In view of the increased jurisdiction conferred by Section 77B and Chapter X continued emphasis upon a distinction between summary and plenary proceedings which was developed by cases decided prior to the enactment of Section 77B and Chapter X appears unwarranted. While Section 2(15)[33] was in terms broad enough to extend the summary power of bankruptcy courts, the tendency to construe that section narrowly so as not to alter the necessity of plenary suits, if paralleled in the construction of the stronger provisions of Section 77B and Chapter X undermines the evident difference in purpose between a reorganization and bankruptcy. The apprehension of summary process as a Star-chamber method of adjudication is groundless, since full opportunity to be heard is provided.[34] The difference, in fact, between a summary and plenary proceeding is so insignificant as to indicate that the latter is a dilatory tactic which should be discouraged like any other hindrance to the consummation of a feasible reorganization.

Bankruptcy—Reorganization—Lease Provisions of Section 77—Treatment of Long Term Leases—[Federal].—The debtor in reorganization under Section 77 of the Bankruptcy Act was the lessee of a 999 year lease of certain street railway property. The terms of the lease provided for an annual rental of over one million dollars, part of which was to be placed in a sinking fund for the retirement of the lessor's bonds. In addition, the lessor was given the right to repossess the property on default without prejudice to his right of action for rent or breach of the lease, but the lease contained no covenant for liquidated damages. The Court of Appeals, affirming the decision of the district court, decided that the lessor was a creditor only to the extent of the rent accruing from the date of the rejection of the lease to the latest date for the filing of claims in the proceedings. On *certiorari* to the Supreme Court, *held*, reversed. The lessor should be allowed damages to the extent of the difference between the present value of rent reserved less the present value of the remainder of the term, the amount to be determined by "evidence which satisfies the mind." *Connecticut Railway & Lighting Co. v. Palmer.*[1]

Prior to 1934, claims for future rent in bankruptcy[2] were not provable in the absence of skillfully worded covenants which provided for liquidated damages measured by the difference between the present fair value of the rent reserved by the lease and the present fair value of the premises for the duration of the term.[3] In an equity

[33] See note 14 *supra.*

[34] "Even in summary proceedings, a reasonable opportunity must be afforded for a proper hearing, for otherwise constitutional rights would be violated." 2 Gerdes, *op. cit. supra* note 1, at § 849. Although the court in the instant case sustained the summary order, it deplored the failure to take evidence before its issuance. Perhaps opposition to summary jurisdiction would be mollified by affording opportunity to present testimony in addition to argument of counsel.

[1] 59 S. Ct. 316 (1939). Two other cases involving the same point have recently been decided. See Palmer v. Palmer, 59 S. Ct. 647 (1939), reversing Old Colony R. Co. v. New York, N.H. & H. R. Co., 98 F. (2d) 670 (C.C.A. 2d 1938), and *In re* Chicago & North Western Ry. Co., Claim of Consolidated Office Buildings Co., Opinion of Special Master (D.C. Ill. 1938).

[2] 30 Stat. 562 (1898).

[3] Litigants were never certain as to whether a given covenant would be construed so as to allow recovery. Manhattan Properties v. Irving Trust Co., 291 U.S. 320 (1933); Irving Trust v. Perry, Inc., 293 U.S. 307 (1934); *In re* Roth and Appel, 181 Fed. 667 (C.C.A. 2d 1910).

receivership, a landlord's claim may be said to have been controlled by local state rules,[4] which were seldom more generous than the rigid Bankruptcy Act. Today, however, Section 63 of the Bankruptcy Act[5] has been modified so that a claim for damages from loss of future rent may be allowed, but whether or not the lease contains a covenant the claim is limited to an amount not to exceed the rent due for the year following the surrender of the premises.[6] The equity receivership, as a reorganization device, has been largely supplanted[7] by the reorganization acts, all of which, even in the absence of a covenant, allow claims based on damages for future rent.[8] Like the amended Section 63, Chapter XIII, Wage Earner Plans,[9] limits the recovery for damages on a broken or rejected lease to the amount of rent reserved for the following year. Chapter X, Corporate Reorganization,[10] confines provable damages to an amount not to exceed the next three years' rent. Section 77,[11] on the other hand, contains no such legislative evaluation of the landlord's provable claim. In the principal case the Supreme Court interpreted for the first time this provision of Section 77[12] which gives landlords a claim for future rent. After stating that "the term 'creditors' shall include . . . . the holder of a claim under a contract executory in whole or in part including an unexpired lease" the act provides that "in case an executory contract or unexpired lease of property shall be rejected . . . . any person injured by such . . . . rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of actual damage or injury determined in accordance with principles obtaining in equity proceedings."

The above quoted provision of Section 77 presents two immediate problems: (1) What is the meaning of "equity proceedings," and (2) does this meaning explain

[4] Finletter, Principles of Corporate Reorganization 270 (1937). For cases based upon the historical treatment of rent see Gardiner v. Butler & Co., 245 U.S. 603, 605 (1917); Rogers v. United Grape Products, 2 F. Supp. 70 (N.Y. 1933); for cases treating a lease like an installment contract see Leo v. Pearce Stores, 54 F. (2d) 92 (D.C. Mich. 1931), and 57 F. (2d) 340 (D.C. Mich. 1932); Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 759 (C.C.A. 2d 1912). *Cf.* Filene's Sons Co. v. Weed, 245 U.S. 597 (1918).

[5] 48 Stat. 923 (1934), 11 U.S.C.A. § 103 (a) (1937).

[6] Whether or not a covenant, which provides that the filing of a petition in bankruptcy is itself a breach of the lease, is subject to the limitation of one year is a matter of some doubt. See Irving Trust Co. v. Perry, Inc., 293 U.S. 307 (1934).

[7] By the end of 1933 only 2,500 miles of railroad track were in the hands of trustees under Section 77B. But by the end of 1937 the figure reached 56,000. In 1937, 28 miles of track passed into equity receivership as against 1,757 which entered statutory reorganization. For the first seven months of 1938, 487 miles went to receivers and 4,528 to trustees. Statistics of Railways in the U.S., 51 I.C.C. 1937.

[8] C. X, Corporation Reorganizations, 52 Stat. 893 (1938), 11 U.S.C.A. § 602 (Supp. 1938); C. XI, Arrangements, 52 Stat. 910 (1938), 11 U.S.C.A. § 753 (Supp. 1938); C. XII, Real Property Arrangements by Persons Other than Corporations, 52 Stat. 921 (1938), 11 U.S.C.A. § 858 (Supp. 1938); C. XIII, Wage Earners Plans, 52 Stat. 933 (1938), 11 U.S.C.A. § 1042 (Supp. 1938).

[9] 52 Stat. 933 (1938), 11 U.S.C.A. § 1042 (Supp. 1938).

[10] 52 Stat. 893 (1938), 11 U.S.C.A. § 602 (Supp. 1938). Construing a similar provision in Section 77B, see Kuehner v. Irving Trust Co., 299 U.S. 445 (1936); City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433 (1936).

[11] 49 Stat. 911 (1935), 11 U.S.C.A. § 205 (b) (1927).

[12] *Ibid.*

why Congress failed to set forth in Section 77 a definite measure of provable damages as it did in Chapters X and XIII.[13]

It has been suggested, as an answer to the first problem, that equity proceedings might be taken to mean equity receiverships. This would lead to the application of the usual equity receivership rule and, in the event of disaffirmance of a lease, claims for damages would be allowed under Section 77 up to the final date of filing claims.[14] In support of this construction is the fact that Section 77 is in many respects a codification of the equity consent receivership.[15] But even if the words are taken to mean equity receivership, it is still possible to urge that the intention of the act is to treat leases as executory contracts to which the doctrine of anticipatory breach may be applied[16] so that "actual damages or injury" would mean more than merely the "accrued damages" allowed in equity receiverships. Under such a view full contract damages would be recoverable.

It seems more probable, however, that the provision means either that damages shall be allowed so far as they can be determined, or that some other standard should be applied by the court in its discretion. As near as it is possible to tell, it is this latter view that the court adopts in the instant case.[17] This construction is fortified by the fact that the term "equity receivership" does appear in Section 77 in another connection where clearly equity receivership is meant,[18] but the phrase "equity proceeding" does not appear elsewhere. In addition, the history of the provision through the stages of legislative drafting indicates that the words equity proceedings may have been intended as words of emphasis rather than of limitation. In its first enactment the section merely made the landlord a creditor for future rent;[19] in the revision by the Federal Coordinator of Transportation,[20] it was stated that a lessor injured by the rejection of his lease should be a creditor "to the extent of such damages or injury"; and it was only

[13] Friendly, Amendment of the Railroad Reorganization Act, 36 Col. L. Rev. 27, 50 (1936).

[14] This formula was applied by the Circuit Court of Appeals in the instant case. *In re* New York, N. H. & H. R. Co., 95 F. (2d) 483 (C.C.A. 2d 1938). But that court did not declare that "equity proceedings" means "equity receivership." See note 4 *supra*.

[15] 1 Gerdes, Corporate Reorganization § 20 (1936); Garrison, Reorganization of Railroads under the Bankruptcy Act, 1 Univ. Chi. L. Rev. 71 (1933); Lowenthal, The Railroad Reorganization Act, 47 Harv. L. Rev. 18 (1933); 47 Yale L. J. 247 (1937).

[16] 2 Gerdes, *op. cit. supra* note 15, at §§ 682, 687 (1936). Even if this were the interpretation given, a landlord's claim might be limited because of the respect courts of equity have shown for the degree of speculation involved in assessing damages. See cases cited in note 2 *supra*. *Cf.* Central Trust Co. v. Chicago Auditorium Ass'n, 240 U.S. 581 (1916); Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 735 (C.C.A. 2d 1912).

[17] *Cf.* the treatment of the set-off problem in Lowden v. Northwestern Nat'l Bank & Trust Co., 298 U.S. 160 (1936).

[18] In Section 77 (c) (3) reference is made to "equity receivership." In two places in Section 77 (p) the phrase "receivership proceedings" is used where the meaning is equity receivership. 49 Stat. 911 (1935), 11 U.S.C.A. § 205 (b) (1937).

[19] 47 Stat. 1475 (1933). In this connection see Rogers and Groom, Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act, 33 Col. L. Rev. 571, 596 (1933).

[20] Report of the Federal Coordinator of Transportation, House Document No. 89, 74th Cong., 1st Sess., Appendix X, 220 (1935).

in the house committee draft, which in most other respects adopted the previous wording, that the words "equity proceedings" first appear.[21]

If the court is free under the provision to allow that amount of damages which is fair, the difficulties of allowing full damages always urged against landlords' claims reappear. It will be contended that any estimate of future damages is too speculative to be allowed, and that the lack of a ready market for this type of property makes the damages more speculative than in the ordinary executory contract. Further, especially with long term leases, it will be argued that the allowance of a full claim to the lessor will dwarf the claims of other creditors.[22] These considerations would seem to justify some limitation on landlords' claims similar to that in Chapter X or Chapter XIII. Since such a limitation in Section 77 is conspicuously absent, an analysis of a possible reason for the omission becomes imperative.[23]

It is apparent that there are some grounds upon which to distinguish leases of railroad property from other leases. Where a lease on non-railroad property is not adopted by the plan of reorganization, the landlord may regain his property and may prove damages. His claim is made to depend upon what is shown to be the present value of probable future rentals.[24] This is necessarily somewhat speculative and justifies an arbitrary limitation on the amount of the claim. The return of leased railroad property, however, presents more difficult problems. In the usual case operation of the leased property cannot be discontinued without the consent of the Interstate Commerce Commission.[25] Usually the lessor will be forced to a choice between leasing to the reorganized tenant or operating the lines.[26] Since in a majority of these cases it is probable that the lessor will be anxious to re-let, it is important that the reorganization court be in a position to allow damages conditioned on the new terms of the lease. By

[21] There was no mention of these changes in House Committee report.

[22] See 47 Yale L. J. 272 (1937).

[23] The amount of recovery allowed the landlord must fully satisfy his claim because Section 77 (f) provides that "the property dealt with by the plan, when transferred and conveyed . . . . shall be free and clear of all claims of the debtor, its stockholders and creditors and the debtors shall be discharged from its debts and liabilities." 49 Stat. 911 (1935), 11 U.S.C.A. § 205 (f) (1937).

[24] See *In re* Chicago & North Western Ry. Co., Claim of Consolidated Office Buildings Co., Opinion of Special Master (D.C. Ill. 1938). This was a claim filed in proceedings under Section 77 arising from the disaffirmance of a lease of certain office space. On the basis of the report of the special master the court allowed a large claim representing full damages limited only by the discretion of the court. Since the lease in question covered non-railroad property, it would seem that the court's discretion should have been controlled by the lease provisions of Section 77B.

[25] 49 Stat. 911 (1935), 11 U.S.C.A. 205 (c) (6) (1937). This section seems to indicate that after the lease is rejected the lessee may elect whether to continue operation of the leased road, and provides that no such road may be abandoned without authorization by the I.C.C.

[26] That such a choice may be theoretical is illustrated by examining the actions of the trustee and the proposed plans in the reorganization of the New York, N.H. & H. R. Co. The New Haven's plan calls for the acquisition of the property of three of five companies whose roads were formerly leased by the New Haven but which leases were disaffirmed by the court. The plan also provides for the assumption of the lease of the fourth. It is interesting to note that the plan recommended a reduction of over $3,500,000 in rentals on leased roads. This would seem to indicate a need for authority to include leased railroad lines in the plan on

proper petition under Section 77 c(6)[27] the lessee may be forced to operate the rejected property. Here, again, the judge should not be bound by an arbitrary measure of damages.

Furthermore, in many cases, the debtor's future existence and the possibility of any reorganization plan may depend largely on the debtor's ability to keep the leased property. It should be remembered that long term leases are often used as devices both for controlling railroad properties[28] and for isolating income and liability. The lessor, thus, is functionally in the same position as a mortgagee. The analogy seems particularly compelling in the instant case not only because of the length of the lease but because part of the rent reserved was to be earmarked for a sinking fund for the lessor's bonds. A mortgagee under the terms of Section 77 is in effect forced to give up his security and rely on the fair plan of reorganization for a satisfaction of his claims.[29] In view of his analogous position, the lessor may possibly receive similar treatment.[30] If so the landlord may not repossess his property in a given case even though the trustee and the plan have not accepted the lease according to its terms.[31] Under these circumstances the lessor's claim for damages need not be completely speculative, because the future rental value of the property is indicated by the new terms of the lease. Where the lessor-creditor refuses to enter into the plan voluntarily, it would seem to be a proper exercise of discretion for the court to isolate the lessor-creditor, establish fair

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some basis similar to that provided for secured creditors. Not only does the New Haven plan recommend acquisition of the property of former lessor companies but the plans of two of the lessor companies also make similar proposals. In many instances the lessor company and the lessee are mutually dependent. See Moody's Steam Railroads 645 (1938).

[27] 49 Stat. 911 (1935), 11 U.S.C.A. § 205 (c) (6) (1937).

[28] There are approximately 325 companies, owning 15% of all the railroads in the country, whose lines are operated by other companies, in large part under long term leases. The extent to which the lessee company has interests in the capital structure of the lessor would vary from complete ownership to no investment at all. Statistics of Railways in the U.S., 51 I.C.C. 1937. For a discussion of advantages and disadvantages to be gained from combination by lease see Ripley, Railroads, Finance and Organization 418 (1915); Frederick, Huring and Hypps, Regulation of Railroad Finance (1930); Cleveland and Powell, Railroad Finance 299 (1912).

[29] *Cf.*, "The reorganization plan under Section 77B . . . . may destroy the security and, as long as the old relative priorities of creditors and stockholders are preserved, may even compel a minority of the secured creditors to accept stock of the reorganized company in lieu of their secured claims." Finletter, *op. cit. supra* note 4, at 69 (1937).

[30] *Cf.* treatment of conditional sales under Section 77B; see *In re* Lake's Laundry, 79 F. (2d) 326 (C.C.A. 2d 1935) *cert. denied* 296 U.S. 622 (1935) (under Section 77B property held by conditional vendee is not subject matter of reorganization proceedings; L. Hand, J., entered a strong dissent); *In re* Ideal Laundry, Inc., 10 F. Supp. 719 (Cal. 1935). See also Brady, Satisfaction of Dissenting Claims in Reorganization Schemes under Section 77B, 19 Marq. L. Rev. 106 (1935); Rogers and Groom, *op. cit., supra* note 19; *In re* Hotel Gibson Co., 11 F.Supp. 30 (Ohio 1935) (holders of land trust certificates entitled to benefit of reorganization proceedings).

[31] Under Section 77 the trustee may reject the lease or it may be rejected in the plan. Although it is rejected in the latter after the former has affirmed, the claim arising is not thereby entitled to priority. The difficulty arises when the plan may need to retain the premises but cannot without a reduction in rent. See Finlettter, *op. cit. supra* note 4, at 223 (1937).

damages, and approve the plan without his consent.[32] It is apparent that this procedure would be justified only where the property is essential to the workings of the railroad or the success of the plan.[33]

Where new terms for the lease are neither required by nor permitted within the plan of reorganization, the court will have to exercise its discretion in determining full damages, and will be forced to apply some standard similar to the nebulous one suggested in the instant case, "evidence which satisfies the mind."[34] Because, however, the percentage of cases is so large where lessor will re-rent to the debtor[35] or the debtor will as of right continue to use the property, an omission of the arbitrary limitation in Section 77 is explainable. In allowing the landlord's claim for future damages, attention will be focused on his treatment in the plan. His treatment there will indicate the future revenues he will receive from the property, thus determining his damages.

Bills and Notes—Fictitious Payee—Protection of Innocent Holder—[Federal and Ohio].—An insurance company authorized its agent, a veteran claim adjuster, to settle certain claims for damages asserted against it. The agent, who was apparently the drawer, executed a draft in which the insurance company was drawee in favor of one of the claimants as payee. The agent had no general authority to execute drafts. The standard form of draft of the insurance company was in the nature of a contract of settlement reciting that proper indorsement was to be a full release of the described claim. The agent forged the indorsement of the payee, had one of his employees transfer the draft to the defendant bank, and pocketed the proceeds. At the time the draft was "issued," the agent intended that the payee should get no interest. The defendant bank collected from the insurance company as drawee, after which the insurance company, on discovering the fraud, settled with the real claimant. In a suit by the assignee of the insurance company to recover money had and received, *held*, the plaintiff may not recover. Since the instrument is payable to bearer under the fictitious payee doctrine, the rule as to forged indorsements is not applicable. *Hartford Accident and Indemnity Co. v. Fifth Third Union Trust Co.*[1]

In another case arising out of similar frauds of the same agent, the sequence of events was parallel except that in the drafts executed by the agent the insurance company appeared both as drawer and as drawee. Furthermore, the agent "at no time" intended that the named payees should get any interest in the instruments. In addition the agent transferred the drafts to the defendant bank personally. In a similar action, *held*, the plaintiff may recover because the instrument is not payable to bearer.

[32] The lease of the Old Colony R. Co. in the reorganization of the New York, N. H. & H. R. Co. is an excellent illustration of this problem. The court disaffirmed the lease but in its plan for reorganization the New Haven included plans for restoring the Old Colony to its system. The Old Colony also submitted a plan including the terms upon which the Old Colony would rejoin the New Haven. The reorganization plan could be more easily formulated if the court had power to deal with the lessor lines without the owners consent. See Palmer v. Palmer, 59 S. Ct. 647 (1939); reversing Old Colony R. Co. v. New York, N. H. & H. R. Co., 98 F. (2d) 670 (C.C.A. 2d 1938); Moody's, *op. cit. supra* note 26, at 645 (1938).

[33] Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U.S. 648 (1935).

[34] P. 324. [35] See note 26 *supra*. [1] 23 F. Supp. 53 (Ohio 1938).