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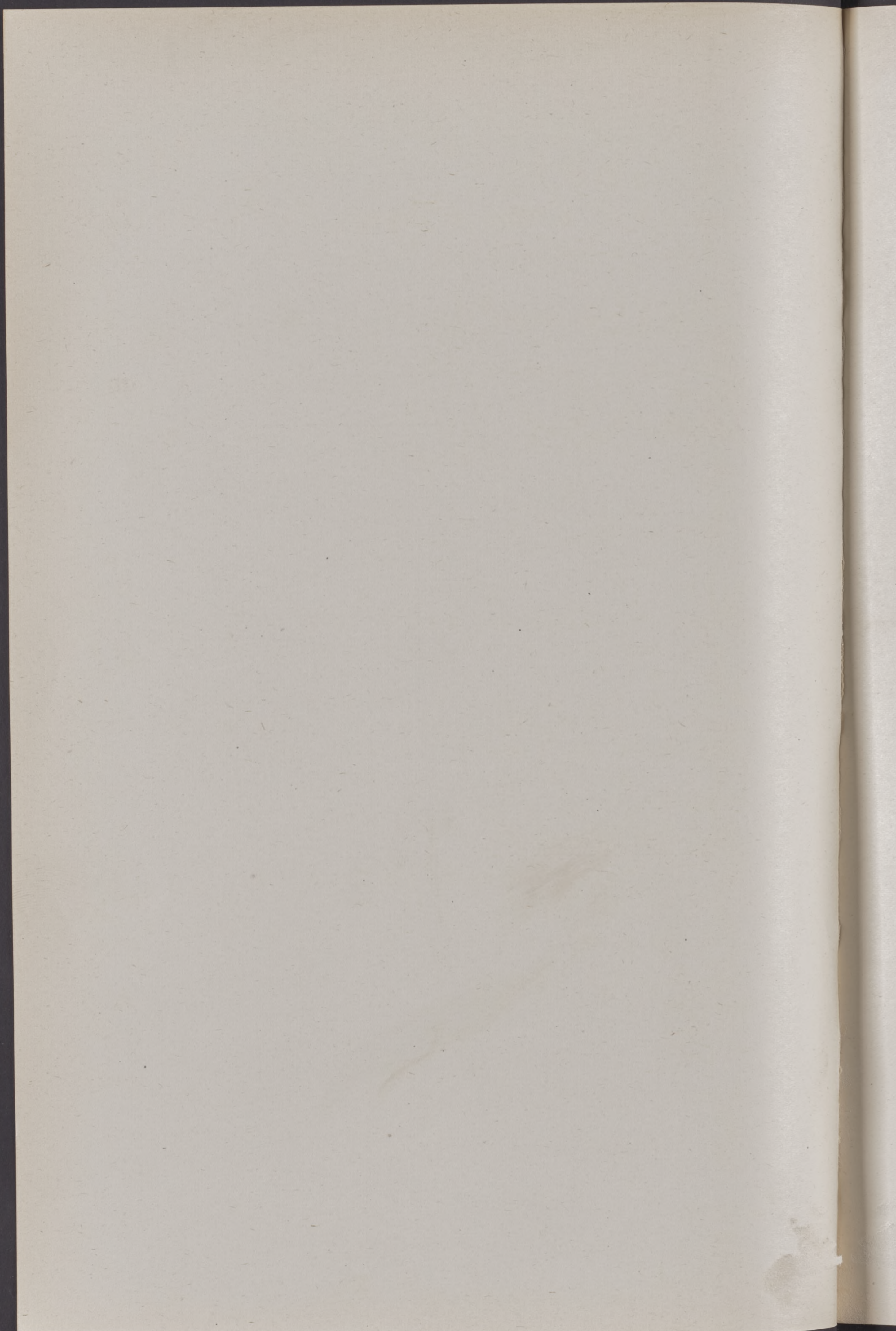

NOTICE OF APPEAL.

Filed December 1, 1921.

In Chancery of New Jersey

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Between	
THEODORE BARTHEN, *Complainant,*	*On Bill, &c.*
vs.	*Notice of Appeal.*
LODI CORPORATIONS, *Defendant.*	

Meyer & Brown, Inc., a creditor herein, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from an order made by the Court herein on November 21, 1921, on appeal from the Receiver's determination, wherein said order limits the allowance of said claim by said Receiver to the sum of $6,608.00, instead of ordering an allowance of said claim in the sum of $7,728.

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Dated November 28, 1921.

STEIN, STEIN & HANNOCH,
Solicitors and of Counsel with Meyer & Brown, Inc.

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I conceive there is good cause for appeal in the above-stated cause.

LEO STEIN,
Of Counsel with Creditor, Meyer & Brown, Inc.

Due acknowledgment of service.

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PETITION OF APPEAL.

Filed as of time, 4/5/22.

New Jersey Court of Errors and Appeals

10 IN THE LAST RESORT OF ALL CAUSES.

Between THEODORE BARTHEN, *Complainant,* *and* LODI CORPORATIONS, *Defendant.*	*On Bill, &c.* *Petition of Appeal.*

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To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The humble petition of Meyer & Brown, Inc., a creditor of the Lodi Corporations, the above-named defendant, respectfully shows that your petitioner finds itself aggrieved by an interlocutory order or decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the twenty-first
30 day of November, 1921, wherein the said Theodore Barthen was complainant and the said Lodi Corporations was the defendant, in this respect that the said interlocutory order or decree orders in the words following, namely: "The claim of Meyer & Brown, Inc., having been heretofore filed in the sum of $7,728 and the Receiver having disallowed the claim on January 25, 1921, so far as the same exceeded the sum of $1,569, and the matter coming on to be heard before this Court in the presence of William J. Morrison, Jr., solicitor for Receiver, and Stein, Stein & Hannoch, solicitors for Meyer & Brown, Inc.;
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it is on this twenty-first day of November, 1921, ORDERED, that the claim of Meyer & Brown, Inc., be allowed in the further sum of $5,040, making the total amount of this claim as heretofore allowed by the Receiver and now by this order, $6,608."

And your petitioner humbly appeals from the said interlocutory order or decree of the Chancellor and from so much thereof as allows the claim of Meyer & Brown, Inc., in only the sum of $6,608 instead of allowing said claim in the sum of $7,728, and upon the ground that said order fails to allow the said Meyer & Brown, Inc., on its said claim the sum of $1,120 in addition to the sum of $6,608, as actually allowed by said order.

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Your petitioner therefore prays that said interlocutory order or decree may be revised in such manner as to allow said sum of $1,120 in addition to said sum of $6,608, making a sum total to be allowed to the said claimant, Meyer & Brown, Inc., of $7,728, and that your petitioner may have such further relief in the premises as to this Honorable Court shall seem meet.

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And your petitioner will ever pray, &c.

STEIN, STEIN & HANNOCH,
Solicitors of the Appellant.

LEO STEIN,
Of Counsel.

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Service of within petition of appeal as of time is hereby acknowledged.

MORRISON, LLOYD & MORRISON,
4/5/22. *Solicitors of James A. VanValen, Recr.*

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ANSWER TO PETITION OF APPEAL.

Filed.

Formal answer filed denying the commission of any errors.

10

BILL OF COMPLAINT (Abstract).

Filed September 28, 1920.

Bill filed by complainant, a creditor of defendant corporation for about $11,000, alleging that the assets of the corporation as of September 20, 1920, amounted to $328,038.90 and that its liabilities amounted to $333,704.34, which, however, included a liability of $200,000 to stockholders for stock issued, and $39,756.53 for reserve, the actual creditors of the company amounting to only about $94,000; that the corporation, however, was unable to meet its debts as they were maturing. The bill prayed for the appointment of the statutory receiver.

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ORDER TO SHOW CAUSE WHY INJUNCTION SHOULD NOT ISSUE AND RECEIVER BE APPOINTED (Abstract).

Filed September 28, 1920.

Recites filing of bill and affidavits and orders defendant to show cause on October 4, 1920 "* * * why an injunction should not issue according to the prayer of the bill of complaint, and why a receiver should not be appointed for the said Lodi Corporations, according to the statute in such case made and provided." 10

"It is further ORDERED that until this order should be made absolute or discharged the said Lodi Corporations, its officers, servants and agents, absolutely desist and refrain, and they are hereby enjoined and restrained from contracting any debts and from collecting and receiving any money owing to the defendant corporation, and also from paying out any money, or selling, assigning or transferring any of the property, estate or effects of the said corporation." 20

Further orders service of bill and order.

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ORDER APPOINTING RECEIVER (Abstract).

Filed October 4, 1920.

"The matter being opened to the Court by William J. Morrison, Jr., of counsel with the complainant, in the above-entitled cause, in the presence of Walter G. Winne, 10 of counsel with the defendant, and upon reading and filing the bill of complaint and the affidavit thereto annexed and the answer of the defendant, and it appearing to the Court that the said defendant is unable to meet its current obligations or to continue its business with safety to the public or advantage to its stockholders, and is insolvent, and that receivers for the defendant company should be appointed by this Court to take charge of and administer all of its assets and property;

It is thereupon, on this 4th day of October, 1920, or- 20 dered, adjudged and decreed as follows:

1. That James A. Van Valen of Hackensack, Bergen County, in the State of New Jersey, be and he hereby is appointed receiver of the said defendant, Lodi Corporations, and of all its assets and property of every character and description wheresoever situate, with full power and authority to demand, sue for, collect and receive, and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and prop- 30 erty of any and every description belonging to the said defendant, Lodi Corporations, or to which it may be entitled, and to sell, convey and assign any or all of the real and personal estate of the said corporation, and to do and perform all the duties imposed upon him and required by law and especially by an act entitled "An Act concerning corporations (Revision of 1896)" and the acts supplementary thereto and amendatory thereof.

2. Requires filing of $25,000 bond.

"3. And it is further ordered that the said receiver 40 shall take possession of all the property and assets of the

said defendant corporation and account for the same as this Court shall hereafter direct, and that the said defendant corporation, its officers, directors and agents, shall forthwith assign, transfer, convey and deliver to the said receiver all of the property and assets of the said corporation, both real and personal, wheresoever situated and of whatever it may consist.'' 10

"4. And it is further ordered that the said defendant corporation, its officers and agents, and all persons claiming under it, shall be and they hereby are restrained from interfering with said receiver taking possession of and managing said property, and that all persons whosoever, and especially the creditors of the said defendant corporation, shall be, and they hereby are, restrained from bringing any action or proceeding at law or otherwise against the said corporation and from taking any further proceedings in any action or proceeding heretofore commenced.'' 20

"5. And it is further ordered, that the said receiver be, and he hereby is, authorized and empowered, until the further order of this Court, to conduct, and to continue to conduct the business of the said defendant corporation without interruption, and fulfill the contracts (other than indebtedness of the said defendant) made by the said defendant until further order in the premises, for two weeks from the date hereof, and to purchase and pay out of the income and profits of money, assets and effects, 30 from time to time, coming into his hands as such receiver for the necessary supplies for the purpose aforesaid, and to collect and pay all needful agents and servants, including payroll due September 29, 1920, and generally to do all acts and things proper or necessary to be done to protect the property and rights of which he is hereby appointed receiver for the benefit of the creditors and stockholders of the said company, with leave to apply, from time to time, whenever necessary, and as he may be ad-

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vised for instructions touching all and singular his rights, duties and liabilities in the premises."

6. Requires creditors and stockholders to show cause, on October 18, 1920, why the receiver should not be continued.

7. Requires serving of notice on creditors and stock-
10 holders.

ORDER CONTINUING APPOINTMENT OF RECEIVER.

Filed October 19, 1920.

This matter being opened to the Court by Wm. J. Morrison, Jr., solicitor for and of counsel with the above
20 named complainant, and an order having been made in this cause on the 4th day of October, 1920, wherein, among other things, the creditors and stockholders of the defendant corporation were ordered to show cause before this Court on Monday, the 18th day of October, 1920, at ten o'clock in the forenoon of that day, or as soon thereafter as this matter can be heard, at the Chancery Chambers, Paterson, New Jersey, why James A. Van Valen, the receiver heretofore appointed in this cause, should not be continued or why some other person should not be
30 appointed receiver in his place or with him as a co-receiver; and proof of mailing of a copy of said order to the creditors and stockholders of said defendant corporation being now presented to the Court, and being duly filed, and no cause being shown to the contrary;

It is, on this 18th day of October, 1920, ORDERED that James A. Van Valen be and he is hereby continued as receiver of the above-named defendant corporation with all the powers and authorities incident thereto, and conferred upon him by the order heretofore made appointing him
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receiver, and especially by the act entitled "An Act Concerning corporations (Revision of 1906)" and the supplements thereto and amendatory thereof.

E. R. WALKER,
C.

Respectfully advised,

VIVIAN M. LEWIS,
V.-C.

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PETITION OF RECEIVER FOR LEAVE TO CONTINUE OPERATION OF DEFENDANT'S PLANT (Abstract).

Filed October 18, 1920.

The petition of James A. Van Valen, receiver heretofore appointed for the defendant corporation by an order of this Court made October 4, 1920, respectfully shows:

1. He has duly qualified as receiver by filing an oath and depositing a bond with the Clerk of this court as required by said order.

2. That he has continued the business of said corporation as required by said order.

3. That he has caused an inventory and appraisement of the assets of said corporation to be made, which he anticipates will be completed within the next week.

4. That he has ascertained that there are on hand a large amount of unfinished contracts for rubber goods, a large amount of material both unmanufactured and in course of manufacture, with which to proceed to fill said contracts, and that he believes the persons and corporations with whom such contracts were made are financially responsible, and will pay for said rubber goods when completed.

5. That there are certain employees who, in the opinion of the receiver, should be retained for completing the manufacture of said rubber goods.

6. Alleges necessity for repair of steam boilers.

Wherefore, your petitioner asks leave of the Court to continue the operation of said plant for such time as the Court may direct, to employ and pay the necessary employees and to make such other expenditures as may be necessary in connection therewith, and that the receiver may be allowed in his account for payments made on account of the matters herein recited.

And your petitioner will ever pray, etc.

JAMES A. VAN VALEN,
Receiver.

ORDER TO CONTINUE BUSINESS.

Filed October 18, 1920.

It is on this 18th day of October, 1920, on motion of Wm. J. Morrison, Jr., of counsel with the receiver, ORDERED that the said receiver be and is hereby authorized, empowered and directed to continue the operation of the plant of said defendant company, until the first day of November, 1920. 10

E. R. WALKER,
C.

Respectfully advised,

VIVIAN M. LEWIS,
V.-C.

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ORDER TO CONTINUE BUSINESS.

Filed November 5, 1920.

It is on this first day of November, 1920, on motion of Wm. J. Morrison, Jr., of counsel with complainant and receiver, ORDERED that the said receiver be and is hereby authorized, empowered and directed to continue the operation of the plan of said defendant company until the 15th day of November, 1920. 30

E. R. WALKER,
C.

Respectfully advised,

VIVIAN M. LEWIS,
V.-C.

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RECEIVER'S PETITION RESPECTING SALE OF CERTAIN ASSETS (Abstract).

Filed November 15, 1920.

The petition of the receiver shows:

10 1. That he has made an inventory of the defendant's assets.

2. That a summary of the inventory indicates the following:

Real estate and buildings..........	$70,390.00
Machinery	47,626.00
Furniture and fixtures..............	2,042.27
Office furniture	1,603.75
Merchandise	41,799.30
Supplies	2,402.75
Accounts receivable	44,187.48
Cash in bank......................	6,527.35
Notes receivable	2,000.00
Manufacturers' Ins. Co. stock.......	510.00
Total assets	$219,088.90

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3. That the inventory is so voluminous that it has not been attached to the petition.

4. That the indebtedness due by the defendant to its
30 creditors is $111,423.02.

5. That it has $100,000 8 per cent. cumulative, preferred stock, and $100,000 common stock outstanding.

"6. That the business of the defendant corporation and the operation of its plant has been and is now being continued by the receiver in accordance with orders made by this Court."

7. That an offer for the reorganization of the company has been submitted, the details of which are set forth hereafter.

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Order to Show Cause.

8. Sets forth in detail the proposed plan of reorganization, the general details of which do not effect the matters before the Court, except that under the plan of reorganization the creditors of the company are to be paid in full.

9. "That it is desirable that the business of the defendant corporation and the operation of its plant be continued by the receiver pending the acceptance of this offer." 10

10. Prayer for instructions concluding as follows: "And that the receiver may be authorized to continue the operation of the defendant's business and plant until an order shall have been made in respect to this offer."

11. General prayer for other relief.

Signature of petitioner and counsel.

Petition verified.

20

ON RECEIVER'S PETITION FOR INSTRUCTIONS. ORDER TO SHOW CAUSE (Abstract).

Filed November 15, 1920.

Recites filing of the foregoing petition and orders creditors and stockholders to show cause on November 29, 1920, why the receiver should not be authorized to accept the proposed offer. 30

Requires service of petition and order on creditors and stockholders.

"And it is further ordered that the receiver continue the business and operation of the plant of the defendant corporation until the return of this order."

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Order Permitting Sale.

ORDER PERMITTING SALE (Abstract).

Filed November 29, 1920.

Order entered upon the foregoing receiver's petition, authorizing and directing receiver to sell assets upon terms and conditions set forth in the petition.

10

Miscellaneous Proceedings With Respect to Meyer & Brown, Inc., Claim.

November 29, 1920. Order entered requiring creditors to file claims with receiver within two months from the date of the order.

December 24, 1920. Meyer & Brown, Inc., appellant, 20 herein, duly filed with the receiver its proof of claim in sum of $7,728.00. (See stipulation.)

January 26, 1921. Receiver gave notice of disallowance of entire claim except for $1,568.00, which amount was allowed. (See stipulation.)

February 10, 1921. Notice of appeal from receiver's determination duly served. (See stipulation.)

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STIPULATION OF FACTS USED IN LIEU OF TESTIMONY IN CONNECTION WITH APPEAL.

It is hereby stipulated and agreed between Stein, Stein & Hannoch, solicitors of Meyer & Brown, Inc., a creditor herein, and Messrs. Morrison, Lloyd & Morrison, solicitors of the receiver herein, as follows: 10

1. That the argument on said creditors' appeal from the receiver's disallowance of part of said creditors' claim as filed be had before Honorable Vivian M. Lewis, one of the Vice-Chancellors of this court at the Chancery Chambers in Jersey City on Wednesday, April 13, 1921, at 10:30 A. M., or as soon thereafter as counsel can be heard.

2. That upon said argument the following facts shall be considered as proved as if the same had been sworn to in open court. 20

(a) That on or about June 4, 1919, said creditor entered into an agreement with the defendants, Lodi Corporations, under the name of Mattson Rubber Company for delivery by said creditor to said defendant of about sixty (60) tons of 2,240 pounds each of Rolled Brown Crepe Hevea Plantation Rubber for arrival and/or delivery in equal monthly quantities of 5 (five) tons each month during the year 1920 at 32¢ (thirty-two cents) per lb., ex dock and/or store New York. Each month's arrival and/or delivery of five tons to stand as a separate contract. That said contract was made subject to the rules and regulations of the Rubber Association of America, Inc. It was further provided that the terms of said contract should be cash ten days from delivery at the City of New York. 30

(b) That pursuant to said agreement said creditor made deliveries to said defendants of said rubber from month to month during the year 1920 up to and including the month of August, 1920. 40

Stipulation of Facts.

(c) On September 24, 1920, the defendant neglected and refused to accept delivery due in the month of September, 1920, and that the defendant resold said delivery to said creditor at 18¢ per pound agreeing to reimburse the said creditor for the difference between that price and the original contract price of 32¢ per pound, making a total then due to the said creditor in the sum of $1,568.00.

(d) On October 4, 1920, A. Van Valen, Esq., was by order of this Court appointed receiver of said defendant and on October 18, 1921, by a like order said receivership was continued, for further details thereof reference being hereby made to said orders.

(e) By orders of this Court, dated October 4th, October 18th and November 1st, 1920, said receiver was duly authorized to continue the business of said defendant and did continue said business until December 1, 1920. For further details thereof reference is hereby made to said orders.

(f) That on or about November 15, 1920, the said receiver filed in this court a petition for the sale of certain assets pursuant to a plan to avoid losses incident to a forced sale of said assets, and that an order to show cause dated November 15, 1920, and returnable November 29, 1920, was made directed to the creditors and stockholders herein to show cause why an order should not be made to empower and direct the receiver to accept said offer, and that pursuant to the said order to show cause an order was made by this Court on November 29, 1920, approving said sale.

(g) On November 29, 1920, an order was made in this cause directed to the creditors of the defendants to present their claims to the receiver herein within two months from the date hereof.

(h) That between October 29, 1920, and December 24, 1920, certain correspondence between the said creditors

or its attorney and the said receiver or his attorney took place, relating to the October, November and December deliveries required to be made under the terms of said contract (see paragraph 5 hereof).

(i) That on November 26, 1920, the receiver by his solicitor informed said creditor that the receiver could not take delivery of the November installment, and that with respect to the December installment the said attorney would notify said creditor of the outcome of the receiver's application for sale which was to be heard on November 29, 1920. 10

(j) That thereafter no further instructions were given by said receiver to said creditor with respect to the December installment.

(k) That on December 24, 1920, said creditor duly filed with the receiver its proof of claim in the sum of seven thousand seven hundred and twenty-eight ($7,-728.00) dollars. 20

(l) That on January 26, 1921, notice of disallowance by the receiver of a part of said claim was served on said creditor. Said claim was allowed in the sum of $1,568.

(m) That the following is a schedule of the difference existing on the dates hereinafter mentioned, between the contract price of $.32 per pound and of the market price at said times respectively, of the rubber of the kind and character referred to in said contract, to wit: 30

October 29, 1920, difference between contract price and market price on five tons of rubber, $1,792.00.

November 29, 1920, difference between contract price and market price on five tons of rubber, $2,016.00.

December 18, 1920, difference between contract price and market price of five tons of rubber, $2,352.00.

The dates mentioned being the dates in the months of October, November and December, respectively, when said creditor tendered itself ready to make said deliveries and 40

when the said defendant and the receiver neglected and refused to accept said respective deliveries.

(n) That on October 4, 1920, the difference between said contract price of 32¢ per pound and the market price of the kind and character of rubber referred to in said contract, 17¢ per pound was 15¢, and that on said date 15 tons of said rubber, being the 3 installments of 5 tons each for the months of October, November and December, 1920, remained undelivered, amounting to 33,600 pounds, the damage on which at the difference of 15¢ per pound would amount to the sum of $5,040.

3. The receiver contends that the damages on the undelivered 15 tons should all be based upon the market price of 17¢ per pound on October 4, 1920. The damage on this basis would be $5,040, as set forth in paragraph "2-(n)." If this contention should be sustained it is agreed that in addition to so much of the claim of the creditor as has already been allowed, to wit, the sum of $1,568, the creditor's claim should be allowed for the further sum of $5,040.

4. The creditor contends that the damages on the undelivered 15 tons should be based upon the market price of 5 tons on October 29, 1920, 5 tons on November 29, 1920, and 5 tons on December 18, 1920, the total damage being $6,160, as set forth in paragraph "2-(m)." If this contention should be sustained it is agreed that in addition to so much of the claim of the creditor as has already been allowed, to wit, the sum of $1,568, the creditor's claim should be allowed for the further sum of $6,160.

5. Correspondence so far as the same is material between said creditor and its attorneys on the one hand and the receiver herein and his attorneys, and J. H. Behrens, agent of the defendant, on the other hand, between September 24, 1920, and January 26, 1921, may be admitted

in evidence without formal proof, and copies of letters may be offered in lieu of originals.

WM. J. MORRISON, Jr.,
Solicitor of Receiver.

STEIN, STEIN & HANNOCH,
Solicitors of Creditor,
Meyer & Brown, Inc.

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Correspondence Admitted Pursuant to Foregoing Stipulation.

Meyer & Brown

September 24th, 1920.

Mattson Rubber Company,
Lodi, N. J.

20

Gentlemen:—

Referring to five tons of Rolled Brown Crepe Rubber representing the September portion against our contract No. 40225. We understand from you that even now after holding the Rubber for you for two weeks, you are unable to accept delivery of the same or unable to pay for the Rubber provided we should ship it to you? We, therefore, think that the best way for us to do is to sell the rubber, and we are sending you enclosed a contract according to which the rubber is sold back to us @ 18¢ per lb., which is in accordance with our proposition made to you several days ago, and which we are willing to adhere to, although the Rubber today is only worth 16¢ per lb.

30

We are also sending you a statement according to which you owe us the difference of $1,568.00 on these five tons.

In view of the fact, that we owe you five tons monthly further for Oct/Nov/Dec, we would suggest that you give us instructions to sell these fifteen tons immediately ow-

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ing to the very weak condition of the market which looks to us as if it might go still lower. We could then settle up the matter immediately and send you a debit note showing you exactly how much you owe us, rather than to leave the matter in abeyance. We are suggesting this as from the remarks which Mr. Behrens made to our
10 representative, Mr. Manchester, you do not expect to be able to take up this Rubber or pay for the same for some time to come.

We now would like to have a distinct understanding as to what you expect to do in regard to your obligation to us. If you can see your way clear to make us a reasonable proposition as to an extension of time, we will be glad to entertain the matter. On the other hand, if you have given up all hope that you can meet your obligations, we think that the best thing for all of us is to put the matter into a lawyer's hands, and have it settled the best way
20 we can. You can quite understand that if your Concern is in such shape that it will have to be liquidated we wish our interests to be protected. We would thank you to let us know immediately what your plans are so that we can act accordnigly.

Yours very truly,

MEYER & BROWN, Inc.
(Signed) Otto Meyer, President.

30 LM-AB

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MEYER & BROWN
LODI CORPORATIONS
LODI, NEW JERSEY

October 15, 1920.

Messrs. Meyer & Brown,
347 Madison Avenue,
New York City.

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Gentlemen:—

The writer has been very busy otherwise would have arranged to call and see you with our Receiver regarding your contracts. We now beg to advise that we will endeavor to do this before the middle of next week. We have no doubt but what we can make some arrangement which will be satisfactory.

Yours very truly,

J. H. BEHRENS.

20

MEYER & BROWN

October 18, 1920.

Mr. J. H. Behrens,
Lodi Corporations
Lodi, New Jersey

Dear Sir:

30

We acknowledge receipt of your letter of October 15th advising that you will call with your Receiver this week relative to your contracts. Mr. Meyer or Mr. Brown will be glad to go over this matter with you.

Yours very truly,

MEYER & BROWN, INC.
W. H. Dickerson
Secretary

WHD-HS

40

MEYER & BROWN

October 29th, 1920

Mattson Rubber Company,
Lodi, N. J.

Gentlemen:

10 Referring to the October portion of the Rolled Brown Crepe Rubber, which we owe you on contract No. 40225, in the absence of instructions as to shipment or disposition of the above, we have taken the same over for our account at today's price, namely, 16¢ per lb., and enclose debit note herewith.

If this is not satisfactory to you, any other suggestion which you may have to offer can be discussed when you call on us next week.

Yours very truly,

20 MEYER & BROWN, INC.

(Signed) A. H. Brown,
Vice-President.

AHB-AB

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MEYER & BROWN
MATTSON RUBBER COMPANY
(DIVISION OF LODI CORPORATIONS)
Lodi, Bergen Co., N. J.

Dictated by J. H. B.

October 30, 1920 10

Messrs Meyer & Brown,
347 Madison Avenue,
New York City.

Gentlemen:

We acknowledge receipt of your letter of October 29th. You have been regularly informed that the Lodi Corporations went into the hands of a Receiver on October 4th. We herewith return your debit note for $1,792.00 of October 29th.

20

Yours truly,

MATTSON RUBBER CO. DIVISION
JAMES A. VAN VALEN, Receiver.

MEYER & BROWN

November 1st, 1920

Mattson Rubber Company, 30
Lodi, Bergen Co.,
New Jersey.

Gentlemen:— Att: Mr. J. A. Van Valen, Receiver

We are in receipt of your favor of October 30th in which you returned to us our debit note for $1,792.00 representing our claim against the Mattson Rubber Company, for the difference on 5 tons of Rolled Brown Crepe Rubber which we owed them during the month of October and which we had to sell at market price because they

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were unable to accept the rubber. We do not understand why you should return us the debit note as the fact that the company is in the hands of a receiver does not invalidate our claim against them. There will be similar claims during the months of November and December to be settled and we certainly must ask you to acknowledge
10 receipt of our claims and also give us an outline as to the proposed settlement. If you wish the company to go into bankruptcy we certainly want to know it. Mr. Behrens wrote us that you would call upon us to give us some idea as to your plans but so far we have received no communication from you whatsoever. We again are sending you our claim for $1,792.00 which we ask you to acknowledge.

Yours very truly,

MEYER & BROWN, INC.

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(Signed) Otto Meyer,
President.

OM/HS

MEYER & BROWN

Lodi Corporations
Lodi, New Jersey

30

November 4th, 1920

Meyer & Brown;
347 Madison Avenue;
New York City.

Gentlemen:—

Your letter of Nov. 1st at hand in relation claim of $1,792.00 against the Mattson Rubber Co., and in reply I beg to state that I have already placed your name upon the list of creditors of the Lodi Corporations of which I am the Receiver and at present time am continuing the

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business under an order of the Court of Chancery of this State. As a creditor you are protected by the Court and will receive due notice when to file your verified proof of claim etc:

Yours very truly,

(Signed) J. A. VAN VALEN, Receiver

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November 18, 1920

Hon. J. A. Van Valen,
c/o Mattson Rubber Company
Lodi, Bergen County, N. J.

Dear Sir:— *Division of Lodi Corporations*

We are the attorneys for Meyer & Brown who have a claim against the Mattson Rubber Company for which company, we understand, you are the Receiver. We would thank you to advise us the present status of the proceeding and whether you have been appointed Receiver in bankruptcy or in equity proceedings. You are no doubt aware of the contract existing between our client and the Mattson Rubber Company, under which there are installments still to be delivered. We wish you would advise us whether you are continuing the business and what you intend to do with regard to this outstanding contract.

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A prompt reply will be appreciated.

30

Yours very truly,

STROOCK & STROOCK

By

CL: E

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MORRISON, LLOYD & MORRISON

November 19, 1920

Stroock and Stroock
141 Broadway
New York

10 Gentlemen:

Mr. James A. Van Valen has brought me your letter of November 18th, in reference to the claim of Meyer and Brown against Lodi Corporations, and has requested me to answer it.

On October 4th, 1920, Mr. Van Valen was appointed receiver of the above corporation in insolvency proceedings now pending in the Court of Chancery of New Jersey. Since that time he has been continuing the business pending the working out of a plan for reorganization.

20 Such a plan was presented to the Court on November 15th and an order to show cause upon the creditors and stockholders was made at that time. Copies of the petition and order are being mailed today to all of the creditors and stockholders and I enclose a copy herewith for your use.

After the return day of the order to show cause, I think Mr. Van Valen will be able to say very definitely what is to be done as to the claim of your client.

30 Yours truly

W. J. MORRISON JR.

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4937
M/B
L-D

Nov. 20, 1920

Messrs Morrison, Lloyd & Morrison,
McFadden Building,
Hackensack, N. J.

Gentlemen:

MEYER & BROWN with MATTSON RUBBER CO.

Permit us to acknowledge receipt of your favor of the 19th inst. in which you enclose copy of notice of the application which is being made by the Receiver to continue the business.

There is still the November and December installments to be delivered on the contract between Meyer & Brown and the Lodi Corporation and if the Receiver does not intend to accept said merchandise the claim for the difference between the contract price and the market price will be filed in due course of our clients; prior installments were tendered and refused and claim for damages on these installments will be likewise filed in due course. If there is a desire on the part of the Receiver to take in the merchandise, may we ask you to see to it that he communicates with our clients at once.

May we ask you to be good enough to let us know what disposition is made of the Receiver's application when it comes on for hearing on November 29th.

Yours very truly,

STROOCK & STROOCK,

By

10 20 30 40

MORRISON, LLOYD & MORRISON

November 26, 1920

Stroock and Stroock
141 Broadway
New York

10 Gentlemen:

This is to acknowledge receipt of your letter of November 20th, in reference to the Lodi Corporations matter.

Mr. Van Valen, receiver for this corporation, has informed that he cannot take delivery of the November installment of your client's contract.

I will write you later as to the December installment and will also let you know the outcome of the receiver's application which is to be heard on November 29th, 1920.

20 Yours truly,

W. J. MORRISON JR.

4937
M/B

MEYER & BROWN

30 December 9th, 1920

Mr. J. A. Van Valen, Receiver,
The Mattson Rubber Company,
Lodi N. J.

Dear Sir:—

The five tons of Rolled Brown Crepe Rubber which we owe you against the December portion of our contract No. 40225 are now ready for delivery.

Will you kindly advise us whether you wish to take

40 delivery of the Rubber yourselves, or whether you want

us to ship it for you. In the latter case please give us shipping instructions.

Yours very truly,

MEYER & BROWN, Inc.

(Signed) Otto Meyer
President. 10

OM-AB

Meyer & Brown

December 18, 1920

Mr. J. A. Van Valen, Receiver,
The Mattson Rubber Company,
Lodi, N. J. 20

Dear Sir:

Referring to our letter of December 9th and also telephone conversation with Mr. Behrens, we are without your instructions in regard to the five tons of Rolled Brown Crepe which we tendered you against our contract No. 40225.

Under these circumstances, we have taken the Rubber at the market price of today which is 11¢ per lb., and are sending you enclosed a debit note for the difference with 30 you owe us in this transaction amounting to $2,352.00.

Yours very truly,

MEYER & BROWN, Inc.
President.

OM-AB

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LODI CORPORATIONS

December 24, 1920

Messrs Stroock and Stroock,
141 Broadway, N. Y. City.

Re Claim Meyer & Brown
vs.
Lodi Corporations:

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Gentlemen:

I beg to acknowledge receipt of claim of Meyer & Brown against Mattson Rubber Co., a branch of the Lodi Corporations amounting to $7,728.00, same being filed by me this A. M.

Relative to the relationship between the Mattson Rubber Co and the Lodi Corporations I beg to state that the Mattson Rubber Co is a branch or department of the Lodi Corporations.

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Yours very truly,

J. A. VAN VALEN,
Receiver, Lodi Corporations.

MORRISON, LLOYD & MORRISON.

January 26, 1921.

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Messrs Stroock & Stroock,
141 Broadway,
New York City.

Re: Meyer & Brown v Lodi Corporations

Gentlemen:—

Your letter of January 24th, addressed to Mr. James A. Van Valen, Receiver, has been sent to us for reply.

Notice of disallowance of part of this claim has been sent to Meyer & Brown and a copy is enclosed herewith.

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The reason for disallowing the part of the claim mentioned in the notice is that the New Jersey courts have held that the order adjudicating the corporation insolvent puts an end to the business of the company and terminates its contracts.

Grey v Reynolds, 55 Eq. 501 at p. 503

Mayer v Attorney General, 32 Eq. 815, Syl. 3

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The Receiver's attention is, therefore, that the claim of Meyer and Brown should be calculated upon the resale price of rubber at the date of the adjudication which was October 4, 1920, and not at the re-sale price of rubber on the dates subsequent to that mentioned in the claim as filed.

If, after examining the above cases, you feel that the Receiver is justified in taking this stand, it may be that you will wish to file an amended claim. The time for filing claims expires on January 29th, 1921.

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Yours very truly,

WILLIAM J. MORRISON, Jr.

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MEMORANDUM OF VICE-CHANCELLOR.

Messrs. Stein, Stein & Hannoch, solicitors of Meyer & Brown, Inc.,

Messrs. Morrison, Lloyd & Morrison, solicitors of receiver.

10 Lewis, *V.-C.*

This appeal is from the receiver of the defendant corporation's determination in disallowing a part of the claim of Meyer & Brown, Inc., a creditor. The matter was argued orally before me and the facts were embodied in a stipulation submitted at the time of the argument. The receiver of the defendant corporation was appointed October 4, 1920, and notice of his appointment was given by mailing and publication. At that time the defendant corporation had a contract with Meyer & Brown made
20 June 4, 1919, for sixty tons (2,240 lbs. each) of rubber, at thirty-two (32¢) a pound, to be delivered to the defendant corporation in monthly lots of five tons each during the year 1920. The August delivery, and those prior thereto, were made and paid for. The defendant corporation refused to accept the September delivery, and the rubber for that month was resold at eighteen cents (18¢) a pound, resulting in a loss of $1,569.00. On October 29th, 1920, Meyer & Brown notified the defendant
30 corporation that, in the absence of instructions as to the October shipment, they had taken the same over at the day's price, sixteen cents (16¢) a pound, and enclosed a debit note for $1,792.00 for the loss on the shipment, and this letter was delivered to the receiver, who, on October 30th, 1920, returned the debit note and called attention to the appointment of a receiver on October 4th. On November 1st Meyer & Brown wrote the receiver again returning the debit note. On November 4th the receiver replied that he had placed their name upon the list of creditors, and advised that they would receive due notice
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when to file a verified proof of claim. On November 8th Strook & Strook, attorneys for Meyer & Brown, wrote the receiver, asking among other things, "what you intend to do with regard to this outstanding contract." On November 19th the attorney for the receiver replied, enclosing a copy of a plan of reorganization upon which an order to show cause had been made on November 15th, and stating that after the return day of the order to show cause, the receiver would be able to say what could be done with the claim of Meyer & Brown. On November 20th Strook & Strook replied, asking whether the receiver desired to take the November and December installments on rubber contract. On November 26th the attorney for the receiver replied that the receiver could not take the November installment, and he would write them as to the December installment after the return day of the order to show cause on the reorganization plan. The difference between the contract price and the market price of this lot of rubber on November 29, 1920, when this letter was delivered, was $2,016.00. On December 9th, Meyer & Brown wrote the receiver that the December installment was ready for delivery and asked instructions as to shipment. On December 18th they again wrote the receiver that having received no instructions, they had taken over this rubber at eleven cents (11¢) a pound, establishing a loss of $2,352.00. On December 24th the attorneys for Meyer & Brown filed with the receiver a duly verified claim for $7,728.00, being the loss for the September shipment $1,568.00, for the October shipment $1,792.00, for November $2,016.00, and for December $2,352.00. The receiver allowed this claim in the sum of $1,568.00, being the amount of the September loss, and disallowed the balance of the claim, the receiver's contention being that the loss on the October, November and December shipments should be ascertained by subtracting from the contract price the value of the rubber as of the fourth day of October, 1920. By the stipula-

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tion, the price on that day was fixed at seventeen cents (17¢) a pound, and the loss on these three shipments at that price is stipulated at $5,040.00. The above facts are all set forth in the stipulation.

On November 21, 1921, I advised an order that Meyer & Brown's claim be allowed in the further sum of $5,-
10 040.00, making the total amount of this claim as heretofore allowed by the receiver and by my order $6,608.00.

The creditor contends that the damages on the undelivered fifteen tons should be based upon the market price of five tons on October 29, 1920, five tons on November 29, 1920, and five tons on December 18, 1920, which would give him a further sum than provided by my order of $1,120.00.

The receiver's contention is that the damages on the undelivered fifteen tons should all be based upon the market price of seventeen cents (17¢) on October 4, 1920,
20 or, in other words, that the Meyer & Brown loss should be fixed in relation to the price on the date on which the receiver was appointed, and not in relation to price at any subsequent date. I am in accord with this view, and the order of November 21, 1921, advised by me, makes such provision.

It is apparent from the stipulation that the creditor, Meyer & Brown, Inc., had notice of the appointment of the receiver, and were further informed by him that he
30 did not intend to carry out the contract beyond the amount which had been allowed on their claim, and having found this to be the fact, I do not deem it necessary to pass upon the question raised on the oral argument before me by the solicitor of the creditor, *i. e.,* that the charter of the Lodi Corporation should have been declared void before the receiver's action could be sustained, or that an injunction (provided for in Section 65 of the Corporation Act) should have issued before rejection could be made of any portion of his client's claim.

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ORDER INCREASING THE AMOUNT OF THE ALLOWANCE ON THE CLAIM OF MEYER & BROWN, INC.

Filed November 21, 1921.

The claim of Meyer & Brown, Inc., having been heretofore filed in the sum of $7,728, and the receiver having disallowed the claim on January 25, 1921, so far as the same exceeded the sum of $1,568, and the matter coming on to be heard before this Court in the presence of William J. Morrison, Jr., solicitor for receiver, and Stein, Stein & Hannoch, solicitors for Meyer & Brown, Inc., it is on this 21st day of November, 1921, ORDERED that the claim of Meyer & Brown, Inc., be allowed in the further sum of $5,040, making the total amount of this claim as heretofore allowed by the receiver and now by this order $6,608.

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E. R. WALKER,
C.

Respectfully advised,

VIVIAN M. LEWIS,
V.-C.

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

THEODORE BARTHEN,
Complainant,

and

LODI CORPORATIONS,
Defendant.

On Bill, etc.

On Appeal from Court of Chancery.

BRIEF FOR APPELLANT.

Statement of Issues.

This is an appeal by Meyer & Brown, Inc., a creditor of the above-named defendant corporation from an order of the Court allowing a claim filed by appellant with the Receiver of the corporation in the sum of $6,608 instead of allowing the sum of $7,728 as claimed by appellant. The Receiver originally allowed it in the sum of $1,568. The Court increased this to $6,608. Appellant alleges it should have been allowed in full, namely, $7,728.

As it is probable that the claims of creditors will be paid in full, the question is more than a mere academic one.

Concretely stated, the question of law involved is whether the mere appointment of a Receiver in Chancery of a corporation automatically fixes the time as of which damages should be computed in favor of a creditor upon a contract for goods to be sold and delivered in instalments in the future when no order restraining the exercise of the corporation franchise is entered and when the Receiver is authorized to continue the business and the merchandise covered by the contract is of a character which the Receiver may have to use in connection with the operation of the business.

THE FACTS.

The fact will appear from the stipulation of counsel (pp. 15-19). From this stipulation it appears that on or about June 4, 1919, appellant and defendant entered into an agreement for the delivery by appellant of 60 tons of rubber in equal monthly quantities of 5 tons each through the year 1920. The contract price was 32¢ per pound. The contract provided that "each month's arrival and/or delivery of 5 tons to stand as a separate contract" (p. 15, l. 30).

Pursuant to the terms of the contract, deliveries were made from month to month up to and including August, 1920 (p. 15, ll. 38-40).

On September 24, 1920, defendant neglected and refused to accept the September delivery and defendant re-sold the rubber to appellant for 18¢ per pound, defendant agreeing to reimburse appellant for the difference between the contract price of 32¢ and the re-sale price of 18¢. This difference amounted to $1,568. This is the amount for which the Receiver allowed appellant's claim (p. 16, ll. 1-11).

On September 28, 1920, a bill was filed in Chancery asking for the appointment of a statutory receiver. The bill disclosed that the corporate assets exceeded its liabilities by a considerable amount but that the company was unable to pay its debts as they matured (p. 4).

An order to show cause was issued on the petition, returnable October 4, 1920. This order restrained the corporation from contracting debts, collecting moneys or transferring any property "until this order should be made absolute" (p. 5).

Upon the return day, an order was entered appointing a Receiver. *The order does not contain any provision restraining the corporation from exercising its franchises,* and is so carefully drafted in other respects, that its omission cannot be regarded as an oversight. The order,

among other things, authorizes the Receiver to continue the business of the company, in the following language:

> "5. And it is further ordered, that the said Receiver be, and he hereby is, *authorized and empowered,* until the further order of this Court, *to conduct* and to continue to conduct the business of the said defendant corporation without interruption, and *fulfill the contracts* (other than indebtedness of the said defendant) made by the said defendant until further order in the premises, for two weeks from the date hereof, and to purchase and pay out of the income and profits of money, assets and effects, from time to time, coming into his hands as such receiver for the necessary supplies for the purpose aforesaid, and to collect and pay all needful agents and servants, including payroll due September 29, 1920, and generally to do all acts and things proper or necessary to be done to protect the property and rights of which he is hereby appointed receiver for the benefit of the creditors and stockholders of the said company, with leave to apply, from time to time, whenever necessary, and as he may be advised for instructions touching all and singular his rights, duties and liabilities in the premises" (p. 7).

On October 18, 1920, the Receiver was made permanent, notices having been in the meantime given to the stockholders and creditors (p. 8).

On the same day, the Receiver filed a petition setting forth that the corporation had a large amount of unfinished contracts for rubber goods which he deemed should be completed and asked for permission to operate the business. Upon this petition it was ordered:

> "that the said Receiver be and is hereby authorized, empowered and directed to continue the operation of the plant of said defendant company until the first day of November, 1920" (p. 10).

On November 1, 1920, the Receiver was authorized to continue the operation of the business until November 15, 1920 (p. 11).

On November 15, 1920, the Receiver filed a petition for permission to sell the assets pursuant to a plan for reorganization. The only important detail of the plan of reorganizing was that the creditors would be paid in full (p. 12). An order to show cause was entered on this petition returnable November 29, 1920, the order containing an authorization in favor of the Receiver to continue the operation of the plant until the return day (p. 13).

Upon the return day, the sale was authorized, then consummated and the assets delivered to the purchasers (p. 14).

The object of this detailed statement of the pleadings is to indicate to the Court that *at no time during the period when the Receiver was in possession, was the operation of the defendant's business discontinued, and at all times the Receiver was in active charge and management of its affairs.*

At the time of the appointment of the Receiver, appellant was under obligation to deliver, and the defendant company to take 5 tons of rubber for each of the months of October, November and December, 1920. During the Receiver's possession and operation, correspondence ensued between appellant and the Receiver, but there was at no time an express statement by the Receiver to the effect that he did not consider himself obligated by the contract or that he released appellant from its obligation to deliver. The effect of this state of affairs was to compel appellant to hold itself in readiness to perform, should it be requested so to do.

The first communication that appellant had from the Receiver was the letter of October 15 (p. 21), in which defendant stated that the Receiver would call to see them shortly. Appellant replied that they would be glad to go over the matter with him (p. 21).

On October 29 no word having been given them concerning the disposition of October delivery, appellant took the rubber over at the market price of 16¢ and charged

defendant with the difference amounting to $1,792 (p. 22). This was the correct market value on October 29, 1920 (p. 17, l. 31).

The Receiver on October 30th, returned the debit memo of October 29, stating:

> "You have been regularly informed that the Lodi Corporation went into the hands of a receiver on October 4th. We herewith return your debit note for $1,792 of October 29th" (p. 23).

Appellant disputed the right to return the memo, contending that the appointment of the Receiver did not invalidate the claim. Appellant further advised the Receiver of the existence of the contract, calling special attention to the remaining November and December deliveries and requested instructions (p. 23.)

The Receiver did not disaffirm the contract or state that appellant need not deliver or perform, but simply replied on November 4th, by stating that he had added appellant's name to the list of creditors and that he was operating the plant under instructions of the Court and that appellant would receive notice when to file its claim (p. 24).

On November 18th, appellant again specifically requested the Receiver for instructions concerning the contract, stating to him:

> "We wish you would advise us whether you are continuing business and what you intend to do with regard to this outstanding contract" (p. 25).

The Receiver replied to this (p. 26), stating that he was operating the business pending a re-organization plan which was then being submitted to the creditors. The letter continues:

> "After the return day of the order to show cause, I think Mr. Van Valen will be able to say very definitely what is to be done as to the claim of your client."

To this appellant replied through its attorneys in these words:

> "There is still the November and December installments to be delivered on the contract between

> Meyer & Brown, and the Lodi Corporation, and if the receiver does not intend to accept said merchandise the claim for the difference between the contract price and the market price will be filed in due course of our clients; prior installments were tendered and refused and claim for damages on these installments will be likewise filed in due course. If there is a desire on the part of the receiver to take in the merchandise, may we ask you to see to it that he communicates with our clients at once" (p. 27).

Receiver replied on November 26th, refusing to accept the November delivery, and stating that instruction concerning the December delivery would be given later (p. 28).

The difference between the contract and market price of the rubber at this time was $2,016 (p. 17, l. 34).

On December 9, 1920, appellant tendered the December delivery (p. 28), but receiving no instructions, on December 18th took the rubber over at the market price of 11¢, making a difference between the contract and market price of $2,352 (p. 29).

On December 24th appellant filed the claim for $7,728, made up as follows:

Difference between contract and market price of the September installment	$1,568
of the October installment	1,729
of the November installment	2,016
of the December installment	2,352
	$7,728

The Receiver allowed the claim for $1,568, contending that "the order adjudicating the corporation insolvent puts an end to the business of the company and terminates its contracts" (p. 31).

The difference between the contract and market price for all the October, November and December rubber as of October 4th, the date of the appointment of the Receiver,

was $5,040 (p. 18, ll. 3-15). This was the amount which the Court allowed, adding to it the damage for the September delivery, which damage had been fixed prior to the appointment of the Receiver, making it $6,608 in all.

The Court in arriving at its conclusion said (p. 34, ll. 26-40):

> "It is apparent from the stipulation that the creditor, Meyer & Brown, Inc., had notice of the appointment of the receiver, and were further informed by him *that he did not intend to carry out the contract beyond the amount which had been allowed on their claim,* and having found this to be the fact, I do not deem it necessary to pass upon the question raised on the oral argument before me by the solicitor of the creditor, *i. e.,* that the charter of the Lodi Corporation should have been declared void before the receiver's action could be sustained, or that an injunction (provided for in Section 65 of the Corporation Act) should have issued before rejection could be made of any portion of his client's claim."

The Court's conclusion, therefore, was based upon two points: (1) that the appellant creditor had notice of the appointment of the Receiver; (2) that the appellant had been informed by the Receiver that he did not intend to carry out the contract.

With respect to the first point it is respectfully urged that mere notice of the appointment of the Receiver did not, as a matter of law, constitute a breach of the contract in question. The law on this subject is duscussed further in this brief.

With respect to the second point we respectfully submit that the *Court's findings of fact that the Receiver did not intend to carry out the contract is not warranted by the evidence in the case.*

The evidence in the case is contained in the correspondence between the parties, already digested, as well as the stipulation and the various orders in the main proceedings.

With the exception of the letter of October 30, 1920, from the Receiver to the appellant creditor (p. 23), there

is not the slightest indication in any of the correspondence of any intention on the part of the Receiver to terminate the contract.

With respect to the Receiver's letter dated October 30, 1920, it will doubtless be argued that an inference might be drawn therefrom that the Receiver was thereby intending to indicate that he would refuse to accept the remaining installments.

Our reply is, that if this letter stood alone, the most that might be taken therefrom is that it was the Receiver's opinion that, as a matter of law, the corporation's life terminated on October 4th, as set forth in the last letter in the correspondence dated January 26, 1921 (p. 30).

On the other hand, when the letter of October 30, 1920, is read in the light of the rest of the correspondence, it is apparent that the Receiver did not intend to definitely refuse acceptance of any of the deliveries until the end of November, and then only of the November installment.

Under the circumstances the creditor could not have been expected to have fixed the damages for the remaining installments on mere conjecture or vague inferences, for it the market had suddenly risen the Receiver might very well have insisted upon the deliveries and any gratuitous expression by the Receiver of the law, such as might be read into the letter of October 30th, would not serve the creditor as a defense for any inability to deliver.

The good faith of the creditor, in its effort to ascertain definitely whether or not the remaining installments would be accepted, is indicated not only in its letter of September 24th (p. 19), in which it calls attention to the weak condition of the market, and suggests to the defendant corporation that it terminate the contract at once, and in all events to give the creditor immediate instructions, but also throughout the entire correspondence.

Should this Court conclude that damages should have been assessed as of the date of the appointment of the Receiver, then the decision below should be affirmed.

If, however, the Court concludes that damages should be assessed as of the various dates of tenders and refusal, then the order of the Court of Chancery should be modified with direction to allow the claim in the sum of $7,728.

THE LAW.

The pertinent portions of the statute (An Act concerning corporations, Revision of 1896 and the amendments thereof and supplements thereto) are as follows:

Section 65, of the General Corporation Act, provides that in certain cases the Court of Chancery "*may* issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises," &c.

Section 66, provides that "the Court may appoint a receiver or receivers * * * with full power and authority to demand * * * and take into their possession * * * all the property of every description of the corporation," &c.

Section 68, provides that "all the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upón the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto."

Section 69, provides that "whenever a receiver shall have been appointed * * * and it shall *afterwards* appear that the debts of the corporation have been paid or provided for, and that there remains or can be obtained by further contributions sufficient capital to enable it to resume its business, the Court of Chancery may * * * direct the receiver to reconvey to the corporation all its property," &c. * * * "and in every case in which the Court of Chancery shall not direct such reconveyances, said Court *may,* in its discretion, make a decree dissolving the corporation and declaring its charter forfeited and void."

Section 86, provides, that after the payment of all allowances, expenses and costs and the satisfaction of priority liens, "the creditors shall be paid proportionately to the amount of their respective debts * * * ; and the creditor shall be entitled to distribution on debts not due making in such case a rebate of interest, when interest is not accruing on the same * * *;"

The following cases deal with the subject before the Court:

> *N. J. Southern R. R. Co.* v. *R. R. Commissioners,* 12 Vr. (41 N. J. L.) 235, Sup. Ct. 1879;
>
> *Kirkpatrick* v. *Board of Assessors,* 28 Vr. (57 N. J. L.) 53, Sup. Ct. 1894;
>
> *Spader* v. *Mural Decoration Co.,* 2 Dick. (47 N. J. Eq.) 18, Chan. 1890;
>
> *Belles* v. *Crescent Drug Co.,* 8 Dick. (53 N. J. Eq.) 614, Chan. 1895;
>
> *Rosenbaum* v. *Credit System Co.,* 32 Vr. (61 N. J. L.) 543, Court of Errors 1898;
>
> *Crews* v. *U. S. Car Co.,* 15 Dick (60 N. J. Eq.) 514, Court of Errors 1900.

I.

Upon the appointment of a Receiv[illegible] property of the corporation subject to all the duties, obligations and liabilities that rest upon the corporation itself.

It was so held in the case of *N. J. Southern R. R. Co.* v. *R. R. Commissioners,* 12 Vr. (41 N. J. Law) 235 (Supreme Court 1879).

In that case, a writ of certiorari issued to review the legality of assessments against certain corporations which were under receiverships. The Court stated (at p. 249) as follows:

> "The appointment of a receiver is a mere mode of procedure for the administration of justice. He is a mere custodian of the property, holding for the common benefit of all interested therein. Plac-

ing the property of a corporation in charge of a receiver does not work its dissolution, nor is the title of the property changed; a power only is delegated to the receiver to take charge of it, and sell it. *Willink* v. *Morris Canal Co.,* 3 Green 377; *Kincaid* v. *Dwinelle,* 59 N. Y. 548. He takes the property of the corporation, including its franchises, in the same condition and *subject to all the duties, obligations and liabilities that rested upon the corporation itself,* and in the administration of his office is under obligation for the performance of every duty and obligation imposed upon the corporation by its charter, or by the general laws of the state."

II.

Putting a corporation in charge of a receivership does not work its dissolution.

It was so held in the case of *Kirkpatrick* v. *Board of Assessors,* 28 Vr. (57 N. J. Law) 53 (Sup. Ct. 1894).

In that case the Court (at p. 54) states as follows:

> "Putting a corporation in charge of a receiver does not work its dissolution. The corporation continues to exist until the dissolution is effected either by surrender or judicial decision. Meanwhile the corporation exists with all its franchises, exer[illegible] the receiver in the management of its [illegible] subject to all the duties, obligations and liabilties that rested upon the corporation itself, among which is liability to taxation, the same as the corporation itself would have been subject to in case the management and control of its affairs had not been committed to a receiver. *New Jersey Southern Railroad Co.* v. *Railroad Commissioners,* 12 Vr. 235. * * *"

III.

The insolvency, suspension of business, and receivership, do not extinguish the corporation's life.

In *Spader* v. *Mural Decoration Co.*, 2 Dick. (47 N. J. Eq.) 18 (Chancery 1890), a claim was filed by an employee engaged for a definite term of service. The corporation became insolvent before the end of that term, and he presented his claim to the Receiver for damages suffered by the breach.

The Court, after pointing out the 86th section of the act dealing with the distribution, requiring the Receiver to distribute moneys among the creditors proportionately to the amount of their debts, holds that the terms "creditor" and "debt" are not to be used in a narrow sense, but are to include those who suffer from breaches of contract "even though the breaches and consequent damages follow the insolvency." The Court states:

> "The insolvency, suspension of business and receivership, do not extinguish the corporation's life. The Chancellor '*may*' declare the charter to be forfeited and void, and '*may*' direct a division of the surplus assets among the stockholders; but cases may arise, and to arise, where he should not, and does not exercise that power, because the assets are sufficient to pay creditors and justify the discharge of the receiver, so that the company may resume its business."

It will be observed that in the case at bar the Chancellor did not declare the charter of the defendant company forfeited and void.

In *Rosenbaum* v. *Credit System Co.*, 32 Vr. (61 N. J. Law) 543 (Errors, 1898), a suit was brought for damages by the plaintiff for breach of contract that he had with the company to act as its general agent for a term of years, and the entire question now before this Court was there discussed. The defendants pleaded a suit brought by the Commissioner of Banking and Insurance against the defendants, the issuing of an order to show cause, and

of an injunction restraining it from collecting moneys due to it, and from paying out any money or selling or transferring any of its property and of an adjudication of insolvency, and of a forfeiture of the company's charter, except for the purpose of collecting its assets and distributing the same among its creditors and stockholders.

A demurrer was interposed to this plea, which the Supreme Court overruled.

The Court of Errors in reversing the Supreme Court pointed out the difference between suspension of business, the forfeiture of the company's charter, and an injunction issued against it, which merely forbade contraction of debts and collection of money due it, so that the injunction did not restrain the defendant from exercising its franchises. By the terms of that injunction, which was dated August 23rd, it was to continue only until September 4th. On that day there was an adjudication of insolvency and the appointment of a receiver, but there was no continuance of the injunction or the issuance of another in its stead.

The Court, at page 547, stated:

> "The statutes nowhere provide that a mere adjudication of the insolvency and appointment of a receiver shall take from the corporation its right to transact business. The practical effect of the insolvency and receivership would probably be the stoppage of business, but the right to continue would not be taken away. The Chancellor might have issued an injunction to restrain the defendant and its agents from exercising any of the privileges or franchises of the defendant" (Sec. 64) "but it does not appear that he did so. Putting the corporation in charge of the receiver did not work its dissolution." Citing *Kirkpatrick* v. *Board of Assessors,* 28 Vr. 55.

The limited nature of the injunction issued in the case at bar will likewise be observed. There was no injunction to restrain the corporation from exercising its franchises, and apparently the only injunction issued was that dated October 4, 1920, which merely restrained the corporation,

its officers and agents "from interfering with said Receiver, taking possession of and managing said property and that all persons whosoever, and especially the creditors of said defendant corporation shall be, and they hereby are restrained from bringing any action or proceedings at law, or otherwise, against the said corporation," &c. It will be observed that this same order authorized the receiver to continue the business of the corporation without interruption, and *"fulfill the contract (other than indebtedness of the said defendant)* made by the said defendant until further ordered in the premises, for two weeks," &c. No further injunction was issued and the Receiver was from time to time authorized to continue the business, and did in fact continue the business until December 1, 1920, as set forth in the stipulation.

The creditor, Meyer & Brown, Inc., was therefore justified in believing that the Receiver intended to fulfill the contract of the defendant company unless and until he was clearly informed to the contrary by the Receiver.

IV.

A decree of insolvency against a corporation does not work a rescission of its contracts.

In *Bolles* v. *Crescent Drug Co.,* 8 Dick. (53 Eq.) 614 (Ch. 1895), the executors of Bolles filed a claim with the Receiver for damages because of a breach of a contract by the Receiver of the corporation, whereby Bolles was to erect and operate at his own expense a soda fountain in the store of the corporation and receive from it 85% of the gross receipts and that the contract should exist for three years.

The corporation having been decreed insolvent and a receiver appointed before the expiration of the three-year period, the Receiver terminated the soda water business and excluded the executors of Bolles (who had since died). The Receiver disallowed the claim on the theory that the

contract did not survive the insolvency of the company, but it was held that the decree of insolvency did not work a rescission of the contract.

In *Crews* v. *U. S. Car Co.*, 15 Dick. (60 Eq.) 514 (Errors, 1900), an appeal was taken from the decision of the Chancellor affirming the rejection by the Receivers of the claim of the State of New Jersey to be paid the amount of a state tax assessed against the corporation "*subsequent* to the entry of the decree of insolvency and the appointment of the receivers." The Court below rejected the claim proceeding on the theory that at the time of the Receivers' appointment there were insufficient assets to pay the debts and that the franchises of the company were not a valuable asset in their hands, the Court holding that the tax was not payable out of the funds in the hands of the Receivers until after all indebtedness existing at the time of their appointment was discharged. The Court of Errors refused to adopt this view and reversed the decree below.

Mr. Justice Gummere, in writing his opinion stated, at page 516, as follows:

> "The State, in creating a corporation, has the right to impose upon its creature such conditions as the Legislature, within constitutional limits, may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it to the performance of these conditions so long as it continues to remain is possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the Legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, is the *existence or non-existence of the corporation.*
>
> Applying this test, it is quite clear that the so-called tax was properly imposed in the present case. At the time of its imposition, although the company had been decreed to be *insolvent, no decree of dis-*

solution had been pronounced against it, but, on the contrary, its corporate life was *continued* for the benefit of its creditors *pending the final distribution* of its assets."

The cases cited by Receiver are not in point.

The Receiver in the case at bar cites as authority for his position *Mayer* v. *Attorney General,* 5 Stew. 815 (Errors, 1880); *Gray* v. *Reynolds,* 10 Dick. 501 (Errors, 1897).

An examination of these cases discloses the fact that the first was a case of a mutual life insurance company, and the claims of various policy-holders were dealt with, as well as the claims of creditors.

The Court, after pointing out how policy-holders, themselves, in effect constitute the corporation until such time as, for one reason or other, they cease to be policy-holders, held that the claims of such policy-holders as had at the time of insolvency matured by death or expiration of the time fixed in the policies, were to be considered as claims of *creditors,* as against all other unmatured claims which were put in the stockholder class.

It is significant, however, that even in that case the Court points out, at page 824, as follows:

> "It is an incident of the peculiar contract and relation which each member of a mutual insurance company enters into with the other members, that the *injunction and judicial sequestration of the property of the corporation* terminates its liability for future losses." Citing *Commonwealth* v. *Mass. Ins. Co.,* 119 Mass. 51.

The case of *Gray* v. *Reynolds,* 10 Dick. 501 (Court of Errors, 1897), likewise deals with the rights of policy-holders in a mutual insurance company, and is to be clearly distinguished from a case under our General Corporation Act, such as is the case at bar.

In that case Gray was the receiver of the U. S. Credit Co., which had made a business of insuring merchants

who were policy-holders, by reason of losses arising from sales of merchandise made by them, and it was held that such losses could be allowed to policy-holders as creditors where the losses occurred before insolvency, whether the merchandise was sold before or after insolvency. In other words, if the merchandise was sold before insolvency, and the losses occurred after insolvency, the policy-holder had no standing as a creditor, but as a policy-holder was merely in the stockholder class.

The most, therefore, that can be said for these cases, is that they fix the date of insolvency as the date on which policy-holders in a mutual insurance company whose policies had matured by death or lapse of time *prior* to insolvency, or who had prior to insolvency sustained an actual loss against which the policy insured them, had their status changed from that of a mere *stockholder* to that of a *creditor,* which is quite a different proposition than that which the Receiver in the case at bar seeks to establish, namely that the insolvency and appointment of the Receiver automatically caused a breach of all of such contracts as the corporation was bound to perform.

Under the cases cited, it is respectfully urged that before there could be such breach, either the Receiver himself by word or deed was bound to give clear notice of his intention not to carry out the contract (which in this case he failed to do), or, the charter of the company itself must have been declared forfeited and void, or the sweeping injunction provided for in Section 65 of the Corporation Act against the exercise of all of its franchises must have been issued against the corporation. No such order or injunction was ever issued, but on the contrary, the Receiver was expressly authorized to carry on the corporation's business, and to *fulfill its contracts.* He, in fact, carried on the business without terminating the contracts in question.

Assuming the Court's conclusion of fact and law relating to the termination of the life of the corporation to be correct, the rule of damages applied was inaccurate.

The contract was one for the sale of delivery in installments. Assuming the Court's conclusion to be correct, there was a refusal on the part of the defendant to accept deliveries.

The Sales Act (C. S. Vol. 4, p. 4662) covers the situation.

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance (Sec. 64 (1)).

The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract (Sec. 64 (2)).

Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the *contract price* and *the market or current price at the time or times when the goods ought to have been accepted,* or, if no time was fixed for acceptance, then at the time of the refusal to accept (Sec. 64 (3)).

Clearly the time for deliveries was fixed and the measure of damages is, therefore, the difference between the contract price and the market or current price *at such times.*

The appellant's claim for damages was calculated on this basis, and from the stipulation it will appear that these damages amounted to $7,728.

Conclusion.

It is, therefore, respectfully submitted that the Court erred in refusing to allow the appellant's claim in the full amount for which it was filed, and that the order of the Court of Chancery should, therefore, be modified so as to allow appellant's claim in the full sum of $7,728.

STEIN, STEIN & HANNOCH,
Solicitors for and of Counsel with Appellant.

LEO STEIN,
HERBERT J. HANNOCH,
Of Counsel.

The Sarco Co. of N. J., Printers, Trenton, N. J.

New Jersey Court of Errors and Appeals.

June, 1922: Term No. 44.

Between THEODORE BARTHEN, *Compl't,* *and* LODI CORPORATIONS, *Def't.*	On Bill. On Appeal from Chancery.

REPLY BRIEF OF APPELLANT.

Respondent's first point is that the appointment of the Receiver was the equivalent of an anticipatory breach of appellant's executory contract.

In support of the general doctrine that an anticipatory breach gives rise to an immediate cause of action, he cites the cases of

Roehm v. Horst, 178 *U. S.,* 1.
O'Neil v. Supreme Council, 70 *N. J. L.* 410.
Holt v. Insurance Co., 74 *N. J. L.,* 795.

We do not deny the existence of the doctrine of anticipatory breach, but allege that in the present case, no such breach exists.

In support of the argument that the appointment of a Receiver is in effect an anticipatory breach, there are cited the cases of

Central Trust Co. v. Auditorium Assn., 240 U. S., 581, (*a bankruptcy case*).

Grey v. Reynolds, 55 *N. J. Eq.* 501 (*an insolvency case*)..

We contend that the point made by the Receiver is unsound; that an adjudication in bankruptcy, a decree in insolvency and the appointment of a Receiver have no connection, *ipso facto*, with an anticipatory breach of an executory contract of the insolvent or bankrupt; and that whether or not such breach exists, depends upon each particular case and facts.

Were the rule as contended by respondent, a Receiver could never take advantage of a favorable contract enterect into by the person or firm whose affairs he is administering. If, as respondent contends, the decree of insolvency and order of adjudication *ipso facto* constitutes the breach, both parties to the contract can take advantage of it. Consequently to approve the doctrine urged would result in diminishing the asset of valuable contracts in many cases.

Our theory (i. e. that each case must be considered on its own facts) is supported by the *Central Trust Co. vs. Auditorium Assn.* case, cited by the Receiver.

In that case, the Court concluded that adjudication in bankruptcy constituted the anticipatory breach because from the facts it appeared that the Receiver did not elect to assume the contract and the effect of the adjudication was to strip the corporation of the assets needed to perform the contract. (*See page* 590 *of the opinion.*) The case does not support the broad rule urged by respondent.

The *Grey vs. Reynolds* case cited is commented upon in our main brief and hence no further remarks are made herein. Suffice it to say that the case refers to an entirely different situation and character of corporation than the one now before the court.

We contend therefore that respondent's first point is not well founded.

Even assuming the correctness of respondent's point, we urge that the parties have by their conduct indicated that no anticipatory breach had occurred, or that if one had occurred, it was waived.

The appellant creditor never admitted that such breach had taken place or accepted the attempted rescission and continued to tender delivery on the various delivery dates. If one party to a contract is advised that the other does not intend to perform, *the former may, at his election,* regard the contract as terminated and sue at once for damages. Or he may wait until the time fixed by the contract for performance, tender performance, and then sue. Should he adopt the second course, and it appears that he could have mitigated his damages by following the first course, the damages actually sustained *may perhaps* be reduced accordingly. But he is not *compelled* to regard the contract as terminated immediately upon being advised of the proposed breach.

Mann v. Continental Cotton Co., 117 *Misc. (N. Y.)* 280.

Gottesman v. Mills, N. J. Law Journal, April 19, 1922.

It is folly to discus the fixing of damages as of the date of the appointment of a Receiver by requiring the creditor to re-sell immediately upon be-

ing advised of the Receiver's appointment. In cases such as this, where deliveries are spread over a period of time, the vendor does not keep *on hand* sufficient merchandise to completely perform all present and *future* deliveries. He makes his own contracts and arrangements so that the merchandise which he requires to perform *his* contracts will be available to him when performance is required *by him,* and not before. Until that time arrives, he cannot re-sell to reduce damages, as is urged by respondent herein.

Respondent's second point is that the damages should be computed as of the date of *breach.* We agree with this rule. The point to be determined is *when did the breach occur?*

Our answer to his argument has been set forth in our main brief. In addition to the statute quoted we desire to add the following cases, which simply follow the statute:

Wood v. Selick v. American Grocery Co., 114 *Atl.* 756.

Mossman v. Steiger, 79 *N. J. L.* 442.

Bixler v. Finkle, 85 *N. J. L.* 77.

The statute was to clear and express that citation of authority to support it was not deemed necessary. Respondent seeks to indicate its inapplicability by seeking to differentiate the foregoing cases which are the leading ones following the statute. The Court however, will upon examination discover that they cover the situation clearly.

The New York cases are to the same effect. *See Continental Cotton Co. v. Mann* (*supra*).

The third point made by respondent is that there was evidence to support the finding of the court below and that its decree should be affirmed for that reason.

This rule is well known. The reason for its adoption is that the court below had an opportunity to see the witnesses, and where the facts are disputed, the appearance and demeanor of a witness while on the stand, plays an important part in determining where the truth lies.

The reason for the rule does not however, exist in the case at bar. The facts were not disputed. There were no witnesses. The case was submitted upon an agreed state of facts. Hence the court should consider the case *de novo,* as is generally done in appeals from Chancery as distinguished from appeals at law.

That the facts do not support the Vice-Chancellors conclusions has been argued in the main brief and that argument is not repeated.

To summarize appellant's arguments:

1. The Receiver of a corporation upon his appointment, takes the property of the corporation subject to all the duties, obligations and liabilities of the corporation.

2. The appointment of a receiver does not *ipso facto* work a dissolution of the corporation, nor does it extinguish the corporations life.

3. A decree of insolvency against a corporation does not constitute a rescission of its contracts and does not *ipso facto*, constitute an anticipatory breach of its contracts. Each case must be decided upon it own facts as to whether the Receiver wishes to accept the benefits of the contract.

4. There was not anticipatory breach of the contract involved in these proceedings, but the breach occurred as of the date of *each* tender and refusal of delivery.

5. The correct measure of damage in the case is the difference between the contract and market price at the time and place of delivery *as fixed by the contract* ($7,728), and *not* the difference between the contract and market price at the date of the appointment of the Receiver ($6,608).

6. The court below having fixed the damages at $6,608, its decision should be reversed and the claim allowed for $7,728 as filed.

Respectfully submitted.

STEIN, STEIN & HANNOCH,
Sol'rs for Appellant.

LEO STEIN,
HERBERT J. HANNOCH,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

THEODORE BARTHEN,
Complainant,

(MEYER AND BROWN, INC.
a creditor, Appellant)

and

LODI CORPORATIONS,
Defendant.

(JAMES A. VAN VALEN, Receiver,
Respondent.)

On Bill for Receiver.
On Appeal from order disallowing part of claim of Meyer and Brown, Inc.

BRIEF ON BEHALF OF RECEIVER.

Statement.

The question presented by this appeal is: Should damages for breach of an executory contract by non-performance by a corporation after it has been found insolvent and a Receiver has been appointed, be measured by the loss as of the time of the Receiver's appointment, or as of the time fixed by the contract for performance?

THE PARTIES—The appellant, Meyer and Brown, Inc., is a creditor of Lodi Corporations

(Case, page 14, lines 19-21), for which the respondent, James A. Van Valen, was appointed Receiver on October 4, 1920, in an insolvency proceeding in the Court of Chancery under our Corporation Act (Case, page 6, lines 19-37).

THE CONTRACT AND BREACH—The appellant contracted to deliver to Lodi Corporations, five tons (2240 pounds each) of rubber at 32¢ a pound, in each calendar month of the year 1920. By an express agreement in this contract, each month's delivery of five tons was to stand as a separate contract (Case, page 15, lines 21-32). Deliveries were made and paid for to and including August, 1920 (Case, page 15, lines 37-40).

The September tonnage was refused by Lodi Corporations and was resold by appellant at 18¢ a pound (Case, page 16, lines 1-11). The October, November and December installments were not taken by the Receiver (Case, page 17, lines 38-40; page 18, lines 1-2).

APPELLANT'S CLAIM AS FILED WITH THE RECEIVER—The appellant filed its claim with the Receiver for the loss on the September installment, five tons, contract price 32¢; market price September 24, 1920, 18¢, loss $1,568; loss on the October installment, five tons, contract price 32¢, market price on October 29, 1920, 16¢, loss $1,792; loss on the November installment, five tons, contract price 32¢, market price on November 29, 1920, 14¢, loss $2,016; and loss on the December installment, five tons, contract price 32¢, market price on December 18, 1920, 11¢, loss $2,352; total, $7,728 (Case, page 17, lines 18-21; page 17, lines 31-37).

RECEIVER'S ACTION—The Receiver allowed the claim for $1,568 (the loss on the September in

stallment) (Case, page 17, lines 22-25), and refused to allow the sums claimed for losses on the October, November and December installments, contending that the adjudication of insolvency and appointment of a receiver put an end to the business of the corporation and terminated its contracts, i. e., that the appointment of a receiver was an anticipatory breach of this executory contract, and that the creditor should thereupon have resold the rubber then remaining undelivered (Case, page 30, lines 30-40; page 31, lines 1-20), the market price of which was then 17¢ a pound (Case, page 18, lines 3-10).

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APPEAL TO COURT OF CHANCERY—The creditor appealed to the Court of Chancery (Case, page 14, lines 25-26). Vice-Chancellor Lewis found that the creditor had notice of the appointment of the Receiver and was informed by him that he did not intend to carry out the contract (Case, page 34, lines 27-31), and advised an order, adding to the loss on September installment $1,568, which had been allowed by the Receiver, a further allowance for the loss on the October, November and December installments, 15 tons, contract price 32¢, market price at date of Receiver's appointment 17¢, loss $5,040; making a total of $6,608 (Case, page 35, lines 1-20).

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APPEAL TO THIS COURT—The creditor has appealed to this Court (Case, page 1, lines 1-40).

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I.

The proceedings in this case (under the New Jersey Corporation Act) resulting in a finding on October 4, 1920, that the corporation was insolvent and in the appointment of respondent as receiver, are the equivalent of an anticipatory breach of appellant's executory contract.

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In Roehm vs. Horst, 178 U. S., 1; 20 S. C. Rep., 780; 44 L. Ed., 953, the U. S. Supreme Court, in an opinion delivered by Mr. Chief Justice Fuller, held that:

> "An unqualified and positive refusal to perform a contract, though performance thereof is not yet due, may, if the renunciation goes to the whole contract, be treated as a complete breach, which will entitle the injured party to bring his action at once."

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In O'Neill vs. Supreme Council, American Legion of Honor, 70 N. J. L., 410, our Supreme Court stated the same rule of law, and that case has been cited with approval by this Court in Holt vs. United Security Life Insurance Co., 74 N. J. L., 795, at 801; same case, 76 N. J. L., 585, at 590.

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Mr. Justice Mahlon Pitney, delivering the opinion of the U. S. Supreme Court in Central Trust Co. vs. Chicago Auditorium Association, 240 U. S., 581; 60 L. Ed., 811, said at page 815:

> "It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition

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in bankruptcy with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by the creditors." * * *

"As was said in Roehm vs. Horst, 178 U. S., 19; 44 L. Ed., 960; 20 S. C. Rep., 780 'the parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due.' Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principal that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement." * * *

"We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of Roehm vs. Horst, supra."

In Grey vs. Reynolds, 55 N. J. Eq., 501, Mr. Justice Depue, delivering the opinion of this Court, said (at page 503):

"The order in the insolvency proceedings" (appointing a Receiver and adjudicating in-

> solvency of an insurance company) "put an end to the business of the Company and terminated its contracts, leaving the holders of policies to be indemnified as indemnity might be awarded"

or in other words, that the result of the order appointing the Receiver was an anticipatory breach
10 of the Company's contracts of insurance.

IT IS RESPECTFULLY SUBMITTED THAT AS A RESULT OF THE FINDING BY THE COURT OF CHANCERY, ON OCTOBER 4, 1920, THAT LODI CORPORATIONS WAS INSOLVENT AND THE APPOINTMENT OF RESPONDENT AS RECEIVER, THERE WAS AN ANTICIPATORY BREACH OF APPELLANT'S EXECUTORY CONTRACT.

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II.

Appellant's damages for this anticipatory breach of its contract, resulting from the Lodi Corporations insolvency, should be measured by appellant's loss at the time of the breach.

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In Spader vs. Mural Decoration Manufacturing Co., 47 N. J. Eq., 18, several persons had been employed by the corporation to serve it for a term of years at fixed salaries. A Receiver was appointed for the corporation before the expiration of the terms of service of these employees and they filed claims for their respective salaries to the termination of their respective contracts.

The Receiver disallowed these claims and the
40 employees appealed to the Chancellor. Chancellor McGill said (at page 19):

"The appellants' claims are substantially for damages caused by the breach of their several contracts for service. The breach was occasioned by the insolvency of the defendant corporation."

And (at page 21):

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"I think that the claimants before me, although entitled to something, are not entitled to the amounts they ask. In measuring their damages, their condition of health and their liberty and opportunity to obtain other employment must be considered."

"When the amounts of the claims shall be determined" (before a jury) "the claimants will be entitled to dividends upon them as other unsecured creditors are upon their claims. The claims are for damages, not for wages due, and they will, therefore, not be entitled to preference. * * *"

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The common law rule of damages for the breach of a contract for the purchase of goods is the actual loss at the time of the breach. Hall vs. Paine, 224 Mass., 62; 112 N. E., 153. Mr. Chief Justice Rugg, delivering the opinion of the Supreme Judicial Court of Massachusetts in this case said (224 Mass., at page 65, 112 N. E., at page 155):

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"The foundation for this rule as applied to contracts for sales or purchases is that goods such as are ordinary subjects of commercial transactions have a fixed value in the market, so that they can be replaced or disposed of at any time. Adequate compensation for the breach of any duty touching the purchase, sale, delivery or carrying of such property is measured by its fair market value at the time of the

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breach. This is a principle which in its broader aspects has illustrations in many departments of the law. It is the usual rule for the determination of damages arising from the conversion of property. The owner is entitled to recover the fair market value of the property at the time of the conversion. Fair market value is the established standard by which to gauge the damages for the taking of property under the power of eminent domain. The measure of damage for deceit or breach of warranty in the sale of goods is the difference between the market value of the thing sold and of that bargained for. The fundamental principle upon which all these rules rest is that, by resort to the test of market value, fair and complete compensation is afforded for the deprivation of the property to which otherwise the injured party would be entitled. Indemnity for such damage is afforded by payment of market value. The theory of the law is that the injured party shall be placed in the same position he would have been in if the duty owed to him had not been violated, so far as compensation can be ascertained by rational methods resting upon a basis of facts. But he is not to be made richer.

It is a general principle of law, because it is a rule of fair dealing, that when one is deprived of the fruits of a contract, he must use the efforts of a reasonably prudent man to put himself in as good a position as he would have been if the contract had not been abrogated. He cannot lie idly by and expect to recover all losses which such inaction may entail as damages for breach of the contract. He must be reasonably active and diligent to recoup his loss."

Our Sale of Goods Act (4 C. S. 1910, 4647; P. L. 1907, page 311) does not modify the common law rule applicable to this case. Section 64 (at page 4662) provides in Subdivision 1 that—

> "(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for non-acceptance." 10

and in Subdivision 2 that—

> "(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract."

That this is, in essence, a statutory statement of the common law rule, was held by this Court in Wood and Selick vs. American Grocery Co., 114 Atl. Rep., 756 (at page 758). 20

It may be contended that the measure of damages to be used in this case is that set forth in the third subdivision of Section 64:

> "(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept." 30

But to use this method of ascertaining appellant's damages in the present case would result 40

not in an estimate of the loss directly and naturally resulting from an anticipatory breach as required by Subdivision 2 of Section 64, but rather in an estimate, in violation of Subdivision 2, of the loss resulting indirectly by reason of the seller's failure to resell the goods as soon as the contract was breached, so as to limit the damages.

10 In Wood and Selick vs. American Grocery Co., supra, the measure of damages set forth in Subdivision 3 of Section 64 was applied by this Court to a contract breached by the buyer's refusal to accept the goods at the time fixed by the contract for delivery and this Court held (at page 758) that the several sections of the act

> "are not disjointed provisions of the act, but must be construed in pari materia, thus con-
> 20 stituting a harmonious enactment to prevent and avoid injustice."

To accomplish this, Subdivision 3 of Section 64 should be construed (so as to be in harmony with Subdivision 2 of the same section) as not applying to the anticipatory breach of appellant's executory contract resulting from the Receivership.

While Subdivision 4 of Section 64 applies to an anticipatory breach, it is not applicable to this
30 case as it is but a statutory expression of the rule applied by Mr. Justice Dixon in Kehoe vs. Rutherford, 56 N. J. L., 23, and followed in many similar cases. Section 65, while applying to an anticipatory breach, is again but a statutory enactment of a common law rule giving the seller an alternative remedy which he has not chosen to use in this case.

This Court held in Wood and Selick vs. American Grocery Company, supra, that

> 40 "10. The Sale of Goods Act was not intended as a substitute in its entirety for the law mer-

> chant, or the rules of damage applicable under the common law in civil actions, except where its provisions clearly conflict therewith, in view of section 73 of the act, which provides that in any case not covered by the act the rules of law and equity, including the law merchant, shall continue to apply."

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The common law rule for damages upon an anticipatory breach of an executory contract is not in conflict with any provision of the Sale of Goods Act, but is in harmony with Subdivision 2 of Section 64, although more specifically stated in the cases above cited, and the common law rule should, therefore, be applied in this case.

The Supreme Judicial Court of Massachusetts held in Centennial El. Co. vs. Morse, 116 N. E., 901, that in an action for breach of contract to receive goods sold, plaintiff's damages are measured as of the date of the breach; for he cannot delay until there is a change in the market and place the loss upon defendant, but must be reasonably active to save himself from loss. The Uniform Sale of Goods Act was enacted in Massachusetts in 1908 (Mass. Laws, 1908, Chap. 237) and the case last cited was decided in 1917. The Massachusetts Act contains provisions similar to our Act and while not referred to in the opinion, it must be presumed that the Court was aware of the provisions of the statute, and that the rule laid down by the Court in the cited case is not in conflict with the statutory measure of damages.

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In Massman vs. Steiger, 79 N. J. L., 442, our Supreme Court held that

> "The general rule for the measure of damages, in case of a breach by a vendee of an executory contract for the sale of an article at

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> a fixed price, is the difference between such contract price and the market value of the article on the day and at the place of delivery."

But the facts as stated in the opinion by Mr. Justice Voorhees (at page 443) are that the defendant

> "agreed to purchase the shares at any time after the first of January, 1908, on demand of either of the parties * * *."
>
> "The breach assigned is, that plaintiff, the owner of the one hundred shares, on the 18th of January, 1908, demanded of the defendant that he should perform the agreement * * *"

showing clearly that, although the contract was an executory contract, it was breached at the time for performance, and not by a repudiation or anticipatory breach before the time for performance. The cited case is thus easily distinguishable from the present case.

In Bixler vs. Finkle, 85 N. J. L., 77, our Supreme Court held that

> "If the breach of a contract to sell takes place before any of the goods have been delivered, the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract, and where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price at the time when the goods ought to have been accepted."

Mr. Justice Trenchard, delivering the opinion in the cited case, said (at page 78):

"It appeared that shortly after the contract was made, and before the goods were shipped, the defendant wrote to the plaintiff that he would not take the goods and not to ship them. It also appeared that later, when they were shipped, he refused to receive them."

and it is not clear whether the breach for which damages were claimed was the repudiation before shipment (i. e., the anticipatory breach) or the refusal to receive the goods when shipped. However, as the point actually decided was that (at page 79)

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"the goods in question in the present case were manifestly of a kind for which there was an available market. But no evidence was offered as to the market or current price, nor was any offered from which it was possible to estimate the loss directly and naturally resulting, in the ordinary course of events, from the defendant's breach of the contract. In such state of the proofs a judgment for nominal damages only was proper."

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it was not necessary to consider, in reaching this decision, whether the damages should be estimated by reference to the market price at the time of the anticipatory breach, or at the time for performance, and the reference to Subdivision 3 of Section 64 of the Sale of Goods Act is obiter, and not controlling in the present case.

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After the anticipatory breach of appellant's executory contract, resulting from the insolvency and receivership of the Lodi Corporations, the appellant was not justified in going on and completing the contract on its part and claiming from the Receiver, the increased damages caused by its continuing to perform.

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13 C. J., pages 655-656, Sec. 731 and cases cited in note 82.

Upon this breach, appellant was entitled to consider the contract terminated for the purpose of further performance, and should have claimed the damages then sustained and should have proceeded to make those damages as little as possible by making the best use it could of its liberty.

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Hochster vs. DeLaTour, 2 El. & B., 678; 22 L. J. Q. B., 455; 17 Jur., 972; 6 Eng. Rul. Cas., 576.

O'Neill vs. Supreme Council, 70 N. J. L., 410.

Holt vs. United Security Life Ins. Co., 76 N. J. L., 585.

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Had appellant done so, the rubber then undelivered could have been sold at 17¢ a pound (Case, page 18, lines 3-10), at which price appellant's loss would be the amount of its claim as fixed by the Court of Chancery.

In Grey vs. Reynolds, 55 N. J. Eq., 501, this Court held, in effect, that the insolvency of an insurance company was an anticipatory breach of its contracts of insurance or policies. The Vice Chancellor had allowed policyholders to prove claims for losses covered by the policies, which losses occurred after the date of the insolvency of the insurance company. Mr. Justice Depue, delivering the opinion of this Court, said (at pages 503-504):

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"These conclusions of the Vice-Chancellor, if sustained, must rest upon the assumption that the policyholders were entitled to treat the insurance company as a going concern until all its policies expired. In this view, with respect

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> to companies of this character, we cannot concur.
>
> The order in the insolvency proceedings put an end to the business of the company and terminated its contracts, leaving the holders of policies to be indemnified as indemnity might be awarded. Any other view would compel the creditors of the company to continue the insurance business with the property and funds of the company, which the insolvency proceedings contemplate shall be divided among the creditors as of the time when the insolvency occurred."

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And similarly, if the Vice Chancellor in this case had permitted the appellant to prove its claim for losses under its contract which occurred after the insolvency of the Lodi Corporations, such action could only have been upon the assumption that those having executory contracts with the Lodi Corporations were entitled to treat that corporation as a going concern until all executory contracts had expired, and in this way to compel its creditors to continue its business with the property and funds of the corporation, which our insolvency law contemplates shall be divided among the creditors as of the time the insolvency occurred. (Corporation Act, 2 C. S., 1910, page 1644, Sec. 68; page 1652, Sec. 86.)

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IT IS RESPECTFULLY SUBMITTED THAT APPELLANT'S DAMAGES WERE PROPERLY FIXED BY THE COURT OF CHANCERY AT THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE MARKET PRICE AT THE DATE OF THE LODI CORPORATIONS' INSOLVENCY.

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III.

There is evidence supporting the Vice Chancellor's finding of fact, and therefore this finding will not be reviewed by this Court.

10 The Vice Chancellor found, as a fact "that the creditor" (now appellant) "had notice of the appointment of the Receiver" (Case, page 34, lines 28-29).

This fact is not denied, and the finding is fully supported by the correspondence (Case, page 21, lines 1-40; page 23, lines 1-20), and by the proofs of publication and mailing notice as required by the order appointing the Receiver (Case, page 8, lines 32-34). The appellant was thereby informed or put 20 upon inquiry as to the Receiver's powers. The order of October 4, 1920, empowering the Receiver to continue the business of the Lodi Corporations and to fulfill its contracts, expressly limited his power to contracts "other than indebtedness of the defendant" (Case, page 7, lines 26-27). The appellant must be charged, therefore, with notice that the Receiver had no power to fulfill its contract under which the Lodi Corporations was indebted to appellant for damages for its actions or omissions to act by which 30 it permitted itself, by its insolvency, to be disabled from making performance.

The Vice Chancellor also found that appellants "were further informed by him" (the Receiver) "that he did not intend to carry out the contract" (Case, page 34, lines 29-31).

The Receiver had no power to agree to perform appellant's contract without approval of the Court, and the Court had no power to permit him, under the circumstances, to agree to pay appellant 32¢ a 40 pound for rubber which he could purchase from

others at about half that price, for at the time of the insolvency, rubber could be purchased in the open market at 18¢ a pound or less (Case, page 16, lines 1-10; page 19, lines 37-40; page 20, lines 1-2). The Receiver was an officer of the Court for the purpose of preserving the property and assets of the Lodi Corporations for distribution to its creditors. He had been empowered to continue the business, because this was essential to its proper preservation. He might fulfill the contracts of the corporation so far as beneficial. He could not fulfill contracts which were burdensome, or tended to diminish the value of the assets in his control. 10

Ellis vs. Boston, etc. R. R., 107 Mass., 1, at page 28.

None of the letters by the Receiver and his attorney to appellant and its attorneys (Case, pages 23, 24, 25, 26, 27, 28) suggest that he might ask leave of the Court to perform appellant's contract, and by so doing purchase from them at 32¢ a pound rubber which could be purchased elsewhere at about half that price. These letters inform the appellant that a reorganization of the insolvent corporation is pending, and suggest that when the reorganization is consummated some disposition of appellant's contract might be made. It might well be that the officers of the company after reorganization and in order to retain the good will of appellant's company or to save it from loss on the contract it had made with them as officers of the Lodi Corporations, might assume appellant's contract, but the Receiver had no power to do this, neither of his own motion nor upon an order of the Court. 20 30

Reading the letters annexed to the stipulation in this light, the Vice Chancellor had before him evidence to sustain his finding that the Receiver in- 40

formed appellant that he did not intend to complete the contract.

There being evidence to support the Vice Chancellor's findings of fact, this Court will not review them.

Scott vs. Blakeley, 85 N. J. L., 729.

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IT IS RESPECTFULLY SUBMITTED THAT THE VICE CHANCELLOR'S FINDINGS OF FACT SHOULD BE AFFIRMED.

IV.

It is respectfully submitted that the order of the Court of Chancery allowing appellant's claim in the sum of $6,608 should be affirmed.

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MORRISON, LLOYD AND MORRISON,
Solicitors of Receiver.

WM. J. MORRISON, JR.,
of Counsel.

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