Knohr & Burchard v. *Pacific Creosoting Co.*, 181 Fed. 856, 860 (D. C.); *The Charles Rohde,* 8 F. (2d) 506, 507 (D. C.); *H. E. Hodgson & Co.* v. *Royal Mail Steam Packet Co.*, 33 F. (2d) 337 (D. C.). In each of these cases the carrier is charged with the responsibility for a loss which, in fact, may not be due to his fault, merely because the law, in pursuance of a wise policy, casts on him the burden of showing facts relieving him from liability.

The vessel in the present case is in no better position because, upon the evidence, it appears that some of the damage, in an amount not ascertainable, is due to sea peril. That does not remove the burden of showing facts relieving it from liability. If it remains liable for the whole amount of the damage because it is unable to show that sea peril was a cause of the loss, it must equally remain so if it cannot show what part of the loss is due to that cause. *Speyer* v. *The Mary Belle Roberts, supra; The Rona,* 5 Asp. 259, 262; Carver, Carriage by Sea (7th ed.), § 78, p. 114.

Since the respondent has failed throughout to sustain the burden, which rested upon it at the outset, of showing to what extent sea peril was the effective cause of the damage, and as the petitioners are without fault, no question of apportionment or division of the damage arises. *Reversed.*

IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, v. A. W. PERRY, INC.

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

No. 22. Argued November 5, 6, 1934.—Decided December 3, 1934.

1. A claim based upon a covenant in a lease which provides that the filing of a petition in bankruptcy by or against the lessee shall constitute a breach of the lease, that *ipso facto* and without entry or other action by the lessor the lease shall be terminated, and

that thereupon the lessor shall be entitled to damages equal to the amount of the rent reserved for the residue of the term less the fair rental value of the premises for the residue of the term, is provable in bankruptcy under §§ 1 (11) and 63 (a) and (b) of the Bankruptcy Act, as it was prior to the amendments of June 7 and 18, 1934. P. 311.

So *held* upon construction of the covenant as an agreement on the part of the tenant to pay as liquidated damages, in the event of the specified breach, an amount equal to the difference between the present fair value of the remaining rent due under the lease and the present fair rental value of the premises for the balance of the term.

2. The claim is not for rent reserved or upon the lease as such, but is one founded upon an independent express contract, and is within the very words of § 63 (a)(4) of the Bankruptcy Act. *Manhattan Properties, Inc.* v. *Irving Trust Co.,* 291 U. S. 320, distinguished. P. 311.

69 F. (2d) 90, affirmed.

Certiorari, 292 U. S. 620, to review a judgment reversing a judgment of the District Court which affirmed an order of the Referee in Bankruptcy disallowing a claim based upon a covenant in a lease.

Mr. Edward K. Hanlon, with whom *Mr. Charles K. Beekman* was on the brief, for petitioner.

The philosophy of the *Manhattan Properties* case was that claims based upon rent stood apart as a matter of well-defined historical development, acquiesced in by Congress. The distinction being historical, reference to cases affecting personalty is futile. See *Gardiner* v. *Butler & Co.,* 245 U. S. 603, 605; *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597; *Maynard* v. *Elliott,* 283 U. S. 273; *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U. S. 581.

In bankruptcy the court is dealing with a statutory system, and can allow only such claims as the statute permits. The bankruptcy statute generally permits proofs of claim for anticipatory breaches of contracts, but as a matter of historical distinction sanctioned by long

legislative history, claims for rent and claims for damages for breach of covenants to pay rent have not been provable.

In equity there may be a distinction between the making and the absence of a promise. In bankruptcy the distinction has to do with the subject matter.

The result below is contrary to the trend of the decisions of the lower federal courts.

Recent legislative history adds evidence that it was not the intention of Congress to have any exception to the general rule. Act of June 7, 1934; H. Rep. 194, 73d Cong., 1st Sess.; S. Rep. 482, 2d Sess.; H. Rep. 1773, 73d Cong., 2d Sess.; Act of June 18, 1934; S. Rep. 1404, 73d Cong., 2d Sess.

In construing an Act of Congress applicable to a controversy, resort may be had to amendments passed after the controversy arose. *Cope* v. *Cope,* 137 U. S. 682; *Dunbar* v. *Dunbar,* 190 U. S. 340; *Wetmore* v. *Markoe,* 196 U. S. 68.

Mr. Thomas F. Dougherty, with whom *Messrs. Albert Stickney* and *Hersey Egginton* were on the brief, for respondent.

By leave of Court, briefs *amicorum curiae* were filed by *Messrs. Walter E. Hope* and *H. Struve Hensel* on behalf of the Trustees in Bankruptcy of Louis K. Liggett Co., in support of petitioner; and *Messrs. Thomas Hunt* and *Earle W. Carr* on behalf of the Trustees of the A. Shuman Real Estate Trust, in support of respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The respondent was lessor in a lease having a number of years to run at the date of the tenant's bankruptcy. The writing stipulated:

". . . for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed

as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof less the fair rental value of the premises for the residue of said term."

Respondent filed a proof of claim, based upon this clause, which the referee expunged. The District Court affirmed the order. The Circuit Court of Appeals, reversing the decree of the District Court, directed that the claim should be allowed.[1] The case is here upon writ of certiorari.

Decision is to be made under §§ 1 (11) and 63 (a) and (b) of the Act of July 1, 1898, as they stood prior to the filing of the petition on September 30, 1932, and the presentation of respondent's proof of claim on March 29, 1933.[2] The subsequent amendments of June 7 and 18, 1934,[3] are by their terms inapplicable.

In *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, we reserved the question of the provability of a claim for liquidated damages arising upon such a covenant. The petitioner's contention is that inasmuch as claims for future rent, or for damages for the breach of the covenant to pay rent, or claims upon contracts of indemnity conditioned upon reëntry by the landlord subsequent to bankruptcy, were there held not provable, it logically follows that a claim for stipulated damages for

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[1] 69 F. (2d) 90.

[2] U. S. C. Tit. 11, §§ 1 and 103.

[3] Public No. 296 [c. 424, 48 Stat. 911] and Public No. 387 [c. 580, 48 Stat. 991], 73d Congress.

breach of the lease may not be proved. We hold otherwise.

By the terms of the contract the filing of the petition in bankruptcy was, of itself, and irrespective of the election of lessor or lessee, a breach of the lease. The claim of the landlord, consequent upon the breach, arose and matured at the moment of the filing of the petition. The claim is not for rent reserved or upon the lease as such, but is founded upon an independent express contract, and hence within the very words of § 63 (a) 4.

The Circuit Court construed the stipulation as an agreement on the part of the tenant to pay as liquidated damages, in the event of the specified breach, an amount equal to the difference between the present fair value of the remaining rent due under the lease and the present fair rental value of the premises for the balance of the term. The covenant is fairly susceptible of this construction. So read, the court held the clause provided a reasonable formula for ascertaining the damages of the landlord, did not smack of a penalty, and was therefore enforceable. See *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597. We concur in the view that the contract, as its terms were interpreted and applied, supports a provable claim for the stipulated damages.

The judgment of the Circuit Court of Appeals is

Affirmed.

IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, *v.* BOWDITCH ET AL.

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

No. 173. Argued November 6, 1934.—Decided December 3, 1934.

Decided upon the authority of *Irving Trust Co.* v. *A. W. Perry, Inc., ante,* p. 307.

Affirmed.