

1950

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

Utah Supreme Court

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Alvin I. Smith; Mulliner, Prince and Mulliner; Attorneys for Appellants;

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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 co-partnership,

Plaintiffs and Respondents

vs.

SARAH WHITE and JAMES L. WHITE,
her husband,

Defendants and Appellants.

BRIEF OF APPELLANTS

FILED ALVIN I. SMITH and
MULLINER, PRINCE AND MULLINER
FEB 14 1930 *Attorneys for Appellants*

Clerk, Supreme Court, Utah

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SARAH WHITE and JAMES L. WHITE,
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Defendants and Appellants.

Case No.
7431

BRIEF OF APPELLANTS

STATEMENT

The principal question presented in this case is whether an unqualified agreement between landlord and tenant that the latter, for a recited valuable consideration accepts the premises, including an old building, "in the condition and state of repair they are now in," is a valid covenant, enforceable between the contracting parties; and whether a covenant to keep such condition imposes a duty to change it.

HISTORY OF LITIGATION

A brief history of this case will be of assistance in showing how the points here presented arise.

The case was filed by respondents on a complaint (1), which, as then filed, alleged a basis for claim, (a) the lease between the parties, (b) defective construction or insufficiency of the roof drain, and (c) that the roof supports were inadequate, both as to "design and construction." It alleged the duty of appellants to *put* both in good condition, and our delict of such duty.

A demurrer (22) and a motion to strike (24) were filed. The former raised the effect of the acceptance of conditions complained of by the covenant of respondents, *and that no change in the roof had been alleged*; and the motion to strike, challenged a number of allegations, particularly including the reference to the requirements of Salt Lake City. It raised the grounds that the ordinance pleaded and the expressions of opinion showed no requirement by public officials, and that, as between the parties, the assertions by City authorities had no bearing or materiality, and imposed no legal duty on us.

After these were argued, respondents filed a bill of particulars (30). This is largely argument. It was apparently treated as an addition to the complaint, but has been ignored.

Thereafter, and to meet the ground raised by the general demurrer, respondents filed an amendment to the complaint (36). This alleged a number of substantial

changes in the condition of the roof structure, after the building had been accepted in the condition it was in, and before respondents went into possession on June 6, 1946. As stated by this Court, in its opinion on first appeal (197 P. 2d 125, at 130), "the plaintiffs do not, at any point in their complaint, indicate that the roof was not in 'good condition and repair' on that day." The opinion then points out that the letter of the City Bureau of Inspection to respondents, pleaded (18), pointed out "what the defects are, and indicates also that the roof drainage system had proved inadequate." Also, "that at no time in either of the letters is there any determination as to when the condition first developed, or as to how long it has existed."

The opinion then (at p. 131) points out, at some length, the allegations of this amendment to the complaint as to changes in the condition of the building, after it was accepted by respondents. We quote as follows (p. 131):

"The plaintiffs by their amended complaint allege that:

"* * * after the lease was entered into the roof commenced to sag * * * which sagging gradually became worse. * * * that in January 1946 the plaintiffs first learned that the roof was actually dangerous and unsafe * * * that *the said roof was unsafe and was not in good condition and repair at that time in January 1946, (not date of lease) and became progressively worse so that when plaintiffs were to take physical possession of the property the roof had*

become so unsafe as to be dangerous to life and limb * * * that *the sagging* of the roof *became progressively worse* and the roof was dangerous and unsafe because of the matters and things heretofore set forth and because of the * * * (Here the complaint sets out the exact defects), * * * and on or about June 7, 1946 by reason of said conditions *the roof had become dangerous and unsafe* * * * that plaintiffs do not know when the said roof first became dangerous and unsafe but the said unsafe condition *became progressively worse from the date of said lease* * * *’ (Italics added.)

“The pleadings obviously refer to conditions *after* the execution of the lease.”

Obviously, this Court attached great importance to these allegations of changes in conditions of the building.

The reference in the opinion to the conditions pointed out by the City Inspector on April 29, 1946, is to a letter of that date (18), which states “that the trusses were not adequate both as to design and as to erection. Also, that the main ceiling beams both for the front and rear part of the store are sagged and are evidently too light to carry the roof load. Also that the roof drainage system has proved to be inadequate.”

These encompassed all of the conditions objected to. This letter also points out, after stating the opinion of the authorities, the full measure of any action taken or indicated by them. It said: “These factors make it mandatory upon me to refuse to allow continued occupancy of this structure beyond this summer season for fear of future heavy snow loading which might cause total beam

and truss failure and consequent collapse of the roof structure.”

These opinions of the City authorities, while they were used throughout the trial to greatly influence the jury, were finally removed from the case, as a basis of duty or liability, by an instruction of the court (149), and are no longer of importance as constituting any basis of right or duty.

This instruction was that the responsibility of the defendants was not to be determined “by any act or finding of the building inspector . . . the defendants’ only obligation was, as provided in the lease, to keep the roof of said building in good condition and repair.” While the jury were also told, in different ways, by the Court repeatedly that “keep,” as used, meant “put” in good condition, this instruction eliminated any issue as to “official requirements.” It is the law of the case.

After this amendment, the demurrer was renewed as to the complaint, as amended (43), and a new motion to strike (44) was filed. The demurrer raised the same matters. The motions to strike were directed to three alleged matters: (1) the intimated official requirements (2) the alleged oral statements made prior to the execution of the lease, and (3) the alleged changes in condition, after its execution. As stated, (1) is now out. No evidence was offered on (2). And, the motion as to (3), on the grounds urged both in the Court below and here, are not now vital, for the reasons referred to below, in the argument.

There was also, incidentally, a motion to strike the allegation that defendant James White drew the lease. Since there is no ambiguity in the lease, no rule of construction as to this is involved. This record shows, incidentally, that Mr. Wolfe was well able to take care of himself.

Thereafter, this general demurrer was again sustained, and the special demurrers and motions to strike were overruled (49). The respondents stood on these pleadings, and the first appeal was taken (60).

On appeal, as cited above, the opinion of this Court reversed the Trial Court, apparently by reason of the allegations of changes in the conditions after the lease, as above quoted, from page 131 of this Court's opinion, and influenced perhaps by reason of the fact that it was then assumed that the alleged "acts or findings" of the City Inspector constituted "requirements of public authorities," as discussed at pages 130 and 131 of the opinion.

On trial of the case, as indicated by instructions which will be hereinafter referred to, the trial went upon the general theory that our liability had been settled by this Court, and that the matter for trial was the amount of damage we should pay.

We proceeded with the trial, expecting that some evidence of change in structure would be introduced, pursuant to the amendment to the complaint. This amendment was used, however, merely for the purpose of getting past the demurrer and appeal. No evidence was

introduced of any change, after the lease was signed and before the building was torn out.

We, on the other hand, introduced some evidence, and the evidence generally showed, without contradiction, that there had been no change. The Trial Court took the position that he understood the decision of this Court was to the effect that the covenant to "keep" the roof in good repair meant that we were to "put" it in such repair, both as to the drainage system and roof support, and the case was so ruled. (See instructions, 144-147, 153-154, and, also, the form of verdict, 165).

Our requests for special interrogatories on the point as to whether there had been any change, was denied (116). As were, also, our motions (972) and our requests for a directed verdict (118), and our other requests to submit the question of change, if any, to the jury (See 119, 121, 123).

STATEMENT OF FACTS

The facts material to an understanding of the questions raised on appeal will be stated as concisely as possible. These are, for the most part, not in dispute. Some matters which were in dispute, were within the province of the jury to determine, and are not material here.

The building involved here, except the rear or west wall, and the balcony joined thereto, was constructed about 1902 (689). In 1922, it was remodeled under the supervision of Miles Miller, architect (689). So that

the building, at the time this lease was entered into, was about 43 years old, and, at the time of the expiration of the lease, would be 63 years old. The defendant Mrs. White acquired it about January 1, 1943.

The remodeling in 1922 and 1923 was by the Hal-loran Judge Trust Company, and was for the purpose of occupancy by the J. C. Penney Store, which occupied it until about 1936 (781). A new roof thereon was installed in May of 1937, after Penney's moved out, by the Layton Roofing Company of Salt Lake City (781), preparatory to which some of the sheathing had been taken off, and the underneath roof structure examined (782), and tests made as to the vibration and strength of the understructure (783).

At that time, or thereafter, it was leased to Stewart Novelty Company, which, by the terms of the lease, occupied it until about June 6, 1946 (802).

The lease here involved was executed February 19, 1945, to commence March 7, 1945, and, under which, respondents were to take possession June 6, 1946. This lease is set out in full in the opinion of this Court on former appeal (197 P. 2d 125).

The first question as to the roof arose in July or August of 1945 (536), when respondents became dissatisfied with the roof drain system, as he testified (542), and kept insisting that Mr. White "assume the responsibility for diverting this drain." Respondent claimed that the drain was not carrying the water sufficiently

away, so that some was getting into an unexcavated portion of the basement, from which some allegedly seeped through the foundation into the basement, and he proposed two plans for correcting this (792).

The plan he wanted was to tap the roof drain under the floor of the building, at the western extremity of the building, and then run a pipe through the basement, and discharge the water at the front of the building (792). Respondent said he wanted to have a "free flow of rain water away from the building as . . . the function of any roof" (610).

On the change proposed by respondent, he employed a roofer, and communicated that fact to appellant (541). On October 9, 1945, appellant wrote a letter (Ex. "H") to respondent, stating that he had had "the flashings of the roof fixed, and the Utah Roof Cement Company advises that the roof is now in good shape." Mr. B. T. Cannon, the manager of that company, testified to this, and that he had made the examination and check of the roof, as referred to in this letter (785). That it was then in good condition.

Under date of November 12, 1945, respondent obtained from a Mr. Ferguson figures for making the drain changes proposed. These are contained in Ex. 18, addressed to Mr. White. They included additional pipe, and other equipment, and a drain or drip gutter at the rear of the building. The total cost of this proposed change, as stated therein, was \$485.86.

Respondent testified that Mr. White said that he would not go for it, but did offer to make a compromise to go 50-50, and that respondent told him "that it was a small item; if I thought the roof was my responsibility, I would fix it myself" (542). Mr. White testified that respondent did ask him to pay the amount of the bill, and that he asked respondent if he did not remember the discussion at the time the lease between them was made, in which Mr. White said that he was confident that if he cared to go to the expense and trouble of partitioning the store, he would get \$1,200.00 monthly rent instead of the \$600.00, as provided in the lease for the first ten years, and that he was leasing it "as is" to avoid the work and expense "that had to be done to make this old building into a modern store" (795). That it was not "his duty to reconstruct" the drain system (697). That conversation was in November of 1945, seven months before occupancy.

Except for the testimony of respondent and architect Paulson that they were in and out of the building during 1945 and early 1946, to make measurements, etc., the next testimony in the record is that Mr. Paulson had determined to get rid of the floor radiators, about 7 in number, that were in the store, and to insulate the attic for heating purposes (293). That he went into the attic in January of 1946, and concluded that the roof or ceiling structure would not support the additional 4 lbs. per square foot, which this insulation would impose (294).

On January 15, 1946, he wrote to Mr. Wolfe (Ex. 7), hereinabove referred to, as to the drain, and also said that the "trussed rafters which form the roof framing are way undersized for the load they now carry. The girders between the columns at the rear are also under sized." Further he said, "The skylights greatly weaken the roof, same should be done away with and the trusses carried through present area occupied by the skylights."

The testimony of architect Miller, as referred to, was that prior to the remodeling job in 1922 there had been 9 skylights. That 3 were then taken out and trussed through, and that 6 remained (630). This witness also testified that on the remodeling job which he did at that time, the remodeling plans and specifications were filed with the City, and approved, and a permit issued (629). This was the plan and the remodeling under City supervision, that existed there at the time that the lease in question was made. About Jan. 15, 1946, Mr. Paulson called in the Building Inspector to talk over the conditions, as mentioned in this letter, and the Inspector asked him to "send it to me in writing" (296).

Pursuant to this, the letter of Jan. 15, 1946 (Ex. 6), appears to have been written to the Inspector, and which contains substantially the same statements as to the drain and other conditions that were made to Mr. Wolfe in Ex. 7.

The next was in a letter from the Building Inspector to Mr. White, Jan. 22, 1946 (Ex. 2), in which the Inspector made the same statements, in almost the same lan-

guage, as to the structural defects, and in which he also said that he believed "this condition is not safe and should be corrected. In case of a heavy snow, it will be necessary to close the building from public use." The building was continuously occupied by the Stewart Novelty Company up to June 6, 1946 (802).

On March 11, 1946, respondent wrote to Mr. White (Ex. "I"), enclosing Mr. Paulson's letter to him (Ex. 7). This was apparently the first communication between them since the oral conversation of Nov. 19, 1945. This letter of March 12, 1946, states, "knowing how you feel about the subject, I hesitated to bring it to your attention," and added that the condition must eventually be corrected, and the best time to correct it was before the remodeling in June. That plans for "correcting it" should be made in advance. This letter also recited that he was expecting to spend considerably more, and up to three times the original estimate of \$10,000.00, for remodeling, and, "*I am sparing no expense to make this location the showplace of the West.*"

It then stated, "I grant that under conditions as they now exist I have a good lease," and added that appellant would be money ahead to make the permanent roof repairs now. He said that he believed it was appellants' responsibility.

On March 13, 1946, Mr. White wrote an answer (Ex. "J"), in which he stated that he was not complaining about the lease or the fact that the rent would be more if they were to rewrite a lease, and stated that he drew the

lease in the strongest way possible, so that appellants would have no further expense with the property, except “*Keeping*” the roof in repair. He stated that he did not have the lease before him, but if Mr. Wolfe would look at it, he “would find that it states definitely that you accept the premises in the condition they are in,” and that, “I feel . . . just as you rightfully are taking advantage of the low rental in the lease, you should not call upon me to alter the terms of the lease.” He added that he could not see that running the pipeline through the basement, as he had requested, was a roof repair, and that the rent “was fixed at the extraordinarily low figure of \$600.00 per month for the equivalent of four store rooms.” That it was realized that a lot of money would have to be spent, and that “It was because I didn’t want to go to the expense or trouble that I made you this low rental.”

On March 20, 1946, architect Paulson filed an application with the City Inspector for remodeling the front of the store.

On March 21, 1946, the Building Inspector (whose title had been changed) wrote a letter (Ex. “B”) to Mr. Paulson, referring to the application, and in which is repeated, almost word for word, the statements made in the previous letters by Mr. Paulson, and continually repeated by the Building Inspector, as to the insufficiency of the rafters and roof framing and the girders between the columns at the rear of the store. It was also stated that if the store “is to be under continued

occupancy this condition must be remedied and therefore your application is being held in abeyance until assurance is given that the roof condition will be taken care of. A plan showing your proposal will be expected." This letter states that Mr. White has been notified, and indicates that a copy of this letter was sent to him.

On April 1, 1946, Mr. Wolfe (Ex. "K") answered Mr. White's letter of March 13, 1946 (Ex. "J"). This letter makes no denial as to the discussion of the matters of low rental and acceptance of the building as it was, in view of reduced rentals, but does say that Mr. Wolfe is not satisfied that Mr. White's conclusions as to liability are impartial. He added that he had taken the matter up with his attorneys, and then makes a formal

"demand upon the lessors to *put* the roof of said premises in a safe and proper condition, to meet with the requirements of the Chief of Building Inspection of Salt Lake City, and also provide the proper drainage facilities for said roof.

"Unless prompt action is taken to remedy the conditions as set forth above, I will cause the proper work to be done to *make* the roof safe and in good condition, which is your responsibility under the lease, and will institute legal proceeding under the lease to compel lessors to pay for the cost of same and attorney fees."

Respondents' attorneys had "considerable to do" with drafting this demand (See Ex. "M").

It will be noticed that, commencing at about this time, or a little before this, respondents and their archi-

tect had determined that they would get the interior posts and construction out of this store entirely, and a full span bowstring steel structure installed. The evidence plainly indicates that they were determined to get such construction at the expense of the appellants. The further efforts were directed to this, and to collecting evidence of defects in the structure, as it had existed.

It should also be noted that, while the Building Inspector had requested assurance that the roof would be made safe, no such assurance was given by the architect filing the application, or at all.

On April 2, 1946, Mr. White wrote Mr. Wolfe (Ex. "L"), acknowledging his letter of April 1, 1946, and stated that he had examined the lease, and then quoted some language from the lease, and said:

"I suggest . . . that you send me an itemized statement of exactly the work you contend the lessors are obligated to do under their agreement to *keep* the roof in good condition and repair."

He also asked Mr. Wolfe if he would advise who his attorney is, so that he might talk to him.

On April 3, 1946, by letter (Ex. "M"), acknowledged Mr. White's letter, and said:

"With reference to the itemized statement which you request stating the exact work to be done *to make* the roof in good condition and repair, this can best be obtained by consulting with my architect Mr. A. B. Paulson, or by engaging some other competent building engineer or architect."

He also added that his attorneys were Rich, Rich and Strong, and that "Benj. L. Rich of this firm . . . had considerable voice in rendering the opinion referred to in my letter of April 1st."

Mr. Paulson testified that he probably did know that Mr. Wolfe, in his letter, had referred Mr. White to him (415). He also said that he may have made the statement, as testified to by Mr. Miller, in substance and effect that he "wanted to have a clear span and that was generally understood from the beginning, and that the expense of it was worth it to the store" (416). That he had "told Mr. Wolfe that it would be a shame to re-roof this thing without putting a clear span on it"; that he told him that "just prior to George Nelson laying out the bowstring truss" (416).

Mr. Wolfe testified that he determined, after this letter of April 1, 1946, to proceed with fixing the roof just as soon as he could get a permit (556). He also testified that he was the first to determine that he wanted the open span roof; that it was his idea (963).

At this time, or just prior thereto, Mr. White asked the City Inspector to meet him at the building, and this was done (813). The Inspector, Mr. Tipton, when they walked to the back of the store, called attention to a girder near the West side of the building, running North and South over the balcony. He pointed out that this was bowed, and Mr. White could see that it was (814).

This ceiling *and girder, mentioned in the letters as "bowed," above the balcony*, however was never dis-

turbed, as this was no part of the new main store reconstruction. This girder is still there, having been scabbed on each side by 2'' pieces (527). This is the only timber sag that, it was agreed on both sides, was visible there. It was the sag expressly mentioned in the architect's and Inspector's letters.

Architect Miller testified that this was bowed in the same way, and to the same extent, soon after it was put in, back in 1923, and had been in that condition ever since (632). There is no dispute as to this.

Mr. Tipton also pointed out, what he referred to as "a point near the Southwest skylight," and asked if Mr. White could not see, by sighting over the ceiling, that there was a deflection there. He seemed to see some such at this point, and said he could see no other deflection, and asked Mr. Tipton if he could see any other. He then asked what should be done about it, and was told by Mr. Tipton that he made no requirements, that they would simply pass upon proposals, as they were made (818).

On or about April 4, 1946, pursuant to Mr. Wolfe's letter of April 3, 1946, Mr. White went also to see Young and Hansen, architects (819), and they advised him that Miles Miller had been the architect on the remodeling job in 1922 and 1923, and recommended that he see Mr. Miller (819).

Mr. White immediately contacted Mr. Miller, and the two of them went to see architect Paulson, as had been suggested. While Mr. Paulson could not recall

the particular visit to his office, he did not deny the conversations testified to by Mr. White and Mr. Miller (413). This was about the 5th of April, 1946. Mr. White called Mr. Paulson's attention to the fact that he had requested a statement as to what he should do, and had been referred by Mr. Wolfe to Mr. Paulson. Mr. White then stated that there were two distinct questions involved: one was, what work is there to be done on this roof structure; and the next one was, who was to pay for it. The last question was one for him and Mr. Wolfe to work out, and, on the first question, he would like these two architects to discuss the question as to what was to be done, and to come to a conclusion, and advise on that (821).

Mr. Miller, at that time, made a statement as to what was required, suggesting that the skylights be trussed in, and, if there was any shoring necessary around the skylights, he suggested this be done, and, if there was any strengthening necessary, they could go through and do this (822).

Mr. White then said for Mr. Paulson to go ahead on this proposal (823). Mr. Paulson was not clear as to this conversation, but testified that Mr. White "may have suggested this" (416), and, also, that the foregoing conversation with Mr. Miller and Mr. White "could have taken place" (413). It was agreed that it was not discussed further by Mr. Paulson with Mr. White (418).

Mr. White testified that he waited to hear from Mr. Paulson the outcome of the proposals made by Mr. Miller (827).

On April 22, 1946, respondent and Mr. Paulson employed George S. Nelson, a construction engineer(360). He testified that the roof was unsafe, and had been since it was designed on the plans approved in 1922. All of his testimony was with relation to this design and the alleged faulty remodeling construction based thereon.

On April 29, 1946, the Building Inspector wrote another letter to Mr. Wolfe (Ex. "C"), referring to future occupancy of the store, and stating that he had called to the attention of Mr. White, as lessor, the same things that had been repeated from the first letter of Mr. Paulson, as to inadequacy of design and construction; and then stated that it would be mandatory for him to refuse to allow continued occupancy beyond the summer, for fear of future heavy snow loading, which might cause collapse.

Mr. George Nelson wrote a letter May 8, 1946 (Ex. "F"). This tends to indicates that no part of this roof would ever hold up. This witness testified that he went in, prior to the removal of the ceiling plaster, for one hour, and didn't remember what part of the roof structure he got into (334). His testimony related to theoretical requirements and computations, and to the insufficiency of timber, nails and fastenings, as referred to in Ex. "F". He said the roof structure "couldn't hold up," and that "it shouldn't be standing at all" (334). That it should have fallen down "years ago" (336). However, he found no changes from the original construction. He stated that the roof could be supported,

as it stood, but this would be impractical (357), and that an open span construction would make a "prettier store" (332). This witness testified that he made a sketch, and that Mr. Paulson thereon drew the plan for the open store (331).

On June 14, 1946, Mr. Paulson wrote to Mr. Wolfe (Ex. "E"), stating that the Inspector would not grant a building permit until a plan for a "code conforming" roof were submitted. That complete measured drawings showed the roof *East* of the balcony, "using Salt Lake City Code as a standard," to be entirely unsafe, "with exceptions of the columns." He stated that to make it safe would cost more than to remove the present roof and to "put on a good roof." He estimated, however, a roof without posts at \$11,680.00 cost, and a new one, using present columns and new beams, etc., at \$9,058.00. That the first scheme would be the best, because it would brace the front wall, which might be a hazard in case of earthquake.

Mr. White, not having heard from Mr. Paulson with relation to Mr. Miller's suggestion, went to the premises about June 7, 1946, when respondents had just gone into occupancy (827). It was about this time that he heard of the project for full span open store (826). He then went again to see the firm of Young and Hansen, architects. and went with them to look at the building. It was at this time that they looked for plaster cracks in the store ceiling (828), and found that there were none due to deflection (830). It may be stated at this point that all the

experts testified that if there was substantial deflection, the ceiling would crack, and no witness testified that the ceiling had cracked in any part of the main store.

It was testified, without dispute, that the drain system had not been changed from the time that Mrs. White acquired the property (790), and, also, that the ceiling was plastered at the time the property was acquired, and not replastered since. There was no testimony of any change in any portion of the structure, after the lease was signed and up to the time of occupancy, or to the time of demolition, by reason of any further "sagging," as alleged, or at all. What testimony was given on this question was all to the effect that there had been no change.

After the above inspection, Mr. White talked to Mr. Wolfe and asked if Mr. Wolfe would discuss the matter with his architect and with Young and Hansen; that the latter firm had convinced him that the roof could be made safe at relatively small cost (832). Mr. Wolfe responded that he would not so meet; that he had employed architects and engineer, and was going to follow their advice.

On June 17, 1946, Mr. Nelson, the engineer, wrote another letter (Ex. "G") to Mr. Wolfe. This referred to the previous letter, of May 8, 1946, and that he had submitted two plans to Mr. Paulson "for replacing this roof"; that he recommended "rebuilding with a fresh start."

On June 18, 1946, attorneys Rich, Rich and Strong wrote a letter to Mr. White (Ex. XX), enclosing the last

previously mentioned letter from George S. Nelson, and, also, from Mr. Paulson, and stating that it would cost more "to monkey with the old roof than a new roof will cost," and also stating that "it is the plan and arrangement to proceed at once with the alterations, including the replacement of a roof . . . "

On June 22, 1946, an applicant by respondents was made for remodeling, including the *open span bowstring structure* (Ex. "O").

Prior to July 8, 1946, Mr. White had a conversation with Mr. Wolfe, which was the first negotiations that they had had since the letter of April 3, 1946, when Mr. Wolfe had said that he did not want to argue about the matter anymore. In this conversation, above referred to, Mr. Wolfe had said that Young and Hansen could write out their proposal (833).

On July 8, 1946, Mr. White wrote Mr. Wolfe (Ex. "P"), submitting a letter, also of July 8, 1946, from Young and Hansen (Ex. "P"), and asked him to submit their plan to the Building Inspector, and also stating that the roof could be tested by loading, and asking that it be tested, if necessary, to satisfy the City, and stating that it would stand, as it had stood, for over 20 years. Also, that testing for the plaster cracks had revealed that there had been no movement or settlement of the roof structure.

The enclosed letter of Young and Hansen (Ex. "P") stated that the roof was safe. That there was a little

sagging around the skylights. That close inspection revealed no recent cracks. That the roof could be made stronger by trussing through and eliminating the skylights. That the cost of the changes suggested would not exceed \$800.00.

Immediately thereafter, respondents had Mr. Paulson draw a blue print (Ex. "P"), which, it was claimed, suggested the plan of Young and Hansen, but it did not show the joists running through the skylight from girder to wall, as had been suggested, although it seems this was intended; and this, with the Young and Hansen letter, and a portion of Mr. White's letter (Ex. "P" and Ex. 1), were submitted with the application.

At this point, the insistence of respondents on having this open span roof becomes even more apparent, because the respondents submitted with the above, a letter signed by Cannon Construction Company (Ex. "P") of July 9, 1946, and they also submitted with this the letter of George S. Nelson (Ex. "P" and Ex. "F"), giving his opinion as to insufficiency of nailing, etc., and in the letter to the Building Inspector said: "the framing to replace the skylights, as the plan shows, *be identical* to the existing framing, and *the nailing* would be as in the existing trusses." This was to invite rejection.

The letter by Mr. White to Mr. Wolfe had said nothing about nailing, nor had the letter of Young and Hansen. Mr. Miller had suggested strengthening where necessary. No one had suggested keeping the "identical"

skylight framing. They had suggested running the regular truss system through instead. It was suggested, that any needed additional nailing would be made, or, if necessary, they could go in without removing the plaster and, using an electric bit, bolt, any connections at a total of all costs not to exceed \$500.00 (799).

On July 11, 1946, the Building Inspector, naturally enough, wrote Cannon Construction Company (Ex. "Q"), stating that this plan, as so submitted, was not acceptable "in that it does not supply the necessary detail for checking," and quoting a portion of the Building Code, required that stress diagrams be furnished.

Respondents did nothing further on this, and did not advise Mr. White that this application had been made or so questioned (837). Mr. White left Salt Lake City July 11, 1946, and was gone until about July 27, or 28, 1946. Upon his return, he talked with the Building Inspector, who stated that he had written this letter of July 11, 1946, and he read this to Mr. White over the telephone (839). He immediately called on Young and Hansen, and had them contact the Building Inspector as to what was wanted as to stress diagrams (840). Mr. White instructed Young and Hansen to go ahead immediately with the stress charts, which they did, and to take any other action necessary (844).

Prior to the foregoing, and on July 2, 1946, pursuant to the plan of June 22, 1946 (Ex. "O"), negotiations had been commenced to purchase the steel for the open span (934). Bids were taken, and one closed on July 19,

1946 (522), and the steel furnished and installed Aug. 14, 1946 (934).

It is apparent that there was a conflict between the witnesses on both sides, as to whether the old roof structure was safe or complied with the present Code requirements, at least for a new roof structure. The Code requirements were not involved.

We have not gone into detail as to this conflict, because it is not material to the points raised, and the jury would apparently have the exclusive right to resolve such conflicts, if they were material. Also, because the jury was finally, and correctly, instructed that no liability arose under the Code or from any act or finding of the Building Inspector (149).

We have not gone into detail as to the testimony of Mr. Wolfe or Mr. White further than to show their respective contentions. It was Mr. White's contention that he was not required, by the lease, to make or pay for the changes, alterations, and new construction to replace the existing roof. It was Mr. Wolfe's contention, throughout his testimony (533-615), and as italicized in his letters above, that appellants were required to, and refused to, "put" in a safe or code complying roof, or to "make" such a roof, or to "construct" such a roof in good condition or repair. There is little foundation for his recital of conversations, and he was hard to pin down. This, however, is the general effect of his testimony. It was the issue then and now.

Before the stress charts on the Young and Hansen proposal to strengthen the roof with removing the ceiling were delivered, demolition had begun on July 2, 1946, by tearing out the ceiling (Ex. 13). It became apparent, and the contractor told Mr. White, that they were going ahead on the open span roof structure. Demolition started at the West side of the store building, and continued from there Eastwardly to the sidewalk, as shown by the pictures. The old interior and roof supporting structure was taken out, a piece of timber at a time.

During the process, the pictures introduced by respondents were taken, admittedly to show alleged defects in the construction, and for use upon the trial of the case. Which, Mr. Wolfe had said on April 3, 1946, he intended to bring (486, 496). These pictures do not disclose any substantial deflection anywhere, and show the laminated girders as perfectly straight. All of the structure, except the posts which were admittedly sufficient, was above the ceiling. Any of this could have been strengthened, if necessary, as was the girder over the mezzanine balcony.

The new construction followed, and was completed by the middle of November, 1946 (478).

The foregoing statement of this large record appears to be sufficient for an understanding of the questions presented on appeal.

ERRORS RELIED UPON

1. Failure to recognize and apply the law that a party who, for a consideration, accepts a building in the condition and state of repair it is then in, cannot demand or make changes and alterations of these exact structural conditions and charge the cost thereof to the other party. And, in denying plaintiffs' motions and requests for instruction, and, in fact, instructing contrary to the law, both as to:

- (a) The existing roof drain system, and
- (b) the supporting roof understructure.

2. Failure to instruct that the covenant to keep the roof in repair did not obligate appellants to put it in a different or better condition, and in ruling and instructing to the contrary.

3. Failure and refusal to instruct on, or to submit appellants' theory, that, since the roof of the building did not get out of the condition and state of repair accepted, the duty, if any, of defendants was only to support the existing roof.

4. Error in submitting case on a misleading form of verdict, suggesting and inviting the assessment of damages, in disregard of the legal duty or delict of appellants.

5. Error in denying appellants' motion for a directed verdict; and, also, for a new trial.

6. That the evidence does not sustain the verdict and judgment against appellants, and same are contrary to law.

(These errors will be made more specific in the argument.)

POINTS DISCUSSED

The controlling questions involved and raised will be argued and supported under the following points:

I. A lease covenant to accept, in the condition it is then in, an old building for remodeling into a new store, is a binding covenant, both:

- a. as to the then existing roof drain system, and
- b. as to then existing pillars, beams, trusses, and other structural roof supporting system.

II. In a lease, the terms to "keep" in repair and to "put" in repair are words of separate and distinctly different meaning. The agreement to do the former, imposes no duty as to the later, and vice versa. The use of terms such as "good," in reference to condition or repair, add nothing to the covenants.

III. Since the roof did not change, or get out of repair, the only duty of the defendants could be, in any event, to support it as it was, and the jury should have been so instructed, and this theory submitted.

ARGUMENT

I.

A COVENANT OF ACCEPTANCE OF THE EXISTING CONDITION IS BINDING.

It would seem that no principles in the extensive field of landlord and tenant law are better settled than,

a. that acceptance of a building in the condition that it is in when accepted, precludes any right to have such condition changed by, or at the expense of, the other party; and

b. that an agreement to "keep" a leased building in the condition in which it is accepted imposes no obligation to "put" it into an improved or better condition, by construction of improvements, or at all.

In this field, also, the principles, well established by well considered precedents over a long period of litigation, have been found to furnish rules which worked for justice and avoid confusion, and where judicial legislation would necessarily be confusing and dangerous. Many cases, some of which follow, emphasize this.

This case has always been colored, perhaps necessarily, by a speculative assumption, emphasized by respondent Wolfe throughout his testimony, that whatever improvements defendants are here compelled to pay for will redound to their benefit anyway; that, therefore, nothing else in the case is of any great importance.

It is clear that this "showplace of the West" store is intended for use, as such, by respondents for the 20

years, as authorized by this lease. It is shown that the building will then be between 60 and 70 years old. The pictures and evidence show that right back to the rear balcony, the entire building, except the North and South walls, was torn out and rebuilt at a cost of more than \$55,000.00, including the new steel roof structure (553). There is no assurance that these old 14½ foot side walls will support this 80-foot span (Ex. 8) bowstring steel roof structure beyond that lease period. Effort to go into this was objected to, and, of course, none of the phases of this speculative assumption could be gone into.

It is speculative as to whether merchandizing practice 20 years hence will make unrentable a store like this, in this business section; whether it can be rentably partitioned under this oval roof. It is common knowledge that each \$5,000.00 added to the value will add about \$300.00 to defendants' tax bill annually, so that \$50,000.00 added value would add \$3,000.00, as well as additional insurance cost, to appellants. If this kind of a constructed building, at this location, had been wanted by appellants for their advantage, they could have made it. Such a choice should not have been forced upon them, in any part, by judicial legislation.

We come now to the law, as we have found it. In view of the specific covenant, accepting this building in its then condition, it would seem unnecessary to cite again authorities referred to in our brief on the first appeal to the effect that without this strict covenant, but

by entering into a lease, the lessee is usually bound by the condition of the property at the time of the lease.

Tiffany, *Landlord and Tenant*, p. 86, on this, says:

“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.”

This court approved this rule on the first appeal.

Also in our brief on first appeal, we cited authorities for the proposition that the acceptance of a building, as is, included the acceptance of any structural defects, and that this would also go to any subsequent changes resulting from these then existing defects.

On these, we quoted 32 *Am. Jur.*, p. 515, as follows:

“A lessee takes the hired premises, in the absence of warranty, fraud, or misrepresentation, in the condition and quality in which they are. The tenant takes the property as he finds it, with all existing defects which he knows or can ascertain by reasonable inspection. He takes the risk

of apparent defects. As between himself and his landlord, where there is no fraud or false representation or deceit, and in the absence of an express warranty or covenant to repair, there is no implied contract that the premises are suitable or fit for occupation or for the particular use intended, or that they are safe for use. Any implied contract relates only to the estate, and not to the condition, of the property. In other words, in the absence of fraud or concealment on the part of the landlord, a rule similar to that of caveat emptor applies and throws upon the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects. *The general rule that there is no warranty of fitness or as to the condition of the premises applies to defects in the construction of the demised building and to the premises leased for business purposes.*''

While such authority was not discussed much by this Court, this last contention was not adopted. However, it need not be pursued further. The only point in this connection that is of importance, now that it has been firmly established that there was no change of any kind after the lease was entered into, is that the alleged defects complained of and, allegedly, corrected were structural ones, existing from the time of remodeling in 1923.

Another matter which appeared to influence the decision of this Court, in ruling upon the demurrer, and which is emphasized in the opinion (197 P. 2d 130, par. 1; p. 131, par. 4) was what this Court termed "requirement of building authorities."

While the reference and the authorities cited therefor in these paragraphs did not appear to us to support the Court's conclusions, as to any such requirement that might have become involved under the circumstances here, this phase is entirely out of the case now, under the 9th instruction of the Court (149) that "the defendants' only obligation was as provided in the lease," and which has eliminated any liability arising out of any alleged or assumed requirements of building authorities.

Another point which we raised, and which need not be considered now, is the point that a covenant to keep in repair a portion of a building, which was later demolished, leaves nothing on which the covenant to repair can operate.

Another point urged on the appeal, and discussed at length by this Court (p. 131, par. 3), need not be considered on this appeal, for reasons which will be amplified under Point II. This dealt with the "last 10 year" provision of the lease.

We have referred to the above matters for the purposes of clarification as to the former opinion, and to narrow the issues to the points which we consider are now determinative of the case on the record here.

It cannot be too forceably emphasized that there was no warranty of fitness of this building by appellants. None can be implied, and there is none in the lease.

The covenant of acceptance, for a valuable consideration, of the building in the "condition and state of

repair'' it is in, also plainly negatives any such contention.

In the case of *Robinson v. Wilson* (Wash. 1918), 173 P. 331, the Court says:

''We think it will not be questioned that the landlord is not a guarantor of the fitness of a building for the purpose for which it is leased, unless he binds himself by written contract.''

The Court quotes with approval the statement from Tiffany on *Landlord and Tenant*, p. 86, as we quote it above.

The Court then continues:

''The trouble in this case is that we are asked to make a contract grounded in the equities incident to subsequent events, where the parties who might have foreseen every incident and circumstances now relied on failed to guard against them in their written contract. . . It may at times result in inequity, but the law is written that the landlord is not bound beyond the terms of his lease, and the parties who enter into written contracts are presumed to have in contemplation probable consequence and the established principles of the law.''

I — (a) — THE DRAIN

This phase will be considered first.

The allegations as to the roof drain are generally that it was inadequate to take the water off the roof, thereby adding weight thereto (38), and did not take

the water away from the building, so that the same seeped into the basement.

The evidence shows that respondents first wanted a "draw or drip gutter" at the rear, a pipe line from the rear to the front of the building, and something to make a free flow of water away from the building, and their architect suggested the need of additional drains (Ex. 7).

Respondent Wolfe's correspondence and testimony on this matter is summed up in his demand that respondents "*put* the roof . . . in *safe* and *proper* condition" and *make* the roof safe and in good condition." The respondents allegedly did this by taking out the old structure and putting in a new one.

The evidence is conclusive that these drain conditions as complained of, were then exactly and in every respect as they were when the lease was signed, and when this roof was installed in 1937, and as it was until torn out.

It is appellants' contention that, under the law and these allegations and the evidence, respondents did not have the right to require them to construct any of the additional improvements first demanded, or to reconstruct the building structure, as was done. That the Trial Court, by the instructions, erroneously adopted the theory that respondents had such a right, and that appellant had the duty to comply with his demands, and that the jury could find that their failure to do so constituted

an actionable delict. No appellate Court, and no authority on this subject, we believe, has so held.

As there will be no question as to this point being fully reserved, we simply refer to the recorded citations above in the "History of Litigation," and to our exceptions (993-994), to the instructions 4, 5, 6, 7, 8, 13 and 14 at the pages above cited. The exceptions to the failure to give the instructions referred to were taken (994-995).

Our request for special interrogatories, asking the jury if there had been any change, was denied (116), as was our separate motion, at the end, to withdraw from consideration by the jury all questions of liability relating to the drain, on the grounds therein stated, and to which we call the Court's attention now (973).

The form of verdict on which the case went to the jury (165), over our objection (996), plainly indicates to the jury that it was to so proceed and to assess damages; that we were charged with liability, regardless of the conditions accepted, and with the obligations of "*putting* the roof in good condition and repair." After reciting that, if the jurors "find the issues in favor of the plaintiffs . . . render verdicts as follows." This recites:

"1. With respect to putting the roof in good condition and repair we render our verdict in favor of the Plaintiff and against the Defendants on account thereof in the sum of \$....."

It goes on in the same way as to other of respondents' claims for damages.

So that, the right of respondents claimed, and as adopted and sustained by the Court, and on which damages were assessed, was the right, after acceptance for adequate consideration of this old building in the condition it was in, to turn right around and demand that it be "put," "made," or "placed" in a different condition. Such condition as the jury might consider "good condition and repair," and to require us to "remedy *any defects*," if any there were (145-146), and to "*make it reasonable safe and adequate*" (147).

We will now support the contention that the respondents, under this lease, did not have such a right, and that we are, therefore, entitled to prevail on this point.

A stronger covenant of acceptance of conditions could hardly be drawn. The contract said (11):

"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, . . ."

If this is not an acceptance of all the structural conditions, then, it would seem, there could be no case in which such covenant could be made effective.

The evidence, as shown in the statement *supra*, emphasizes that both parties clearly understood that this rental consideration was substantial and important in entering into this contract. This is not in dispute.

The first case that we shall rely upon on this, and the other points raised, is the decision of this Court in this case on first appeal (197 P. 2d 125). This decision

will be more appropriately analyzed in the next division (b) under this point I. We cannot see that there was anything necessarily decided, or that was decided, which would give the right to respondent, as claimed and allowed on the trial, particularly now that the claim based on "requirements of building authorities," as referred to in the opinion of this court, and on which it was misled, was no longer in the case.

Underhill, Landlord & Tenant, Page 782:

"In the lease of a factory, store, dwelling or other building, there is no implied warranty on the part of the landlord that the building is safe, tenantable or reasonably suitable for the purpose for which it is to be used by the lessee, nor is there any implied warranty that it shall continue to be fit for the purpose to which the lessee intends to put it. In the absence of fraud or concealment by the landlord at the time of the letting of the condition of the building, the rule of caveat emptor applies."

Kingstead v. Wright County, 133 N. W. 399:

Here the covenant was "to keep the building in repair." Question was who was liable for the cost of putting in a drain and sewer connection.

The court said:

"This did not impose upon him an obligation to make improvements or betterments. *Harris v. Corlies*, 41 N.W. 940, 2 L.R.A. 349. 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. The fact that the building at the time the contract was entered into had no sewer connection or drain to carry off water coming into the basement did not render it out of repair within the meaning of the contract. Such a drain was no part of the premises and to put one in would constitute not a repair but an improvement and clearly not required under the covenant to keep in repair. 34 Cyc. 1336, 24 Cyc. 1028.”

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 pay for 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.”

Harris v. Lewiston Trust Co. (Pa) 191 A. 34, 110 A.L.R. 749:

“We have held repeatedly that a tenant takes the property as he finds it, with all existing de-

fects which he knows or can ascertain by reasonable inspection. This is so even though the premises are in a condition called ruinous. *Robbins v. Jones*, 15 C. B. (N.S.) 221, 240. Where the entire possession and enjoyment of property are transferred by landlord to tenant, the rule of caveat emptor applies. As was said by Mr. Justice Sharswood in *Moore v. Weber*, 71 Pac., 429, 10 Am. Rep. 708, 'The lessee's eyes are his bargain. He is bound to examine the premises he rents, and secure himself by covenants, to repair and rebuild.' "

Driver v. Maxwell, 56 Ga. 11:

Under Georgia statute the duty to repair was on the landlord. In this case it was held:

"* * * where the premises, by reason of patent defects, known alike to both parties, are, at the time they are offered for rent, out of repair and unfit for safe or comfortable use, the tenant ought to reject them if he is not satisfied to accept them as they are; and if he does accept them, no matter what price he agrees to pay, the landlord, in the absence of a special undertaking to do more, should be held for such repairs only as become requisite to keep the property in as good condition as when it was rented. He may well say to the tenant, 'you knew what you got; I offered my property as it was, and did not hold it out to you for more than it was.'" In such a transaction all the conditions of fair dealing are met and satisfied."

Justice Holmes in the case of *O'Malley v. Twenty-Five Associates*, (Mass.) 60 N.E. 387, held:

“But *when attention has been directed in any way to the condition of things* at the beginning of the lease, it has been recognized as the general rule that the tenant must take things as he finds them, and if they are unsafe, cannot complain. There is no implied undertaking or duty on the landlord’s part to make things better than they are.”

Dwight v. Ludlow Mfg. Co., 128 Mass. 280:

The lessor covenanted to “repair and renew” so far as necessary the gutter of a mill. Court held that it was obligated to make such repairs and renewals as were necessary in order that the existing gutter would do all that it was capable of doing when it was in good condition according to the original construction. The Lessor, however, was not required to build a new gutter or a different construction even though the plan of the original gutter was defective.

The cases cited under the next division (b) also support this one.

I — (b) — STRUCTURAL DEFECTS

While this phase does not very fundamentally differ from (a), there are different cases applicable directly to each of these points, and a little more chance that some claim of change as alleged, after the lease, might have been looked for under (b). However, we have found nothing in the record of any such change, not by the loss of even a nail. The testimony of respondents’ theoretical expert, George S. Nelson (309-365), particularly

emphasizes that the defects claimed were those in the original design and construction only. This is confirmed, but nowhere, we believe, controverted.

The typical extracts quoted by this Court from the the complaint, in discussing City requirements, are all of allegations (p. 126) such as rafters being “over-stressed,” and “girders . . . undersized,” and “trusses not adequate, both as to design and erection,” and (p. 130) “beams evidently too light,” So that the question here again is, can such an old building be accepted “in the condition and state of repair” it is then in, and a party immediately assert the right to have it changed and reconstructed.

And, also, after so constructing differently and at great expense to the other party, continue the right of use of the building *at the same low rentals fixed*, as consideration for such covenant of acceptance, and, *also, impose the additional annual taxes and insurance expense thereby created.*

Wolfe v. White, 197 P. (2) 125:

We think that the assumption by respondents and the Trial Court that this Court, on first appeal, committed itself to this erroneous doctrine is not justified by what was said in the opinion. Such commitment would be contrary to previous decisions of this Court, cited herein, as well as to the settled law in other jurisdictions.

This Court had then only to decide whether the respondents, on all their pleadings, could make out a case

below, if the general demurrer were overruled. And this was all that need be, or that actually was, then decided. This demurrer, of course, admitted the facts pleaded.

One thing that then appeared somewhat important in the Court's opinion was the discussion there based upon respondents' contention that they had sufficiently pleaded that the "public authorities" had made "requirements" (p. 130-131), and that such imposed some obligation upon us. Thus, in referring to "obligations" in the opinion, and as this term is used in par. 8 of the lease as to the roof, this seemed to have influenced the Court's discussion. At least, if it had then been understood that there had been no actual requirements by public officials, the opinion would have been shorter and, perhaps, different.

It can now be emphasized that this record is conclusive that public authorities here made no relevant requirements at any time, either as to what should be, or as to what was done. And so, as stated *supra*, the Trial Court instructed that no obligation arose as to any such, at all. And, conversely, no right, as to such, in respondents, arose. That whole matter, in fact, never was rightly in this case.

Incidentally, we believe, if the Court cares to examine the authorities cited by it (p. 130, par. 1), under what is stated to be a "general rule" as to requirements affecting landlords, it will be found that these apply only to such alterations and improvements as are in the nature of additions, things such as sprinkling systems for

fire protection, or fire escapes, or some such things to meet safety or sanitary requirements, and, perhaps, as in one, later case, the removal of show window projections over sidewalks, by new ordinance requirements. And, we might also add, there is certainly no covenant of appellants here to make “alterations or improvements.”

Another matter extensively considered in the opinion was put out of the case by this Court’s decision, rejecting our contention that the duty to make the changes, as made, was imposed upon respondents by the second clause of par. 8 of the lease. This followed the acceptance clause, above quoted, and was generally to the effect that “for the last 10 years of the lease” all improvements, etc., regardless of how necessitated, were to be made at the expense of the lessees. This Court held that the pleading indicated that the alleged changes and necessity for repairs arose before this 10-year period started, so that this covenant did not apply (p. 131, par. 3).

This duty, as then contended by us, however, got in the Court’s decision at different points. After stating, for example, that the covenant to “*keep* the roof in good condition . . . implies that, at the time of the lease, *it was in good condition,*” the opinion says:

“The obligation to *keep* the roof in good condition and repair for the entire term of the lease eliminates the thought that the *Lessees* would have to *put* the roof in good condition before that obligation fell upon the shoulders of the Lessors.”

This statement is, at first, somewhat confusing. It is the statement which, no doubt, greatly influenced the Trial Court. It is quite clear, however, that the words "that obligation" did not refer to the preceding words "put the roof," etc. This seems so, both because of the context, as well as because of the thought being expressed; "that obligation," quite clearly refers to the lessors' covenant "to keep", as recited in the preceding sentence, and as quoted in part above, to "keep the roof" in repair. There was no covenant by anybody to "put" anything in any condition. It was construed, however, as a holding that we were to put the roof in a different condition.

This is not a statement, we think, and there is no statement, either as dicta, or at all, that appellants were obligated to *put* this building in a different condition than that in which it was accepted.

For complete clarification before leaving this 10-year provision as to lessees' duty to repair, we call attention that our contention on appeal, as to the duty of respondents under this provision, was wholly unnecessary in this case anyway. This is not a suit to compel respondents to do anything, either under this covenant, or at all. It is a suit to establish merely the alleged right of respondents to have certain changes in the leased structure made at the expense of appellants, under their covenant discussed next under point II.

Now we come to something that was and is in the case, and which was, in fact, considered as ground for

overruling our demurrer, and which this court indicated was a ground requiring reversal. This relates to respondents' allegations of substantial changes in the condition of the roof occurring after the lease was signed. These allegations are in the amendment to their complaint (36), and are recited at considerable length, with italics for emphasis, in the opinion of this Court (p. 130-131) and as quoted above. After which recital this Court said:

“The pleading obviously refer to conditions *after* the execution of the lease.”

The word “after” was also italicized for emphasis.

Going back a little, the Trial Court had sustained our demurrer before this amendment was added to the complaint. This, then, left us, upon renewing our demurrer, with the contention that, since the pleading did not disclose that these alleged changes did not result from structural defects which had existed at the time of the execution of the lease, they could not have the benefit of these alleged changes coming afterward. We had some authority on this, and the Trial Court went along with us on it. But, this Court did not. So, we bow out on this graciously, because we have to.

And, this Court also unquestionably indicated its opinion that respondents were entitled to rely upon and to establish in the Court below these allegations as to changes, and that, therefore, the demurrer should not have been sustained below.

It would seem idle to contend that this Court, so fully and with such emphasis, went into these allega-

tions of changed conditions, without intending to rely thereon for its decision. If the Court had intended to decide, and had decided, that the lease itself gave the right to respondents to have the alterations and improvements, which were then completed, paid for by us, *regardless of these changes*, it would have said so, and eliminated all this discussion. The case was quite clearly reversed on the ground of the alleged changes, after the lease was made.

It, obviously, was not reversed wholly on the assumption that the alleged rights and duties existed because of "requirements of building authorities," even though the respondent's arguments on the appeal had convinced the Court that their pleadings alleged such. If the Court had so intended to rule, that would have ended it. There would have been no need for discussion of the allegations of changes in the roof structure; nor was it reversed because of the ruling on existing structural defects, as above referred to, or on account of overruling us on the 10-year provision. These could have had, and clearly were given, no such effect.

Now, on the trial, none of these last three matters entered into the instructions on liability, or into the judgment here appealed from, at all. Indeed, it seemed to us important then, and also now, that, at this point of decision in the Court below, everything in the opinion of this Court was out of this case, except only the lease covenants recited there, and the discussion and conclu-

sion on these allegations of changed conditions. And these were also not then considered or submitted.

As to right and liability, the Court had then to determine only (1) whether this Court had intended to hold that respondents had the right to charge us, as a matter of law, on the lease covenants alone; or (2) whether that Court should have ruled on the proof, or lack of it, as to these allegations of changes, or, at least, to submit the issue of fact on these by instructions, if there was thought to be any conflict.

In effect, the Court concluded that this Court did intend to hold, as suggested in the first of these alternatives. It refused to consider the second suggested alternative, at all.

In order to conclude that this Court so intended, it must also be concluded that it wasted an awful lot of its time and space, and also the time of the litigants. Instead of saying simply that the Court was "of the opinion that the demurrer should have been overruled," and remanding the case for further proceeding generally as was done, it would have indicated that the question of liability was settled by the covenant of the lease alone, and that there was left for determination only the question of damages.

So, it seems to us, that this Court must be deemed to have decided in this case, that to charge appellants' allegations of change in the conditions accepted were required to be made and established.

We call attention now, on the point of the acceptance of rental property in the condition accepted, to other decisions of this Court, as well as some of those in other Courts.

Wilson v. Woodruff, 65 Utah 118, 235 Pac. 638, 43 A.L.R. 1269: Justice Cherry states:

“The general proposition is well settled that in the absence of warranty, deceit or fraud on the part of the landlord, the lessee takes the risk of the quality of the premises and cannot make the landlord answerable for any injury sustained by him during his occupancy by reason of the defective condition of the premises *or their faulty construction*. *Doyle v. U.P. Railway Co.* 147 U.S. 413; *Reams v. Taylor*, 31 Ut. 288; 87 Pac. 1089; *Walsh v. Schmidt*, 206 Mass. 405, 92 N.E. 496.”

The statement above quoted was approved in the case of *Hatzis v. U.S. Fuel Company*, Supreme Court of Utah, May 11, 1933; 21 Pac. (2) 862 at 864.

Middlekauf v. Smith, 1 Maryland 329:

The Landlord leased a mill for a two-year term and covenanted to keep the mill and mill race in good repair. Lessee sued for damages for his failure to repair and recovered in the lower Court.

On appeal the upper Court held that evidence that the premises were not kept in good repair should have been refused because nothing was shown as to the time when it went out of repair.

“Under the covenant to repair generally, the coventantor will be bound to keep the building

in as good a state, as it was when the agreement was made, to make good all deteriorations arising from natural decay, and all injuries resulting from inevitable accident, but he is not bound to do more. And where an old house is rented, with the usual covenants to keep the same in repair, the coventantor will not be bound to put it in an improved state, nor to avert the consequences of the elements, but only to keep it in a state in which it was at the time of demise, by the timely expenditure of money and care. *Guttridge v. Munyard* 7 C. & P. 129, *Archbold's Law of Landlord and Tenant* 176."

LeVine v. McClenathan, 246 Pac. 347, 92 A. 317. L. R. A. 1917 B, 235:

This case holds that a property owner is not, in the absence of a covenant or warranty, liable for injury to its tenants' goods by a leak in the roof due to faulty construction in the building. In this case it was alleged that the building was defectively and improperly and imperfectly constructed and that in consequence of the defective, improper and negligent conditions aforesaid of the roof of said building and the party wall and the cornices around the skylight, the roof leaked causing damage to the merchandise. Court holds:

"We know of no case in Pennsylvania and none has been called to our attention in which a tenant was permitted to recover damages against the landlord upon the ground that the demised premises had been defectively and improperly constructed. If a tenant could recover damages upon the grounds that the demised premises had not been properly constructed, all that has been

said in our case about the rule about caveat emptor would be meaningless.”

A California statute requires the lessor of buildings to be used for human habitation to “repair all subsequent dilapidations which rendered it untenable” and a further statute provides that if after notice by the lessee to the lessor, the lessor neglected to repair, lessee may repair the same and deduct the same from the rental.

In the case of *Wall estate v. Standard Box Company*, 128 Pac. 1020, the Court held that these statutes did not authorize the tenant to put in new work or new conveniences which did not exist theretofore.

“Much, if not the greater part of the work, for which the defendant claims credit in the case at bar was new in character and was not for the repairs of dilapidations. No effort was made at the trial by the defendant to show how much of the expense incurred by it in complying with the order of the board of health was for new work and new conveniences, nor how much was for repair of dilapidations. * * * We think it quite clear that sections do not require the landlord after the beginning of the tenancy to install new conveniences, but only require him to repair ‘*subsequent dilapidations*’ of the building which rendered it untenable.”

Sheets v. Selden, 19 L. Ed. 166 (7 Wall 416):

“The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. A covenant is never implied that the lessor will make any re-

pairs. The tenant cannot make repairs at the expense of the landlord, unless by special agreement.”

Commonwealth v. Samson (Penn.) 196 A 564:

Lease provided that in consideration of low rental, lessee was to take the premises “as is,” and at his own cost to put and keep the interior in good order and repair as well as make improvements. The building collapsed, fire broke out and injuries resulted. In sustaining a conviction of the lessee of manslaughter the court held:

“We think the terms of the lease clearly disclose that, in consideration of the low rental and obtaining possession of the building before the time he was to pay rent, lessee was not only to make interior repairs, but he was to take the building ‘as is,’ and also make such improvements as were required so that it would be safe in general for the purpose for which it was rented. This he did not do.”

Roche v. Sawyer (Mass.) 57 N.E. 216:

“The walk was in good repair, and in the same condition in which it was when Grady hired his tenement. If it was dangerous at all to a person in the exercise of due care, the danger arose out of its original construction, and not from lack of repair. * * * Everything was plainly visible, and in the same condition as when hired. Grady got and had the benefit of the tenement he hired, including its approaches, and had no right to insist on anything better. His rent must be assumed to have been gauged in accordance with the thing he hired, and its condition at the time.”

Gade v. National Creamery, 324 Mass. 515, 87 N.E. (2) 180:

“In the ordinary lease of real estate there is no implied warranty that the premises are fit for occupancy or for the particular use contemplated by the lessee. The lessee takes the premises as he finds them.”

The foregoing cases are more directly on the right of the tenant here, the authorities cited next under Point II on the duty of the landlord, also support Point I.

POINT II.

A COVENANT TO “KEEP” IN REPAIR DOES NOT MEAN TO “PUT” IN REPAIR.

This point is on the covenant, in paragraph 8 of the lease, as follows:

“(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.”

The point is that this covenant does not impose the obligation to “put” or “place” the roof drain, or the other structure involved, in a different condition by “making” a new construction. The existing condition of these had been specifically accepted. It had not changed.

We have discussed the matter under Point I, from the standpoint of the right of respondents, and now, under II, will discuss it from the standpoint of the duty of appellants. These, of course, are closely related.

It seems clear that the words "entire term" add nothing to the fact that this covenant was intended to be in effect only during the term of the lease, and that it imposed no duty to change anything before the term started. And, as we shall attempt to show, the word "good" adds nothing to the obligation, and that "condition" or "repair" means the same thing. So that, stated plainly, appellants agreed that, from the date of this lease and during its existence, they would *keep* the roof in repair.

In this connection, we are aware that, on first appeal, in discussing our other contentions there, including the one that respondent had accepted any changes that might thereafter result from structural defects existing before the lease, the writer of this Court's opinion (p. 131, par. 4) makes a statement which may be construed as intimating a somewhat different view of these terms. It is to the effect that the term "good" may add something.

This was, as pointed out, on this now abandoned contention of ours. The statement was not a holding of the court. It was unnecessary, either to the discussion or to the conclusion reached in the opinion, and is clearly dicta. It should not be considered as binding the court now, on this point II, especially if it is established that this statement of the writer of the opinion is contrary

to the law. The authorities are clear also that to *keep* a "good condition," as applied to an old building, relates only to its condition as it is then accepted, and in which it is when the covenant is entered into.

The question directly is, does a covenant to "keep" such conditions impose a duty to immediately construct a different or additional drain system, or to construct a different roof supporting structure?

The terms adopted by the lower court, in instructing the jury, *supra*, under point I, as well as by the respondents, in their demands, required that we "put," "place," or "make" the structure involved in good condition and repair, and "remedy any defects" therein, and "make" the structure "adequate."

We had made no covenant containing any of these terms, or any terms of like meaning or import.

Farr v. Wasatch Chemical Co., 143 P. (2) 281. In this case, this Court not only held that a written covenant to keep the floor and elevator in good repair could not be construed to require the landlady to "place" them in such condition, but held that allegations that she so covenanted to "place" them in such condition was "in direct conflict" with the lease covenant to "keep" them so.

On this point, the Court said:

"The provision of the written lease with which it is urged that this evidence was in conflict, provides: '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; * * *

“Certainly the allegation that the plaintiff agreed to ‘*maintain*’ the elevator in serviceable condition in addition to *repairing* the floor and roof is in direct conflict with the written lease * * * Evidence given in an attempt to show that plaintiff had orally agreed to *repair and maintain* the elevator was designed to vary the terms of a written instrument and was therefore incompetent.”

There was claimed, however, in that case that a prior oral agreement to put or place these things in repair was made, independently of the written lease, and was intended to have been complied with before the written lease went into effect.

The Court held that the party alleging this, had a right to support this independent arrangement, and in connection with this oral agreement said:

“The allegation that plaintiff agreed [orally] to ‘place’ the warehouse in a serviceable condition for the intended uses stands on a somewhat different light.”

This Court clearly and necessarily held that the tenant there had to rely upon the oral agreement, and would have been out of court on the written agreement, thus emphasizing the exact distinction in meaning between the terms “place” and “keep” for which we contend. These terms are in “direct conflict.”

West v. Hart, 30 *Kentucky* 258. The covenant was "to keep the farm and buildings in good repair."

"The word keep, seems to us, to have direct reference to the condition of the premises at the time of the lease, and that the then state of repair must be taken to be, what the parties meant by good repairs. There is a so broad and palapable a distinction between a promise to *put* into repair and one to *keep* in repair, that it is impossible to believe the parties meant the former, when they used the latter expression. A covenant to keep in repair is certainly no broader than a covenant to repair, and if the latter obliges only to make good the damage ad interim, no greater stress can be laid on the promise to keep in repair."

The last sentence of this statement seems certainly sound. And, in any event, in the case at bar no covenant, either to repair or to keep in repair, could be construed as being intended to go to conditions back of the beginning of the lease, because here we have the specific covenant of acceptance of both the "condition" and "state of repair" that the building was then in.

St. Joseph & St. Louis Railroad Co. v. St. Louis Iron Mountain & Southern Railway Co., (Mo. 1896), 36 S.W. 602. The covenant: "The party of the second part shall and will at all times during the hereby demised term keep the building upon the land hereby demised insured * * * and will keep the demised railroad equipment and property in good order and repair," was interpreted by the court as follows:

“A covenant to keep leased premises in repair imposed upon the tenant the obligation ‘to keep’ the premises in as good repair as when the agreement is made. Covenants ‘to keep in repair’ and to ‘keep in good repair as they now are’ are held to amount to the same thing in law.”

Foss v. Stanton, (Va.), 57 A. 942.

“The covenant was to keep the premises in *good repair*, not to put and leave them in good repair. The lessee’s duty to the lessor under this covenant is to be measured by the condition of the property when taken.”

Stultz v. Locke, 47 Maryland 562. The Lessor had covenanted to keep the mills and machinery, water power and fencing on the premises “in as good repair as they are now.” In the narrative of the complaint, the tenant alleged that the Lessor “agreed to keep in repair.” The court held:

“It follows that the covenant as stated in the narrative, is in its legal effect the same as that contained in the articles of agreement. Or in other words, that a covenant to *keep in repair*, and a covenant to *keep in as good repair* as they now are, are identically the same covenant.”

24 Cyc. 1088:

“A covenant to keep the premises in repair is generally construed to mean and impose on the covenantor the legal obligation to keep the premises in as good repair as when the agreement was made; but does not require him to make repairs necessitating radical changes in the structure, of a permanent, substantial and unusual character.”

Vincent v. Crane, (Mich.), 97 N.W. 34. Under a covenant to *keep* in good repair, the case went to jury on instruction that repairs required were those ordinary prudent farmers make.

“* * * the test made by the contract is not that they shall be *kept* in such reasonable repair as ordinarily prudent farmers use, but that they shall be *kept* in such repair and condition as when taken.”

In *Cadman v. Hy-Grade Foods Products Corporation* (Mass.), 33 N.E. (2d) 759, the action was for failure to keep and return the premises “in good tenantable condition” as stipulated. Actually they were not in good condition when returned because they required a new floor understructure. Plaintiff demanded return on 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 sound 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. They are not required to pay the cost of destroying the then existing roof and its supporting understructure and constructing a new understructure of different materials.

The reasoning of the foregoing case seems very important. These covenants to keep in repair or in good condition, or to keep and return in such condition, appear frequently. They appear more often as covenants by lessees, than by lessors. There must be hundreds of leases made daily, in which it is routine to state that the tenant will keep the premises in good condition and repair, or equivalent words. Must the tenant, then, place the landlord's premises in good condition and repair, if they are not in such condition at the commencement of the lease?

The rule, as this case points out, cannot be that they are, by these terms, required to place the building in a better condition than when they entered into the contract relationship concerning it. And, if it was, bad then, a defective building, or a partially dilapidated one, improve it into a good one, or one which would be "in good condition and repair."

This, obviously, would work great hardship. And the law gives to these terms the same meaning, no

matter which party is bound by the covenant containing them. There can be no possible difference in meaning on this account.

Lister v. Lane, 2 Q.B. 214, 9 Eng. Rule Case 478:

“These cases (old English cases) establish that, where there is a general covenant *to repair*, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one.

“You have then, to look at the condition of the house at the time of the demise, and amongst other things, the nature of the house—what kind of house it is. If it is a timber house, the lessee is not bound to repair it by making a brick or stone house. If it is a house built upon wooden piles in soft ground the lessee is not bound to take them out and to put in concrete pile.

“However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing; and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair.”

EFFECT OF DECISION ON POINTS

I. AND II.

If we are correct in our contention as to point I, or point II, or as to both of these, it would follow that we are entitled to a reversal here. And, also, that it is not necessary to consider the remaining point.

The previous decision of this court was intended to, and did, insure that the parties hereto would have their day in Court. They have had this. And respondents have exhaustively presented their claims and contentions.

It would seem, therefore, that if we have sustained either, or both, of these fundamental and determinative points the Court, upon reversal, should direct a judgment of dismissal. There would be nothing left on respondents' contentions, as made below, to try.

POINT III.

APPELLANTS' RIGHT TO SUPPORT THE ROOF SHOULD HAVE BEEN SUBMITTED.

This numbered assignment and point is based upon the error of the Court in refusing to give our requested instructions No. 13 and No. 18 (130, 135), and in submitting the case on instructions and a form of verdict which failed to present, but which excluded, our theory as to damages.

The evidence was conclusive that the roof itself never "got out of repair," after it was accepted, and after we had agreed to keep it in repair. That the under-

structure was tested when it was put on, and that it was tested by the manager of a roofing company, after the date of acceptance, and before the date of occupancy. Some slight flashing repairs were made, and it was thus placed in good repair, as a roof. This is not in dispute. There is no claim that it leaked or failed thereafter; or that it did not continue to function, until taken out. The contention was, that the supporting structure was inadequate, or may be inadequate, to support it, in view of future heavy snows; and, also, that the drain was not satisfactory.

We had offered the testimony, as shown in the statements, *supra*, of a firm of experts, Young and Hansen, and another expert, Miles Miller, that it could have been safely supported without the necessity of replacing it by another kind of structure entirely. No witness denied this. There was other corroboration (357), and, in fact, their architect at first so indicated (Ex. 7).

It was shown, without dispute, in the evidence that respondents' objections to the drain could have been met, if the changes demanded back in 1945 had been assumed and paid for by appellants, amounting to \$485.56 (Ex. 18). There was no objection by appellants to these changes being made by respondents. There was a disagreement as to who should pay for these.

It is also shown that the skylights could have been taken out and trussed through, as first suggested by respondents' architect (Ex. 7), for \$800.00. (See Young and Hansen's letter, Ex. "P").

Also, that any loose joints, or connections, in the structure could have been securely fastened by nailing or bolting, for not to exceed \$500.00 (779). That these would have given sufficient support.

It is true that respondents' witnesses testified that this was not the best way to do it (357, 332), nor the way which would make the best store (307-8), and that, in the long run, the bow-string steel truss construction would not cost more. There was also some testimony as to individual pieces of imperfect struts, or nails, or single timbers. The jury, of course, under the testimony, could have allowed something for substitutions or repairs of these, if they had considered such necessary. The evidence shows these could have been done. This roof structure, as it was, had supported the roof for over twenty years.

There is a vast difference between these figures and the verdict, covering a complete demolition and different construction. This was our theory, and the jury should have been instructed so as to present it and so as to authorize the jury to determine whether the same roof could have been supported in the manner and at the comparatively smaller cost, as we contended.

When the form of verdict (165) was ready for submission, we made objection on this ground, and called attention directly to this matter (996). It was not changed to meet this, nor was this theory submitted for consideration by the jury, as requested, or at all. The result was that, under the instructions previously refer-

red to, the jury obviously proceeded to consider only, and to charge us with the cost of the new construction.

Several instructions definitely negated our theory (see 140, 145, 146, 147, 153, 154). The verdict, in view of instructions like No. 13 (153) and instruction No. 10 (150), could have left no doubt that damages “with respect to *putting* the roof in good condition and repair,” meant putting in the whole new structure.

Plaintiffs’ list of claims had been repeatedly called to the jurors’ attention, and, at least twice, introduced as exhibits, one of which was withdrawn. The court had set up this list (Ex. “D-1”) in instruction No. 1 (139) in detail, and repeated it in part in instruction No. 14 (154). Under all these, the jury would understand that the only question was this amount of damage, and it was already set up for them.

Another thing that had made the presentation of our theory important, and that also points up that this failure was prejudicial, was the carrying, throughout the trial, of the theme that we were disobeying public officials and violating the City’s ordinances. While this, as a claim of liability, went out at the end of the trial, the damage was done. Our many alleged acts of commission and omission in this respect runs throughout the record. First, that these things imposed conclusive liability upon us (619), and that we were bound conclusively by what the City authorities said (779), and so on.

So that we were left where it could be argued that we were deliberately endangering the public, and even the jurors and their families. They, quite naturally, gave us the works. We made a request for an instruction that would have helped on this, and it was refused (134).

We had made a motion to strike these things from the complaint, before the appeal. However, in view of the fact that our general demurrer had been sustained, we did not cross-appeal on the trial court's denial of our motion to strike these, and, as we view the matter, as long as they were in, we could not keep out evidence relating to them. We were only successful in eliminating them at the very end of the trial, although we raised the matter several times.

Gihisalbert's, et al. v. Lagarde (La.), 147 So. 763. Tenants, as part of consideration for the lease, agreed to pay for "any alterations, changes, repairs, or reconstruction of every nature and kind, whether ordinary or extraordinary * * * necessary to keep the property in good order and repair." Upon lessee's failure to repair, lessor made extensive repairs. The court limited the recovery on the following grounds:

"Upon taking up a study of plaintiff's claim, we are at once impressed by the apparent effort to charge defendant for everything that was done by plaintiffs to recondition and rehabilitate the building, and that little regard was had for the necessity of determining whether the particular work done was made necessary by damage sus-

tained during the term of the lease. It was apparently plaintiffs' intention, since the building was quite an old one and not equipped in a modern way, to place upon defendant all possible expense of renewing the building as far as possible."

Our right, in this kind of case, to have our theory submitted to the court, we think, will not be questioned. It is supported by this court, and by the courts generally. We cite the following authority:

State Bank of Beaver County v. Hollingshead (Utah), 25 P. (2) 612:

"It is proper and generally necessary for the court in its instructions to submit to the jury the theory of the case as presented by the defendant as well as that presented by the plaintiff."

Webb v. Snow (Utah), 132 P. (2) 114:

"The jurors should have been instructed on the defendants' theory of the case as well as on the plaintiff's theory."

See, also, *Martin v. Sheffield* (Utah), 189 P. (2) 124; *Pratt v. Utah Light and Traction Co.* (Utah), 169 P. 868, 869; *Raney v. Barlow*, 112 U. S. 207, 28 L. Ed. 662, 5 S. Ct. 104; 53 Am. Jur., p. 487, Sec. 626, and p. 500, Sec. 649.

CONCLUSION

At the end of argument on Points I and II, we pointed out the effect of decision on these points. This need not be repeated here. These set up the conclusive matter of law involved.

We have, also, presented Point III, as one of the additional errors claimed at the trial, and which was prejudicial.

It follows, we believe, from the failure of evidence of any change of conditions, that the evidence does not support the verdict and judgment. The same are against law, and, under these, and the other points relied upon and presented, appellants are entitled to a reversal of the judgment entered herein.

Also, in view of the fact that respondents have had full opportunity to present their case, appellants are entitled to an order of final dismissal.

Respectfully submitted,

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