

1950

Soren J. Jespersen, Roy H. East, Howard J. Hassell
and Roy W. Brown, dba Power Engineering
Company v. Deseret News Publishing Co. : Brief of
Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SOREN J. JESPERSEN, ROY H.
EAST, HOWARD J. HASSELL
and ROY W. BROWN, doing busi-
ness as POWER ENGINEERING
COMPANY, a partnership,

Plaintiffs and Respondents,

— vs. —

DESERET NEWS PUBLISHING
COMPANY, a corporation,

Defendant and Appellant.

Case No.
85281

FILED

APR 24 1950

Clerk, Supreme Court, Utah

Appellant's Brief

ROBERTS & ROBERTS,
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IN THE SUPREME COURT OF THE STATE OF UTAH

SOREN J. JESPERSEN, ROY H.
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DESERET NEWS PUBLISHING
COMPANY, a corporation,

Defendant and Appellant.

Case No.
85281

Appellant's Brief

STATEMENT OF THE CASE

This suit was brought by the Plaintiffs against the Defendant to recover under the terms of a written lease for damages to a building and payment of rent. The complaint is in the usual form but in two counts.

In the first count the Plaintiffs seek damages to the floor in the building which collapsed during its occupancy by the Defendant. In the second count the Plaintiffs

seek recovery of the rent for the unexpired term of the lease after the Defendant abandoned the building following the collapse of the floor.

The Court, sitting without a jury awarded judgment for damages to the building in the first cause of action in the sum of \$3,000.00 and for rent for the unexpired term of the lease in the sum of \$2,025.00 and for \$500.00 attorney fees and costs.

ADMITTED FACTS

Defendant leased from Plaintiffs the West 145 feet of a building known as Building No. 181, located at 1710 South Redwood Road. The lease provides for a term of 12 months, the rental for that period to be \$2,700.00 payable at the rate of \$225.00 per month. The term commenced on the 23rd day of August, 1948. It is to be noted that there is no leasing of land, but there is only a lease of a portion of the building. This fact is important. In addition to the usual provisions in the lease it provided, "that the said lessee further agrees to deliver up said premises to said lessors at the expiration of said term in as good order and condition as when the same was entered upon by said lessee, reasonable use and wear thereof and damage by the elements excepted."

Negotiations for the lease were commenced on Friday, August 20, 1948, at which time an agent of the Defendant telephoned the Plaintiff East and inquired about renting warehouse space. (Tr. 107-108). During

the negotiations on this day, and subsequently, a full disclosure was made by the Defendant of the purpose for which the warehouse was to be rented. (Tr. 109). The Plaintiff, East, conducted these negotiations for the Plaintiff partnership. This storage space was needed immediately because of the fact that 15 railroad cars were being held up until the newsprint which they contained could be unloaded. Over the weekend, between the 20th of August and the 23rd of August, it was necessary for the Plaintiffs to remove a number of partitions which were in that portion of the building the Defendant was going to lease. (Tr. 110). The Plaintiffs were fully informed of the weight and size of the rolls of newsprint which were to be stored. (Tr. 112). The Plaintiffs were informed of the manner in which these rolls were to be stacked. These rolls of newsprint had a diameter of 38 inches and were of four sizes. The 66 inch rolls weighed approximately 1600 pounds each, the 49½ inch rolls weighed approximately 1200 pounds each, the 33 inch, approximately 800 pounds each, and the 30 inch, approximately 650 pounds each. (Tr. 114).

The Plaintiff East was in and about the premises during the time that the railroad cars were being unloaded and the newsprint stored in the building. This operation commenced August 23rd and took approximately three or four days. (Tr. 120).

The flooring sustained the load of this newsprint until Sunday, forenoon the 19th day of September, 1948 which was the date on which the flooring in the South-

west portion of the building collapsed. (Tr. 145). The weather report which was introduced without objection showed 43/100 of an inch of rain had fallen the Saturday afternoon and Sunday morning. (Exhibit 6).

Defendant's agents were concerned about the sufficiency of the floor to hold the weight of these rolls of newsprint. Mr. East stated that the floor was of sufficient strength to hold this newsprint. The Defendant's agents stated that he assured them on a number of occasions that the floor was of sufficient strength to withstand the load of these rolls. (Tr. 205) As a matter of fact, the Plaintiff East conceded that in the portion of the building retained by Plaintiffs, they had stacked some sort of bricks, and had loaded the floor to the extent of Five or Six hundred pounds per square foot, (Tr. 206), a weight very much in excess of the load placed upon the floor in Defendant's portion of the building.

It is uncontradicted that in this case that the building was erected during war years for a temporary purpose and that a poor grade of material was used in its construction.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY FOR THE REVERSAL OF THE JUDGMENT MADE AND GIVEN HEREIN.

I.

That the evidence is insufficient to support finding No. 3 to the effect that Defendant stored certain materials therein in such amounts and in such a manner

that Defendant broke said floor and sub-flooring or caused said floor to be broken and smashed, said pilings to be driven downward and out of line and the walls of said building to be broken and pushed out of line.

II.

That the evidence is insufficient to support findings No. 4 and 5 to the effect that said damages were in excess of the reasonable use and wear of said premises or damages by the elements and that reasonable cost of restoring said building to its former good order and condition is the sum of \$3,000.00.

III.

That the evidence is insufficient to support finding No. 7 to the effect that Plaintiff is entitled to recover the sum of \$2,025.00 as rental for the reason that the destruction of said building terminated the relationship of landlord and tenant between Plaintiff and Defendant.

ARGUMENT

The Three points on which Defendant relies are so interrelated that they may be properly discussed under two heads. The lease provides that the building must be delivered up to said lessors at the expiration of the term in as good order and condition as the same was entered upon by said lessee, "reasonable use and wear thereof and damage by the elements excepted."

It is the contention of the Defendant that the damages to the building was the result of either or both

and that the Defendant was relieved of any liability for the damages to the building and further that the building was rendered untenable by reason thereof without the fault of the Defendant and thereby was relieved of paying any further rent.

One of the main issues of fact in this case was the cause of the collapse of the flooring of the building. It is the contention of the defendant that under the above quoted covenant of the lease, it makes no difference whether the collapse of the floor was caused by overloading it or whether the floor collapsed because of the action of the elements. If the collapse was due to overload, it nevertheless was within the contemplation of the parties, caused by reasonable use and wear. If such is the case, there is no liability under the said covenant contained in the lease. On the other hand, if the collapse was due to the action of the elements, then and in such evidence, the defendant would be relieved from liability by reason of said covenant.

REASONABLE USE

This is a contract action, and as will be shown by the authorities hereinafter cited, the meaning of the phrase "reasonable use and wear," must be given the meaning contemplated or intended by the parties. It can readily be seen that the phrase "reasonable use and wear" would have an entirely different meaning if the portion of the warehouse rented was to be used for an office than it would if such portion was to be used for the storing of heavy merchandise, such as newsprint.

We submit that the building was used for the very purpose contemplated by both parties to this agreement. On cross examination, the plaintiff East admitted that he knew of the manner in which this newsprint was to be stored and he knew the weight and size of the rolls and the manner in which it was to be stacked. (Tr. 215). He not only was informed of these matters before the storing of the newsprint commenced, but he was in and about the building at all times that the defendant's agents were unloading and storing this newsprint and saw the manner in which it was being stored. (Tr. 205). On cross examination, he stated that he thought that the floor was sufficient to hold the newsprint, and that he made no objection at any time during the process of storing the newsprint. He conceded in so many words that he believed the use to which the building was being put was a reasonable and proper use. He conceded that in that portion of the building retained by plaintiffs, (Tr. 207), they had loaded the floor to an even greater weight per square foot. Of course, the defendant, through its agent, also believed that this use was a reasonable and proper use.

We therefore submit that it is established in this case that the collapse of the flooring was due to "reasonable use and wear", as contemplated by the parties in making this use of the building. We believe that this issue is one of fact and also one of law. The authorities will be hereinafter cited.

DAMAGE BY THE ELEMENTS

Plaintiff in this action is suing the defendant for a breach of the above quoted provision of the lease contending that the premises were not delivered up in as good order and condition as when the same were entered upon by the defendant, "reasonable use and wear thereof and damage by the elements excepted." Plaintiffs have the burden of proving by a preponderance of the evidence that this covenant was breached.

Plaintiffs' experts testified that the sole cause of the collapse was the overload. (Tr. 80). As above pointed out, even if this were so, defendant still did not breach this covenant. However, we believe that the plaintiff has failed in its burden of proof and that as a matter of fact and under all of the circumstances, the most reasonable conclusion is that the cause of the collapse was due to "damage by the elements."

The newsprint was loaded upon the flooring of the building commencing August 23. The flooring sustained the load of this newsprint until the 19th day of September, 1948, which was the date on which the flooring in the Southwest portion of the building collapsed. The exhibit from the weather department shows that during Saturday afternoon and night and Sunday morning, there was a very heavy rain fall. This rain fall was unusual for this part of the country. The testimony further disclosed that the ground was at such a level that the water would accumulate in this Southwest section of the building and in and around the two rows of pilings identified as rows "B" and "C" in the testi-

mony. Mr. Wycoff, who handled the storing of the newsprint for the defendant, examined the flooring on Monday, September 20. (Tr. 128). In making the examination he got down into the collapsed section of the flooring, examined the ground at that point and looked in under the flooring which had not collapsed. He testified that there was an accumulation of water in this Southwest section of the building and that in looking in under the other portions of the building, the ground appeared to be dry. He was able to push a stick into the ground near one of the footings a distance of 2 feet. (Tr. 147). This disclosed the nature of the soil and the fact that it was of such a nature that it would readily permit the footings to sink. Mr. Ulrich, an expert witness called by the defendant, testified that in his opinion, the cause of the collapse was due to the sinking of one or more of these footings, causing a heavier load to be placed on the joists supported thereby, and causing the floor to collapse. (Tr. 146-168). It is true that the plaintiff Jespersen stated that there was no water under this portion of the building, but he based his conclusion upon the fact that he saw no damage to the newsprint and from an observation he took from the outside of the building, we submit that Mr. Wycoff was in by far the better position to observe the conditions of this part of the building.

Then too, there is the fact that the other flooring in the building did not collapse, although loaded to the same extent as the flooring in the Southwest portion of the building. If there had been no weight upon the floor of any kind, of course there would have been no

collapse of the floor. There had to be weight upon this floor for there to have been a collapse. But without the water condition and the resultant weakening of the soil and sinking of the footing or footings there would have been no collapse. The floor was subjected to the strain of a 20 foot span instead of the 10 foot span under which it had been constructed.

THE FLOOR WAS NOT OVERLOADED

As to whether or not there was an overload placed upon this floor, the evidence is in direct conflict as above indicated. Even if it were overloaded, no liability could be visited upon the defendant and therefore this issue is really immaterial in this case.

Naturally, we believe that the testimony of Mr. Ulrich should be followed, and it appears to be the most reasonable. The floor had withstood this weight for approximately 26 days and only after the severe rain and the collection of water under this portion of the building did the floor fall. The rest of the flooring remained, other than this collapsed section which continued to sustain the same weight which had been placed upon it.

We believe that Mr. Ulrich, due to his experience and training was better qualified than any other expert at the trial. The experts testified to certain formulas and arrived at different results in connection with the strength of this floor. It is difficult upon just the looking at the formula and considering the answers of

each expert to arrive at a conclusion as to which should be followed. But we believe that the surrounding circumstances just above set forth tend to bear out the testimony and conclusions reached by Mr. Ulrich. Here again, the burden of proof is upon plaintiffs to show by the preponderance of the evidence the cause of the collapse of the floor.

DEFENDANT IS NOT LIABLE FOR RENT

There is a general rule of the common law that the liability of the tenant for rent is not affected by the fact that buildings or improvements *on the land leased* are wholly or partially destroyed by some unforeseen casualty. In spite of this general rule, however, upon two grounds, we believe that this rule is not applicable to the case at bar. The first reason is that this old common law rule is outmoded, is harsh and severe, and is not one which is applicable to present day conditions. The second reason is that there is a well established exception to this common law rule recognized in the United States where the lease is not of the land, but is of a portion of a building.

THE COMMON LAW RULE SHOULD NOT BE ADOPTED

Section 88-2-1, Utah Code Annotated, 1943, provides in part so far as material here as follows:

“The common law of England * * * so far only as it is consistent with and adapted to the natural and physical conditions of this state and

the necessities of the people thereof, is hereby adopted and shall be the rule of decision in all courts of this state.”

The common law rule contended for by the plaintiffs which visits upon a tenant's liability for rent where the subject matter of the lease is substantially destroyed does not come or certainly is not constant with or adapted to present day conditions in this State, and the necessities of the people. It has been severely criticized by many courts.

In *Whitaker v. Hawley*, 25 Kan. 674, 26 Pacific States Reports 471, 37 Am. Rep. 277, Judge Brewer, who subsequently became a Justice of the Supreme Court of the United States, severely criticized this ruling. (This criticism is not found in the case as reported in the American Reporters Citation, but is contained in the Pacific States Reports, which may be found in our County Law Library). In this case, Justice Brewer points out that this rule is a hold over from feudal times, and is not in accord with modern day conditions. In this case he quotes from *Gates v. Green*, 4 Page 354, as follows:

“It appears to be a principle of natural law that a tenant who rents a house or other tenement for a short period, and with a view to no other benefit except that which may be derived from its actual use, should not be compelled to pay rent any longer than the tenement is capable of being used.”

In *Scott Brothers v. Flood's Trustee*, Ky. 99 S.W. 967, the court referred to the common law rule which

had been changed by statute in Kentucky as being a "harsh and unreasonable rule of the common law," and that such rule "imposed upon him (tenant) an unreasonable burden."

The common law rule was further criticized by the court in *Taylor v. Hart*, 73 Miss. 22, 18 So. 546, 30 L.R.A. 716, wherein the court referred to the opinion in *Whitaker v. Hawley*, *supra*, in the following language:

"* * * in an opinion of great learning and power, exposing the absurdities of the common law rule on this general subject as especially applied to the condition of society existing with us."

Perhaps the leading case which refused to follow the common law rule is the case of *Wattles v. So. Omaha Ice and Coal Company*, 15 Neb. 251, 69 N.W. 785, 36 L.R.A. 424, 61 Am. St. Rep. 554. In that case, the plaintiff leased to the defendant certain land and buildings wherein the defendant stored ice. After the defendant had entered possession, the buildings were destroyed and rendered entirely valueless. Plaintiff in this action sought to recover the rent reserve in the lease accrued subsequently to the destruction of the buildings. The court repudiated the common law rule and held that the defendant was not liable for the rent. We will take the liberty of quoting at length from this case because it is the best expression we have been able to find refusing to follow the common law rule. The conclusion of court is stated as follows:

"We reach the conclusion that the common law rule of construction under consideration is

not in force in this state, and formulate the rule as follows: Where a *substantial portion of leased premises is destroyed* without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction."

In reaching this conclusion, the court stated:

"By the lease under consideration, the premises were let to the lessee for a specified term, in consideration of which he covenanted to pay to the lessor a specific sum as rent, payable in installments, on certain dates during the term. The lease contained no provision binding the lessor to rebuild. The lease contained no provision for any abatement of the rent promised for any reason whatsoever. The question presented is: A substantial part of the leased premises having been destroyed without the fault of either lessor or lessee, is the latter entitled to an apportionment of the rent accruing thereafter? The common-law construction of such a covenant as this would not relieve the tenant from payment of the entire rent reserved."

In further discussing this rule, the court stated:

"This rule has often been assailed as utterly repugnant to justice and reason * * * and so harsh was the operation of the rule that in many states * * * statutes have been passed for the purpose of modifying or abrogating it."

"The clear tendency of all the modern decisions, in our states, has been to modify the rule of the common law as to work out a result just and equitable in the situation."

Quoting from another case, the court stated:

“The clear tendency of the rulings has been to do away with the common law technicalities concerning real estate, and to bring the rules of the common law more in harmony with those respecting personal property and that the distinctions growing out of the feudal system are disappearing, and this distinction between the lease of real property and the hiring of chattels is one which sooner or later will cease to exist.”

The court then discusses the old English case, *Paradine v. Jane*, Aley 26, which was the case considered to be the first one to expound the common law rule. Then the court discusses the establishment of the exception to the rule where the lease is of only a portion of a building, which exception was first announced in 1832 in the case of *Winton v. Cornish*, 5 Ohio 477. In discussing this exception, the court stated:

“Indeed, the exception to the rule seems to be about as well established in the United States as the rule itself. In some of the cases following the rule, the reasons for its existence are said to be that it is only equitable that the lessee should pay the entire rent, notwithstanding a destruction of the part of the leased premises, since the lessor must bear the loss of the destroyed property, and that the enforcement of the rule tends to diminish the carelessness and increase the vigilance of a lessee. We do not know what reason led to the formulation of this rule, but, if the one quoted above is the correct one, it is of no force at the present time, because the lessor may protect his interest in the property while in the hands of the lessee by insurance. The reason given for the formulation of the exception to

the rule is that by a lease of a room or basement in a building, no interest in the soil passes to the lessee, and that, when the basement or room is destroyed, the leased estate is gone, and the relation of landlord and tenant terminated. But it seems to us that another principle underlies and controls the exception, and that is this: that, the leased room or building having been destroyed without the fault of the lessee, the consideration for his promise to pay the rent accruing thereafter failed. The common-law rule announced in *Paradine v. Jane* is merely a rule of construction of a real-estate contract.

We have already seen to what extent the common law is in force in this state, and have noted the command of the legislature to the courts of this state, in construing real-estate contracts, to look to the subject-matter of the contract, the language employed by the contracting parties, and to ascertain, if possible, and give effect to, the intention of the contracting parties. A lease for real estate is not a bargain and sale for a given time of the lessor's interest in the leased premises. It is rather a hiring or letting of property for a certain time, and for a named consideration; and, when a lessee covenants to pay rent for a term, the consideration for that covenant is his right to the use and occupancy of the thing leased. In the covenant of a lessee to pay at stated times certain sums of money for the rent—that is, for the privilege or the right to use and occupy the leased premises—is involved the condition that such leased property shall be in existence, and be capable of being used and enjoyed by the lessee. The promise to pay a stated sum of money as rent for leased premises for a certain term is based upon the presumption that the leased premises shall exist for the term. In the case at bar if the lessee had been evicted from

part of the demised premises by the holder of a title paramount to that of the lessor's, the lessee would be entitled to an apportionment of the rent. Tayl. Landl. & Ten. 387, and cases there cited.

Under the exception established to the rule, had the entire leased premises been washed away by a flood, the relation of landlord and tenant existing between the parties to this suit would have from that moment ceased. This relation would not have been terminated by the act of the parties, but by operation of law; and the lessee would have been relieved from the payment of rent accruing thereafter, upon the principle that the consideration for his promise to pay such rent had failed. If we look to the subject-matter of the lease under consideration, and the language employed by the parties in making the contract, we cannot say that either of these parties, at the time they made this lease, had in contemplation the fact that the leased premises, or any part thereof, might be destroyed by a hurricane. They did not contract with reference to such a casualty. To use the language of McKean, C. J., in *Pollard v. Shaffer*, *supra*, had the lessor been asked at the time this lease was made, "Is it your intention to hold the lessee liable for the entire rent reserved in case the leased buildings shall be destroyed by a cyclone?" he doubtless would have answered that he had never considered that contingency. If the question had been asked the lessee whether it was his intention to pay the entire \$6,000 rent even if one-half of the leased property should be destroyed before the expiration of the term, it is very probable that he would have said that he had no such an intention. Yet, in construing this contract, we must, if possible, give effect to the intention of the parties, notwithstanding the common-law rule of construction. To us it seems that the lessor, in effect, said

to the lessee: "I own this tract of land, and these ice houses. They are in good repair. They are fit for the purposes of harvesting and storing ice. I will hire them to you for five years if you will pay me twelve hundred dollars per year, and keep the premises in good repair." To this the lessee assented. This was an offer and a promise upon the part of the lessor to furnish for the entire time the hired property. It was a promise and a covenant upon the part of the lessee to pay the monthly installments of rent for the right to use and occupy the hired property, if it existed. But it was not a proposition on the part of the lessor to quit-claim his right to the use and occupancy of the leased premises to the lessee for five years, in consideration of \$6,000 paid or to be paid by the latter."

The court then continued its discussion of common law rule and stated:

"This rule of construction of the common law is a harsh and a technical one. We do not certainly know the conditions that existed when it was formulated, nor do we know in what reasons it had its origin; but we do know that since the decision of *Paradine v. Jane* the conditions of the race have changed; its conscience and intellect have been quickened; and this rule, however meritorious it may have been at the time and place of its origin, is opposed to the genius and spirit of the present age, and in conflict with its judgment and conscience. In one or two instances, in states where its effect has not been even limited by statute, its applicability to real-estate contracts in this country has been questioned. Such was the case of *Ripley v. Wightman*, 4 McCord, 447, where it was held that the fact that a house had been rendered untenable by a hur-

ricane afforded the lessee a defense to the action for the rent. In *Whitaker v. Hawley*, 25 Kan. 674, the buildings upon the leased premises were wholly destroyed by fire, without the fault of the lessee, and the court held that, because of the accidental destruction by fire of the buildings upon the leased premises, the lessee was entitled to an apportionment of the rent. In that case, Brewer, J., speaking for the court, said: "And right here it may be remarked that a lease is, in one sense, a running, rather than a completed, contract. It is an agreement for a continuous interchange of values between landlord and tenant, rather than a purchase single and completed of a term or estate in lands." We are aware that this case stands practically alone, and in a footnote to *McMillan v. Solomon*, 94 Am. Dec. 654, its isolation is pointed out with a remark by the editor that it is supported by "much charity and some logic." We approve of the opinion, because we think it is good law, as well as good sense. We approve of it also because it is a magnificent protest against slavish devotion to antiquated rules; and we approve of it because it breathes the spirit of humanity and equity, and is based on a thought of the nineteenth century."

Three judges desented from the opinion of the majority, but it is to be noted that the desenting judges only desented upon the ground that the tenant had not surrendered the premises, but had remained therein.

The court, in *Coogan v. Parker*, 2 S.C. 255, 16 Am. Rep. 659, also held that the common law rule was not applicable and stated the rule to be followed thusly:

“Unless something of importance has been overlooked in the foregoing citations, it cannot be doubted that, in case of substantial destruction of the subject matter of the lease, the tenant is entitled to descind.”

See also the quotation hereafter from *Waite v. Oneil*, 76 Fed. 408.

We submit that the common law rule should not be followed in this state for the reasons stated by the foregoing authorities, and upon the grounds that it is not that type of common law rule which has been adopted in the jurisprudence of this state. But even though the court should not feel at liberty to repudiate this common law rule, there is an exception which has become well established in the United States, and under which the case at bar is to be decided.

EXCEPTION TO COMMON LAW RULE

As pointed out above, the lease in the present case is not a lease of land, it is merely a lease of a portion of a building. We submit that under the well recognized exception to the common law rule, a substantial destruction of this building for the purposes for which it was leased constitutes a defense to an action for rent for that period of time after the collapse of the floor.

Two reasons are given for the exception we contend is applicable to this case. The first reason is that where a portion only of a building is leased by implication, the parties intend that the subject matter of the lease shall have continued existence. This reason is exempli-

fied by the following cases: *Davis v. Shepperd*, 196 Ark. 302, 117 S.W. 2d 337; *Whittaker v. Holmes*, 165 Ark. 1, 263 S.W. 788; *Saylor v. Brooks*, (Kan.), 220 P. 193; *Greenberg v. Sun Shipbuilding Company*, 277 Pa. 312, 121 A. 63.

The other reason given for this rule is that the subject matter having been substantially destroyed, the leased estate is gone and the relation of landlord and tenant terminated. This basis on the rule is exemplified by the following cases: *Womach v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Ainsworth v. Ritt*, 38 Cal. 89; *Graves v. Berdan*, 26 N.Y. 493, 29 Barb. 100; *Harrington v. Watson*, 11 Or. 143, 3 Pacific 173, 50 Am. Rep. 465; *Han v. Baker Lodge*, 21 Or. 30, 27 Pacific 166, 13 L.R.A. 158, 28 Am. St. Rep. 723; *Shawmut v. Nat'l. Bank v. City of Boston*, 118 Mass. 125; *Waite v. Oneil*, 76 Fed. 408.

We will here discuss briefly some of the foregoing cases and make quotations therefrom. We will first consider the group of cases basing the exception on the continued existence of the subject matter of the lease.

Davis v. Shepperd, supra, was an action for rent of a store building which was destroyed by fire to such an extent that it could not be used for business purposes. The lease was for a term of one year, the rent being payable six months in advance. The fire occurred two months after the second 6 month rent had become due. The court stated:

“In 36 Corpus Juris under the title Landlord and Tenant, it is said that: ‘At common law, a

lessee of premises which are accidentally destroyed subsequent to the making of the lease cannot be relieved from an express covenant to pay rent unless he has stipulated in the lease for a cessation of the rent in such case, or the lessor has covenanted to rebuild.'

"There is a well recognized exception to this general rule to the effect that where the performance depends on the continued existence of the building leased and the building is destroyed so that it cannot be used for the purposes for which it was leased, the consideration for the contract fails, and the lessee is no longer obligated to pay rent on the building. This exception to the general common law rule is recognized in the cases of *Buerger v. Boyd*, 25 Ark. 441 and *Whitaker v. Holmes*, 165 Ark. 1, 263, S.W. 788.

"It is clear from the evidence in the instant case that the building was leased for the purpose of running a store and that purpose only, and that after the fire it became unfit to use for that purpose."

Whitaker v. Holmes, supra, was an action for rent after the destruction of a building by fire. The court stated:

"In the case at bar, there is no admission upon the part of the lessee that he leased anything more than the store building, but, on the contrary, the testimony of Holmes is direct and positive to the effect that he did not use any part of the lot upon which the building stood not covered by the building. He did not pay any rent after the building was destroyed because he did not feel that he owed it after the building was destroyed."

The court quoted the common law rule contended for by plaintiffs herein from the case of *Buerger v. Boyd*, 25 Ark. 441, and then quotes as follows:

“If one simply leases the house or room, and acquires no control over, or interest in, the soil, and the building be destroyed, we understand the rule to be otherwise.”

The court then continued as follows:

“We are convinced that the facts of this record show that the consideration of the lease under review was for the store building alone. When the building, therefore, was destroyed by fire, the consideration for the contract failed, and the appellee Holmes was no longer obligated to pay rent on the premises.”

The court quoted the usual contract rule from 6 *A.R.C.L.*, Page 1005, Section 369, and from 13 *C.J.*, Page 643, Section 718, to the effect that the lease agreement in such case as this is on the basis of the continued existence of the subject matter of the contract.

In *Saylor v. Brooks*, *supra*, the tenant brought an action for failure by the landlord to rebuild a building. The lease providing that landlord agreed to keep the building in good repair. The court discussed the rule of the liability of a tenant for rent, and the court quotes from *Whitaker v. Hawley* as follows:

“The fact is, the parties negotiate for the possession of the building during the entire term. This underlies the whole thought of lease, just as fully as when they negotiate for the hiring of a horse, or a steamboat, or any other chattel. If

fire is thought of, it will be mentioned, and, if it is not mentioned, it is because it is not thought of, and because they are negotiating for a mutually understood coterminous occupation and rent. Now to ignore these facts, which actually underlie the contract and are the very basis upon which it is made, will practically work out injustice, no matter how beautiful and symmetrical the legal structure we erect thereon. * * * Again, in almost every other contract, these underlying facts are recognized, and modify the letter to accomplish the intent. Thus, in the hiring of chattels, though the terms be as absolute and positive as those of a real estate lease, their absolute destruction without the fault of the hirer terminates the contract. It is assumed that the contract only lasts and the obligation to pay for the use continues only while the property remains in being, and not until the end of the term named in the contract. Anything which involves the substantial destruction of the chattel puts an end to the obligations of either party in reference to it. * * * So if the hiring is of a room or rooms in a building, destruction of the building by fire puts an end to the lease (citing cases.)”

We will now consider some of the cases which hold that where there is a substantial destruction of the portion of the building leased, the lease hold estate is gone and the relationship of landlord and tenant terminated.

In *Womach v. McQuarry*, supra, the plaintiff owned a saw mill and a woolen factory which were side by side. Plaintiff leased to the defendant the entire saw mill and one room of the factory to the defendant. Both buildings were destroyed by fire. The court held that

the defendant was liable for rent on the saw mill but not on the room in the factory. Thus, this case clearly presents the application of the harsh common law rule and the exception thereto. The court recognizes the existence of the common law rule and then further as follows :

“There are, however, some comparatively recent cases in which an exception to this rule has been held to exist * * * This exception applies only to cases where the demise is a part of an entire building, as a cellar or an upper room, and it is founded upon the idea that in such cases it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment demised, and *that when that enjoyment becomes impossible by reason of the destruction of the building*, there remains nothing upon which the demise can operate.”

In *Harrington v. Watson*, supra, the court, after recognizing the common law rule, stated:

“The authorities, however, indicate that there is an exception to this rule that the distinction of a building does not discharge the liability of the tenant for rent where the lease is of an upper story or basement or apartment in a building, because in such cases, they say, it is not the interest of the lease to grant any interest in the land further than is necessary for the enjoyment of the rooms so demised, and when these are destroyed, there is nothing upon which the lease can operate. The lease terminates with the estate.

“If, ‘the room on the corner’ etc., was the thing leased, and when the principal thing leased was destroyed, the lessee’s interest therein neces-

sarily terminated. The fire dissolved the relation of landlord and tenant, for there was nothing left to hold in tenancy. The thing rented was gone, destroyed by fire, and as a consequence, the lease terminated."

In *Waite v. Oneil*, supra, the plaintiff brought an action for rent of a "landing" on the Mississippi River. A current washed away the landing leaving a vertical bluff of from 60 to 80 feet high. The court refers to the common law rule contended for by plaintiffs in the case at bar and then states:

"The reason for this severe rule is that the land is deemed the subject of the demise, and the buildings mere incident. If the land remained to the tenant after the buildings were destroyed, he had a right to occupy and use it, his liability for rent, without abatement was held to continue * * * In view of the fact that rent is a compensation for the use of the thing demised, it has been regarded as a harsh rule and contrary to natural justice, that liability for rent should continue after the possibility of beneficial use had been destroyed by accident, and at an early day some of the judges struggled over its severity * * * These early efforts to mitigate it were unavailing, and the rule was finally settled as stated. * * * But the very foundation upon which the old rule was vested is removed if the subject matter of the demise is destroyed. This exception is noticed by Justice May in his statement of the common law rule in *Viterbo v. Freedlander* (120 N.S. 707, 7 S. Ct. 962), when he adds, "*unless at least the injury is such a destruction of the land as to amount to an eviction.*" Where the subject matter of the lease is a room or an apartment in a building, and the building is destroyed, the lease is

terminated, the interest of the tenant is at an end, and the covenant to pay rent extinguished. This rule is bottomed upon the fact that under such leases it is to be presumed that the interest of the tenant in the subjacent land was to continue only so long as the subject matter of the lease existed * * * it has never been repudiated or questioned in cases where it is applicable, so far as our researches have extended and has been applied in many well reasoned cases.”

The court applied the exception in favor of the defendant and denied the plaintiff recovery for rent and in so doing stated:

“In the case at bar, we have already determined that the subject matter of this lease was the landing, as it existed at the date of the lease. A ‘landing’ implies a place where vessels can be moored and loaded or discharged. The landing was effectually destroyed by the ravages of the river.”

This well established exception to the common law rule is applicable to the case at bar by the very terms of the lease, the only thing leased is: “The West one hundred forty-five feet (145’) of that certain building known as building number one eighty one (181) located at 1710 South Redwood Road.” In considering whether or not there has been a circumstantial destruction of the building, we must take into consideration the purpose for which the building was leased. As indicated in the statement of the case, all parties concerned knew of the purpose for which the portion of the building was rented. That purpose was for the storage of large heavy rolls of newsprint. A sizeable portion of the

flooring collapsed. Upon the happening of that event, certainly the defendant could not continue the use of the building for the storage of these heavy rolls. It had been indicated by the collapse a reasonable person would conclude that he should remove the heavy weight from the flooring. No determination could be safely made that the rest of the flooring had not been weakened in some way because of the elements or because of the weight placed upon the floor. In other words, the building had become valueless for the purpose for which it had been rented. The use and enjoyment of these premises by the defendant was at an end. That such is the rule to be followed is indicated by the case of *Coogan v. Parker*, supra, wherein the court stated at Page 679 of 16 *Am. Rep.*:

“* * * the construction of all deeds must be made with reference to the subject matter.”
The court again stated at Page 680:

“The ground of destruction must be the fact that the structure bears such relation, in point of fitness and value for the use contemplated by the lease, as to give rise to the conclusion that the buildings were the main element of consideration on which the agreement to pay rent was based.”

This is also indicated by the underlined portion of the quotation from *Waite v. Oneil*, supra, as follows: “Unless at least the injury is such a destruction of the land as to amount to an eviction.” An eviction takes place when the use and enjoyment of the premises is materially interfered with. It does not require a total and complete expulsion. *C. Silberstein v. Larbovit*.

(Tex.), 200 S.W. 2d 647; *Giraud v. Milovitch*, 29 Cal. App. 543, 85 P. 2d 182.

Destruction does not mean complete annihilation, destruction is harm that substantially affects the value of the thing. Following the rule stated in the restatement of the law of torts, section 221, relating to personal property as follows: This is the holding of *Roberts v. Commercial Casualty Company*, 168 Fed. 2d 23.

Following the analogy of the contractual rule requiring continued existence of the subject matter of the contract, the court, in *Calechman v. Great Atlantic and Pacific Tea Company*, held that the obligation to pay rent becomes absolute only by use and enjoyment of the property and upon deprivation of right by unavoidable accident or contingency of like nature, the tenant's liability for rent only extends to that time.

The court in *Taylor v. Hart*, *supra*, the court stated:

“Rent is compensation for the use and implies the continued existency of the property to be used.”

That there was such destruction of the portion of the building as to relieve defendant from rent is indicated by the case of *Leonard v. Armstrong*, 73 Mich. 577, 41 N.W. 695, wherein the defendant rented a house for dwelling purposes and moved out after he was unable to heat the house and the plumbing fixtures permitted severe gas to permeate the house. The court stated:

“If, as defendant contends, from the defects in the construction of the house, it became untenable and unfit for habitation, he was not compelled to keep it and pay rent; or if, from defects in plumbing, of which he was not advised when making the lease, sewer gas escaped, and his family became sick from such causes, and the home became untenable and unfit for habitation from such causes, he was not compelled to keep the premises and pay rent. He rented the premises for a dwelling for his family, believing, as it appears, that the premises were tenantable and fit for the purposes for which he rented them. After remaining in them he found them unfit for the purposes for the causes above-mentioned and moved out.”

In *Hazard Bank and Trust Company v. Hazard Mercantile Company*, 220 Ken. 165, 294 S.W. 1034, the court stated:

“The uncontradicted evidence shows that only walls or parts of the walls were left standing. That this amounted to a practical destruction of the building for storeroom purposes there can be no doubt, and the court did not err in refusing to submit the question to the jury.”

We submit then, that under the foregoing authorities, the collapse of the floor under the circumstances existing in this case and in view of the fact that the only purpose in the leasing of the premises was to store heavy materials, there was a practical and circumstantial destruction of the subject matter of the lease.

NO APPLICATION OF PAROLE EVIDENCE RULE

We are not here seeking to enforce any covenant against the plaintiffs and hence the parole evidence rule has no application. This is merely an application of the rules concerning the construction of a contract that is the lease agreement between the parties to determine whether or not plaintiffs are entitled to recover. Under these rules of construction, it clearly appears that plaintiffs are not entitled to recover any rentals in this action.

Let us hasten to say that the defendant is not relying upon any warranties in its defense of this action, and did not introduce said testimony for the purpose of varying the terms of the written contract.

It is our contention that the testimony was competent and material in assisting the court in ascertaining the intentions of the parties in relation to covenants and limitations of liability under the exceptions set forth in the lease. The rule appears to be well settled that a view of the circumstances connected with the making of the lease will materially assist the court in ascertaining the meaning of the contracting parties.

In the case of *Machen, et al. v. Hooper, et al.*, 21 Atlantic Reporter 67, the lessors owned a warehouse which they desired to rent. The lessees desired for the prosecution of their business just such a warehouse as this one was supposed to be. In commenting upon the circumstances connected with the making of this lease, in ascertaining the meaning of the contracting parties

and the limitation of liability under the exceptions set forth in said lease, the court said:

“The jury had a right to consider the purpose for which the warehouse was built, and for which it had been used, and also its apparent strength and storage capacity, and the business in which the defendants were engaged when they rented it, and to find, whether, as men of ordinary prudence and sagacity, they were justified in believing that it was strong enough to bear the weight of the goods which they stored in it. It is not in the ordinary course of business to require tenants to make the examination mentioned in this prayer. The defendants rented the warehouse for the prosecution of their business. They and their business were known to one of the plaintiffs, and it must have been known that they intended to use the warehouse for such proper purposes as their business required. The plaintiffs’ seventh prayer proceeds on the theory that, if the building fell because of the weight of the goods stored in it, or of the manner in which they were stored, the defendants were liable. It does not leave to the jury the inquiry whether the weight of the goods was unreasonable and excessive, or whether they were stored in a cautious, prudent, and skillful manner. These inquiries were indispensable, unless the defendants are to be understood as contracting that they would abstain from a reasonable use of the building for the purposes to which it was apparently adapted. There must be some limitation to their liability of injuries caused by their own act. If a warehouse, to all appearance strong and stable, should in reality be so infirm as to fall down when the most ordinary operations of business are going on with care and prudence within its walls, it would not be just to say that the fall was caused by the

tenant's conduct. Before we can convict the tenant of inflicting such an injury, we must find that he did something which he ought not to have done; that he subjected the building to an unreasonable strain; or that he was in some other way negligent, incautious, or regardless of duty. If a building should fall because it was too weak to endure legitimate use, it could not with propriety be said that the injury was inflicted by a tenant who was prudently and carefully making such legitimate use of it.

In this case, the lease provided that at the end of the term, the defendants would quietly surrender to the lessors the said demised premises and building in the same good order and condition they were in at the time of the lease, ordinary wear and tear, loss by fire, (other than as hereinbefore especially provided against) acts of God and damage caused by external accident or acts of third parties.

These same exceptions are embraced in the case at bar. In commenting upon the construction of this lease, the court said:

“Certainly this rule of construction prevails in this state to the fullest extent. In very many cases it has been tacitly applied as a matter of course, without formal enunciation. Our decisions have been in full accord with the rule stated by the supreme court of the United States in *Nash v. Towne*, 5 Wall. 699. It may answer a good purpose if we quote it: “Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the con-

tract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of the words, and to the things described.”

The conversations had between an employee of the Deseret News, one of the plaintiffs in the action, and two men who were to handle the storage of newsprint paper in the premises if they were found suitable. In these conversations, they discussed the age and character of the building, the use to which the building was to be put, the building was measured for height and the size and weights of the different rolls of paper were divulged. They figured out the weights on a square foot basis. The plaintiffs had stored in its portion of the building brick tiling at an average load of 500 pounds per square foot, while the weight of the paper averaged from 320 to 331 pounds per square foot. That the reasonable use of the building was based upon that information and an inspection of the understructure revealed that the building was constructed on cement footings with vertical cement piers sustaining the floor, and that the soil was observed to be dry.

In the case of *Codman et al. v. Hygrade Food Products Corporation of New York*, 3 N.E. 2d 759, the court says:

“In the application of phrases of such general significance to a building which is the subject matter of a lease various things are to be taken into account. Among these are the character of the building and of its original construc-

tion, *Judkins v. Charette*, 255 Mass. 76, 82, 151 N.E. 81, 45 A.L.R. 1; the use to which the building is to be put and the character of a business there to be carried on, *Kaplan v. Flynn*, 255 Mass. 127, 130, 150 N.E. 872, 45 A.L.R. 6; the age of the building and its general capacity for use at the time the lease is given, *Drouin v. Wilson*, 80 Vt. 335, 67 A. 825, 13 Ann. Cas. 93; *St. Joseph & St. Louis Railroad v. St. Louis, Iron Mountain & Southern Railway*, 135 Mo. 173, 36 S.W. 602, 33 L.R.A. 607; *Lehmaier v. Jones*, 100 App. Div. 495, 91 N.Y.S. 687; *Lister v. Lane & Nesham*, (1893) 2 Q.B. 212; *Lurcott v. Wakly & Wheeler*, (1911) K.B. 905, 916; and the class of tenant and the kind of business of a tenant who would be likely to lease the building, *Miller v. McCardell*, 19 R.I. 304, 33 A. 445, 30 L.R.A. 682; *Proudfoot v. Hart*, 25 Q.B.D. 42.”

In the case of *Harris v. Corliss Chapman and Drake*, the defendants lease from plaintiffs for a term of years the first story and basement of a brick building in the City of St. Paul. Among other things, the lease provided that the tenant would not be liable for damage by the elements.

“The court below found that during the term ‘the said basement became so damp and wet and unhealthy as to be untenable, and unfit for use by the defendant in its business; that said premises were so rendered untenable by springs of water percolating and oozing through and under the walls of said basement from the exterior of said building.’

“The sole question is whether, upon these facts, the basement was rendered untenable ‘by the elements,’ within the meaning of the lease. The terms ‘the elements,’ and ‘damages

by the elements,' are somewhat uncertain and indefinite expressions, and very little aid will be derived from resorting to any technical or scientific discussion of the meaning of the word 'elements.' We should rather look to see whether the word has received any fixed and accepted meaning in the language of leases, and take the contract by its four corners, and try to ascertain how such an expression would be ordinarily understood by conveyancers and business men. The expression 'by fire or the elements' occurs twice elsewhere in this lease. Immediately preceding the provision quoted is one to the effect that if the premises shall at any time during the term be rendered wholly untenable 'by fire or the elements,' and the injured premises can be rebuilt or repaired within three months, then the lessor is to rebuild or repair, if the lessee shall so request, 'within ten days after such occurrence;' otherwise such occurrence shall operate to terminate the lease. It is apparent that the expression, 'by fire or the elements,' is used in the same sense in both instances. The lease also contains a covenant on part of the lessee to surrender the premises at the expiration of the term in as good condition as the same were in when occupation under the lease began, usual wear and tear of reasonable and careful use thereof, 'and destruction thereof or injury thereto by fire or the elements, excepted.' We think, with the defendant, that the expression is here used also in the same sense.

"The lease contains no covenant on part of the lessor to make repairs, except those above quoted, and hence he was not bound to do so, much less to make improvements or betterments; the policy of the law being to require the tenant, before he takes a lease, to examine the premises, and elect, once for all, whether they will suit his purposes. While the finding is silent upon the

subject, it is fair to assume that the percolation of water into the basement was not the result of any extraordinary or unusual occurrence, such as a flood or freshet, or of any cause originating subsequent to the demise, but was the natural result of a cause fully existing at and prior to the date of the lease, such as the wet or springy character of the soil on which the building was erected or that adjacent, or some inherent defect in the plan of its structure, as the lack of proper drains to carry off the water of the oozing springs. In such a case, although the existence of a wetter season of the year, yet the efficient cause existed at the date of the demise, and the results were but the natural and ordinary operations of the laws of nature."

Of course, this case is easily distinguishable from the situation of that in the case at bar. In the present case, the records of the weather bureau show that on Saturday and Sunday, 42/100's of an inch of rain fell in that area accompanied by sudden thunder showers and heavy down pour. This storm was a sudden, unusual and unexpected action of the elements in that it was figured out that thousands of gallons of water fell upon the roof and the platforms of the building, and a survey of the premises disclosed that the southwest corner was the lowest point underneath the building, and the testimony from expert witnesses who made surveys of the premises was that it did drain from both an east and west direction into that low area. The court will undoubtedly take judicial notice of the fact that the annual precipitation in the State of Utah is only 13 72/100's inches per annum, and that this storm

deposited over a period of 48 hours 1/26th of the annual rainfall.

The testimony of Mr. Wycoff, who went inside the building on Monday, September 20, the day after the floor collapsed, was that there was about 6 inches of water in the collapsed area, and that on account of the large amount of water, the ground had become so soft that he could and did push a broom handle without much exertion to a depth of 2 feet, far below the cement footings on which the structure rested. Naturally, this sudden action of the elements, and the collecting of water, and the softening of the ground to an extent of 2 feet did weaken the cement understructure and permit the sinking of the footings as shown by the expert testimony of Mr. Ulrich to the extent that the floor was subject to a span of 20 feet instead of a 10 foot span under which the building had been constructed. Mr. Ulrich figured out from scientific formulas that this additional strain on the timbers greatly increased the fiber stress far beyond the fracture stress and that consequently the floor collapsed.

In the case of the *Oakland Motor Car Company v. Rippey Motor Company*, 154 S.E. 823, the court commented on what constituted damage by the elements. In that case, plaintiff brought suit against defendant for rent of a certain building. There was no dispute made by the record as to the amount due for rent, but defendant set up that during the period of the lease, a heavy wind storm prevailed in which the rented premises were located; that the wind reached an "unusual, severe

and dangerous velocity'' on account of which, all or nearly all the plate-glass windows in the leased premises were blown out. The windows were repaired by the defendant at a stated cost and he made demand upon the plaintiff for reimbursement but had been refused. The court directed a verdict for the plaintiff in the amount represented by the difference between the amount due for rent and the amount expended by the defendant in repairing the broken glass.

“None of the cases cited by counsel, or which have been examined, indicate that a violent windstorm of unusual nature which could not be reasonably foreseen or guarded against, resulted in damages, should not be deemed a casualty and it seems clear that the damages to the plate-glass windows of the building leased in the instant case resulted in a casualty within the meaning of the contract”, the court concluded.

In conclusion, we contend that the defendant did not breach its covenant under the lease; that the damage to the building was a result of sudden, unusual and unexpected action of the elements; that the building was rendered untenable by reason of the damage thereto, and that defendant should be relived of any liability in this cause of action.

Respectfully submitted,

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