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Claims For Unaccrued Rent In Bankruptcy

(CONCLUDED)

II.

Considered as a technical problem, to be discussed and dealt with in the peculiar language of lawyers and by their peculiar methods, what can be said of the status of claims for unaccrued rent for realty when the tenant is bankrupt?\(^1\)

First of all, we may clear the ground by saying that the statute\(^2\) does not—or did not, until the enactment of section 74—say anything specifically about them. Whether anything was said even by that section, we may leave for later discussion. Therefore, if such claims are provable they come under the classification of "contracts express or implied," and in almost every case, the contract will be an express one. It is, however, concededly a special class of express contract, which can be easily classified and distinguished from other contracts.

The whole question is whether it must be classified under the group of non-provable contracts, about which, after all, the Bankruptcy Act has something to say. What contracts are not provable? They are described in the statute in two ways. In section 63a debts which may be proved are listed, and we may infer that other debts are not provable. In section 17 debts not dischargeable are listed, and it is possible

\(^1\) Reference should be made at the very beginning to two excellent articles in which most of the cases and the situations here involved are fully reviewed. Schwabacher and Weinstein, Rent Claims in Bankruptcy (1933) 33 Col. L. Rev. 213, and Douglas and Frank, Landlords' Claims in Reorganizations (1933) 42 Yale L. J. 1003. No examination of the question is complete that does not begin with these two thorough discussions of the problem. See Note (1932) 20 Calif. L. Rev. 622.

\(^2\) The rent provision of the Bankruptcy Act of 1867, §19, was as follows:

"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 from day to day, and not at such fixed and stated periods." This obviously made no distinction between rent and any other debt.
to assume that what is not dischargeable, is in general, not provable, or, at any rate, hardly worth proving.

Section 63a reads as follows:

1. "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. . . ."

4. "... founded upon an open account, or upon a contract express or implied . . ."

A claim for rent which has not yet accrued must come within the definition here given to be provable.

It may be said at once that the description is logically somewhat contradictory. It implies that a debt may be "absolutely owing" and still not be "payable," at least at that particular moment. Cases have sometimes declared "owing" to be synonymous with "due" and sometimes to be distinguishable from "due," and either phrase has been taken to be distinguishable from "payable." 4

But we need not trouble ourselves to reconcile contradictions, since it is clear that "owing" as used here, must include both what is now payable and what will be payable. It implies that a legal transaction has been entered into, or that an event has taken place, capable of creating an obligation. It includes—and has been officially declared to include—what is described in Law-Latin as debitum in praesenti, solvendum in futuro.

Now, among the varied debts which have been declared not to be debita in praesenti, solvenda in futuro, there have undoubtedly been debts for future rent. That is unqualifiedly true of Massachusetts, and the federal courts of Massachusetts as well as those of New York are among those which have obstinately set their faces against the provability of unaccrued rent-claims in bankruptcy. Even the very earliest

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3 This is the statement of In re Roth and Appel (C. C. A. 2d, 1910) 181 Fed. 667, 31 L. R. A. (n. s.) 270. But there is no logical connection between provability and dischargeability, and it is implied in a number of cases that the two have no connection. Cf. Friend v. Talcott (1913) 228 U. S. 27, 1 Remington on Bankruptcy (2d ed 1915) §633. In the case of In re Bernard (E. D. N. Y. 1921) 278 Fed. 734, a claim on a judgment for libel was declared to be neither "provable nor dischargeable" and ordered expunged from the schedules. The order was reversed by the Circuit Court of Appeals (C. C. A. 2d, 1922) 280 Fed. 715, on the ground that the court had no power to expunge anything from the schedules. Cf., however, United States ex rel. Weber v. Meyering (C. C. A. 7th, 1933) 66 F. (2d) 347.

cases in Massachusetts have spoken of the rent-claims as being "contingent" in their nature. They are not debita in praesenti, solvenda in futuro. It is not merely that they are not yet payable. They may never be payable at all. They will be payable if the tenant is not evicted by paramount title, or if the tenant does not surrender his lease with the landlord's consent.

These conditions are repeated in Wood v. Partridge,\(^5\) in Davis v. Ham,\(^6\) and in Wentworth v. Whittemore,\(^7\) and are quoted in the cases based upon these Massachusetts decisions.

It will be noticed that these early cases in no way suggest that the peculiar character of rent-claims is their connection with the realty. They are placed side by side with claims which are not connected with the realty at all, but which share with rent-claims the characteristic of being contingent in a special sense. It is not certain that they will ever be payable at all.

But if we examine this contingency more closely, it will be apparent that it is not the sort of contingency which first occurs to us when we think of contingent contracts. When, for example, a lease is made subject to rescission if war should break out, or when the rent is due only if and when the tenant should be appointed to a certain position, we should readily recognize this as an obligation contingent in the proper sense. The contingency is an outside factor.\(^8\) It does not depend on the will of the participants. It is not an act which forms one of the two elements of the contract, the promise or the consideration.\(^9\)

\(^5\) (1814) 11 Mass. 488.
\(^6\) (1807) 3 Mass. 33.
\(^7\) (1805) 1 Mass. 471.
\(^8\) This is, of course, what was meant by a condition at Roman law, whether it was attached to a unilateral or a bilateral obligation. Buckland, A Text Book of Roman Law (1921) pp. 419-421; Girard, Manuel Eléméntaire de Droit Romain (8th ed., 1906) p. 493. It is equally the sense of the word in the modern civil law; cf. II Colin-Capitán, Cours Élémentaire de Droit Civil Français (7th ed., 1932) §§ 391 et seq.
\(^9\) That promise and consideration may in bilateral agreements be mutual conditions, is a terminology too well established in our law to make it possible to change it. Cf. Boone v. Eyre (1779) 2 Bl. W. 1312. It will do no harm if the term "conditional" is understood to mean one or the other of these types of contract. As far as the rule against proof of conditional contracts in bankruptcy is concerned, it seems obvious that the first type of contingency offers a problem very different from the second. It is unfortunate that we cannot meet it as the German Konkursordnung does, §§ 65, 66, 67, by which conditions subsequent are disregarded in bankruptcy, and if there is a condition precedent, the creditor may demand security for the possible accruing of his claim. That would delay proceedings somewhat, but only to a limited extent.

As far as mutually concurrent conditions are concerned, the point is not so much that the creditor's claim is premature, as that he has not earned its performance. The breach by the debtor excuses performance on his side as far as
What do the contingencies suggested amount to? One of them is that the rent may never become due, because the tenant may be evicted by paramount title. That is to say, it may turn out that the landlord really had nothing which he could give the tenant. The consideration for the covenant of rent has failed. Or else, it is possible that the tenant may with the landlord's consent surrender the lease. That, again, is equivalent to saying that the parties who created the obligation may by mutual consent abrogate it. But surely this is true of every contract which contains a promise, i.e., a still unexecuted undertaking on the part of one of the two makers of the contract. The consideration for the promise may fail and the promise will not be enforceable. Or the two parties may agree to rescind the whole transaction, and the obligation will cease; the performance of the promise will never be due.

To do these older courts justice, it is perfectly apparent that they would have completely accepted this conclusion, and there is no suggestion that if the lease had been for personalty, installments of the rent would not have been similarly declared to be contingent upon the continued right to use the personalty. A contract for personal services, to be rendered and paid for as rendered, would equally have been held to involve a contingency. If the services are not rendered, nothing will be due.

What, then, did debitum in praesenti, solvendum in futuro mean? It must mean a situation in which the only reason why the payment was not yet due, was the fact that a definite or indefinite period of time had not elapsed. Goods had been sold and delivered on credit. Services had been rendered and payment deferred by agreement. Money had been loaned and a promissory note taken. No action could be brought on any one of these three claims until the term had expired. But if an action should be brought, the only possible defense will be the prematurity of the proceeding. Not non or numquam but nondum. It is what was called plus petitio tempore at Roman law. 10

There is one other factor to consider. In the cases mentioned, as has been said, the fact that a definite or indefinite term has not elapsed is the only barrier to enforcement. The consideration has already been maturing his cause of action is concerned, but it does not take the place of consideration. However, there is no insuperable difficulty in allowing for that fact in determining his loss. Since the Auditorium case (Central Trust Co. v. Chicago Auditorium Ass'n (1916) 240 U. S. 581) it is no longer open to us to argue that it cannot be done.

10 Girard, loc. cit. supra note 8. The statement of the Institutes, statim quidem debetur, sed peti prius quam dies veniat non potest, completely describes the situation of debitum in praesenti, solvendum in futuro.
furnished. Logically, the same thing should be said, if both sides of the contract were executory, if a valid agreement had been made in which both delivery of the goods or services and the payment for them were in the future. The *debitum*, as far as the money is concerned, if it ever comes into existence, must have arisen when the agreement was made. But for obvious reasons, such contracts are not likely to have practical importance in bankruptcy cases or similar situations. We may, therefore, emphasize the fact that where a *debitum in prae-senti, solvendum in futuro* exists, the creditor is put in the equitably advantageous position of having already furnished all the consideration he will ever be called upon to furnish.

Evidently when the N. B. A. says "absolutely owing ... whether then payable or not," it means this situation. It would have been far better if the entire phrase had been taken as a unit and its implications considered. Instead, the word "absolutely" was seized upon and it was declared to mean "not contingently" or "not conditionally." This made it possible on the one hand to be misled by the kind of contingency inherent in every executory contract, to wit, the contingency that the consideration might fail or the contract be rescinded before the time of performance arises. And, on the other hand, it forced courts to pretend that an indubitably and professedly contingent obligation, e.g., the liability of an endorser, was "absolutely owing."

If we remember that the whole phrase is merely the equivalent of *debitum in prae-senti, solvendum in futuro*, the indorser may well come within it. He has received all the consideration which he will ever be entitled to claim. Or better, all the consideration that ever will pass, has already passed from the claimant. The conditions of presentment, dishonor and notice, while perfectly real conditions, are often formalities quite sure to be fulfilled, and it is highly likely that whether they will be fulfilled or not will be apparent before the bankrupt's estate is distributed. It is really not too much to say that the passing of the consideration is a more controlling factor, than the time element. A man who has received his share of the bargain may well be called a present debtor of the *quid pro quo*.

The specialty debtor who formerly was bound without consideration and who promises under seal to pay at a future date, obviously becomes a debtor when the contract is made. If his creditor sues prematurely, he will be met by a plea which sets up that fact and if terms of the specialty are cited in the declaration, he will be met by a demurrer. While no consideration has passed, it may be said that as much consideration has been given as ever will be given. If the contract under seal provided for something to be done by the obligee which he
had not in fact done, something more than prematurity of claim would be pleadable, and the situation would be precisely like those already mentioned.

The fact that, by the express terms of the statute, guarantors, before payment of the guaranty may have a provable claim,\(^1\) indicates once more that the words "absolutely owing . . . whether payable or not" can best be taken to exclude, not every type of contingency, but simply some types of contingencies. The liability of an indorser, an indemnitor, a guarantor, while contingent enough, is a special type of contingency. We may omit consideration of the fact that the contingency is in a sense formal, and very likely to happen in the ordinary course of business dealings. A court has declared that the probability of the conditions being carried out is irrelevant. Perhaps it would be best to rest the inclusion of these claims on sheer expediency, as the courts in effect do.\(^2\) Bankruptcy and discharge which are arrangements for the expedition of mercantile affairs ought not to be applied in a way that will hinder them. Or else we might call attention to the characteristic which these have in common with claims for goods sold and delivered, services rendered, money loaned. The consideration—all the consideration—which the claimant will ever be called upon to give for these claims, has been given. To make the claim effective the creditor has to do some formal acts, but not to perform services or transfer property.

Now, as has been repeatedly stated, rent-claims for realty are contingent in one of the senses mentioned. The consideration—all the consideration—which is to be rendered in order to make the obligation to pay rent effective, has not yet been furnished. But they are neither more nor less contingent than any other type of executory contract, than rent for personalty, payment for future services and the like. The reason for rejecting realty rent-claims from the class of debita in praesenti, solvenda in futuro must be precisely the same in all these cases, if it is the contingency that is the matter with them.\(^3\)

\(^1\) Bankruptcy Act, §57i.
\(^3\) Special provision is made for claims not yet due both in the case of bankruptcy and of insolvency, by the French Code Civil §1188 and Code de Commerce §444. The position of the landlord in France in the case of future rent is highly privileged and the bankruptcy of the tenant gives rise to serious complications. Code Civil §2102, provides for the provability of future rents in general if the term is fixed, but the results are frequently unsatisfactory. Cf. II Colin-Capitants, op. cit. supra note 8, §1081. The discussion of M. Capitant on this point raises most of the questions involved in the American cases.

The German Konkursordnung §21, regulates claims for rent. In general, by
In none of these early cases was anything said of some curious peculiarity of claims dealing with interests in land which made so special a class of them that what held for them was prima facie inapplicable to any other class. What caused them to be rejected was not the fact that these claims had as their basis an interest in land, but that they were contingent to the extent described. They were not due until the right of using the land for the term or part of the term had been properly secured to the tenant.

After these early cases were decided, two legal developments occurred, and we might well suppose that all obligations would be affected by them. One was the rise of the doctrine of anticipatory breach. It came to be quite generally held that an executory contract could be breached before performance was due by a clear indication of an intention to omit performance. This applied evidently to contracts in which the consideration had not been furnished and, in such cases, it is evident that a tender of the consideration would be a meaningless and futile gesture. This meant in effect that when a contract was breached by anticipation, an action on the contract was not premature, and neither performance nor tender was a necessary condition. Contracts contingent in the sense that performance on one side was a condition to claiming performance on the other, and contracts in which the consideration had been wholly furnished but credit had been given, were under these circumstances placed in the same group.

A second development is a very recent one, at least as far as authoritative pronouncement is concerned. The case of Central Trust Co. v. Chicago Auditorium Ass'n was decided in 1916. It involved the lease of a line of buses and the lease still had some years to run when the lessee was petitioned into bankruptcy. It was held that the lessee

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The fullest examination of the doctrine of anticipatory breach is found, as we might expect, in 3 WILLISTON, CONTRACTS (2d ed. 1920) §§ 1296-1337. The American rule is summarized in section 1337. It is interesting to note that the Year-Book case (1481) 21 Edw. IV, 54, pl. 26 which, erroneously enough, has been made the foundation of the doctrine, concerns realty. The same is true of the case of Johnstone v. Milling (1886) 16 Q. B. D. 460, cited by Williston, at p. 2363, n. 37. It will be also noted that the type of obligation which cannot, according to Professor Williston, be breached by anticipation, viz. contracts such as promissory notes and the like (§1328), are the very ones which are at once matured by bankruptcy.

Attention must further be called to the fact that future rent, as far as anticipatory breach is concerned, is declared to be in the same situation as the purchase price of goods sold by executory contract. Ibid. §1329.
by permitting himself to become bankrupt, or rather by not preventing
the act of bankruptcy on which the petition was based, had breached
the lease by anticipation and therefore created the same situation that
would have arisen if the lease had terminated and the rent reserved
was still unpaid.

Clearly the contract in question is the type of contract in which
continued performance or tender by the lessor is a permanent condi-
tion of the obligation to pay rent on the part of the tenant. It is,
therefore, as completely contingent in this sense, as any one of the
contracts listed above, including a contract to pay rent for realty. The
case accordingly ought to establish the doctrine that such contingent
contracts can be broken by anticipation and that, when they are so
broken, an obligation to pay damages for the breach immediately
arises. And certainly the decision rules out the generalization that con-
ditional contracts of this sort are, because of their conditional char-
acter, not provable in bankruptcy.

The Restatement of the Law of Contracts section 324 states:

"Insolvency of a promisor is not an anticipatory breach, and his
bankruptcy does not have all the effect of such a breach; but it is not an
objection to proof in bankruptcy of a contractual duty either that the
time for its performance has not arrived or, if the duty is capable of
valuation, that it is conditional."

The Restaters apparently desired to overrule the cases which held
that conditional contracts in general were not provable. In doing so
they obviously relied largely on the considerations advanced by Mr.
Williston,16 as further appears from the Explanatory Notes on Con-
tracts of the American Law Institute.17 If, however, the sole basis for
the general inclusion of conditional contracts is the only United States
case cited, Williams v. United States Fidelity Co.18 the basis is clearly
inadequate. This case dealt with a surety's claim for indemnity, in-
dubitably conditional before the surety had paid, but no more so than
the claim of an indorser. The surety is placed in a special position by
N. B. A. section 57i, and his failure to act under that section is the
real reason for the decision in the Williams case. Certainly the case is
far from establishing the general provability of contingent contracts.

The Auditorium case must serve as our point of departure. Every
subsequent case that involves claim for rent has referred to it and has
either followed or distinguished it.

16 3 Williston, op. cit. supra note 14, §1327.
17 CONTRACTS RESTATEMENT (Am. L. Inst. March 1, 1930) Tentative Draft
No. 7.
18 Supra note 12.
There can be no doubt that the court indicated that a distinction was possible. Toward the end of the opinion we find the following: 19


Whatever we may say about this distinguishability, one thing is clear. If rent obligations for realty are to be treated as in a class different from rent obligations for personalty, the holding cannot be placed on the ground that the former are conditional or contingent. They are contingent to exactly the same extent as the latter. The basis must be, just as Justice Pitney assumes Coke to have said, because of the difference in the character of the duties that concern personalty from those that concern realty.

Upon these few sentences a formidable structure has been built. First, it has been declared that the Supreme Court has decided that claims for future rent of realty are not provable in bankruptcy. Secondly, it has been assumed that Coke was speaking of exactly the situation we have here, that is, of the essential difference, *in* and *per se,* between a contingent claim for rent of personalty and one for rent of realty. What Coke said, however erroneously, is the common law. And the third construction that has been built on these words of the opinion, is that the common law has made the distinction in question, with or without good reason, and that therefore only a statute can abrogate it.

The two questions therefore are: did the common law make this distinction between future claims for rent and future claims for other things, and secondly, did the Supreme Court accept it?

As a matter of fact, did the Supreme Court decide anything about it? We need merely recall just what a court means when it says—"Such and such cases are distinguishable because they involve realty." Does that mean that the Court decides that if the situations in those cases were before it, it would feel itself bound to decide differently? Evidently not. At best, the statement means that it might decide dif-

19 *Supra* note 15, at 589-90.
ferently, but it obviously implies that it is not deciding the question at all, but reserving it.

This would be so, if, under the principle of *stare decisis*, the decisions here called "distinguishable" were of the sort that the Court felt constrained either to follow or to overrule formally if they could not be distinguished. But if we look at them, they are clearly not such decisions at all. They are in every instance decisions of lower federal courts, decisions which have at best "persuasive" force in the Supreme Court. They may interest the Court, illustrate how such situations may be met, if the Court desires so to meet them, but they can have no greater value for the Court than the cogency of their reasoning and the accuracy of their premises give them.

And certain other facts become evident. In the first place, three of the decisions are not claims for rent at all. In *Re Ells*, the contract was for indemnity, if there should ultimately turn out to be a loss of rents. In *Re Pennewell*, the covenant claimed to be breached was one for quiet enjoyment. The Court found that it had not been breached and that therefore there was no claim at all. In *Coleman v. Withoft*, the contract was between two tenants one of whom had a claim for reimbursement which could not have arisen until after the petition was filed. In the much cited case of *Re Roth & Appel*, the terms of the lease as to damages on bankruptcy provided for a claim which was not to arise, and in fact did not arise, until many months after the petition. Only in the case of *Watson v. Merrill* was there an unqualified statement that damages for the breach of the rent covenants in the lease could not be proved in bankruptcy, but even here the Court rested its decision on the ground that though the claim was called damages, it was in fact for future and necessarily contingent rent claims.

That is to say, two of the five cases did not deal with realty at all, but were contracts of indemnity. One was for the alleged breach of the covenant of quiet enjoyment, a covenant which the court held not to have been breached, and the two that dealt with rent were not claims for damage by reason of anticipatory breach.

The case of *Re Roth & Appel*, which is frequently quoted in later federal cases, is indubitably a case for rent. But it was decided wholly upon the ground that a claim for rent was necessarily a contingent

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21 (C. C. A. 6th, 1902) 119 Fed. 139.
23 Supra note 3.
claim. This particular reason has surely been rendered inadmissible by the Auditorium case itself, which, we may remember, was later than Re Roth & Appel.

In other words, if these cases had been really considered by the Court, it is scarcely conceivable that it would have offered the reasons they adduce for making rent claims for realty unprovable in bankruptcy.

Mr. Justice Pitney was quite justified in declining to decide an issue that was not presented. The claim in the Auditorium case was not for rent of realty but rent of personalty and it was quite within accepted methods to call attention to what the Court was not deciding as well as to what it did decide. It is regrettable, of course, that he hinted that he might have decided differently, if the question had involved realty. But it was no better than a hint, something that cannot even be raised to the dignity of a dictum and is far indeed removed from the majesty of a decision. And it is fortunate that he suggested on what this distinction would be based, if he should in the future have wished to make it. In this way, he at least permitted arguments to be directed to the foundation of the distinction, arguments which seem to me to dispose of it completely.

The distinction, let us recall, is placed squarely on the statement quoted from Coke. If Coke said anything that is germane to our discussion, we may reluctantly admit that the common law has spoken "ore rotundissimo," and there is no gainsaying it.

It is therefore unfortunate that the court did not quote at least the whole sentence from Coke. But it is even more unfortunate that the entire context of Coke upon Littleton was not examined before other courts hastened to infer that in a more or less mysterious way they were precluded from dealing with realty rent-claims, as they would have dealt with other executory contracts.

Coke in the passage cited is commenting on two sections of Littleton. In section 513 Littleton states that a release of "all actions" would bar action on a bond, but in section 513 he goes on to say that a release of all actions would not bar an action for rent on a lease, and bids us: "Stude causam diversitatis enter les deux cases."

We might well take the admonition of Littleton to heart, and study the cause of the diversity.

In his Commentary Coke says:

"RELEASETH all actions: This release shall not barre the lessor of his rent, because it was neither debitum nor solvendum at the time

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26 Ibid.
of the release made; for if the land be evicted from the lessee before the
rent become due, the rent is avoynen; for it is to be paid out of the profits
of the land, and it is a thing not meerely in action, because it may be
granted over. But the lessor before the day may acquite or release the
rent. But if a man be bound in a bond or by contract to another to pay
a hundred pounds at five several dailes, he shall not have an action of
debt before the last day be past: and so note a diversity betweene duties
which touch the realty, and the meere personalty. But if a man be
bound in a recognizance to pay a hundred pound at five severall dayes,
presently after the first day of payment he shall have execution upon
the recognizance for that summe, and shall not tarry till the last bee
past, for that it is in the nature of severall judgments. And so note a
diversity between a debt due by recognizance, and a debt due by bond or
contract. And so it is of a covenant or promise, after the first default
an action of covenant, or an action upon the case doth lie, for they are
severall in their nature. Lastly, note a diversity between debts and
covenants, or promises."

It turns out that so far from saying anything to our purpose,
Coke was speaking of a peculiarly technical matter of the procedure
of his own day, a matter from which we should be compelled to draw
an inference very different from the usual one, provided we could
draw any inference at all. For, the fact that leases could be sued on,
whenever rent was due—four times a year frequently—while a spec-
ialty contract to pay a sum by installments could be sued on only
once, and that, when the last installment was due and not before,
allows us to consider the lease as a more flexible source of obligation
than the specialty, capable of being more readily broken than the
latter. In other words, if we are following Coke, we might justifiably
hold that future rent claims could to some extent be broken by antici-
pation, but that future contract claims could not be.

The fact is, however, that Coke's statement has nothing to do
with our case. The causa diversitatis lies in the character of the in-
strument in which leases and contracts were at that time usually em-
bodyed, not in the nature of the obligation. The very next sentence
of Coke's commentary shows this, for if the promise to pay by in-
stallments were contained in a recognizance, it would be exactly on a
par with rent reserved in a lease, even though the recognizance dealt
with the "meere" personalty and not with realty at all.

And, since the English law, very soon after Coke,27 changed the
rule in regard to specialties so that they were placed on this point

back the rules of the common law on this subject to an ancient period, when it
was held that but one action of debt would lie upon one contract; ... and he
cites the authorities, on which the law has now finally settled down upon the
more reasonable and equitable principle, that for each separate and distinct breach
of a contract to do several things, an action will lie."
exactly on a parity with leases, the entire diversity which Littleton bade us study vanishes into smoke, leaving nothing but a fragmentary statement that realty and personality are different. I hazard the guess that no one will seriously question this assertion. But the issue is: different in what respect? As far as the passage from Coke is concerned, the difference here mentioned is a difference which has nothing to do with our problem and which had, even for Coke’s own point, been repudiated by the common law before that law was generally received in the American colonies.

This in no way detracts from the validity of the older Massachusetts decisions that claims for future rent are not provable in bankruptcy. They are quite sound for the reasons they themselves allege, to wit, that such claims are contingent in a definite sense. They were unprovable just so long as others of their type were unprovable but they cannot be used to support a distinction they did not make and for which no better support can be found than the broken reed of a half sentence from Coke, detached from its context and dealing with a rule obsolete before the common law reached America.

What the line of cases in Massachusetts and elsewhere decided was not the brute fact that claims for future rent are unprovable in bankruptcy, but that they are unprovable because they are contingent, because they belong to a certain class of unprovable claims characterized by the fact that performance on one side was conditioned by the continuous furnishing of consideration. There is no suggestion in these cases that a distinction was made within this class, and that claims for rent of realty were put in a category different from those for rent of personality or for services to be rendered or goods to be delivered.

Indeed as far as the common law is concerned, there is nothing to justify the theory that these latter distinctions are required. Whatever difference the common law created between realty and personality—and they were numerous enough—the covenant to pay rent was more and more assimilated to other promises to pay money. The same actions, debt, covenant and even assumpsit, lay to recover the money. The distinction that existed in the time of Coke emphasized rather than detracted from the contractual character of the rent-obligation.

In fact, to insist on the intimate connection of rent with the land—which is frequently done in cases—contradicts the rule that at common law the rent covenant is independent.28 And this independence

28 There are two possibilities. If the rent-covenant is independent, the rent is unconditionally due. If this is taken literally, there is, as is stated above, noth-
is mentioned in season and out of season—perhaps we might add, in reason and out of reason. Certainly the extraordinary, but well-established, rule that the destruction of the premises in a lease of improved property is no defense to an action for rent,\textsuperscript{29} serves to confirm the doctrine that rent obligations for land are even less contingent than other executory contracts, and that they are almost like the obligation of makers of notes. The only defense if they are sued upon prematurely is that the term of payment has not arrived.

Of course, what any claimant may demand when his contract is broken is not the fulfillment of the contract but damages for its breach. This is especially so when the breach is by anticipation. It is quite true that at each rent installment, the action is for the exact amount due and not for the damages suffered, but in such cases the rent exactly measures the damages. If the entire lease had been repudiated, while specific performance would be possible, it is not mandatory. Damages may be demanded and damages in case of bankruptcy is all that can be had, almost by hypothesis.

Therefore when we speak of claims for future rent being provable or not provable, what is obviously meant is damages for failure to pay the future rent. Under a theory of breach by anticipation, such damages are calculable, and there is obviously no greater difficulty in determining now what the damages are in the case of future installments of rent for realty than in the case of future installments of rent for personalty.

In many of the cases in which future rent installments have been declared unprovable, stress has been laid on the fact that the lease was silent in regard to bankruptcy or in regard to the right of the landlord on default to reenter and relet the premises or attention is

\textsuperscript{29} This was already well-established in the fourteenth century. \textit{Cf.} (1365) Hil. Y. B. 40 Edw. III, f. 3, 5, pl. 11; Broke, Abr. Covenant, pl. 4.
called to the absence of an acceleration clause. To make these provisions controlling, however, is plainly giving them a quite unreal importance. In most instances leases are formal printed documents which the parties vaguely regard as containing set terms of which the most important are the payment of the rent and the right to use the premises. But even when the lease carefully specified that bankruptcy was to be a breach of the whole lease and that the landlord might treat the residue of the rent as due at once, courts, as we have seen, have pounced on the inevitable fact that the option must be exercised after—if only one second after—the petition in bankruptcy and that therefore the question of future rents was presented.

It is stated by Judge Cardozo in *Hermitage Co. v. Levine*\(^{20}\) that when the tenancy is at an end what survives is a liability not for rent, but for damages. Of that there can, of course, be no question. We must remember, however, that it is this liability for damages which is really denied in most of the cases refusing proof of a claim for rent. If a landlord calls his claim one for rent, the proper action is, of course, not to reject the claim but to rename it. This opinion, which is cited to justify the decision in *In re Service Appliance Co., Inc.*,\(^{21}\) is based—although that fact is frequently ignored by those who discuss it—on the particular provision of the lease in question. Judge Cardozo expressly says that if the lease had contained a provision like that cited in *McCready v. Lindenborn*,\(^{32}\) the damages would be provable in bankruptcy—at any rate the damages would be due at once. The lease in that case provided that, if the premises were relet after default, the tenant would pay the difference between the rent reserved and the rent obtainable "in equal monthly payments as the amount of such difference shall from time to time be ascertained." In the *Hermitage* case the words of the lease were: "... the tenant shall remain liable for all damages which the landlord may sustain by any such breach of this agreement, or through such entry or reletting." Apparently the difference between these two provisions is that, in the latter lease, it is assumed that the damages will be payable only once, which must be, the court finds, at the end of the term. This diversity seems an excessive load for a slight change in terminology to carry, but at any rate makes it clear that a lease can be so drawn even in New York as to cause an obligation for damages measurable on the basis of future rent, to arise on a breach of the rent-covenant.

If there were anything needed to establish the invalidity of the


\(^{21}\) (N. D. N. Y. 1930) 39 F. (2d) 632.

\(^{32}\) (1902) 172 N. Y. 400, 402, 65 N. E. 208.
doctrine that future rents must be unprovable because of the difference between the duties concerning the realty and those concerning the personality, we need merely consider the case of a wholly executory contract to make a lease or to buy land. Suppose the lessor or vendor tenders performance and performance is refused. He can scarcely be denied a right to damages. And there can be equally no doubt that if the prospective purchaser or lessee announces long before the date of entry that he will repudiate his agreement, damages can be claimed at once. And if instead of a formal repudiation, the prospective lessee becomes bankrupt, will it be seriously contended that these damages are not provable because of the difference between realty and personality? And if the breach in advance of all future duties to pay constitutes a provable debt, surely a similar breach of some of them does.\textsuperscript{33}

Not only has the Supreme Court been cited against the provability of rent-claims, on the basis of a deprecatory phrase on the part of Justice Pitney, but there are those who have not hesitated to read into a characteristically felicitous phrase of Justice Holmes a similar intention to decide what he was not even considering. In \textit{Gardiner v. Butler & Co.}\textsuperscript{34} Justice Holmes said that "... the law as to leases is not a matter of logic \textit{in vacuo}; it is a matter of history that has not forgotten Lord Coke." The astonishing misconception that this statement indicates an approval of the distinction on which recent cases have been based, is apparent if the entire opinion is read—it occupies only two lines more than one printed page of the Reports. Two leases were before the Court. One was like the lease in \textit{William Filene's Sons Co. v. Weed},\textsuperscript{35} which contained a clause giving the landlord the right to damages if there is a default in rent. The other lease contained no such clause. The Court, speaking through Justice Holmes, declared that the claim for damages in the former cases was provable and that in the latter there was no claim for damages at all and therefore no provable claim in bankruptcy.

We have therefore the high authority of Holmes and of the entire

\textsuperscript{33} The most recent case on the rule of damages when a lease is repudiated \textit{in toto} is Branhill Realty Co. \textit{v. Montgomery Ward & Co.} (C. C. A. 2d, 1932) 60 F. (2d) 922; \textit{cf.} also Addig \textit{v. Tull} (C. C. A. 2d, 1911) 187 Fed. 101. The rule was early established in New York (Trull \textit{v. Granger} (1853) 8 N. Y. 115) and in many other jurisdictions. The cases are collected in (1928) 54 A. L. R. 1359. It is generally held that the measure of damages is the difference between the rental value of the premises and the reserved rent. A California case to this effect is Silva \textit{v. Bair} (1904) 141 Cal. 599, 75 Pac. 162; \textit{cf.} also, Douglas and Frank, \textit{op. cit. supra} note 1, at 1044, n. 120. But \textit{cf. In re Metropolitan Chain Stores} (C. C. A. 2d, 1933) 66 F. (2d) 482.

\textsuperscript{34} (1916) 245 U. S. 603, 605.

\textsuperscript{35} (1918) 245 U. S. 597.
Supreme Court to the effect that the distinction between duties that touch the personality and those which touch the realty, is not a valid distinction. The distinction between the two leases in *Gardiner v. Butler* rested wholly on the terms of the lease. If the lease provides for damages, then damages can be proved, even though such proof necessarily involves an estimation of the rent not yet due. If no damages at all are given by the lease, the rule applied which confined the lessor to his action of ejectment, unless he wished to ignore the fact of default altogether and sue for each installment of rent as it accrued.

That is authentic common law. It has not merely not forgotten Coke. It has not forgotten William the Norman and Henry of Anjou. The roots of this rule, as of so many other rules of landlord and tenant, go deep into the scarcely mitigated feudal system. If the cases which spoke of the common law had this fact in mind, little could be said against them unless we were prepared to deal more boldly with the common law than some courts are inclined. But the extraordinary fact is that in the cases cited by Justice Pitney in the *Auditorium* case, nearly all the leases involved provided for damages, and so under the *Filene* and the *Gardiner* cases would make provable claims possible.

An even more extraordinary situation is presented by *Re Blum Bros. Co.* in which the *Auditorium* case is bracketed with the *Filene* and *Gardiner* cases, and the remarkable conclusion is drawn that future claims for rent are provable only if they concern personality, in spite of the fact that the *Filene* and *Gardiner* cases both deal with leases of land and not with leases of personality.

Indeed, it may be said that if the four cases in the Supreme Court are given the authority which belongs to them and if we abandon the absurd practice of pouring out cases of assorted qualities into a discussion, without discrimination of the courts that rendered them or the facts on which they are based, we need not regard the settled law on this question—as far, of course, as it can be settled—as quite so confused and contradictory as it is often declared to be. We may say that the *Auditorium* case decided emphatically enough that one type of conditional contract was provable in bankruptcy, to wit, the type in which future performance on one side is a condition of future performance on the other. The *Filene* case decided that if a lease specially provided for damages on default in rent, those damages were provable even if they involved the unaccrued rent as one of the ele-

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36 (S. D. Ohio 1932) 55 F. (2d) 723.

ments in estimating damages. The Gardiner case reiterated this conclusion and held that if no damages of any sort were provided for in the lease, no claim for damages was provable. The Kothe case held that a provision that all unaccrued rent became at once due on default of any installment as liquidated damages was void as a penalty.

We have therefore the following doctrinal statements for which we may quote the Supreme Court.

1. Bankruptcy constitutes an anticipatory breach of an executory promise which is conditioned on the future and therefore uncertain performance by the promisee, i.e., the proving creditor.

2. Such promises may be contained in leases of realty in which it is provided that the lessor is entitled to damages on default of payment of rent.

3. Such promises may not be implied in leases of realty in which it is not provided that the lessor is entitled to damages on default of payment of rent.

4. Such promises may not be promises to pay all the unaccrued rent as liquidated damages.

Within these limits we must move if we wish to conform to what the Supreme Court has already decided and therefore by reasonable conjecture will again decide. It is merely necessary to state these propositions, to note how completely most of the decided cases have ignored the limitations here imposed and have based their decision on propositions which contradict or have nothing to do with them.

As a matter of fact, these propositions are too sharply stated above. In regard to Number 3, the unprovability of claims for damages when the lease does not provide for damages, Justice Holmes seemed to regard it as important that the case arose in Massachusetts and that the courts of Massachusetts are common law courts which have insisted on the rule that the landlord may have no damages unless his lease provides for damages. We should then have to depend on the local

38 Ibid.

39 In Rogers v. United Grape Products Inc. (W. D. N. Y. 1933) 2 F. Supp. 70, an attempt was made to avoid the Filene and Gardiner cases by declaring that a provision for liquidated damages for breach of a rent covenant was something different from a provision permitting reentry and reletting and holding the tenant liable for the difference between the reserved rent and the rent actually obtained. It seems strange that a court would seriously assert that a provision for damages is different from a provision for computing damages in the ordinary—and perhaps the only—way in which such computation can be made. The court might profitably have examined People v. St. Nicholas Bank of New York (1897) 151 N. Y. 592, 45 N. E. 1129.

law in every instance. As an illustration, what would the situation in California be?

It is regarded as settled law in California that on non-payment of rent, the landlord has the option either to sue for each installment of rent as it becomes due or to reenter and sue the tenant for damages caused by his non-payment. In that case, the damages will be the difference between the reserved rent and the rental value at the time of the breach. Apparently this is so whether or not the lease specifically provides that the landlord has the right to damages under such circumstances.41

If, therefore, the second lease in the Gardiner case allowed no proof of damages, merely because the law of Massachusetts so held, it follows that if the case had arisen in California, the decision would have been different. In every situation we should then have to depend on the special law of the particular states to the great impairment of that uniformity which the Constitution wished the bankruptcy system to have.42

41 The case of Bradbury v. Higginson (1912) 162 Cal. 602, 123 Pac. 797, may not have necessitated this result. Cf. McMurray, A Review of Recent California Decisions in the Law of Property (1921) 10 Calif. L. Rev. 42, 46. But later cases proceed upon the rule as a well-established doctrine in California. Oliver v. Loydon (1912) 163 Cal. 124, 124 Pac. 731.

In Phillips-Holman Inc. v. Peerless Stages Inc. (1930) 210 Cal. 253, 258, 291 Pac. 178, 180, the case of Hermitage v. Levine, supra note 30, is cited and apparently followed. But whether the action for damages may be brought at the end of the term or immediately upon reletting, the case follows other California cases in declaring that damages are obtainable even without a special provision to that effect, indeed, unless there is a special provision preventing it. There is accordingly a sharp distinction between California and those states like Massachusetts that cling to the feudal law.

In both the Hermitage case and the Phillips-Holman case, the question is not whether damages were due, but when they were recoverable. That is to say, under the principles of the Bankruptcy Act, these damages must belong to the group of claims due now but payable later and can be liquidated just as other such damages are. The method of liquidation is established by the Act, not by the local law.

42 Evidently there can be no complete uniformity. The rules governing exemption and fraudulent conveyances are by the terms of the N. B. A. itself in whole or in part derived from the local law. Equally the validity of a contract or liability for a tortious act will depend on local law. But there is obviously no reason for increasing this multiplicity of systems if it can be avoided. And it is just in such matters as the maturing of the cause of action in the interests of liquidating a bankrupt estate, that the N. B. A. system may properly override the local law. The fact that a promissory note is not yet due is a good defense in any action on it by the laws of nearly all the states. But the claim is none the less provable. As stated, the adoption of the principle of anticipatory breach holds for every bankruptcy court even when the contract is made in state jurisdictions that have not accepted the principle.

However, the case of Gardiner v. Butler, supra note 34, has indubitably
It is hard to see, if the landlord and tenant law of the various states determines the provability of claims that arise in each state, why the local law on anticipatory breach does not equally govern it. Some jurisdictions have never accepted the doctrine. Some have specifically repudiated it. Some have accepted it in general but have not allowed it in claims for non-payment of rent. Are we committed to having the claims provable or not provable in accordance with the rules on this subject as well? It will make the matter more complicated and difficult but it seems to be implied in the stress which Justice Holmes placed on the Massachusetts *situs* of the Gardiner case.  

Another instance of overstatement in the four propositions cited is in regard to the Kotke case. It was declared that an acceleration clause in a lease which matured all the future rent on default of any payment was void as a penalty, even though it was called liquidated damages. But suppose that in fact there was only a very small part of the term left so that the unaccrued rent might well be the actual damage suffered or less than the actual damage. Shall it be the mere fact that the amount claimed is equal to the rent reserved or the fact that it is really a penalty which will make the claim unprovable? Again are we to adopt the rules in force in any particular state as to penal damages with the added need of concerning ourselves with the more or less liberal policy of the local courts in finding that damages are penal?

If we forego the attempt to transfer the forty-eight versions of the law of anticipatory breach and of landlord and tenant that prevail in the various states and if we establish an independent rule for the bankruptcy courts, based upon the decisions of the Supreme Court, we

rested one of its decisions on the Massachusetts lease-law. Even if the decision is followed, the mischief will be slight because most leases do permit re-entry and reletting and thus imply that the landlord has a remedy that sounds in damages.  

43 In Leo v. Pearce Stores Co. (E. D. Mich. 1931) 54 F. (2d) 92, it is also held that the local law governs. But in this case, the law was the opposite of that of Massachusetts. In Michigan apparently a landlord has an immediate claim for damages. *Cf.* McGraw v. Union Trust Co. (1904) 135 Mich. 609, 98 N. W. 390. However, the lease contained a provision for re-entry.

Similarly in *In re Newark Shoe Stores, Inc.* (D. Md. 1933) 2 F. Supp. 384, the Maryland law as to non-apportionability of rent was strictly applied.  

44 In Ludlow v. Pugh (C. C. A. 3d, 1914) 213 Fed. 450, adopting the opinion of *In re Keith-Gara Co.* (E. D. Pa. 1913) 203 Fed. 585, a clause in the lease making future rents at once payable at bankruptcy, was held not merely provable, but entitled to priority. The decision was based on the validity of such provisions in Pennsylvania.

In general, it may be said that the disproportion of the stipulated amount to the actual damages suffered has been declared to be a proper test in such cases as Wise v. United States (1919) 249 U. S. 361; Bassett v. Claude Neon Federal Co. (C. C. A. 10th, 1933) 65 F. (2d) 526.
should have to recur to the four propositions already mentioned. It
may be that the Court will abandon the second as stressing too much
what is in reality an accident. Most leases do contain a provision for
reentry and the option to determine damages by reletting. Ordinarily
tenants do not know whether such a provision is there or not, and it
might be more in accordance with the realities of the situation to treat
this option as inherent in the relation of landlord and tenant, despite
the common law. The only practical result will be that ultimately all
leases will contain such a provision as an addition to other ritualistic
formulae.45

It is important to add another observation. Ordinarily the reentry
by the landlord and his assertion of a claim for damages is an option
on his part. But in bankruptcy, the result of finding that a claim is
provable is to hold that it must be proved or else it will be discharged
whether proved or not. The option therefore really ceases. Since the
landlord could by reentry—a more or less formal act—entitle himself
to prove for the damages suffered—he will no more be allowed to con-
tinue his claim against a tenant, than a surety or guarantor can con-
tinue his claim against his principal by the mere device of delaying
payment to the creditor.

Under such circumstances the question of policy on the part of the
landlord, to which I have adverted, is solved for him by law. And
it would be equally solved for him if the option is in practice destroyed,
by imposing on the landlord, as some states do, the duty of reducing
the damages by reletting as soon as possible.

This leads to some curious results. One of the most frequently
cited cases against the provability of any claim based on unaccrued
rent is Wells v. Twenty-First St. Realty Co.46 This case based itself
entirely on the principle that the "common law" prevails in Ohio and
reversed the holding of the court below.47 But the same court declared
in Walsh v. E. G. Shinner & Co.48 that in Ohio on reentry the land-
lord had not merely the privilege of reletting but was under a legal
duty to do so in order to "mitigate" damages. But if damages can be
mitigated, it follows almost inevitably that there is a means of ascer-
taining them, and that they can therefore be proved. In other words

45 In Schneider v. Springmann (C. C. A. 6th, 1928) 25 F. (2d) 255, it was
declared that a tenant would not be allowed by his own default to bring about
his release. But that is exactly what every bankrupt is permitted to do by the
very principle of bankruptcy discharge. Obviously, if there is fraud or con-
spiracy, there will be no discharge or release here as elsewhere.
46 (C. C. A. 6th, 1926) 12 F. (2d) 237.
47 In re Bissinger Co. (N. D. Ohio 1925) 5 F. (2d) 105.
the solution which the Wells case so readily announced, to wit, that the matter was governed by the common law, merely leads to two other questions: first, what particular rule of the common law? and second, what is the relation of the declared local rule in regard to bankruptcy to the established local rule in regard to the landlord's claims for damages? Evidently the two rules should not grow up in ignorance of each other.

It is generally asserted, as has been indicated, that the cases are in hopeless conflict and that the rule against proving for unaccrued rent either directly or by way of damages for the breach of the lease, has the weight of authority on its side. There would be far more authority in these decisions if they undertook the task of relating themselves to the four Supreme Court decisions already cited. But nearly all of them base the decision on the contingency of the demand, a doctrine which the Auditorium case renders inadequate or on the fact that the common law has something to do with the matter. It undoubtedly has, but under the Filene, Kothe and Gardiner cases, this something cannot be the fact that in leases of land damages for non-payment of rent are essentially unprovable.

Has the new amendment done anything in the premises? Section 74a provides, among other things:

"The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act."

49 The cases in which future rent-claims in any form have been rejected fall into several classes.


2. Cases in which the emphasis has been laid on the contingency of the demand, either directly or by relying on In re Roth & Appel, supra note 3. In re Hubbard (W. D. N. Y. 1932) 57 F. (2d) 213; In re Mullings Clothing Co. (C. C. A. 2d, 1916) 238 Fed. 58, where a distinction was made on the ground that the tenant-corporation was being dissolved.

Evidently cases before the Auditorium case, like Atkins v. Wilcox (C. C. A. 5th, 1900) 105 Fed. 595, might legitimately refuse proof of future rent because the claim was contingent. But they at least included all contingent claims. So the court in In re Jorolemon-Oliver Co. (C. C. A. 2d, 1914) 213 Fed. 625, refused proof of future rent in the case of a lease of personality on the authority of In re Roth & Appel. Cf. also In re Wise Shoes, Inc. (S. D. N. Y. 1932) 2 F. Supp. 521.
This is sufficiently cautious. But at the end of section 74a, we find:

"A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act."

This sudden injection of a specific reference to the bankruptcy proceedings proper might be taken to indicate that the doubt reserved earlier is meant to be resolved here, and that claims for future rent are hereby declared provable both for compositions and adjudicated bankruptcies. It is doubtful whether this is a reasonable inference, and if rent-claims are to be made provable, it is certainly not desirable that it should be done in this casual, almost furtive, manner.

So long as we determine important economic results by logical structures which must be forced into older schemes of which the premises are arbitrary or are vestiges of feudal society, we must perforce tack a great deal when we are sailing against the wind, the wind being in this case the decision in the second part of Gardiner v. Butler, which injects a collection of forty-eight systems of landlord and tenant law into the law of Bankruptcy.

But if we were free to deal with these matters on the basis of social and economic needs, it seems reasonable to treat the claim for damages caused to a landlord by his tenant's default as other claims are treated. If a landlord desires in advance to forego his right to damages, perhaps he might be allowed to do so by specifically and unmistakably waiving a claim for them. But on the whole, the leasing of business property might reasonably be said to impose on the lessor the same share of the commercial risk involved as is imposed on other persons who deal with a potential bankrupt.

In any case, the methods which courts have used in dealing with these situations constitute an admirable instance of the resistance which judges oppose to a disturbance of their conceptual equilibrium. Realists must take continued note of this fact.

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51 In (1933) 33 Col. L. R. 1060, n. 13, it is declared: "But a recent decision declares the amendments inapplicable in bankruptcy proceedings other than compositions and extensions." Reference is then made to Manhattan Properties Inc. v. Irving Trust Co. (C. C. A. 2d, 1933).