

1950

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HUBERT WOLFE, SHIRLEY
WOLFE, his wife, ELLIOTT
WOLFE, KAYLA WOLFE and
MERRILL STRONG, copartners,
doing business under the firm name
and style of WOLFE'S DEPART-
MENT STORE and WOLFE'S
DEPARTMENT STORE, a co-
partnership,

Plaintiffs and Respondents,

— vs. —

SARAH WHITE and JAMES L.
WHITE, her husband,

Defendants and Appellants.

BRIEF OF PLAINTIFFS AND RESPONDENTS

FILED

MAR 22 1950

SHIRLEY P. JONES and
RICH & STRONG,
*Attorneys for Plaintiffs
and Respondents.*

Clerk, Supreme Court, Utah

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WHITE, her husband,

Defendants and Appellants.

Case No.
7431

BRIEF OF PLAINTIFFS AND RESPONDENTS

PREFACE

The insuperable barrier to appellants' (defendants') success in this case is the lease. If they could only avoid the terms and provisions of their own lease

which they drew, there might be some relevancy to their brief. Their determined efforts to avoid discussing the actual terms of the lease and their studious and repeated misquoting of its terms, of course, indicate that they, themselves, are aware of the fact that the lease itself defeats them and is the sound foundation upon which the decision of this Court rests.

Appellants' brief on this appeal consists of some 69 pages. 63 pages are nothing more nor less than a repetition of their brief in this Court when the case was here, No. 7153, on the first appeal. The citations they mainly rely upon in the present brief were used in the former brief and were discussed by us in our former brief. Their inapplicability was pointed out by us. This Court's opinion in *Wolfe vs. White*, 197 Pac. (2) 125, rejected the position and argument presented by the defendants at that time, and defendants' present brief is merely a reargument of their former untenable position. In their present brief they have not even bothered to change some of the headings, and while others of the headings are in rearranged words, the substance is the same. We do not intend to reargue the case, but will later in this brief, discuss defendants' brief and its lack of merit under the facts as they are relevant in view of the decision of this Court. First we shall attempt to present to the Court the facts developed at the trial. They support the verdict of the jury and establish the plaintiffs' right to recover from the defendants. We shall also discuss the action of the trial court in striking from the verdict items of damages

awarded by the jury and point out why we think the court erred in so doing. We adopt this order of procedure because we think the appellants' brief does not present the relevant issues nor give this court a true or an adequate understanding of the case as it now stands.

STATEMENT OF FACTS

1. THE PREMISES AND THE LEASE.

The premises in question here are located at 248-256 South State Street, Salt Lake City, Utah, and are approximately 78' 3" north and south on State Street and 123' 6" in depth running east and west. The dimensions are important in understanding the magnitude of the work which was done to fix the roof. They are located on the west side of State Street, Exhibit "A", the lease. In 1922 Miles E. Miller, an architect who testified for the defendants, remodeled these premises to accommodate the J. C. Penney Company. His object was to convert the entire ground floor into one large area by removing partitions and strengthening the roof, (T. 628). Before that remodelling there were five stores with partitions, (T. 696). These partitions were removed with the four separating partitions leaving the outer north and south walls. The four partitions ran east and west so that there had been six lateral supports for the roof, (T. 698). In the remodeling, two girders running east and west were put in supported by 10 x 10 posts. He reused the existing joists running

north and south which had formerly supported the roof and in order to do so it was necessary to splice every joist. These joists had to be spliced in order to reach the new girders so that the joists which had formerly been supported by the six lateral supports running east and west were on the remodeling only supported by the outer walls and the two girders, and they had to span a 26 foot space in order to reach from the wall to the girder, from girder to girder and from girder to wall. Every one of them had to be spliced, (T. 698, 699). Then above the girders were the rafters which ran north and south and were held up by struts and braces forming what is called a trussed rafter. These rafters ran the same direction as the joists and also had to be spliced. Then came the sheathing upon which was placed the material constituting the roof surface. The roof was a flat roof, (T. 700, 702). The distance between the joists and the rafters ranged from 3½ feet at the lower end to about 5 feet at the upper. This was the roof structure at the time of the lease from the defendants to the plaintiffs, Exhibit "A".

The lease is dated February 19, 1945, is set out in full in the opinion of this Court, *Wolfe vs. White*, 197 Pac. (2) 125, and provides that the lessors (defendants) lease to the lessees (plaintiffs) the premises for a term commencing March 7, 1945, and ending the 31st day of May, 1956. The premises are then described, then follows the provision for the payment of rental at the rate of \$550.00 a month from March 7, 1945, to June 6, 1946,

a period of 15 months; \$480.00 for the period commencing June 7, 1946, and ending June 30, 1946, and \$600.00 for the 9 years and 11 months period commencing July 1, 1946, and ending May 31, 1956. The rental was fixed in this method for the reason that the lease recites in paragraph 5 that the premises are presently occupied by the Stewart Novelty Company under a lease expiring June 6, 1946, and the lease between the parties hereto was made subject to that lease, and it was provided that if Stewart Novelty Company paid its rent, then the lessees (plaintiffs here) were under no obligation and had no right of possession under the lease until June 7, 1946. There is no dispute that the Stewart Novelty Company paid its rent and under the lease involved here plaintiffs had no obligations and no rights until June 7, 1946, more than 15 months after the date of the lease which, as stated, was February 19, 1945. The lease provided, paragraph 3, that the lessees at their own expense would make permanent improvements including the installation of a first-class front at a cost of not less than \$10,000.00, which permanent improvements were to be commenced "on or before June 7, 1946, or as soon thereafter as Government restrictions will permit. Rental shall be paid during the time said improvements are being made"; that all such permanent improvements shall become a part of the realty and become the property of the lessors at the end of the lease. Paragraph 3 further provided:

"After said permanent improvements are made, it is agreed that further structural changes

shall not be made to said premises by the Lessees without first obtaining the written consent of the Lessors, which consent Lessors covenant will not unreasonably be withheld.”

Paragraph 6 of the lease is as follows:

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

Paragraph 7 provides for the delivery of the demised premises at the end of the lease and specifies that “Lessees agree to occupy said premises in a lawful manner.” Paragraph 8 is as follows:

“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.”

Paragraphs 9, 10, 11, 12, 13, 14 and 15 contain provisions with which we are not now concerned. Paragraph 16 is the lessors' covenant that the lessees "shall and may in accordance herewith peacefully and quietly have, hold and enjoy said demised premises during the term hereof." Paragraph 17 provides for attorneys' fees for the successful party in case of court action involving the lease. Paragraph 18 provides that in the event of fire lessors agree to repair and restore the premises with reasonable dispatch if the premises are rendered untenable by fire. Paragraph 19 is an option to renew, and paragraph 20 specifies that lessors' remedies provided for in the lease are not exclusive of other remedies.

2. REQUIREMENTS OF PUBLIC AUTHORITIES AND DEFENDANTS' REFUSAL TO ACT.

Lessees (plaintiffs and respondents here), in accordance with the requirements of paragraph 3 that they should spend at least \$10,000.00 on permanent improvements including a first-class store front, the work to be commenced on or before June 7, 1946, or as soon thereafter as Government restrictions will permit, in March of 1945, one month after the signing of the lease, employed A. B. Paulson, a licensed architect, to make plans for the remodeling of the store front. These plans were in course of preparation during the next six months and were completed about Christmas of 1945, (T. 290, 291).

In October of 1945 the defendant James White had written Mr. Wolfe, one of the plaintiffs, that the roof had been fixed and was in "excellent shape." (Ex. H.) Neither party knew anything about the roof at the time the lease was entered into and never made an examination until this present trouble came up, (T. 859). There was no reason, therefore, for Mr. Paulson to do anything other than he was employed to do which was to design the store front and to make a fixture layout for the counters and the interior so that the process of merchandising could be most effectively carried out, (T. 290, 292). The fixtures were designed to accommodate the existing posts, (T. 582). These original plans of Mr. Paulson's had nothing to do with the roof as it existed. It had been pronounced to be in excellent shape by the owner.

Defendants make considerable "to do" because eventually the roof was fixed by making a clear span by the use of steel girders from the north to the south wall and eliminating the posts, and suggest, with nothing to support their suggestion, that Mr. Paulson and Mr. Wolfe were determined from the beginning to construct a new roof with a clear span at the expense of the defendants. Nothing is further from the facts.

We have already shown that Mr. Paulson was engaged entirely on the plans for remodeling the store front and arranging the fixtures, and a part of the fixture arrangement was to accommodate them to the existing posts. Mr. Paulson was anxious to get rid of

radiators that were in the store as they interfered with the efficiency of his layout plan, (T. 292), and felt that if he could insulate the attic, he could remove the radiators from the store. Mr. Wolfe told him to go ahead and secure bids for insulating the attic which would cut about in half the amount of heat required. In order to determine the method and manner of insulation, Mr. Paulson and his employees went up into the attic for the purpose of making an inspection with reference to insulating, and at that time they noticed that excessive deflection existed in all roof members and decided that it would not be safe to add the insulation of approximately 4 pounds per square foot to the roof. When he ran into this excessive deflection, he wrote Mr. Wolfe a letter on January 15, 1946, Exhibit 7, (T. 292, 294), calling his attention to the unsafe condition of the roof, particularly emphasizing that the trussed rafters and the girders were undersized and unsafe, that the roof had only one drain and that if the drain should plug up, the roof would carry additional water backed up from a storm. He also advised Mr. Wolfe that he had gone through the building with the building inspector and immediate attention should be given the roof, and that in addition to the other things mentioned the skylights weakened the roof and should be done away with. Mr. Paulson on the same day, Exhibit 6, called the attention of the building inspector to the condition of the roof and advised him that the building was owned by Mr. James L. White. On January 22, 1946, the building inspector, Exhibit 2, wrote Mr. James L. White

calling his attention to the fact that the roof was unsafe and should be corrected, and that "in case of a heavy snow it will be necessary to close the building for public use." Mr. White admitted that he received this letter, (T. 874), and that he didn't do anything with reference to Mr. Tipton until he met him in April.

Mr. Paulson noticed 3 to 4 inches deflection, and since his job had nothing to do with fixing the roof, he called the attention of Mr. Wolfe and the building inspector to the condition, and the building inspector asked him to write the letter, Exhibit 6, which he did, (T. 295, 296).

According to Mr. White after he received the letter from the building inspector, Exhibit 7, all his business was conducted by correspondence, which appears as Exhibits "I" to "M" inclusive, and Exhibit 1, which is a letter from Young & Hansen dated July 8, 1946, a letter from Mr. White to Mr. Wolfe dated the same day. This correspondence includes letters addressed to Mr. White by Mr. Wolfe and Mr. White's answers and shows that on March 12 Mr. Wolfe wrote Mr. White enclosing a letter from Mr. Paulson, Exhibit 7, and asking him to correct the condition, and that plans for the work should be made in advance. He advised Mr. White that he was sparing no expense to make the location the show place of the West and that Mr. White should correct the condition of the roof; that time was running short and something should be done. On March 13, Exhibit "J", Mr. White replied that the

work required by Mr. Paulson's letter was not a roof repair, and that Mr. Wolfe should call upon him "only for roof repairs from now to the end of the term of the lease." On April 1 Mr. Wolfe answered this letter and suggested that a mutual friend present the lease to three disinterested law offices and that he was willing to accept their findings as final if Mr. White would do the same. He also advised Mr. White at that time, April 1, 1946, that the roof is unsafe, that a permit to remodel the above described premises was refused on that account, that he thereupon made demand upon the lessors to put the roof of the leased premises in a safe and proper condition, and that unless prompt action was taken, he, Mr. Wolfe, would cause the proper work to be done to make the roof safe and in good condition. With reference to the suggestion that the lease be submitted to three law firms, Mr. White testified that that suggestion wasn't feasible, and when asked whether he felt that he had drawn a lease so obscure that three law firms couldn't agree on it or else it was so clear that three law firms would find against him, he said that whatever went through his mind he didn't think that was a practicable solution, (T. 877, 878), and that regardless of his knowledge of what the building authorities had required he did not fix the roof. He frankly admitted that he didn't intend to, (T. 867). On April 2 Mr. White replied, Exhibit 'L', stating to Mr. Wolfe that he had again carefully read the lease and that there was only one sentence in the lease providing for work to be done by him, quoting paragraph 8, and asking Mr.

Wolfe to give him the name of his attorney. This letter shows that Mr. White at that time had before him the specific language of paragraph 8 which he quoted. Mr. Wolfe answered the letter on April 3, Exhibit "M", telling Mr. White if he wanted to know the exact work necessary to be done to consult with Mr. Paulson "or by engaging some other competent building engineer or architect", and advising Mr. White that his lawyers were Rich, Rich & Strong, particularly Mr. Benjamin L. Rich.

These requirements of the building authorities which were the subject matter of the foregoing correspondence are set out in full in the complaint and are here as Exhibits "B" and "C". They are a letter from the Superintendent of the Bureau of Mechanical Inspection to Mr. Paulson dated March 21, 1946, advising him that with reference to his application of March 20, 1946, for a permit to remodel the front of the property, that the roof was unsafe because the rafters were overstressed and sagging and that the girders were undersized and bowed; that he had notified the owner, Mr. James L. White, of this condition on January 22, and that obviously this condition must be rectified, "and, therefore, your application is being held in abeyance until assurance is given that the roof condition will be taken care of," and a letter from Mr. Tipton, the Superintendent of the Bureau of Mechanical Inspection, on April 29, 1946, Exhibit "C", to Mr. Wolfe advising him that he had called the attention of Mr. Paulson and Mr. White to the condition of the roof, and "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." Mr. White's attention was called to this letter of April 29 some time after April 29, (T. 875), and while he contends that from April 5 to June 7 he heard nothing more from Mr. Wolfe or Mr. Paulson, (T. 875), he himself never communicated with them in the meantime and he didn't do anything; he didn't know what they were going to do; he relied upon them to go ahead, (T. 876). He didn't ask Mr. Paulson for a statement of what was necessary to be done, (T. 877). He didn't propose any counter-plan to Mr. Wolfe. He just suggested that Mr. Wolfe go ahead and fix the roof "as economically as possible, and we would have to decide who was going to pay for it." (T. 878.) Mr. Wolfe did go ahead as economically as possible, but Mr. White objects to paying, although he concedes that he made no counter-proposals and did nothing between April 5 and June 7, the date Mr. Wolfe was supposed to go into possession.

Mr. Wolfe, being unable to get Mr. White to act, did proceed. On June 14, 1946, Mr. Paulson wrote him, Exhibit "E", advising him that it was necessary to submit a roof plan to Mr. Tipton, and that because the entire roof with the exception of the columns was unsafe, that to open the area that is not safe and make it safe would cost more than to remove the present roof and put on a good roof. He called his attention to the

fact that if they could eliminate the posts, it would cost more than to use the posts. The roof as finally constructed did eliminate the posts, but the defendants are not charged with that extra cost. Exhibit "D-1" shows the actual cost of the roof to be \$14,408.97 from which is deducted \$2,224.94, the extra costs of constructing the roof by eliminating the posts. While defendants, as above stated, have made considerable "to do" about the clear span construction, they know and the record is clear, that they were not charged for clear span construction. Mr. Wolfe bears that expense from his own pocket. No attempt was made to make defendants pay for it. The extra cost of the clear span construction was completely deducted from the cost of the roof, and the jury allowed nothing for the extra cost of the clear span construction. Mr. Wolfe did exactly as Mr. White expected him to do. He followed the recommendations of Mr. Paulson that the cheapest way was to remove the roof and put on a good roof, and in putting on the good roof they used all the material possible from the old roof and did the job in the most economical way, (T. 477). We shall point this out in more detail in a moment.

More than a month after the time Mr. Wolfe should have been in the building, and on July 8, 1946, Mr. White, Exhibit 1, again wrote Mr. Wolfe, refusing to accept responsibility. He said: "As I have heretofore written and informed you, we contend that the lessors of the building at 248-56 South State Street in this City have no liability whatsoever for repair, replacement or

change of the roof structure.” In that letter he did not make the contention that he makes in his brief, that to keep the roof in good condition and repair meant to keep it in the same condition it was in at the time the lease was entered into. In that letter he stated:

“It has always been our contention that the provision, ‘the lessors shall have the obligation to keep the roof of the leased premises in good condition and repair’, refers to, and was clearly understood by the parties to the lease to refer to, repair and/or replacement of the roofing material above the roof structure, commonly referred to as the roof, and ordinarily repaired by a roofer in case of leakage. This is still the contention of the lessors of the building.”

This letter is interesting for two purposes—it shows, regardless of Mr. White’s protestations to the contrary when he was on the witness stand, that in July 1946, a month after Mr. Wolfe should have been in the premises, he was still insisting he had no duty to make the roof safe. He did not even contend as he does now that at the most he had only the obligation to keep the roof in the same condition it was in when the lease was entered into, (whatever that was no one knows). Then he claimed that he was required only to keep the roofing material from leaking. It is quite clear from that letter that his present position is an afterthought and is only a second subterfuge to attempt to avoid complying with the express terms of the lease which he quoted verbatim in that letter. In his letter of July 8 he specifically denies that it was the duty of the owner to keep the roof

safe. Then belatedly he says, that assumming it was his duty, he attaches a letter from Young & Hansen stating that if the roof is unsafe it could be made safe for \$800.00. Continuing in his letter he suggests that if the building inspector won't issue a permit for remodeling until the roof is repaired or replaced, *Mr. Wolfe's* remedy is to proceed against the building inspector to force the issuance of a permit. He also says:

“It is entirely open to *you*, therefore, to submit to the building inspector plans in accordance with the suggestions contained in the letter from Young & Hansen, and we suggest that you do so.”

The letter from Young & Hansen which is also attached to Exhibit 1 and is dated July 8, 1946, says that the roof is amply safe as it is but that it can be made even stronger at a cost not to exceed \$800.00, by eliminating the skylights.

“If the skylights are to be eliminated, we suggest the same designed trusses and rafters used throughout be placed thru these openings.”

In accordance with Mr. White's suggestion to Mr. Wolfe that Young & Hansen's proposal be submitted to the building inspector, Mr. Wolfe had Mr. Paulson draw the blue print attached to Exhibit 1 which contains the proposal to eliminate the skylights by “frame through present skylights with same spacing and same trusses as adjoining”, which is almost the identical language above quoted from Young & Hansen's letter. Mr. Paulson drew Exhibits 1 and “P”, which is the

same as Ex. 1, from the information suggested by Young & Hansen, and Mr. Gerald Cannon, Wolfe's contractor, at Mr. Wolfe's suggestion and in accordance with Mr. White's request in the letter of July 8, submitted the proposal together with Mr. White's letter, Mr. Wolfe's letter, and a letter from George S. Nelson, hereinafter to be discussed, to the building inspector, and on July 11, 1946, Exhibit "Q", the building inspector replied that the plan was not acceptable and requested additional information and data. Mr. Wolfe thus did as Mr. White suggested, and the Young & Hansen proposal was not accepted by the public authorities. The Young & Hansen proposal never would have corrected the condition found in the roof, and as a matter of fact, the jury was perfectly justified in disregarding this belated and abortive suggestion with respect to the roof. It will be noted that the building inspector's letter of July 11 asks for computations, strain sheets and stress diagrams. While Mr. White in his testimony says that he hoped that the roof would be fixed in accordance with the Young & Hanson plan, it will be noted that he supplied no strain sheets, etc., to be submitted with it. He complains that Mr. Wolfe submitted plans without stress charts or accompanying data, and that when Mr. Tipton said he required stress charts he did nothing to supply them. Mr. White says that he asked Mr. Hansen to prepare stress charts but that he, Mr. White, did not submit any stress charts to Mr. Tipton, nor did any one in his behalf, and he also admits that he never made any application to Mr.

Tipton to repair the roof, (T. 863). The fact of the matter is Young and Hansen were not even employed by Mr. White until the latter part of June, 1946, (T. 624). Mr. Hansen said that he made stress charts after they got the letter from the building inspector, which would be after July 11, but they have been lost and couldn't be produced now, (T. 920); that they didn't make up others and when asked at the trial to make up some new stress charts and to compute the stresses, he said he didn't have the formula, and when he was offered the formula, he said he didn't care to do it, (T. 930). Mr. Young of that firm, however, testified that they made the stress charts before the ceiling was removed. Young & Hansen's letter of July 8, says the ceiling had been removed at that time, so the stress charts must have been made before that time, but they did not accompany their letter of July 8. Then Mr. Young said that they didn't go on with the stress charts because the ceiling had been removed, (T. 757, 759). He admitted that he didn't submit any stress diagrams, and he didn't say anything about stress diagrams in his letter of July 8, (T. 760). Mr. Young frankly admitted that they weren't employed by Mr. White to fix the roof. All they were employed to do was to report on the safety of the roof, which they did by contradicting the building inspector, by declaring the roof to be safe, (T. 773). On the witness stand he could not tell what the allowable load on the roof was, and stated that he didn't make the stress diagram, (T. 771). If one was made, it was made by Mr. Hansen, but it

couldn't be produced, and Mr. Hansen refused to attempt to figure the stresses so that we might have the benefit of his figures for the purpose of cross examination. As a matter of fact, the only computed evidence concerning stresses and strains was that given by the plaintiff's witness, Mr. George S. Nelson. As to him, Mr. Young testified that occasionally they use a structural engineer in their own work from outside of their own office, and that they use Mr. George Nelson for this purpose. The record is without dispute that neither Mr. White nor Young & Hansen ever submitted any stress charts or diagrams to the building authorities in compliance with the requirements in Exhibit "Q".

On August 1, 1946, Exhibit "VV", Mr. White wrote to Mr. Wolfe stating:

"On July 11, the day before I went to Denver, I talked to Mr. Tipton, building inspector, who told me that you had made application to repair the roof in accordance with the suggestions of Young and Hansen contained in their letter of July 8. He read a letter to me which he said he was sending to you, but which I have not seen, nor have I received a copy. This letter suggested that certain stress diagrams be furnished. I told Young & Hansen to go ahead with them and they are now completed."

This is on August 1, nearly two months after Mr. Wolfe should have been in the premises. In this letter of August 1 Mr. White declares that if Mr. Wolfe is not interested in repairing the roof as suggested by Young & Hansen, then there is no use of further discussion.

Seven months had gone by since Mr. White first knew of the unsafe condition of the roof. Mr. Wolfe was then two months late in getting into his premises, and Mr. White is still insisting that the roof needed nothing except the patch-work suggested by Young & Hansen, whose stress diagrams, if any, were never submitted to the building inspector. No one knows what the stress diagrams were, nor could we find out from either Mr. Young or Mr. Hansen, both of whom refused to make any computations at the trial.

Returning now to Mr. White's letter of July 8, we find that he made a very interesting suggestion that: The way to test the roof structure was to haul up sacks of sand and load them on the roof.

“We are satisfied that if such a test is made with uniform weight over the span of trusses equal to that required by present Salt Lake City Building Code (30 pounds per square foot live load), that the roof structure will stand, as it has stood for over twenty years. * * * If such a test is made and the building inspector still refuses you a permit, then you have your remedy against him to force the issuance of such a permit.”

Even Young & Hansen admitted that the strength of a roof was determined by mathematical computations and not by hauling sand up and loading it all over the roof to see if it would stand. We suppose that if Mr. White could have gotten anyone to haul the sand up on the roof and take a chance on it, and the roof had fallen

in, that he might then concede that the roof was unsafe. We picture the city authorities hauling sand up to the top of buildings under construction in the city in order to determine whether they would stand up. That would provide a much larger audience than usually assembles to watch new construction. It would also furnish a little business for the sand and gravel people and might afford a reason for increasing the payroll of the city building inspector. Fortunately, however, it is not necessary to resort to such picturesque, laborious and hazardous test methods in these days when stresses and strains are mathematically computed. It will be interesting to note also from Mr. White's letter that he knew or has gained the knowledge from someplace that the requirements of the Salt Lake City Building Code are 30 pounds per square foot live load. We suppose he got that information from his architects Young & Hansen, although Mr. Hansen insisted that although you determine stresses by mathematical computation, (T. 924), he understood the Code only required 20 pounds per square foot of live load, (T. 925). We shall discuss this matter in a moment in connection with Mr. Nelson's testimony.

3. THE ACTUAL CONDITION OF THE ROOF.

Mr. Tipton, the Superintendent of the Bureau of Mechanical Inspection, and Mr. Hargraves, the Building Inspector, both testified for the plaintiff. The building permit for the remodeling of the store which was applied for in March, was resubmitted by Cannon Con-

struction Company to include the roof on June 22, 1946, but was not issued until July 16, 1946, Exhibit "O". Both Mr. Tipton and Mr. Hargraves made personal inspections of the roof.

The Building Code, Section 201, Exhibits "N", "AA", and "5", specifies that no building shall be altered or repaired without a building permit, Section 301, that any building found to be dangerous or unsafe must be made safe, Section 305, that it shall be unlawful for any person to enlarge, alter or repair or occupy any building in violation of the Code. (The lease in question, paragraph 7, stipulates that the lessees shall occupy the premises in a lawful manner.) Section 2305 of the Building Code provides:

"Roofs shall be designed for a vertical live load of 20 pounds per square foot of horizontal projection applied to any and all slopes. * * * Where snow loads occur, roofs shall be designed for the increase in loading."

This roof, as we have seen, was a flat roof. Section 2522 of the Code provides:

"Joists supporting plastered ceilings shall be so proportioned that their deflection to full live load and dead load exclusive of weight of plaster shall not exceed 1/360th of the span length." (T. 246.)

That means not exceeding 1 inch deflection in 30 feet of length, (T. 193). Section 2513 of the Code, particularly Tables A and B on page 138, (T. 322), provides

that the allowable load is 160 pounds per each 16 penny nail in the end connections for nailing members to other members.

Mr. Tipton testified that the condition stated in Exhibits "B" and "C" recited the facts as he found them, although those exhibits did not state everything that could be said about the condition, but simply generalized the condition, (T. 244-245). He said that the roof was in bad condition; that there was a sagging or deflection of 3 to 4 inches. The trusses, the roof rafters and the roof beams were deflected. The east-west beams were deflected, as were the east-west trusses; that the allowable deflection is one inch in thirty feet and that the deflection here of 3 to 4 inches was in a span of about 26 to 27 feet, (T. 192, 195). The girders holding up the ceiling joists were undersized and bowed. The building permit was finally issued after plans complying with the Building Code were submitted, (T. 201).

Mr. Hargraves also examined the roof several times. The deflection in the girders and ceiling joists was three times as great as allowed for safety, and he considered a degree of failure was taking place, (T. 249, 250). The ceiling joists, the roof rafters and trusses were in bad condition. They were too light for the span they were carrying. Splintering and deterioration had been taking place in the joints. The roof did not comply with the standards of safety of the Ordinances, and it was unsafe, (T. 251, 252). Subsequent work corrected the condition and made the roof safe and in compliance

with the Ordinances, (T. 253). The unsafe condition of the roof had nothing to do with the skylights. It was general throughout, (T. 257). The joists and rafters throughout the roof were spliced to make them reach from the wall to the girders, from girder to girder, and from wall to girder, from north to south though the building. There were two series of posts running east and west carrying the girders. On top of the girders were the joists running north and south from the girders to the wall. Then there were the rafters above the joists held up by trusses and struts, making a trussed rafter, (T. 277, 278). The deflection was general throughout the whole ceiling clear from east to west throughout the entire store, and the skylights simply made it worse, and reinforcing or eliminating the skylights would only correct the condition that existed in the skylights and would have nothing to do with the remainder of the roof, (T. 279, 280). After the partitions from the store were removed in 1922 the same timbers were used only they were made to reach the additional distance required by splicing, and that was one reason for the deflection and failure, (T. 287).

Mr. Paulson testified that there was three or four inches deflection, (T. 295), and that he employed George Nelson, a structural engineer, to design a safe roof, (T. 301). Mr. Nelson, a structural engineer whose work is accepted by the building inspector, (T. 211), testified concerning his investigations as shown in Exhibit "F", a letter of May 8, 1946. He examined the old roof and made the design for the new roof, (T. 311).

In his investigation he examined the various members of the roof and made comparisons between the allowable load and the actual conditions, (T. 311, 312). The roof was a mixed up affair, (T. 314), comprised of trusses, rafters about 4 feet apart, and the ceiling joists and roof joists above them were spaced about 16 inches apart and in between were the trussed rafters. The trussed rafters in turn and the ceiling joists rest on beams or girders, and then the posts carry on down to the footing. This was a slightly sloping roof. The trusses ranged in height from 3 feet to about 5 feet. This was a flat roof under the Code which requires where snow loads occur that the roof shall be designed for an increase in loading which is an increase over 20 pounds, and that 30 pounds is the accepted minimum where snow loads occur and there is a flat roof, (T. 314, 316). The allowable load bearing on the posts to conform to the Ordinance was 26,300 pounds. This is arrived at by multiplying the area at the top of the post by 325 pounds which is the unit stress. The actual load the girders were carrying if the roof was carrying 30 pounds live load would be 35,800 pounds, so the girders were overstressed 30% in excess of the allowable. The posts themselves were all right. The allowable live load deflection on the east and west girders would be $1/360$ th of the span; that is one inch to 360 inches or 30 feet; that is the allowable deflection. The calculated deflection would on these girders be 30% more than that as it existed in the girders, (T. 318, 320). The trussed rafters were deflected beyond the

point of safety. The nailing in the trussed rafters under the Ordinance would allow 450 pounds for the three 16 penny nails in the end connections. Actually, these nails carried 4,650 pounds for the three nails in the high trusses and 6950 pounds for the three nails in the low trusses, (T. 322).

“Now, they—it would be impossible for nails to carry this. They were depending on something, hanging by their teeth or something, and the nails couldn’t carry that load. There must have been some other factor in there holding it up. It wasn’t those nails. The nails were carrying a load ten times more than allowable.” (T. 322, 323.)

Eliminating the skylights wouldn’t have corrected that condition at all. The skylights were badly sagged, and while they hadn’t collapsed, they had failed inasmuch as they had sagged excessively. The roof was unsafe, (T. 324). The proposals of Young & Hansen, Exhibits 1 and “P” merely calls for more trusses, like other existing trusses, going through the existing skylights, and that would not have corrected the unsafe condition, (T. 326). The compression members which are the struts and trusses where the length should not be more than fifty times the width were in violation of the Ordinance and exceeded the Ordinance allowable, (T. 345, 347). Some of the struts were 10 feet long and some longer, when they should have been 6 feet 8 inches or 6 feet 7 inches, (T. 349). He sent Mr. Wolfe a bill for his services of \$45.00 which was paid, (T. 349).

Mr. Nelson, as heretofore indicated, was employed to design the new roof, and on June 17, 1946, he calls attention in Exhibit "G", a letter to Mr. Wolfe, that after his letter of May 8, Exhibit "F", he submitted two designs for fixing the roof. He states that he has been asked if the present roof could be made safe without removing it. He says it could be but in his opinion the cost of doing this would cost more than to remove the roof completely and rebuild it reusing much of the present material; that trying to repair the old roof in place would cost more than rebuilding from a fresh start. On June 14, 1946, Mr. Paulson in a letter to Mr. Wolfe, Exhibit "E", says that it would cost more to open up the entire area and make it safe than to remove the present roof and put in a good roof; that the estimated cost for a new roof without posts would be some \$2,000.00 more than the estimated costs of using the present columns with new beams and a new roof.

The condition of this roof is graphically illustrated by the pictures, and at random we reached into the Exhibits and came up with five of them numbered "A-A-A" to "E-E-E" inclusive. We find from the record that Mr. Nelson rather graphically pointed out the weaknesses of the roof from these exhibits in his testimony when he was recalled towards the end of the trial. The defendants' witness, Mr. Miles Miller, had attempted to compute the stresses while on the witness stand and had come up with the most absurd answers, and the other experts for the defendants, Young & Hansen, had refused to attempt to make stress

computations, so Mr. Nelson in the court room refigured his computations showing stress of 4890 pounds compression in the end struts and diagonal struts, and a tension of 4590 pounds in the end member of the bottom cord, which means that you would have to have thirty 16 penny nails in these timbers to carry the load. This testimony was in answer to the defendants' witnesses that the additional nails could be put in to hold the timbers. Mr. Nelson showed by his computation that the boards wouldn't hold the thirty 16 penny nails, (T. 941). Also, the timbers themselves were overstrained and deflected more than three times the allowable. The stresses that a member can carry is not a matter of opinion. It is something that can be calculated. It is factual. They can be computed, and that is what the witness did. Nor would the timbers carry sufficient bolts to sustain the load. As the pictures show, some of the timbers were split, others were full of knot holes. They did not meet to form a real truss, and if you used three-fourths inch bolts, which is the maximum size you could use in such a connection, it would require nine three-quarter inch bolts, and you couldn't possibly get more than three in there under the best of circumstances, (T. 952, 954). Exhibit "A-A-A" shows how the diagonal members do not meet the uprights, shows the splicing of the joists with no support thereunder, and shows the deflection. Exhibit "C-C-C" shows the split in the timbers, as also does Exhibit "D-D-D", and the latter exhibit shows the knot holes. Exhibit "Q-Q" is taken from the bottom and shows the patch work con-

struction of the joists which was uniform throughout the entire roof. Three of the skylights appear in Exhibit "E-E", and it can readily be seen that eliminating the skylights would in no sense rectify the condition of the roof. See also Exhibit "C-C".

There was a good deal of discussion from Mr. Ramm Hansen, one of defendants' witnesses, about the effectiveness of a Howe truss. The true Howe truss consists of uprights and diagonals joining the joists at the bottom and supporting the rafters at the top, and each of the members meet to form a support for each other. Not only do the pictures show that there are no true Howe trusses, but Mr. Don C. Young, another of defendants' witnesses and a partner of Mr. Hansen, when asked if he could find a true Howe truss in the entire roof replied: "I suppose in all that mess you might find a truss." No one in the case more aptly described the roof than Mr. Young, who called it a mess, (T. 986).

4. WHAT WAS DONE TO MAKE THE ROOF SAFE.

Mr. Gerald Cannon, the owner of the Cannon Construction Company, testified that he was at first employed to remodel the store front, and nothing was said about the roof, but almost simultaneously with signing the contract, Exhibit "U-U", May 7, 1946, he was asked to submit figures for fixing the roof, (T. 459). He understood when he made the contract that Mr. Wolfe was to take occupancy the first of June, (T. 457). He

told Mr. Wolfe that he could complete the alterations in sixty days, by the first of August, or shortly thereafter, and if they could have proceeded with the work, they could have finished it by that time. This was only the remodeling of the store front, (T. 460, 461). However, he was then asked to submit figures on the roof, and he made estimates of the cost of fixing the roof. He made two estimates of two methods and submitted them to Mr. Wolfe. They made an estimate of removing the roof structure and eliminating the columns and spanning from north wall to south wall with a series of bow string trusses and then rebuilding the roof by salvaging all possible lumber. The estimate of this cost was \$11,021.00. The alternate plan was to remove the roof structure including the longitudinal beams which supported the truss rafters by utilizing the existing columns and replacing or placing new beams of steel on top of the wooden columns and building wood trusses from beam to beam and from beam to wall and using the existing posts, and the estimate of this cost was \$8,500.00. Using steel instead of wood did not increase the cost at all. Lumber was very difficult to get and was not any cheaper, (T. 462, 464). They finally adopted the clear span bow string truss roof, and the additional cost was in eliminating the posts, (T. 464). They proceeded with the work under the contract, "U-U", which has a provision in it which allowed them to proceed with any additional work directed by the owner or architect. He was the contractor who did the work from beginning to end, (T. 464).

Before doing the work he made an inspection, and after he had made his estimates he saw the roof and inspected and examined it many times. The ceiling was very badly sagging generally throughout the building, and there was an apparent distortion in the longitudinal beams running east and west. The water wouldn't drain off of the roof because there was a sag in the roof, (T. 465, 466), and every horizontal member practically in the structure "was sagging, cracked and split at the splices. The roof was just generally—the whole structure was in very bad shape." The timbers had come loose from the members quite extensively, (T. 466). The worst sagging, of course, was in the middle of the spans and at the skylights. They ran strings which show the sagging, (T. 467, 468), and these are shown in the pictures. The witness particularly called attention to Exhibits "H-H", "O-O", "Q-Q", "T-T", "E-E", etc., (T. 471, 474).

There was no practical way of repairing the structure which wouldn't cost as much and maybe more than to take the structure off and replace it with a new structure, (T. 476), so they removed the whole roof structure and built a new roof, and the way in which they did it was the best in his judgment because it was cheaper. They utilized all the old wood they could, reused the sheathing, and salvaged as much as they could and reused it, (T. 477, 478).

Before they could finish the store front they had to finish the roof, and because of the extra work of

finishing the roof, they did not get done until the middle of November. Part of the additional time was due to stoppage of the work, (T. 478).

(Mr. Wolfe testified that the reason the work was stopped was because Mr. White asked him to hold it up so that he could make an independent examination. This was in June, and he stopped the work and didn't go any further. Mr. White made this same request on another occasion in July, (T. 564, 565). He had the work held up at Mr. White's request until after he got the letter from Mr. White telling him that he had made the independent examination and enclosing the Young & Hansen letter, Exhibit 1, (T. 566). Mr. White gave him no further plans with reference to the roof and so far as he knows made no further effort to fix it, (T. 567). On August 1 he received the letter from Mr. White, Exhibit "V-V", which was the next time he heard from Mr. White after the communication of July 1. The letter refers to stress diagrams, but they were never supplied to him.)

Mr. Cannon had prepared a memorandum of the actual cost of fixing this roof which is shown on Exhibit "B-B", (T. 480). This shows the actual cost of fixing the roof, and the costs have been segregated from his records from all other work that he did, (T. 482, 483), and the fair and reasonable cost of fixing the roof was \$13,679.56, (T. 487). (The cost of photographs was eliminated from this figure in Exhibit "B-

B'' making the total cost \$13,593.37). This cost does not include the extra cost of constructing a clear span roof which is shown on Exhibit "D-1" to have been eliminated in the sum of \$2,224.94. This sum was arrived at after the roof had been completed and the costs had been determined. It was another estimate after the work was done of the difference in the cost between the clear span and the beam and trusses and trussed rafter method, so that \$13,593.37 is the fair and reasonable cost for the work and labor on the roof and does not include the cost of the clear span construction, (T. 487). The estimates he had previously made of \$11,021.00 as against \$8500.00 were before the work was done. The figures he has just given are the figures computed after the work was done, (T. 488).

The clear span construction as against using the posts was not decided upon until June, 1946, (T. 963).

(THE DRAIN)

It will be noted that in appellants' brief they make quite a point even to the extent of a sub-heading of "The Drain System", page 34. Lest the Court get the impression that the drain was a matter independent of the roof, we call attention to the fact that the only thing the defendants were charged with so far as the drain is concerned was \$55.72 which, of course, was the fixing of the drain in connection with the fixing of the roof, Exhibit "B-B".

5. PLAINTIFFS' DAMAGES AND THE VERDICT OF THE JURY.

The Court instructed the jury that if we were entitled to recover at all, we could only recover what was reasonably necessary to put the roof in good condition and repair, and that we were obliged to use the most efficient and economical means possible and practicable under the circumstances and could impose no liability upon the defendants more than the actual and necessary costs of so placing the roof in good condition and repair; (T. 151); that the defendants, if responsible at all, would be responsible only for such delay as they unreasonably and unnecessarily caused by their conduct, (T. 152); that the damages, if any, could not exceed the sum of \$13,547.89, for placing the roof in good condition and repair, (T. 153), plus any damage occasioned by reason of unreasonable and unnecessary delay caused by defendants' conduct by which the plaintiffs were prevented from occupying the store and which plaintiffs contend caused them to have to pay monthly and excess percentage rental that they would not otherwise have to pay and which they claim lost them an opportunity to sublease the store, but the damages, if any, with respect to said amounts could not exceed for monthly rental on the old store \$1125.00, for excess percentage rental on the old store of \$2856.84, for loss of rental because of failure to sublease the old store \$1500.00, (T. 154) (the amounts set forth in Exhibit "D-1").

The Court gave the jury the forms of verdict allowing them to find for the plaintiffs or defendants. The jury selected the verdict finding the issues in favor of the plaintiffs, (T. 165). This verdict allowed them to fix damages in five separate items: (1) With respect to putting the roof in good condition and repair; (2) With respect to additional monthly rental on the old store; (3) With respect to loss of rental and loss of opportunity to sublease the old store; (4) With respect to excess percentage rental paid by the plaintiffs on the old store; and (5) With respect to attorneys' fees. The amount to be found was left blank in each instance. The jury returned a verdict: (1) With respect to putting the roof in good condition and repair, \$12,893.83; (2) With respect to additional monthly rental on the old store, \$2,400.00, (the court had instructed the jury that they could not find on this item in excess of \$1,125.00); (3) With respect to loss of rental and loss of opportunity to sublease the old store, \$1,500.00; (4) With respect to excess percentage rental paid by the plaintiffs on the old store, none; and (5) With respect to attorneys' fees, \$3,000.00.

The appellants raise no point as to the amount of the verdict with respect to putting the roof in good condition and repair except as it might be contended that their points I and II, which argue that we were entitled to nothing might raise that point, or their point III, under which they seem to infer but not to claim positively, that the jury should have been instructed that the \$800.00 proposed by Young & Hansen

plus \$500.00 for extra nailing, plus \$485.86 for the drain, pages 64 and 65 of their brief, should be specifically taken into consideration in fixing the reasonable cost of putting the roof in good condition and repair. The trial court, we think, very properly refused to single out particular items, but instructed the jury, as we have shown, that we could only recover what was reasonably and necessarily required to put the roof in good condition and repair as economically as possible. Obviously, the jury did not believe that the defendants' belated subterfuge would either put the roof in good condition or was a reasonable cost of doing so as is evidenced by the verdict. There was no more reason for the court to single out specific items claimed by the defendants than there would have been to single out specific items of expenditure made by the plaintiffs in putting the roof in good condition and repair. Obviously, had the jury felt that the \$1,785.56 suggested by the defendants at the trial, but never prior to that time, to be the reasonable cost of repairing the roof, they would have so found. It will be noted that the defendants put in an item of \$485.56 for the drain, whereas, we only charged them \$55.72, as shown by Exhibit "B-B". The jury evidently believed the plaintiffs' witnesses that trussing the skylights and putting thirty 16 penny nails or nine three-quarter inch bolts in each of these connecting joints was neither feasible nor would it have corrected the unsafe condition of the roof. We discuss point III of appellants' brief later in considering their brief. With respect to item 5, the

\$3,000.00 attorneys' fees, no question whatever is raised on that, and we pass that with the remark that there was no conflict in the evidence that \$3,000.00 was a reasonable fee.

On items 2 and 3 of the verdict the court on its own motion reduced item 2 to \$1,125.00, (T. 166), and item 3 he eliminated entirely on defendants' motion, (T. 173). The trial court reduced the plaintiffs' judgment in the sum of \$2,775.00. Thus, the judgment instead of being \$19,793.83 as rendered by the jury, is only \$17,018.83 as reduced by the trial court. The court on the back of the judgment, (T. 166), ordered that interest on item 1 should be added from February 1, 1947, and on item 2 from January 1, 1947. Originally, he allowed interest on item 3 from April 1, 1946, but later struck that out as is shown on the back of the judgment.

Prior to occupying the premises in question here the plaintiffs were occupying property at 224-226 South State Street under a lease from the Joseph J. Snell Estate. Mr. Wolfe advised Mr. White of the terms of this lease of which Exhibit "W-W" is a renewal, (T. 965-968). Prior to signing the lease with Mr. White, Mr. Wolfe had many conversations with Mr. White with reference to his lease on the Snell property and told him that he, Mr. Wolfe, was paying percentage rentals, and at the same time he told Mr. White about the terms of the lease and the duration of it, (T. 965, 967). "Prior to the signing of the new lease with Mr. White, I advised him as to how long I had to go yet,

and the terms of the lease. He was informed of that", (T. 968). The lease, "W-W", was in 1945 and is a renewal and continuation of the Snell lease in effect at the time of his conversations with Mr. White, (T. 968, 969).

Mr. Wolfe should have gotten into his premises June 7, 1946, under the lease in question, paragraph 3, and he did not get in until November 7, 1946. According to the evidence of Mr. Cannon above referred to, the store front could have been remodeled by August 1, so that there was a three month delay due to fixing the roof during which three months Mr. Wolfe had to pay rent under the new lease and rent under his old lease which provided for a monthly rental of \$500.00, less \$125.00 he received from sub-letting, making a flat rental of \$375.00 plus an additional rental of $2\frac{1}{2}\%$ of all sales over \$170,000.00 and up to \$200,000.00, and if over \$200,000.00 2% of all sales over that figure, (T. 570 and paragraph first of Exhibit "W-W"). Mr. Wolfe paid his rent under the old lease up to and including March 31, 1947. Had he been able to move from them, he had the old premises subleased commencing with the 1st of August, 1946, (T. 572), to a Mr. Chandler, who testified, (T. 530), that he was ready and willing to take over the occupancy of the old building August 1 but was unable to get into the building and so went elsewhere. Mr. Chandler went into the business of what is called Jack and Jill Shop, and Wolfe's arrangement for him to take over the old premises fell through, (T. 574) and he was unable to rent them later, although

he made an effort to do so, (T. 575, 576). Wolfe himself had to pay rent on the old premises up to March 31, 1947, a period of eight months at \$375.00 a month, (T. 576). He paid a percentage gross rental as long as he was in the old premises up to November 6 and also paid Mr. White rents for the same period as he paid rental on the old premises. This percentage rental from August 1 to November 9 amounted to \$2,856.84, Exhibit "D-1", so that for the three months he actually occupied the old premises (August to November 7, 1946), Mr. Wolfe paid a base rental of \$1125.00 and a percentage rental of \$2856.84, and a rental for five months, November, December, January, February and March of \$375.00 on the old store while he was out of occupation, or a total of \$1875.00, for which we asked only \$1500.00 in Exhibit "D-1". Thus the total rental he paid on the old store when he should have been in the new one amounted to \$5,481.84. Mr. White at the time the lease here in question was made knew of the Snell lease its duration and terms, and knew that Mr. Wolfe would have to pay the rent on that place unless Mr. Wolfe could sublease it. He also knew that Mr. Wolfe could not sublease it as long as he was in the premises and occupying them. The jury allowed us by its verdict \$3900.00 in items 2 and 3 for monthly rental we had to pay at the old store when we should have been in the new one. While item No. 2 is for \$2400.00 instead of \$1125.00 in accordance with the instruction, (T. 154), and nothing under item 4 with reference to excess percentage rentals, it is quite obvious that the

jury by items 2 and 3 intended to allow us \$3900.00, although our actual damage was \$5,481.84, for rental we had to pay on the old store when we should have been in the new store. The jury's verdict of \$3900 on the two items, 2 and 3, is \$1581.84 less than the actual damage we sustained. The trial court instead of giving effect to the verdict as he had the right and duty to do, reduced the \$2400.00 to \$1125.00 and later struck out the entire item 3, the \$1500.00 for the months of November, December, January and February, so that all we were allowed by the judgment for the rental we had to pay and which we did pay at the old store when we should have been in the new one and could not get in due to the fault of the defendants, was \$1125.00, a loss to us of \$4,356.84 in money we actually paid out because of defendants' breach of the lease, and a loss of \$2,775.00 in the amount the jury found we were entitled to.

6. THE EVIDENCE ON DEFENDANTS' POINT III,
PAGE 63 OF THEIR BRIEF.

The defendants offered Miles E. Miller, Don C. Young and Ramm Hansen as expert architects to testify with reference to the roof. Mr. Miller is the architect who in 1922 designed the roof that was in 1946 pronounced unsafe by the building inspector. He testified that the requirements of the building inspector were entirely superfluous, and that he was entirely wrong, (T. 691), and when the building inspector said the roof wasn't safe he was "wrong", or "wet", (T. 692). He

said that originally there were five stores with their separating partitions supporting the roof, (T. 696); that he took out all the partitions and used the existing joists and made them fit by splicing every joist, (T. 699). He frankly admitted that the construction in 1922 doesn't now comply with the present Building Code, (T. 719). He also said that regardless of what the building inspector required he wouldn't have touched the skylights or anything, (T. 724), but that if Mr. White wanted it fixed, all he had to do was to tell Mr. Miller to go ahead and fix the roof, and he would have done it, (T. 725).

Mr. White frankly admitted that he didn't tell any of these people to go ahead and fix the roof. He interpreted the lease to mean that it wasn't his legal obligation to make structural repairs, and he didn't intend to do it, (T. 867); that after he got Tipton's letter in January, he didn't do anything but write the letters we have heretofore called attention to, (T. 874), and from April 5 to June 7 he never did anything. He relied on Wolfe to go ahead, (T. 876).

Young & Hansen wrote the letter of July 8 proposing to truss through the skylights, and while they say that later on in July they made stress diagrams for the building inspector, they were never submitted either to Mr. Wolfe or the building inspector. They could not be produced at the trial, and both gentlemen refused to compute the actual loads carried by the roof when

requested to do so at the trial, although Mr. Nelson offered to furnish them the formula, and Mr. Nelson himself actually did compute them at the trial.

That the defendants' contention that the roof could be fixed for \$1785.56 is a pure after-thought is apparent from the defendants' answer, (T. 73-82). In that answer the defendants contended that they had had the building examined by Young & Hansen on July 8 and that Young & Hansen found the roof to be safe and in good condition, but if the skylights were to be eliminated the cost would not exceed \$800.00, (T. 78), and that plaintiffs should go ahead and perform that work; that at the time the plaintiffs removed the old roof structure the same was in good condition and repair, (T. 80), "Wherefore, defendants pray that plaintiffs take nothing by reason of their complaint." It is perfectly obvious that the proposition of fixing the drain for \$485.56 and nailing or bolting the loose joints for \$500.00 occurred after the answer was filed, after the work was all done, and after the defendants admittedly had refused to do anything even with respect to the \$800.00 but had told the plaintiffs to go ahead and do it. The evidence is so overwhelming that the proposal of Young & Hansen was neither acceptable to the building inspector as it did not comply with the Building Code, nor would it in fact have made the roof safe, that it is no wonder the jury disregarded it.

ERRORS RELIED UPON

1. The Court erred in not having the jury correct its verdict and in not correcting it himself so as to allow us to recover the amounts we actually lost as found by the jury which were less than the amounts that we actually did lose.

2. The Court erred in eliminating item No. 3 of \$1500.00 from the jury's verdict.

ARGUMENT

I. THE PLAINTIFFS WERE ENTITLED TO RECOVER.

In its decision herein, 197 Pac. (2) 125, this Court held that the plaintiffs' complaint stated a cause of action. The evidence established the allegations of the plaintiffs' complaint, and under the evidence the jury found for the plaintiffs. The jury's verdict established: (1) That the roof of the leased premises was not kept in good condition and repair by the defendants; (2) That the defendants failed and refused to keep said roof in good condition and repair; (3) That the defendants knew the roof was not in good condition and repair and failed to put it in good condition and repair; (4) That the plaintiffs adopted reasonable and necessary plans and methods to put the roof in good condition and repair, and that the amount found in item 1 of the verdict was the necessary and reasonable amount required to put the roof in good condition and repair as economically as possible, said amount being \$12,893.83;

and (5) That plaintiffs were damaged otherwise by the acts of the defendants by reason of having to pay rental on the old store in the sum of \$3900.00, and \$3,000.00 attorneys' fees.

The jury's verdict is supported by the testimony which establishes: That the lease was entered into February 19, 1945, but plaintiff had no duty or obligations and no rights thereunder until June 7, 1946; that for the entire term of the lease from February 19, 1945 to May 31, 1956, the lessors had the obligation to keep the roof of the leased premises in good condition and repair; that in January, 1946, the building authorities of Salt Lake City, Utah, notified the defendant James L. White in writing that the roof was not safe and that it must be made safe; that the defendants denied any obligation to make the roof safe or to rectify the conditions objected to by the public authorities of Salt Lake City; that the roof was in fact unsafe in January, 1946, and was not in good condition and repair at that time; that the plaintiffs repeatedly called to the attention of the defendants that the roof was not in good condition and repair in January, 1946, and thereafter, and called upon the defendants to fix the roof; that the defendants failed and refused to do so, although they had at least five months within which to undertake said work; that the plaintiffs thereupon submitted plans and proposals to the public authorities which were accepted and which were Code complying for fixing the roof and did fix the roof in the cheapest and most economical manner; that by reason of the failure and refusal of the defendants

to fix the roof the plaintiffs were damaged in the amounts shown by the verdict. That these amounts were expended and these losses incurred is not disputed and the foregoing evidence is without substantial conflict except that defendants make some argument that they made counter-proposals for fixing the roof on July 8, 1946, a month after plaintiffs should have been in possession of the premises, but the evidence shows that the proposals of the defendants were not acceptable to the public authorities, and defendants in fact did nothing at any time in actually fixing the roof, but did make suggestions that the plaintiffs do so; that defendants expected that the plaintiffs would go ahead and fix the roof. The decision of this Court established:

“The general rule is: In the absence of a covenant on the part of the lessee to repair the leased premises as required by public authority or to make alterations or improvements required by public authority, that obligation falls upon the shoulders of the landlord.” (P. 130.)

There was no such covenant on the part of the lessee, so it was defendants' obligation to comply with the requirements of the public authorities. Not only was there no obligation on the part of the lessee, but, as this Court said:

“The law in this case, we think, is strengthened by the terms of paragraph 8 specifically placing responsibility for the roof on the shoulders of the lessor.” (P. 131.)

This Court also pointed out:

“The lessees alleged that they were unable to get lessors to remedy the situation and therefore did the work themselves. They ask for reimbursement for those expenditures, for damages and attorneys’ fees. The letters from the Salt Lake City Bureau of Mechanical Inspection to lessees’ architect and to one of the lessees, from which we have quoted above, are incorporated as part of the pleadings. The lease is also made part of the pleadings.” (P. 130.)

The lessees proved and the jury found that “they were unable to get the lessors to remedy the situation, and therefore did the work themselves.” The evidence shows and the jury found the amount of lessees’ expenditures, damages and attorneys’ fees, and the jury’s verdict gave reimbursement to the plaintiffs for those items. The letters from the Salt Lake Bureau of Mechanical Inspection are in evidence, and the Superintendent of the Bureau of Mechanical Inspection and the City Inspector testified that the letters were true and that the condition of the roof was even worse than the letters indicated. This Court also said:

“It is to be noted that at no time in either of the letters is there any determination as to when the condition first developed or how long it had existed. The nature of the defect is not such as to indicate the time of its development. Approximately eleven months passed from the time of signing of the lease before any indication came

that there were defects in the roof.” (P. 130-131.)

The evidence shows that Mr. Miles Miller constructed the roof; that while he claims it was Code conforming at the time, he also admitted that it was not Code conforming now. The roof under present day standards is improperly constructed. When it commenced to sag is not known, but obviously it would not improve any with the passing of time. Neither party to the lease inspected the roof or knew of its condition at the time of the signing of the lease. In October of 1945, eight months after the signing of the lease, the defendant James L. White assured the plaintiff that the roof was in excellent shape, and one of his witnesses, B. T. Cannon, testified that at that time, October 1945, the roof was in good condition. Certainly it was not in good condition in the following January. If defendant and his own witness are to be believed, the sagging occurred in the interval. We alleged that in January, 1946, we first learned that the roof was actually dangerous and unsafe, and that it was not in good condition and repair in January, 1946, and became progressively worse so that when we were to take physical possession of the property the roof was unsafe and dangerous to life and limb. We set out the exact defects and then alleged:

“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 said unsafe condition became progressively worse from the date of the lease.*" (Italics added.)

These provisions of our complaint are quoted by this Court on page 131. This Court on the same page says:

"The pleadings obviously refer to conditions after the execution of the lease."

This definitely was established because at the time of the execution of the lease we didn't know anything about the condition of the roof, and our pleadings refer to conditions we discovered after the execution of the lease. This Court then points out that it was only for the last ten years of the lease that we had any obligation, which period would not commence until June 7, 1946, which would be more than five months after the discovery of the unsafe and dangerous conditions by us. The writer of the opinion was inclined to believe that the exception stated in paragraph 6 with regard to our obligations,

"is an exception to 'all improvements, upkeep and repairs of every kind and nature whatsoever, regardless of the extent thereof and whether the same be ordinary or extraordinary,' and would authorize, as an exclusion from this overall duty of the Lessees, the provisions of paragraph 8 (quoted) as to the roof. There is, however, a reason why it is unnecessary to decide this point."

The writer then proceeds to speak for the Court that the lessees' obligation did not mature until after May 31, 1946:

“The condition of the roof of which complaint is made developed prior to that time; and the obligation of correcting it arose prior to that time. With this provision out of the way by reason of its lack of maturity, we have a situation wherein at the time of the discovery of the defect the Lessees had not undertaken repairs or changes incident to any cause. The law we have cited above places the burden as to requirements by building authorities under such circumstances on the shoulders of the Lessor.” (P. 131.)

The Court then rejects defendants' contention that only ordinary repairs were contemplated, and calls attention to the fact that the lease provides that the roof shall be kept in good condition, but that even the word “repair” has a relative meaning.

“There is implicit in the maintenance of any part of a building the purpose for which that part is intended to function. * * * A faulty construction or remodeling of the roof may lead to quicker wearing out, but it doesn't change the meaning of 'repair'.” (P. 131-132.)

This Court thus has already squarely rejected the defendants' arguments (repeated and reasserted in their present brief), and has held squarely that it was the obligation of the defendants to put the roof in good

condition and to comply with the requirements of the public authorities; that at the time the requirements were made we had no obligations; that our obligations, if any, did not mature until months later, and that if we were unable to get lessors to remedy the situation and did the work ourselves, we had a right to reimbursement for those expenditures and for damages and attorneys' fees. This Court concludes:

“We are of the opinion that the demurrer to the complaint should have been overruled.”

We established all the allegations of our complaint. As a matter of fact, it makes no difference when the roof first got out of good condition and repair. The pertinent fact is that the lessors agreed that from February 19, 1945, until May 31, 1956, they would keep the roof in good condition and repair; that in January, 1946, and on June 7, 1946, when we were to take possession the roof was not in good condition and repair; expressly under the lease we had no duty with regard to the roof at either time. The defendants fail to point out whose duty it was to fix the roof in January, 1946. This Court has said it was their duty, and the evidence overwhelmingly establishes that it was not in good condition and repair. Having established all the allegations of our complaint, we have under the decision of this Court established our right to recover.

II. THE TRIAL COURT WAS IN ERROR IN REDUCING
ITEM 2 OF THE VERDICT FROM \$2400.00 TO \$1125.00
AND FROM ELIMINATING ITEM 3 OF \$1500.00 FROM
THE JUDGMENT.

In the complaint we prayed for the total sum of \$24,693.89, (T. 7). We did not segregate the damage but asked for that amount which included all damages and attorneys' fees. For the sake of convenience we itemized these damages in Exhibit "D-1" to show that the actual cost of the roof was \$13,477.89, and the actual damage to us by having to pay rent on the old store when we should have been in the new store was \$5,481.84, consisting of rental paid while still occupying the premises of 3 months base rental of \$1125.00 plus \$2856.84 percentage rental, and \$1500.00 base rental for the 4 months we had to pay after we vacated, and that the attorneys' fees were \$3,000.00. There was no legal principle that required us thus to separately state these damages. Those items all come under the same rule of damages, and they were set up thusly merely for convenience in understanding of what they consisted. The fact that the court segregated them in the verdict to the jury in the same manner we had listed them in the Exhibit "D-1", which was only for the purpose of itemization and distinguishing the various periods, does not change the rule of law which was correctly announced by the court in instruction No. 14, (T. 154), that if we were prevented from occupying the store and by reason thereof were compelled to pay monthly and excess percentage rent and lost an opportunity to sublease the

store, we should be allowed such damages as naturally and directly flowed from the breach of their covenant by the defendants. The Court also directed the jury that such damages also must be such as the parties would reasonably have contemplated, if, at the time the lease was made, their attention had been called to the natural and direct consequences of such a breach of such covenant of the lease. This latter instruction put more of a burden on us than proper, but the jury found for us anyway. In the form of verdict the court segregated the damages in accordance with the itemization of Exhibit "D-1". In instruction No. 14 the court also segregated the items, but while there are three segregations, (items 2, 3 and 4), there are only two sums to be accounted for—(1) the monthly rental for the old store actually paid in base and excess percentage rental while we were in occupation, and (2) for rental for 4 months when we were not in occupation and which we paid. We were unable to sublease because we couldn't put the subtenants into possession timely. The rent actually paid while in occupation is covered by items 2 and 4 of the verdict. The rent while we were not in occupation is item 3 of the verdict. The jury returned a verdict for \$2,400.00 under item No. 2 of the verdict "with respect to additional monthly rental on the old store we render our verdict in favor of the plaintiffs and against the defendants in the sum of \$2,400.00", as distinguished from item 3 of \$1500.00 "with respect to loss of rental and loss of opportunity to sub-lease the old store." The only period we could sublease was the

four months we were not in occupation. It is quite obvious that the jury intended to allow us under item 2 more than merely the base rental of \$375.00 a month for August, September and October, and that the difference between \$1125.00 base rental for those months and \$2400.00, to-wit, \$1,275.00, was the jury's idea of how much of the percentage rentals we should be allowed to recover because after allowing us the \$2,400.00 in item No. 2, which is in excess of the base rentals of \$375.00 a month, they allowed us nothing for the percentage rentals. This was perfectly proper under the evidence because we actually did pay \$2,400.00, to-wit, \$3,981.84, additional monthly rental on the old store while we were in actual occupation. By allowing us the \$2,400.00 in item No. 2 and not allowing us anything in item No. 4 the jury indicated and returned a verdict in our favor for that amount as distinguished from our damages by reason of our inability to sublease the premises for the months of November, December, January and February, at \$375.00 a month, when we were not in occupation, which sum they allowed us in item No. 3 of the verdict in the sum of \$1500.00.

We contend, therefore, that it was the duty of the trial court when the jury brought in the verdict in the manner they did to have segregated the amounts himself if that was desireable, although such a segregation was not necessary. Whether the rental was paid as a base rental or as a percentage rental, it was all for the same period and is recoverable under the same rule of damages. The court had the right, if such a segrega-

tion was necessary, which it was not, or desirable, which it may have been in view of the itemization in Exhibit "D-1" and in the verdict, either to have the jury make the segregation or to have done so himself. There is no rule of law that makes the percentage rentals paid by us any different than the base rentals we paid during the same period. They were all rents actually paid by us which we should not have been required to pay, and the only reason for the segregation is that during the months we were in occupation part of our rent had to be paid on a percentage basis, and when we were not in occupation, the percentage basis was not applicable because there were no sales upon which to base it. The base rental, however, went on even though we were not in occupation, and the same rule of law, also, allows recovery for the rent that we actually and necessarily paid even though we were not in occupation of the premises. We finally were released from the Snell lease on the old premises March 31, 1947, and we paid the rent for March, 1947, but we did not ask for that month's rent from the defendants. The rent that we paid for the month of March in the sum of \$375.00 is just as recoverable as any of the other amounts, but since we did not ask for it, of course, we are making no claim for it now. We do, however, respectfully insist that since the jury allowed us \$2,400.00 for rent we actually paid while occupying the old premises and that amount is less than the amount we actually paid while we were in such occupancy, the court was wrong in reducing that sum from \$2400.00 to \$1125.00, and that the jury's

finding on item No. 4 that we should recover nothing for the percentage rentals was clearly by reason of the fact that they had already allowed us \$2,400.00 as reimbursement for the rent while we were actually in the store, as distinguished between the period covered by item No. 3 of \$1500.00 for the four months that we were not in possession. As stated, the jury found that we sustained total damages in the sum of \$3900.00 for rental on the old store (items 2 and 3 of the verdict) which is well within the proof which shows that our actual damage was \$5,481.84. The same rule of damages applies to both items. Merely because the court segregated them in the verdict should not deprive us of the amount of damage the jury found we actually sustained by having to pay rent on the old store by reason of the defendants' breach of its lease covenants.

The rule with reference to damages goes back as far as *Hadley vs. Baxendale*, when the English Court, 9 Ex. 341, in 1854 handed down an opinion which ever since has furnished the general standard by which English speaking courts all over the world have tested claims for damages for breach of contract. In that case the Court said:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or

such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.”

It is apparent from the rule that the consequences may have been foreseeable because they would occur in the natural course of events or because, though unusual, the defendants knew of special facts making them probable. The Restatement on Contracts, Section 330, states the rule as follows:

“In awarding damages, compensation is given, for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it. Otherwise, it must be shown specifically that the defendant had

reason to know the facts and to foresee the injury.”

We have already shown that Mr. Wolfe testified that before the lease was signed Mr. White was familiar with the terms of his lease on the Snell property; that it was on a flat base plus a percentage rental; that Exhibit “W-W” is a continuation of the lease that Mr. Wolfe had at the time the lease in question was signed. The question then is: Is the injury, the payment of rent under the Snell lease, — one that “may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probably result of the breach of it”, or, under the language of the Restatement, is “the injury one that follows the breach in the usual course of events?” If it does, “there is sufficient reason for the defendant to foresee it.” The jury’s verdict answers each question affirmatively.

The defendants knew that plaintiffs would be required to pay rent on the Snell property, and certainly anyone would know that if the plaintiffs continued to occupy the Snell premises, they would have to pay rent for them. The plaintiffs could have been in their new premises by August 1, and by reason of the defendants’ failure to fulfill the terms of their lease the defendants couldn’t get into their new premises until November 7,

so certainly those damages which the jury assessed of \$2,400.00 unquestionably followed the breach in the usual course of events. Did the injury, payment of additional rental for November, December, January and February, when the plaintiffs were not in possession of the old premises but when they had to pay rent under their lease and when they could have subleased had they been able to vacate in time, follow the breach in the usual course of events, or may the injury fairly and reasonably be considered as arising naturally from the breach, or is the injury such as may reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it? Should the defendant with the knowledge he had have reasonably expected that the plaintiffs would have to pay rent on the old premises even after they vacated? Certainly anyone would know that when the plaintiffs couldn't occupy their new premises on time they would have to make arrangements with their old landlord to stay where they were, and certainly it naturally follows and is reasonably to be supposed that the old landlord would want some assurance of continuity and duration of the tenancy in order to allow the plaintiffs to continue in their possession of the old premises. The defendant James L. White himself conceded that he assumed that Mr. Wolfe would have to keep paying rent whatever was charged to him on the old premises, (T. 851), that if he couldn't get into the new place, he would have to pay rent there, that it was possible to re-rent the old

premises after you leave them, and that it would be very difficult to secure a lease for a short term. "When you have only a short term, it is very difficult to get anyone to go into business. * * * Nobody will go in business on a year's lease." (T. 849, 850). Mr. White also admitted that he wouldn't give a lease on such property for a short term so certainly he could anticipate that Mr. Wolfe could not continue to occupy his old premises without giving the Snell Estate a suitable lease, which according to Mr. White himself would have to be longer than one year. Exhibit "W-W" indicates that the lease actually ran until December 31, 1947. Mr. Wolfe was able to terminate it March 31, 1947, nine months before its expiration date, and certainly the defendants should be required to pay for the months of November, December, January and February, the rental Mr. Wolfe had to pay when he could have subleased and avoided the payment had it not been for the breach of their lease by the defendants.

The court instructed the jury, as we have already shown, that we could only recover this excess rent if the jury believed that such damage "naturally and directly flowed from such breach of the covenant by the defendants, *and* which the parties would reasonably have contemplated, if, at the time the lease was made, their attention had been called to the natural and direct consequences of such a breach of such covenant of the lease." (T. 154). This instruction of the court required the Jury, in order to allow us for these items, to find more than is required under the authorities, as we have

shown. The court used the word "and" such as would have been in contemplation of the parties; whereas, the authorities use the word "or"; that is, the authorities, as we have shown, say that if the injury arises in the natural course of events from the breach *or* is such as may be reasonably supposed to have been in the contemplation of the parties, there is a recovery. The court required the jury to find both circumstances to exist in order to return a verdict in our favor, and the jury did so find. The jury's verdict is right for the obligation to pay rent on property we were forced to lease in order to occupy it when we should have been in our new premises is an obligation that arises naturally and in the usual course of events from our inability to occupy our new premises due to the defendants' breach of the lease.

The trial court was wrong in striking item No. 3, the \$1500.00, for the months of November and December, 1946, and January and February, 1947, in the face of the jury's verdict, and was also wrong in reducing item No. 2, the actual rental we paid while we were in possession and which clearly the jury intended to allow us as damage for the payment of rent when we were in possession and which is less than the amount we actually did pay.

The court had the alternative when the verdict was handed in of having the jury right then and there alter or rearrange the verdict, or of doing so himself, as to the \$2400.00 item. If the court felt that the verdict was

not responsive to his instructions, the court should have directed the jury then and there to make the changes and alterations. The court had no right to substitute his judgment for that of the jury as to the amount of damage we were entitled to recover under the item of rent on the old premises during our actual occupancy of them. 53 Am. Jur., Sec. 1099, page 762, cites the rule which is so elementary as to require no citation, as follows:

“The principle is general that when a jury return an informal, insensible, or a repugnant verdict, *or one that is not responsive to the issues submitted or is in disregard of the instructions of the court*, they may be directed by the court to reconsider it and bring in a proper verdict, provided the verdict is returned before a judge present when the case was tried. This may be done with or without the consent of counsel *and should be done whether requested or not*. This principle has been applied to corrections by the jury as to damages, parties, * * *, etc. The practice is really only an application of the settled rule that until the verdict has been recorded, or the jury have been discharged as unable to agree, their connection with the case has not come to an end.” (Italics added.)

The court waited until three days after the verdict had been received to change it which he did June 6 on the margin of the judgment, (T. 166).

If the court did not desire to have the jury rearrange its verdict in accordance with the instructions, the court should have done so himself. We had asked

for damages for rental we paid out while in possession of the premises concerning which there could be no possible question as to such damages reasonably and naturally flowing from the breach. The court divided these damages into the base rental and the percentage rental, although they all come under the same category. When the jury found that we were entitled to \$2,400.00 for the rental we actually paid while still in the possession of the old premises, if the court felt that the artificial segregation should still be made, he had the right to do that. This rule is also elementary. 53 Am. Jur., Section 1094, page 758, says:

“A verdict in a civil case which is defective or erroneous as to a mere matter of form not affecting the merits or rights of the parties may be amended by the court to conform it to the issues and to give effect to what the jury unmistakably found. In fact, it is the duty of the judge to look after its form and substance, so as to prevent a doubtful or insufficient finding from passing into the records of the court, *and every reasonable construction should be adopted for the purpose of working the verdict into form so as to make it serve.*” (Italics added.)

The defendants themselves led the court into the error on this matter of damages, particularly in striking item 3, the \$1500.00 from the judgment. We called the court's attention to the fact that in our complaint and in our bill of particulars we had specifically asked for these damages and that we had raised that question in our briefs in this Court and that this Court had already

called attention to the fact that our complaint asked for reimbursement for these damages and that this Court had already said that our complaint stated a cause of action. The defendants, however, were able to lead the court into the error committed. They filed a memorandum brief in which they cited *Globe Refining Company vs. Landa Cotton Oil Company*, 190 U.S. 540, 47 L. Ed. 1171, and we called the Court's attention to the fact that despite this case, *Hadley vs. Baxendale* has been generally adopted except in some of the Federal cases. We called the Court's attention to the fact that Williston in his 1938 edition, Sections 1344, 1344 (a), 1356 and 1357 points out that the acceptance of *Hadley vs. Baxendale* is well nigh universally followed by all of the courts. Williston points out that if the damages follow in the natural course of events, they are presumed to be foreseeable. The jury found that all of these damages for rent followed in the natural course of events and also found that they were such as should reasonably have been in contemplation of the parties.

McCormick in his Handbook on Damages (Hornbook Series) says that the modern tendency is to liberalize the application of *Hadley vs. Baxendale*:

"Our rules should sanction, as our actual practice probably does, the award of consequential damages against one who deliberately and wantonly breaks faith, regardless of the foreseeability of the loss when the contract was made. We shall then have completed the process, begun piecemeal in *Hadley vs. Baxendale*, of borrowing

from the French Civil Code its theory of damages in contract.” (Sec. 141, p. 581.)

That the defendants deliberately, wantonly and intentionally violated their contract in the case at bar is obvious. Williston, *supra*, cites the law the same as McCormick as above indicated.

ATTORNEYS' FEES IN THIS COURT

The jury awarded plaintiffs' attorneys \$3,000.00 for services up to and including the termination of the trial, but no award was made, of course, for any further services on this appeal. The lease provides, paragraph 17, page 129 of this Court's decision, for the payment of reasonable attorneys' fees. We call this to the Court's attention in order that this Court will have that question in mind when it considers this case, and we respectfully request this Court to make an award of attorneys' fees for this appeal in such amount as the Court deems reasonable. In this connection may we say that we have been required by reason of this appeal and by reason of the method by which the defendants and appellants have presented their appeal, to read the entire transcript of the evidence, most of the pleadings, and all of the instructions of the court, and to make a rather complete index of the testimony. We have also, of course, been required to read the defendants' brief and cases cited and then re-examine their brief on the other appeal as well as our own brief in order to present this case in its true light to this Court, and we have

been compelled to write a complete statement of facts in our own brief and answer the defendants' at considerable length in order to present to this Court the case as it actually exists. It also appears to us that there is absolutely no basis for this appeal; that it is completely without merit, and it also appears to us that the defendants' unfortunate influence on the trial court deprived us of \$2775.00 awarded us by the jury, thus making it necessary for us to present that matter to this Court. The actual time involved in the foregoing, including the work of revising, proof-reading and indexing the brief, aside from any oral argument to this Court, has consumed at least 21 days of actual time including Saturdays full time, and for this appeal in view of all circumstances we feel that a reasonable fee to be allowed us is \$2500.00.

THIS COURT SHOULD CORRECT VERDICT AND
AWARD ATTORNEY'S FEES

This Court should either correct the judgement and reinstate the verdict as it was rendered or should direct the trial court to do so. The jury's verdict has been rendered. It is within the issues and sustained by the evidence. We definitely are not contending and are not asking for a reversal of this case. We do not desire a reversal. The verdict of the jury finding the issues in our favor should stand and be affirmed as it was rendered. We wish to state very definitely that we do not assert that the error of the trial court with respect to altering the jury's verdict is reversible error and the

case should not be reversed for that reason. The verdict can be restored as it was rendered, and we respectfully request this Court either to do so or to direct the trial court to do so. There is no request for nor is there any necessity for another trial because of this error. We, therefore, respectfully submit that the only error committed in this case was the error of the trial court in altering the jury's verdict and eliminating therefrom the damages awarded by the jury; that this should be corrected and the judgement affirmed with this correction. We also respectfully request this Court to award the attorneys' fees as provided for in the lease.

We come now to a

REVIEW OF BRIEF OF APPELLANTS AND DEFENDANTS

The opening statement on page 1 of appellants' brief does not define the question involved in this case. Defendants' contention has already been rejected by this Court. Since appellants' brief on this appeal is based and built upon this statement, all that follows in the brief is likewise wrong and irrelevant in this case.

The aforesaid opening statement is as follows:

“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.”

There was no unqualified acceptance of these premises and there was no covenant merely to keep them as they were.

This Court in its opinion, page 126, said:

“The issue involved is this: Was it the obligation of the lessors, or the obligation of the lessees, under the terms of the following written lease, to remedy a condition of the roof of the leased premises characterized by the Salt Lake City building authorities as unsafe.”

The Court then quotes the letters of the building authorities with reference to the roof declaring it to be unsafe and requiring it to be made safe, and then quotes the lease in full. Paragraphs 6 and 8 of the lease we have already quoted.

Appellants in their present brief continue to ignore as they did in their former brief, and as they have from the beginning of this controversy, the express language of paragraph 8, and continue to discuss the said paragraph as though it only required them to keep the roof in repair. They ignore their obligation to keep the roof in good condition. For 15 months after the acceptance of the premises by us, which was only upon the limitations provided for in paragraph 8, the defendants had the duty to keep the roof in good condition and repair. We accepted the premises only upon this covenant on the

part of the defendants, which was also a representation to us that at the time of our acceptance the roof was in good condition and repair. There was no unqualified acceptance by us of the roof, nor is there involved in this case any *implied* covenant upon which we base our rights against the defendants. If at the time we were to take possession, some 15 months after the execution of the lease, the roof was not in good condition, then the defendants had not fulfilled or complied with the express covenant of the lease, and if the roof was then in bad condition, it was the defendants' duty to place it or put it in good condition. These matters were all presented to and decided by this Court. This Court, page 130, said:

“Let us consider the present lease. Paragraph 6 says that the Lessees ‘accept said premises in the condition and state of repair they are now in.’ According to the briefs of the parties the lower court seemed to lay considerable stress upon this provision. But what about paragraph 8 which provides that ‘For the entire term of this lease the Lessors shall have the obligation to keep the roof of the leased premises in good condition and repair * * *.’ If it may be properly inferred from the first quotation—the one from paragraph 6—that the Lessors would not be responsible for a roof in bad condition at the time of the execution of the lease then we have a situation wherein the inferences of that quotation are in conflict with those of the declaration of the second quotation—from paragraph 8—as the Lessors were, during the entire term of the lease and under the second quotation, to keep the roof in good condition, *which*

implies that at the time of the lease it was in good condition, otherwise the Lessors would not have agreed to keep it in that condition. (Italics added.) 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 on the shoulders of the Lessors.”

This Court then points out, page 131, that our obligation to make improvements other than the store front did not accrue until May 31, 1946; that the condition of the roof complained of developed prior to that time,

“and the obligation of correcting it arose prior to that time. * * * The law we have cited above places the burden as to requirements by building authorities under such circumstances on the shoulders of the Lessor. The law in this case, we think, is strengthened by the terms of paragraph 8 specifically placing responsibility for the roof on the shoulders of the Lessor.

“The suggestion of the Lessors that only ordinary repairs were contemplated by paragraph 8—that structural changes were not contemplated, would be stronger if the word ‘repair’ was the only word used in paragraph 8 as descriptive of the Lessors’ duties. ‘Good condition’ we discussed above. Even the word ‘repair’ however has a relative meaning. There is implicit in the maintenance of any part of a building the purpose for which that part is intended to function. * * * A faulty construction or remodeling of the roof may lead to quicker wearing out, but it doesn’t change the meaning of ‘repair’.”

This Court on page 130 called attention to the fact that we allege that we could not get the defendants to remedy the situation and therefore did the work ourselves and asked for reimbursement for our expenditures, damages and attorneys' fees. There is thus implicit in the ruling of this Court reversing the lower court at the former hearing the recognized rule that if defendants failed to perform their duty, we had the right to do so and recover our expenditures for so doing. The defendants in the present appeal have neither presented nor argued the question of damages nor the question of our right to do what we did. Their present appeal is based solely, as was their former one, upon the proposition that they had no obligation to do anything with reference to the roof. They do not claim as, of course, they cannot, that they even undertook to make "repairs" to the roof. Their position is the same now as it has always been — that they had no obligation or duty. They also infer that the roof was safe regardless of the facts and the requirements of the public authorities. They make no pretense that they did anything with reference to the roof after the matter was called to their attention by the public authorities, our architect, and by us. Their whole argument continues to be that they had no duty and so they did nothing. Since this Court has already determined that they did have a duty to act, and the evidence, conclusively establishes that they did nothing, they have raised no relevant points on this appeal.

It is true that in the present appeal the defendants and appellants devote some 6 pages to what they call their point III, "Appellants' right to support the roof should have been submitted". This argument is a pure afterthought and subterfuge since appellants never at any time attempted to exercise their so-called "right to support the roof."

It thus appearing that defendants "Statement" of the question involved, on page 1 of their brief, is not the issue here, as has already been decided by this Court, we shall proceed as expeditiously as possible to review the remainder of their brief which really is nothing more than a second petition for re-hearing of the former case.

DEFENDANTS "HISTORY OF LITIGATION"

Under this heading defendants argue that in our amended complaint we set forth that the roof conditions became worse after the lease was entered into. At other places in their brief they argue that our case was based upon a change in the condition of the roof after the lease was entered into, and that there is no evidence of a change, and consequently we cannot recover, pages 4, et. seq. The quotation they themselves give from our complaint on page 4 of their brief shows that we alleged "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." One of the defendants himself as late as October 9, 1945, eight months after the lease was entered

into, advised us that he had had the roof fixed and "that the roof is now in excellent shape," Exhibit "H." The defendants also offered evidence by O. C. Nielson, (T. 781) that in 1937 a new covering was put on the roof, and by B. T. Cannon, a roofing contractor, (T. 785), that in October, 1945, he went over the roof and examined it and that it was in good condition. If this letter of the defendant and the evidence of Mr. Cannon are true, then, of course, it follows that the condition found by the public authorities of Salt Lake City and the plaintiffs' architect and contractor occurred after October, 1945, which was eight months after the lease was entered into. As a matter of fact, neither the plaintiff nor the defendant made any examination of the roof, neither one of them thought that the city would declare the roof to be unsafe, and neither one of them knew anything about the roof at the time the lease was entered into, (T. 859). We have already sufficiently discussed this matter heretofore in our brief and will not repeat here.

Defendants attempt to avoid the effect of the opinion of this Court concerning the duty of complying with the requirements of public authorities, and on page 5, say:

"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."

In other words, defendants assert that the trial court overuled this Court so what this Court said in its opinion is of no present importance. It is true the trial court did give an instruction that "The responsibility of the defendants to the plaintiffs is 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, as defined in these instructions", (T. 149). We excepted to this instruction because we believed and still believe, as this Court held in its opinion, that the defendants did have a duty to satisfy the public authorities with reference to this roof. The opinions of the city authorities are still very much in this case. Be that as it may, it is difficult to see how the defendants are aided by an erroneous instruction that was favorable to them. In the same instruction the trial court did, however, say that the defendants' obligation was to be determined by the terms of the lease, and in the next instruction, (T. 150), told the jury that we were not required to accept or adopt plans or proposals with reference to the roof that were not acceptable to Salt Lake City building authorities, and plaintiffs were not required to enter into any controversy or dispute with the Salt Lake City building authorities with respect to the repair to the roof. This correctly states the law, and if we may digress a moment, it also reflects the lack of merit in defendants' point III.

Not only did defendants make no effort to fix the roof, but their representatives, Miles Miller and Young & Hansen, insisted that the public authorities were wrong and that the roof was all right; that even if it wasn't all right it could be fixed for about \$800.00 by a method which was rejected by the public authorities, Exhibits 1, "P" and "Q". The defendants never made any application to the public authorities for a permit to fix the roof, and the only suggestion that they ever made was the letter of Young & Hansen that there was nothing wrong with the roof, but that it could be strengthened by extending the trusses through the skylights at an expense of \$800.00. This letter of Young & Hansen was never submitted to plaintiffs until July 8, 1946, more than a month after plaintiffs should have been in the premises, and the proposal was not accepted by the building inspector, Exhibit "Q". The court did, however, tell the jury that before we could recover we had to prove that the roof was not in good condition and repair; that the defendants had notice thereof and failed for a reasonable time to place the roof in good condition and repair, (T. 146).

The defendants do not specifically object to any of the instructions of the court in their "Errors Relied Upon", pages 27 and 28. The objection they make is that they were not liable at all and consequently the court should have directed a verdict, and that the form of verdict was erroneous as it invited the assessment of damages against the defendants, although the court specifically told the jury, (T. 157), that the jury was

to disregard any instruction with reference to damages unless they felt that the plaintiff should recover.

Returning now to their brief after these digressions. The trial court instead of allowing us to rely upon the requirements of the public authorities, required us also to establish to the satisfaction of the jury that the roof in fact was not in good condition and repair when we were to assume our tenancy, June 7, 1946. The trial court could not and did not remove from the case the requirements of the public authorities of Salt Lake City, and even though the instruction was more favorable to the defendants than they were entitled to, the requirements of the public authorities are not only still in the case but are relevant and moving factors that made it obligatory for the defendants to take some action with reference to the roof or else respond in damages for the losses we sustained by reason of their dereliction.

The defendants assume that this Court based its opinion upon our allegation of "change in conditions after the lease was entered into". There is not now and never was any relevancy as to when the roof became in bad condition. If at any time during "the entire term of the lease" the roof was not in good condition and repair, it was the duty of the defendants to fix it. At this point may we remark that we are unable to follow the defendants in their attempt to make a distinction between keeping the roof in good condition and repair and putting the roof or placing the roof in good

condition and repair. If at any time during the lease the roof was not in good condition and repair, the only way that defect could be remedied would be to put it in good condition or place it in good condition. If the thing becomes out of condition or out of repair and is kept that way, it is not kept in good condition and repair, and it, therefore, can only be kept in good condition and repair if it is then placed or put in good condition and repair. The truth of the matter is, defendants are still insisting that they had no obligation with reference to the roof; that because we accepted the premises in the condition they were in, it was not their obligation to comply with the requirements of the public authorities. This is not only contrary to the general law, the opinion of this court, but also contrary to the express terms of the lease. We had no duty with reference to the premises until the last ten years of the lease, which period did not commence until May 31, 1946, at the earliest. The bad condition complained of was in existence long before this and was present during the period when the defendants had agreed that the roof would be kept in good condition and repair. They didn't keep it in good condition and repair, and consequently the only way that it could be rectified was to put it in good condition. We are sorry we have to reiterate these matters, but the defendants' entire brief is so replete and honeycombed with their fallacies and rejected theories that we encounter them on nearly every page.

On page 6 defendants assert that the trial went upon the theory that all that was before the jury in this case was the question of damages. This statement is pure fiction. The defendants themselves have already shown, argued and pointed out that the trial court took out of the case our right to rely upon the public authorities and we were required to prove by a preponderance of the evidence that the roof in fact was not in good condition and repair prior to June 7, 1946.

DEFENDANTS' "STATEMENT OF FACTS"

Under their statement of facts defendants themselves call attention to the fact that defendant James White and their witness, B. T. Cannon, in October, 1945, asserted that the roof was in good condition. They also in their statement of facts call attention to correspondence, disclosed by the exhibits we have heretofore specifically discussed, between Mr. Wolfe and Mr. White, the public authorities, plaintiffs' architect, Mr. Paulson, all showing that as early as January, 1946, the defendants knew that the building authorities of Salt Lake City insisted that the roof was unsafe and that it must be fixed or that occupancy later than the summer of 1946 would be denied, and that the defendant James White insisted that it was not his obligation and that he did nothing. The defendants attempt to give the impression that because the plaintiff Mr. Wolfe was trying to make these premises "the show place of the West", he had determined to remove the interior posts so as to make a clear span roof at the expense of the defend-

ants. Actually, the Exhibits 2, 6, 7, "B" to "M" inclusive, show that for months Mr. Wolfe was trying to get Mr. White to fix the roof any way that would make it safe; that Mr. White not only refused but denied his obligation to do so. When the clear span roof was put on, the cost of a clear span roof in excess of a roof which would use the interior posts, was eliminated from the cost of the roof, Exhibit "D"-1, and a roof was constructed in the cheapest and most economical way that could be done. The defendants say on page 18 that Mr. White told Mr. Paulson (plaintiffs' architect) "to go ahead on this proposal", that is the proposal to truss in the skylights. Not only does Mr. Paulson deny this, but it is clearly shown by Exhibit "Q", Mr. Nelson, Mr. Gerald Cannon and Mr. Paulson, that this method of fixing the roof would not correct the unsafe condition of the roof nor would it meet the approval of the building inspector. Appellants' statement of facts, page 23, says that Mr. Paulson drew a blue print, Exhibit "P", which did not support the plan of their architects, Young & Hansen, because "it did not show the joists running through the skylight from girder to wall" as Young & Hansen suggested. The blue print in both Exhibit "P" and Exhibit 1 in plain and unequivocal language states: "Frame through present skylights with same spacing and same trusses as adjoining". The Young & Hansen letter, Exhibit 1 and Exhibit "P", says: "If the skylights are to be eliminated, we suggest the same designed trusses and rafters used throughout be placed thru these openings." That is

exactly what Mr. Paulson did in his diagram, and the building inspector wouldn't accept it. Defendants say on page 24, that naturally the building inspector would not accept the plan based on the proposals of Young & Hansen, and that we didn't advise Mr. White that the application had been made or questioned. The building inspector testified that he told Mr. White the plans were not acceptable, and Mr. White in Exhibit "VV" says, himself, that on July 11, he knew about the applications, and that on that day the Building Inspector read him Exhibit "Q", the letter of refusal. While appellants complain that we did nothing, the question naturally arises, why did they not do something? It was their duty, not ours. The letter from their architects was not even submitted to us until a month after we should have been in, although Mr. White had known for more than six months what was required to be done. Appellants make it clear on page 25 that all of this talk that precedes that page is mere camouflage. They make this statement: "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."

DEFENDANTS' "ERRORS RELIED UPON" AND "POINTS DISCUSSED", PARTICULARLY POINT III.

Defendants clearly indicate that regardless of what this Court has said, that because we accepted the premises they had no further duty, and that to keep

in repair does not mean to put in repair. These points have already been decided by this Court and sufficiently discussed by our brief herein. They add a point III, that 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. We confess we do not know what it means to support the roof as it was. They made no effort to do anything.

They complain, page 63, that the court did not give their instructions No. 13, (T. 130) and 18, (T. 135). With reference to instruction No. 13, (T. 130), the court did instruct the jury, as we have heretofore indicated, that before we could recover we had to show that defendants had notice thereof and a reasonable opportunity to place the same in a state of good condition and repair, and that they failed and refused to do so. By their verdict the jury found all these things. Defendants' requested instruction attempted to invade the province of the jury by stating that in no event would they be liable for the expense of constructing a new roof. Defendants' requested instruction No. 13 is contrary to the decision of this Court. It was not the measure of the defendants' liability merely to keep the old roof in the condition and state of repair it was in when the premises were accepted by the plaintiffs. Defendants' requested instruction No. 18, (T. 135), the court did give in substance in its instruction No. 4, (T. 144), and No. 9, (T. 149). The court had already pointed out in

instruction No. 4 "The burden of proof is also upon the plaintiff to prove by a preponderance of the evidence the costs and expenses reasonably incurred in putting the said roof in good condition and repair." We could not recover, the court says, unless the roof structure was unsafe, and responsibility of the defendants was not to be determined by any act or finding of the building inspector. The defendants' discussion under point III argues that the inadequate drain could have been met by the expenditure of \$485.56, (they were only charged \$55.72, Ex. "BB"), the trussing of the skylights \$800.00, and by nailing of loose joints for not to exceed \$500.00. If the jury had believed that the expenditure of these items were all that was required to put the roof in good condition and repair, they under the instructions of the court would have found only in that amount. The defendants do not point to any other instructions except the two we have referred to—one of which is wrong, and the other of which was embodied, some of it erroneously, in the instructions the court did give the jury. The jury had before it all of their testimony with reference to the amounts they claimed would have fixed the roof which the jury did not believe as is apparent from its verdict. Under this point III the defendants object to the form of verdict, (T. 165), at page 65 of their brief. The court had already instructed the jury with reference to the question of damages, (T. 154), and by the form of the verdict the jury were given the right and option to find, if they so desired, that the amounts contended for by the defend-

ants at pages 64 and 65 of their brief were adequate to fix the roof, but obviously the jury didn't believe the defendants' witnesses on these points, nor is that difficult to understand when the testimony of those witnesses is considered, as we have already pointed out. With respect to sub-divisions 2, 3 and 4 of the verdict the court expressly instructed the jury that they could only find damages that naturally and directly flowed from the breach and which reasonably would have been in contemplation of the parties at the time the lease was entered into if their attention had been called to such a breach, (T. 154). It does not follow that had the jury believed that the roof could be fixed for the amounts contended by the defendants the jury would not have made a finding in favor of the plaintiffs on 2, 3 and 4 of the verdict. The evidence would amply have supported the verdict on these items even had the jury fixed the cost of repairing the roof at \$1785.56, the figures set forth by the defendants. There never was any offer or attempt on the part of the defendants to fix the roof at all let alone expend \$1785.56 for that purpose. Even could the roof have been fixed for that amount, which it could not, and the jury obviously so found, defendants never at any time offered to do so, and consequently the jury were entitled to find for the plaintiffs on sub-divisions 2, 3 and 4 of the verdict regardless of the amount of money it took to fix the roof. Under their point III defendants contend at page 66 that several instructions negative their theory. The

instructions complained of, (T. 140), merely stated the contentions of the plaintiffs and the defendants including the defendants' contention that the roof could be fixed not for \$1785.56 but for \$800.00, and (T. 145, 146, 147, 152, 153, 154), state the law as announced by this Court on the former appeal.

Defendants presented fully to the jury their claim that the roof could be fixed for \$1785.56, and the court instructed the jury that in the event they determined we were entitled to recover we could only recover for work which was reasonably necessary to put the roof in good condition, (T. 148), and that we were required to use the most efficient and economical means possible and practicable under the circumstances, and that the defendants were under no liability to pay anything more than the actual and necessary costs of so placing the roof in good condition and repair, (T. 151), and we could also only recover such damages as directly and naturally flowed from the breach and would reasonably have been in contemplation of the parties at the time the lease was made if their attention had been called to such consequences as a result of the breach, (T. 154). The defendants asked the court to instruct the jury on theories in conflict with the decision of this Court. The court did instruct the jury fully, adequately and correctly, and in fact by instruction No. 9, (T. 149), and 14 (T. 154), gave the defendants more favorable instructions than they were entitled to.

POINTS I AND II OF DEFENDANTS' BRIEF

Defendants' argument on points I and II, pages 29 to 63 of their brief, is only a reargument of the position they heretofore took in this Court and which this Court rejected. The argument at page 29 of their present brief that "a covenant of acceptance of the existing condition is binding" we have sufficiently discussed. That statement does not state the question involved in this case at all. Defendants do, however, point out that the plaintiffs spent \$55,000.00 on their building, page 30, which when added to the rental provided for in the lease would, if made in monthly payments, make the defendants' rental for the last ten years of the lease some \$1058.00 every month. Defendants say that it is common knowledge that their tax bill will go up annually \$3,000.00 because of the improvements we made. Defendants required, paragraph 3 of the lease, that we spend at least \$10,000.00 and such additional amount as was necessary to make permanent improvements including the installment of a first-class store front. They contemplated and required us to spend money on their property. So we do not see the pertinency of their statement that their tax bill was increased \$3,000.00 annually, even though there is no evidence to support such an assertion. They state that "such a choice should not have been forced upon them, in any part, by judicial legislation." Nothing was forced upon the defendants except the compliance with the lease which they wrote.

That defendants have merely copied their former brief on the former appeal is apparent. While they have cited additional cases in this brief and have left out others which they heretofore cited and which were demonstrably inapplicable, their argument is the same, and, in fact, in many instances their wording is identical. For instance, in the present brief (P. 59) they again cite *Cadman vs. Hy-Grade Food Products Corporation*, 33 N.E. (2) 759. Not only is the citation wrong, as we pointed out in our former brief, but the name of the case is wrong. The case is *Codman vs. Hy-Grade Food Products Corporation* and it is found in 3 N.E. (2) 759. They haven't even taken the trouble to correct their former erroneous citation. That case holds in line with the decision of this Court on the former appeal that "there is implicit in the maintenance of any part of the building the purpose for which that part is intended to function", page 131. The Court in the Codman case also says:

"The phrases 'in good tenable repair' and in 'good condition' appearing in such lease do not have a fixed or technical meaning which is always the same regardless of the character or use of the building to which they refer."

That Court also said it should be taken into consideration "the use to which the building is to be put and the character of business there to be carried on." When we consider that in the case at bar the plaintiffs were required by the defendants to expend a large amount of money to put in a first-class store front; that the

lease expressly provides that the premises are to be used for a mercantile business, and that the defendants in keeping with that character of expenditure and that character of business would for the entire term keep the roof in good condition and repair, we have no difficulty in concluding as this Court has already concluded that the condition complained about by the public authorities and which actually existed was a condition that the defendants under the lease were required to rectify.

As further evidence that the defendants are merely repeating their former arguments it is interesting to note that the reference to the *Codman* case, *supra*, and the discussion of that case contained at pages 59 and 60, including the first paragraph of page 61, are copied word for word from the defendants' former brief in this case on pages 14, 15 and 16.

Turning to the index of cases in defendants' brief herein we find that the case of *Dwight vs. Ludlow Mfg. Co.*, 128 Mass. 280, is cited at page 41 of their present brief in the identical language used by them at page 21 of their former brief. This case, as we heretofore pointed out at page 23 of our reply brief, is actually an authority in our favor. According to Mr. Miller, defendants' witness and the architect who constructed the roof as it existed at the time the lease was entered into, that original roof met the requirements of the public authorities at the time it was constructed, (T. 628), and that is all we are asking that the roof do now is to

meet the requirements of the public authorities in 1946. Mr. Miller conceded that the 1922 construction does not comply with the present ordinance, (T. 719). The roof passed the building inspector in 1922 according to Mr. Miller, but when we went into possession it was in a position where it was not acceptable under the Code. When it reached that condition no one knows. Obviously, from the nature of the construction the roof didn't get any better as time progressed. The defendant James White and his roofer, Mr. B. T. Cannon, stated the roof was in good condition in October, 1945. It was not in good condition in January of 1946. Its original construction was faulty to begin with. From the very nature of physical properties it was bound to become worse with time. No one knows what condition the roof was in at the time the lease was entered into in February, 1945. The defendant himself concedes that neither he nor Mr. Wolfe made any examination of it, (T. 859).

The next case duplicated by the defendants is *Kingstead vs. Wright County*, 133 N.W. 399, cited by them at page 38 of the present brief, page 13 of their original brief, and replied to by us at page 16 in our reply brief, where we pointed out that the covenants in the two cases were entirely dissimilar. Under paragraph 6 of our lease the exception required the lessors to do the same thing with reference to the excepted property as we were required to do with that not excepted, and under paragraph 8 the lessors' duty was even greater.

The next duplication is *St. Joseph & St. Louis Railroad Co. vs. St. Louis, Iron Mountain Southern Railway Co.*, 36 S.W. 602, cited at page 57 of defendants' present brief and relied upon by them at page 9 of their former brief and replied to by us at page 9 of our reply brief. In that case plaintiff leased its railroad to Wabash. Wabash agreed to put the road in such condition that it could be operated efficiently. Wabash did not do this and sublet to defendant who only agreed to deliver up the property in the same good order and repair as it was at the time of subletting. Plaintiff tried to hold the defendant for the breach committed by Wabash. The Court said the sublessee was not liable for the prior breach. The referee, however, to whom the case was referred in the beginning stated that if Wabash had been the defendant he would have found for the plaintiff. Applying the rule of that case to the case at bar, the defendants agreed that for 15 months before we went into possession they would keep the roof in good condition. We accepted the premises in reliance upon this promise. They did not do so. The lease was breached before we went into possession.

Defendants also cite *Walker vs. Cosgrove*, 273 S.W. 450, at page 39 of their present brief, copied in the exact language of page 20 of their former brief, replied to by us at page 23 of our reply brief, wherein we pointed out that in that case the tenant agreed to take good care of the property and pay for ordinary repairs. Actually, the case involved the attempt of the landlord to raise the tenants rent, and the court recognized that

the repair feature was injected by the landlord simply as a subterfuge to compel the tenant either to pay increased rent or get out. The drain was in poor condition when the tenant took possession, and the case holds that his obligation was to make repairs that resulted from his use. The obligation in the case at bar was that of the landlord. He obligated himself to keep the roof in good condition during the 15 months we were not in possession after the lease was entered into. This he did not do.

Picking out at random other of the authorities cited by defendants, their inapplicability is readily apparent. For instance, on page 38 they cite *Underhill, Landlord & Tenant*, page 782, holding that there is no implied warranty on the part of the landlord. We are not dealing in this case with any implied warranties or any implied covenants. We are dealing with an express covenant. Again take the case of *O'Malley vs. Twenty-Five Associates*, (Brief P. 40), 60 N.E. 387, opinion by Justice Holmes. In that case Justice Holmes says, page 388:

“No doubt when the lessor retains control he owes a duty, and, in some cases where the point which we now are considering was not before the mind of the court, the duty has been spoken of in a general way as a duty to keep the article or place reasonably safe.”

The trial court in the case at bar defined the defendants' duty under the lease as a duty to keep the roof in such

condition and repair that the roof would be reasonably safe and adequate for its normal usage and purposes, (T. 143). Mr. Justice Holmes' language is particularly applicable in connection with this instruction. Justice Holmes continues on page 388:

“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 then are unsafe, cannot complain. There is no implied undertaking or duty on the landlord's part to make things better than they are.”

As the record indicates, neither party to the lease knew of the condition of the roof at the beginning of the lease, and the plaintiffs accepted the premises only upon defendants' promise to keep the roof, with which neither of them was familiar, at all times in good condition. We are not dealing, as we have stated, with any implied undertaking or duty on the part of the landlord.

The case of *Robinson vs. Wilson*, 173 P. 331, cited by defendants at page 34 of their present brief, was cited by them extensively in their former brief at pages 16 and 47, and discussed in principle by us at page 18 of our reply brief. The court expressly said in that case that if the lessee desires to protect himself, he must exact of the lessor an express stipulation (which lessee did in the case at bar), and that in the absence of special stipulation (which is present here), the lessor is not liable.

Under defendants points I and II they argue, to summarize it briefly, that because we accepted the premises in the condition they were in in February, 1945, they had no duty to make the roof safe, although when the time came for us to occupy the premises 15 months later, the roof was unsafe. They also argue that the covenant to keep in repair does not mean to put in repair. They consistently throughout the entire brief ignore the fact that they did more than agree to keep in repair. They agreed to keep in good condition and repair. This Court has already called attention to the fact that repair is not the only word used as descriptive of lessors' duties; that in addition, the words "good condition" were used. This Court said, however, that even the word "repair" has a relative meaning. "There is implicit in the maintenance of any part of the building the purpose for which that part is intended to function." On page 54 of their brief they attempt to eliminate the words "good condition" with the bald statement: "condition or repair means the same thing". If so, why did defendant use both words? It is a common rule of construction that all words and phrases are used deliberately and must all be given meaning and effect. It is thus apparent that as we have heretofore stated defendants' present brief is the same as their former brief, advances the same arguments, sometimes in different language, other times in the identical language heretofore presented to this Court. Their cases are no different and are of no more applicability now than they were then. As we have shown, most of them

concern implied covenants with which we are not concerned in this case, apply only to repairs, although as this Court has pointed out, even the word "repair" has a relative meaning.

The defendants suggest that this Court didn't know what it was doing in coming to its decision herein, or that if it did know what it was doing it was wrong. On page 43 of their present brief they say:

"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", etc.

This, we take it, assumes that the Court has not examined the authorities and consequently does not know what they hold. Of course, we believe the Court did know what it was doing since it cited correctly the general rule. The general rule could not be otherwise. Certainly, where the public authorities say that property under their jurisdiction is unsafe they may require the owner of the property to fix it. However, in the case at bar we have not only the requirement of the public authorities, but the express provisions of the lease placing upon the defendants the duty they refused to assume. On page 42 of their brief defendants again assume that this Court didn't know what it was doing. They say:

"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.”

The erroneous doctrine referred to is that announced by this Court that we did not by accepting the premises in February, 1945, agree that 15 months later the defendants would not be required to fix a roof which was then unsafe and which they had agreed in the interim to keep in good condition. We believe this Court knew exactly what it was doing and that it announced correct principles of law and that the defendants’ present attempt to rehash and reargue its former errors should be futile.

CONCLUSION

This is a useless and needless appeal. There is no sense to it, and there has been nothing added by the present brief that was not fully discussed and decided on the former appeal. We do not believe that the defendants’ points or authorities justify a rehearing of this case by this Court. Their petition for a rehearing was denied long ago. The lower court committed no error of which the defendants can complain; they have had a full and fair trial, and the evidence amply demonstrates that the allegations of our complaint were overwhelmingly sustained. The defendants have no defense in this case, and the jury’s verdict was amply justified.

However, we do believe that the trial court committed error heretofore specified by us in eliminating from the verdict the certain items of damage heretofore discussed after the jury had awarded them to us. We have stated the reasons why we believe this Court should correct the judgment or direct that it be corrected so that we will receive that which the jury awarded us, award us in the judgment proper attorneys' fees on this appeal, and then affirm.

Respectfully submitted,

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