NOTES

RIGHTS OF A LESSOR AGAINST THE ESTATE OF A LESSEE CORPORATION IN THE HANDS OF A RECEIVER—Not infrequently a corporation for which a receiver in Chancery has been appointed under Section 65 of the Corporation Act may be the lessee of a leasehold interest. The lessor, realizing that liquidation of his lessee will virtually nullify the lease,[1] generally will attempt to prove a claim of some nature against the assets in the hands of the receiver.[2] Such claim may seek either

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[1] The statement is made in a realistic sense. Inability or refusal to proceed with an obligation may be a breach, giving rise to a claim, but it will terminate performance of the agreement. In theory, however, it is clear that the receivership of a corporation does not terminate its executory obligations such as unexpired leases or unperformed contracts. The receiver has the election to assume the contract or lease and become bound according to its terms, or to reject it—whichever seems to him most advantageous to the estate. Suydam v. Bank of New Brunswick, 3 N. J. Eq. 114 (Chancery, 1834); see Stockton v. Mechanics & Laborers Savings Bank, *32* N. J. Eq. 163, 168 (Chancery, 1880); Bolles v. Crescent Drug & Chemical Co., 53 N. J. Eq. 614, 32 Atl. 1061 (Chancery, 1895). The same rule prevails in federal equity receiverships. United States Trust Co. v. Wabash Western Ry., 150 U. S. 287 (1893); Sunflower Oil Co. v. Wilson, 142 U. S. 313 (1891); Pennsylvania Steel Co. v. New York City Ry., 198 Fed. 721 (C. C. A. 2d, 1912) see Oscar Heineman Corp. v. Nat Levy & Co., 6 F. (2d) 970 (C. C. A. 2d, 1925); Denver v. Stenger, 295 Fed. 809 (C. C. A. 8th, 1924). It is also applied in other jurisdictions in which receivers are appointed under state statutes. Conover v. Sterling Stores Co., 4 Del. Ch. 26, 120 Atl. 740 (1923); Jacob v. Roussel, 156 La. 171, 100 So. 295 (1924); In re Bishop, 60 Minn. 305, 62 N. W. 335 (1895); Woodruff v. Erie Ry., 93 N. Y. 609, 30 N. E. 89 (1883).

If the receiver chooses to adopt any unexpired leases, he becomes liable to pay rent according to the covenants in the lease. United States Trust Co. v. Wabash Western Ry., 150 U.S. 287 (1893) (rent is preferred claim, payable as part of the receivership expenses); Woodruff v. Erie Ry., *supra;* Oscar Heineman Corp. v. Nat Levy & Co., *supra.* There is no breach because the adoption relates back to the appointment of a receiver. *Cf.* Pennsylvania Steel Co. v. New York City Ry., *supra,* at 744.

If the receiver abandons the lease after having assumed it, the lessor may have a preferred claim for damages against the estate. *Cf.* Jacob v. Roussel, *supra.* If he rejects the lease without having assumed it at all, the corporation remains liable under it as originally. See American Brake Shoe & Foundry Co. v. New York Rys., 282 Fed. 523 (C.C.A. 2d, 1922) certiorari denied 262 U.S. 736 (1923). Thus the lessor may re-enter under a covenant in the lease, for breach of the lease, and terminate it. Odell v. H. Batterman & Co., 223 Fed. 292 (C.C.A. 2d, 1915); see Pennsylvania Steel Co. v. New York City Ry., *supra,* at 729.

This Note will deal primarily with general claims presented against the assets in the hands of a receiver, for unaccrued rents, or for damages for breach of lease.

[2] The liability of the receiver for rent while in possession of the premises is clear. The receiver may for a reasonable time after appointment occupy the leased premises, without being deemed to have assumed the lease, in order to determine whether to accept or renounce it. United States Trust Co. v. Wabash Western Ry., 150 U.S. 287 (1893); Fleming v. Noble, 250 Fed. 733 (C.C.A. 1st, 1918); Conover v. Sterling Stores Co., *In re* Bishop, both *supra* note 1; see Day-

future rents covenanted to be paid under the lease,[3] or else damages for a breach of the lease alleged to have been caused by the appointment of a receiver. Under the present state of the New Jersey law, neither of such demands can be proved.

In the early case of *Stockton* v. *Mechanics & Laborers Savings Bank*,[4] a lessor sought to prove for the rent which was to accrue under a lease after the institution of receivership proceedings against the lessee corporation. Chancellor Runyon refused to allow this claim, apparently relying for authority upon the Federal bankruptcy law,[5]

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ton Hydraulic Co. v. Felsenthal, 116 Fed. 961 (C.C.A. 6th, 1902); Pennsylvania Steel Co. v. New York Rys., *supra,* note 1, at 729; *Cf.* Sunflower Oil Co. v. Wilson, 142 U.S. 313 (1891) (lease of rolling stock). During such trial period he must pay rental for the use and occupation of the premises as part of the administration expenses. In some jurisdictions, including New Jersey, such rent must be paid at the rate reserved in the lease. Nelkin v. Carencon, Inc., 108 N. J. Eq. 42, 153 Atl. 702 (Chancery, 1931) (lease of electrical display); Woodruff v. Erie Ry., *supra,* note 1; Schwartz v. Cahill, 220 N.Y. 174, 115 N.E. 451 (1917); *In re* Bishop, *supra,* note 1. In other jurisdictions the receiver need pay only the reasonable rental value of the premises. Carswell v. Farmers Loan & Trust Co., 74 Fed. 88 (C.C.A. 6th, 1896); Miltonberger v. Logansport, C. & S. Ry., 106 U.S. 286 (1882); Quincy, M. & P. R.R. v. Humphreys, 145 U.S. 82 (1891); Bell v. American Protective League, 63 Mass. 558, 40 N.E. 557 (1895); Commercial Bank v. Gates, 121 Mich. 281, 80 N.W. 13 (1899); *Cf.* Denver v. Stenger, 295 Fed. 809 (C.C.A. 8th, 1924) (reasonable rental can not exceed rate reserved in lease); Oscar Heineman Corp. v. Nat Levy & Co., *supra,* note 1 (rent in lease is *prima facie* the reasonable rental).

Where railroad lines, or rolling stock is leased, the receiver's obligation for rent is discharged if he turns over to the lessor the net earnings for the period of occupation. United States Trust Co. v. Wabash Western Ry., 150 U.S. 287 (1893); Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., 6 F. (2d) 547 (C.C.A. 2d, 1925); see American Brake Shoe & Foundry Co. v. New York Rys., *supra,* note 1, at 532.

[3] Rents due at the time of the appointment of a receiver are of course provable, as a general claim. Bloch v. Bell Furniture Co., 111 N.J. Eq. 551, 162 Atl. 414 (1932); Schwartz v. Cahill, *supra,* note 2.

In New Jersey, by virtue of Section 4 of the Landlord and Tenant Act (2 N.J. Comp. Stat. [1910] p. 3066, § 4), it has been held that a lessor is entitled to priority out of the proceeds of the goods and chattels on the leased premises, for all rents due and unpaid at the time of the appointment of a receiver, not exceeding one year's rent. Wood v. McCardell, West & Farrell Carriage Co., 49 N.J. Eq. 433, 24 Atl. 228 (Chancery, 1892); Franz Realty Co. v. Welsh, 86 N.J. Eq. 228, 98 Atl. 388 (1916); *cf.* Conover v. Sterling Stores Co., *supra,* note 1 (same result in Delaware under a similar statute). The right to priority is not a lien, and may be defeated by a *bona fide* sale or mortgage of the chattels before receivership, or by consumption of the goods. See Franz Realty Co. v. Welsh, *supra.* This priority is recognized and enforced in bankruptcy. *In re* Spies-Alter Co., 231 Fed. 535 (D.N.J. 1916); see Franz Realty Co. v. Welsh, *supra; cf.* Longstreth v. Pennock, 87 U.S. 575 (1875) (same result under similar Pennsylvania statute); McCann v. Evans, 185 Fed. 93 (C.C.A. 3d, 1911) (same). It will probably be recognized in receivership proceedings in the federal equity courts sitting in New Jersey. See Fee Crayton Hardware Co. v. Richardson-Warren Co., 18 F.(2d) 617, 626 (W.D.La. 1927); Leo v. Pearce Stores Co., 54 F.(2d) 92, 93 (E.D.Mich. 1931).

[4] 32 N.J. Eq. 163 (Chancery, 1880).

[5] The court referred to Section 19 of the Bankruptcy Act of 1867, which

and the frequent statements by the Court of Chancery that the provisions of the Corporation Act relating to receivership proceedings were of a bankruptcy nature.[6] It has since been established by an unbroken line of decisions in the federal courts that a claim for unaccrued rents can not be proved against the estate of a bankrupt lessee,[7] the reason most frequently assigned being that the obligation to pay unaccrued rent under a lease is not *"debitum in praesenti, solvendum in futuro,"*[8] and therefore not a fixed liability absolutely owing at the time of filing

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provided for the proving of rent falling due up to the time of bankruptcy. Chancellor Runyon said (at p. 168): "The debt to be proved can not include rent to become due * * *"

[6] It had repeatedly been held and stated by the courts of New Jersey that the provisions of the Corporation Act relating to the appointment of a Receiver, and the administration proceedings subsequent thereto were essentially of a bankruptcy nature. Before the Stockton case was decided: State Bank v. Bank of New Brunswick, 3 N.J. Eq. 266, 270 (Chancery, 1835); Van Wagoner v. Paterson Gas Light Co., 23 N.J.L. 283, 291 (Supreme Court, 1852); Van Wagenen v. Paterson Savings Bank, 10 N.J. Eq. 13, 17 (Chancery, 1854). After the Stockton case was decided: Frost v. Barnert, 56 N.J. Eq. 290, 38 Atl. 956 (Chancery, 1897); Butler v. Commonwealth Tobacco Co., 74 N.J. Eq. 423, 70 Atl. 319 (1908); see Spader v. Mural Decoration Mfg. Co., 47 N.J. Eq. 18, 20 Atl. 378 (Chancery, 1890).

This concept of analogy was carried to the extent of basing the permissibility of a claim upon whether or not it would have been provable in bankruptcy. State Bank v. Bank of New Brunswick, *supra;* Nutz v. Murray-Nutz, Inc., 109 N.J. Eq. 95, 156 Atl. 668 (1931); *cf.* Butler v. Commonwealth Tobacco Co., *supra* (adoption of the bankruptcy rule requiring security to be applied to the debt, and proof made solely for the balance).

[7] Watson v. Merrill, 136 Fed. 359 (C.C.A. 8th, 1905); *In re* Roth & Appel, 181 Fed. 667 (C.C.A. 2d, 1910); *In re* Scruggs, 205 Fed. 673 (S.D. Ala. 1913); Colman v. Withoft, 195 Fed. 250 (C.C.A. 9th, 1912); *In re* Cushman, 3 F.(2d) 449 (S.D. N.Y. 1924); Trust Co. of Ga. v. Whitehall Holding Co., 53 F.(2d) 635 (C.C.A. 5th, 1931); see 2 REMINGTON, BANKRUPTCY (1923) § 793.

As a result the bankrupt, despite his discharge, still remains liable under the covenants in the lease. See Watson v. Merrill, *supra,* at 363; *In re* Goldberg, 52 F. (2d) 156 (S.D. N.Y. 1931); *In re* Roth & Appel, *supra,* at 670; 3 WILLISTON, CONTRACTS (1927) § 1985.

In some states statutes provide that the lessor shall have a lien upon the goods and chattels on the leased premises, or a priority to payment out of the proceeds of such personal property, for rent which has accrued, or is to accrue. Under such provisions, the lessor is entitled to be paid future rents for the period limited by the statute, out of the proceeds of the personalty upon the leased premises at the time of bankruptcy. Martin v. Orgain, 174 Fed. 772 (C.C.A. 5th, 1909) (rent for one year); *In re* Meyer & Bleuler, 195 Fed. 653 (E.D. La. 1912) (same); Courtney v. Fidelity Trust Co., 219 Fed. 57 (C.C.A. 6th, 1914) (same); *In re* Scruggs, *supra* (rent to accrue for entire term); *In re* Southern Hardware & Supply Co., 210 Fed. 381 (S.D. Ala. 1913) (same). The trustee is entitled to possession of the premises, or the rents and profits thereof, during the period for which future rents have been paid. See Courtney v. Fidelity Trust Co., *supra.*

It is clear that rents which have accrued at the time of filing the petition are provable. *In re* Service Appliance Co., 39 F.(2d) 632 (N.D. N.Y. 1930).

[8] "An obligation of which the binding force is complete and perfect, but of which the performance cannot be required till some future period." 1 BOUVIER, LAW DICTIONARY (8th ed. 1914) p. 786.

the petition.[9] With bankruptcy principles furnishing a guide for the Chancery court, the law of New Jersey in regard to the provability of such claims in receivership would seem equally well settled.

However, the *Stockton* case was interpreted by the New Jersey Court of Chancery to apply only to claims for future rents as such.[10] One case indicated that a claim for damages for breach of a lease flowing from the receivership of the lessee corporation would be allowed.[11] But the Court of Errors and Appeals in the recent case of *Bloch* v. *Bell Furniture Co.*[12] discredited these *dicta,* and held that the appointment of a receiver for a lessee corporation is not an anticipatory breach of the lease, and that no claim for damages will be allowed.[13] This decision is likewise rested upon the authority of cases under the

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[9] The following cases base their result wholly or partially upon the principle that rent is not due until rent day, and that future rents are not unmatured debts, whose maturity is accelerated by bankruptcy. *In re* Goldberg, *supra* note 7; *In re* McAllister-Mohler Co., 46 F.(2d) 91 (S.D. Ohio, 1930); *In re* Mullings Clothing Co., 238 Fed. 58 (C.C.A. 2d, 1916) certiorari denied 243 U.S. 635 (1917); Watson v. Merrill, *supra* note 7; *Cf.* William Filene's Sons Co. v. Weed, 245 U.S. 597 (1918) (federal equity receivership).

Other reasons given are that the claim for unaccrued rents is contingent upon unforseen events which may prevent their ever arising. For example, the lessee may be evicted during the term, or the destruction or disrepair of the premises may justify abandonment of them by the lessee. See *In re* Roth & Appel, *supra* note 7, at 669. Or, the lessee may default, and the lessor re-enter and terminate the lease. See Watson v. Merrill, *supra* note 7, at 362. (Yet it might with equal force be said that any executory contract may by the conduct of one of the parties be terminated before any payments under it are due, and that therefore claims for anticipatory breach of a contract are not provable in bankruptcy.)

It has even been suggested as a reason for denying proof to unaccrued rents that the bankrupt still remains liable for them despite his discharge. See *In re* Rubel, 166 Fed. 131 (E.D. Wis. 1908). The more accurate causal progression would seem the reverse: the bankrupt remains liable because the claim is not provable.

[10] See Bolles v. Crescent Drug & Chemical Co., 53 N.J. Eq. 614, 32 Atl. 1061 (Chancery, 1895); *cf.* Klein v. Gavenesch Co., 64 N.J. Eq. 50, 53 Atl. 196 (Chancery, 1902); Usher v. Sarco Co., 100 N.J. Eq. 428, 136 Atl. 199 (Chancery, 1927).

[11] Vice Chancellor Pitney in Klein v. Gavenesch Co., *supra* note 10, denied a claim for unaccrued rents under a lease on the ground that "it could not be assumed that the leasehold was of no value at all." (64 N.J. Eq. at p. 51.).

[12] 111 N.J. Eq. 551, 162 Atl. 414 (1932).

[13] The bill was filed by the president of the defendant corporation, alleging that the latter was "conducting its business at a great loss, and prejudicially to the creditors and stockholders." (See S.C. below, 109 N.J. Eq. 356, 157 Atl. 390 (Chancery, 1931). A covenant in the lease provided that on abandonment of the premises, the landlord could re-enter "as agent of the tenant", relet, and receive the rents, and apply them to the payment of rent due under the lease, "holding the tenant liable for any deficiency." The claimant sought to prove for the difference between the rent reserved in the lease, and the rental value of the premises for the balance of the term. The claim was disallowed.

national Bankruptcy Act, and "the essentially bankrupt character" of the state statute.[14]

The interest in uniformity between state insolvency proceedings and federal bankruptcy administration[15] may perhaps support the sedulous application of bankruptcy principles to receivership cases. The existence in state courts of a rule more favorable to the lessor will undoubtedly precipitate attempts by creditors of any corporation for which a receiver has been appointed in the state courts, to have the corporation adjudicated a bankrupt.[16] Yet it is perfectly clear that the lessor, by the principle of *Bloch* v. *Bell Furniture Co.*, has been thrust upon the mercies of his corporate lessee, which is now completely equipped with a means of effectively escaping from unprofitable leases.[17] Any solace to be derived by the lessor from the corollary to this decision, namely, the continuing liability of the corporation upon the covenants in the lease, is indeed tenuous. The corporation may dissolve;[18] even should it continue, it remains a mere corporate hulk,

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[14] See Bloch v. Bell Furniture Co., *supra* note 12, at 560, 162 Atl. at 418. Yet in the same case a claim under a covenant to restore the premises to their original condition at the lessor's request, if the lease should terminate, was allowed even though the demand for restoration had not been made by the lessor until after a receiver had been appointed. Mr. Justice Case, delivering the opinion of the court, cited William Filene's Sons Co. v. Weed, 245 U.S. 597 (1918), which held that the appointment of a receiver in the federal equity courts does not have the effect of the filing of a bankruptcy petition, and that claims arising shortly after the appointment of the receiver are provable. A strict bankruptcy analogy might prevent proof of such claim also. For example, claims under leases have been disallowed because they did not arise until the lessor had re-entered after the filing of the bankruptcy petition. Slocum v. Soliday, 183 Fed. 410 (C.C.A. 1st, 1910).

[15] See Butler v. Commonwealth Tobacco Co., *supra* note 6; Nutz v. Murray-Nutz, Inc., *supra* note 6.

[16] See Bloch v. Bell Furniture Co., *supra* note 12, at 561, 162 Atl. at 418: "A harmonious doctrine in the administration of the assets of an insolvent corporation in the state and federal courts * * * tends to avert an unseemly race for jurisdiction in the interests of one or another class of creditors." See also Napier v. Peoples' Stores Co., 98 Conn. 414, 120 Atl. 295 (1923).

[17] *Cf.* Start, C. J., in Kalkhoff v. Nelson, 60 Minn. 284, 62 N.W. 332 (1895): "If a corporation [which voluntarily dissolves] can not be held liable for total breach of its executory contracts, the law has armed it and all other domestic corporations with power to repudiate all obligations of their executory contracts simply by instituting proceedings by its stockholders for a voluntary dissolution."

See also Peck v. Southwestern Lumber & Exporting Co., 131 La. 177, 59 So. 113 (1912), expressing the same thought in regard to receivership proceedings unaccompanied by dissolution.

It is true that Bloch v. Bell Furniture Co. also indicated that any surplus after payment of all creditors and administration expenses should be applied to the lessor's claim, before any distribution to stockholders. But evasion of this rule could easily be effected by the declaration of a dividend before receivership, of the surplus of assets over liabilities.

[18] Section 69 of the Corporation Act (2 N. J. Comp. Stat. [1910] p. 1645 § 69) provides that if after payment of debts, "there remains or can be obtained * * * sufficient capital to enable [the corporation] to continue its business, the court of chancery may in its discretion * * * direct the receiver to reconvey to

stripped of all assets.[19] A slavish adherence by the state courts to bankruptcy rules is hardly unavoidable. Although receivership proceedings in New Jersey are, like bankruptcy, controlled by a statute, no provision appears in the state statute corresponding to Section 63 of the Bankruptcy Act, which defines the debts which are provable.[20] The courts of Chancery are free to apply purely equitable principles to the allowance of claims; the only requirement of the statute is that "creditors shall be paid proportionally to the amount of their respective debts."[21] The historical concept of the nature of a covenant to

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the corporation all its property and franchises * * *; and in every case in which the court of chancery shall not direct such reconveyance, said court may in its discretion make a decree dissolving the corporation * * *" Generally, there is no surplus. Moreover, it would be most remarkable if a corporation whose assets have been distributed, and against whom a substantial and unprofitable obligation remains outstanding and undischarged should thereafter voluntarily acquire assets and engage in business. Such corporation will either endure a moribund existence, or else dissolve, even if the court should not dissolve it.

[19] See Pennsylvania Steel Co. v. New York City Ry., *supra* note 1, at 737; *cf.* Central Trust Co. v. Chicago Auditorium Ass'n, 240 U.S. 581, 592 (1916). Chancellor Runyon in Stockton v. Mechanics & Laborers Savings Bank, *supra* note 1, at 168, said: "The covenant to pay rent in the future is in fact valueless by reason of the insolvency, for the covenantor will have no property to answer its liabilities thereon." Vice Chancellor Reed, in Bolles v. Crescent Drug & Chemical Co., 53 N.J. Eq. 614, 32 Atl. 1061 (Chancery, 1895) said: "The disposition of the property of an insolvent corporation is its death * * * Those * * * who are precluded from proving their claims are left remediless." To the same effect, see Bloch v. Bell Furniture Co., *supra* note 12, at 561, 162 Atl. at 419. WILLISTON, CONTRACTS (1927) § 1985, makes the same criticism in regard to bankruptcy.

[20] Section 63 (a) (1) of the Bankruptcy Act of 1898 provides that debts provable include debts which are "a fixed liability * * * absolutely owing at the time of the filing of the petition, whether then payable or not * * *" Section 63 (a) (4) provides for proof of debts "founded upon * * * a contract, express or implied." It has been held that the latter section, as well as Section 63 (b), which provides for the liquidation of unliquidated claims, are subject to the limitation that the claim must exist at the time of the filing of the petition. *In re* Roth & Appel, *supra* note 7. If the bankruptcy itself constitutes the breach of contract for which damages are sought to be proved, the claim is regarded as existing at the time of filing the petition. Central Trust Co. v. Chicago Auditorium Ass'n, 240 U.S. 581 (1916) (contracts).

The only pertinent provisions of the state insolvency act are Section 75 (2 N.J. Comp. Stat. [1910] p. 1648 § 75), which provides that the "court of chancery may limit the time within which creditors shall present and make proof * * * of their respective claims * * * and may bar all creditors * * * failing so to do * * *"; and Section 86 (Ibid. p. 1652 § 86) which provides that "after payment of all allowances, expenses and costs * * * the creditors shall be paid proportionally to the amount of their respective debts * * * and the creditors shall be entitled to distribution on the debts not due * * *"

[21] See Section 86 of the Corporation Act, note 20, *supra.*

Mr. Justice Holmes has adverted to the distinction between statutory proceedings, such as bankruptcy, and purely equitable proceedings, such as receiverships. See William Filene's Sons Co. v. Weed, 245 U.S. 597, 602 (1918). In that case it was held that the appointment of a receiver would not be given the effect of the filing of a bankruptcy petition with reference to the provability of

pay rent may prevent assimilating unaccrued rents to unmatured but absolutely owing debts,[22] but rents accruing until the time of distribution, although not "absolutely owing" at the time of the appointment of a receiver[23] may well be treated as claims maturing in sufficient time to be allowed.[24]

It may be that the theory of anticipatory breach of executory contracts caused by insolvency proceedings is not strictly applicable to such contracts as leases, whose obligations are deemed independent of each other;[25] nevertheless the reasons supporting the principle seem

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claims; consequently, a claim for damages for breach of lease, under a provision in the lease providing for such damages, was held provable although not accruing until the lessor had re-entered after receivership.

[22] See note 9, *supra*.

[23] See Section 63 (a) (1) of the Bankruptcy Act. *Cf.* the cases cited in the first paragraph of note 7, *supra*.

[24] See Section 75 of the N. J. Corporation Act, cited note 20, *supra*.

Usher v. Sarco Co., *supra* note 10, involved a claim in receivership for unaccrued rents, filed in the state court against a corporate lessee which had assigned its lease prior to the appointment of a receiver. Vice Chancellor Buchanan pointed out that at the time of filing the claim there was no indebtedness, and disallowed the claim "without prejudice to the right of the claimant to file a supplemental claim if before distribution there should occur any default in payment by the assignee of the lease, which would fix liability upon the corporate estate" as surety.

Several cases in other jurisdictions have allowed claims for rent accruing until the time for distribution. Chicago Fire Place Co. v. Tait, 58 Ill. App. 293; Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632 (1887); Woodland v. Wise, 112 Md. 35, 76 Atl. 502 (1910).

It has also been held on several occasions that claims which mature within a reasonable time of the date fixed for distribution will be allowed, even though not existing at the institution of the proceedings. Pennsylvania Steel Co. v. New York City Ry., *supra* note 1, at 739; McPherson v. Evart State Bank, 239 Mich. 670, 214 N.W. 971 (1927); *cf.* Samuels v. E. F. Drew & Co., 292 Fed. 734, 735 (C.C.A. 2d, 1923) (claim must be definite and certain by date fixed for filing claims).

The same principle should permit proof of claims which arise only upon some act of the lessor following the receivership, such as re-entry or re-letting. The court in Bloch v. Bell Furniture Co., *supra* note 12, was in fact permitting such a claim when it allowed proof of damages for failure to restore the premises.

[25] See 3 WILLISTON, CONTRACTS (1927) §§1985, 1329.

It is settled that bankruptcy is an anticipatory breach of an executory contract, in that the bankrupt has disabled himself from further performance. This gives rise to a claim for damages, provable in bankruptcy. Central Trust Co. v. Chicago Auditorium Ass'n, 240 U.S. 581 (1916); Heyward v. Goldsmith, 269 Fed. 946 (C.C.A. 3d, 1921); Board of Commerce v. Security Trust Co., 225 Fed. 454 (C.C.A. 6th, 1915); Trust Co. of Ga. v. Whitehall Holding Co., *supra* note 7. The same doctrine applies to the appointment of a receiver. Pennsylvania Steel Co. v. New York City Ry., *supra* note 1, at 756; Isaac McLean Sons Co. v. William S. Butler & Co., 227 Fed. 325 (D. Mass. 1914); Samuels v. E. F. Drew & Co., 296 Fed. 882 (C.C.A. 2d, 1924); Napier v. Peoples' Stores Co., *supra* note 16; Peck v. Southwestern Lumber & Exporting Co., *supra* note 17. But the cases are fairly uniform in holding that bankruptcy does not constitute an anticipatory breach of an unexpired lease. *In re* Roth & Appel, *supra* note 7; Wells v. Twenty-First St. Realty Co., 12 F.(2d) 237 (C.C.A. 6th, 1926);

to apply with equal vigor to unexpired leases. In both cases, the benefit of a contract will be lost because of the insolvency of one of the parties.[26] The only tenable reason for excepting such agreements from the general doctrine of anticipatory breach of contracts—namely, the independence of obligations in leases—is at best a hypertechnical insistence upon the application of somewhat obsolete concepts.[27] A

In re Service Appliance Co., 39 F.(2d) 632 (N.D. N.Y. 1930); *In re* McAllister-Mohler Co., 46 F.(2d) 91 (S.D. Ohio, 1930); *In re* Goldberg, *supra* note 7; see 2 REMINGTON, BANKRUPTCY (3d ed. 1923) § 789.

The latter rule, for some reason, has not been fully applied by the courts in the Third Circuit. See *In re* Spies-Alter Co., *supra* note 3, at 540. In *In re* Caloris Mfg. Co., 179 Fed. 722 (E.D. Pa. 1910), a covenant in the lease provided that if the lessee should default in the rent, or if the premises should become vacant, the lessor might re-enter and relet as agent for the lessee, the latter being liable for any monthly deficiency. District Judge McPherson held that a claim for the difference between the amount of rent reserved in the lease, and the total rental for which the premises were relet after the lessee's bankruptcy, was provable, despite the fact that the reletting had not taken place until after the bankruptcy. The theory of the court seemed to be that although the claim was not a fixed liability under Section 63 (a) (1) when the petition was filed, it was nevertheless liquidated within a year, under Section 63 (b), and thus provable as a claim on a contract under Section 63 (a) (4).

[26] See *In re* Bissinger, 5 F.(2d) 106 (N.D. Ohio, 1925).

[27] That the obligations in leases are independent of each other is recognized in this jurisdiction. Thus, failure to pay rent will not justify an eviction, in the absence of an express reservation of such right; and failure of the lessor to keep the premises in repair will not justify refusal to pay rent. Stewart v. Childs Co., 86 N.J.L. 648, 92 Atl. 392 (1914); Ocean Grove Ass'n v. Sanders, 68 N.J.L. 631, 54 Atl. 448 (1903).

But since present day leases customarily contain a right of re-entry in the lessor for breach of covenant, and corresponding rights in the lessee, the historical conception of the independence of obligations in leases may well be deemed out-moded. The insolvency of the lessee will disable the performance by him of the most essential covenant in the lease. Although the lessor may repossess himself of the premises, it is obvious that he is losing any possible benefits of his contract. See *In re* Bissinger, 5 F.(2d) 106 (N.D. Ohio, 1925), reversed *sub. nom.* Wells v. Twenty-First St. Realty Co., *supra* note 25.

Other reasons have been advanced for not holding bankruptcy an anticipatory breach of a lease: That there is no inability to carry out the lease, in that the term remains in the bankrupt, and the latter may acquire assets in the future, reachable by the lessor in further proceedings. See Watson v. Merrill, *supra* note 7, at 363; *In re* McAllister-Mohler Co., *supra* note 9, at 95; *In re* Mullings Clothing Co., *supra* note 9, at 68; *cf.* Pennsylvania Steel Co. v. New York City Ry., *supra* note 1, at 758. It has also been said that the trustee may adopt the lease, preventing any breach from arising. See *In re* Roth & Appel, *supra* note 7, at 669; Watson v. Merrill, *supra* note 7, at 362.

The fallacy with this reasoning is plain: The same arguments would also apply to executory contracts. See *In re* Bissinger, *supra*, at 107; *cf.* Kalkhoff v. Nelson, *supra* note 17. Another reason advanced is that the amount of damages will not be ascertainable until the premises have been relet, or until the term has expired. Watson v. Merrill, *supra* note 7; see *In re* Roth & Appel, *supra* note 7, at 671; *In re* Service Appliance Co., *supra* note 7, at 636. Unless the claim is presented under a covenant in the lease which expressly requires that damages be measured by the reletting, it may be said that the rental value is easily ascertainable as of the date of the bankruptcy. *Cf.* Kalkhoff v. Nelson, *supra* note 17;

tacit recognition that some damage will be caused the lessor by the insolvency seems implicit in the ruling in *Bloch* v. *Bell Furniture Co.* to the effect that any surplus of assets after payment of administration expenses and allowed claims should be applied to the rejected claim of the lessor.[28]

New Jersey seems to be alone in denying proof of damages for breach of a lease caused by the appointment of a receiver for the lessee.[29] In dissolution proceedings, which seem to offer a sounder analogy than bankruptcy,[30] such claim is usually allowed.[31] But with

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"Although the damages are unliquidated and it cannot be shown with absolute certainty that the lessor except for the breach of the contract by the lessee corporation, would have completely executed the contract on its part, yet the same difficulties in a greater or lesser degree exist in all actions for recovery of damages for breach of executory contracts."

[28] If the lessor has no claim, he would seem to have no right to object to such a distribution of assets. To admit that he has a potential claim is to acknowledge a contract right of some sort to future rents, existing at the date of the receivership. For example, the lessor could probably not object to the declaration of a dividend on the ground that it would leave the corporation with only enough assets to pay all its creditors except the lessor.

But the decision in Bloch v. Bell Furniture Co., postponing the lessor's claim to those of all other creditors, is tantamount to denying relief entirely.

[29] Under receivership statutes in other jurisdictions, damages for breach of lease are usually held provable. Jacob v. Roussel, *supra* note 1 (La.); McGraw v. Union Trust Co., 135 Mich. 609, 98 N.W. 390 (1904). The same rule prevails in equity receivership in the federal courts sitting in these states. See Crayton Hardware Co. v. Richardson-Warren Co., *supra* note 3; Southern Cotton Oil Co. v. Morrison, 21 F.(2d) 786 (C.C.A. 5th, 1927); Leo v. Pearce Stores Co., 54 F.(2d) 92 (E.D. Mich. 1931); *cf.* American Brake Shoe & Foundry Co. v. New York Rys., *supra* note 1.

It seems probable that in receiverships in the federal equity courts sitting in New Jersey, the state law will be applied to the question of provability of claims under New Jersey leases. *Cf.* Leo v. Pearce Stores Co., *supra;* see Fee Crayton Hardware Co. v. Richardson Warren Co., *supra* note 3.

However, the courts of New Jersey do recognize that receivership is an anticipatory breach of executory contracts. Spader v. Mural Decoration Mfg. Co., 47 N.J. Eq. 18, 20 Atl. 378 (Chancery, 1890); Allen v. Distilling Co. of America, 87 N.J. Eq. 531, 100 Atl. 620 (Chancery, 1917), *aff'd* 89 N.J. Eq. 177, 104 Atl. 216 (1918); Bloch v. Bell Furniture Co., *supra* note 12 (contract contained in a lease).

[30] It is common knowledge that corporations whose assets have been distributed in receivership do dissolve. See note 18, *supra.* Even if undissolved, it becomes a most unsatisfactory debtor. Mr. Justice Case in Bloch v. Bell Furniture Co., *supra* note 12, admitted that "even though the corporate life should continue, it would be stripped of vitality and of productive resources—a mere moribund existence."

It seems more reasonable to assimilate the insolvency proceedings under the corporation act to dissolution of a corporation, than to bankruptcy. Moreover, bankruptcy is a system applicable alike to individuals and corporations; its principles must apply to both indiscriminately and with equal vigor. It is not unlikely that an individual, although discharged in bankruptcy, will reacquire assets in his own name.

[31] In re Mullings Clothing Co., *supra* note 9; Kalkhoff v. Nelson, *supra* note 17; People v. St. Nicholas Bank, 151 N.Y. 592, 45 N.E. 1129 (1897).

the New Jersey Court of Chancery committed to regarding bankruptcy rules as precedent,[32] the lessor must seek protection in the inclusion of damage clauses in the lease.

The customary provision for re-entry by the lessor upon the institution of receivership or bankruptcy proceedings against the lessee, with authority in the lessor to relet, and a right to hold the lessee liable for any damage,[33] is deficient in several respects. A claim under such clause will not arise until the lessor enters after the filing of a bankruptcy petition, and has for this reason been held not provable in bankruptcy.[34] Even should the need for re-entry be expressly eliminated, the damages may still not be provable because unascertainable until a reletting, or until the expiration of the term.[35]

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[32] The Bankruptcy Act may not improbably be modified. The English Bankruptcy Act at one time required that claims to be provable must be owing at bankruptcy, and thus also excluded all claims for rent which was unaccrued. The injustice was felt, however, and the act was modified in 1867 by 32 & 33 Vict., c. 71, § 23, to permit the discharge of the bankrupt from all obligations upon leaseholds, and thus enabled the lessor to prove to the extent of the injury so caused. See Ex Parte Llynvi Coal & Iron Co., L.R. 7 Ch. App. 28 (1871); Ex Parte Blake re McEwan, 11 L.R. Ch. Div. 572, both of which hold that the measure of damages provable is the difference between the amount the lessor was to receive by his contract, and the present letting value of the premises for the same period.

Having hitched the state receivership law to so variable a star as the statutory system of another jurisdiction the fate of the former must be subject to the vagaries of the latter.

[33] This type of covenant varies. The lessee may covenant to pay any monthly deficiency as it accrues. *E.g., In re* Caloris Mfg. Co., *supra* note 25; *In re* Roth & Appel, *supra* note 7; McCready v. Lindenborn, 172 N.Y. 400, 65 N.E. 208 (1902). He may covenant to pay the difference between the avails of reletting and the rental reserved in the lease. *Cf.* Matter of Hevenor, 144 N.Y. 271, 39 N.E. 393 (1895); People v. St. Nidholas Bank, 3 App. Div. 544, 38 N.Y. Supp. 379 (1896), *aff'd* 151 N.Y. 592, 45 N.E. 1129 (1897). Or he may undertake to be liable for any damage caused by the lessor's re-entering and re-letting, or by the premises remaining vacant. *E.g., In re* Shaffer, 124 Fed. 111 (D. Mass. 1903); Hermitage v. Levine, 248 N.Y. 333, 162 N.E. 97 (1928). Another type of covenant is one undertaking to pay, upon re-entry by the lessor, the difference between the rental value of the premises, and the rent in the lease for the residue of the term. *E.g.,* William Filene's Sons Co. v. Weed, 245 U.S. 597 (1918); Slocum v. Soliday, 183 Fed. 410 (C.C.A. 1st, 1910). In Bloch v. Bell Furniture Co., *supra* note 12, the pertinent covenant provided that upon abandonment or desertion of the premises by the tenant, the landlord had an option to re-enter as agent of the tenant and relet, receiving and applying the rents received to the rent due under the lease, and holding the tenant liable for any deficiency. See Brief of Substituted Receiver.

[34] *In re* Shaffer, 124 Fed. 111 (D. Mass. 1903); Slocum v. Soliday, *supra* note 33; *In re* Roth & Appel, *supra* note 7.

[35] See *In re* Goldberg, *In re* Roth & Appel, *cf. In re* Service Appliance Co., all *supra* note 7.

In *In re* Shaffer, *supra* note 33, under a covenant to be liable for all losses sustained by premises remaining vacant, or being let for the remainder of the term at a lesser rental, it was held no claim was provable. District Judge Lowell

A clause providing for the acceleration of all rents immediately upon bankruptcy was regarded with favor by many courts, especially those in the third federal circuit, and was given effect where the lessor did not resume possession.[36] But such clause was held unenforceable in bankruptcy by the United States Supreme Court, because in the nature of a penalty.[37] However, the tenor of the reasoning in that case would seem to indicate that a more fairly drawn measure of damages would not be ill-received.[38] The same court[39] in a federal

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said: "The liability is contingent on a loss of rent. If the lessor subsequently rerented at a greater rent, a claim could not arise."

It has also been held that re-entry by the lessor terminates the lease and prevents any claim under it from arising, in the absence of an express provision to the contrary. Watson v. Merrill, *supra* note 7.

[36] *In re* Pittsburg Drug. Co., 164 Fed. 482 (W.D. Pa. 1908); Rosenblum v. Uber, 256 Fed. 584 (C.C.A. 3d, 1919); *In re* Barnett, 12 F.(2d) 70 (S.D. N.Y. 1925); *In re* Schechter, 39 F.(2d) 18 (C.C.A. 3d, 1930); see *In re* Roth & Appel, *supra* note 7 at 671; *cf. In re* Miller Bros. Grocery Co., 219 Fed. 851 (C.C.A. 5th, 1915) (such clause enforced in a lease of a cash-carrier system).

Where the lessor had re-entered upon the premises after the bankruptcy or receivership, and repossessed himself thereof, no claim under the accelerated rental clause was provable. Electric Appliance Co. v. Ellis, 4 F.(2d) 108 (C.C.A. 3d, 1925); South Side Trust Co. v. Watson, 200 Fed. 50 (C.C.A. 3d, 1912); Wilson v. Pennsylvania Trust Co., 114 Fed. 742 (C.C.A. 3d, 1902); *In re* H. M. Lasker Co., 251 Fed. 53 (C.C.A. 3d, 1918). These cases are logically sound. A lessor may not have the use of the premises, and the rents in addition. Proof of unaccrued rentals involves the theory that the title to the leasehold is in the lessee or his trustee or receiver. *Cf.* Courtney v. Fidelity Trust Co., *supra* note 7, at 66; Rosenblum v. Uber, *supra*.

Under a Pennsylvania statute which is substantially similar to Section 4 of the New Jersey Landlord and Tenant Act (see note 3, *supra*) it has been held that an accelerated rental clause will give the lessor upon bankruptcy, a priority for one year's rent (provided the unexpired term is at least that long) out of the proceeds of the personal property in the hands of the trustee. *In re* Quality Shoe Shop, Inc., 212 Fed. 321 (E.D. Pa. 1914); *In re* Keith-Gara, 203 Fed. 585 (E.D. Pa. 1913) *aff'd sub. nom.* Ludlow v. Pugh, 213 Fed. 450 (C.C.A. 3d, 1914); *In re* Pittsburg Drug Co., and Rosenblum v. Uber, both *supra*.

The same result has been reached in a receivership proceeding in the Pennsylvania courts of equity. General Tire Co. v. General Tire Co., 93 Pa. Super. 173 (1924). It is not unlikely that the Chancery court of New Jersey will reach the same conclusion under an acceleration clause.

[37] Kothe v. R. C. Taylor Trust, 280 U.S. 224 (1930).

[38] The ultimate authority in Bankruptcy was here presented for the first time with an admirable opportunity to affirm the doctrines of *In re* Roth & Appel. It could have held the claims not provable because it sought unaccrued rents; it might at least have adverted to the rule *obiter*. Instead, the court rests its decision solely upon the penal nature of the claim. The language indicates that liquidated damage clauses are not forbidden. Mr. Justice McReynolds, delivering the opinion of the court, said (280 U.S. at 225): "Courts are strongly inclined to allow parties to make their own contracts and to carry out their intentions, even when it would result in the recovery of an amount stated in liquidated damages upon proof of the violation of the contract and without proof of the damages actually sustained. The question always is—what did the parties intend by the language used? When such intention is ascertained, it is ordinarily the duty of the court to carry it out. (Citing from U.S. v. United Engineering & Contracting Co.,

equity receivership proceeding allowed a claim under a clause in a lease by which the lessee covenanted to pay as liquidated damages, if the lease was terminated upon the lessee's bankruptcy or receivership, the "difference between the rental value of the premises at the date of re-entry (by the lessor), and the rent reserved in the lease."[40] By taking this clause as a model, and eliminating the necessity for re-entry by the lessor after bankruptcy or receivership, one may evolve a provision for liquidated damages under which proof of a claim may possibly be allowed in both types of insolvency proceedings.[41]

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234 U.S. 236, 241 [1914]): 'Such contracts for liquidated damages when reasonable in their character are not to be regarded as penalties and may be enforced between the parties.'"

[39] But the personnel of the bench was different. In William Filene's Sons v. Weed, 245 U.S. 597 (1918), the bench was composed of the following: White, CJ., Holmes, Pitney, McReynolds, Day, Clarke, Van Devanter, and McKenna, JJ. (Mr. Justice Brandeis took no part). In Kothe v. R. C. Taylor Trust, 280 U.S. 224 (1930), the bench was composed of the following: Taft, CJ., Holmes, McReynolds, Van Devanter, Brandeis, Sutherland, Butler, Sanford, Stone, and Roberts, JJ.

[40] William Filene's Sons Co. v. Weed, 245 U.S. 597 (1918); Gardiner v. William S. Butler & Co., 245 U.S. 603 (1918). Mr. Justice Holmes, in allowing the claim under the covenant for damages, said (245 U.S. at 602): "Such a contract was not that all the rent for the term should become presently due—it was not for rent at all, but was a personal covenant that liquidated damages upon a footing that was familiar and fair."

In view of the relaxing of the rigid bankruptcy rule in Bloch v. Bell Furniture Co., *supra* note 12, in regard to the claim for restoration of the premises, it is not inconceivable that the courts of New Jersey may follow the precedent of Mr. Justice Holmes in William Filene's Sons Co. v. Weed, and permit proof of a claim under a liquidated damage covenant in a lease, even though a re-entry by the lessor was essential after the appointment of a receiver, to fix the claim. It is also significant that in Bloch v. Bell Furniture Co., *supra* note 12, Mr. Justice Case pointed out that "no covenant for payment of damages is involved, thus differing from Filene's Sons Co. v. Weed * * *"

[41] A suggested clause: "Immediately upon the appointment of a receiver for the lessee, or upon the filing of a petition in bankruptcy by or against the lessee, seeking to adjudicate the lessee a bankrupt, the lease shall *ipso facto* terminate, and there shall simultaneously become due and payable as liquidated damages a sum equal to the difference between the rent reserved in the lease for the residue of the term, and the rental value of the premises for the same period, from the date of the appointment of a receiver or the filing of the petition in bankruptcy." *Cf.* the provisions in the leases involved in William Filene's Sons Co. v. Weed, 245 U.S. 597 (1918); and in Kothe v. R. C. Taylor Trust, 280 U.S. 224 (1930).

A claim under such clause, arising at once upon bankruptcy or receivership, could in bankruptcy be liquidated under Section 63(b) of the Bankruptcy Act.