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BANKRUPTCY - PROOF OF CLAIM FOR LOSS OF FUTURE RENTS

RECENT DECISIONS

BANKRUPTCY — PROOF OF CLAIM FOR LOSS OF FUTURE RENTS — A covenant in a lease provided:

> " . . . 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, . . . 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."

The lessee having become bankrupt, the lessor filed its proof of claim under this clause, which the referee expunged; the judge affirmed the order. On appeal it was *held* that the lessor's claim was provable. *A. W. Perry, Inc. v. Irving Trust Co.* (manuscript opinion, C. C. A. 2d, 1934).[1]

This decision was handed down soon after the ruling of the Supreme Court in *Manhattan Properties, Inc. v. Irving Trust Co.*[2] which made it clear that claims for future rent are not provable, at least in the absence of a special covenant properly drawn. It is altogether possible that the Supreme Court will uphold the decision of the Circuit Court of Appeals in the principal case should it be called upon to do so. In its opinion in the *Manhattan Properties* case the Supreme Court expressly reserved the question of the validity of a covenant worded as the one in the instant lease. And in *Filene's Sons Co. v. Weed*,[3] an equity receivership case, the Supreme Court, dealing with a covenant in which it was agreed that damages were to be measured by the difference between the rent reserved and the rental value, ruled that such provision "liquidated the damages upon a footing that was familiar and fair."[4] The court in the principal case thought that the language of the covenant removed all objectionable contingencies. There is no doubt as to the lessor's having an immediate right of action, since "the mere filing of a petition in bankruptcy puts an end to the lease; not at the lessor's option, but unconditionally." And admitting that the amount of the damages is not fixed in advance, the parties have nevertheless agreed to the standard of liquidating such damages.[5] The court also ruled that the cove-

[1] For a treatment of the general problem involved in proof of claims for unaccrued rent, see the comment in this issue of the REVIEW, p. 664, and a discussion of the effectiveness of the different types of indemnity covenants, at p. 668, and note 22.

[2] (U. S. 1934) 1 U. S. LAW WEEK 464.

[3] 245 U. S. 597, 38 Sup. Ct. 211 (1918).

[4] Though not a proceeding in bankruptcy, the case does demonstrate the Court's willingness in a related situation to estimate prospective damages when the parties have agreed on a fair basis of appraisal.

[5] Responding to the contention that the mere formal words of a covenant should not make the claim provable, since the calculation of damages is as speculative where there is a covenant as where there is not, the court made this somewhat puzzling answer:

"This argument loses sight of the real objection to allowing the claim when dam-

nant did not provide for a penalty, construing the doubtful language to mean that the measure of damages should be the difference between the rent reserved and the fair rental value for the balance of the term, *discounted to present value.*[6]

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ages have not been liquidated. That is not because the rule for measuring damages is too vague or uncertain to be manageable in bankruptcy; but that, though it is the best approximation available, it is still only a forecast and a forecast in these circumstances will not do for bankruptcy which is more rigid as to such issues than other proceedings, an action at law, for example. . . . But when the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the bankruptcy court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable."

[6] The court intimated that if the covenant were interpreted to mean that the lessor should be liable for the *face value* of the deficiency in future rentals without discount to present value it would amount to a penalty under the rule of Kothe v. Taylor Trust Co., 280 U. S. 224, 50 Sup. Ct. 142 (1930).