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# Bankruptcy--Loss of Future Rent as Provable Claim--Effect of Section 74-A of the Bankruptcy Act

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# NOTES AND COMMENT

*Editor*—RUBIN BARON

## BANKRUPTCY—LOSS OF FUTURE RENT AS PROVABLE CLAIM—EFFECT OF SECTION 74-A OF THE BANKRUPTCY ACT.

"But the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not forgotten Lord Coke." [1]

The above quotation from Mr. Justice Holmes' opinion briefly and accurately describes our theory of the law of leases. From the days of the early common law a lease has been treated as something *sui generis*. A covenant to pay rent has been regarded in an entirely different light than any other contract and the lessor's rights have differed radically from those of an ordinary contract creditor.[2] A lease of real property was a contract, but a contract which dealt with realty and created the relationship of landlord and tenant and the fundamental rules of realty and that relationship had to be satisfied before the contract itself would have any binding force between the parties.[3]

This common-law idea of rent is best understood by a reading of a quotation from Coke upon Littleton:[4]

> "But if a man letteth land to another for a yeare, to yeeld to him at the feast of S. Mich. next ensuing 40s. and afterwards before the same feast he releaseth all actions, yet after the same feast hee shall have an action of debt for the non-payment of the 40s. notwithstanding the said release * * *."

Coke's comment is as follows:

> "This release shall not barre the lessor of his rent, because it was neither *debitum* nor *solvendum* at the time of the release made; for if the land be evicted from the lessee before the rent became due, the rent is avoyed; for it is to be paid out of the profits of the land, and it is a thing not merely in action, because it may be granted over * * *."

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[1] Gardiner v. Butler & Co., 245 U. S. 603, 605, 38 Sup. Ct. 214 (1918).

[2] Clark, Foley, Shaw, *Adoption and Rejection of Contracts and Leases by Receivers* (1933) 46 HARV. L. REV. 1111.

[3] Radin, *Claims for Unaccrued Rent in Bankruptcy* (1933) 21 CALIF. L. REV. 561, 563.

[4] Co. LITT. 292b (§513).

Coke, therefore, says that "rent is reserved out of the profits of the land." [5] Blackstone says that it "is a profit issuing out of" the land.[6] Tiffany comments on these two statements as follows:

> "These statements presumably mean merely that as stated in the definition above given, rent is in theory part of the actual or possible profits of the land, a theory which is no doubt closely related to another theory, that rent, like any feudal service, is something issuing from and owed by the land itself, and not by any particular tenant of the land. The chief consequences of the theory that rent is payable out of the actual or possible profits of the land are that if the lessee is deprived of the opportunity to take the profits as by eviction, the landlord's right to rent ceases or is suspended, and that, as above stated, the rent is not a debt until the profits have been taken in the absence of an express provision to the contrary." [7]

So we find that in the common law a covenant to pay rent did not give rise to a present obligation to render performance in the future. No obligation arose until the rent day, and if the tenant was deprived of possession, even for his own breach, no obligation arose at all. This of course differs from obligations which arise under ordinary contracts of an executory nature which give rise to a present obligation to render performance in the future, and a material breach of which, by one of the parties thereto, ordinarily excuses performance by the other and gives rise to an immediate right to damages.[8]

The question arises whether this distinction is followed today. First let us disregard the legal aspect of the question for the moment and turn our attention to the situation as regarded by the landlord and the tenant. We will find that, "We may say that the landlord thinks of his land as a source of income, an investment which brings him a return, not differing in kind from other investments * * *. The tenant on the other hand thinks of his obligation to pay rent as one of his current expenses. It is counted as forming part of the cost of running his business and is often a substantial part of the cost, so that a profit must be earned on that as well as on other costs, if he is to think of himself as prosperous.

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[5] Co. Litt. 141b.

[6] 2 Bl. Comm. 41.

[7] 1 Tiffany, Landlord and Tenant (1912) §168.

[8] Schwabacher and Weinstein, *Rent Claims in Bankruptcy* (1933) 33 Col. L. Rev. 213, note 12: "The main distinction between a lease and other executory contracts is that a material breach of the latter ordinarily excuses further performance and allows immediate suit for damages. In a lease only specific performance of the rent covenant is allowed. The landlord must perform and sue for the stipulated rent."

It is a recurring charge, but it is not different from the amount due on notes, on bills for merchandise, on wages and salaries. He will in an emergency seek to defer payment on one as well as on another. * * * Whatever minute and subtle discriminations courts find between his rent obligations and his other debts, it is not apparent that the rent-obligor—the tenant—feels any difference." [9]

This, therefore, is the present, common view of the relationship between landlord and tenant. But to return to the legal aspect of the question, we find that the courts have steadfastly refused to be swayed from their archaic views of that relationship, based, as they are, upon the ancient history of our land law. Such views have given rise to many complicated and unjust results, especially noticeable in the operation of our bankruptcy law.

The purpose of our present Bankruptcy Act is twofold; [10] to relieve the debtor from the burden of his overpowering debts, and to effect an equitable distribution of his assets among his creditors.

The courts by their application of the common-law theory of leases have frustrated both of these purposes. They hold that bankruptcy does not cancel the lease and the tenant remains liable for future rent as it accrues.[11] The individual tenant is, then, still burdened with the obligation of carrying out the terms of the lease and, having been stripped of all his assets by the bankruptcy proceedings, his chances for reorganization are very slim. They also hold that the landlord may only file his proof of claim for rent that has accrued prior to the filing of the petition in bankruptcy.[12] Thus

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[9] Radin, *loc. cit. supra* note 3.

[10] "* * * To convert the assets of the bankrupt into cash for distribution among the creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh, free from the obligations and responsibilities, consequent upon business misfortunes." Williams v. U. S. Fidelity Co., 245 U. S. 597, 38 Sup. Ct. 211 (1918); see also Williams v. U. S. F. & G. Co., 236 U. S. 589, 35 Sup. Ct. 289 (1915); Central Trust Co. v. Chicago Auditorium Association, 240 U. S. 581, 36 Sup. Ct. 412 (1916); Maynard v. Elliot, 283 U. S. 273, 51 Sup. Ct. 390 (1931).

[11] *In re* Goldberg, 52 F. (2d) 156 (S. D. N. Y. 1931); *In re* Hubbard, 57 F. (2d) 213 (W. D. N. Y. 1932); see *In re* Roth & Appel, 181 Fed. 667 (C. C. A. 2d, 1910); *In re* Sherwoods, Inc., 210 Fed. 754 (C. C. A. 2d, 1913); *In re* Frischknecht, 223 Fed. 417 (C. C. A. 2d, 1915).

"But the better and more logical rule is that *the bankruptcy of the tenant even, does not sever the relationship of landlord and tenant,* and the tenant and his surety remain liable and that the rent obligation is not discharged as to future rent, unless the trustee elects to retain the lease as an asset." 2 REMINGTON, BANKRUPTCY (3rd ed. 1923) §789.

[12] Hendricks v. Judah, 2 Caines 25 (N. Y. 1804); Lansing v. Pendergast, 9 Johns. 127 (N. Y. 1812); Bosler v. Kuhn, 8 Watts & S. 183 (Pa. 1844); Stinemets v. Ainslie, 4 Denio 573 (N. Y. 1847); Savory v. Stocking, 4 Cush. 607 (Mass. 1849); Bailey v. Loeb, Fed. Cas. No. 739 (C. C. M. D. Ala. 1875); *In re* Commercial Bulletin Co., Fed. Cas. No. 3,060 (C. C. D. La. 1876); *Ex parte* Houghton, Fed. Cas. No. 6,725 (D. C. D. Mass. 1871); *In re* Hufnagel, Fed. Cas. No. 6,837 (D. C. E. D. Mich. 1875); *Ex parte* Lake, Fed. Cas. No. 7,991 (D. C. D. Mass. 1877); *In re* May, Fed. Cas. No. 9,325 (D. C. S. D. N. Y. 1874); *In re* Ells, 98 Fed. 967 (D. Mass. 1900); Bray

the landlord is not allowed to share equitably with the other creditors who are allowed to prove not only debts actually owing but damages suffered from breaches of contracts. He must look to the bankrupt tenant for the remainder of his return under the lease, or, of his own volition bring the term to an end and look for a new tenant. This hardship is especially flagrant where the tenant is a corporation dissolved after bankruptcy.

Thus the purposes and aims of the Bankruptcy Act are, as already stated, frustrated and there has been a continuous endeavor to amend this situation and to apply to the relationship of landlord and tenant the usual rules of contract or to read into the Act an intention on the part of the legislature to allow future rent claims to be proved in bankruptcy. This is by no means a new or modern movement. Various attempts have been made to accomplish the same ends under all of our Bankruptcy Acts.

The first attempts arose under our first Bankruptcy Act passed in 1800 and were entirely unsuccessful. The Act permitted claims of a contingent nature, but these claims were expressly limited to a small class not including rent [13] and the cases tried under this statute so decided.[14]

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v. Cobb, 100 Fed. 270 (E. D. N. C. 1900); *In re* Mahler, 105 Fed. 595 (E. D. Mich. 1900); Atkins v. Wilcox, 105 Fed. 595 (C. C. A. 5th, 1900); *In re* Hays, Foster & Ward Co., 117 Fed. 879 (N. D. Ky. 1902); Watson v. Merrill, 136 Fed. 359 (C. C. A. 8th, 1905); *In re* Pettingill & Co., 137 Fed. 143 (D. Mass. 1905); *In re* Rubel, 166 Fed. 131 (E. D. Wis. 1908); *In re* Roth & Appel, 181 Fed. 667 (C. C. A. 2d, 1910); Slocum v. Soliday, 183 Fed. 416 (C. C. A. 1st, 1910); Colman Co. v. Withoft, 195 Fed. 250 (C. C. A. 9th, 1912); *In re* Scruggs, 205 Fed. 673 (S. D. Ala. 1913); *In re* Sapinsky & Sons, 206 Fed. 523 (W. D. Ky. 1913); *In re* Mullings Clothing Co., 238 Fed. 58 (C. C. A. 2d, 1916); McDonnell v. Woods, 298 Fed. 434 (C. C. A. 1st, 1924); Britton v. Western Iowa Co., 9 F. (2d) 488 (C. C. A. 8th, 1925); Wells v. Twenty-first Street Realty Co., 12 F. (2d) 237 (C. C. A. 6th, 1926); *In re* Hook, 25 F. (2d) 498 (D. Md. 1928); *In re* Barton Co., 34 F. (2d) 517 (D. N. H. 1929); *In re* Twentieth Century Millinery Exchange, 41 F. (2d) 237 (S. D. N. Y. 1930); Trust Co. of Georgia v. Whitehall Holding Co., 53 F. (2d) 635 (C. C. A. 5th, 1931); *In re* Metropolitan Chain Stores, Inc., 66 F. (2d) 482 (C. C. A. 2d, 1933); Orr v. Neilly, 67 F. (2d) 423 (C. C. A. 5th, 1933). *Contra:* In re Chakos, 24 F. (2d) 482 (C. C. A. 7th, 1928). The cases in the third circuit reach a different conclusion because they turn upon a special form of lease drawn to take advantage of a local statutory provision. Wilson v. Pennsylvania Trust Co., 114 Fed. 742 (C. C. A. 3rd, 1902); South Side Trust Co. v. Watson, 200 Fed. 50 (C. C. A. 2d, 1912); *In re* H. M. Lacker Co., 251 Fed. 53 (C. C. A. 3rd, 1918); Rosenblum v. Uber, 256 Fed. 584 (C. C. A. 3rd, 1919).

[13] Act of Congress approved April 4, 1800, 2 Stat. 19, §39. "* * * the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss, to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities, as if such money had been due and payable before the time of his or her becoming bankrupt."

[14] Hendricks v. Judah, Lansing v. Pendergast, both *supra* note 12.

The second Bankruptcy Act was passed in 1847. The section dealing with provable claims listed several classes of contingent claims which would be allowed but did not include rent. The section, however, also contained a definition of all contingent claims [15] but the courts held that future rent claims were not such contingent claims as to be susceptible of liquidation.[16]

The section describing provable claims in the Bankruptcy Act of 1867 specifically allowed proof of contingent claims and rent up to the time of the bankruptcy.[17] The courts under this section refused claims for future rent on the ground that it was not a contingent claim or on the theory that the legislature by expressly allowing claims for rent up to the date of the bankruptcy, impliedly excluded claims for rent to accrue after that date.[18]

In 1898 our fourth and present Bankruptcy Act was passed. Section 63 of that Act deals with the provability of claims. The exact wording of that section, as far as is necessary for this discussion, is as follows:

> "Section 63.[19] *Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest

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[15] Act of Congress of August 19, 1841, §5, 5 Stat., 440, 444. "* * * all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under the act, and shall have a right, when their debts and claims become absolute to have the same allowed them, and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in presenti. * * *"

[16] Bosler v. Kuhn, Stinemets v. Ainslie, Savory v. Stocking, all *supra* note 12.

[17] Act of March 2, 1867, §19, 14 Stat. 517, 525. "* * * In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, and shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. * * *

"Where the bankrupt is liable to payment or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due day to day, and not at such fixed and stated periods."

[18] Bailey v. Loeb, *In re* Commercial Bulletin Co., *Ex parte* Houghton, *In re* Hufnagel, *Ex parte* Lake, *In re* May, all *supra* note 12.

[19] 30 STAT. 562 (1898), 110 U. S. C. §103 (1926).

upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract expressed or implied; * * *

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." [20]

It will be noted that subdivision (1) is limited to claims absolutely owing at the time of the filing of the petition while subdivision (4) is not so limited. Nevertheless the lower federal courts read this limitation into the latter subdivision and refused to allow any contingent claims against the bankrupt's estate,[21] including, of course, claims for future rent. Such a result was to be expected. "The history of bankruptcy legislation both in England and in the United States [22] pointed to such a result, for never had proof of contingent claims been allowed under statutes which like the present Act made no express provision therefor; and statutes designed to permit proof of such claims had been construed in a ruthlessly narrow and technical fashion." [23]

Having been thus thwarted in their efforts to prove their claims for future rent in bankruptcy, due to the peculiar law applicable to leases, landlords have attempted to remedy this situation by employing express covenants in their leases. Knowing that at common law the landlord could enforce a covenant for damages even after eviction, they believed that the same would hold true in bankruptcy proceedings. Their view was further strengthened by a decision of the Supreme Court allowing a claim for damages in an equity receivership, based upon a covenant in a lease, where no such claim would have been allowed in the absence of such covenant.[24]

But once again the landlords were doomed to disappointment for most of the covenants usually employed in leases met with very slight success. The majority of the federal courts refused claims

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[20] In Dunbar v. Dunbar, 190 U. S. 340, 350, 23 Sup. Ct. 757, 761 (1903), the court, after refusing a claim by the bankrupt's wife on his contract to pay his divorced wife a specified amount annually so long as she should remain unmarried, on the ground that the contingency was such as to make any valuation of the claim impossible, said that §63-b added nothing to the category of provable claims, but only provided for the liquidation of claims otherwise provable under §63-a.

[21] *In re* Hutchcraft, 247 Fed. 187 (E. D. Ky. 1917); First National Bank of Pikeville v. Elliot, 19 F. (2d) 426 (C. C. A. 6th, 1927); see Schwabacher & Weinstein, *loc. cit. supra* note 8; Note (1901) 14 HARV. L. REV. 372; Note (1913) 13 COL. L. REV. 172.

[22] For a study of the history of provable claims in bankruptcy in England and the United States and an analysis of the cases under the various acts, see Schwabacher & Weinstein, *loc. cit. supra* note 8.

[23] *Ibid.*

[24] Filene's Sons Co. v. Weed, 245 U. S. 603, 38 Sup. Ct. 211 (1918).

based on such covenants holding that they were too contingent, or in the nature of a penalty. The leading case on the point and one that is continually cited as authority is *In re Roth & Appel.*[25] In this case the landlord had reserved to himself the right of re-entry and the tenant agreed to pay the landlord the difference between the rents collected after re-entry and those reserved in the lease. After the petition in bankruptcy had been filed the landlord re-entered and relet the premises at a lower rental. The court, however, refused his claim for the deficiency, saying:

> "Now when the petition was filed, the first step toward declaring the lessee bankrupt was taken. It was not certain that bankruptcy would follow, but, if it did follow, the lessor would have the right to re-enter and terminate the lease. * * * But the lessor was not obliged to re-enter, and whether he would do so or not was manifestly dependent upon uncertainties. Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature:
>
> "(1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.
>
> "(2) In case the lease was terminated it was uncertain whether there would be any loss in rents. * * * "[26]

It is claimed that both of these reasons have been nullified by two subsequent cases, both of which, however, do not deal with realty. The first case is the *Central Trust Co. of Illinois* v. *Chicago Auditorium Ass'n*[27] in which the bankrupt had leased from the claimant a cab privilege and covenanted to make certain annual payments to the lessor who had the right to revoke the privilege. The lessee becoming bankrupt, the court held that he had disabled himself from fulfilling his contract and therefore, said the court, there was an anticipatory breach of contract and the lessor's claim was provable even though, as Judge Hand points out, "the uncertainties attendant upon any future installments were as great as in the case of a covenant to pay rent under a lease."[28]

The second case was that of *Maynard* v. *Elliot.*[29] In this case the claimant was the holder of a note not yet due, upon which the bankrupt was an endorser. The Supreme Court allowed the claim, holding that contingent claims are provable in bankruptcy and that

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[25] 181 Fed. 667 (C. C. A. 2d, 1910).

[26] *Id.* at 671.

[27] 240 U. S. 581, 36 Sup. Ct. 412 (1916).

[28] Manhattan Properties, Inc. v. Irving Trust Co., 66 F. (2d) 470 (C. C. A. 2d, 1933).

[29] 283 U. S. 273, 51 Sup. Ct. 390 (1931).

§63-a (4) of the Bankruptcy Act should not be interpreted to prohibit a claim upon a contract merely because the obligation was not absolutely owing at the time of the filing of the petition.[30]

It was, therefore, with renewed vigor that this question of provability of future rent claims was placed before the courts in two recent cases. The question had acquired widespread notice due to the prevalent use by tenants, especially the chain store companies, of the benefits of the Bankruptcy Act to relieve themselves of the burden of financially disastrous leases during the last few years of economic stress. The question was further advanced by the passage of §74-a, which was one of the sections added to the Bankruptcy Act in 1933 which were enacted to permit extensions and compositions. Section 74-a provided that a claim for future rent shall constitute a provable debt and shall be liquidated under §63-b of the Act. It was thought by some that this provision might apply to all proceedings in bankruptcy, while the prevailing opinion was that it only applied to the new relief actions granted to debtors under the compositions and extensions provided for in the newly added sections from 73 to 77.[31]

These two cases arose in the district court for the district of New York where the court followed the old-time honored rule against the provability of claims for future rents and expunged the claims. Appeals were taken to the United States Circuit Court of Appeals for the Second Circuit which followed its earlier decision in *In re Roth & Appel.*[32] Justice Hand, who wrote the prevailing opinion, nevertheless dissented in the reasoning, while forced to follow in result due to the doctrine of *stare decisis*. The cases came to the Supreme Court on writs of certiorari and were decided together. For the first time the Supreme Court of the land had an opportunity to pass upon the precise point. In both cases the leases contained covenants similar to that passed upon in *In re Roth & Appel,*[33] giving the landlord the right to re-enter and terminate the lease if bankruptcy should ensue and containing a promise on the tenant's part to pay the landlord any deficiency between the rent collected and that which was reserved in the lease for the remainder of the term.

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[30] The court said: "Although the omission to any reference to contingent claims in section 63 of the present Act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contracts, which at the time of the bankruptcy are fixed in amount or susceptible liquidation, may be proved under subdivision (a) (4) of that section, although not absolutely owing when the petition is filed." *Supra,* note 29 at 275.

[31] "It is, however, further provided that 'a claim for future rent shall constitute a provable debt and shall be liquidated under section 63-b.' This provision is clearly applicable to composition proceedings under section 74; whether, however, it is applicable to ordinary bankruptcy proceedings admits of some doubt, since it appears a part of section 74 and not as an amendment to section 63." Schwabacher & Weinstein, *loc. cit. supra* note 8.

[32] *Supra* note 12.

[33] *Ibid.*

The court unanimously affirmed the decision of the Circuit Court of Appeals, stressing the legislative history of the bankruptcy laws passed by Congress and the preponderant construction of them by the courts.[34]

First the court considered the provability of rent claims in general. After an exhaustive study of the history of bankruptcy law on this point both in England and the United States, the court, per Mr. Justice Roberts, said:

> "This court has never had occasion to pass upon the precise point. It has not, however, expressed disapproval of the rulings of the great majority of the lower federal courts, and has cited many of their decisions with apparent approbation (see *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581, 589-590; *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597; *Gardiner* v. *Butler & Co.,* 245 U. S. 603, 605; *Maynard* v. *Elliot,* 283 U. S. 273, 278).
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> "In accord with the well nigh unanimous view of the federal courts reiterated for over thirty years are statements of leading text writers (COLLIER, BANKRUPTCY, vol. 2, p. 1422; REMINGTON, BANKRUPTCY, vol. 2, secs. 79, 793; LOVELAND, BANKRUPTCY, vol. 1, sec. 313).
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> "What of the activities of the Congress while this body of decisions interpreting section 63-a was growing? From 1898 to 1932 the Bankruptcy Act was amended eight times without alteration of the section. This is persuasive that the contruction adopted by the courts has been acceptable to the legislative arm of the government.
>
> "In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted' (*Maynard* v. *Elliot, supra,* 277). If the rule is to be changed Congress should so declare." [35]

As for §74-a, the court held it only applied to individuals and not to corporations and then went on to say, "It is highly unlikely that if the quoted sentence had been intended as an amendment of section 63-a it would have been placed in context dealing only with the novel procedure authorized by the new sections." [36] So the landlord's newest hope for relief from his unhappy situation, even though meager, was not well founded.

The court then considered the particular covenants involved in these two cases. As was stated before, the covenants gave the lessors the option to terminate the leases by re-entry and then to collect from

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[34] Manhattan Properties, Inc. v. Irving Trust Co., 54 Sup. Ct. 385 (1934); S. R. Brown v. Irving Trust Co., 54 Sup. Ct. 385 (1934).

[35] *Ibid.*

[36] *Ibid.*

the former tenant the difference between the rent collected by the landlord by reletting the premises and the rent reserved in the leases for the remainder of the terms. The court regarded this as a new and complete contract which would not come into existence until after the filing of the petition in bankruptcy and then only at the choice of the claimant. This contract, the court says, cannot be breached until the duty to indemnify the landlord arises and which will not be complete until the end of the term. There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term." [37] It is difficult to see how this statement in its entirety can be reconciled with the opinion of the same court in *Central Trust Co.* v. *Chicago Auditorium Ass'n* [38] and in *Maynard* v. *Elliot.*[39]

No doubt, through a strict construction or interpretation of the statute, the decision of the Supreme Court can be justified and defended. But can the strict construction be justified? It is difficult to see why a strict interpretation is to be employed when dealing with realty while a liberal interpretation is to be used when dealing with matters relating to personalty. Surely §63 makes no such distinction. If it is to be construed to allow contingent claims in one instance, then why not in the other? The court cannot seriously hope to answer this question by saying that the liquidation of the claim for damages for the breach of a lease of realty is too difficult to ascertain, while damages for the breach of a lease of a bus privilege are easy to ascertain. Quite obviously there is a greater market, and, consequently, a more readily ascertainable market price for realty than there is for a bus privilege. Then, too, it is difficult to see how a claim for unaccrued rent is more contingent than a claim against an endorser on a note not yet due. Yet the court finds some distinction between the two, a distinction which it confines within the workings of its own mind, and, having settled upon the distinction proceeds to render an opinion based upon the doctrine of *stare decisis.* The writer is a firm believer in the above-mentioned doctrine and does not, by any means, advocate the overthrow of long-respected authorities, but feels that when reason and logic, usefulness and expediency have long vanished from the principle sought to be upheld, the court should be free—in fact, should find it its duty—to depart from the archaic doctrine which has outlived its usefulness.

The strongest argument put forth by the court against the provability of future rent claims was the history of Bankruptcy in the United States. Great stress was laid upon the decisions under our present Act and the fact that Congress has amended the Act eight times without altering the section dealing with provable claims,

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[37] *Ibid.*
[38] *Supra* note 27.
[39] *Supra* note 29.

showing, says the court, that this was the intent of Congress when the Act was adopted and that Congress is fully satisfied with the interpretation of the courts of this section with regard to rent claims. One might, with all due respect, ask why the same argument was not applied in the case of *Maynard* v. *Elliot* [40] in which the Supreme Court decided that contingent claims were provable under the present Act. It is equally applicable. As we have stated before, the first three Bankruptcy Acts adopted by Congress expressly allowed contingent claims. In the first two the contingent claims allowed were listed, while the third allowed contingent claims generally, excepting, by more or less express language, future rent. The fourth and present Act, however, says absolutely nothing about contingent claims. Might it not be said that such action on the part of Congress showed an intent that no contingent claims should be allowed? Statutes of a like nature were so construed in England before our present Act was adopted.[41] And our own courts for many years so interpreted the Act of 1898 without any interference or alteration by Congress,[42] showing, one might readily say, the "construction adopted by the courts has been acceptable to the legislative arm of the government." [43] But in 1931 the Supreme Court decided that contingent claims are provable under the present section.[44] One is forced to conclude that they are irreconcilable decisions.

The Supreme Court does not, however, eternally condemn the landlord to stand in trembling and fear of the ever-threatening bankruptcy of his tenant. They hold out one faint and flickering beacon of salvation to him. Being reluctant to change a rule so long imbedded in our land law, reluctant to place a different interpretation on the Bankruptcy Act than that established so long by the decisions of the lower courts, with the apparent sanction of the legislature, leaving a bad situation where it finds it, the Supreme Court of the United States holds out this parting word of advice:

> "If the rule is to be changed Congress should so declare." [45]

HAROLD V. DIXON.

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PARTY WALLS—NATURE—CREATION—TERMINATION.

From the layman's point of view, a party wall is a wall erected on a line between adjoining property-owners and used in common.[1]

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[40] *Ibid.*
[41] *Supra* note 22.
[42] *Ibid.*
[43] *Supra* note 34.
[44] *Supra* note 29.
[45] Ibid.

[1] FUNK & WAGNALLS, PRACTICAL STANDARD DICTIONARY (1930) 827.