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

Utah Supreme Court

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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 copartnership.

Plaintiffs and Appellants,

vs.

SARAH WHITE and JAMES L. WHITE,
her husband,

Defendants and Respondents.

Case No.
7153

REPLY BRIEF OF PLAINTIFFS AND APPELLANTS

COMMENTS ON "RESPONDENTS' STATEMENT OF CASE" (Page 1)

Respondents have made their own statement of the case although plaintiffs' and appellants' "Statement of Facts" contains the lease in full, the complaint with amendments, bill of particulars and exhibits in full. Because we felt that it would be more convenient for the

court if each member of the court had before him the documents in their entirety, we made no attempt to abridge the documents. An abridgement also is apt to present incompletely the actual story that should be disclosed. This is quite evident from the statement of the case in respondents' brief. Respondents set forth paragraphs 3, 6, 8 and 11 with certain portions of them italicized and do not refer to other paragraphs or provisions of the lease that are significant and of controlling importance. For instance respondents leave out paragraph 5 which shows that the plaintiffs (lessees) actually had no rights or obligations under the lease and as to them there really was no lease until June 7, 1946, even though the lease is dated February 19, 1945, for a term commencing March 7, 1945. Actually plaintiffs' term was only from June 7, 1946, to and including May 31, 1956, which term is spoken of throughout the lease as "the last ten years of this lease." There were the first 15 months covered by the lease during which the defendants (lessors) had obligations under the lease, but during which period plaintiffs had no rights or obligations.

Also in their abridgement of the complaint defendants leave out many things that are actually present and which should be included if a fair and adequate statement is to be presented. On page 5 of respondents' brief on the first line the last word should be "erection" instead of "construction." Further down on the page respondents in stating the contents of the Building Code confine their attention to Sec. 301, whereas the complaint

gives the substance of all the sections referred to therein. The complaint calls attention to the fact that the provisions of the Code authorized the condemnation of any building or portion thereof found to be dangerous or unsafe or which violate the provisions of the Code "due to deterioration or other defects." The quoted language is not included in respondents' statement nor do respondents call attention to the fact that in addition to prohibiting the building condemned to be occupied the Code also prohibits it to be "used for any purpose." Nor do defendants in their statement include the allegations of the complaint that they refused to take any action whatsoever to put the roof in good condition and that plaintiffs were excluded from possession of the premises because of the condition of the roof. Nor do they call attention to the allegations of the complaint that plaintiffs repeatedly notified defendants that if defendants did not take some steps to put the roof in good condition and to meet the requirements of the public authorities plaintiffs would be compelled to do so and hold defendants liable therefor. Nor do the defendants point out that the complaint alleges that while a new roof was put on much of the old roof was salvaged and used in the new roof and that while steel beam construction was used that that was as cheap or cheaper than lumber and that at that time only green lumber was obtainable at a cost higher even than steel. Nor do they call attention to the fact that plaintiffs expressly eliminated from their claim for damages any charges that could be questioned as being excessive. Actually the complaint alleges

that the Building Code specifies that if a building or portion thereof is dangerous or unsafe due to deterioration or other defects it shall not be occupied or used for any purpose until it has been made safe; that defendants' attention was called not only to the requirements of the Building Inspector but also to the fact that actually and aside from the Building Inspector's opinion the roof was unsafe; that defendants refused not only to comply with the Building Inspector's requirements but refused to do anything at all with reference to the roof, and that as a result the plaintiffs were excluded from occupying the premises for the purposes for which they were leased to them; that plaintiffs told defendants that if they didn't fix the roof plaintiffs would do it and hold them responsible; that Plaintiffs did fix it as cheaply as they could and salvaged and used all they could of the existing materials in their construction work. Steel construction was not used as indicated by respondents. The steel was used in the steel beams.

Respondents' break-down of the lease agreement into paragraphs a, b, c and d on pages 6 and 7 of their brief does not reflect the actual or controlling provisions of the lease at all.

There is in the lease no such unqualified acceptance of the premises as counsel would indicate. Paragraph 6 must be construed in connection with the other provisions of the lease, particularly those of paragraph 3, 5, 8 and 18. This is also true of paragraph 11. One phrase of one paragraph cannot be singled out as the controlling

provision of the lease and construed alone without any reference to remaining provisions of the lease explanatory of and applicable to such phrase. There is no period as indicated on page 6 of defendants brief (a), after the words "accept said premises in the condition and state of repair they are now in." Our acceptance of the premises was qualified and the roof was expressly excepted. The remaining portion of paragraph 6 clearly shows when construed with the other provisions of the lease that the lessees assumed no responsibility for any of the premises until June 7, 1946. Up to that time under paragraph 5 the plaintiffs had nothing to do with the premises and had no rights and no obligations. For the period preceding June 7, 1946, and for the remaining ten years of the lease the lessors under the exception in paragraph 6 and under paragraph 8 had all the obligations with reference to the roof. For the last ten years of the lease the lessees agreed only that all improvements, upkeep and repairs of every kind and nature whatsoever, etc., "except as hereinafter stated," were to be made at their expense. This did not include any structural changes which were expressly excluded as their responsibility and they were forbidden to do them under paragraph 3, nor the roof by reason of paragraph 8. It is obvious that the lessees for the first 15 months of the lease had no obligation whatever concerning any of the premises. That was the obligation of the lessor. For the last ten years of the lease if "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." were required for the roof they were expressly excluded by the lease terms from the obligation of the plaintiffs. By the terms of paragraph 8 and by exclusion from paragraph 6 the roof at all times was the obligation of the lessors.

On page 7 of their brief under paragraph B defendants purport to quote the provisions of paragraph 6. Their quotation, however, leaves out and overlooks five commas which are found in paragraph 6 of the lease. In the lease itself the phrase, "except as hereinafter stated," refers to everything that precedes the phrase. It is separated from the remainder of the paragraph by commas. In defendants' quotation it would appear that the words, "except as hereinafter stated," modified the words, "and regardless of how the same may be necessitated." That is not the way the paragraph reads. When construed in connection with the remaining provisions of the lease it is clear from the lease itself, that in addition to the other matters recited, the lessees accepted the premises in the condition and state of repair they are now in, "except as hereinafter stated." Expressed another way, under the language of the lease the premises were accepted by the lessees only upon the condition that the lessors for the entire term would keep the roof in good condition and repair. Lessor James L. White drafted and composed the lease. When he put the words in the lease that he would keep the roof in good condition and repair, he thereby represented that it was

in good condition at the time the premises were accepted. He also agreed further that if at any time during the entire term, including the 15 months when lessees were out of possession, the roof was not in good condition, defendants would be required to keep it in good condition. We have already on page 41 of our original brief given the definition of the words "to keep," "roof" and "good condition." These definitions were not disputed by defendants, and under these definitions the lessors agreed to maintain and preserve from risk or danger from the beginning to the end, the cover of the building including the roofing and all the materials and construction necessary to carry and maintain the same upon the walls or other uprights, in a reasonably safe condition, sufficient or satisfactory for its purposes. However, "to keep" and "good condition" have such common meanings that the words speak for themselves. "To keep" means "to maintain" and "good condition" means good condition, not dangerous or unsafe condition or in such a condition that the premises cannot be occupied or used. It is grotesque to assert that under this lease defendants had no responsibility for a roof that was so inadequate and unsafe as to prohibit the use of the premises which they leased to the plaintiffs for ten years.

With reference to paragraph D (paragraph 11 of the lease) on page 7 of defendants' brief, the lease itself shows that that paragraph only exempted the lessors from liability for plaintiffs' failure to keep the premises

in repair. Paragraph 11 when construed with the rest of the lease exempts the lessors from liability for failure of the lessees to perform their obligations. Paragraph 11 does not exempt dependants for their failure "to keep the roof in good condition." We shall refer to this paragraph later.

DEFENDANTS' "ARGUMENT" ON PAGE 7

Throughout their brief defendants do as they did in the lower court. They assume that all they were required to do was to keep the roof in repair. According to the defendants the lease reads: "Lessees accept the premises in the condition and state of repair they are now in, so for the entire term of this lease the lessors shall have the obligation only to keep the roof of the leased premises in the same condition as it now is, even though it is or becomes dangerous and unsafe." That is the effect of the defendants' argument. That, however, is not what the lease says. We accepted the premises in the condition they were then in only upon defendants' express promise that so far as the roof was concerned it would be maintained by them in a safe and proper condition at all times both before we took possession and afterwards. Defendants, themselves also defined the extent of their obligation in paragraph 6 by stating that all improvements, upkeep and repairs, regardless of how the same may be necessitated, and regardless of the extent thereof, whether ordinary or extra-ordinary did not apply to the roof. We were to do none of those things to or for the roof. Those were defendants' obligations.

And it was only with this understanding that we accepted the premises.

Defendants discuss the lease as though the words "in good condition" were not in it. The fact that the words "in good condition" are used and that the word "repair" is also used clearly indicate that they refer to different things. "Good condition" means something different than "repair," or the words would not have been used. The parties meant that something other than mere repairs were to be done by the lessors. The defendants' obligations with reference to the roof were just as extensive as were plaintiffs' obligations for other matters under paragraph 6.

DEFENDANTS' ARGUMENT ON PAGE 9

Defendants on page 9 and the following pages up to page 23 argue that they were only obligated to make ordinary repairs to the roof. They cite many cases on this point. Cases dealing merely with the obligation to repair have no application to this case. Be that as it may, many of the cases cited by defendants if applied to the facts here would be directly opposed to the theory asserted by defendants. For instance on page 9 defendants cite *St. Joseph, etc. vs. St. Louis, etc.*, 36 S.W. 602. In that case the plaintiff leased its railroad to the Wabash Railroad. Wabash agreed to put the road in such condition that it could be operated efficiently. Wabash did not do this and sublet to the defendant who only agreed to deliver up the property in the same good order and repair as it

was in at the time of the subletting. The plaintiff tried to hold the defendant for the breach committed by Wabash. The defendant itself had greatly improved the road, but the lease had been broken and violated before defendant took possession. The court said that the sub-lessee was not liable for the prior breach and was only required to maintain the road in the same condition it was in when it took it. The referee, however, to whom the case was referred in the beginning stated that if Wabash had been the defendant he would have found for the plaintiff. Applying the rule of that case to the case at bar, the defendants agreed that for the 15 months before we went into possession they would keep the roof in good condition. We accepted the premises in reliance upon this promise. They did not do so. The lease was breached before we went into possession. Defendants cite on page 9 excerpts from 36 C.J. and 32 Am. Jur. These authorities must be considered in connection with the entire subject under discussion and in connection with the cases supporting the text. For instance 36 C.J. 142, the same page referred to by defendants, also states, "A covenant by the landlord to repair and to keep in repair * * * obligates him to put the premises in repair if out of repair at the time of the making of the lease." This rule applied to our case makes defendants' liability clear. And in the next subdivision, 781, it states that the duty of the tenant to make repairs does not include structural changes or unforeseen building alterations required by public authorities, even though the tenant had agreed in the lease to make repairs. We not only had not agreed to

make repairs to the roof, but defendants had agreed to do so.

At one or two places in their brief defendants by innuendo infer that we were probably required under paragraph 3 to take care of the roof if it was in such a condition as to require more than mere patching up. The plain language of paragraph 3 is that we were to make permanent improvements which were in the main to consist of a new front. The cost of the improvements was not to be less than \$10,000.00 but could be more. The fact that the figure \$10,000.00 was used shows that it was approximately that amount that the parties had in mind that the lessees should add to the permanent value of defendants' building. It would be beyond reason to assert that the parties had in mind that the \$10,000.00 to be spent by plaintiffs in adding to the value of the defendants property meant also a new roof for the place, and particularly if the new roof was required because the premises were actually unfit to be used at all.

Defendants argue that covenants to keep in repair and to keep in as good repair as they now are amount to the same thing. What of it? That proposition is not involved here. They then repeat and repeat the same thing over and over again, and over and over again assert that that is all they were required to do because we accepted the premises in the condition they were then in. The meaning of the words "to keep in repair," and the meaning of the words "to keep in as good repair as they now are" are not the test here, although as just seen from

36 C. J., *supra*, "to keep in repair," means to put in repair if out of repair. Neither phrase, however, defines the defendants' obligations under this lease.

A brief review of the cases relied upon by defendants will be sufficient to indicate that they do not justify any holding in favor of the defendants under the facts present in the case at bar. We shall spend little time on those cases that involve only the obligation to keep in repair or in as good repair as at the time when the premises were leased since they have no application here. Therefore, commencing with page 10 of defendants' brief we find the case of *Farr vs. Wasatch Chemical Company*, 105 Utah 272, 143 Pac. (2) 281. This case we have already discussed at pages 43 and 54 of our first brief, and we shall later refer to it herein in connection with the contention of defendants that evidence under some of the allegations of our complaint would violate the parole evidence rule with reference to written contracts. The next case cited by defendants is on page 11 and is *Nixon vs. Gammon* (Ky.) 229 S.W. 75. Defendants contend that the lease in that case provided that the lessee should keep the premises in good condition *and* repair. As a matter of fact, in reciting the terms of the lease the court at first said that the lease provided that the tenant agreed to keep the premises in good condition *of* repair. However, at another place in the opinion the court uses the word "and" instead of "or" so we are unable to determine which is the word actually expressed in the lease. Nevertheless, in that case the landlord had agreed to

make extraordinary repairs, and the tenant to keep the premises in such condition as to return them to the lessor "in as good condition as they now are." The court said that the landlord's agreement for extraordinary repairs did not mean rebuilding after a fire. It also held that the tenant was only required to keep the building in ordinary condition which did not include building a roof or replacing property destroyed by fire. The case didn't say who had to replace the roof which was destroyed by fire. However, in the case at bar the lease itself demonstrates that the provisions of paragraph 3 and 6 defining the plaintiffs' obligations broad as they were did not contemplate the replacement of property except as specifically enumerated. Paragraph 18 provides that if the premises are destroyed entirely at any time the lease shall terminate, but "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." Clearly the parties to this lease did not contemplate that the lessees had any such obligations as defendants now try to infer. Paragraph 18 provides that if the premises are rendered untenable by the elements the lessors shall repair and restore them. The lessors also define their obligation to "restore" the premises as "repairs." Defendants themselves have indicated by the lease that the word "repairs" is far broader than their counsel now insist is the meaning of the word. If the Nixon case is of any value to the court, it is only for the reason that it in-

dicates that the word "repairs" does cover "ordinary wear and tear of the building and its decay." The complaint herein expressly alleges that the roof sagged and became worse as time went on, and if defendants agreed only to repair the roof, (which they did not) they were bound even under that case or under any of the others cited by defendants to take care of what resulted from ordinary wear and tear and decay. The complaint expressly alleges that the roof commenced to sag after the lease was entered into and the sagging became worse; that it was unsafe at the time the lease was entered into and became progressively worse. (p. 25 our brief) So even under the contention that defendants were only required to make repairs the complaint is invulnerable. However, it is not necessary to place this case upon any narrow ground because the defendants did not agree only to keep the roof in ordinary repair or in the same repair as when the lease was entered into.

On page 12 of their brief defendants make several assertions that are inexcusable. It may be that they were carelessly made, but inasmuch as they purport to recite the terms of the lease it is difficult to overlook the fact that the statements are not true. Defendants say that we "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*,". There is no qualification whatsoever in the brief to that statement and it is absolutely untrue. The defendants continue: "while Lessors, under the con-

struction 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." The first statement eliminates all punctuation found in paragraph 6 of the lease and leaves out the words contained therein after "however necessitated" which words are "except as hereinafter stated." While in the second statement defendants assert that under the lease they were required "to make only ordinary repairs to the roof." The lease says no such thing. Then defendants argue: "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 a substitution be an 'improvement' or an 'extraordinary repair' within the obligation of the lessees?" Those statements alone demonstrate the completely false position created by the defendants. Regarding the last statement, we neither destroyed the roof and the understructure support, nor did we accept the roof and agree that all defendants had to do was keep it in the same condition it was in. If what we did was an "improvement" or "an extraordinary repair" as defendants imply, then the defendants definitely were obligated by paragraph 6 alone to do the work, because paragraph 6 eliminated, by the exception contained therein, our obligation to make any improvements or extraordinary repairs of the excepted property. Under their own construction, as to the excepted property, they had the same obligations as we did for that not excepted. Defendants

continue: "There is no allegation in the complaint that the roof as accepted ever became out of repair." We have already called the court's attention to the allegations of the complaint which, of course, this court can read for itself, and particularly those found on page 25 of our first brief. If as defendants imply on page 13 the roof was unsafe from the beginning, certainly it would be more unsafe fifteen months later when we were to go into possession.

On page 13 defendants cite *Kingsted vs. Wright*, 133 N. W. 399. Lessors' covenants in that case were not the same as in the case at bar. The case holds that the lessors' covenants to keep in repair did not impose the duty to make improvements or betterments. Under paragraph 6 of our lease we believe that the exception required the lessors to do the same thing with reference to the excepted property as we were required to do with that not excepted and that under paragraph 8 the lessors' duty was even greater. When all paragraphs of the lease are construed together including paragraph 18, it is obvious that so far as the roof is concerned even if entirely rebuilding it was involved that obligation was the obligation of the lessors.

At the bottom of page 13 defendants state: "There is a studious avoidance by appellants of the phrase 'keep in good condition and repair' as used in the lease." In view of what we said in our first brief and what we have so far said in this brief, that statement is ludicrous. We are the ones who have emphasized and emphasized

again the words "keep in good condition and repair." It is the defendants who have avoided them by leaving out the words "good condition and." Then at the top of page 14 defendants assert that 32 Am. Jur. pages 673-4 points out that these terms express entirely different obligations. That is just what we have been arguing. To keep in good condition is entirely different than to keep in repair. However, in reading the citations from C. J. and Am. Jur. as we have already pointed out, it is necessary to read the complete citations on the subject being considered. Excerpts, with omissions from the text, sometimes convey an entirely different meaning than that actually stated in the text.

The next case cited by defendants, *Cadman vs. Hy-Grade Food Products Corporation*, (Mass.), 33 N. E. (2) 759, we do not find in either volume of 33 N. E. either the first or second edition. However, we could agree in considering the parol evidence rule in our case with the statement attributed to that case by defendants on page 15: "The phrases '*in good tenable 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." However, we have not read the case and do not know what it holds. We do know, however, that we did not accept an unsafe and dangerous roof. If there was any representation with reference to the roof, it was defendants' representation that at the time of the lease it was in good condition. Certainly, they agreed that when we took possession in June of 1946 it would be in good condition because

they agreed that for the entire term of the lease they would keep it in that condition. It was not in good condition when we were to take over under the lease and defendants had not kept it in good condition for the fifteen months prior to our occupancy.

DEFENDANTS' CONTENTION THAT "LESSORS OBLIGATED TO MAKE ONLY ORDINARY REPAIRS TO THE ROOF" (Page 16)

What we have already said in our original brief and in this brief, we think answers defendants' arguments commencing at page 16 and ending at page 23. It might be added, however, that the complaint sets forth the construction that defendants placed on the lease they drew, (which construction we believe was correct) and that they did make special covenants and stipulations with regard to the roof. The lessors did not as defendants' counsel now contend make only a general covenant, and the lessees a larger covenant. The lessees' covenant contains an exception which exception is as broad as the covenant from which it is excluded and is amplified by paragraph 8. Defendants argue that we did more than they were required to do because we removed an entire roof and supporting structure constructed of wood and substituted therefor one of steel beam construction. The complaint and the bill of particulars show that we used all the old materials from the original roof it was possible to use; that steel beam construction was cheaper at that time than lumber and also that the only kind of lumber obtainable was green and unsuitable for use in roofs;

that 60% or more of the old material in the roof was used in the work of fixing the roof and that we eliminated from our costs anything that made the roof more expensive than actually replacing what formerly existed. (Bill of Particulars, brief 33-34) However, what we did was only what was necessary and required by the public authorities. If to have a roof in good condition required us to do what we did, then the roof could not be kept in good condition without the doing of what we did.

It would unduly extend this brief, now already too long, to discuss in detail every case cited by defendants, but there is one case cited by them, *Lurcott vs. Wakely*, (1911), 1 K. B. 905, that does need special attention—not because of what defendants have said concerning it, but because of what they have failed to say. Actually the principles announced in that case when applied to the case at bar are decidedly against the defendants. We wonder if they actually read the case. In that case the tenant agreed to well and substantially repair and keep in thorough repair and good condition all of the premises demised. The lease ran for a great many years. One of the walls because of age became unsafe. To repair it required that it be rebuilt. The court said that under the aforesaid covenants of the tenant it was the tenant's duty to rebuild the wall. If the entire house had become unsafe, the duty to make it safe was that of the landlord. There are three opinions in the case. One by Cozens-Hardy, M. R.; one by Fletcher Moulton, L. J.; and one by Buckley, L. J. Defendants' quotation is from the

opinion by Lord Buckley. But even defendants' quotation is against them as appears merely from reading it. The quotation given by defendants is not complete. The complete quotation on the subject under discussion including that omitted is as follows:

"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 flashings, (defendants called these flushings), and the like." (The following is omitted by defendants:) "Part of a garden wall tumbles down; repair is affected by building it up again with new mortar, and so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject matter under discussion." (The defendants' quotation then continues:) "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."

However, this judge as well as the other two hold that under the tenant's covenants he had to rebuild the wall, but if the whole house had needed rebuilding that would have been the obligation of the landlord. Applying these principles to the case at bar, had the roof fallen down "repair is affected by building it up again." Certainly, it cannot be contended that we were required to wait until the roof fell in on us, nor that had the roof fallen in

on us defendants then and not until then, would have been required to build it up again; that they could wait until it actually fell in before that duty devolved upon them. There is no principle with which we are familiar that would justify any such nonsense. The judges discussed another and earlier case to this effect: Where the tenant had agreed to keep the premises in good tenantable repair "if the floor become rotten, the tenant must put in a new floor unless he can make the floor good by ordinary repair. The floor was a subsidiary part of the whole. The house could not be occupied if the floor were rotten, and the tenant to comply with his covenant as to tenantable repair, must either make it good by repair or replace it, for otherwise the house would not be tenantable." In our case if the roof became unsafe the landlord must put in a new roof unless he can make the roof safe by ordinary repair. The premises could not be occupied if the roof were unsafe, and the landlord to comply with his covenant to keep in good condition must either make the roof good by repair or replace it, otherwise the roof would not be in good condition. We make this analogy because of the construction another judge in that case placed upon the words "thorough repair." In that case since the wall could not be repaired without rebuilding it the court held it must be rebuilt. In the decisions is found this language: "It is only repair in the sense that it is restored to stability and safety a subordinate part of the whole." Applying the principles of that case to our case: even had there been here no covenant on the part of the landlord and had the roof become

so unsafe as to require replacing of the whole, the rebuilding would have been the obligation of the landlord because we made no covenant to replace or rebuild anything. The English court holds that if renovating or renewing or repairing requires the rebuilding of the whole that obligation falls upon the landlord and not the tenant. In the case at bar, however, the landlord specifically agreed to keep the whole roof in good condition. Lord Fletcher Moulton's opinion is very helpful in our case. He used this language: "The words are a description of a state and not a mode by which that state is arrived at, and therefore, in my own mind I draw no wide distinction between keeping in thorough repair and keeping in good condition; they both appear to me to describe the condition of the house." He also said: "I think that to keep in thorough repair does not in any way confine the duty of the person who is liable under the covenant to the doing of what are ordinarily called repairs." This judge defined the words "keep in good condition" to be the same as "keep in thorough repair." He said they were not the same as "what are ordinarily called repairs." He also said: "If a house is in such a condition so that it is dangerous to the public, and that a portion of it has to be pulled down and rebuilt at the demand of the authorities on the ground of public safety—which must be the safety of the people within as well as without—there is a plain breach of the covenant to keep in good condition." This judge not only says "good condition" is different from "ordinary repairs" but also says that if a thing is dangerous and unsafe and

must be replaced at the demand of the public authorities, it is not in good condition.

Referring now to three more of defendants cases, *Plaza Amusement Co. vs. Rothenburg*, 131 S.W. 351; *Walker vs. Cosgrove*, (Ky. 1925), 273 S.W. 450, and *Dwight vs. Ludlow Mfg. Co.*, (Mass.) 128 Mass. 280, 282: In *Walker vs. Cosgrove* the tenant agreed to take good care of the property and pay for ordinary repairs. A drain was in poor condition when he took possession. The case only holds that his obligation was to make repairs that resulted from his use. Of course, that case has no application here. Actually that case involved an attempt by the landlord to raise the tenant's rent, and the court recognized that the repair feature injected by the landlord was simply a subterfuge to compel the tenant either to pay increased rent or to get out. The *Dwight vs. Ludlow* case is really an authority for us. All we are asking in the case at bar is what the court required to be done in that case. All we are asking is that defendant restore the roof so that it would be capable of doing what it did after its original construction. So far as appears in the case at bar the original roof as originally constructed was adequate. It apparently passed the building inspector then, but when we went to take possession it was in such a condition as to be unsafe and inadequate. When it reached that condition, no one knows, nor do we know whether building requirements had changed; whether the roof was inadequate because of the strain put upon it by time, or for what reason. All we know is what

the building inspector told us and what was actually disclosed when we went to work on the roof. The building inspector said it was unsafe and we could not occupy the premises in that condition. Actually the roof proved to be unsafe as disclosed when we went to work on it. Regardless of what else it holds, the case of *Plaza Amusement Company vs. Rothenberg*, holds that the lessee was not required to make structural changes regardless of the provisions of his lease with reference to keeping the premises in as good order and condition as when leased. That case also holds that the parties must be assumed not to have intended to violate the law. In our lease it is expressly provided by paragraph 7 that we will occupy the premises in a lawful manner. We could not occupy them in a lawful manner and disregard the building inspector.

Defendants say (brief p. 21): "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 * * *, " etc. They then quote rules of law from which there is no dissent that parol evidence cannot vary the terms of a written contract. We rely on the terms of the lease. But, also, the complaint alleges that defendant James L. White drew the lease and that upon discussing it with the plaintiff Hubert Wolfe he represented to Mr. Wolfe that under the lease plaintiffs had no responsibility for the roof and that the provisions of the lease with respect to accepting the premises did not apply to the roof; that the roof was the sole responsibility of the de-

fendants; that plaintiffs would have no responsibility whatever for the roof. We believe that Mr. White correctly advised Mr. Wolfe and that the lease does exactly what he said it did. In spite of the contentions to the contrary by Mr. White's counsel we believe that he told Mr. Wolfe the truth. However, the lower court took the interpretation of the defendants' counsel and construed the lease to mean something different than in our judgment it actually does mean. We did not believe and we do not now believe that any amendment to the complaint was necessary. We believe that the lease says exactly what Mr. White represented it to say. However, because the lower court took the other view, it became material to allege the interpretation placed upon the lease by the person who drew it. This is not evidence to vary the terms of a written contract by parol. We think that the case of *Farr vs. Wasatch Chemical Company*, 105 Utah, 272, 143 Pac. (2) 281, supra, is authority for some of the amendments to the complaint. The principle therein announced is the same as expressed and enlarged by Williston in his latest work on "The Law of Contracts," the Revised Edition in 1938, at Sec. 629 under the heading "Surrounding circumstances may always be shown." Under defendants' argument the lease to say the least is ambiguous. Under all authorities any ambiguity will be resolved against the lessor and particularly where he is the one who drew the lease. The lease will be construed against him. However, the amendments to the complaint merely attempt to show the interpretation put upon the lease by the parties before it was ever signed.

It is alleged that the plaintiffs never inspected the roof and knew nothing about its condition and that Mr. White assured them that they were not accepting the roof and that the lease was clear on that point. Williston's quotes from a federal case as follows :

“The correct principle has been well summarized in a federal decision. (*Eustis Mining Co. vs. Beer*, 239 F. 976, 985) All the attendant facts constituting the setting of a contract are admissible, so long as they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might ‘contradict’ the contract—that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. Yet, as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include. Whatever may be the propriety of admitting evidence of extrinsic facts where the meaning of the instrument is apparently clear, there is no question that such evidence is admissible in every jurisdiction where there is no clear apparent meaning. It must be kept in mind, however, that the only purpose for which such evidence is ever admissible in an action on the contract is to interpret the writing. So far as the evidence tends to show not the meaning of the writing but an intention wholly unexpressed in the writing, it is irrelevant.”

This thought is expressed by the Restatement of the Law of Contracts, American Law Institute print, under Sec. 236 (b):

“The principal apparent purpose of the parties is given great weight in determining the meaning to be given to manifestations of intention or to any part thereof.”

Sec. (d):

“Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law.”

The following language is also found in the aforesaid Restatement under Comments to (f) of Sec. 235:

“Yet, as all language will bear some different meanings, evidence of surroundings is always admissible.”

If the contract means what defendants contend it means, then Mr. White misrepresented its meaning to the plaintiffs, and they signed as a result of such misrepresentation. That is pleaded in the complaint as is also that Mr. White is estopped now to assert that the contract means what his counsel say it does. Under the rule in the *Farr vs. Wasatch Chemical* case the parties may be said, because of defendants' present contention, to have a collateral agreement with reference to the roof, i.e., that the roof was no obligation of plaintiffs and

that the writing expressly obligated defendants to do everything with reference to the roof. However, as already stated, we believe that the lease means exactly what we alleged Mr. White told the plaintiff Mr. Wolfe it did mean; that is that the lessors assumed all obligations with reference to the roof and that in accepting the premises in their present condition the roof was excluded by express language in the lease.

Defendants assert on page 23 that any statements that Mr. White made after the lease were immaterial. Any statements Mr. White made after the signing of the lease with reference to the roof would be a further interpretation by him as to the meaning of the lease with reference to the roof.

DEFENDANTS' ARGUMENT THAT "ACTS OF BUILDING INSPECTOR IMPOSED NO OBLIGATION ON LESSORS" (Page 23)

We have already discussed this phase of the case in our first brief, and we confess that we are unable to follow defendants' argument at all. They repeat the erroneous assertions previously made that we were bound to make all the repairs however necessitated and insinuate that the roof was our obligation if it was unsafe, etc. The fact is that the building inspector would not let us occupy the property under the lease until the roof was made safe. It is immaterial when it became unsafe. We allege that as time progressed it became more unsafe and that its condition became worse after the lease was

entered into. The building inspector's letters clearly indicate that the roof was in bad condition, that it was not in good condition. When or how the overstressing and the bowing of the rafters, trusses and girders occurred does not appear, but these conditions did become worse until they rendered the premises untenable at the time we were to go into possession. At the top of page 26 defendants say: "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 would have nothing at all to do with the repair of the then existing roof." The actual wording of the lease indicates how flimsy is this argument.

Defendants cite three cases on page 26: *Pratt vs. Grafton Electric Company*, (Mass.) 65 N. E. 63, *Knight vs. Foster*, (N.C.) 79 S.E. 614, and *Victor A. Harter Realty Company vs. Lee*, 132 N. Y. S. 447, to show that they were under no obligation to comply with the orders of the public authorities. In the Grafton case the lease expressly provided that the lessors should not be required to make any repairs on the leased premises nor to furnish any substitute in case of destruction, loss or damage. The lessee was required at its own expense to make all necessary repairs to the flumes, gates, bulkheads, and leased property, to keep them in proper condition for use. The court said that under such stipulations there was no implied covenant on the part of the landlord to make repairs ordered by the public authori-

ties because the gates in the millpond were rotten and in need of repair. The lessees expressly agreed to keep the gates in proper condition for use, and the lessors expressly agreed they would not furnish any substitute for the gates in case of their destruction, loss or damage. All that the court did was follow the terms of the lease which is all that we ask the court to do in the present case. In the Knight case 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 injury due to the defective premises, and particularly if the landlord contracts to repair the very thing which is in disrepair. The court also said, as we say with respect to the roof in this case, that fixing the gate was a change and not a repair, and so 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. In the case at bar we wished to escape this liability by having the nuisance that existed corrected before we went into possession. In the Harter case the lease provided that the *tenant* should comply with all the rules, ordinances and regulations of the City Government, and with this express provision the court said that the tenant was required to make repairs to the building required by orders of the municipal authorities, *short of a reconstruction of the house*. So that case is authority for the proposition that even though the lease requires the tenant to comply with orders of the public authorities

he is not required to do so when such orders require a reconstruction, and that is the rule of law generally recognized. Those cases when applied to the case at bar where the lessors agreed to keep the roof in good condition, show that defendants are the ones who are required to comply with the orders of the public authorities particularly when the reconstruction directly concerns that portion of the premises over which they assumed the obligation.

The case of *Clark vs. Yukon Investment Company*, 145 Pac. 624, also cited by defendants on page 26 is not applicable to the facts in our case. The Supreme Court of Washington points out that there was a statute requiring the owner to do certain things and that that meant the owner of the business; that the statute applied to the lessee because it was the nature of the lessee's business that necessitated the improvements specified by the statute. The lessor had stipulated that it should not be required to expend any money on the premises and the lessee had expressly agreed that it would not permit any violation of the laws of the State of Washington. None of those elements are present in the case at bar. On page 27 counsel place their own construction on the case cited by us, at page 48 of our first brief, *Herald Square Realty Company vs. Saks*, (N.Y.) 109 N.E. 545. The principle that the landlord must make structural changes required by public authority is there announced. This court can interpret the case without us referring to it further. Of course, that is true of all the

cases cited by either of us, but when counsel assert that cases stand for things they do not stand for we cannot let such assertions go by without comment.

On page 28 of their brief defendants say that they had no obligation to heed the building inspector's letters. In other words, that they could ignore the law. This court answered the question very effectively in the case of *Wilcox vs. Jameson*, 55 Utah 535, 188 Pac. 638, cited by us at page 51 of our first brief. Counsel for defendants argue that the building inspector didn't serve any notice in writing by personal service on the lessors. That does not affect the lessors' liability under our lease. If Salt Lake City was attempting to inflict a punishment for violation of the ordinance, lessors might plead lack of service of the notice. That, however, does not affect their civil liability or their liability under the lease. The building inspector's letters show and the complaint alleges that the defendants were advised repeatedly about the unsafe condition of the roof. The building inspector pointed out specifically what was wrong and asked for a submission of plans to correct the condition. He did not attempt to dictate what the details of roof construction should be. That was left to the parties. The defendants could have submitted any plan they desired and any plan that was adequate would have been approved by the building inspector. They refused to do anything. The building inspector set forth what must be done, and defendants refused to do anything.

DEFENDANTS' ARGUMENT THAT "LESSEES
SEEK TO RECOVER FOR STRUCTURAL IM-
PROVEMENTS" (Page 31 and Breach of Covenant
of Quiet Enjoyment page 34)

Under this heading defendants argue that the permanent improvements we were to make at a cost of not less than \$10,000.00 might have included the roof. The fact that the parties used the figure \$10,000.00 and specifically stated that the permanent improvements should include the installation of a first-class front shows that they did not have in mind anything with reference to the roof nor with reference to improvements that would run to two or three times \$10,000.00. The whole tenor of the lease including paragraph 6 indicates that we were not to make structural improvements generally. Paragraph 18 as well as paragraph 8 as well as general law hold that defendants' have the liability they seek by insinuation to impose on us. Counsel repeatedly harp upon the fact that we used steel, in spite of the allegations of the complaint that we used the cheapest construction possible.

On page 34 counsel argue that we claim a breach of the covenant of quiet enjoyment. We have spent little time on this phase of the case, but actually under the case of *Heywood vs. Ogden Motor Company*, 71 Utah 417, 266 Pac. 1040, cited by us at page 49 of our first brief, we were kept out of possession of the premises by the acts of the defendants. As we recall it there was no express covenant of enjoyment in the Heywood case

while in our case there is an express covenant that the lessees "shall and may in accordance herewith peacefully and quietly have, hold and enjoy said demised premises during the term hereof," paragraph 16 of the lease, page 10 of our first brief. Defendants argue that there was no violation of this covenant of the lease because there was no eviction. They cite certain authorities including 32 Am. Jur. page 231, etc. In our case there was an actual eviction because we were unable to go into beneficial possession when we should have done, and there likewise was a constructive eviction because thereafter we were deprived of the beneficial enjoyment of the demised premises—by reason of acts of the defendants. It is not necessary that there be an actual physical ouster or dispossession in order to constitute an actual eviction. Am. Jur., *supra*, says: "The ancient rule of the common rule that entry or expulsion, or some real disturbance of the possession, was required to establish eviction of a tenant by his landlord has been so far modified in favor of the tenant that *actual ouster or physical dispossession* is no longer necessary to constitute an eviction." (Italics added). If the tenant later resumes possession, he may waive the eviction but that does not waive the damages flowing therefrom. The authorities are in conflict as to whether an eviction terminates the obligations of the tenant under the lease. We had no desire to terminate our obligations but adopted the alternative available to us of fixing the roof ourselves and holding the defendants liable thereof. The covenant of "quiet enjoyment" is a covenant that the tenant will be

free from actual disturbance of his possession, and that he will be protected from unlawful interference by others in enjoying the demises premises. *Koeber vs. Summers*, 84 N. W. 991, 992. That the city interfered with our possession cannot be disputed. The defendants did not protect us from this interference nor from actual disturbance of our possession. It is merely begging the question to say that the city officials did not notify defendants in writing that we could not occupy the premises unless the roof was made safe. In the *Farr vs. Wasatch Chemical* case, *supra*, this court says: "The language 'keep said premises tenantable' indicates that the parties understood the warehouse would be made tenantable." So in our lease "The language 'keep the roof in good condition' indicates that the parties understood that the roof would be made in good condition." We think the lease is clear that it was defendants' obligation at all times to maintain on the premises a roof in good condition. If it is not clear from the lease, then oral evidence concerning the responsibility therefor, if there is such evidence and the complaint pleads that there is, may be offered. We were kept from the premises by fault of the defendants in our judgment. We have made no effort in this case to recover anything by way of damages for eviction except for the damages proximately resulting from actual dispossession of the premises for the purpose for which they were leased.

DEFENDANTS CLAIM THEY ARE EXEMPT
FROM LIABILITY (Page 38)

Defendants devote several pages (38-43) to a discussion of paragraph 11 of the lease. Reading paragraph 11 in connection with all of the lease it is perfectly obvious that all that paragraph does is to exonerate lessors from our failure to perform our obligations to keep the premises in repair. Paragraph 11 is mainly devoted to an enumeration of damage to be caused by plumbing, gas, water, steam pipes, and from damage occasioned by acts of neighboring tenants. The paragraph clearly is not an attempt to exempt lessors from their liability but is an exemption of lessors from liability for the acts or omissions of others. Be that as it may, the paragraph does not exempt the lessors from liability for damage occasioned by failure "to keep the roof in good condition." There is no mention of that in the paragraph.

Under the authorities cited by us in our original brief even a clause such as we have here if applied to acts or omissions of the lessor would not exempt the landlord from liability for that portion of the premises over which he retained responsibility. But paragraph 11 of the lease does not exempt defendants from liability for failure "to keep the roof in good condition," under the lease, or any authorities or rule.

We have already sufficiently discussed the remaining contentions of defendants' brief headed by them "Comments on Immaterial Allegations" (43). As stated above we believe the lease says exactly what Mr. White

told Mr. Wolfe it did say. If, however, there is any doubt concerning this, that doubt will be resolved against Mr. White both for the reason that he is the lessor and also for the reason that he is the person who drew the lease. If there is any ambiguity or if there are any oral representations as to the meaning of the lease made to induce its signing, which are different than now claimed, or any oral agreements not contained in the lease, not only may evidence be introduced to establish the facts, but Mr. White is estopped to contend for a different construction of the lease than that which he represented to Mr. Wolfe would be the construction placed upon it.

We cannot pass without comment, however, defendants' attempt again in the closing pages of their brief to fasten upon us by insinuation the responsibility for the roof. They again misquote paragraph 6 (45) "regardless of how the same may be necessitated" and assert that the letters of the building inspector were to require to be done something "necessitated" within our special obligations. As pointed out above, the lease actually contains a comma after the word "necessitated" and says, "except as hereinafter stated." Anything necessary to be done to the roof comes within the express exception contained therein.

Defendants concede on page 46 that we had the right to fix the roof in this language: "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?" Of course, the defendants use the foregoing language for an entirely different purpose than that of showing that we had the right to do what we did, but it nevertheless is a concession by defendants of this right, and we leave them to answer their own question which they have not done in their brief. We also agree with defendants' statement on page 47: "If Lessors were liable at all to construct a new roof, it is immaterial when the roof began to sag."

It is unnecessary to make further comment on the conclusions set forth in eight sub-headings in the last pages of defendants' brief. Further comment would merely constitute further repetition. The whole brief is based upon the argument advanced on nearly every page,—in fact in nearly every paragraph—that we accepted a defective roof and that they were only bound to keep the roof in repair. Neither premise is correct, as we have pointed out almost with the same amount of repetition made necessary by the repeated assertions of defendants.

The complaint herein stated a cause of action both before and after each of the amendments. The judgment of the lower court should be reversed, (1) For sustain-

ing the demurrer to the original complaint; (2) For sustaining the demurrer to each of the amendments.

Respectfully submitted,

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