IN RE JEWELL ET AL.

Case No. 7,302.
{19 N. B. R. 383.}[1]

District Court, S. D. New York. June 25, 1879.

LANDLORD AND TENANT—ALTERATIONS—REPAIRS—DUTY OF TENANT TO SURRENDER PREMISES IN GOOD CONDITION—DAMAGES—EVIDENCE OF EXPERTS.

1. The bankrupts were lessees of a building under a lease which permitted them to make such alterations as were requisite to their business, "subject to the clause here following," which provided that at the expiration of the term the lessees would quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted. *Held,* that the true construction of these clauses is, that if alterations were made which injuriously affected the state and condition of the building as it was before they were made, it should, at the expiration of the lease, be restored to its former condition in respect to the changes so made; that the fact that the lessor, in anticipation of the expiration of the lease, relet the building to a tenant whose business was such as to make the building as altered convenient for him, does not affect or impair his cause of action against the bankrupts for a breach of their covenant.

2. On the question as to how much the building has been injured by the alterations, the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property, are competent.

{In bankruptcy. In the matter of Abraham Jewell and others.}

Jacob F. Miller, for petitioner.

Chas. W. Marsh, for opposing creditors.

CHOATE, District Judge. The bankrupts were lessees of a building for the purpose of carrying on the business of manufacturing lard oil and perfuming lard, under a written lease, which permitted them "to make such alterations to the building requisite to said business, subject nevertheless to the clause here following." The clause referred to was "and at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." I think the true construction of these two clauses is, that if alterations were made which affected injuriously the state and condition of the building as it was before making the alterations, it should, at the expiration of the lease, be restored to its former condition in respect to the changes so made. I do not see how otherwise any meaning is given to the words "subject nevertheless to the clause here following." The lessor permits any alterations, however injurious, that the lessees may find "requisite to the business." The parties do not attempt to specify in advance what such alterations shall be, but, to secure the lessor against loss in the working of this license, he expressly provides that notwithstanding such alterations "the premises hereby demised,"—that is, the building substantially as it then was—should be surrendered at the expiration of the term in the same state and condition, reasonable

use and damage of the elements alone excepted. The construction contended for by the opposing creditors, that the covenant is only to surrender the premises as they may be altered in good state and condition, seems not to me to give full effect to all parts of the instrument, nor consistent with the intent of the parties appearing therein. The fact that, in anticipation of the expiration of the lease, the lessors relet the building to a tenant whose business was such as to make the building, as altered, convenient for him, seems not to affect or impair the cause of action which the lessor has against the bankrupts for breach of the covenant. The lessees were, as the lessor knew, disabled by their bankruptcy from performing their covenant, and he did not waive any rights by letting the premises to a tenant who happened to want them as they were. It is not for the bankrupts who have broken their covenant to say to the lessor in excuse: "You do not need the restoration of the building to its former condition, which we agreed to make, for your present use of it." Nor is it material whether the lessor has got in fact as good a rent for it in its altered condition as he would probably have got for it if restored. If this is so, it is his good fortune, and there is no reason why it should inure to the benefit of the former lessees. The question

simply is, how much is the building injured by the alterations? And on this issue I think the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property, are competent. The witness Naylor seems to have had sufficient experience to make him a competent witness on the question of the extent of the damage. Evidence also of the cost of restoring the building to its former condition would be competent. Although Mr. Naylor's experience was as a builder, and not as a repairer of buildings, yet he had such an experience as to the cost of materials and labor that I think he should have been allowed to testify on this point also. Report recommitted, with instructions to give the parties a further hearing.

[1] {Reprinted by permission.}