

assets in the interest of all members. They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain. We hold the challenged provisions impair the obligation of the appellant's contract and arbitrarily deprive him of vested property rights without due process of law.

The judgment of the Supreme Court of Louisiana must be reversed. As numbers 288, 289, 290 and 316 involve the same question as the instant case, a like judgment will be entered in each.

Reversed.

THE PRUDENCE CO., INC. *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 270. Argued January 8, 9, 1936.—Decided February 3, 1936.

1. In an action by the maker of a building loan, secured by a mortgage on the building, to recover on a bond indemnifying him from loss due to the failure of the borrower to complete the building in time and manner as specified in the loan contract, the measure of damages should be such as will place the lender in the same position as if the building had been completed as stipulated. P. 205.
2. Where the lender, in such a case, was obliged by the borrower's defaults in construction of an apartment building, to foreclose his mortgage, buy in the unfinished structure for less than the loan and take a deficiency judgment, it was error to limit recovery on the indemnity bond to the cost of completing the building in accordance with the contract; in the estimation of damages there should be considered also the rents that might have been impounded in the foreclosure proceedings had the building been ready for use, and the reduced value of the building at the foreclosure sale because of its unfinished state. P. 206.
3. The difference between the value of the unfinished building, at the foreclosure sale, and the value it would have had if completed as per contract, may be considered as made up of two elements, the cost of completion and the carrying charges meanwhile. These may

be proved by expert testimony; or where, as in this case, the building was completed by the lender, the actual cost of that may be shown; and the other element may be established by expert proof of the rental value of such a building (finished) at the date of default and later. P. 206.

4. In this case, in proof of damages due to delay in completing the building, evidence was received, without objection, of payments for taxes and insurance and of loss of interest on investment during the time required for its completion. *Held* that an objection that such carrying charges may have exceeded the rents that might have been received if the building had been finished as agreed, came too late, it not having been made at the trial. P. 207.
5. In an action for damages caused by impairment of a mortgage security, through the borrower's failure to complete the mortgaged building as agreed, loss of rents is to be classed not as special but as general damage and may be proved without having been specifically alleged. P. 207.

77 F. (2d) 834, modified and affirmed.

CERTIORARI, 296 U. S. 566, to review a judgment reversing one recovered in the District Court, 7 F. Supp. 392, in an action on an indemnity bond.

Mr. Alfred T. Davison, with whom *Messrs. Martin A. Schenck* and *Orrin G. Judd* were on the brief, for petitioner.

Interest, taxes and insurance should be allowed as part of the damages caused by the failure to complete the building at the time guaranteed. *Trainor Co. v. Aetna Casualty Co.*, 290 U. S. 47; *Kidd v. McCormick*, 83 N. Y. 391.

The facts and circumstances of this transaction, specifically show that interest, taxes and insurance premiums were within the contemplation of the parties as items of damage in case of breach.

Interest bears the same relation to money as rent does to land, and is clearly recoverable as an item of damage. *Woerz v. Schumacher*, 161 N. Y. 530, 536; *White v. McLaren*, 151 Mass. 553; *U. S. Fidelity & Guaranty Co. v. Parsons*, 147 Miss. 335; *Noonan v. Independence In-*

demnity Co., 328 Mo. 706; *Hexter v. Knox*, 63 N. Y. 561; *Lord v. Comstock*, 20 J. & S. (N. Y.) 548; *Donlan v. Trust Co.*, 139 N. C. 212; *Somerby v. Tappan*, Wright (Ohio) 229, 231, 570.

The holder of a mortgage, representing a money interest in land, is entitled to the interest, corresponding to the rent of an owner, which he loses, during the delay in completion of a building guaranteed to be finished at a specified time.

Interest is recognized as part of the measure of damages for breach of contract, where loss of such interest was within the contemplation of the parties. *United States v. New York*, 160 U. S. 598, 621; *Wilbur v. United States*, 284 U. S. 231; *Meyer v. Haven*, 70 App. Div. 529; *Gordon v. Curtis Bros.*, 119 Ore. 55, 66; *Wood v. Joliet Gaslight Co.*, 111 Fed. 463; *DeFord v. Maryland Steel Co.*, 113 Fed. 72; *American Bridge Co. v. Camden Interstate Ry. Co.*, 135 Fed. 323, 330-31; *New York Mining Co. v. Fraser*, 130 U. S. 611, 622; *South African Territories, Ltd. v. Wallington*, [1897] 1 Q. B. 692; *Lloyd Investment Co. v. Illinois Surety Co.*, 164 Wis. 282, 286, 288; *Macleod v. National Surety Co.*, 133 Minn. 351.

In addition to being within the contemplation of the parties, interest, taxes and insurance premiums are recoverable because necessarily included in the general rules of damages applicable to bonds guaranteeing completion.

If the building had been completed and ready for occupancy with all equipment installed, on December 16, 1930, Prudence Company could have immediately rented it instead of having to wait until October 1, 1931; and out of such rent it would have had a source of payment of its interest, taxes and insurance premiums.

The fact that a breach of the obligation to pay the mortgage is also involved does not alter the causal relation between the delay in completion of the building and

the loss of interest, taxes and insurance premiums. *Sauter v. New York Central & H. R. R. Co.*, 66 N. Y. 50; *Lane v. Atlantic Works*, 111 Mass. 136; Torts Restatement (Am. L. Inst.) § 447. See *Purchase v. Seelye*, 231 Mass. 434. Cf. *O'Brien v. Illinois Surety Co.*, 203 Fed. 436, 439. See also *Rock v. Monarch Building Co.*, 87 Ohio St. 244; *Kanter v. New Amsterdam Casualty Co.*, 195 App. Div. 756, 760, aff'd 233 N. Y. 602.

Whether the rule of damages be considered from the standpoint of difference in value, cost of completion, or impairment of security, the broad primary rule of putting Prudence Company in as good position as it would have been had the building been properly completed and within the time specified, requires allowance of its actual loss in interest, taxes and insurance premiums.

Interest, taxes and insurance premiums during the period of completion must necessarily enter into the determination of difference in value.

Taxes, insurance premiums, and interest on the investment during the construction period are uniformly treated for accounting, rate-making and general legal purposes, as part of the cost of construction, and must be included in the entire cost of the erection, construction and completion of the building which the sureties agreed to pay.

The provisions of the surety bond in this case obliged the surety in express terms to pay interest on the loan, and taxes and insurance on the mortgaged property until the date of actual completion of the building in accordance with the plans and specifications.

Mr. John W. Davis, with whom *Messrs. Thomas E. White* and *Joseph F. Murray* were on the brief, for respondents.

The measure of damages is the difference between the value of the uncompleted building on the date of the default and its value if it had been completed. *Trainor Co.*

v. *Aetna Casualty Co.*, 290 U. S. 47; *Kidd v. McCormick*, 83 N. Y. 391; *United Real Estate Co. v. McDonald*, 140 Mo. 605, 612; *Longfellow v. McGregor*, 61 Minn. 494; *Province Securities Corp. v. Maryland Casualty Co.*, 269 Mass. 75, 94; *Phillipe v. Curran*, 218 Ill. App. 517; *Comey v. United Surety*, 217 N. Y. 268; *Kanter v. New Amsterdam Casualty Co.*, 195 App. Div. 756, aff'd 233 N. Y. 602.

Under the decisions in *Kidd v. McCormick* and *Trainor v. Aetna Casualty Co.*, petitioner is not entitled to recover loss of interest on the mortgage loan, taxes or insurance premiums.

The petitioner included in its claimed cost of completion, taxes and insurance premiums covering the period alleged to have been used for completion, but which were due and were paid after petitioner had purchased the property on the foreclosure sale.

It also claimed specifically for interest on the mortgage loan claimed to have been lost during the alleged period used for completion.

In neither *Kidd v. McCormick* nor *Trainor v. Aetna Casualty Co.* did the court allow interest on mortgages, taxes or insurance premiums. In each case it was held that the proper measure of damages was difference in value.

Respondents' bond did not guarantee payment of interest, taxes and insurance premiums, but only guaranteed the completion of a building. Cf. *United Real Estate Co. v. McDonald*, 140 Mo. 605; *Province Securities Corp. v. Maryland Casualty Co.*, 269 Mass. 75, 94; *McCauslan v. Zoar Holding Co.*, 131 Misc. 148, 150.

The obligation of the surety is not to be extended. *Smith v. Molleson*, 148 N. Y. 241, 246.

The bond was a guaranty only of the completion of the building. *Maloney v. Nelson*, 144 N. Y. 182, 186.

Interest on the mortgage loan as damages is not recoverable from respondents because they assumed no ob-

ligation as to the principal of the loan; and interest as damages cannot be recovered apart from the principal. *Matter of Trustees*, 137 N. Y. 94, 98; *Cutter v. Mayor*, 92 N. Y. 166, 170; *Southern Central R. Co. v. Moravia*, 61 Barb. 180, 188. See *United Real Estate Co. v. McDonald*, 140 Mo. 605; *Province Securities Corp. v. Maryland Casualty Co.*, 269 Mass. 75, 94.

All cases and authorities recognize the distinction between interest payable by virtue of contract and that payable as damages for breach of contract. *Brewster v. Wakefield*, 22 How. 118; *Holden v. Trust Co.*, 100 U. S. 72; *O'Brien v. Young*, 95 N. Y. 428; *Brady v. Mayor*, 14 App. Div. 152; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Melick v. Knox*, 44 N. Y. 676.

No evidence was offered by petitioner to show that it suffered any loss of interest on mortgage loan, or taxes or insurance premiums, by reason of failure to complete the building.

Since petitioner concedes that it is entitled to recover damages suffered by it only as mortgagee and not as owner, it may not recover interest on mortgage, taxes or insurance premiums, because the foreclosure of the mortgage and the sale of the property terminated its status as mortgagee.

The difference in value between a building with and without omissions and substitutions is the proper measure of damages for such omissions and substitutions and the petitioner offered no evidence that the value of the building was lessened by reason thereof.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

We are to determine the measure of damages upon a bond conditioned against loss through the failure to complete a building at the time and in the manner called for by the building contract.

In September, 1929, petitioner, the Prudence Company, Inc., undertook to make a mortgage loan of \$6,650,000 in aid of the construction of Essex House, an apartment hotel in the City of New York. The borrower covenanted that the building would conform to plans and specifications, and would be completed not later than December 16, 1930. As part of the same transaction, two surety companies, the respondents in this court, signed a bond in the sum of \$3,000,000, indemnifying the lender against loss through the failure of the borrower to construct and pay for a building conforming to the contract, and complete it by the stated time. The bond also provided that in the event of the borrower's default, the lender, if it so elected, should be at liberty to go forward with the work, and charge the cost against the sureties. Other conditions are believed to be immaterial to any question now before us.

On December 16, 1930, the borrower made default under the mortgage, abandoning the work with the building then unfinished. At that time the petitioner's advances under the building loan agreement were \$6,575,000, the full amount promised, less \$75,000 retained by agreement. On December 18, 1930, petitioner through its nominee brought suit in the state court for the foreclosure of the mortgage. On January 6, 1931, it went into possession with the mortgagor's consent. On January 19, 1931, there was a judgment of foreclosure, followed by a sale on March 17, 1931, at which the mortgagee was the buyer, the bid of \$6,000,000 being applied upon the mortgage. A deficiency judgment of \$716,215.02 was entered the next month.

Petitioner in possession of the building went on with the unfinished work, bringing it to completion in October, 1931. An action on the bond was then begun against the sureties. The trial court gave judgment for damages in the sum of \$798,416.81, made up of three classes of items:

the cost of completion; the loss from omissions and inferior substitutions; and the interest on investment, together with taxes and insurance charges, while the building was idle because unready for its occupants. 7 F. Supp. 392. The Circuit Court of Appeals for the Second Circuit found this award to be excessive. In the view of that court no award should have been made for interest, taxes or insurance during the period of idleness. Payments necessary to complete the building were properly allowed, for they were evidence of the difference in value between an incomplete and a completed structure. Reparation was also to be made for omissions and substitutions to the extent that they diminished value, unless strict compliance had been waived by the lender or its agents. However, the extent of the recovery was not susceptible of ascertainment without the aid of a new trial. This was so because evidence of waiver had been offered by the surety and erroneously excluded. A remand was thus necessary to elicit all the facts. 77 F. (2d) 834. Before a second trial was had, a writ of certiorari issued at the instance of petitioner to resolve a claim of conflict between the decision to be reviewed and a decision of this court. *Trainor Co. v. Aetna Casualty & Surety Co.*, 290 U. S. 47. The writ states that it is "limited to the question of the measure of damages," thus excluding from our consideration the ruling of the court below as to the effect of waiver of performance.

Limiting our review accordingly, we think the extent of the recovery upon the new trial that will be necessary has been too narrowly confined.

The petitioner should be placed in the same position it would have occupied if the building had been completed on December 16, 1930. *Trainor Co. v. Aetna Casualty & Surety Co.*, *supra*, at pp. 54, 55; *Kidd v. McCormick*, 83 N. Y. 391, 398; *Province Securities Corp. v. Maryland Casualty Co.*, 269 Mass. 75, 94; 168 N. E. 252. To give

it nothing but the cost of doing the unfinished work, plus the loss resulting from omissions and substitutions, would be a scant measure of reparation, allowing nothing for delay. *Ruff v. Rinaldo*, 55 N. Y. 664; *C. W. Hunt Co. v. Boston Elevated Ry. Co.*, 199 Mass. 220, 233, 235; 85 N. E. 446; *Sedgwick, Damages*, 9th ed., § 645. If performance had been prompt, the mortgagee would have had the security of a finished structure, which a buyer at a foreclosure sale could have utilized at once. During the pendency of the suit, the rents might have been impounded at the hands of a receiver and applied upon the deficiency resulting from the sale. *Freedman's Saving & Trust Co. v. Shepherd*, 127 U. S. 494, 503; *Worthen Co. v. Kavanaugh*, 295 U. S. 56, 62. With the building still unfinished there were no rents to be collected and hence none to be applied in reduction of the debt. More important still, the amount of any bid was certain to be reduced by notice to the bidders that the building would be unproductive until ready to be occupied. From the point of view of bidders the reduction in value as the consequence of delay would be made up of two factors: the estimated cost of finishing the work, and the estimated carrying charges, not to exceed the rental value, during the period of idleness. Cf. *Trainor Co. v. Aetna Casualty & Surety Co.*, *supra*, at p. 55; *Kidd v. McCormick*, *supra*, at p. 398. So at least an assessor of the damages might find as a fair inference of fact, even if the finding does not follow as an inference of law. The effect of the decision is to hold down the recovery to the first of these factors and to eliminate the second.

The petitioner might have relied upon the testimony of experts as to the total depreciation and as to the weight of the component factors. It chose a different method. To show the loss sustained from finishing the work, it proved the actual cost, as by the express provisions of the bond it was at liberty to do. Cf. *Comey v.*

United Surety Co., 217 N. Y. 268, 276; 111 N. E. 832; *Appleton v. Marx*, 191 N. Y. 81, 85, 86; 86 N. E. 563. One of the factors of diminished value it has thus established with precision. To fix the weight of the other factor, it would have done better to give evidence by experts of the rental value of such a building at the date of the default and later. *Griffin v. Colver*, 16 N. Y. 489, 496; *Cassidy v. Le Fevre*, 45 N. Y. 562, 567; *Witherbee v. Meyer*, 155 N. Y. 446, 453, 454; 50 N. E. 58. Instead of doing this it chose to give evidence of the taxes, insurance premiums and interest on investment. We are told by the respondents now that for anything appearing in the record the carrying charges may have been greater than any rents that could have been earned if the building had been finished. No such objection was made upon the trial. We think it comes too late when first made upon appeal. In the absence of more specific challenge the trier of the facts might not improperly assume that interest on the investment along with taxes and insurance were losses flowing from the failure to receive a finished building. *New York & Colorado Mining Syndicate v. Fraser*, 130 U. S. 611, 622, 623. The point will not be labored, for the assumption is a safe one that evidence and objection will not be subject to this criticism when the case is tried again.

A question is raised as to the form of the complaint. The respondents insist that its allegations are insufficient to permit proof of loss of rents in addition to the cost. We read the pleading otherwise. In the circumstances of this case, loss of rents is to be reckoned as general, not special, damage. Sedgwick, Damages, 9th ed., § 1261; *Griffin v. Colver*, *supra*; *Cassidy v. Le Fevre*, *supra*; *Ruff v. Rinaldo*, *supra*; *Jutte v. Hughes*, 67 N. Y. 267, 271. It is one of the factors contributing to and measuring the diminished worth of the security. Damages when general are recoverable under a pleading that does not

enumerate the items. *Armstrong v. Percy*, 5 Wend. 535, 538, 539; *Laraway v. Perkins*, 10 N. Y. 371, 373. Here the complaint alleges that except for the default and in particular the delay, the plaintiff would have obtained upon foreclosure the full amount of principal and interest due upon the mortgage; it alleges that through the same causes the value of the mortgage was impaired to the extent of the deficiency judgment; it alleges that the plaintiff has thereby been deprived of any and all return on the amount of the investment. We find these allegations broad enough to let in evidence of damages along the lines that have been marked.

Another trial will permit the petitioner to show more accurately than it has done upon the record now before us that the building was continuously untenable until the completion of the work and that the time taken for completion did not outrun the bounds of reason.

What was ruled by the Court of Appeals in respect of the scope of the recovery for omissions and substitutions was not specified as error in the petition for the writ, and will be assumed to be correct. *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 182; *Helvering v. Taylor*, 293 U. S. 507, 511; *Clark v. Williard*, 294 U. S. 211, 216.

The judgment is modified by a direction that the measure of damages upon a new trial shall be that defined in this opinion, and as thus modified affirmed.

Modified and affirmed.