair of the then existing roof.

In *Pratt v. Grafton Electric Company*, (Mass.) 65 N. E. 63, the lease provided that the Lessee should make all necessary repairs, but the public authorities required a repair to the gates of the mill pond, the subject matter of the lease. Held that it was not the Lessors' obligation to conform to the requirements of public authority.

In *Knight v. Foster*, (N. C.) 79 S. E. 614, the city ordinance required that a gate on the leased premises should be changed to swing inward instead of outward. Held it was not a repair and the Lessor was not obligated.

In *Victor A. Harter Realty Company v. Lee*, 132 N. Y. S. 447, it was held that the mere fact that the order of the Tenement House Department was for such an alteration as would increase the value of the property imposed no burden upon the landlord to make the alteration.

In *Clark v. Yukon Inv. Co.*, (Wash.) 145 Pac. 624, it is held:

"Laws of 1909, p. 43, regulating buildings used for hotels, section 11 (Rem. & Bal. Code, Sec. 6040) of which imposes a penalty upon every owner, manager, agent, or person in charge of a hotel for failure to comply with the act, does not require the owner of a building, leased for a long term to a

tenant who is conducting a hotel on the premises, under a lease which did not require the owner to make repairs or equip the building for such purpose, to pay for the installation of a fire escape, as required by the city under the authority of that act; the term "owner of the hotel" referring to the owner of the hotel business and not to the owner of the building in which it was conducted."

Counsel cite the case of *Herald Square Realty Company v. Saks*, (N. Y.) 109 N. E. 545, (Br. p. 48) to support their contention that it was Lessors' obligation to comply with requirements of public authorities. Assuming that any such requirements were legally made (which we deny), said case is clearly inapplicable. There, plans for the building were submitted to the tenant and approved by him. These plans included a projection over a portion of the sidewalk, of the show windows on the ground floor. The plans were then submitted to the municipal authorities and by them approved. The lease was executed November 2, 1903, and it provided, among other things that the Lessee should comply at its own expense with all requirements of public authorities. Eight years later the municipality repealed all regulations which permitted the Building Commissioner to allow building encroachments on the sidewalk, and ordered all such encroachments removed. The Lessor incurred the expense of the removal of the show-window obstruction and sought to recover from the tenant under the covenant of the Lessee hereinbefore mentioned. The court held the Lessee was not liable, using this language:

“This change in municipal policy has taken place since execution of the lease between these parties and the construction of the lease may be determined by extrinsic conditions that existed at the time of its execution.

. . .

“It is not to be assumed therefore that the comprehensive phrases of the lease of all of which were quite germane and appropriate to existing conditions, were intended to apply to future events not then in contemplation.

. . .

“The language of this lease, construed in the light of contemporaneous regulations, usages and customs, seems to require the conclusion that it was not the purpose of the parties to subject the tenant to an expense caused wholly by extraordinary and unforeseen building alterations made necessary *by a subsequent and radical change in the policy of the municipal government.*” (Italics ours.)

There is no similarity between the facts in that case and those in the case at bar.

As we have shown, Lessors had no obligation to heed letters of the Building Inspector. Lessors' liability must depend upon the lease itself, and the existence of a Building Code and the fact that an application was made to the Building Inspector can neither add to nor detract from the Lessors' obligation under the lease. Therefore, all the allegations as to what the Building Code requires and as to what is contained in the letters of the Building Inspector as to “design” or “erection” and as to what Lessees claim they did to comply with his suggestions or requirements are wholly irrelevant.

But even if under some conditions Lessors might have been obligated to pay heed to the Building Inspector, the allegations of the complaint show affirmatively that no such obligation was imposed on the Lessors in this case. Said Code (made a part of plaintiffs' complaint) among other things provides:

(a) No person shall repair any building without a permit from the Building Inspector upon application therefor.

(b) The Building Inspector shall be furnished with plans and specifications of the work to be done, except that in case of minor repairs the Inspector may issue a permit without such plans and specifications. (parenthetically may we remind the court that the Building Inspector stated in his letter to Lessees of March 21, 1946, "a plan showing your proposal will be expected.")

(c) The work must be done according to the Building Code (Building Code Section 201).

(d) The Building Inspector is authorized to enforce the Building Code.

(e) Whenever any building is used or occupied contrary to the provisions of the Building Code, the Building Inspector shall *order such use or occupancy discontinued* by notice served on any person using the same, and the building shall be vacated *within ten days after the service of such notice*. Provided that *in case of an emergency*:

(f) Any building if found to be dangerous to person or property or *unsafe* for the purposes for which it is being used *may be condemned*. The Building Inspector may order portions of the structure exposed for inspection and if the building is found to be unsafe, the Building Inspector shall serve notice in writing on the owner, reputed owner or person in charge *setting forth what must be done to make such building safe*. The person receiving such notice must proceed within forty-eight hours thereafter to make the changes, repairs or alterations *set out in such notice*.

(g) Service of notice in writing means "personal service" on the Lessor if within the city limits. (Section 301 Building Code.)

The allegations in plaintiffs' complaint show affirmatively that there was no compliance with the Building Code which could possibly impose any responsibility on Lessors:

(a) Because the notice alleged to have been given Lessors was not personally served upon or even addressed to them.

(b) The notice alleged to have been given relates to structural conditions and not to the roof.

(c) Said notice does not "*set forth what must be done*" by way of repairs to the roof.

Therefore, taking all the allegations of the complaint, there is no basis for any liability on the Lessors, even if the lease contemplated that Lessors should com-

ply with the Building Code, (which we deny) for the proper proceedings were not observed to impose such or any responsibility.

LESSEES' SEEK TO RECOVER FOR STRUCTURAL IMPROVEMENTS

Counsel concede, and paragraph 3 of the lease provides, that Lessees were obligated to make certain unspecified permanent improvements (including a first-class front) to cost not less than \$10,000.00 and that no further "*structural improvements*" were to be made without Lessors' consent. It was immaterial to Lessors how much Lessees might determine to expend in excess of the \$10,000.00 and, therefore, if they saw fit to substitute a new steel roof structure for the old one constructed of wood in making said "permanent improvements," how can they expect to recover from Lessors the cost of such roof structure? They needed no other consent or approval of the Lessors to build such new roof structure than is contained in paragraph 3. But, they argue, such "permanent improvements" did not contemplate new roof construction for under the lease the building was to have a *safe* roof structure and one in good condition when Lessees went into possession, and the building of a new roof was a structural improvement outside of and beyond the "*permanent improvements*" required of the lessee. As suggested above the old roof structure had been accepted as of February 19th. Its structural condition then was, and must have been, the same as found by the Building Inspector, for

his criticism was as to “the *design* and as to the *erection*” of the trusses. We have also shown by the authorities that our obligation “to keep the roof in good condition and repair” did not obligate us to “*put*” or “*place*” the roof in any other condition structurally than it was when the Lessees accepted it, or to make the premises tenantable. It should be noted that differing from the Lessors’ restricted covenant to repair, the Lessees’ covenant is in the broadest language. Indeed it is difficult to see how language could have been more effective to impose upon the Lessees the obligation to do extraordinary alterations and repairs. It is evident from a reading of the entire lease that the premises were rented to Lessees “as is” at a reduced rental, with the clear understanding that they needed to be structurally remodeled to fit the needs of Lessees and this remodeling was to be at the expense of the Lessees. It would be patently contrary to the intent of the parties, as shown by the entire lease, to enlarge the Lessors’ covenant beyond its legal meaning, which is that the Lessors were to make only ordinary repairs to the roof, such as is done by a roofer, as distinguished from a structural steel worker. It is made plain by the bill of particulars that the new steel roof structure enabled the Lessees to create a store building with an eighty-foot span without a post in it. This might well be a very advantageous thing to do for a Lessee with a ten-year lease with an option of ten additional years, at a low rental. In fact, paragraph 3 of the lease fixes the low rental of \$600.00 per month “upon the express condition” that

the expensive permanent improvements will be made; and said paragraph 3 further provides that "Rental shall be paid during the time said improvements are being made," which further indicates that Lessees took the building as it stood. Lessees should not be permitted to compel the Lessors to pay for such structural alterations, when there was clearly no intention of the parties, as shown by the lease, that the lessors were supposed to bear any such expense.

To accept counsel's contention that the construction of the new steel roof structure was outside of the "permanent improvements" Lessees were obligated to make, puts the Lessees into an altogether untenable position, for they concede that "further *structural improvements*" (other than the permanent improvements to cost \$10,000.00 or more) could not be made without Lessors' consent; that they did not have such consent, yet they are seeking reimbursement for doing what confessedly they had no right to do. They do not allege that the Building Inspector required them to remove the wooden roof structure or to substitute one of steel, or that he required any particular or specified work to be done. It was the Lessees who decided what sort of improvement, alteration or change of the roof structure they would seek to have the Lessors pay for, and they proceeded to do this structural work, which they say was in addition to the "*permanent improvements*," without getting Lessors' consent, and therefore, without any right to do it, and they now seek to have Lessors pay for the new roof structure under Lessors' obliga-

tion to “*keep* the old roof in good condition and repair.” This argument of Lessees defeats itself. They offer another equally illogical reason why Lessors should pay for the new steel roof structure. They cite authority that if the Lessor fails to keep his covenant to repair, Lessee may make such repairs and recover the cost from the landlord or charge it against the rent, and yet they admit that the work the Lessees performed and for which they are seeking to recover was not roof “*repairs*” under any definition of that word, but was *structural* improvement of the building, which they either have agreed to make or had no legal right to make without Lessors’ consent, which consent they did not have, and they admit that they continued to pay the rent.

THE CLAIMED BREACH OF COVENANT OF QUIET ENJOYMENT

The letters of the Building Inspector do not, as appellants allege, refuse “to allow the leased premises to be occupied at all until the roof is made safe;” (Br., p. 19) nor do they impose any obligation whatever on the Lessors or the Lessees. The Building Inspector went no further than to say that it was “mandatory upon” him

“to refuse to allow continued occupancy of this structure *beyond the summer season* for fear of heavy snow loading, which might cause total beam and truss failure and consequent collapse of the *roof structure,*”

and this remark was not within his authority under the Building Code. That Code (Section 301, which is made

a part of the complaint, Br., p. 20) provides that "*in the event of an emergency*" when a building is "*dangerous to person or property or unsafe for the purpose for which it is being used,*" it may be *condemned*, but before condemnation, the Building Inspector shall serve notice of "*what is to be done*" and that

"The person receiving such notice must commence within *forty-eight hours* to make the changes, repairs, or alterations *set out in said notice* and shall proceed diligently with such work *or demolish the building.*"

When there is no emergency and the building is being used contrary to the Building Code, The Building Inspector may order his requirements complied with *within ten days or that the building be vacated*. The letter of the Building Inspector attached to the complaint does not come within any of said provisions of the Code, and he could not refuse to permit the building to be occupied "*beyond this summer season*" (whatever these words mean) because he had no such authority to make such an order. He is required to conform to the Code in making his directives and his letters show that he did not do so. It is idle for counsel to argue that the Building Inspector's mere statement as to what was wrong with the building without setting forth "*what must be done*" was sufficient to impose the obligation on anyone to destroy the wooden structure and construct one of steel.

It is upon the provisions of the Building Code and upon the letters of the Building Inspector that Lessees

rely for their claim that Lessors breached their *covenant to quiet enjoyment*, that is to say, for Lessees claim that they were *excluded* from the possession of the premises for there is no other basis for their "*exclusion*" alleged in the complaint. Who was in possession immediately after June 7, 1946? Who was in possession when Lessees applied for the permit and when they tore off the old roof structure and constructed the steel roof structure? By some kind of left-handed logic, Lessees seem to claim that even during the time they were constructing the steel roof structure they were not in possession of the premises, even though they confirmed their possession by the payment of rent, which they are now seeking to recover back. So under the facts as appear from the complaint itself, there was no exclusion from the premises, nor any eviction. Plaintiffs rely upon *Haywood v. Ogden Motor Company*, 71 Utah 417, to support their contention that Lessors breached their covenant of quiet enjoyment, (Br., pp. 49-50) but in that case the Lessors remained in *actual possession* of the premises making certain repairs during part of the first month when Lessees were entitled to possession and the court held that in thus depriving Lessees of possession during such period they committed a trespass, and that Lessees had the right to counterclaim against an action for rent, for the period possession was denied them. No claim of trespass can be made against Lessors in this case, because Lessors were never in possession at any time subsequent to February 19, 1945, or even before while the

Stewart Novelty Company's lease was in effect. Lessees must, as a matter of law, base their claim of Lessors' breach of the covenant of quiet enjoyment on *eviction, either actual or constructive*, for as stated by our court in the *Heywood* case:

“It is also a general rule of law that a breach of covenant for quiet enjoyment cannot occur without an eviction actual or constructive.”

Now, of course, Lessees cannot claim there was any *actual* eviction and the authorities hold without dissent that there can be no constructive eviction unless the tenant abandons the premises and that such abandonment is necessary before the Lessee can defend against a claim for the rental. *32 Am. Jur.*, pp. 231, 236, 391-2, and cases cited. See also *Stone v. Sullivan*, (Mass.), 15 N. E. (2) 476; 116 A. L. R. 1223.

Our own court in *Warm Springs Co. v. Salt Lake City*, 50 Utah 58, 165 Pac. 788, recognizes this doctrine.

Lessees went into possession according to the lease and they have been in possession ever since, and there was, and could be, no breach of the covenant of quiet enjoyment, for the Building Inspector did not attempt by anything set forth in his letters or otherwise to interfere with Lessees' possession on June 7, 1946, or at any other time, nor did he order them to vacate, and certainly no one else interfered with them. The contention of counsel with respect to this matter is wholly without merit.

LESSOR EXEMPT FROM LIABILITY

Even if by any possible construction of the allegations of the complaint, the covenant of the Lessors to "keep the roof in good condition and repair" was breached (and we say no such construction can be placed upon them), nevertheless the Lessors are not liable. Paragraph eleven of the lease provides:

"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."

This provision can only mean that the parties agreed that the Lessors were absolved from liability for failure to fulfill the only obligation imposed upon them, to-wit, to "keep the roof in good condition and repair." It can not possibly relate to *Lessees'* failure to make repairs, because, without such provision, the *Lessor* could not be liable for the *Lessees'* breach. The provision must be given its plain and obvious meaning. It is tantamount to a *covenant not to sue*, and there is no legal reason preventing the parties from entering into the stipulation above quoted.

In *Buchanan v. Tessler*, (Ga.) 148 S. E. 614, the lease provided:

“The Lessee hereby releases Lessor from any and all damage to both person and property and will hold the Lessor harmless from all such damages during the term of this lease.”

A subsequent paragraph provided:

“It is agreed the Lessor shall be called on to make no repairs of any nature whatsoever during the term of this lease, *except repairs to the roof.*”

It was held that Lessor was not liable for damages by reason of the roof becoming out of repair.

In *Gralnick v. Magid*, (Mo.) 238 S. W. 132, the lease provided:

“Lessor agrees to do repairing.”

It also contained the provision:

“Said Lessor shall not be liable to said Lessee or agents, guests or employees for any damage caused to his or their person or property by water, rain, snow, ice, sleet, fire, storms and accidents, or by breakage, stoppage or leakage of water, gas, heating and sewer pipes upon, about or adjacent to said premises.”

The court uses this language:

“While it is true in paragraph three, ‘the Lessor agrees to do repairing’ that paragraph nowhere states what kind of repairing she is to do, but most certainly that paragraph does not mean that the Lessor was to make such repairs as would protect the Lessee and his property from damages on account of rain and water, ice, etc. for the obvious reason that both parties had agreed in paragraph one that the Lessor should not be liable for any

damages done to the property of the Lessee on account of water, rain, ice, etc. . . .

“But be that as it may, and concede for the sake of argument without deciding it, that the words ‘the Lessor agrees to do repairing’ as found in paragraph three, meant that she was to replace the roof or other parts of the building when destroyed by fire, yet we are unable to see in what possible manner that would benefit the Lessee in this case or render the Lessor liable when both parties clearly agree by the language found in paragraph one that the Lessor should not be liable to the Lessee because of any damages done to him or his property on account of rain, water, etc.”

In *Inglis v. Garland*, (Cal.) 64 Pac. (2d) 501, the lease provided:

“Tenant agrees that tenant will not, and that agents, servants and others claiming the right under tenants to be in the premises or in said building . . . shall not make any claim against landlord for any injury, loss or damage to person or property occurring therein from any cause.”

The tenant claimed damage as a result of a defective roof drain-pipe. The landlord had undertaken to repair the roof, but in such repairs the defective drain pipe had been overlooked. Held that the landlord was not liable in view of the above quoted provision.

In *Higgins v. Menckton*, (Cal. Dist. Ct. App. Oct. 20, 1938), 83 Pac. (2d) 516 at 521, several leases were involved, all having clauses to about the same effect, that “the Lessee shall not claim or have any damages, or right to claim damages by reason of any reclamation work or

levee work which may in any way affect the demised premises *or by reason of the failure to perform any of said work.*" The court said:

"These clauses quoted from the 3 leases have a double application and significance. They are in plain and unequivocal language complete releases of all claims for damages against the lessor arising out of poor construction or poor maintenance of the levees, and they are at the same time full waivers of any claim or right of action based upon the covenants of the contracts of 1902 and 1905."

The court sustained a general demurrer in a suit brought for both breach of contract and in tort arising from the fact that the levees broke and inundated the lands of the Lessees.

In *Franklin Fire Ins. Co. v. Moll*, (Ind.) 58 N. E. (2d) 947, the plaintiff sought damages suffered by its assured due to leaks in the plumbing. The lease provided:

"Lessor not liable for any damage or injury sustained by Lessee due to building becoming out of repair or from water or steam or from plumbing or pipes or from any tank, wash stand or water closet or from water or ice from the roof."

The contention was made that this provision did not exempt the Lessor from liability for his *negligence* in maintaining the plumbing in good condition which he was obligated to do. The court sustained a general demurrer to the complaint on the ground that even if the landlord was negligent, the foregoing provision absolved him from liability. See also *Kirshenbaum*, (N. Y.) 180 N. E. 245.

In *Pecarre v. Grover*, 5 La. Ct. of App. 676, the statute made Lessor responsible for vices or defects in leased premises. The lease provided:

“No repairs shall be done by Lessor except such as may be needed to the roof.

“The Lessor will not be responsible for damages caused by leaks in the roof or by any vice or defect on the leased premises except in the case of positive neglect on his part to have the repairs made after notice.”

The syllabus reads:

“It is lawful to stipulate in a lease that the Lessor shall not be responsible for damages caused by any vice or defect on the leased premises. With such a stipulation in a lease the Lessee cannot recover damages against the Lessor for injury received from falling plaster. Such a stipulation is not against public policy.”

In the body of the opinion, the court says:

“Very often parties insert in the lease clauses having for their object to restrict the obligation of warranty of the Lessor; these claims be it understood should receive their execution and the Lessor shall not be held for any warranty for the vice or the vices of which he is formally exonerated.”

In another part of the opinion the court said:

“But the Lessor may by a clause of the lease put aside or restrict his warranty just as the Lessee may expressly or impliedly renounce the warranty. Public order is not interested in the question.”

See also *Bullock v. Coleman*, (Ala.) 33 So. 884.

The only case on the question of exemption of the landlord from liability which counsel cite is *Columbia Laboratories v. California Beauty Supply Co.*, 148 Pac. (2d) 15, which is not in point at all. In that case, the court simply held that if property *not* covered by the lease became out of repair so that the tenant (of other premises) suffered injury, the landlord would be liable. Why the case is cited, counsel alone can give a reason.

COMMENTS ON IMMATERIAL ALLEGATIONS

The complaint contains allegations which are, in substance, repeated in appellants' brief and which can have no possible bearing on the legal obligations of the parties. We shall refer to only a few of them. References are to the pages of Appellants' Brief.

Page 45:

"We accepted the premises in the condition they were 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."

Any such "express agreement" was clearly superseded by the written agreement whereby Lessees accepted the building as it was. *Halloran-Judge Tr. Co. v. Heath*, 70 Utah 124.

Page 46:

"Thus on June 7, 1946, when defendants had agreed we might enter into possession of the prop-

erty, we were refused a building permit and thus prevented from making the permanent improvements which we had agreed to make because of plaintiffs' 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." (Italics ours.)

Respondents did not agree to obtain for appellants, or guarantee that appellants could obtain, a building permit to make the permanent improvements. According to their complaint, they actually made permanent improvements, so they were not "prevented from making" them. Did they make them without a permit? If they "could not occupy the premises because the roof was unsafe," who was occupying the premises when the permanent improvements were being made? Appellants' conduct disputes their own statements.

Furthermore, as the foregoing statement and the argument at page 50 of the brief have no relation to any other claim of appellants except that there was a breach by respondents of the covenant of quiet enjoyment, please bear in mind that such covenant is not breached except there be an eviction (*Haywood v. Ogden Motor Co.*, 71 Utah 417) and even to rely on constructive eviction, the tenant must abandon the premises. (*Stone v. Sullivan*, (Mass.) 15 N. E. (2d) 476.)

Page 47:

"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 Building Inspector never at any time made any requirements. At no time did he “*set forth what must be done*” as required by the Building Code, and if he had, in view of the specific covenant of the Lessees to make all improvements and repairs (except ordinary repairs to the roof) “*regardless of how the same may be necessitated,*” it would have been Lessees’ duty to follow the directive of the Building Inspector. The Building Inspector’s criticism related wholly to structural defects, and Lessees cannot hold Lessors for the cost of permanent improvements of upwards of \$10,000.00 they were obligated to make, and did make, whether with a permit or without, by asserting that Lessors failed to make it possible for them to secure such permit.

Page 48:

“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.”

If the letters of the Building Inspector can be construed as an order to do anything, then what he required to be done was something “*necessitated*” within the specific obligation of appellants under the lease.

Page 53:

“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 desired. *It was still in this condition* when our right to possession under the lease accrued." (Italics ours.)

This statement is more of counsel's mental gymnastics. Is it true that merely because the Building Inspector declared the roof to be unsafe, someone (irrespective of the provisions of the lease) had to make it safe? That declaration *taken alone* imposed no duty on anyone. The building might have been left just as it was even if appellants could not have used it. Resort must be had to the lease to ascertain who "had to make it safe." Certainly Lessors did not covenant to do so. Appellants say "they couldn't have gone in and fixed it." Well, as soon as their "*right of possession accrued*," they did actually "go in" while the roof "*was still in this condition*" and construct a new roof of steel beam construction and a new understructure. If they did not possess the right to do this work under the lease, from what source did they derive their authority?

Page 55:

"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 June 7, 1946."

Yet at page 53, counsel declares: "At the time the building inspector declared the roof to be unsafe," appellants had no "right to possession of the premises," (that was in March, 1946) and adds: "*It was still in this condition*" (that is, the same condition) "when our right to possession under the lease accrued."

Furthermore, the allegation that after the lease was entered into *the roof commenced to sag, which sagging gradually became worse*, adds nothing to impose liability on Lessors. If Lessors were liable at all to construct a new roof, it is immaterial when the roof began to sag. It is apparent from the complaint that if such sagging occurred it was due to original faulty construction. If the sagging required *extraordinary repairs* such as the construction of an entirely new roof (a steel roof) the lease imposed the duty upon the Lessees, not the Lessors.

By way of conclusion, let us very briefly summarize.

1. There is no implied covenant on the part of a Lessor that leased premises are fit for occupancy or tenantable or inhabitable or safe for use. If the Lessee would have any such guarantee, he must have it expressly set forth in the lease.

32 *Am. Jur.* 526;

Robinson v. Wilson, (Wash.) 183 Pac. 331;

Tiffany on Landlord and Tenant, p. 86.

2. The lease in the case at bar contains no such covenant or guarantee, the Lessors being bound by the one covenant only, to "*keep the roof in good condition and repair*."

3. The covenant of the Lessors to “*keep the roof in good condition and repair*” cannot be enlarged by construction and means the same as the covenant to keep the roof in as good condition as when the lease was made, that is, in its condition on February 19, 1945, and said covenant is not a covenant that the building was *safe or fit for occupancy or tenantable*. *Farr v. Wasatch Chemical Company*, (Utah) 143 Pac. (2d) 281, clearly holds that a covenant “to *keep the floor and roof in good order and repair so as to keep said premises tenantable*” did not obligate the Lessor to *place* the building in a tenantable condition.

4. Lessors’ covenant was to *keep* the old roof in the condition *in which it had been accepted*, not to construct a roof structure of steel. Lessor’s only obligation was to make “ordinary repairs” to the existing roof.

5. There was no order of public authorities for the construction of a *steel roof structure* or any order to do any specific work. Nothing was done by the Building Inspector which obligated either the Lessors or the Lessees to do anything. The provisions of the Ordinance were not followed so as to impose any obligation on anyone. If any valid order had been made, it would have been the Lessees’ obligation to comply if they desired to continue to occupy the building as their covenant to make “permanent improvements” to cost \$10,000.00 or more and to make “*all improvements, upkeep and repairs of every kind and nature and whether the same be ordinary or extraordinary and regardless of how the same may be necessitated*” is so all-inclusive that no

other construction can fairly be given to the language other than that Lessees were bound to do whatever under existing ordinances the public authorities might require.

6. If the construction of the new steel roof structure is to be regarded as not included within the “*permanent improvements*,” then Lessees had no right to construct it without Lessors’ consent, and such consent not having been obtained, Lessees cannot recover from Lessors the cost thereof.

7. There was no breach of the covenant of quiet enjoyment because there was no eviction, actual or constructive, and no abandonment of the premises by the Lessees, and they are therefore, not entitled to recover rent paid to Lessors or to recover rental paid on the premises they continued^u to occupy during the time they were making the “*permanent improvements*” on the leased premises or wrongfully making “*further structural changes*” without the Lessors’ consent.

8. The Lessors being absolved from liability under paragraph 11 of the lease, no action can be maintained against them even if they violated the covenant contained in the lease (which we deny).

The judgment should be affirmed.

Respectfully submitted,

JESSE R. S. BUDGE,

H. L. MULLINER,

Attorneys for Respondents.

IN THE SUPREME COURT of the State of Utah

HERBERT 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.

REPLY BRIEF OF PLAINTIFFS AND APPELLANTS

FILED

MAY 10 1948

SHIRLEY P. JONES and
RICH & STRONG

*Attorneys for Plaintiffs
and Appellants.*

CLERK, SUPREME COURT, UTAH

INDEX

	Page
COMMENTS ON "RESPONDENTS' STATEMENT OF CASE" (Page 1)	1
DEFENDANTS' "ARGUMENT" ON PAGE 7	8
DEFENDANTS' ARGUMENT ON PAGE 9	9
DEFENDANTS' CONTENTION THAT "LESSORS OBLIGATED TO MAKE ONLY ORDINARY REPAIRS TO THE ROOF" (Page 16)	18
DEFENDANTS' ARGUMENT THAT "ACTS OF BUILDING INSPECTOR IMPOSED NO OBLIGATION ON LESSORS" (Page 23)	28
DEFENDANTS' ARGUMENT THAT "LESSEES SEEK TO RECOVER FOR STRUCTURAL IMPROVEMENTS" (Page 31 and Breach of Covenant of Quiet Enjoyment page 34)	33
DEFENDANTS CLAIM THEY ARE EXEMPT FROM LIABILITY (Page 38)	36

AUTHORITIES

32 Am. Jur. p. 231	34
32 Am. Jur. 673-4	10, 17
36 C. J. 142	10, 12
Cadman v. Hy-Grade Food Products Corporation, 33 N.E. (2) 759	17
Clark v. Yukon Investment Company, 145 Pac. 624	31
Dwight v. Ludlow Mfg. Co., 128 Mass. 280, 282	23
Farr v. Wasatch Chemical Company, 105 Utah 272, 143 Pac. (2) 281	12, 25, 27, 35
Herald Square Realty Company v. Saks, 109 N.E. 545	31
Heywood v. Ogden Motor Company, 71 Utah 417, 266 Pac. 1040	33
Kingsted v. Wright, 133 N.W. 399	16
Knight v. Foster, 79 S.E. 614	29
Koeber v. Summers, 84 N.W. 991, 992	35
Lurcott v. Wakely, 1 K.B. 905	19
Nixon v. Gammon, 229 S.W. 75	12
Plaza Amusement Co. v. Rothenburg, 131 S.W. 351	23, 24
Pratt v. Grafton Electric Company, 65 N.E. 63	29
Restatement of The Law of Contracts, Sec. 236 (b), (d), Sec. 235 (f) Comments	27
St. Joseph, etc. v. St. Louis, etc., 36 S.W. 602	9
Victor A. Harter Realty Company v. Lee, 132 N.Y.S. 447	29
Walker v. Cosgrove, 273 S.W. 450	23
Wilcox v. Jameson, 55 Utah 535, 188 Pac. 638	32
Williston's Law of Contracts, Revised Edition 1938, Sec. 629	25