by the Act of 1917, has substituted for the action, given in the alternative to heirs or personal representatives by the Code of 1881, one vested exclusively in the personal representative. It results that the petitioner could sue only under the Act of 1917.

The judgment is

Affirmed.

MANHATTAN PROPERTIES, INC. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY.*

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

No. 505. Argued January 10, 1934.—Decided February 5, 1934.

1. The claim of a landlord for future rents based on a covenant to pay rent in a lease terminated by reëntry on the bankruptcy of the tenant, is not a provable debt under § 63 (a) of the Bankruptcy Act. P. 332.

   So *held* in view of the great weight of judicial authority construing that section and similar provisions of earlier Acts, and in view of the legislative history of the subject.

2. The fact that a provision of a statute which has received a settled construction from federal courts has remained unaltered notwithstanding that Congress has repeatedly amended the statute in other respects, is persuasive that the construction accords with the legislative intention. P. 336.

3. Sections 73–76, added to the Bankruptcy Act by the Act of March 3, 1933, were enacted to permit extensions and compositions not theretofore possible, for individuals only; and the clause of § 74 (a) providing that "A claim for future rent shall constitute a provable debt and shall be liquidated under § 63 (b) of this Act," is to be related to this novel procedure and not taken as an amendment of § 63 (a) or as declaratory of its meaning. P. 336.

4. A covenant by a tenant to indemnify the landlord for loss of rent he may suffer during the residue of the term after reëntry by the

---

* Together with No. 506, *Brown et al.* v. *Irving Trust Co., Trustee in Bankruptcy*, certiorari to the Circuit Court of Appeals for the Second Circuit.

landlord upon the bankruptcy of the tenant, and which can come into operation only after the bankruptcy, and only if the landlord sees fit to reënter on that ground, is not a basis for a debt provable in the bankruptcy proceedings. P. 338.

5. Such a covenant is not the equivalent of an agreement that bankruptcy shall be a breach of the lease and that the consequent damages to the lessor shall be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future. P. 338.

66 F. (2d) 470, 473, affirmed.

REVIEW by certiorari, 290 U.S. 619, of orders sustaining the rejection of claims for loss of future rents, in two bankruptcy cases.

Mr. William D. Mitchell, with whom *Messrs. C. Dickerman Williams, Rollin Browne, Ralph Montgomery Arkush,* and *Amos J. Peaslee* were on the brief, for petitioners.

The lower courts have become involved in a maze of technicalities and distinctions based on ancient maxims of the law of landlord and tenant and developed by indemnity clauses, reëntry clauses, *ipso facto* clauses, acceleration clauses, liquidated damage clauses, and a variety of other covenants contained in modern leases. They have to a large extent lost sight of fundamentals and of the purposes of the Bankruptcy Act, and of the fact that Congress may have intended that such claims should be allowed, the tenant discharged from liability for future rents, and the landlord allowed to share with other creditors in the distribution of assets.

The correct rule is to be found in the Bankruptcy Act and in the decisions of this Court. *Williams* v. *U.S. Fidelity & G. Co.,* 236 U.S. 549; *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581; *Wm. Filene's Sons Co.* v. *Weed,* 245 U.S. 597; *Gardiner* v. *Wm. S. Butler & Co.,* 245 U.S. 603; *Kothe* v. *R. C. Taylor Trust,* 280 U.S. 224; *Maynard* v. *Elliott,* 283 U.S. 273.

To deny provability of such claims defeats the purposes of the Act. It leaves the bankrupt liable indefinitely, while denying the landlord the right to participate with other contract creditors.

If the tenant be a corporation, it rarely is rehabilitated after bankruptcy; and if the claim be not allowed in bankruptcy, the landlord is left to pursue the empty husk of a corporation without assets. For all practical purposes his claim is discharged. It is true he may resume possession, but the value of what he resumes is depreciated below the rent contracted, otherwise he would have no claim. The persons interested in the corporation may organize a new one to take over the assets at bankruptcy sale at a price which will satisfy other creditors or pay them in full, and then continue the business and leave the landlord to pursue a defunct corporation, with only the possibility of mitigating his loss by renting the property for less than the original lease provided. How this system works is well stated in an article on "Rent Claims in Bankruptcy," 33 Col.L.Rev. 213. See 7 Univ.Cin.L. Rev. 162.

Claims have been allowed on instalment contracts to buy ice (*In re Stern,* 116 Fed. 604); contracts to buy cotton bagging (*Lesser* v. *Gray,* 236 U.S. 70); instalment contracts to sell rubber (*In re Portage Rubber Co.,* 296 Fed. 289); contracts to buy stock (*In re Pettingill & Co.,* 137 Fed. 143); employment contracts (*Re Schultz & Guthrie,* 235 Fed. 907); annuities (*Cobb* v. *Overman,* 109 Fed. 65); and on contracts to make monthly payments similar to rents for the privilege of handling baggage at a hotel (*Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581).

There should be no distinction between leases having special indemnity or *ipso facto* covenants and those which have not.

The special covenants have been relied on to remove the element of contingency, to endeavor to make claims absolute at the time of the filing of the petition, and also to avoid the objection that a covenant to pay rent is extinguished by the landlord's resumption of possession. On the latter theory, these special covenants have been said to substitute for the covenant to pay rent a personal covenant of indemnity, the liability to perform which is not extinguished as is the rent obligation by reëntry. There is support for this theory in *Gardiner* v. *Butler,* 245 U.S. 603, and in other decisions.

The resumption of possession is not the voluntary act of the landlord; it is forced upon him by the bankruptcy. For the purposes of the Bankruptcy Act the argument that the obligation to pay rent no longer forms a basis for awarding damage because the consideration for rent is the possession of the land, is no more forcible than the argument that the obligation of the bankrupt to pay for goods on future delivery is extinguished because the goods will not be delivered to an insolvent purchaser.

The argument that reëntry cancels the covenant to pay rent, the only covenant on which a claim could be based, unless there is a special indemnity covenant, ignores the fundamental purpose of the Bankruptcy Act as announced in *Williams* v. *U.S. Fidelity & G. Co.,* and *Maynard* v. *Elliott, supra.* Cf. *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581.

On the narrower view as to the operation of the Bankruptcy Act, the claims involved in these cases are provable because of the special indemnity covenants. In both leases the parties expressly contracted for personal liability of the tenant to indemnify the landlord for loss of rent consequent upon default or bankruptcy leading to reëntry and stipulated that resumption of possession of the leased premises by the landlord would not discharge that liability.

The lease in No. 506 contains an indemnity clause in substantially the form involved in the *Filene* case, except that in the latter case the lease contained a liquidated damage clause adopting the formula which is the ordinary rule for computing the damage, and which is the rule which may be adopted even where some other rule has been contracted for. *Central Trust Co.* v. *Chicago Auditorium Assn., supra; Sweatman's Appeal,* 150 Pa. St. 369.

The lease in No. 505 contains an indemnity clause in which the tenant agreed to reimburse the landlord from month to month. In so far as such a covenant contemplates a continued liability of the tenant after discharge in bankruptcy, it could not be operative, but nevertheless the covenants of that lease sufficiently reserve a claim against the tenant notwithstanding reëntry.

Although the covenants in both leases provide the same formula in case of bankruptcy as is provided in case of default without bankruptcy, if the provision for future liability of the tenant after bankruptcy is discarded, there still remains the covenant for indemnity in case of default, which satisfies the rule in the *Filene* case. The result is that in both cases the covenant for indemnity may form the basis of the claim as a substitute for the covenant for rent, and the objection that has sometimes been offered to the provability of such claims, that a rent covenant is extinguished by reëntry, disappears from the case.

The agreement of the tenant to indemnify his landlord is itself an existing contractual obligation susceptible of present valuation. *Williams* v. *U.S. Fidelity & G. Co.,* 236 U.S. 540; *In re Buzzini,* 183 Fed. 827, cited with approval by this Court in *Maynard* v. *Elliott,* 283 U.S. 273.

The provability of the indemnity covenant may be based theoretically on the doctrine of anticipatory breach

(cf. *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 244 Fed. 485, aff'd, 250 Fed. 327, cert. den., 246 U.S. 672; *In re Mullings Clothing Co.*, 238 Fed. 58, cert. den., 243 U.S. 635; *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U.S. 581; *Re Fitz George*, [1905] 1 K.B. 462); or on the broad ground that any contractual obligation susceptible of present liquidation, matured or unmatured, absolute or conditional, may be proved in bankruptcy. *Maynard* v. *Elliott, supra;* Restatement, Contracts, § 324. The present value is the discounted difference between rental value and rent reserved. *Sweatman's Appeal*, 150 Pa. St. 369, cited with approval in *Wm. Filene's Sons Co.* v. *Weed, supra.*

The question has never been at rest in any circuit. There is no rule of property involved.

Under the English system, landlords' claims for damages for loss of future rent where tenants become bankrupt have long been provable, without regard to the presence of special covenants. *Mayor* v. *Steward*, 4 Burr. 2439 (K.B. 1769); 32 and 33 Vict., c. 71, § 23 (1869); *Ex parte Llynvi Coal Co.*, L.R. 7 Ch. App. 28 (1871); *Ex parte Blake*, 11 Ch. Div. 572 (1879); Bankruptcy Act of 1883, 46 and 47 Vict., c. 57. See *In re Panther Lead Co.* (1896), 1 Ch. Div. 978; Act of 1914, 4 and 5 Geo. V, c. 59, §§ 30, 54. See also *Ex parte Leather Sellers Co.*, 3 Morrell 126 (Q.B.D., 1886); *Ex parte Verdi*, 3 Morrell 218 (Q.B.D., 1886); *Hardy* v. *Fothergill*, L.R. 13 App. Cas. 358 (H.L., 1888); *In re Carruthers*, 15 Reports 317, 2 Mansons 172 (1895).

The amendment to the Bankruptcy Act enacted March 3, 1933, to the effect that "a claim for future rents shall constitute a provable debt and shall be liquidated under Section 63 (b) of this Act" is declaratory and intended to remove doubt as to the construction of the prior law, and confirms our position.

Mr. Frederick H. Wood, with whom *Messrs. Harold L. Fierman* and *William D. Whitney* were on the brief, for respondent.

The legislative and judicial history of the Bankruptcy Act is persuasive, if not conclusive, that Congress did not intend that claims for damages for loss of future rent should be provable in bankruptcy.

Moreover, only compelling language in the Act itself—which is wanting therefrom—would warrant the rejection of the construction placed upon the Act by the courts below, which is a construction accepted and followed with substantial unanimity by bench and bar practically ever since the enactment of the statute.

The amendment of March 3, 1933, was not, as asserted by petitioners, declaratory of the intent of the Act as originally passed.

The long accepted interpretation of the Act upon which the decisions below are based, is consistent with the decisions of this Court and is supported by well established and long recognized principles of law.

With regard to the law of England, it is pertinent to observe that it took an Act of Parliament to abolish the distinction based upon what petitioners concede to be "the technical law of landlord and tenant" and the law governing contracts relating to personalty or to the performance of personal services.

The "technical law of landlord and tenant" is to be found in the rule that, while breaches of executory contracts relating to personalty and to the performance of personal services give rise to claims for damages, the landlord by reëntry terminates all liability of the tenant to pay rent, and that upon such reëntry and termination no cause of action in favor of the landlord for the recovery of damages for the consequent loss of future rent arises. *Gardiner* v. *Butler,* 245 U.S. 603; *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581. Breach of a

covenant to pay rent, followed by reëntry and termination by the landlord, would give rise to no cause of action in favor of the landlord were the tenant solvent. Consequently, it gives rise to no claim where the breach of such covenant is the result of bankruptcy. This being so, the claim asserted is not even a contingent claim, since all liability of the tenant, whatever the occasion for the default, is extinguished by reëntry and termination of the lease on the part of the landlord.

Distinguishing: *Williams* v. *U.S. Fidelity & G. Co.,* 236 U.S. 549; *Maynard* v. *Elliott,* 283 U.S. 273; *Kothe* v. *R. C. Taylor Trust,* 280 U.S. 224. *Wm. Filene's Sons Co.* v. *Weed,* 245 U.S. 597, was in equity. The opinion intimates that the claim would not have been allowable in bankruptcy. Cf. *Gardiner* v. *Butler, supra.*

The specific claims presented in these cases, arising out of the particular covenants contained in the leases before the Court, are in no event provable in bankruptcy.

By leave of Court, briefs of *amici curiae* were filed as follows: by *Messrs. W. Randolph Montgomery, Edwin M. Otterbourg,* and *Charles A. Houston,* on behalf of the National Association of Credit Men; *Messrs. Joseph F. Mann, Harry J. Gerrity,* and *Donald Adams Powell,* on behalf of the National Association of Building Owners and Managers; *Messrs. Rollin Browne* and *Ralph Montgomery Arkush,* on behalf of numerous owners of real property; *Mr. Reese D. Alsop,* on behalf of the Cotton Textile Merchants Association of New York; *Messrs. Arthur A. Ballantine* and *Henry J. Friendly,* on behalf of the Trustees in Bankruptcy of Paramount Publix Corp.; *Mr. Godfrey Goldmark,* on behalf of the Trustee in Bankruptcy of McCrory Stores Corp.; *Messrs. Charles Tuttle* and *Robert P. Levis,* on behalf of the Creditors Advisory Committee of McCrory Stores Corp. and McLellan Stores Co.; and *Messrs. Alanson W. Willcox* and *Bertram F. Willcox,* on behalf of certain landlords.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases present the question whether a landlord may prove in bankruptcy for loss of rents payable in the future, where the claim is founded upon the bankrupt's covenant to pay rent, and, in the alternative, upon his breach of a covenant that in event of bankruptcy, the landlord may reënter, and if he does, the tenant will indemnify him against loss of rents for the remainder of the term.

In No. 505 it appears that Oliver A. Olson Co., Inc., was the lessee of premises for a term of nine years and eight months beginning February 1, 1928, and expiring October 1, 1937. Defaults in payment of rent due February and March, 1932, were followed by an involuntary proceeding in which the company was, on March 18, 1932, adjudicated a bankrupt. The total rent reserved for the portion of the term subsequent to bankruptcy was $58,000, and, as the claimant asserted, the present rental value of the leased premises for the remainder of the term was $33,000. The lessor filed its claim, one item being damages for loss of future rentals, which it asked to have liquidated at $25,000, the difference between the rent reserved and the present rental value.

The lease contained a covenant that if the tenant should default in the payment of rent, or abandon the premises, or if they should become vacant, the tenant become insolvent, or make an assignment for the benefit of creditors, or if bankruptcy proceedings should be instituted by or against the tenant, the landlord might without notice reënter the premises; and after obtaining possession, relet as agent for the tenant, for the whole or any part of the term, and from time to time, and:

"The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the

amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

The referee expunged so much of the claim as sought damages for loss of future rents, holding that it did not constitute a provable debt. The District Court and the Circuit Court of Appeals were of the same opinion.[1]

In No. 506 premises owned by the petitioners were held by the bankrupt under a lease dated June 14, 1920, for a term to expire June 30, 1945. There was a covenant that on default by the lessee, or if it should be adjudicated a bankrupt, the lessor might enter and repossess the premises,

". . . and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

A voluntary petition was filed and an adjudication entered August 29, 1932. November 23, 1932, the trustee disaffirmed the lease, and three days later the lessors took possession and proceeded to collect rents from the occupants of the demised premises; and January 13, 1933,

[1] 66 F. (2d) 470.

they filed a proof of claim which as amended included an item of $4,404.40, representing the difference between the rent accrued to the date of reëntry and the collections from occupants during that period, and an item of $143,-615.80, representing the difference between the alleged rental value for the remainder of the term after reëntry and the rent reserved in the lease. Petitioners made application for liquidation of their claim under § 63 (b) of the Bankruptcy Act. The trustee moved to have the claim expunged and disallowed. The referee disallowed both items, and his action was affirmed by the District Court and the Circuit Court of Appeals.[2]

The controversy hinges upon the interpretation of the following sections of the Bankruptcy Act:

"Sec. 63. *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 upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express 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." [3]

"Section 1 (11). 'Debt' shall include any debt, demand, or claim provable in bankruptcy." [4]

"Section 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, . . ." [5]

[2] 66 F. (2d) 473.

[3] U.S.C. Title 11, § 103.

[4] U.S.C. Title 11, § 1.

[5] U.S.C. Title 11, § 35.

A majority of the Circuit Court of Appeals felt bound to follow its earlier decision in *Re Roth & Appel,* 181 Fed. 667, which denied a landlord's right to prove a claim for future rents arising under a similar lease. The view there expressed was that the occupation of the land is the consideration for the rent, and if the right to occupy terminates, the obligation to pay ceases; and the covenant to pay rent creates no debt until the time stipulated for payment arrives. Since many events may occur which will absolve the tenant from further obligation for rent, the claim is said to be too contingent, both because of the uncertainty at the date of adjudication that the lessor will reënter, and the doubt as to his suffering loss of rent if he should reënter.

In the present case one of the judges of the Court of Appeals held that *Maynard* v. *Elliott,* 283 U.S. 273, has settled the provability of claims contingent in the sense that no sum is presently payable, thus destroying the principal ground of decision in *Re Roth & Appel,* and that the estimation of the present worth of payments to be made in the future is no obstacle to the proof of a claim based upon an anticipatory breach. *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U.S. 581.

The petitioners say the provability of claims for future rent is a subject on which the lower federal courts have been in disagreement. They argue that a claim for rent is founded upon a lease which is an express contract within the words of § 63 (a) (4). They rely upon the purpose of the bankruptcy law to bring in all contract creditors and to discharge all debts of the bankrupt, so that he may start afresh unembarrassed by old indebtedness, and point to the hardship to an individual bankrupt of not discharging claims for rent which might well prevent his financial rehabilitation, and the unfairness to the landlord of a corporate bankrupt who, under the decision below, cannot prove upon his lease along with other cred-

itors, but must look solely for redress for loss of future rents to a corporate debtor whom bankruptcy has stripped of all assets.

The respondent asserts a substantial difference between rent and other kinds of indebtedness, and presents equitable considerations thought to weigh in its favor, but especially stresses the legislative history of the bankruptcy laws passed by Congress, and insists that the preponderant construction of them by the courts excludes claims for future rents from the class of provable debts.

The issue is not one of power, for plainly Congress may permit such claims or exclude them. The sole inquiry is the intent of the Act. The construction for which the petitioners contend is, as a matter of logic, an admissible one. But that construction is contrary to the great weight of authority as to the effect of similar provisions in earlier Acts, and § 63 of the present Act.

In England such claims were not provable under the Act of 7 Geo. I, c. 31; *Mayor* v. *Steward*, 4 Burr. 2439; and a discharge could not be pleaded in defense of an action for rent accruing subsequent to bankruptcy. *Boot* v. *Wilson*, 8 East 311. The landlord's claim for loss of future rent was made provable by the Act of 32 and 33 Vict., c. 71, § 23 (1869), and more explicit provisions to the same effect were embodied in that of 46 and 47 Vict., c. 52, §§ 37 and 55 (1883).

The Act of Congress, approved April 4, 1800,[6] permitted proof of a limited class of contingent claims, but did not mention rents. Apparently the latter were not considered provable debts under that statute. *Hendricks* v.

[6] 2 Stat. 19, Sec. 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 . . ."

Judah, 2 Caines (N.Y.) 25; *Lansing* v. *Prendergast*, 9 Johns. (N.Y.) 127.

The Act of August 19, 1841, § 5, 5 Stat. 440, 444, expressly allowed proof of contingent claims,[7] specifying certain classes and adding a general description of contingent debts but said nothing about rent. The courts held that the latter was not a provable debt within this section, because neither a present debt nor a contingent claim susceptible of liquidation. *Bosler* v. *Kuhn*, 8 Watts & S. (Pa.) 183; *Stinemets* v. *Ainslie*, 4 Denio (N.Y.) 573; *Savory* v. *Stocking*, 4 Cush. (Mass.) 607.

The Act of March 2, 1867, § 19, 14 Stat. 517, 525, authorized the proof and liquidation of contingent claims, and also proof of a claim for a proportionate part of any rent up to the date of bankruptcy.[8] The courts uniformly

[7] ". . . 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 this 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 . . ."

[8] ". . . 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, which 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 pay rent 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 from day to day, and not at such fixed and stated periods."

held that claims for future rent or for damages for breach of covenant to pay rent were not provable under the act, though differing as to the reason; some holding them not contingent claims within the statutory definition, and others thinking the express permission of proof for rent past due at the date of bankruptcy impliedly excluded claims for rents thereafter falling due. *Ex parte Houghton,* Fed. Cas. 6725; *Ex parte Lake,* Fed. Cas. 7991; *In re Croney,* Fed. Cas. 3411; *In re Commercial Bulletin Co.,* Fed. Cas. 3060; *In re May,* Fed. Cas. 9325; *In re Hufnagel,* Fed. Cas. 6837; *Bailey* v. *Loeb,* Fed. Cas. 739.

In the year 1880 Circuit Judge John Lowell, of Massachusetts, at the suggestion of several mercantile associations, drafted a proposed bankruptcy law, which, after revision, was introduced in Congress, but failed of passage. It contained a section (60) which allowed proof of damages suffered by a landlord by reason of the trustee's rejection of a lease, and another (61) permitting any creditor to compel the trustee to elect to accept or decline any lease, and upon declination the landlord was to have " any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in the bankruptcy." [9]

After much agitation by trade associations and commercial bodies, and after prolonged consideration (see *Schall* v. *Camors,* 251 U.S. 239, 250), Congress adopted the Act now in force, that of July 1, 1898.[10] The committee reports do not disclose the origin of the phraseology of § 63, nor discuss the classes of claims intended to be included. But it is clear that Congress was familiar with analogous sections of the earlier Acts and the court decisions interpreting them, and with the text of the

[9] The bill in full appears in the Congressional Record, Vol. 14, pp. 43–48.

[10] 30 Stat. 544, c. 541.

Lowell Bill and the English act then in force. In view of the extended consideration and discussion which preceded the passage of the Act, the failure to include a provision for claims for loss of rent or for damages consequent on the abrogation of leases, is significant of an intent not to depart from the precedents disallowing them. *Schall* v. *Camors, supra,* pp. 250, 251.

Soon after the passage of the Act several federal courts were called upon to decide the question, and they uniformly held such claims were not provable debts under § 63. *In re Ells,* 98 Fed. 967; *In re Mahler,* 105 Fed. 428; *Atkins* v. *Wilcox,* 105 Fed. 595. Since 1900 the Circuit Courts of Appeals in six circuits, and the District Courts in another, have agreed with these early adjudications. *Slocum* v. *Soliday,* 183 Fed. 410; *McDonnell* v. *Woods,* 298 Fed. 434 (C.C.A. 1); *In re Roth & Appel, supra; In re Mullings Clothing Co.,* 238 Fed. 58; *In re Metropolitan Chain Stores,* 66 F. (2d) 482 (C.C.A. 2); *Trust Co. of Georgia* v. *Whitehall Holding Co.,* 53 F. (2d) 635; *Orr* v. *Neilly,* 67 F. (2d) 423 (C.C.A. 5); *Wells* v. *Twenty-first Street Realty Co.,* 12 F. (2d) 237 (C.C.A. 6); *Britton* v. *Western Iowa Co.,* 9 F. (2d) 488 (C.C.A. 8); *Colman Co.* v. *Withoft,* 195 Fed. 250 (C.C.A. 9); *Bray* v. *Cobb,* 100 Fed. 270; *In re Hook,* 25 F. (2d) 498. The decisions in the Third Circuit turn upon a special form of lease drawn to take advantage of a local statutory provision, and while establishing a rule differing from that elsewhere recognized, are not inconsistent with it. See *Wilson* v. *Pennsylvania Trust Co.,* 114 Fed. 742; *South Side Trust Co.* v. *Watson,* 200 Fed. 50; *In re H. M. Lasker Co.,* 251 Fed. 53; *Rosenblum* v. *Uber,* 256 Fed. 584. The Court of Appeals of the Seventh Circuit has not discussed the question at length, but at least one of its decisions supports the view that a claim for loss of future rentals may be proved. *In re Chakos,* 24 F. (2d)

482; compare *In re Desnoyers Shoe Co.*, 227 Fed. 401; *In re National Credit Clothing Co.*, 66 F. (2d) 371.

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. *Elliott*, 283 U.S. 273, 278.

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, §§ 789, 793; Loveland, Bankruptcy, Vol. 1, § 313.

What of the activities of the Congress while this body of decisions interpreting § 63a was growing? From 1898 to 1932 the Bankruptcy Act was amended seven times [11] without alteration of the section. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. *Baltimore & O. R. Co.* v. *Baugh*, 149 U.S. 368, 372.

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. *Elliott*, *supra*, 277. If the rule is to be changed Congress should so declare.

The petitioners call attention to the last clause of § 74 (a), which is one of the sections added to the Act in 1933: [12] "A claim for future rent shall constitute a

[11] Acts of February 5, 1903, c. 487, 32 Stat. 797; June 15, 1906, c. 3333, 34 Stat. 267; June 25, 1910, c. 412, 36 Stat. 838; March 2, 1917, c. 153, 39 Stat. 999; January 7, 1922, c. 22, 42 Stat. 354; May 27, 1926, c. 406, 44 Stat. 662; February 11, 1932, c. 38, 47 Stat. 47.

[12] Act of March 3, 1933, 47 Stat. 1467.

provable debt and shall be liquidated under section 63 (b) of this Act." Sections 73 to 76 inclusive were enacted to permit extensions and compositions not theretofore possible. They apply only to individuals. It is highly unlikely that if the quoted sentence had been intended as an amendment of § 63 (a) it would have been placed in context dealing only with the novel procedure authorized by the new sections. Moreover, the discussion on the floor of the Senate relative to the insertion of the sentence, indicates that it was not intended to alter § 63 (a) as it then stood.[13] The petitioners insist the clause is declaratory of the law, as understood by the Congress; but there is no evidence to support this view, and it is inconsistent with the long standing contrary judicial construction.

It remains to consider the effect of the indemnity covenants in the leases. These do not provide for liquidation of damages (compare *Wm. Filene's Sons Co.* v. *Weed, supra*), nor indeed for any right to damages for breach of the covenant to pay rent.

In No. 505 the agreement is, in the event of reëntry and reletting by the landlord, to pay each month the deficit accruing from the difference between the amount to be paid as rent under the lease and the amount received by the landlord from the premises throughout the residue of the original term; and further, that the overplus, if any, at the expiration of the term, shall be paid to the tenant, unless the landlord, within six months from reëntry, release the tenant from all liability under the covenant, which the landlord is authorized to do, thus terminating all rights and liabilities under the agreement of lease.

In No. 506 the stipulation is that upon bankruptcy the landlord may reënter and thereby terminate the lease, and

[13] Cong. Rec., Senate, Feb. 24, 1933, pp. 5058–9; Feb. 27, 1933, p. 5278.

the lessee covenants that, in such case, " it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term . . ."

In both cases the lessor has the choice whether he will terminate the lease. Neither the bankrupt nor the trustee has any such option, except as the trustee may be entitled by law to disclaim. And upon the exercise of the option by the landlord, a new contract, distinct from that involved in the original letting, becomes operative. While there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract, entailing a damage claim against the estate, this cannot be true as respects these independent covenants of indemnity. For here, the landlord does not rely upon the destruction of his contract by the bankruptcy; he initiates a new contract of indemnity by the affirmative step of reëntry. And this new contract comes into being not by virtue of the bankruptcy proceeding, but by force of the act of reentry, which must occur at a date subsequent to the filing of the petition. Obviously this contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original 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 fulfilment of which is contingent on what may happen from month to month or up to the end of the original term. Compare *In re Ells, supra; Slocum* v. *Soliday, supra; In re Roth & Appel, supra.* Such a covenant is not, as petitioners contend, the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder

of the term and the total rent to fall due in the future. The covenants appearing in the leases in question cannot be made the basis of a proof of debt against the estate.

The judgments are

Affirmed.

BOOTH *v.* UNITED STATES.*

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 656. Argued January 17, 1934.—Decided February 5, 1934.

1. A district or circuit judge of the United States who retires pursuant to § 260 of the Judicial Code, as amended, continues in office within the meaning of § 1 of Art. III of the Constitution, and his compensation may not be diminished. P. 348.
2. In the light of the evident purpose of the Act that a retiring judge shall continue to hold office and perform official duties, its provision for the appointment of a "successor" can not be construed as vacating the office. P. 351.
3. A diminution after an increase of compensation, even though not a reduction below the rate at date of appointment, is a diminution within the meaning of § 1 of Art. III. P. 352.

CERTIFICATES from the Court of Claims in two cases involving the validity of an Act reducing the pay of retired federal judges.

Messrs. William D. Mitchell and *John S. Flannery,* with whom *Mr. Carl Taylor* was on the brief, for petitioners.

To resign an office is to give it up. To retire from active service is something less. To retire from regular active service is still further removed from resignation. By retiring, a federal judge does not retire from office or wholly from active service, but in the words of the statute, only "from regular active service." The service he does per-

---

* Together with No. 657, *Amidon* v. *United States,* certificate from the Court of Claims.