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EXHIBITS

Notice of Appeal

(Filed January 16, 1930.)

NEW JERSEY SUPREME COURT

(Passaic County.)

I. Tannenbaum, Son & Co., Inc.,
Plaintiff,
vs.
Oxford Dye Works, Inc.,
Defendant.

10

NOTICE OF APPEAL

To: Arthur C. Dunn, Esq.,
Attorney for Plaintiff.

Sir:

Take Notice, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

20

Dated: January 15, 1930.

Respectfully,
Ward and McGinnis,
Attorneys of Defendant.

30

Grounds of Appeal

(Filed April 25, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS

I. Tannenbaum, Son & Co., a corporation, Plaintiff, vs. Oxford Dye Works, Inc., a corporation, Defendant.	Action at Law. On Appeal from New Jersey Supreme Court. Passaic circuit

GROUNDS OF APPEAL

To: Arthur C. Dunn,
Attorney of Plaintiff.

Take Notice, that the defendant appeals from the whole of the judgment entered in this cause, on the following grounds:

1. That the Court found that there was due from the defendant the sum of $10,500.00 under the contract.

2. The Court improperly found there was a contract in existence between the parties.

3. The Court improperly assessed the damage at $10,500.00, whereas the damages, if any, should have been assessed at approximately $7300.00.

Ward and McGinnis,
Attorneys of Appellant.

Summons

(Filed January 30, 1930.)

SUMMONS

The State of New Jersey To: Oxford Dye Works, L.S.

Incorporated, a corporation, Greeting:

You Are Summoned to answer the annexed complaint of I. Tanenbaum Son & Co., a corporation, in an action at law in the New Jersey Supreme Court. And Take Notice, that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the anneved complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Justice of the Supreme Court, at Trenton, this 30th day of January, 1929.

Arthur C. Dunn,
Attorney.

Fred L. Bloodgood,
Clerk.

NEW JERSEY SUPREME COURT
(Passaic County.)

I. Tanenbaum Son & Co., a corporation, Plaintiff, vs. Oxford Dye Works, Incorporated, a corporation, Defendant.	Action at Law.

COMPLAINT

Plaintiff, I. Tanenbaum Son and Co., a corporation of the State of New York, having its principal office at No. 516 Fifth Ave., in the Borough of Manhattan, City, County and State of New York, says that:

FIRST COUNT

1. On the 20th day of August, 1919, the plaintiff entered into a contract in writing with the defendant, whereby the defendant promised and agreed that during the period from the 20th day of August, 1919 to the 31st day of December 1934, it would order, apply for, procure and accept through the plaintiff as its broker and agent, policies of fire insurance on merchandise, machinery, furniture, fixtures and improvements of the defendant, or in its possession or control, in or on the buildings and premises situate and known as on the South side of the Delaware, Lackawanna & Western R. R. Tracks, Oxford Furnace, Warren County, New Jersey, and upon the said buildings and premises, and upon the rents of said buildings

and premises, and upon the use and occupancy of said buildings and premises, and the use and occupancy of the business conducted therein and thereon, which policies were to be at all times during said period in amounts at least equal to the full value of said property and items respectively, and at no time less than $250,000, for which insurance the defendant promised and agreed to pay plaintiff on demand at the uniform rate of one dollar per year for each and every $100. of insurance procured by the plaintiff for the defendant.

2. The said contract further provided that if the defendant should at any time during the term thereof fail to fully carry out the same on its part, or sell or dispose of said business, or discontinue business, or for any reason cease to occupy the premises hereinbefore described, the defendant should thereupon immediately become liable to and pay to the plaintiff, and the plaintiff should thereupon be entitled to recover from the defendant the sum of $1500 for each and every unexpired year or fraction of a year, of said term, which sum, with interest thereon to the date of payment was agreed upon as liquidated damages for the failure of the defendant to carry out said contract on its part.

3. On or about the 13th day of December, 1928, the defendant sold and disposed of its business, discontinued business and ceased to occupy the premises hereinbefore described.

4. The defendant, under the terms of the contract, thereupon became liable to pay to plaintiff, and plaintiff became entitled to recover from the defendant the sum of $10,500 with interest to date of payment as liquidated damages for the failure

of the defendant to carry out said contract on its part, as aforesaid.

5. Plaintiff has demanded of the defendant the said sum of $10,500 with interest, which defendant refused to pay.

6. Plaintiff demands as damages the sum of $10,500. with interest from December 13th, 1928.

SECOND COUNT

1. Plaintiff repeats paragraph one of the first count.

2. During the period commencing December 1, 1927, to December 1, 1928, the defendant failed to order, apply for, procure and accept through the plaintiff as its broker and agent, policies of fire insurance to the minimum amount of $250,000 as it was obliged to do under the said contract, but during said period ordered, applied for, procured and accepted through plaintiff as its broker and agent, policies of fire insurance to the amount of only $110,000.

3. By reason of the failure of the defendant to carry out the said contract on its part as aforesaid, the plaintiff sustained damage in the amount of $1160.81.

4. Plaintiff demands as damages the sum of $1160.81 on the second count.

THIRD COUNT

1. Plaintiff repeats paragraph one of the first count.

2. On the first day of December, 1926, the plaintiff as broker of the defendant, pursuant to the authority contained in the contract referred to in Paragraph one, ordered, applied for and procured policies of fire insurance for and on behalf of the defendant to the amount of $50,000, cover-

ing the items referred to in paragraph one, for a period of three years, for which, under the said contract, the defendant covenanted and agreed to pay plaintiff on demand at the uniform rate of One dollar per year for each and every $100 of insurance, $500 thus accruing and becoming due and payable by the defendant to the plaintiff on December 1st 1928.

3. Plaintiff has demanded of the defendant the said sum of $500, which the defendant refused to pay.

Plaintiff demands as damages the sum of $500 together with interest from December 1st, 1928, on the third count.

Arthur C. Dunn,
Attorney for Plaintiff.

Amendment to Complaint

NEW JERSEY SUPREME COURT
(Passaic County.)

I. Tanenbaum Son and Co., a corporation, Plaintiff, vs. Oxford Dye Works, Incorporated, a corporation, Defendant.	Action at Law.

AMENDMENT TO COMPLAINT

Plaintiff amends its complaint in the above entitled action, by adding thereto:

FOURTH COUNT

1. Plaintiff repeats paragraphs one and three of the first Count.

2. On December 13th, 1928, the defendant, disregarding its promises and undertakings in the premises, failed and refused to carry out its said agreement as set out in paragraph one of the first count, and failed and refused to order, apply for, procure and accept through the plaintiff, as its agent and broker, any policies of fire insurance as it was in duty bound to do, and by reason of the said breach of the said contract by defendant, plaintiff lost the moneys and profits that it would have obtained and acquired if defendant had performed its said agreement.

3. Plaintiff's loss, by reason of defendant's said breach of its contract, is the sum of $15,000.

Plaintiff demands as damages the sum of $15,000., on the Fourth Count.

Arthur C. Dunn,
Attorney for Plaintiff.

NEW JERSEY SUPREME COURT
(Passaic County.)

I. Tanenbaum Son and Co., a corporation, Plaintiff, vs. Oxford Dye Works, Incorporated, a corporation, Defendant.	Action at Law.

ANSWER

Defendant answering the complaint filed in the above entitled cause, says:

FIRST COUNT

1. Defendant denies the allegations contained in paragraph one.

2. Defendant denies the allegations contained in paragraph two.

3. Defendant denies the allegations contained in paragraph three.

4. Defendant denies the allegations contained in paragraph four.

5. Defendant denies the allegations contained in paragraph five.

6. Defendant denies the allegations contained in paragraph six.

SECOND COUNT

1. Defendant denies the allegations contained in paragraph one.

2. Defendant denies the allegations contained in paragraph two.

3. Defendant denies the allegations contained in paragraph three.

4. Defendant denies the allegations contained in paragraph four.

THIRD COUNT

1. Defendant denies the allegations contained in paragraph one.

2. Defendant denies the allegations contained in paragraph two.

3. Defendant denies the allegations contained in paragraph three.

FIRST SEPARATE DEFENSE

Any sum the plaintiff claims due under paragraph four of the first count, is excessive, unlawful and out of proportion to the actual damage and is therefore a penalty, and not liquidated damages.

SECOND SEPARATE DEFENSE

Plaintiff has waived the terms of the original policy by subsequent agreements entered into by the parties.

THIRD SEPARATE DEFENSE

By subsequent agreements, the plaintiff and defendant entered into a new contract; the old contract was abrogated. The new contract modified the amount of insurance to be carried.

FOURTH SEPARATE DEFENSE

On or about the 22nd day of January, 1925, the Oxford Dye Works, Inc., ceased to exist. Thereupon the plaintiff failed to take advantage of its rights as set forth in paragraph two of the first count of the complaint, and has waived the same.

FIFTH SEPARATE DEFENSE

On the 22nd day of January, 1925, the charter of the Oxford Dye Works, Inc., was proclaimed

defaulted by the Governor of the State of New Jersey. The charter was revoked. The rights of the plaintiff, as set forth in paragraph two of the first count of the complaint, should have been taken advantage of at that time. Plaintiff has waived these rights.

SIXTH SEPARATE DEFENSE

The Oxford Dye Works, Inc., ceased to exist, and under the contract, plaintiff was not entitled to recover any sums thereafter, as the contract did not contemplate, under the wording of dissolution, any revocation of the charter by the State.

SEVENTH SEPARATE DEFENSE

The contract entered into was ultra vires and did not have the consent or approval of the stockholders.

EIGHTH SEPARATE DEFENSE

The contract is contrary to public policy and the Laws of the State of New Jersey.

Ward and McGinnis,
Attorneys of Defendant.

NEW JERSEY SUPREME COURT
(Passaic County.)

I. Tanenbaum Son and Co., a corporation, Plaintiff, vs. Oxford Dye Works, Incorporated, a corporation, Defendant.	Action at Law

REPLY

Plaintiff, replying to each of the eight separate defenses set out in the Answer in the above cause, denies each and every one of them.

At the trial plaintiff will move to strike out the fourth, fifth, sixth, seventh and eighth separate defenses set out in the Answer on the ground that the said defenses have no warrant to sustain them in law or under the practice of this court.

Arthur C. Dunn,
Attorney for Plaintiff.

NEW JERSEY SUPREME COURT
(Passaic County.)

I. Tanenbaum Son and Co., a corporation, Plaintiff, vs. Oxford Dye Works, Incorporated, a corporation, Defendant.	Action at Law.

STIPULATION

It is hereby stipulated and agreed by and between the plaintiff and defendant that paragraphs two and three of the Third Count shall be amended so as to read as follows:

THIRD COUNT

2. On the first day of December, 1926, the plaintiff as broker of the defendant, pursuant to the authority contained in the contract referred to in paragraph one, ordered, applied for and procured policies of fire insurance for and on behalf of the defendant to the amount of $100,000, covering the items referred to in paragraph one, for a period of three years, for which, under the said contract, the defendant covenanted and agreed to pay plaintiff on demand at the uniform rate of One dollar per year for each and every $100 of insurance, $1,000 thus accruing and becoming due and payable by the defendant to the plaintiff on December 1st, 1928.

3. Plaintiff has demanded of the defendant

the said sum of $1,000, which the defendant refused to pay.

Plaintiff demands as damages the sum of $1,000 together with interest from December 1st, 1928, on the third count.

It is further stipulated and agreed that the Answer of the defendant shall be amended by the addition of the following paragraphs:

FOURTH COUNT

1. Defendant denies the allegation contained in paragraph one.

2. Defendant denies the allegation contained in paragraph two.

3. Defendant denies the allegation cotained in paragraph three.

Arthur C. Dunn,
Attorney for Plaintiff.
Ward and McGinnis,
Attorney for Defendant.

Proceedings in Court

NEW JERSEY SUPREME COURT
Passaic Circuit.

I. Tanenbaum Son and Co., Inc.,
Plaintiff,
vs.
Oxford Dye Works, Inc.,
Defendant.
At Law

Paterson, N. J., October 22, 1929.

Before Hon. Newton H. Porter, Judge, (Without a Jury).

Appearances: For the Plaintiff, Arthur C. Dunn, Esq., and Charles A. Houston, Esq., (N. Y. Bar); For the Defendant, Ward and McGinnis, Esqs.

Mr. Houston—This is an action by I. Tanenbaum and Sons Company, a corporation of the State of New York, against Oxford Dye Works, Incorporated, a corporation of the State of New Jersey. The number of counts are four. The first count is still pressed. The second count has been waived. The third count is amended as to that stipulation there, it was made a thousand where five hundred was claimed. The fourth count is disposed of by the stipulation between counsel.

The action arises out of an insurance contract entered into between I. Tanenbaum and Sons Company and the Oxford Dye Works on August 20, 1919. This contract is a contract whereby I. Tanenbaum and

Sons Company agreed to provide insurance for a period of fifteen years at a fixed rate to the Oxford Dye Works, Incorporated, for its plant situated at Oxford Furnace, New Jersey. At the time the contract was entered into there was no fire protection at Oxford Furnace.

The Court—This is the action which was before me once before on motions?

Mr. McGinnis—Yes.

The Court—The contract provided there was a certain amount to be paid to the plaintiff by the defendant over a period of years?

Mr. McGinnis—That is it, yes.

The Court—And if the contract was terminated it was to be so-and-so; meanwhile a sprinkling system was installed, and one of the rows was as to who owned the sprinklers. Am I right?

Mr. McGinnis—That is out of the case now; but you remember the case. That is the case.

Mr. Houston—We have stipulated and agreed that the provisions of the contract pertaining to liquidated damages are valid and controlling in this action. So that there is no question about penalty and liquidated damages.

Mr. McGinnis—We have agreed that that is liquidated damages and not a penalty.

Mr. Houston—The situation at the time we entered into the contract was as I have stated, the Oxford Dye Works had a plant

up there, there was no fire protection in the town, and Mr. Tanenbaum asked them to buy the insurance at a fixed rate for a period of years, which contract was entered into, whereby they were to take a minimum of $250,000 worth of insurance over a period of fifteen years.

The Court—They did not do that, did they?

Mr. Houston—And pay a dollar a thousand. The contract further provides that it is further specifically understood and agreed that if the said assured shall at any time during the term of this agreement fail to fully carry out the same on its part, or sell or dispose of said business or discontinue business or for any reason cease to occupy the premises hereinbefore described, or file or have filed a petition in bankruptcy, or in case proceedings in bankruptcy are started against them, the said assured shall thereupon immediately become liable to and pay and the insurance company shall thereupon be entitled to recover from the said assured the sum of fifteen hundred dollars for each and every unexpired year or fraction of a year of said term, which sum, with interest to the date of payment, is hereby agreed upon as liquidated damages for failure to carry out the contract on its part.

Now, on December 13, 1928, we will show you, and it is stipulated by counsel, that the Oxford Dye Works, Incorporated, sold and disposed of the business, plant,

and ceased to occupy the premises at Oxford Furnace covered by this contract.

This contract was entered into as of August 20, 1919, and continued to December 31, 1934.

The Court—Six years yet?

Mr. Houston—There is six and some over.

Now, it is for that liquidated damages that the first count is directed, we claiming that it has six years and a fraction of a year at fifteen hundred dollars, which would be $10,500. The contract stipulates a fraction of a year is the same as a year.

The other count is directed at policies that were sold and delivered as of November 20, to take effect December 1, 1928, prior to the breach, and that there were $50,000 worth of insurance given to them under the contract, for which they were to pay a dollar a hundred; so our claim is for premiums due December 1 for policies issued in compliance with the contract, which we claim is a thousand dollars; and the other claim is for $10,500 at fifteen hundred dollars a year for six years and a fraction of a year.

Now, the contract is admitted. Stipulation by the parties. The fact of the sale and the deeds, et cetera, are stipulated and agreed to between the parties. The delivery of the insurance and the rate is stipulated between the parties.

The Court—Wasn't there another bone of contention with respect to the amount of insurance that was purchased?

Mr. Houston—No; we have waived this claim.

Mr. McGinnis—That is out of the case.

Mr. Houston—We say we probably abandoned certain concessions, and we are willing to waive that second count.

The Court—All right.

Mr. Houston—We want to stipulate that on the record.

We will offer the contract in evidence.

The Court—Is your stipulation accurate with respect to the period of time? The Senator seems to disagree.

Mr. McGinnis—The only thing we disagree as to whether that fourteen days over the six years—whether or not it is read out of the contract. Everything counsel has stated is correct.

The Court—If the stipulation is correct, then the amount, it is understood, should be nine thousand.

Mr. Houston—No, $10,500.

The Court—$10,500 for the six years and a fraction.

Mr. Houston—No; we say that is fifteen hundred dollars a year. Six years is nine thousand.

Mr. McGinnis—I want to argue they are not entitled to that much. If they are entitled to the lump sum, I shall argue they are entitled to the present worth of the money; in other words, $1,500 due in 1934,

they can only get the value at this time, if they are entitled to the lump sum.

The Court—You do not get my point. Mr. Dunn's point is that they are entitled—

Mr. Houston—We claim that the contract specifies that we are entitled to fifteen hundred dollars a year for each and every unexpired year or fraction of the year.

The Court—Then, you claim seven years.

Mr. McGinnis—I shall, of course, dispute that seventh year.

The Court—Very well.

Mr. Houston—I offer a certified copy of a deed, Oxford Dye Works, Incorporated, to Oxford Piece Dye Works, dated December 13, 1928.

The Court—What is the purpose of that?

Mr. McGinnis—To show that the policy was violated, or the contract, and from that time on they were entitled to these liquidated damages.

The Court—There is no dispute about that?

Mr. McGinnis—No. I suggest he just recite the deed.

The Court—Yes.

(Certified copy of deed marked in evidence exhibit P-2.)

Mr. Houston—I offer a bill for $500 for two policies of insurance on real estate in the amount of $50,000, dated December 1, 1928.

(Bill marked exhibit P-3.)

Mr. Houston—A bill for $500 for four policies of insurance totaling $50,000 on machinery, dated December 1, 1928.

(Bill marked exhibit P-4.)

Mr. Dunn—The matter of interest would be a matter of computation for the Court?

The Court—Oh, yes.

Mr. Houston—The plaintiff rests.

DEFENDANT'S TESTIMONY

Mr. McGinnis—It is also agreed, if your Honor please, that there is to go in evidence on behalf of the defendant the proclamation of the Governor of New Jersey, dated January 22, 1925, in which the defendant corporation, Oxford Dye Works, Incorporated, is proclaimed for nonpayment of taxes. It appears on page 749 of Session Laws of 1925.

The Court—That is the only addition you have to the stipulation?

Mr. McGinnis—Yes, sir.

The Court—All right, now, I will hear you on it. It would seem to the Court that this is rather a technical matter, and a matter that is to be largely a construction of the contract, in view of these facts that have been stipulated with respect to how much is due from the one to the other I suppose there is something due from the defendant to the plaintiff?

Mr McGinnis—Yes.

The Court—We start with that proposition. I think that is quite apparent.

Mr. McGinnis—Maybe.

The Court—Well, perhaps not, but, however, won't we be saving time if you submitted it on briefs, because I cannot answer a proposition of this kind offhand? You would not wish me to. I have got to take this contract into my library and examine it, and it seems to me that it would be most helpful to the Court if we save our breath at this stage of the game, because I might remember what your argument was and I might not, and I would depend more on what you may have said in a written memorandum, and therefore, under these circumstances, there being no jury, and it being necessary for me to examine these documents at my leisure, I think the matter would be expedited if it were reduced to a brief. Is there objection to that?

Mr. Dunn—Just this: that we would like to know just what the Senator's points are at this time.

The Court—Well, I think that is fair.

Mr. McGinnis—I will state the points without argument.

The Court—All right. State them without argument and then you can reply to them, if you don't know now what his points are from his pleadings.

Mr. Dunn—We have stipulated so much.

The Court—All right, he does not object to it.

Mr. McGinnis—Well, the first point is this, that in this fifteenth clause of the contract is the provision which states that if

the business is sold or disposed of, the contract in effect terminates, and they become entitled to these liquidated damages.

In that same clause it appears also the following language, that if the corporation shall cease to exercise its corporate functions, or if proceedings are taken against it by any State or body of the United States for dissolution and revocation of its charter, then this same event happens as stated by counsel with reference to the sale of the property.

Now, in 1925 the Governor of the State proclaimed this corporation in accordance with the 142nd section of the Corporation Act, and that section states distinctly the corporation's charter shall become void. We shall argue on our first point that that being so, at that time there came the right of the defendant to demand this fifteen hundred dollars damage, and he did not do it. It was waived. The corporation had, so far as the proclamation is concerned, ceased to exist.

The Court—That was constructive notice to the plaintiff?

Mr. McGinnis—Yes, sir.

The Court—Did not need actual notice?

Mr. McGinnis—No; and I shall argue to your Honor and call their attention that in that fifteenth section of this contract it does not say that at their option this shall happen, but it says distinctly if any one of a dozen of things, of which this is the one

thing, happens, that thereupon they would be entitled to these liquidated damages.

Now, not having done it, and insurance thereafter having been written up year after year, I say that that was not done under this contract of 1919, which was exhibit P-1 in the case, but from that time on was merely so much insurance written up from year to year, and terminated when we went out of business last fall.

Now, that is my first point, without arguing.

The Court—Well, consider this when you are writing your brief, the difference between a de jure corporation and a de facto corporation. They were still a de facto corporation, even with the proclamation of the Governor forfeiting their charter.

Mr. McGinnis—De facto only for the purpose of winding up their business. It provides that the board of directors thereafter shall be trustees.

The Court—Do you suppose that if this company continued as a de facto corporation and did business while the proclamation was in effect, that they could not sue as a corporation?

Mr. McGinnis—They could, perhaps, but I do not think your Honor gets my full point. Perhaps I have not made myself clear. My point is this: They say that if a certain event happens—never mind what happens afterward—that shall be the test. In other words, the event is the test when fifteen hundred dollars a year shall start.

I say that event determined that contract limit.

The Court—That may be a way to interpret it, but you cannot say, can you, that that is what they intended it to mean?

Mr. McGinnis—It is there in black and white. If they had intended something different, it would seem they would have said so, or they would have said, "at their option," or used more liberal language. In other words, the Courts may not make the parties a contract.

The next point I shall argue, they are not entitled, as far as this fifteen hundred dollars a year is concerned, to more than one year at this time. They must sue each year for the fifteen hundred dollars. In support of that I shall cite to your Honor 17 Corpus Juris, 850, beginning at 847, and a case in the New York court.

My next step is, if they are entitled to recover that, so far as this fifteen hundred dollars a year is concerned, that they may only recover one year at this time, and I shall cite to your Honor Brecknagel versus Steinway, at 77 Northeastern Reporter, 801.

The next point will be that if your Honor does not take that view,—of course, as I step from point to point I am not conceding I have to go further—

The Court—Certainly not.

Mr. McGinnis—My next point is that they would be entitled only to the present worth of this money, if they are entitled to

a lump sum. That is to say, they are not entitled to fifteen hundred dollars which is to fall due in January, 1934, but are only entitled to the present worth of it.

The Court—I suppose that would be self-evident, particularly if they were entitled to interest on any sums past due.

Mr. McGinnis—Yes, certainly. And then I shall finally argue that that clause with reference to a fraction of a year could only deal with the thirteen unexpired days. In other words, they are not entitled to fifteen hundred dollars under a fair reading of that contract, but are only entitled to such proportion of fifteen hundred dollars as thirteen days bears to three hundred and sixty-five.

Those are our points.

The Court—Mr. McGinnis may have ten day to two weeks to prepare his brief and present it to the other side, and they may have a week to reply, so that three weeks from now I can get to work. In the meantime, Mr. Kelley will transcribe the stipulation of facts and hand me the papers with them.

Mr. Dunn—We are offering a chattel mortgage from the Oxford Piece Dye Works to Oxford Dye Works, Incorporated, dated December 13, 1928, recorded book 27 of chattel mortgages in Warren County Clerk's office, page 277.

(Paper marked exhibit P-5.)

NEW JERSEY SUPREME COURT
(Passaic County.)

I. Tanenbaum, Son and Co., a Corp., Plaintiff, vs. Oxford Dye Works, Incorporated, Defendant.	Action at Law.

OPINION

Arthur C. Dunn, Esq., Attorney for Plaintiff.

Ward & McGinnis, Esqs., Attorneys for Defendant.

Porter, S. C. C.

This case, by consent of counsel, is submitted on an agreed state of facts to be decided by the Court without a jury. The action is to recover an amount claimed to be due under a contract of insurance. The dispute is as to the amount due. The contract was entered into between the parties on August 20, 1919, whereby the plaintiff agreed to procure fire insurance for defendant on property at Oxford Furnace, this State, for a period from that date until December 31, 1934. We are only concerned with the fifteenth clause of the contract which provides for liquidated damages of $1,500 for each unexpired year or fractional part thereof to be paid by the defendant in default of the contract. This clause also provides that there will be a default in certain contingencies, among which is in the event of the revocation of the defendant's

charter. The charter was revoked for the non-payment of taxes for the year 1922 by the State in 1925. In spite of this breach the parties continued in the performance of the contract until December 13, 1928, when the contract came to an end because of the sale of the property.

The defendant says that the contract came to an end in 1925 owing to the revocation of its charter and that the dealings between the parties since were not subject to the terms of the contract. While it is true that the language of the fifteenth clause does terminate the contract under these conditions, still such termination is at the option of the plaintiff. That provision was in the contract for the benefit and protection of the plaintiff and it could surely waive its right. The defendant cannot discharge its obligation by its own default. Vickers v. Electrozone Co., 65 N. J. L., 665. The plaintiff did by its subsequent action waive its right of revocation and the defendant so understood by continuing to perform its part of the contract until it sold the property.

The defendant further contends that if recovery be had it should not be based on seven years as claimed but on six years and a small fraction of a year. Also that the basis of recovery should not be the full amount claimed because same is not all due now, some comes due at the rate of $1,500 annually hereafter, and that the proper measure of damage is the present worth of the total sum. The figure submitted under this theory is $7,-443.92 as against $10,500 claimed.

The contract is not susceptible of this construction. Its language is that in case of default the plaintiff shall "thereupon be entitled to recover

the sum of $1,500 for each and every unexpired year or fraction of a year of said term." It seems clear that such sums became due not each year during the balance of the term but upon the date of the breach. It is equally clear that a fraction of a year may be figured at the same amount of a full year.

There is a claim for the contract price of insurance for one year amounting to the sum of $1,000 which is not in dispute.

Judgment may be entered for this sum together with the sum of $10,500 with interest from December 1, 1928, in favor of the plaintiff and against the defendant.

Newton H. Porter,
Supreme Court Commissioner,
Occupying the Position of
Circuit Court Judge.

Paterson, N. J.,
December 30, 1929.

Postea

NEW JERSEY SUPREME COURT
(Passaic County.)

I. Tanenbaum Son and Co., a corporation, Plaintiff, vs. Oxford Dye Works, Incorporated, a corporation, Defendant.	Action at Law.

POSTEA

This case was tried before Hon. Newton H. Porter, Supreme Court Commissioner, occupying the position of Circuit Court Judge at the Passaic Circuit, upon a stipulation of facts submitted and agreed upon by the Attorneys of the respective parties on December 30th, 1929.

A general verdict was rendered against the defendant and in favor of the plaintiff for the sum of Eleven thousand one hundred and fifty-six dollars and twenty-five cents ($11,156.25) on the first count; and one thousand sixty-five dollars ($1,065) on the third count; the whole amount being twelve thousand two hundred and twenty-one dollars and twenty-five cents ($12,221.25).

Newton H. Porter,
Supreme Court Commissioner,
occupying the position of
Circuit Court Judge.

Exhibit P-1.

EXHIBIT P-1

This Agreement, made this 20th day of August 1919, between the Corporation of I. Tanenbaum Son & Co., of the Borough of Manhattan, in the City and State of New York, hereinafter designated the broker and Oxford Dye Works, Incorporated, hereinafter designated the assured, Witnesseth:

That, for and in consideration of the sum of one dollar interchangeably in hand paid, by each of the parties hereto to the other, the receipt whereof is hereby acknowledged, and of the several covenants and agreements hereinafter set forth, and to be performed by the said parties respectively, it is hereby stipulated and agreed by and between the parties hereto:

First: That the assured shall, during the period from the Twentieth day of August, 1919 to the Thirty First day of December, 1934, through the broker as its agent, order, apply for, procure and accept policies of Fire Insurance, from such fire insurance companies, and individual underwriters as now are or may be hereafter admitted or permitted to do business in the State of New York, or New Jersey, or Pennsylvania, or Rhode Island, or Massachusetts, or Illinois, or from such other as may be agreed upon, on Merchandise, Machinery, Furniture, Fixtures and Improvements of the assured, or in its possession or control in or on the buildings and premises situate and known as on the south side of Delaware Lackawanna and Western Railroad tracks, Oxford Furnace, Warren Co., New Jersey, and upon the said buildings and premises and upon the rents of said buildings and premises, and upon the use and occupancy of said buildings and premises and the use and occupancy

of the business conducted therein and thereon. Said policies to be at all time in amounts at least equal to the full value of said property and items respectively, and at no time less than Two Hundred and Fifty Thousand ($250,000.) Dollars on Merchandise, Machinery, Furniture, Fixtures and /or Improvements, on Commissions and/or Profits, on Use and Occupancy, on Buildings and Rents.

And the assured hereby authorizes the broker, as its agent and for its account to procure and pay for such policies and agrees from time to time to advise and inform the broker as to the value of said property and items respectively, and the assured's consequent requirements of insurance as aforesaid.

Second: And the assured hereby covenants and agrees that it will pay on demand to the broker, at the uniform rates of One Dollar ($1.00) on said Merchandise, Machinery, Furniture and Fixtures, and/or Improvements, on said Use and Occupancy, on said Commissions and/or Profits, on said Buildings and Rents, per year for each and every one Hundred Dollars of Insurance procured originally or as renewals by the broker for the assured (whether the policies for such insurance be procured or paid for by the broker at greater or less rates than said rates), all sums which may accrue, or become due, by virtue of this contract, whether the premiums on said policies have been paid by the broker or not, but the broker shall, nevertheless, hold the assured harmless from liability to pay the premium a second time on any policy for which the assured shall have already paid the broker.

Fifteenth: It is further specifically understood and agreed that if the said assured shall, at any

time during the term of this agreement, fail to fully carry out the same on its part, or sell or dispose of said business, or discontinue business, or for any reason cease to occupy the premises hereinbefore described, or file or have filed against it a petition in bankruptcy, resulting in an adjudication of bankruptcy either voluntary or involuntary, or if the assured (being a corporation) shall commence, or carry on proceedings for a voluntary dissolution, or shall cease to exercise its corporate functions, or if proceedings are taken against it by any State or by the United States for a dissolution and revocation of its charter, said assured shall thereupon immediately become liable to and pay to said broker, and the said broker shall thereupon be entitled to recover from said assured the sum of Fifteen Hundred ($1500.) Dollars for each and every unexpired year or fraction of a year of said term, which sum, with interest thereon to the date of payment, is hereby agreed upon as liquidated damages for the failure of said assured to carry out said contract upon its part. It is especially understood, however, that the broker may contract in advance with insurance companies or underwriters to provide insurance to the assured during the whole or part of the term hereof; that the broker, by reason of experience, skill and exceptional facilities, can probably secure or has secured such insurance at specially reduced cost; and it is agreed that if for any partial or other breach of this contract by the assured, it becomes necessary to ascertain the actual damages suffered by the broker, instead of resorting to said liquidated and stipulated damages, that said facts shall be given full effect.

It is further specifically understood and agreed that this contract is made, executed and delivered in the Borough of Manhattan, in the City and State of New York, and the rights and obligations of the parties under the same are to be governed and determined by the laws of the State of New York.

It is specifically understood and agreed by and between the parties hereto, that all policies of fire insurance to be procured and furnished by the broker under and pursuant to paragraph First of this agreement, and any and all renewals of such policies shall contain a One Hundred per cent. (100%) co-insurance or average clause in the usual form adopted and used by Fire Insurance Companies, and that the rate agreed to be paid for such fire insurance by the assured is based upon policies containing such One Hundred per cent. (100%) co-insurance or average clause.

It is specifically understood and agreed by and between the parties hereto, that no change in the name or membership of said firm, of the assured, nor a dissolution of said firm, shall in any wise release said firm or any of the present members thereof from any of the covenants, terms or conditions of this agreement, but each and all of the members of said firm as at present constituted and their legal representatives shall remain liable under this contract for the full term hereinbefore named.

In Witness Whereof, the parties hereto have duly executed this instrument the day and year first above written.

Moses Tanenbaum,
Broker.

Lester J. Saul,
Witness as to the Broker.

Exhibit P-2 & P-3

Adolph Rutler, Pres.
Oxford Dye Works, Inc.

Fred E. Nichols,
Witness as to the Assured.
Before me August 20th, 1919.

Louis Steinhardt,
Notary Public, Oxford, N. J.

In consideration of the execution of the within agreement by the party therein designated the broker at the request of the undersigned hereafter designated the guarantor, the guarantor hereby guarantees unto the broker that the party designated the assured in the within agreement will fully and faithfully perform the within agreement and all the terms and conditions thereof.

Adolph Rutler, Pres.

Dated: August 20th, 1919.
Witness: Fred E. Nichols

EXHIBIT P-2

Abridgment of P-2 by agreement of counsel.

Warranty Deed made by Oxford Dye Works Incorporated, a corporation of State of N. J. to Oxford Piece Dye Works, Inc., Dated Dec. 13th, 1928, acknowledged Dec. 13th, 1928, received, Dec. 14, 1928. Book 253, Deeds for Warren Co., P. 374. Consideration $50,000. Conveying the premises described in Exhibit P-1.

EXHIBIT P-3

In account with Oxford Dye Works, Inc., Oxford Furnace, N. J., dated 12-1-28. December 1, 1928 to December 1, 1929, 7045, Mercury, $25,000., S/S of D. L. & W. R. R., Tracks at Oxford Furnace, N. J. December 1, 1928, to December 1, 1929, 222246, Ins. Co. of N.A., $25,000. S/S of D.L. & W. R.R. Tracks at Oxford Furnace, N. J.,$50,000. Building, One

Year @ $1.00 per $100. as per agreement. $500.00. The above policies have been issued for a period of three years from December 1, 1926, to December 1, 1929. We are charging you each year for one year's insurance at the contract rate. This is the last installment due on these policies.

EXHIBIT P-4

In account with Oxford Dye Works, Inc., Oxford Furnace, N. J., dated 12-1-28. December 1, 1928, 52728, Springfield F & M, $12,500., s/s of D. L. & W. R. R. Tracks at Oxford Furnace, N. J. December 1, 1928, 1328, Glen Falls, $12,500.,s/s of D.L. & W. R. R. Tracks at Oxford Furnace, N. J. December 1, 1928, 1765, Aetna of Htfd., $12,500., s/s of D.L.& W.R.R. Tracks at Oxford Furnace, N. J. Dec. 1, 1928, 449483, No. Brit & Merc., $12,500, s/s of D. L. & W.R.R. Tracks at Oxford Furnace, N.J., $50,000. Machinery, One Year @ $1.00 per $100. as per agreement. $500.00. Renewal.

EXHIBIT P-5

Abridgment of Exhibit P-5 by consent of counsel.

Chattel Mortgage

Oxford Piece Dye Works, Inc., a corporation of the State of New Jersey to Oxford Dye Works, Inc., a corporation of the State of New Jersey, Dated, December 13, 1928, acknowledged, December 13, 1928, rec'd, December 14, 1928. Book 27, C. M. W. Co., P. 277. Consideration $45,000.00. Covering chattels in premises described in Exhibit P-1.

EXHIBIT D-1

NEW JERSEY COURT OF ERRORS AND APPEALS

I. Tanenbaum Son and Co., Inc.,
Plaintiff,

vs.

Oxford Dye Works, Inc.,
Defendant.

10

STIPULATION

It is hereby stipulated and agreed that there was a Proclamation of the Governor of New Jersey, dated January 22nd, 1925 in which the Oxford Dye Works, Inc., Charter, is proclaimed defaulted by non-payment of taxes.

20

Arthur C. Dunn,
Attorney of Plaintiff.
Ward & McGinnis,
Attorneys of Defendant.

30

New Jersey Court of Errors and Appeals

I. Tannenbaum Son & Co., a corporation,
Plaintiff-Respondent,
vs.
Oxford Dye Works, Incorporated,
Defendant-Appellant.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

STATEMENT OF FACTS

This is an appeal from a judgment in favor of the plaintiff, rendered at the Passaic Circuit of the Supreme Court. The case was tried without a jury before Judge Porter, upon an agreed state of facts. Substantially these facts are as follows:

The plaintiff is engaged in the insurance business in the City of New York, and in August, 1919, entered into a contract with the defendant to furnish insurance commencing from the 20th of August of that year, to the 31st of December, 1934. This contract is set out as Exhibit P-1, P. 31, S. of C. There was a provision for liquidated damages, by which the sum of $1500. each year was fixed as the damage, in the event of a breach by the assured. It is admitted by the plaintiff, that the defendant carried out its contract until the 13th of December, 1928, (Complaint, P. 5, l. 30), and grounds its action on the theory that there was seven years which the contract had still to run, the exact period being six years and some two weeks

the plaintiff, however, contending that the contract entitled them to $1500. for any portion of a year that the contract was broken.

On December 13th,1928, the defendant sold its plant, and it is because of this, that the plaintiff claims a right of action arose.

Plaintiff contends that there was a breach of contract, and the right to demand damages arises out of the 15th clause of the contract. This clause appears at the bottom of P. 32, S. of C., and is as follows:

> "It is further specifically understood and agreed that if the said assured shall, at any time during the term of this agreement, fail to fully carry out the same on its part, or sell or dispose of said business, or discontinue business, or for any reason cease to occupy the premises hereinbefore described or file or have filed against it a petition in bankruptcy, resulting in an adjudication of bankruptcy either voluntary or involuntary, or if the assured, (being a corporation) shall commence or carry on proceedings for a voluntary dissolution, or shall cease to exercise its corporate functions, or if proceedings are taken against it by any State or by the United States for a dissolution and revocation of its charter, said assured shall thereupon immediately become liable to and pay to said broker, and the said broker shall thereupon be entitled to recover from said assured the sum of Fifteen Hundred Dollars ($1500.00) for each and every unexpired year or fraction of a year of said term, which sum, with interest thereon to

> the date of payment, is hereby agreed upon as liquidated damages for the failure of said assured to carry out said contract upon its part. It is especially understood, however, that the broker may contract in advance with insurance companies or underwriters to provide insurance to the assured during the whole or part of the term hereof; that the broker, by reason of experience, skill and exceptional facilities, can probably secure or has secured such insurance at specially reduced cost; and it is agreed that if for any partial or other breach of this contract by the assured, it becomes necessary to ascertain the actual damages suffered by the broker, instead of resorting to said liquidated and stipulated damages, the said facts shall be given full effect."

It also appeared in the course of the trial, that in 1925, the corporation charter was proclaimed defaulted for non-payment of taxes for the year 1922 (Session Laws, 1925, p. 749).

Judge Porter found in favor of the plaintiff, for the entire amount, viz., $1500. a year for seven years.

The defendant's contentions substantially are as follows:

1. That when the corporation charter was proclaimed defaulted by the Governor, that forthwith the contract was determined and the plaintiff became entitled to damages. That thereafter, any insurance written up by the plaintiff, and paid for

by the defendant, was or were based on a contract or contracts from year to year.

2. That if the plaintiff was entitled to maintain this action as of a breach in 1928, that the plaintiff was only entitled to the present worth of $1,500.00 each year for the seven years of the unexpired term of the contract.

3. That the action of the plaintiff was prematurely brought, with respect to damages arising after the institution of the action.

The case will be argued on these points, and in this order.

POINT I.

THE FORFEITURE OF THE DEFENDANT'S CHARTER IN 1925 TERMINATED THE CONTRACT AND PLAINTIFF BECAME ENTITLED TO DAMAGES AT THAT TIME.

Any insurance thereafter written by plaintiff for defendant was not under the contract sued upon. A careful reading of the 15th clause shows that it was specifically agreed that if, at any time, during the term of the contract, the defendant did any one of a number of things, that, in the language of the contract,

> "Said assured shall thereupon immediately become liable to, and pay to said broker, and the said broker shall thereupon be entitled to recover from said assured, the sum of $1500. for each and every unexpired year, or fraction of a year of said term, etc." (P. 32 at bottom, P. 33, l. 13 to 19.)

Because of the failure of the defendant to pay its corporate tax for the year of 1922, the Governor of the State by proclamation, as shown in Session Laws of 1925, page 749, proclaimed defendant's charter defaulted for that reason, and declared it to be revoked, inoperative and void. The exact language being as follows:

> "The charter is revoked and all powers created by such corporation are declared inoperative and void."

This proclamation is in acordance with the provision of the Corporation Act, Section 142, which provided that if any corporation created under the Act, shall refuse to pay the tax assessment against it, etc.

> "The charter of such corporation shall be declared void as in Section 2 of this Act provided."

Section 144 provided that the Governor shall issue a proclamation, which as stated above was done.

Section 145 provides that any person or persons who shall exercise or attempt to exercise any powers under the Charter of any such corporation, after the issuance of such proclamation, shall be guilty of a misdemeanor, etc., (penalty provided).

The plaintiff had no hesitancy in proceeding under the 15th Section of the contract, when the defendant sold its business, but the language with respect to that, is no stronger than the provision with respect to the forfeiture of the charter. Both conditions appear in the 15th section, as two of a

number of conditions which could terminate the contract.

The language is clear with respect to the effect of the forfeiture of the charter terminating the contract. It (the contract) provides:

> "If proceedings are taken against it by any State or by the United States for a dissolution and revocation of its charter, said assured shall thereupon immediately become liable to and pay to said broker, and the said broker shall thereupon be entitled to recover from the said assured the sum of $1500. for each and every unexpired year aforesaid as liquidated damages."

We insist that when the defendant did not immediately demand $1500. for each year after the proclamation by the Governor nullifying the charter, that this provision was waived, (and thereafter the parties in effect entered upon a new contract, viz., the plaintiff agreeing to insure the defendant from year to year. If it had been intended that the contract in controversy should operate otherwise, there undoubtedly would have been inserted in the contract a provision that the right of the plaintiff to regard the contract as determined was optional, upon the happening of any of the events mentioned in the 15th section). It would have been preceded by a provision that it was at the option of the plaintiff to take this action, or that it was at the option of the plaintiff to regard the contract as at an end, and/or a further provision that failure to take advantage of any of the provisions enumerated in the 15th section should not be considered a waiver, and/or that the fact that subsequent insurance was writ-

ten up and premiums paid under the contract, should be considered as a payment in accordance with the contract.

Any doubtful elements against the plaintiff should be considered in favor of the assured, the defendant. Further, the contract should be considered as being made for both parties, as there were mutual rights, liabilities and responsibilities provided for. Therefore, we submit that if the 15th paragraph of the contract does not leave it optional with either party to say whether or not the contract was to determine absolutely upon the happening of any of these events, then the law of the case must apply regardless of the wishes of either, and therefore we contend that the contract came to an end in 1925 by the proclamation of the Governor, and thereafter subsequent insurance sold by the plaintiff to the defendant was with regard to one yearly policy or contract of insurance, a separate and distinct contract.

Our view is that by this 15th section the plaintiff set forth a series of acts any one of which would bring the contract to an end. By way of illustration or example, reference to a condition respecting a certain day in the future, the amount of business the defendant might do, the political complexion, or any other ridiculous condition could be inserted in the contract, and in the event of some trivial hapening therein set forth, the contract would be at an end.

It makes no difference if the defendant, as the result of this proclamation of the Governor ceased its corporation functions only for a day, the event provided in the 15th section had happened and

the contract thereby was determined, and once dead, the contract could not be resurrected, merely because the corporation was again brought into existence (if such was the fact).

The Court, in his opinion at P. 28, meets this condition by saying:

> "In spite of this breach, the parties continued in the performance of the contract until December 13th, 1928, when the contract came to an end, because of the sale of the property."

This is untrue. The contract was not continued thereafter, merely because a sum was paid by defendant to the plaintiff, which was equivalent to the sum paid under the contract of insurance. The contract of insurance had merely formed a basis for the fixing of the rate of price of insurance, thereafter written. The Court, too, it seems to us, is illogical, by invoking the 15th section, to call the sale of the property, a breach, and ignoring the equally strong language of the provision with respect to the forfeiture of the charter. It is true, that later in his opinion, the Court admitted that he forfeiture of the charter would terminate the contract. In this connection, his language is:

> "While it is true, that the language of the 15th clause does terminate the contract under these conditions (forfeiture provision), still such termination is at the option of the plaintiff." (P. 28, l. 10 to 14).

The Court met this by finding, or contending, that the provision in question, was for the benefit and protection of the plaintiff, and that it had a right to waive this. We contend otherwise. If such had been the intention of the parties, there

would undoubtedly have been inserted in the contract, the words, "at the option of" the plaintiff. Such language nearly always appearing in contracts in which one of the parties reserves the right to invoke a default. In the contract under discussion, however, no such language appears. This Court should not make a better contract for the parties, than they choose to make for themselves.

See the case of Precipio v. Insurance Co., 103 N. J. L., P. 589.

Furthermore, this was a contract prepared by the plaintiff, and if there be doubt as to its provisions, or there be language capable of two interpretations, it should be, in that event, construed against the plaintiff, and in favor of the defendant. (Am. Lith. Co. vs. Com. Cas. Ins. Co., 81 N. J. L., 271, 274.

If this contract terminated in 1925, by force of its own language, and the further fact that the defendant corporation had ceased to exist, the mere fact of paying insurance at the same rate thereafter, would not of itself, revive the contract, even though the defendant company had been once more restored to its corporate rights. Both plaintiff and defendant were corporations, and it would take something more than one corporate body mailing a check to another, to constitute a resurrection and ratification of a dead contract. Nowhere in this case does it appear that following the termination of this contract in 1925, as the result of the proclamation by the Governor, they were the contracting parties, as in any formal corporate action to revive the contract.

In this case, as in ever other case of like character, the burden of proof is upon the plaintiff, and the Court cannot presume that the contract was revived, rather than that the parties had entered into several distinct contracts.

POINT II.

IF THE PLAINTIFF BE ENTITLED TO DAMAGES FOR THE ALLEGED UNEXPIRED PERIOD OF SEVEN YEARS, WE RESPECTFULLY SUBMIT THAT THE DEMAND FOR DAMAGES SET OUT IN THE FIRST COUNT IS NOT JUSTIFIABLE AS TO AMOUNT.

The Court found for a period of seven years, $1500. a year, or $10,500. in all, which sum was reached as follows:

> For the period from December 13th, 1928 to December 31st, 1928, a period of seventeen days, the Court allowed $1500. under the language of the contract which provided for $1500. each year "or any fraction thereof," and then he found at $1500. a year for the years of 1929 to 1934 inclusive.

On this point we submit that the language is such that it was never intended by the parties that $1500. should be regarded as liquidated damages for a period of two weeks and four days, when in the same paragraph $1500. is regarded as a liquidated or fairly fixed damage for a whole year. If $1500. is liquidated damage for one year, surely the same amount for two weeks and four days, is a penalty. These provisions in contracts should

be construed against the party for whose benefit they are made. Furthermore, the plaintiff had already been paid the insurance premiums under the terms of its contract for the year 1928, so that there could be no damage for that year, even though the contract had terminated at some period before the year had expired. These liquidated damages fixed for each year, were to take the place of the lost profits of the plaintiff under its contract. Where, we ask, were there any lost profits for the year 1928, if all premiums had been paid?

If we were to carry out the plaintiff's contention to a logical conclusion that on the 30th day of December, 1928, the business had been sold, could it be said that the plaintiff would be entitled to $1500. for the one day remaining in the month of December, 1928. We submit no Court should uphold such a provision. It undoubtedly would be against public policy and should fail.

We feel that the fair meaning of the language in the contract should be, that the defendant would be required to pay such portion of $1500. as the seventeen unexpired days in December of the contract would bear to the three hundred and sixty-five days of the year of 1928. This would be approximately $68.00.

For the remaining six years plaintiff would undoubtedly be entitled to damages at the rate of $1500. each year, but inasmuch as the moneys could not under this contract fall due at once, but only at the rate of $1500. each year, we respectfully submit that the plaintiff would be only en-

titled to the present worth of $9000. which we have figured up as follows:

December 15th,	1928	$ 68.00
"	" 1929	1415.09
"	" 1930	1334.99
"	" 1931	1259.42
"	" 1932	1188.13
"	" 1933	1120.87
"	" 1934	1057.42
		$7443.92

If we take the contrary of this, or rather the view the Court found, then we have the plaintiff at this time, receiving moneys not due for years to come, which, bearing interest at the legal rate, would produce a sum far in excess of $10,500. and make the damages considerably more than $1500. each year. For example, if we take the moneys due in 1934, the plaintiff would have been entitled to, from 1928, to that date, $1500. eventually yielding seven years interest, or $630. even though not compounded. It would therefore be receiving $2130. in 1934, instead of $1500. Bear in mind, that this sum, $1500. is liquidated damage, to take the place of the lost profits on the insurance for 1934. Under the terms of this contract, if it had been carried out, plaintiff would not have received the 1934 premiums until the year 1934. His profits would then be ascertained. Here, it is asked, and the Court has found that they get these profits which they would not be entitled to until 1934, and get it so far in advance, as to place in their hands in 1934, as we have stated, $2130. to say nothing of compounding this interest even from year to year.

This leads us to a consideration of the next point:

POINT III.

WAS THE PLAINTIFF'S ACTION PREMATURE WITH REFERENCE TO COLLECTING FUTURE DAMAGES?

This action was commenced on the 30th day of January, 1928. Plaintiff at the time was entitled to $68.00 and perhaps $1500 for the year of 1929, but are they entitled at this time to commence an action for the moneys due under the contract for the remaining years?

This involves a serious and somewhat difficult question of law. The rule cited in 17 Corpus Juris, page 850, under the subject "Damages", is as follows:

> "Where a contract is to be performed in installments, the damages for breach must be measured as of the time at which each installment is due and not as of the time at which performance is to be completed."

In support of this is cited the case of Recknagel v. Steinway, 184 N. Y. 614, 77 N. E. 801.

In that case the syllabus is as follows:

> "The plaintiff is not entitled to recover in one sum as for an entire breach of the contract in suit."
>
> "She is entitled to judgment for all installments due and unpaid on the contract

up to the time of the commencement of this action."

In any event, whatever rule should be adopted by this Court as to the method of computing the rule is clear, that the method to be adopted shall create the lowest amount of damages to be recovered. In connection with this, see 17 Corpus Juris, 846 and 847, in selecting the method, the defendant has the choice.

See also, subject discussed under "Actions" 1 Corpus Juris, 1114, Sec. 293, therein dealing with cases of actions to recover wages. The doctrine seems to be that the action may only be for such wages as were due at the time the action was commenced; that future installments cannot be recovered as such but may only be considered generally, with a view of measuring damages for the entire breach.

CONCLUSION

To re-state therefore our contentions, they are in substance, (1) that the contract came to an end in 1925 when the proclamation was proclaimed, and no attempt was made by the plaintiff to claim damages fixed therein; (2) that if the plaintiff be entitled to damages for the entire remainder of the contract, a present value must be fixed, and (3) if the plaintiff is entitled to recovery, the recovery should be limited to the seventeen days of 1928, and the year of 1929. If the Court found to the contrary of these contentions, and judgment

was entered in favor of the plaintiff by reason thereof, we submit that the judgment was erroneous and should be reversed.

WARD & McGINNIS,
Attorneys of Defendant-Appellant.

May Term, 1930.

Felix J. McGinnis.
Of Counsel.

New Jersey Court of Errors and Appeals

I. Tanenbaum Son & Co., a corporation,
Plaintiff-Respondent,
against
Oxford Dye Works, Incorporated,
Defendant-Appellant.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

STATEMENT OF FACTS

The defendant has conceded the execution of the contract, on which this suit is brought. The contract is in a form which has been used by the plaintiff for many years and which has been repeatedly sustained, as a valid contract, by the Courts of New York.

Tanenbaum v. Federal Match Co., 189 N. Y. 75.
Tanenbaum v. Rothenberg, 236 N. Y. 520, affirming 201 App. Div. 272.
Tanenbaum v. Rosenthal, 60 N. Y. S. 1092.

Briefly, the contract contemplates the installation in the premises of the defendant of an automatic sprinkler equipment and other devices for the reduction of the fire hazard, all at the expense of the plaintiff. The value of this equipment was stipulated by the parties to be $15,000. (Exhibit P-11.)

The natural effect of this installation of a sprinkler equipment would be to reduce the fire hazard and render fire insurance more easily obtainable and at cheaper rates.

Without this contract, in order to obtain the same result, the defendant would have been obliged to invest $15,000. in a sprinkler equipment, all at its own expense. Rather than do that, it preferred to let the plaintiff incur the expense, and on these considerations the contract was made.

The defendant was obtaining the benefit of an automatic sprinkler equipment and in consideration thereof it agreed, for the period from August 20th, 1919, to December 31, 1934, to order and accept from the plaintiff, as broker, policies of fire insurance on its building and on merchandise, etc., in its possession, at no time less than $250,000 (p. 32, l. 1-10), for which the defendant agreed to pay at a uniform rate of $1 per year for each $100 of insurance (p. 32, l. 15-20) whether the policy premiums were at greater or less than said rates (line 25).

In addition the defendant agreed, during the period of the contract, to order and accept policies for all its insurance of every kind through the plaintiff, as broker. This was in addition to the fire insurance which it was required to take at the fixed contract rate. Upon the additional insurance the defendant was to pay the policy premium rates and the plaintiff would in that event profit only to the extent of the usual brokerage commission. (Paragraph seventh, exhibit P-1.)

Upon the breach of a contract such as this, for a long term of years, it was clear that the par-

ties would not be able to accurately foresee or estimate the damage. Accordingly they made provision for a liquidation of the damages in paragraph fifteenth (p. 32, l. 35) which, for the sake of convenience, we repeat:—

> "Fifteenth—It is further specifically understood and agreed that if the said assured shall, at any time during the term of this agreement, fail to fully carry out the same on its part, or sell or dispose of said business, or discontinue business, or for any reason cease to occupy the premises hereinbefore described or file or have filed against it a petition in bankruptcy, resulting in an adjudication of bankruptcy either voluntary or involuntary, or if the assured (being a corporation) shall commence or carry on proceedings for a voluntary dissolution, or shall cease to exercise its corporate functions, or if proceedings are taken against it by any State or by the United States for a dissolution and revocation of its charter, said assured shall thereupon immediately become liable to and pay the said broker, and the said broker shall thereupon be entitled to recover from said assured the sum of Fifteen Hundred ($1500) Dollars for each and every unexpired year or fraction of a year of said term, which sum, with interest thereon to the date of payment, is hereby agreed upon as liquidated damages for the failure of said assured to carry out said contract upon its part. It is especially understood, however, that the broker may

> contract in advance with insurance companies or underwriters to provide insurance to the assured during the whole or part of the term hereof; that the broker, by reason of experience, skill and exceptional facilities can probably secure or has secured such insurance at specially reduced cost; and it is agreed that if for any partial or other breach of this contract by the assured, it becomes necessary to ascertain the actual damages suffered by the broker, instead of resorting to said liquidated and stipulated damages, the said facts shall be given full effect."

The defendant has conceded that the amount provided in paragraph Fifteenth is liquidated damages and not a penalty. We therefore are not concerned with any questions regarding the reasonableness of the amount of the liquidated damages or the general legality of the clause.

The parties proceeded to the performance of the contract and continued therein until December 13th, 1928, when the defendant sold its interest in the premises, sold and disposed of its business and discontinued business at that place. In other words, both parties regarded the contract as having been in full force and effect until December 13th, 1928.

It appears, however, that in the year 1925 the Governor of the State by proclamation, proclaimed the defendant's charter defaulted for failure to pay its corporate tax.

There is no dispute, however, that the defendant, in spite of this proclamation continued to exercise its corporate privileges and continued in

business as a corporation. The exhibits in evidence show that it continued to exercise its corporate rights up to and including the date when it sold its business, to wit, December 13th, 1928. When it finally sold its business, it did so in its corporate name.

We contend that the proclamation of the Governor revoking the charter of the defendant did not as a matter of fact terminate the contract and that the contract could not be terminated by reason of that breach or any other breach unless the plaintiff, for whose benefit the provisions were inserted, should so elect.

POINT I.

A PARTY TO A CONTRACT MAY WAIVE ITS PROVISIONS FOR HIS BENEFIT AND ELECT NOT TO TAKE ADVANTAGE OF A BREACH.

Bradley v. McDonald, 218 N. Y. 351.
Vickers v. Electrozone Co., 66 N.J.L. 9, affirmed in 67 N.J.L. 665.

In the Vickers case the contract provided that if the party of the first part should fail to order and purchase from the party of the second part during certain periods a specified amount of goods, the agreement should thereupon **ipso facto**, and without action on the part of the party of the second part, become null and void. The purchaser was in default and took the position that the contract was at an end; in other words by the very language of the contract, upon this breach

it had become **ipso facto** null and void. He contended that there was no option residing in the other party to waive that breach, just as the defendant contends in this case.

Chief Justice Depue in the lower court, said:

> "It would be an extraordinary construction of this agreement to make it confer upon a party the power to make his own default in not performing his part of the agreement a discharge of his obligation to perform it."

It is almost elementary that a party entitled to terminate a contract may waive its right to do so. (13 C. J. 608—note 35.)

Provisions for forfeiture may be waived by the person entitled to enforce them.

Clark v. West, 193 N. Y. 349.

Moffet v. O. & C. R. Co., 46 Or. 443, 80 P. 489.

In the last cited case the contract stipulated that if the vendee failed to make payments as agreed upon then "the contract, so far as it may bind the first party shall be utterly null and void," and the seller had the right upon default to enter the land and retain all payments made under the contract.

When the default occurred and the vendee argued just as the defendant does in this case that the seller must treat the contract as at an end and could proceed only on the theory that it had terminated and could not regard the contract as continuing, the Court said:

> "These stipulations were inserted wholly and solely for the benefit of the vendor. They could not serve the purchaser in any way, as the latter would be precluded from taking the least advantage of their own default. Being for the benefit of the vendor, it might, if it so desired, waive their strict and literal observance on the part of the purchaser, and this it could do in advance of the time of the agreed performance. So it could, if it saw fit to, forego a forfeiture already incurred and thereafter accept the performance, and itself perform as if no default had taken place."

Applying the law to the contract in this case we have the following situation:

In 1925 the defendant permitted its charter to be revoked, and one of the events occurred which "entitled" the plaintiff to treat the contract as broken, terminate it and recover the liquidated damages.

It would be strange if the defendant through its own default could bring about a situation which would compel the plaintiff to treat the contract as terminated.

No affirmative action was taken by the plaintiff with regard to the revocation of the defendant's charter. Both parties apparently ignored it and continued in the performance of the contract. Nowhere does the fallacy of the defendant's position appear more clearly than when it attempts to explain the position of the parties in the period from the date of the Governor's proclamation and

the sale of the business. Ordinarily one would say that the parties had ignored the breach and continued on in the performance of the contract. Not so the defendant; it says that when the breach of the contract was ignored, the contract was at an end! The parties then, according to the defendant's theory, continued in business on a new arrangement, entirely outside of the contract, from year to year thereafter. Consequently, on this fiction of a new arrangement, there was no long term contract in existence in December, 1928, and this action cannot be maintained.

Such is the defendant's position and the very statement of it should serve to discredit it.

If the defendant is correct, then this contract was broken by it in 1925. At that time, the plaintiff by the very language of the contract became entitled to recover the liquidated damages as and for a complete breach of the contract. The defendant says that this clause operated automatically and was not subject to waiver by the plaintiff. Accordingly, in 1925 the defendant became indebted to the plaintiff in the amount of the liquidated damages. The defendant senses the difficulty of this position and seeks to escape it by the mere statement that "these damages were waived." In short, the sum and substance of the defendant's position is that the plaintiff is not competent to waive a **breach** of the contract, but it is competent to waive the **payment** of the damages resulting from the breach.

This contract does not differ from any other contract with regard to the rights of the parties

upon a breach. In any contract, when one party has failed to perform its obligations, the other party may, **if it so elects,** treat this failure as a breach of the contract and act accordingly. On the other hand, it is the injured party and not the defaulting party who has the right to terminate it.

No peculiar language is necessary to confer that right upon the plaintiff in this case. It is part of the general law and is read into every contract.

POINT II.

THE LIQUIDATED DAMAGE IS RECOVERABLE ON A FACTOR SEVEN TIMES $1500. BEING FOR SIX FULL YEARS AND A FRACTION OF A YEAR.

The breach occurred on December ~~13th~~ 13TH, 1928, and the contract would have expired on December 31st, 1934. There was thus left a period of six full years and eighteen days of the unexpired term of the contract.

The Fifteenth clause provided that the plaintiff shall be entitled to recover $1500 for each and every unexpired year or fraction of a year.

The defendant is shocked at the fact that the fraction in this case is only eighteen days. But when the parties made the contract they could not foresee at what time of the year the breach might occur. The contract might have been broken on New Year's Day in any year and the fraction of the year then would have been three hundred sixty-four days. It might have been broken on the 1st day of June. It was broken, it happens, on December 13th.

Unless we disregard the words "or fraction of a year" and eliminate them entirely from the contract, making the contract read "for each and every complete unexpired whole year," we must treat this fraction of eighteen days as the contract says it should be treated, namely, as the equivalent of a year.

Once we begin to measure the fraction and to construe the contract so as to provide that if the fraction is large the contract will be followed, and on the other hand, if the fraction is small the contract will not be followed, we are in a morass of difficulties. What is a small fraction of a year and what is a large fraction of a year? We find ourselves making new rules and in effect making a new contract for the parties.

POINT III.

THE PLAINTIFF'S ACTION WAS NOT PREMATURE INASMUCH AS THE PLAINTIFF WAS ENTITLED TO RECOVER THE FULL LIQUIDATED DAMAGES IMMEDIATELY UPON THE BREACH, TOGETHER WITH INTEREST.

The language of the contract is clear on this point. Upon the breach the defendant "shall thereupon immediately become liable to and pay to the said broker, and the said broker shall thereupon be entitled to recover from said assured the sum of Fifteen Hundred ($1500) Dollars for each and every unexpired year or fraction of a year of said term, which sum, with interest thereon to the date of payment, is hereby agreed upon as liquidated damages for the failure of said as-

sured to carry out said contract upon its part." (P. 33, l. 15.)

This was not a promise on the part of the defendant to pay the sum of $1500 in yearly instalments. There were to be no instalment payments on the liquidated damages but all of it was to become immediately due and payable.

The contract speaks of one "sum," in the singular, and not of several sums, accruing at different times and payable year by year. This "sum" is the agreed liquidated damages, and in a single sum becomes "immediately" due and payable on the breach.

The cases with regard to instalment contracts have no application.

For example, the case of Recknagel v. Steinway, 184 N. Y. 614, relied upon by the defendant, was a case in which the defendant agreed to pay to certain trustees for the use of the plaintiff $6,000 per annum in quarterly payments. A breach occurred and the plaintiff sued to recover as damages the entire balance of unpaid instalments. The Court of Appeals naturally held that the plaintiff could recover only the instalments due at the time of the breach and unpaid.

In our case we ask only to recover the amount due at the time of suit but we contend that the amount which is due is the full amount of the liquidated damages and that that became due and payable immediately on the breach and is now due and payable with interest.

Once more, if the defendant is to be successful we must redraw the contract. We must in-

sert a clause to the effect that these damages are payable, if breached, year by year and disregard the word "immediately," and insert a provision giving the defendant the right to make annual payments. The contract is capable of no such construction and should not be so construed.

The same error of misconstruction vitiates the defendant's point as to discounting the damages. If they were payable year after year, in instalment payments, **without interest**, there might be some reason for discounting the payments and so arriving at their present worth. But such is not the contract.

The contract has never received such a construction. On the contrary, the courts have uniformly treated the liquidated damage as one lump sum, payable immediately upon the breach.

The contention of the defendant is unsound and unsupported by authority.

POINT IV.

The judgment of the court below should be affirmed.

Respectfully submitted,
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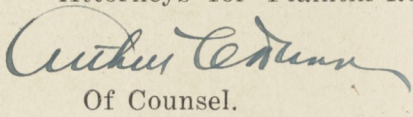

Of Counsel.