

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 20 - Death and Bankruptcy
Section 1. - Death

Introductory

20-001

The general rule at common law was that the maxim *actio personalis moritur cum persona* had no application to any breach of contract, except breach of a promise to marry.¹ Hence the personal representatives of a deceased contracting party could generally sue and be sued on contracts made by him in his lifetime. However, the operation of the maxim quoted above has been greatly circumscribed by the Law Reform (Miscellaneous Provisions) Act 1934 s.1(1) of which provides that on the death of any person after the commencement of the Act, all causes of action (with certain exceptions in tort) subsisting against or vested in him shall survive against or for the benefit of his estate.

Actions by personal representatives

20-002

Wherever money due on a contract made with the deceased will, when recovered, be assets, the executor or administrator may sue for it in his representative capacity.² Therefore, when the defendant ordered a coat of one T, a tailor, but before the coat was finished T died, and the coat was afterwards finished and delivered by his administratrix, it was held that the value of the coat was recoverable in an action for goods sold and delivered by her as administratrix.³ Again, where a person agreed to do certain work and died before it was begun and his executors did the work, using his materials, it was held that the executors might sue in that capacity for the value of the materials⁴, and in such a case they might also sue for work and labour as executors.⁵ An executor may also sue in that capacity for goods sold by him in the course of carrying on and continuing as executor the testator's business, although the goods were acquired by the executor after the testator's death, provided they formed part of the assets.⁶

Recovery of damages by personal representatives

20-003

There is no rule of law which prevents a personal representative from recovering larger damages than the deceased could have recovered had he survived. Accordingly, where solicitors in breach of contract negligently advised a young man that he was tenant in fee simple of certain property and that he need take no steps to reduce it into possession, whereas in fact he was tenant in tail, and he died before barring the entail, his personal representatives recovered substantial damages, although if the deceased had lived he could only have recovered nominal damages, since the mistake could easily have been rectified.⁷

When right of action arises

20-004

An executor's title to the property of his testator is derived from the will and not from the grant of probate. He may therefore begin an action as executor before probate, but cannot complete his case without proving his title, and must accordingly obtain probate before the hearing.⁸ An administrator's title is derived from the grant of administration, but upon the grant being made, his title relates back to the date of the intestate's death⁹; however, a subsequent grant of letters of administration cannot operate retrospectively to validate a writ which from the beginning was a nullity, e.g. as being issued in a representative capacity not possessed by the person issuing the writ.¹⁰

Actions against personal representatives**20-005**

Similarly, in principle, the personal representatives of a contracting party are bound, so far as his assets will extend, to perform all his contracts although not named therein.¹¹ Special provision now exists enabling proceedings to be brought against a deceased person's estate prior to a grant of probate or administration.¹²

Personal contracts**20-006**

The Law Reform (Miscellaneous Provisions) Act 1934 contains no exception for contracts involving personal skill, taste or confidence, such as a contract of service,¹³ a contract to perform at a concert,¹⁴ to paint a picture, to write a book, or to act as professional jockey to the owner of racehorses.¹⁵ In such contracts, however, there is probably no cause of action to survive, as the contract is frustrated by the death of the party whose skill or other personal qualifications were relied upon.¹⁶ The personal representatives are, however, entitled to sue for any money actually earned by the deceased under his contract, which has become due during his lifetime.¹⁷ Further, where the contract is in such terms that the remuneration should continue after the service has ceased, the personal representatives may sue for remuneration accrued due after death.¹⁸ And of course if a personal contract is broken by a contracting party during his lifetime, and one party subsequently dies, the cause of action survives the death and his personal representatives can sue or be sued for breach.¹⁹

20-007

It is thought that the question whether a contract is personal for this purpose is generally the same as whether the contract is personal for the purposes of the law relating to voluntary assignments and vicarious performance²⁰; that is, the benefit of a contract which can be voluntarily assigned, and the burden of a contract which can be vicariously performed, will (subject to the terms of the contract itself) be transmissible to the personal representatives of the contracting parties.²¹ It appears, however, that there are some cases in which the benefit of a contract will pass on the death of a party to his personal representatives, although it may not be assignable inter vivos, e.g. in the case of third-party road traffic insurance policies.²²

Personal liability of personal representatives**20-008**

The general rule is that a personal representative is not personally liable on the contracts of the deceased: he is liable only to the extent of the assets of the estate. There is, however, a singular exception in the case of the covenants in a lease. Before entry and taking possession, the personal representatives of a tenant cannot be made personally liable as assignees of the term,²³ though they are liable to the extent of assets.²⁴ If they do enter, then they may be personally liable. Yet they may, by proper pleading, limit their liability for rent to the yearly value the premises might have yielded.²⁵

No such defence is, however, apparently allowed if the personal representative is sued after entry for a breach of the covenant to repair. ²⁶

Confirmation of deceased's contract

20-009

An administrator will generally be liable upon contracts which he confirms whether the contracts are made by the deceased or by an agent of the deceased: this is sometimes referred to as ratification, but does not seem to be a true application of agency principles. ²⁷ However, confirmation of a contract made by an agent and a third party does not necessarily involve confirmation of a contract between the deceased and the agent of which the administrator may have been ignorant. Thus, where an agent, after the death of his principal, in pursuance of a contract made with him before the death sold the principal's goods, it was held that the principal's agreement to remunerate the agent was discharged by the death, and that confirmation of the sale by the administrator did not render him liable to remunerate the agent. ²⁸

Executor carrying on business of testator

20-010

Unless empowered to do so by the testator's will, an executor is not entitled to carry on the testator's business, except for the purpose of winding it up. If he does carry it on, whether with or without authority, he is personally liable upon the contracts he makes, and persons contracting with him have no remedy against the testator's assets. ²⁹ The executor, if he has carried on the business in accordance with his duty, has a right to be indemnified out of the estate, and any profits made belong to the estate. He is not, however, entitled to be indemnified out of the estate in priority to the testator's creditors, even when empowered by the will to carry on the business, unless they consent to its being carried on. ³⁰ The fact that the creditors stand by with knowledge that it is being carried on and without interference is not of itself sufficient to show consent. ³¹ Executors who carried on their testator's business under the powers of his will in the same firm name as before were held not to be partners, though no doubt joint debtors. ³² An administrator only has power to continue the intestate's business with a view to realising its assets. The statutory power ³³ to postpone sale for such period as he may think proper may justify trading for purposes other than realisation especially in view of the duty of a personal representative to preserve the business as an asset. ³⁴

Liability on bills or notes

20-011

Where a person such as an executor is under an obligation to indorse a bill of exchange in a representative capacity, he may do so in such terms as to negative personal liability. ³⁵ If he fails to do so he is personally liable. ³⁶

Executor de son tort

20-012

An executor de son tort is one who assumes the office of executor or interferes with the assets without having been appointed executor or having obtained a grant of administration. ³⁷ He is liable in the same manner as a rightful executor ³⁸; and this rule includes the executor de son tort of an original rightful executor. But the executor of an executor de son tort is not liable for a breach of contract committed by the person with whose estate the executor de son tort has intermeddled, and similarly there is no such liability in the case of an executor of an administrator de son tort. ³⁹

Protection of representative on distribution of estate

20-013

A personal representative who has protected himself by advertisements ⁴⁰ in accordance with s.27 of the Trustee Act 1925 may, at the expiration of the time fixed in the notice, distribute the property to which the notice relates, having regard only to the claims of which he has notice ⁴¹ and is not liable to any person of whose claim he has not had notice at the time of distribution. A creditor may, however, in spite of the distribution, follow the property or any property representing it into the hands of any person (other than a purchaser) who may have received it, in order to satisfy his claim, ⁴² and he need not join the representative in any such proceedings. ⁴³

Payment and compounding of debts by executor

20-014

By s.15 of the Trustee Act 1925, a personal representative may pay or allow any debt or claim ⁴⁴ on any evidence that he thinks sufficient, and may accept any composition or any security for any debt and allow any time of payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate. He is not bound to avail himself of the Limitation Act 1980 in an action brought against him by a creditor of his testator, ⁴⁵ but he may not pay such a debt after it has been judicially declared by a court of competent jurisdiction to be statute-barred, ⁴⁶ nor may he pay a debt which is unenforceable under the Statute of Frauds. ⁴⁷

-
1. *Pinchon's Case* (1611) 9 Co. Rep. 86b; *Hambly v Trott* (1775) 1 Cowp. 371, 375; *Raymond v Fitch* (1835) 2 Cr. M. & R. 588; *Phillips v Homfray* (1883) 24 Ch. D. 439, 456–457.
 2. *Marshall v Broadhurst* (1831) 1 Cr. & J. 403, 405; *Heath v Chilton* (1844) 12 M. & W. 632, 637; *Moseley v Rendell* (1871) L.R. 6 Q.B. 338; *Abbott v Parfitt* (1871) L.R. 6 Q.B. 346.
 3. *Werner v Humphreys* (1841) 2 M. & G. 853.
 4. *Marshall v Broadhurst* (1831) 1 Cr. J. 403.
 5. (1831) 1 Cr. J. 403; *Edwards v Grace* (1836) 2 M. & W. 190.
 6. *Aspinall v Wake* (1833) 10 Bing. 51; *Abbott v Parfitt* (1871) L.R. 6 Q.B. 346.
 7. *Otter v Church, Adams, Tatham & Co* [1953] Ch. 280. See also *Ross v Caunters* [1980] Ch. 297; *Clarke v Bruce Lance & Co (A Firm)* [1988] 1 W.L.R. 881; *White v Jones* [1995] 2 A.C. 207; *Hemmens v Wilson Browne* [1995] Ch. 223.
 8. *Thompson v Reynolds* (1872) 3 C. & P. 123; *Re Masonic, etc. Assurance Co* (1885) 32 Ch. D. 373. As to staying executor's action where the defendant admits the claim, but requires production of the probate, see *Webb v Adkins* (1854) 14 C.B. 401; *Tarn v Commercial Bank of Sydney* (1884) 12 Q.B.D. 294.
 9. *Wooley v Clarke* (1822) 5 B. & Ald. 744; *Foster v Bates* (1843) 12 M. & W. 226. Administrators now have the same rights and liabilities and are accountable in the same manner as executors: Administration of Estates Act 1925 s.21.
 10. *Ingall v Moran* [1944] K.B. 160; *Hilton v Sutton Steam Laundry* [1946] K.B. 65; *Burns v Campbell* [1952] 1 K.B. 15; *Finnegan v Cementation Co Ltd* [1953] 1 Q.B. 688. See also *Re Crowhurst Park* [1974] 1 W.L.R. 583. But cf. the different rule in actions for the recovery of land: Limitation Act 1980 s.26. The statement in the text appears to be unaffected by CPR r.17.4,

which gives the court power in certain specified cases to allow amendments to the writ or pleadings, notwithstanding that the effect may be to deprive a party of a defence under the Limitation Act 1980: *Dawson (Bradford) v Dove* [1971] 1 Q.B. 330 (see n.12). As to the effect of RSC Ord.20 r.5, the predecessor to CPR r.17.4, generally, see *Beck v Value Capital Ltd (No.2)* [1975] 1 W.L.R. 6; [1976] 1 W.L.R. 572; *Hancock Shipping Co Ltd v Kawasaki Heavy Industries Ltd* [1992] 1 W.L.R. 1025.

11. *Williams v Burrell* (1845) 1 C.B. 402; *Wills v Murray* (1850) 4 Exch. 843, 865; *Kennewell v Dye* [1949] Ch. 517, 521–522; *Youngmin v Heath* [1974] 1 W.L.R. 135. For the position of options see *Longbutt v Amoco Australia Pty Ltd* (1974) 4 A.L.R. 482.
12. See RSC Ord.15 r.6A para.3, preserved by CPR Sch.1, which negatives *Dawson (Bradford) v Dove* [1971] 1 Q.B. 330. As regards bankruptcy see Insolvency Act 1986 s.421; Administration of Insolvent Estates Deceased Persons Order 1986 (SI 1986/1999); *Hounslow v Ballard* [2010] B.P.I.R. 149.
13. *Farrow v Wilson* (1869) L.R. 4 C.P. 744.
14. cf. *Robinson v Davison* (1871) L.R. 6 Ex. 269.
15. *Graves v Cohen* (1829) 46 T.L.R. 121. cf. *Phillips v Alhambra Palace Co* [1901] 1 Q.B. 59 (surviving partners who owned a music hall liable on contract with troupe of music hall performers); *Harvey v Tivoli (Manchester) Ltd* (1907) 23 T.L.R. 592 (surviving members of a troupe of music hall artistes cannot enforce contract against owner of music hall).
16. *Stubbs v Holywell Ry* (1867) L.R. 2 Ex. 311, 314.
17. *Stubbs v Holywell Ry* (1867) L.R. 2 Ex 311.
18. *Wilson v Harper* [1908] 2 Ch. 370.
19. *Shaw v Shaw* [1954] 2 Q.B. 429.
20. As to personal contracts which cannot be voluntarily assigned or vicariously performed, see above, paras 19-043 et seq. As to personal contracts the benefit of which do not pass to a debtor's trustee in bankruptcy, see below, para.20-034.
21. See, e.g. *Warner Engineering Co Ltd v Brennan* (1913) 30 T.L.R. 191; *Re Worthington* [1914] 2 K.B. 299; cf. *Collins v Associated Greyhound Racecourses* [1930] 1 Ch. 1.
22. See *Peters v General Accident, etc., Ltd* [1938] 2 All E.R. 267 and *Kelly v Cornhill Insurance Co* [1964] 1 W.L.R. 158. It is implicit in this latter case that such a policy does not, in the absence of some express stipulation, come to an end on the death of the insured.
23. *Wollaston v Hakewill* (1841) 3 M. & G. 297; *Rendall v Andreae* (1892) 61 L.J.Q.B. 630.
24. *Youngmin v Heath* [1974] 1 W.L.R. 135.
25. *Rendall v Andreae* (1892) 61 L.J.Q.B. 630; *Whitehead v Palmer* [1908] 1 K.B. 151.
26. *Tremeere v Morrison* (1834) 1 Bing.N.C. 89; followed in *Sleap v Newman* (1862) 12 C.B.(N.S.) 116; *Rendall v Andreae* (1892) 61 L.J.Q.B. 630.
27. See *Foster v Bates* (1843) 12 M. & W. 226; Powell, *Law of Agency*, 2nd edn (1961), p.388, n.7; cf. *Greenwood v Martins Bank Ltd* [1933] A.C. 51 (adoption of a forgery).
28. *Campanari v Woodburn* (1854) 15 C.B. 400. A quantum meruit might have been available. As to this remedy, see below, paras 29-073—29-082. But cf. *Ex p. Phillips* (1887) 19 Q.B.D. 234.
29. *Re Morgan* (1881) 18 Ch. D. 93; *Re Evans* (1887) 34 Ch. D. 597.

- [30.](#) *Dowse v Gorton* [1891] A.C. 190. Except where he has carried on only for such reasonable time as is necessary for selling the business as a going concern: 199.
- [31.](#) *Re Oxley* [1914] 1 Ch. 604; *Re East* (1914) 111 L.T. 101.
- [32.](#) *Re Fisher & Sons* [1912] 2 K.B. 491.
- [33.](#) Administration of Estates Act 1925 s.33(1).
- [34.](#) *Strickland v Symons* (1883) 22 Ch. D. 666, 671; (1884) 26 Ch. D. 245, see also *Garrett v Noble* (1834) 6 Sim. 504 (defence to action for breach of trust in continuing business).
- [35.](#) Bills of Exchange Act 1882 ss.31(5), 26(1).
- [36.](#) *King v Thom* (1789) 1 T.R. 487. cf. *Childs v Monins* (1821) 2 B. & B. 460; *Liverpool Borough Bank v Walker* (1859) 4 De G. & J. 24. See Vol.II, para.34-041.
- [37.](#) See, e.g. *Williams v Heales* (1874) L.R. 9 C.P. 177; *Stratford-upon-Avon Corp v Parker* [1914] 2 K.B. 562; Administration of Estates Act 1925 s.28.
- [38.](#) *Meyrick v Anderson* (1850) 14 Q.B. 719.
- [39.](#) *Wilson v Hodson* (1872) L.R. 7 Ex. 84.
- [40.](#) Or has been excused from the need to advertise by an order of the court: *Re Gess* [1942] Ch. 37. As to the form of such advertisements, see *Re Aldhous* [1955] 1 W.L.R. 459.
- [41.](#) *Guardian Trust and Executors Co Ltd v Public Trustee of New Zealand* [1942] A.C. 115.
- [42.](#) Trustee Act 1925 s.27(2); Administration of Estates Act 1925 s.38.
- [43.](#) *Hunter v Young* (1879) 4 Ex. D. 256; *Re Frewen* (1889) 60 L.T. 953.
- [44.](#) Including a claim by a co-executor: *Re Houghton* [1904] 1 Ch. 622.
- [45.](#) *Stahlschmidt v Lett* (1853) 1 Sm. & G. 415; *Hill v Walker* (1854) 4 K. & J. 166; *Lewis v Rumney* (1867) L.R. 4 Eq. 451; *Midgley v Midgley* [1893] 3 Ch. 282, 297.
- [46.](#) *Midgley v Midgley* [1893] 3 Ch. 282.
- [47.](#) *Re Rownson* (1885) 29 Ch. D. 358.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 20 - Death and Bankruptcy
Section 2. - Bankruptcy ⁴⁸

Preliminary

20-015

The bankruptcy of one or both parties to a contract may have a considerable effect upon their contractual obligations. Technically a debtor only becomes bankrupt on the making of a bankruptcy order, ⁴⁹ which may take place some time after the commencement of bankruptcy proceedings, but the insolvency of a party to a contract prior to his bankruptcy may materially affect the obligations of the other party.

20-016

The property of a person adjudicated bankrupt vests in the trustee in bankruptcy and, for this purpose, the bankrupt's property includes choses in action. Thus the benefit of a contract made by a person later adjudicated bankrupt passes to his trustee. ⁵⁰ Broadly speaking, the trustee in bankruptcy steps into the shoes of the bankrupt and, so far as the law of contract is concerned, the result of adjudication is to effect a form of assignment by operation of law. In addition, rights may sometimes pass to the trustee even though they did not belong to the bankrupt. ⁵¹ Rights of a personal nature do not pass to the trustee, ⁵² and he may sometimes disclaim the burden of onerous contracts. ⁵³ Where contracts vest in the trustee, he normally takes them "subject to equities" in the sense that the other contracting party may set up defences against him which would have been available against the bankrupt himself. ⁵⁴ Purely personal defences cannot, however, be set up against the trustee, ⁵⁵ and there are special statutory provisions relating to set-off. ⁵⁶

20-017

Once a bankruptcy order is made against a person, normal legal remedies cease to be available against him, so that he can no longer be sued for (inter alia) breach of contract. The remedy of the other contracting party is to prove for his loss or damage in the bankruptcy, ⁵⁷ and once the bankrupt has been discharged all liabilities which could have been proved are finally discharged. ⁵⁸ A bankrupt remains personally liable on contracts entered into by him *after* adjudication, ⁵⁹ but since the bankrupt's property can on the application of his trustee in bankruptcy be made to vest in the trustee even where it is acquired after adjudication, the other contracting party may find that the bankrupt has no assets with which to meet any such liability. ⁶⁰ In these circumstances it is possible to take new bankruptcy proceedings in which property acquired after the previous adjudication and still undistributed will pass to the second trustee. ⁶¹

^{48.} This section does not profess to be a summary of the whole of the law of bankruptcy, but only of the effect of bankruptcy on contracts. See generally Muir Hunter on Personal Insolvency (London: Sweet & Maxwell). (Bankruptcy is now dealt with in the Insolvency Act 1986. The second group of parts of the Act which deal with individual insolvency is entitled "Insolvency of Individuals; Bankruptcy".)

- [49.](#) Insolvency Act 1986 s.278(a).
- [50.](#) Below, para.20-019.
- [51.](#) Below, paras 20-024 et seq.
- [52.](#) Below, para.20-034.
- [53.](#) Below, para.20-035.
- [54.](#) Below, para.20-039.
- [55.](#) Below, para.20-039.
- [56.](#) Below, paras 20-040 et seq.
- [57.](#) Below, para.20-037.
- [58.](#) Below, para.20-046.
- [59.](#) Below, para.20-053.
- [60.](#) Insolvency Act 1986 s.305; paras 20-024 et seq. In special cases the other contracting party may be able to invoke the rule in *Ex p. James (1874) L.R. 9 Ch. App. 609*, below, para.20-022.
- [61.](#) Below, para.20-057.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 20 - Death and Bankruptcy
Section 2. - Bankruptcy ⁴⁸
(a) - Contracts Made Prior to Bankruptcy

Grounds for creditor's bankruptcy petition

20-018

A creditor may present a bankruptcy petition against a debtor where the debtor owes him a debt for a liquidated sum which is unsecured ⁶² and which exceeds the "bankruptcy level" ⁶³ and "the debtor either appears to be unable to pay or to have no reasonable prospect of being able to pay" the debt. ⁶⁴ A creditor can satisfy the requirement of showing that the debtor is unable to pay his debt by serving a statutory demand which the debtor fails to comply with within a three-week period or to have set aside. ⁶⁵

Effect of presenting a bankruptcy petition

20-019

The bankruptcy of an individual commences on the day on which a bankruptcy order is made. ⁶⁶ The property comprised in the bankrupt's estate is defined by s.283 of the Insolvency Act 1986; broadly it is "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy". The general principle of insolvency law is that the trustee in bankruptcy takes no better title to property than was possessed by the debtor and therefore excluded from the bankrupt's available property is any property held on trust by the bankrupt. ⁶⁷ Property is given a very wide definition and includes "things in action" and "every description of property wherever situated". ⁶⁸ In *Heath v Tang* ⁶⁹ it was held that a bankrupt could not appeal against the judgment on which the bankruptcy order was based since this right of action was vested in the trustee. ⁷⁰ Certain property is excluded from the estate of the bankrupt, the major categories being tools and equipment necessary to enable the bankrupt to carry on business and personal belongings. ⁷¹ Also certain actions which are personal to the bankrupt, for example, actions for damages for pain and suffering, do not vest in the trustee. ⁷² Where a person is adjudged bankrupt any disposition of property, if made between the day on which the petition is presented and the vesting of the estate in the trustee, is void except to the extent that it is made with the consent of the court or is ratified by it. ⁷³ This section could obviously affect the validity of a contract involving a disposition or anything done under a contract entered into by the bankrupt after the presentation of a petition. It is important to note that it is only dispositions by the bankrupt that are affected and not dispositions made to him; it is thus possible for a person to make payment to the bankrupt and to obtain a good discharge until the estate is vested in the trustee. ⁷⁴ A person who deals with the bankrupt in good faith before the commencement of the bankruptcy, ⁷⁵ who gives value and who has no notice of the presentation of the petition, ⁷⁶ is protected. ⁷⁷

Proof of notice

20-020

It is probably for the person supporting the transaction to show that it was entered into without notice of the presentation of the bankruptcy petition.⁷⁸ He will probably have to establish that he had no knowledge or notice of any facts which would reasonably lead an ordinary man of business to conclude that a bankruptcy petition had been presented.⁷⁹ A statement by a creditor that he intends to present a bankruptcy petition would not be notice for the purpose of the section.⁸⁰ Notice to an agent is not necessarily notice to his principal, for example, notice to a sheriff's officer is not notice to the creditor,⁸¹ but notice to a creditor's solicitor in the course of a particular matter in respect of which a solicitor has usual authority will be sufficient to fix the creditor with notice.⁸²

Assignments by bankrupt

20-021

Since s.284(4) has the effect of validating assignments of debts made by the bankrupt, it follows that payment by the debtor to the assignee is also validated. In such circumstances it is immaterial that the debtor had notice of an act of bankruptcy, provided only that the assignee had no such notice at the date of the assignment.⁸³ Moreover, even where there has been no assignment, a payment by a debtor to a third party at the request of the creditor (later made bankrupt) is within the protection of the section though in this case it is essential that the payer has no notice of an act of bankruptcy.⁸⁴

The rule in *Ex p. James*

20-022

The rule in *Ex p. James*,⁸⁵ governs situations in which, though in law the money or property belongs to the trustee for the creditors, the trustee is restrained from enforcing his claim to it or retaining it. The court will restrain the trustee whenever it would not be honourable or high minded for the trustee to assert his title.⁸⁶ The fact that the applicability of the rule depends upon a finding that the trustee has not met a high standard of moral, as distinct from legal, honesty has led to uncertainty and has been criticised.⁸⁷

Conditions of application of rule

20-023

There are, however, other, more certain, prerequisites to the application of the rule. First, there must be some form of enrichment of the assets of the bankrupt by the person seeking to invoke the rule.⁸⁸ Secondly, the claimant must not normally be in a position to submit a proof of the claim in the bankruptcy: the rule should not give a creditor preference but should give relief where there would otherwise be none.⁸⁹ Finally, when the rule does apply, it applies only to the extent necessary to nullify the enrichment and not so as to restore the claimant to the status quo ante by compensating him for his full loss.⁹⁰ So, the court has allowed an execution creditor to recover money paid to the trustee under a mistake of law,⁹¹ a wife to recover premiums paid (with the knowledge of the official receiver) in respect of her bankrupt husband's life policy,⁹² a lender to recover a loan made to the bankrupt the day after the receiving order had been made,⁹³ agents to retain sums paid to them after the receiving order with the knowledge and approval of the official receiver,⁹⁴ a seller to retain the price of goods sold and delivered shortly after, but in ignorance of the making of a receiving order,⁹⁵ and executors to retain sums for funeral expenses and creditors for payment for necessities supplied to the debtor out of money earned by him after the adjudication.⁹⁶ On the other hand, premiums paid in respect of life policies have in varying circumstances been held not to be protected,⁹⁷ builders who had erected buildings on the debtor's land immediately prior to bankruptcy could not recover because they had omitted to take a charge,⁹⁸ and counsel could not recover his fees where they had been paid to a deceased insolvent solicitor.⁹⁹

- [48.](#) This section does not profess to be a summary of the whole of the law of bankruptcy, but only of the effect of bankruptcy on contracts. See generally Muir Hunter on Personal Insolvency (London: Sweet & Maxwell). (Bankruptcy is now dealt with in the Insolvency Act 1986. The second group of parts of the Act which deal with individual insolvency is entitled “Insolvency of Individuals; Bankruptcy”.)
- [62.](#) Where the debt is secured, the creditor may waive the security and present a bankruptcy petition: see s.269; *Zandfarid v BCCI* [1996] 1 W.L.R. 1420.
- [63.](#) The bankruptcy level is £750 and it can be altered by statutory instrument: Insolvency Act 1986 s.267. This must be owing at the time the petition is presented: see *Re Patel (A Debtor)* [1986] 1 W.L.R. 221; *Coulter v Chief Constable of Dorset Police* [2004] EWCA 1259, [2005] B.P.I.R. 62. See, however, *Lilley v American Express (Europe) Ltd* [2000] B.P.I.R. 70.
- [64.](#) s.267(2). The debtor may also present a petition: see s.272; *Re Coney* [1998] B.P.I.R. 333.
- [65.](#) s.268(1). As regards inability to pay debts not yet due, see s.268(2). A document which purports to be a statutory demand is a statutory demand even though defective: *Re A Debtor (No.1 of 1987)* [1989] 1 W.L.R. 271; see also *Re A Debtor (No.1 of 1987)* [1989] 1 W.L.R. 461; *Practice Note (Bankruptcy: Service Abroad) (No.1 of 88)* [1988] 1 W.L.R. 461; *Practice Note (Bankruptcy: Prescribed Forms) (No.2 of 88)* [1988] 1 W.L.R. 557; *Re A Debtor (No.415-5D-1993)*, *The Times*, December 8, 1993 (debtor faced with statutory demand not entitled to have it set aside because he offered security).
- [66.](#) Insolvency Act 1986 s.278(a); the bankruptcy continues until the debtor is discharged or the bankruptcy order is annulled: s.278(b). The 1986 Act does not make use of the doctrine of relation back formerly contained in s.37 of the Bankruptcy Act 1914.
- [67.](#) s.283(3)(a); see generally, Cork Report, Cmnd.8558 (1982), Ch.22.
- [68.](#) s.436. It also can include after acquired property: see para.20-017. On the effect of bankruptcy on joint tenancies: see *Re Dennis (A Bankrupt)* [1993] Ch. 72; *Re Palmer (Deceased) (A Debtor)* [1993] 4 All E.R. 812; *Re Pavlou (A Bankrupt)* [1993] 1 W.L.R. 1046, 1048.
- [69.](#) [1993] 1 W.L.R. 1421.
- [70.](#) A bankrupt who is dissatisfied with the conduct of the trustee can seek relief under s.303 of the 1986 Act.
- [71.](#) s.283(2); business is defined in s.436 to mean “trade or profession”. Where the excluded property exceeds the cost of a reasonable replacement, it can be recovered from the bankrupt and a replacement provided: s.308. The matrimonial home will be dealt with in para.20-036.
- [72.](#) *Heath v Tang* [1993] 1 W.L.R. 1421, 1423.
- [73.](#) s.284(1). Section 284(2) extends the section to a “payment” whether in cash or otherwise. No indication is given as to how the court should exercise its discretion but presumably the court will follow the principles developed with respect to similar provision dealing with corporate insolvency: see s.127. Section 284(5) provides special rules with respect to banks.
- [74.](#) s.306.
- [75.](#) Bankruptcy commences on the date on which the bankruptcy order is made: Insolvency Act 1986 s.278(a).
- [76.](#) It is important to note that it is notice of the petition and not the making of a statutory demand that is important. Notice of the making of a statutory demand may affect the question of good faith: Muir Hunter on Personal Insolvency, paras 3-153—3-154. On the meaning of good faith under s.46 of the Bankruptcy Act 1914, see *Re Simms* [1930] 2 Ch. 22; *Re Dalton* [1963] Ch. 336.

77. s.284(4); enhanced protection is given to a bank where the bankrupt incurs a debt after the commencement of his bankruptcy: s.284(5); see generally Muir Hunter on Personal Insolvency, paras 3-691 et seq. As regards actions against a debtor once bankruptcy proceedings have begun or an order made, see s.285; *Realisations Industrielles et Commerciales SA v Loescher* [1957] 1 W.L.R. 1026.
78. *Re Dalton* [1963] Ch. 336, 351 (dealing with position under the Bankruptcy Act 1914).
79. For the position under the Bankruptcy Act 1914, see *Smith v Osborn* (1858) 1 F. & F. 267; *Ex p. Snowball* (1872) L.R. 7 Ch. App. 534; *Ex p. Dawes* (1875) L.R. 19 Eq. 438; *Herbert's Trustee v Higgins* [1926] Ch. 794, 800.
80. *Herbert's Trustee v Higgins* [1926] Ch. 794.
81. *Ex p. Schulte* (1874) L.R. 9 Ch. App. 409. Strictly speaking a sheriff's officer is not the agent of the party on whose behalf he acts: *Hooper v Lane* (1857) 6 H.L.C. 443; *Barclays Bank v Roberts* [1954] 1 W.L.R. 1212.
82. *Brewin v Briscoe* (1859) 28 L.J.Q.B. 329. See also *Re Dalton* [1963] Ch. 336 (notice to debtor's solicitor); see generally Bowstead and Reynolds on the Law of Agency, 20th edn (2014), paras 8-204—8-214.
83. *Re Dalton* [1963] Ch. 336. It is also immaterial that the assignee does not actually claim payment from the debtor until after the receiving order, so long as he had no notice of an act of bankruptcy at the date of the assignment: *Re Seaman* [1896] 1 Q.B. 412.
84. *Re Dalton* [1963] Ch. 336.
85. [1874] L.R. 9 Ch. App. 609. See also *Re Byfield* [1982] Ch. 268; *Re Multi Guarantee Co Ltd* [1987] B.C.L.C. 257; *Commissioners of Customs & Excise v T.H. Knitwear Ltd* [1986] B.C.L.C. 195; *Hartgarten Ltd v Australian Gas Light Co Ltd* (1992) 8 A.C.S.R. 277; Goff and Jones, *The Law of Restitution*, 11th edn (2008), paras 5-012—5-016.
86. *Re Wigzell* [1921] 2 K.B. 835, 850, 858; *Re Tyler* [1907] 1 K.B. 865; *Re Clark (A Bankrupt)* [1975] 1 W.L.R. 559, 564. A number of different phrases, all indicating moral opprobrium, have been used to describe the trustee's conduct.
87. *Re Wigzell* [1921] 2 K.B. 835, 845, 850, 858; *Re Byfield* [1982] Ch. 268.
88. *Government of India v Taylor* [1955] A.C. 491, 512–513; *Re Clark (A Bankrupt)* [1975] 1 W.L.R. 559, 563.
89. *Re Clark (A Bankrupt)* [1975] 1 W.L.R. 559, 564, 566; *Re Gozzett* [1936] 1 All E.R. 79; *Re Multi Guarantee Co Ltd* [1987] B.C.L.C. 257, 270. This may explain the willingness of the court to intervene in *Re Thellusson* [1919] 2 K.B. 735. But cf. *Re Cushla Ltd* [1979] 3 All E.R. 415, 423.
90. *Re Clark (A Bankrupt)* [1975] 1 W.L.R. 559, 564.
91. *Ex p. James* [1874] L.R. 9 Ch. App. 609. Although a trustee who deals with a creditor will not be allowed to take advantage of a technical mistake bona fide committed by the creditor (*Re Tricks* (1885) 3 Morr. 15) the rule will probably not protect a creditor who makes such a mistake in his dealings with other creditors or the debtor: *Re Tyler* [1907] 1 K.B. 865; *Re Gozzett* [1936] 1 All E.R. 79. See also *Re Byfield* [1982] Ch. 268 (good faith payment by debtor's bank used to pay certain creditors not protected by the rule.)
92. *Re Tyler* [1907] 1 K.B. 865.
93. *Re Thellusson* [1919] 2 K.B. 735 (breadth of dicta questioned in *Re Wigzell* [1921] 2 K.B. 835, but see n.91, above).

- [94.](#) *Re Wilson Ex p. Salaman* [1926] Ch. 21.
- [95.](#) *Re Clark (A Bankrupt)* [1975] 1 W.L.R. 559.
- [96.](#) *Re Walter* [1929] 1 Ch. 647.
- [97.](#) *Tapster v Ward* (1909) 101 L.T. 503; *Re Phillips* [1914] 2 K.B. 689; *Re Stokes* [1919] 2 K.B. 256 . The distinction between these cases and *Re Tyler* [1907] K.B. 865, may lie in the fact that in *Re Tyler* the trustee was aware of the existence of the policy and the payments.
- [98.](#) *Re Gozzett* [1936] 1 All E.R. 79.
- [99.](#) *Re Sandiford (No.2)* [1935] Ch. 681.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 20 - Death and Bankruptcy
Section 2. - Bankruptcy ⁴⁸
(b) - Vesting of Property in Trustee

Appointment of trustee

20-024

Between the making of a bankruptcy order and the vesting of the bankrupt's estate in the trustee, the official receiver is under a duty to act as the receiver and manager of the bankrupt's estate. ¹⁰⁰ Once a bankruptcy order has been made it is normally the creditors in general meeting who will appoint the trustee of the bankrupt's estate. ¹⁰¹ No person can be appointed a trustee unless qualified to act as an insolvency practitioner in relation to the bankrupt. ¹⁰² The bankrupt's property vests immediately on the appointment of the trustee taking effect and there is no need for a conveyance, assignment or transfer. ¹⁰³

Vesting provisions mandatory

20-025

The vesting provisions of the Insolvency Act are, it would appear, mandatory, and contracting out is not permissible. ¹⁰⁴ Thus a contract is invalid in so far as it provides that on the bankruptcy of one of the parties debts then due to him are not to pass to the trustee but are (for instance) to be offset or "cleared" against liabilities of the bankrupt to a third party. ¹⁰⁵

Choses in action

20-026

Prima facie all choses in action belonging to the bankrupt at the commencement of the bankruptcy pass to the trustee as part of the bankrupt's property. ¹⁰⁶ There is, however, nothing to prevent the trustee from reassigning a chose in action to the debtor. ¹⁰⁷ Difficulties may arise where the bankrupt has purported to assign such a chose in action prior to the commencement of the bankruptcy. Generally such an assignment is valid and binding on the trustee as the successor in title of the assignor, but the trustee can upset such an assignment in two main cases. ¹⁰⁸ First, an assignment of future choses in action which are not actually earned (in the sense that the whole consideration is not supplied) until after the commencement of the bankruptcy is void against the trustee. ¹⁰⁹ Secondly, a general assignment of existing or future book debts (or any class thereof) by a trader is void against the trustee unless it has been registered as if it were a bill of sale. ¹¹⁰

Adjustment of prior transactions

20-027

There are certain transactions entered into by a bankrupt prior to his bankruptcy which can be challenged by his trustee. If these transactions are successfully challenged they will be unenforceable against the estate of the bankrupt and the trustee may be able to recover with respect to them with the consequence that the bankrupt's estate will be increased for the benefit of his creditors. The transactions that may be challenged are: (i) transactions at an undervalue; (ii) preferences; (iii) extortionate credit transactions; and (iv) transactions defrauding creditors.

Transactions at an undervalue

20-028

A transaction at an undervalue is defined in section 339: it is a transaction in which a bankrupt makes a gift or otherwise receives no consideration, enters into a transaction in consideration of marriage, or enters into a transaction where the consideration provided by the other person to the contract is "significantly less, in money or money's worth", than the consideration provided by the bankrupt.¹¹¹ A transaction at an undervalue can only be challenged by the trustee if it is entered into at the "*relevant time*" which is defined as a period of five years prior to the presentation of the bankruptcy petition and, provided the transaction was not entered into less than two years before the presentation of the bankruptcy petition, the bankrupt was insolvent or rendered insolvent¹¹² by the transaction.¹¹³ The onus of showing insolvency is on the trustee but there is a presumption that the bankrupt was insolvent where the transaction is with an associate.¹¹⁴ Where a transaction at an undervalue is shown to have taken place, the court can:

"... make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction."¹¹⁵

No order can be made against a third party who is a bona fide purchaser for value unless he has notice of certain statutory prescribed circumstances which would allow the transaction to be set aside.¹¹⁶

Preferences

20-029

A preference occurs where a person does something which puts one of his creditors, or a surety or guarantor of his debts, in a better position than he would have been in the event of the person's bankruptcy had that thing not been done and the person providing the preference was influenced by a desire to put the other person in such a better position.¹¹⁷ Such a transaction can only be challenged if the transaction was entered into within the six-month period before the presentation of the petition¹¹⁸ and the individual is insolvent or rendered insolvent by the transaction.¹¹⁹ As with transactions at an undervalue, the courts are given very wide remedial powers.¹²⁰ The relevant time for determining whether there is an intention to prefer is when the transaction is entered into and the fact that the debtor believes that he will be in a position to pay all his debts will not negative a preference.¹²¹

Extortionate credit transactions

20-030

The provision on extortionate credit transactions is modelled on ss.137 to 139 of the Consumer Credit Act 1974.¹²² A transaction is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit, it requires the debtor to make grossly exorbitant payment or otherwise grossly contravenes "ordinary principles of fair dealing".¹²³ A transaction can only be challenged if entered into within three years before the commencement of the bankruptcy.¹²⁴ Where the court finds that a bankrupt has entered into an extortionate credit transaction, it is given very wide remedial powers to deal with the issue.¹²⁵

Transactions defrauding creditors

20-031

The definition of a transaction defrauding creditors in s.423 ¹²⁶ of the Insolvency Act 1986 (which applies to both individual bankruptcy and corporate insolvency ¹²⁷) is not unlike a transaction at an undervalue. Thus it applies to gifts, transactions in which a person receives no consideration, or where the consideration received is significantly less than the consideration provided. ¹²⁸ For such a transaction to be caught, it must have been entered into for the purpose of putting the assets beyond the reach of those who would have a claim against the transferor, or otherwise prejudicing the interests of the transferor's creditors. ¹²⁹ The advantage of this section over that relating to transactions at an undervalue is that no time limit for avoidance is fixed. In addition, the victim of the transaction may apply to have it set aside and not just the trustee in bankruptcy. ¹³⁰ Where there is a breach of s.423 the court has a very broad power under s.425 to remedy the situation. ¹³¹

Contracts not terminated by bankruptcy

20-032

A contract is not determined by the bankruptcy of one of the parties thereto. ¹³² Ordinarily the benefit of any contract made by the debtor passes to his trustee in bankruptcy as part of his property, subject to the trustee's right to disclaim unprofitable contracts, ¹³³ and, if it is an executory contract, the trustee may complete it and receive the benefit for the estate ¹³⁴; he may give receipts ¹³⁵ and, with the permission of the creditors' committee, ¹³⁶ exercise various powers, e.g. he may sue on the contract, assign the right of action to creditors ¹³⁷ or even to the bankrupt, ¹³⁸ sell the bankrupt's business (in a proper case even to a company promoted by himself and the creditors' committee ¹³⁹), or make any compromise of an action or claim. ¹⁴⁰

Effect on contractual rights

20-033

In some cases the rights of the trustee in respect of the bankrupt's contracts differ from the rights which the bankrupt would himself have had if he had remained solvent. Thus, in the case of the sale of goods, if a buyer becomes insolvent before the goods are delivered the seller may refuse to deliver them until paid in cash:

“... when the insolvency of the purchaser had been declared the vendor [was] ... not bound to deliver any more goods until the price of the goods delivered ... as well as those which were to be delivered ... had been tendered to him.” ¹⁴¹

The vendor may also exercise the right of lien ¹⁴² even though he has agreed to give the buyer credit, and would not therefore have had any lien in the absence of insolvency of the buyer. So also, the seller's right of stoppage in transit only arises if the buyer is insolvent. ¹⁴³ Where a person who has entered into a contract is subsequently adjudged bankrupt, the other party to the contract may apply to the court to be discharged. The court may discharge the contract on such terms as it thinks just and equitable and any damages payable by the bankrupt are provable as a bankruptcy debt. ¹⁴⁴

Contracts which do not pass

20-034

From the nature of certain contracts it follows that the benefit of them does not pass to the trustee. Contracts in which the personal skill of the bankrupt forms an essential part of the consideration are

instances of these.¹⁴⁵ A right of action for the wrongful dismissal of the bankrupt before his bankruptcy passes to his trustee.¹⁴⁶ Benefits payable under a permanent disability insurance policy constituted property of the bankrupt and passed to the trustee.¹⁴⁷ Rights of action in respect of injury to credit and reputation, or of personal injury, as opposed to injury to property, do not pass to the trustee in bankruptcy,¹⁴⁸ and in this type of case it seems that the trustee cannot even recover the fruits of the action received by the bankrupt¹⁴⁹; unless perhaps the trustee obtains an order relating to the bankrupt's after-acquired property.¹⁵⁰ It is often difficult to determine if the proceeds of an action for breach of contract vest in the trustee for the benefit of the bankrupt's creditors. This difficulty is particularly acute in hybrid actions, that is, an action involving a claim:

“... constituted by a single cause of action which is partly for personal injury or loss of reputation (to which the creditors are not entitled) and partly for financial loss (to which they normally are).”¹⁵¹

For example, in an action where there is a claim seeking the recovery of property (i.e. the loss of earnings), the cause of action vests in the trustee but if he recovers damages that are personal (i.e. damages for pain and nervous shock) he holds them on trust for the bankrupt.¹⁵² The whole action, however, vests in the trustee,¹⁵³ who will hold any personal recoveries on trust for the bankrupt.¹⁵⁴ In *Grady v HM Prison Service*¹⁵⁵ the court held that a claim for unfair dismissal, for which the court could order reinstatement or re-engagement, was personal but that damages for wrongful dismissal constituted property of the bankrupt's estate. Sedley L.J. stated that the authorities tended:

“... to place on the non-vesting side of the line a claim which is primarily directed at the restoration of a contractual relationship in which the claimant's skill and labour are the essential commodity.”¹⁵⁶

Difficult questions of characterisation arise with respect to claims that are connected with the fact that the bankrupt has gone into bankruptcy; obviously these claims are not pre-bankruptcy assets. In *Mulkerrins v Pricewaterhouse Coopers*¹⁵⁷ the House of Lords considered that a claim for damages against professional advisors who had given negligent advice resulting in the bankruptcy did not vest in the trustee in bankruptcy in that the damages represented what the bankrupt had “lost by the making of the bankruptcy order”.¹⁵⁸

Disclaimer

20-035

Section 315 of the Insolvency Act 1986 enables the trustee to disclaim onerous property and for this purpose onerous property is “any unprofitable contract”, property which is not saleable or readily saleable, or property that “may give rise to a liability to pay money or perform some other onerous act”.¹⁵⁹ The disclaimer operates from the date on which the prescribed notice, which has to be filed in court, is indorsed by the court.¹⁶⁰ Any person who suffers loss or damage in consequence of the disclaimer may prove in the bankruptcy.¹⁶¹ A notice of disclaimer with respect to property may not be given if the person interested in property had applied in writing to the trustee to decide whether to disclaim or not and 28 days have expired since that notice was given.¹⁶² The trustee is deemed to have adopted any contract which he cannot disclaim by virtue of this section.¹⁶³ Disclaimer is the right to get rid of property or contracts which are onerous, any contract which is unprofitable, any property which is unsaleable or not readily saleable, or which gives rise to a liability to pay money or to perform any other contract.¹⁶⁴ Disclaimer is intended to affect the rights of third parties as little as possible; s.315(3) provides that disclaimer only operates to the extent that is necessary “for the purpose of releasing the bankrupt, the bankrupt's estate and the trustee from any liability”.¹⁶⁵

Matrimonial home

20-036

Special provision is made to protect the interests of the bankrupt and his spouse in the matrimonial home. Where a spouse has a charge ¹⁶⁶ on the matrimonial home under Pt IV of the Family Law Act 1996 on the interest of the other spouse in the matrimonial home, the charge continues to subsist notwithstanding the bankruptcy of the other spouse. ¹⁶⁷ On an application under s.33 of the 1996 Act ¹⁶⁸ the court has to take into consideration the financial resources of the spouse or former spouse ¹⁶⁹ and the needs of any children ¹⁷⁰ as well as the interests of the creditors. ¹⁷¹ Also of relevance is the conduct of the spouse in contributing to the bankruptcy. The bankrupt is also given the right to occupy the dwelling-house provided he has a beneficial interest in it and there is someone under the age of 18 with whom the bankrupt shared the home at the time the bankruptcy petition was presented. ¹⁷² In this situation the bankrupt cannot be evicted except under a court order. ¹⁷³ The right of occupation is treated as a charge under the Family Law Act 1996 and on an application to have the bankrupt evicted the court shall take into consideration not only the interests of the creditors but also the interests of the children but not "the needs of the bankrupt". ¹⁷⁴ Where a bankrupt for whatever reason occupies the matrimonial home on condition that he makes payments to satisfy mortgage obligations or to satisfy other outgoings, he does not acquire any interest in the premises by reason of making the payments. If a dwelling-house forms part of the trustee's property and for any reason the trustee is unable to realise it, he may apply to the court for an order imposing a charge on the property for the benefit of the bankrupt's estate. ¹⁷⁵

Remedies of contracting party against bankrupt

20-037

A person who has entered into a contract with one who subsequently becomes bankrupt cannot generally sue either the bankrupt or the trustee; but an obligation under a contract is a "liability" ¹⁷⁶ provable in the bankruptcy. All such debts and liabilities, except such wages or salary or other debts as are entitled to preferential payment, ¹⁷⁷ are payable *pari passu* out of the estate. ¹⁷⁸ The right of a creditor to prove in the debtor's bankruptcy is dealt with more fully in a subsequent part of this chapter. ¹⁷⁹

Remedies of employee against bankrupt employer

20-038

The Insolvency Act 1986 confers a limited preference on employees for unpaid wages and certain other entitlements. ¹⁸⁰ To the extent that a claim falls outside the statutory limits it ranks as an ordinary debt. An employee has a statutory right to payment owed to him by his insolvent employer and this may often be a more valuable right than any personal claim he may have against his employer. ¹⁸¹ Where the Secretary of State makes a payment from the National Insurance Fund he is subrogated to the rights of the employee against the bankrupt employer, including any preferential claims. ¹⁸²

^{48.} This section does not profess to be a summary of the whole of the law of bankruptcy, but only of the effect of bankruptcy on contracts. See generally Muir Hunter on Personal Insolvency (London: Sweet & Maxwell). (Bankruptcy is now dealt with in the Insolvency Act 1986. The second group of parts of the Act which deal with individual insolvency is entitled "Insolvency of Individuals; Bankruptcy".)

^{100.} s.287; an interim receiver can be appointed under s.286 and a special manager under s.370.

^{101.} ss.292–294.

^{102.} s.292(2). As to who is qualified to act as an insolvency practitioner, see s.388 and s.390.

- [103.](#) s.306; *Weddell v J.A. Pearce & Major* [1988] Ch. 26. For the definition of the bankrupt's estate see paras 20-015—20-016. On the vesting of after-acquired property, see s.307 and paras 20-026—20-027.
- [104.](#) This was the position under previous bankruptcy legislation: *Ex p. Mackay* (1873) L.R. 8 Ch. App. 643.
- [105.](#) *British Eagle International Airliner Ltd v Compagnie Nationale Air France* [1975] 1 W.L.R. 758; *Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd* [2001] 2 B.C.L.C. 347; cf. *Horne v Chester and Fein Property Developments Pty Ltd* (1986) 11 A.C.L.R. 485. As regards companies, debt subordination agreements have been upheld: *Re British and Commonwealth Holdings Plc (No.3)* [1992] B.C.L.C. 322; *Re Maxwell Communications Corp Plc* [1993] 1 W.L.R. 1402.
- [106.](#) ss.283 and 436(4) ("property includes ... things in action"). This includes most rights of action but not those arising from contracts for personal service to be performed, defamation, breach of confidence, or an action for damages for pain and suffering: *Bailey v Thurston & Co* [1903] 1 K.B. 137; *Wilson v United Counties Bank Ltd* [1920] A.C. 102; *Re Kavanagh* [1949] 2 All E.R. 264, [1950] 1 All E.R. 39n; *Heath v Tang* [1993] 1 W.L.R. 1421; *Re Landau (A Bankrupt)* [1998] Ch. 223. The bankrupt's home can in certain circumstances cease to form part of the estate: Insolvency Act 1986 s.283A (added by s.261(1) of the Enterprise Act 2002); *Re Byford* [2003] EWHC (Ch) 1267, [2003] B.P.L.R. 1089.
- [107.](#) *Ramsay v Hartley* [1977] 1 W.L.R. 686, 692–694; *Stein v Blake* [1996] A.C. 243. On the powers of a trustee in bankruptcy, see Insolvency Act 1986 s.314 and Sch.V.
- [108.](#) There are also provisions relating to transactions which can be set aside: see paras 20-022—20-023.
- [109.](#) *Wilmot v Alton* [1897] 1 Q.B. 17; *Re Collins* [1925] Ch. 556; *Re de Marney* [1943] Ch. 126 (the basis of the reasoning in these cases is that a bankrupt cannot create greater rights in an assignee than those which the bankrupt actually possesses); cf. *Re Davis & Co Ex p. Rawlings* (1888) 22 Q.B.D. 193; *Re Trytel* [1952] 2 T.L.R. 32.
- [110.](#) s.344, re-enacting the substance of s.43 of the Bankruptcy Act 1914. This prohibition does not apply to assignments from a specified debtor or under specified contracts, nor to assignments made on a bona fide transfer of an assignor's business, nor to an assignment made for the benefit of creditors generally: s.344(3)(b). As to the meaning of "book debts", see *Shipley v Marshall* (1863) 14 C.B.(N.S.) 566; *Paul & Frank Ltd v Discount Bank (Overseas) Ltd* [1967] Ch. 348; *Re Brightlife Ltd* [1987] Ch. 200, 208–209. See also *Hill v Alex Lawrie Factors* [2000] B.P.I.R. 1038, dealing with s.344(2).
- [111.](#) s.339(3): see *Re Kumar (A Bankrupt) Ex p. Lewis v Kumar* [1993] 1 W.L.R. 224; *Ailyan and Fry (Trustees in Bankruptcy of Kevin Foster) v Smith* [2010] EWHC 24 (Ch), [2010] B.P.I.R. 289.
- [112.](#) s.341(3) defines insolvency as an inability to pay debts as they fall due or the value of liabilities exceeds assets.
- [113.](#) s.341(1) and (2).
- [114.](#) s.341(2); associate is defined in s.435 and is qualified by s.341(2) to exclude a bankrupt's employee.
- [115.](#) s.339(2); the more specific powers of the court are spelled out in s.342.
- [116.](#) s.342(2)(b) and (4) as amended by the Insolvency (No.2) Act 1994.
- [117.](#) s.340(3). There is a rebuttable presumption that such was intended where the transaction was with an associate: see s.340(5). "Associate" is defined in s.435. Also the fact that something is done in pursuance to a court order does not prevent it from being a preference: see s.340(6).

See also *Re Jones (A Bankrupt)* [2008] 2 F.L.R. 1969.

- [118.](#) s.341(1)(c); where the transaction is entered into with an associate then it can be challenged within a two-year period: s.341(1)(b).
- [119.](#) For the definition of insolvency, see s.341(3).
- [120.](#) s.342.
- [121.](#) *Re F.P. & C.H. Mathews Ltd* [1982] Ch. 257 (dealing with a preference by a company under the previous insolvency legislation); *Re M.C. Bacon Ltd* [1990] B.C.L.C. 324 (dealing with preferences by a company under current legislation).
- [122.](#) See now Consumer Credit 2006 Act, Vol.II, paras 40-217 et seq. The trustee in bankruptcy was precluded from making an application for relief under s.139(1)(a) of the Consumer Credit Act but had to rely on his rights under the Insolvency Act: s.343(6). This has been repealed: see the Consumer Credit Act 2006 Sch.4.
- [123.](#) s.343(3). Where a trustee applies to have a transaction set aside under s.343 there is a presumption that it was extortionate: see s.343(3).
- [124.](#) s.343(2); on commencement of the bankruptcy, see s.278 and para.20-019.
- [125.](#) s.343(4).
- [126.](#) See *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No.2)* [1990] B.C.C. 636; *Choan v Sagar* [1993] B.C.L.C. 661; *Re Ayala Holdings Ltd* [1993] B.C.L.C. 256; *Agricultural Mortgage Corp Plc v Woodward* [1995] 1 B.C.L.C. 1; *Barclays Bank Plc v Eustice* [1995] 2 B.C.L.C. 630; *IRC v Hashmi* [2002] 2 B.C.L.C. 489; *Gil v Baygreen Properties Ltd* [2004] EWHC 1732 (Ch), [2005] B.P.I.R. 95; *Delaney v Chen* [2010] EWCA Civ 1455.
- [127.](#) *Re Shilena Hosiery Ltd* [1980] Ch. 219.
- [128.](#) s.423(1).
- [129.](#) s.423(3).
- [130.](#) s.424.
- [131.](#) *Re Husky Group Ltd* [2014] EWHC 3003 (Ch).
- [132.](#) *Ex p. Chalmers* (1873) L.R. 8 Ch. App. 289; *Morgan v Bain* (1874) L.R. 10 C.P. 15; *Re Sneezum* (1876) 3 Ch. D. 463; *Jennings' Trustees v King* [1952] Ch. 899. The case of the bankrupt's apprentices or articulated clerks is dealt with by Insolvency Act 1986 s.348 (previously s.34 of the Bankruptcy Act 1914), which provides that if either party gives notice in writing to the trustee to that effect the agreement shall be discharged by the order and a part of any premium may be returned. Payment may also be made out of the Redundancy fund, see para.20-038.
- [133.](#) Below, para.20-035.
- [134.](#) *Ex p. Stapleton* (1879) 10 Ch. D. 586.
- [135.](#) s.314 Sch.V Pt II para.10.
- [136.](#) s.314.
- [137.](#) s.314 Sch.V Pt I; *Guy v Churchill* (1888) 40 Ch. D. 481; *Seear v Lawson* (1880) 15 Ch. D. 426. These cases and those in the next three footnotes were decided under previous bankruptcy legislation but probably still reflect the law.

138. *Seear v Lawson* (1880) 15 Ch. D. 426. *Ramsay v Hartley* [1977] 1 W.L.R. 686; *Stein v Blake* [1996] A.C. 243.
139. *Stein v Blake* [1996] A.C. 243. *Re Spink* (1913) 108 L.T. 572.
140. *Re Spink* (1913) 108 L.T. 572. *Re Ridgway* (1889) 6 Morr. 277; *Re A. & T. G. Ridgway* (1891) 8 Morr. 289; *Re Pilling* [1906] 2 K.B. 644.
141. *Ex p. Chalmers* (1873) L.R. 8 Ch. App. 289, 293; this preceded what is now s.41(1)(c) of the Sale of Goods Act 1979. See Benjamin's Sale of Goods, 9th edn (2014), para.15-037; see also *Re Eastgate* [1905] 1 K.B. 465; *Tilley v Bowman Ltd* [1910] 1 K.B. 745 (right to repossess goods) but cf. *Re Wait* [1927] 1 Ch. 606 and Vol.II, para.44-441. There is no need to have recourse to Insolvency Act 1986 s.345 if the contract provides that bankruptcy is a terminating event: see *Cadogan Estates v McMahon* [2001] B.P.I.R.
142. Sale of Goods Act 1979 s.41(1)(c).
143. Sale of Goods Act 1979 ss.44–46; Vol.II, paras 44-315 et seq.
144. s.345. Contracts will often provide that bankruptcy is a terminating event: see *Cadogan Estates v McMahon* [2001] B.P.I.R. 17.
145. *Gibson v Carruthers* (1841) 8 M. & W. 321, 333; *Knight v Burgess* (1864) 33 L.J.Ch. 727; *Re Collins* [1925] Ch. 556. See also above, paras 19-055–19-056 (voluntary assignment of personal contracts) and para.20-006 (transmission of personal contracts on death); cf. *Re Worthington* [1914] 2 K.B. 299.
146. *Beckham v Drake* (1849) 2 H.L.C. 579, 596, 627; cf. *Wenlock v Moloney* (1967) 111 S.J. 437. As to the sale of such rights of action by the trustee, see above, para.16-073. For the position where the contract is unexecuted at the date of the bankruptcy and the breach occurs thereafter see: *Bailey v Thurston & Co Ltd* [1903] 1 K.B. 137.
147. *Cork v Rawlins* [2001] EWCA Civ 202, [2001] 3 W.L.R. 300.
148. *Wilson v United Counties Bank* [1920] A.C. 102, 120, 129–130; *Rose v Buckett* [1901] 2 K.B. 449; *Heath v Tang* [1993] 1 W.L.R. 1421.
149. *Re Kavanagh* [1949] 2 All E.R. 264, [1950] 1 All E.R. 39n.
150. See para.20-054.
151. *Mulkerrins v Pricewaterhouse Coopers* [2003] UKHL 41, [2003] B.P.I.R. 1357 at [6].
152. *Ord v Upton* [2000] Ch. 352; cf. *Cork v Rawlings* [2001] EWCA Civ 197, [2001] 3 W.L.R. 300.
153. If the trustee decides not to pursue any action he can assign it to the bankrupt.
154. *Ord v Upton* [2000] Ch. 352, 371.
155. [2003] EWCA Civ 527, [2003] 3 All E.R. 745.
156. [2003] EWCA Civ 527 at [24]. This was cited in *Mulkerrins v Pricewaterhouse Coopers* [2003] UKHL 41, [2003] 1 W.L.R. 1937 at [25] without comment.
157. [2003] EWCA Civ 527.
158. [2003] EWCA Civ 527 at [17].
159. s.315. Special provision is made for the disclaimer of leases (s.317) and land subject to a rentcharge (s.318). Also leave of the court is required to disclaim property acquired under s.307

or s.308 (s.315(4)); *Re Hans Place Ltd* [1993] B.C.L.C. 768; *Hindcastle v Attenborough Associates Ltd* [1997] A.C. 70; *Re Park Air Services Plc* [2000] A.C. 172; *Re SSL Realisations (2002) Ltd* [2006] EWCA (Civ) 7, [2005] 1 B.C.L.C. 1 (dealing with the equivalent provision for companies).

- [160.](#) s.315(3)(a) and Winding Up Rules 1986 r.6.178(4).
- [161.](#) s.315(5).
- [162.](#) s.316. This time period can be extended: s.376; *Re Richardson (1880)* 16 Ch. D. 613.
- [163.](#) s.316.
- [164.](#) s.315(2). It is important to note that the lack of profitability of the contract does not have to flow from the onerous nature of the contract: cf. *Re Potters Oils Co Ltd* [1986] 1 W.L.R. 201. *Re Bastable Ltd* [1901] 2 K.B. 518 would probably be decided in the same way today but the reasoning would not be followed; there could be no disclaimer in that case because it would be depriving a purchaser of an interest and not merely relieving the bankrupt of an onerous obligation.
- [165.](#) *Stacey v Hill (1900)* 69 L.J.Q.B. 796, affirmed [1901] 1 K.B. 660. For disclaimer on the part of a company in liquidation see: *Re Potters Oils Ltd* [1986] 1 W.L.R. 201; *Re Distributors and Warehousing Ltd* [1986] B.C.L.C. 129; *Re A.E. (Realisations) Ltd* [1981] B.C.L.C. 486; *Re Hans Place Ltd* [1993] B.C.L.C. 768; *Hindcastle v Barbara Attenborough Associates Ltd* [1997] A.C. 70; *Re Park Air Services Plc* [2000] A.C. 172.
- [166.](#) A “matrimonial home right”: see s.30 of the Family Law Act 1996.
- [167.](#) Family Law Act 1996 s.336(2); see also Insolvency Act 1986, ss.336 and 337 dealing respectively with the rights of occupation of a spouse, civil partner and the bankrupt of a dwelling home. The court has jurisdiction to modify or remove the spouses’ occupation rights under this section: see *Mekarska v Ruiz* [2011] EWCA Civ 1646.
- [168.](#) This section deals with the court’s power to make occupation orders in favour of the person entitled to occupy a dwelling-house by virtue of the general law or s.30 of the 1996 Act.
- [169.](#) s.336(4)(c).
- [170.](#) s.336(4)(d).
- [171.](#) s.336(4)(a). See also *Haghighat (A Bankrupt)* [2009] EWHC 90 (Ch), [2009] 1 F.L.R. 1271.
- [172.](#) s.337 (as amended by the Family Law Act 1996 s.66(1)).
- [173.](#) s.337(2)(a). Where the bankrupt is out of possession, then he can only regain it with a court order.
- [174.](#) s.337(5); where the application is made one year after the commencement of the bankruptcy it is presumed that the interests of the creditors prevail unless there are exceptional circumstances indicating otherwise: s.337(6).
- [175.](#) s.313 as qualified by s.313A for low value homes (added by s.283A(3) of the Enterprise Act 2002).
- [176.](#) ss.322 and 382(4).
- [177.](#) Below, para.20-038.
- [178.](#) s.328(3). Debts owed to a spouse are deferred to the claims of ordinary creditors: s.322.

[179.](#) See below, para.20-049.

[180.](#) ss.328, 386 and Sch.6.

[181.](#) Employment Rights Act 1996 s.186; Vol.II, paras 40-198 et seq.

[182.](#) s.189.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 20 - Death and Bankruptcy

Section 2. - Bankruptcy ⁴⁸

(c) - Trustee takes "Subject to Equities"

General

20-039

Broadly speaking, a trustee in bankruptcy (like a voluntary assignee) acquires the property of the bankrupt "subject to equities". Thus a person who has been induced by fraud to sell property to a buyer who subsequently becomes bankrupt does not lose his right to rescind the contract and recover his property merely because it has passed to the trustee in bankruptcy. ¹⁸³ So also where contractual rights have been validly assigned by the bankrupt before the commencement of the bankruptcy, the trustee takes the benefit of the contract subject to the rights of the assignee. ¹⁸⁴ Exceptions to this principle have been discussed above. ¹⁸⁵ On the other hand, the trustee in bankruptcy takes the property of the bankrupt free from purely personal claims binding on the bankrupt.

Set-off and mutual dealings

20-040

The right of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties (which is designed to prevent cross-actions) but is governed by s.323 of the Insolvency Act 1986. The section applies where before the commencement of the bankruptcy:

"... there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any creditor of the bankrupt proving or claiming for a bankruptcy debt." ¹⁸⁶

Where such mutual dealings exist, an account is to be taken of what each party owes and the sums due from one party to the other with respect to mutual dealings between the parties shall be set off against each other. ¹⁸⁷ Section 323(3) provides that sums due from the bankrupt shall not be included in any set-off if the other party "had notice at the time they became due" that a bankruptcy petition relating to the bankrupt was pending. ¹⁸⁸ Were this provision to be applied literally, it would mean that a creditor could not set off sums due on a contract entered into before a bankruptcy petition was presented but which become due after the presentation of the petition. If such an interpretation were valid, this would severely curtail the right of set-off in a way that was probably not intended by the legislature. To deal with the alleged problem, a reform of s.323 was proposed in the Companies Bill 1989. ¹⁸⁹ This was intended to make it clear that no debt or liability could be set-off which arose after the date on which the creditor had notice that a bankruptcy notice relating to the bankrupt was pending; thus debts incurred before but falling due after the debtor's bankruptcy could be set-off. However, it was decided that such a reform was not needed ¹⁹⁰ and it was abandoned. Section 323(1) sets out the debts that are capable of being set-off and this refers to all "mutual credits, mutual debts and other mutual dealings". The requirement of being "due" is imposed by s.323(2), but this deals only with the time for the taking of an account and it is clear that unless a debt is due at the time of

taking an account it cannot be the subject of set-off. ¹⁹¹

20-041

The right of set-off under s.323 is mandatory and no contracting out of it is permissible. ¹⁹² The question whether there are sufficient mutual credits, debts or other dealings is determined at the date of the bankruptcy order. ¹⁹³ As the object of the section is to do substantial justice between the parties ¹⁹⁴ it has not been restrictively interpreted. Thus, it is not necessary that at the date of the order there should be mutual debts existing. If there are claims for the breach of contractual obligations ¹⁹⁵ or other mutual demands which do not arise out of the contract ¹⁹⁶ which will result in pecuniary liabilities they may be set off provided, in both cases, that the claims are provable in the bankruptcy. It has also been held that contingent debts and liabilities owed by the bankrupt may be set off in bankruptcy. ¹⁹⁷ Whether the debt is a legal or an equitable debt is immaterial, for the bankruptcy jurisdiction proceeds upon equitable principles. ¹⁹⁸ The claims on each side must be such as result in pecuniary liabilities. A debt cannot therefore be set off against a claim for the return of goods wrongfully detained, for the judgment in the latter case is for the return of the goods *in specie* and only in the alternative for their value. ¹⁹⁹ On the other hand, where property is entrusted to a person for sale, this is a giving of credit. ²⁰⁰ So where a company employed a commission agent to sell its property, and the company owed the agent money by way of commission on earlier sales, it was held that, on the company going into liquidation, the agent was entitled to set off the sum due to him against the value of the property in his possession and still unsold. ²⁰¹ There was, however, no setoff in respect of other property of the company in the agent's possession which had not been entrusted to him for sale. ²⁰² A debt cannot be set off against a sum of money deposited for a specific purpose which failed owing to the bankruptcy, ²⁰³ at least where it would amount to a misappropriation for that money to be used for any other purpose. ²⁰⁴ The right of set-off may exist although one of the debts is secured ²⁰⁵; to the extent that there is set-off the security is released. ²⁰⁶

Set-off of unliquidated damages

20-042

A claim for unliquidated damages may be set off against a debt under the section. ²⁰⁷ Thus a claim for damages for fraudulent misrepresentation on the sale of a chattel was set off in an action by the bankrupt's trustee for the unpaid price, the fraudulent representation being not merely a personal tort but a breach of the obligation arising out of the contract of sale. ²⁰⁸

Debts must be mutual

20-043

In order that debts may be set off they must be mutual. For debts and credits to be mutual they must be between the same parties, in the same right and must be commensurable in the sense that at the relevant time both can be reduced to monetary terms. ²⁰⁹ This may be illustrated by *Re City Life Assurance Co Ltd (Stephenson's Case)* ²¹⁰ where a policy holder mortgaged his policy to the company and the deed contained an absolute covenant to pay, but provided that so long as the premiums and interest and other obligations were paid the debt should not be called in. The company equitably assigned the mortgage to trustees for another class of policy holders, no notice of this being given to the mortgagor. The whole mortgage debt was outstanding at the time of the winding up of the company. The policy holder claimed to set off the amount due to him on his policy against his mortgage debt. It was held that as the equitable assignment was complete as between the company and their assignees without notice to the mortgagor, there was no mutual credit or mutual debt between the company and the policy holder within s.31, and the latter had no right of set-off in spite of the provisions of the mortgage deed. Warrington L.J. ²¹¹ observed that there was no mutuality because at the date of the winding up there was a debt due from the company to the policy holder, but no debt due from the policy holder to the company because the debt which had been so due had been effectively transferred to certain trustees. Therefore, at the date of the winding up there was no mutual credit or mutual debt which could come within the provisions of s.31 and be set off the one against the other.

20-044

A debt due to or from the trustee in bankruptcy as such cannot be set off against a debt due from or to the bankrupt. Therefore a person who has received money from the bankrupt under a transaction which is void as against the trustee (e.g. as a preference) cannot set off a debt due to him from the bankrupt against a claim by the trustee for that money.²¹² Similarly a joint debt cannot be set off against a separate debt²¹³ nor can a debt due to an executor personally be set off against a debt due to him as personal representative of his testator.²¹⁴ Debts due in the same right in equity may be set off although they are not due in the same right at law,²¹⁵ and a debt due to an agent not known by the other party to have been acting as such may be set off against a debt due from him personally.²¹⁶

-
- ^{48.} This section does not profess to be a summary of the whole of the law of bankruptcy, but only of the effect of bankruptcy on contracts. See generally Muir Hunter on Personal Insolvency (London: Sweet & Maxwell). (Bankruptcy is now dealt with in the Insolvency Act 1986. The second group of parts of the Act which deal with individual insolvency is entitled "Insolvency of Individuals; Bankruptcy".)
- ^{183.} *Re Eastgate* [1905] 1 K.B. 465; *Tilley v Bowman* [1910] 1 K.B. 745; *A.W. Gamage Ltd v Charlesworth's Trustee* [1910] S.C. 257.
- ^{184.} *National Provincial Bank Ltd v Ainsworth* [1965] A.C. 1175, 1256–1258.
- ^{185.} Above, para.20-026.
- ^{186.} s.323(1); *Stein v Blake* [1996] A.C. 243.
- ^{187.} s.323(2).
- ^{188.} A petition would appear to be pending even though no order has been made on it: Derham, *Set-Off*, 4th edn (2010), p.672.
- ^{189.} Companies Bill cl.161.
- ^{190.} The reason for this is clear from *Stein v Blake* [1996] A.C. 243. See Goode, *Legal Problems of Credit and Security*, 5th edn (2013), pp.338–341.
- ^{191.} See Goode, at pp.282–285; Derham, *Set-Off*, pp.456–457. A debtor of a bankrupt cannot gain an advantage by acquiring the bankrupt's liabilities after the making of a bankruptcy order, but this in no way affects the interpretation being put forward in the text: see *Re Charge Card Services Ltd* [1987] Ch. 150, 190 (affirmed [1989] Ch. 497). cf. *Stein v Blake* [1996] A.C. 243.
- ^{192.} *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] A.C. 785; *Re Cushla Ltd* [1979] 3 All E.R. 415. See also *Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 Q.B. 514 (right of party to exclude contractual set-off).
- ^{193.} *Re Taylor* [1910] 1 K.B. 562; *Tilley v Bowman* [1910] 1 K.B. 745, 751; *Re A Debtor* [1927] 1 Ch. 410; *Re A Debtor* [1956] 1 W.L.R. 1226; cf. *Re Charge Card Services Ltd* [1987] 1 Ch. 150, [1989] Ch. 497.
- ^{194.} *Foster v Wilson* (1843) 12 M. & W. 191, 203–204; *Re Davies* (1867) L.R. 2 Ch. App. 808; *Re City Life Assurance Co Ltd* [1926] Ch. 191.
- ^{195.} *Re National Benefit Assurance Co* [1924] 2 Ch. 339; *Re City Life Assurance Co (Grandfield's Case)* [1926] Ch. 191.
- ^{196.} *Re D.H. Curtis (Builders) Ltd* [1978] Ch. 162; *Re Cushla Ltd* [1979] 3 All E.R. 415.

- [197.](#) *Re Charge Card Services Ltd* [1987] Ch. 150, [1989] Ch. 497; *Day & Dent Constructions Pty Ltd (In Liquidation) v North Australian Properties Pty Ltd (Provisional Liquidator Appointed)* (1982) 40 A.L.R. 399; Derham, *Set-Off*, 4th edn (2010) pp.328–334. As regards contingent debts owed to the bankrupt see *Secretary of State for Trade and Industry v Frid* [2002] EWHC (Ch) 3192, [2004] 2 A.C. 506 (dealing with companies).
- [198.](#) *Bailey v Finch* (1871) L.R. 7 Q.B. 34; *Mathieson's Trustee v Burrup, Mathieson & Co* [1927] 1 Ch. 562.
- [199.](#) *Re Winter* (1878) 8 Ch. D. 225; *Eberle's Hotels & Restaurant Co v Jonas* (1887) 18 Q.B.D. 459; cf. *Re Thorne* [1914] 2 Ch. 438; *Ellis & Co's Trustee v Dixon-Johnson* [1925] A.C. 489; and contrast *Naoraji v Chartered Bank of India* (1868) L.R. 3 C.P. 444; *Rolls Razor Ltd v Cox* [1967] 1 Q.B. 552.
- [200.](#) *Astley v Gurney* (1869) L.R. 4 C.P. 714; *Palmer v Day* [1895] 2 Q.B. 618.
- [201.](#) *Rolls Razor Ltd v Cox* [1967] 1 Q.B. 552. For criticisms of this case see Goode, *Principles of Corporate Insolvency*, 4th edn (2011), pp.300–303.
- [202.](#) [1967] 1 Q.B. 552.
- [203.](#) *Re Pollitt* [1893] 1 Q.B. 455; *Re Mid-Kent Fruit Factory* [1896] 1 Ch. 567; *Re City Equitable Fire Insurance Co* [1930] 2 Ch. 293; Derham, *Set-Off*, pp.431–439.
- [204.](#) *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] A.C. 785.
- [205.](#) *Ex p. Barnett* (1874) L.R. 9 Ch. App. 293; *Baker v Lloyds Bank Ltd* [1920] 2 K.B. 322.
- [206.](#) *M.S. Fashions Ltd v Bank of Credit and Commerce International SA (No.2)* [1993] Ch. 425.
- [207.](#) *Peat v Jones & Co* (1881) 8 Q.B.D. 147.
- [208.](#) *Jack v Kipping* (1882) 9 Q.B.D. 113; *Tilley v Bowman* [1910] 1 K.B. 745; cf. *Kitchen's Trustee v Madders* [1950] Ch. 134.
- [209.](#) *Re Cushla Ltd* [1979] 3 All E.R. 415, 420–421. See Derham, *Set-Off*, Ch.11.
- [210.](#) [1926] Ch. 191 (this dealt with s.31 of the Bankruptcy Act 1914).
- [211.](#) [1926] Ch. 191, 218.
- [212.](#) *Lister v Hooson* [1908] 1 K.B. 174.
- [213.](#) *Tyso v Petitt* (1879) 40 L.T. 132. cf. *Re Pennington and Owen Ltd* [1925] Ch. 825 (debt owed by a company could not be set off against debt owed to company by a firm of which the creditor was a member; also the principle in *Cherry v Boulton* (1839) 4 My. & Cr. 442 did not apply in this situation).
- [214.](#) *Bishop v Church* (1748) 3 Atk. 691; *Nelson v Roberts* (1893) 69 L.T. 352.
- [215.](#) *Bailey v Finch* (1871) L.R. 7 Q.B. 34; for a criticism of this case see Derham at pp.647–648; *Re Willis, Percival & Co Ex p. Morier* (1879) 12 Ch. D. 491.
- [216.](#) *Lee v Bullen* (1858) 27 L.J.Q.B. 161 (note the brokers acted “and/or as agents”).

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 20 - Death and Bankruptcy
Section 2. - Bankruptcy ⁴⁸
(d) - Discharge of Bankrupt

Discharge

20-045

Section 279 deals with the duration of bankruptcy. ²¹⁷ A bankrupt is automatically discharged at the end of one year beginning on the date the bankruptcy commences. ²¹⁸ This period can be shortened ²¹⁹ or extended. ²²⁰ A new procedure called a bankruptcy restriction order has been introduced which is designed to enable the duration of bankruptcy to be extended where the bankrupt has been particularly culpable. ²²¹

Effect of discharge

20-046

Where a bankrupt is discharged, it releases him from all bankruptcy debts except:

- (a)
from any bankruptcy debt which was incurred in connection with any fraud or fraudulent breach of trust ²²²;
- (b)
from any liability in respect of a fine ²²³;
- (c)
from any liability relating to damages for personal injuries ²²⁴;
- (d)
from any liability with respect to an order made in family or domestic proceedings ²²⁵;
- (e)
from any other bankruptcy debts as may be prescribed. ²²⁶ It is important to note that discharge only releases a bankrupt from "bankruptcy debts" and therefore a debt which is not so classified is not released. ²²⁷

20-047

An order of discharge does not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of surety for him. ²²⁸ It does, however, release the bankrupt from his liability, whether the debt was owed by him alone or jointly with others. ²²⁹ As an order of discharge releases the bankrupt from the debt, so it releases him from the operation of a collateral remedy for that debt, such as a licence to seize after-acquired goods. ²³⁰ It does not release him where the real effect of the transaction providing the collateral remedy is to assign after-acquired property. Such a transaction gives the assignee a right in rem against the property, which is not barred by the bankruptcy. ²³¹ An order of discharge also releases the bankrupt from any liability for consequential damages which may result or arise from the non-payment of the debt. ²³²

20-048

After the making of a bankruptcy order, no person who is a creditor of the bankrupt with respect to a provable debt can enforce any remedy with respect to that debt. ²³³ However, a promise to pay such a debt binds the bankrupt if made for a fresh consideration or otherwise by means binding in law, ²³⁴ and this will apply although the promise and consideration was made or given during the bankruptcy. ²³⁵ It may be added that although a discharge releases the debtor from provable debts, it does not necessarily extinguish the obligation for all purposes. ²³⁶

Debts provable

20-049

The debts provable in a bankruptcy are defined in the broadest possible terms in s.382 of the Insolvency Act 1986. ²³⁷ These include any debt or liability to which the bankrupt is subject at the commencement of the bankruptcy or to which he may be subject. ²³⁸ Liability means a liability to pay money or money's worth and it includes:

“... any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution.” ²³⁹

It is irrelevant that the debt or liability is present or future:

“... whether it is certain or contingent or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as matter of opinion.” ²⁴⁰

Liability under s.339 (transactions at an undervalue) and s.340 (preferences) of the 1986 Act has been held to be provable debts. ²⁴¹ Where a bankruptcy debt bears interest, such interest is provable except in so far as it relates to interest accruing after the commencement of the bankruptcy. ²⁴² Interest with respect to the period after the commencement of the bankruptcy is payable only if there is a surplus after the satisfaction of all of the bankruptcy debts. ²⁴³ Certain debts are not provable. ²⁴⁴ Thus a fine imposed for an offence and any obligation “arising under an order made in family or domestic proceedings” ²⁴⁵ are not provable. As well as these statutory exceptions, there are other debts which are not provable in the bankruptcy because they are such that the policy of the law will not allow the creditor to sue and consequently will not give the creditor a remedy in bankruptcy. Such debts are, for example, those given for an illegal or immoral consideration, ²⁴⁶ and in bankruptcy the existence of lawful consideration can be scrutinised even after judgment has been given against the bankrupt so that, as against him, the matter would be *res judicata*. ²⁴⁷ It is also important to keep in mind that the definition of bankruptcy debt has important implications for discharge as it is with

respect to these debts that the bankrupt is discharged so that he can have a fresh start. ²⁴⁸

- ^{48.} This section does not profess to be a summary of the whole of the law of bankruptcy, but only of the effect of bankruptcy on contracts. See generally Muir Hunter on Personal Insolvency (London: Sweet & Maxwell). (Bankruptcy is now dealt with in the Insolvency Act 1986. The second group of parts of the Act which deal with individual insolvency is entitled "Insolvency of Individuals; Bankruptcy".)
- ^{217.} The current provision was inserted by s.256 of the Enterprise Act 2002.
- ^{218.} s.279(1).
- ^{219.} s.279(2).
- ^{220.} s.279(3)–(5); see *Sherson v Rastogi* [2007] EWHC 1266 (Ch), [2007] B.P.I.R. 864.
- ^{221.} s.281A and Sch.4A (introduced by s.257 of the Enterprise Act 2002). See also *Official Receiver v May* [2008] EWHC 1778 (Ch), [2008] B.P.I.R. 1562 (once it was established that the conduct of the bankrupt fell below the requisite standard, the trial judge was obliged to make a bankruptcy restriction order, there was no discretion). In making a bankruptcy restriction order it was appropriate to apply the principles on director's disqualification laid down in *Re Sevenoaks (Retail) Stationers Ltd* [1991] Ch. 164; see *Official Receiver v Bathurst* [2008] EWHC 1724 (Ch), [2008] B.P.I.R. 1548.
- ^{222.} s.281(3).
- ^{223.} s.281(4); in the case of a fine in connection with an offence concerning the public revenue, the Treasury can consent to its discharge.
- ^{224.} s.281(5)(a); the court has a discretion to order that the bankrupt be discharged to whatever extent it considers appropriate from these debts; see *Hayes v Hayes* [2012] EWHC 1240.
- ^{225.} s.281(5)(b).
- ^{226.} s.281(6); see the Insolvency Rules 1986 r.6.223 (liability under s.1 of the Drug Trafficking Offences Act 1986 not discharged). For what constitutes a prescribed debt, see s.384(1).
- ^{227.} See s.382 on the definition of bankruptcy debt. See para.20-049.
- ^{228.} s.281(7).
- ^{229.} *Ex p. Hammond* (1873) L.R. 16 Eq. 614.
- ^{230.} *Thompson v Cohen* (1872) L.R. 7 Q.B. 527; *Cole v Kernot* (1872) L.R. 7 Q.B. 534n; *Collyer v Isaacs* (1881) 19 Ch. D. 342 (in these cases the court held that the committee merely had a personal right and not a proprietary interest).
- ^{231.} *Re Reis* [1904] 2 K.B. 769; (affirmed [1905] A.C. 442); *Re Lind* [1915] 2 Ch. 345. But if the agreement concerns chattels it may be void unless registered as a bill of sale.
- ^{232.} *Van Sandau v Corsbie* (1819) 3 B. & Ald. 13.
- ^{233.} s.285(3). A secured creditor can still enforce his security: s.284(5).
- ^{234.} *Jakeman v Cook* (1878) 4 Ex. D. 26; *Re Aylmer* (1894) 70 L.T. 244; *Re Bonacine* [1912] 2 Ch. 394. See also *Wild v Tucker* [1914] 3 K.B. 36. cf. *John v Mendoza* [1939] 1 K.B. 141.

- [235.](#) *Wild v Tucker* [1914] 3 K.B. 36 (contract by undischarged bankrupt to pay in full a larger debt in consideration of smaller loan held a good contract).
- [236.](#) e.g. *Re Ainsworth* [1922] 1 Ch. 22 (gift by will to children equally, subject to proviso that one child must account for debt due to testator; bankrupt child must account for balance due after discharge). Also, of course, it does not release the bankrupt from debts which for whatever reason are not provable.
- [237.](#) See also the Insolvency Rules 1986 r.12.3.
- [238.](#) s.382(1)(a) and (b).
- [239.](#) s.382(4).
- [240.](#) s.382(3).
- [241.](#) *Holland v Chadwick* [2014] EWHC 2158 (Ch).
- [242.](#) s.322(2); for criticisms of the old law see Cork Report, 1982, Cmnd.8558, Ch.31.
- [243.](#) s.328(4); the rate of applicable interest is set out in s.328(5).
- [244.](#) See also para.20-046 on the effect of discharge.
- [245.](#) Insolvency Rules 1986 r.12.3(2); Insolvency Act 1986 s.281(5)(b). This probably effects a change in law by reversing the decision in *Curtis v Curtis* [1969] 1 W.L.R. 44; see Muir Hunter on Personal Insolvency, p.3222 (para.20-046).
- [246.](#) See above, Ch.16. Rule 12.3 of the Insolvency Rules 1986, which deals with provable debts, provides that: "Nothing in this Rule prejudices any enactment or rule of law under which a particular kind of debt is not provable, whether on the grounds of public policy or otherwise".
- [247.](#) *Ex p. Kibble* (1875) L.R. 10 Ch. App. 373; *Ex p. Banner* (1881) 17 Ch. D. 480; *Re Beauchamp* [1904] 1 K.B. 572; *Re Van Laun* [1907] 1 K.B. 155, [1907] 2 K.B. 23; *Re Mead* 2 Ir.R. 285; *Re A Debtor* [1927] 2 Ch. 367.
- [248.](#) The object (as was stated with respect to previous bankruptcy legislation) is that "the bankrupt is to be a freed man—freed not only from debts but from contracts, liabilities, engagements, and contingencies of every kind": *Ex p. Llynvi Coal and Iron Co* (1871) L.R. 7 Ch. App. 28, 32; and see *Ex p. Waters* (1873) L.R. 8 Ch. App. 562; *Flint v Barnard* (1888) 22 Q.B.D. 90.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 20 - Death and Bankruptcy
Section 2. - Bankruptcy ⁴⁸
(e) - Schemes of Arrangement

Voluntary arrangement

20-050

Part VIII of the Insolvency Act 1986 establishes a procedure for enabling a debtor to make what is referred to as a “voluntary arrangement” ²⁴⁹ with his creditors. A debtor intending to enter into a voluntary arrangement with his creditors ²⁵⁰ can apply to the court for an interim order which precludes a bankruptcy petition from being presented against him and no other proceedings may be commenced against him. ²⁵¹ The debtor’s proposal must provide for a person—“the nominee”—to act in relation to the voluntary arrangement for the purpose of implementing its realisation. The court has a discretion as to whether to make an interim order. ²⁵² If the court makes an interim order, the nominee has to report to the court as to whether a meeting of the debtor’s creditors should be summoned to consider the debtor’s proposal. If a creditors’ meeting is called and it approves the voluntary arrangement (with or without modifications) ²⁵³ then broadly speaking it becomes binding on all persons who under the rules were entitled to notice of and to vote at the meeting of creditors held to approve the arrangement. ²⁵⁴ Provision is made for the implementation of the arrangement ²⁵⁵ and a creditor who is aggrieved by the arrangement can petition the court for relief. ²⁵⁶

Deeds of arrangement ²⁵⁷

20-051

Apart from proceedings in bankruptcy the creditors may agree to a voluntary deed of arrangement on the part of the debtor, though such a deed will not have the same effect in favour of a debtor as a discharge in bankruptcy. Section 2 of the Deeds of Arrangement Act 1914 ²⁵⁸ provides that deeds of arrangement to which the Act applies ²⁵⁹ shall be void unless registered under the Act.

Deed of arrangement and surety

20-052

A deed of arrangement with creditors contained a proviso that the deed was not to affect the rights and remedies of the creditors against any surety. The executors of a surety for the debtor sued the latter to recover sums paid on her behalf under the deed. It was held that the covenant by creditors not to sue, as limited by the proviso, imported not only that the deed did not affect any creditors’ rights against the surety but also that a surety’s consequential rights against the debtor were not to be affected. ²⁶⁰

- [48.](#) This section does not profess to be a summary of the whole of the law of bankruptcy, but only of the effect of bankruptcy on contracts. See generally Muir Hunter on Personal Insolvency (London: Sweet & Maxwell). (Bankruptcy is now dealt with in the Insolvency Act 1986. The second group of parts of the Act which deal with individual insolvency is entitled “Insolvency of Individuals; Bankruptcy”.)
- [249.](#) s.253(1). See also County Courts Act 1984 ss.112–117 (as amended by the Courts and Legal Services Act 1990 s.13); *Practice Direction (Bankruptcy: Voluntary Arrangements (No.1/91))* [1992] 1 W.L.R. 120 (making of an administration order).
- [250.](#) On the status of creditor see *Booth v Mond* [2010] B.P.I.R. 1111; *CMEC v Beesley* [2010] EWCA Civ 1344.
- [251.](#) s.252. As to who may make an application, see s.253.
- [252.](#) s.255. The grounds on which the court’s jurisdiction is to be exercised are designed to prevent a debtor from misusing the procedure.
- [253.](#) No modification may affect the rights of a secured creditor without that creditor’s consent: s.258(4); *Webb v Macdonald QC and Dakers Green Brett* [2010] EWHC 93 (Ch), [2010] B.P.I.R. 503. The proposal is treated as being made to creditors as a class and not to each creditor individually: *Re A Debtor (No.2389 of 1989)* [1991] 2 W.L.R. 578.
- [254.](#) s.260. The arrangement only affects creditors’ rights as creditors and does not affect proprietary rights such as a landlord’s right to forfeit a lease: *Re Mohammed Naeem (A Bankrupt)* (No.18 of 1988) [1990] 1 W.L.R. 48.
- [255.](#) s.263.
- [256.](#) s.262; *Re A Debtor (No.259 of 1990)* 1 W.L.R. 226 (the prejudice must be brought about by the unfairness stemming from the terms of the scheme).
- [257.](#) The Cork Committee recommended that the Deeds of Arrangement Act 1914 be repealed (paras 350–399), but this was not implemented. The relationship between the Insolvency Act 1986 and the Deeds of Arrangement Act 1914 is complex: see Muir Hunter at pp.2003–2005 (paras 20-001 et seq.).
- [258.](#) See also Insolvency Act 1986 s.260(3) and s.388(2)(b).
- [259.](#) i.e. assignments of property, deeds or agreements for composition, deeds of inspektorship, letters of licence or other agreements for the purpose of carrying on or winding up a debtor’s business; see s.1.
- [260.](#) *Cole v Lynn* [1942] 1 K.B. 142; following *Kearsley v Cole* (1846) 16 M. & W. 128, and *Close v Close* (1853) 4 De G.M. & G. 176. See further Vol.II, para.45-098, as to the effect of a scheme or deed of arrangement on the liability of a surety.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 20 - Death and Bankruptcy

Section 2. - Bankruptcy ⁴⁸

(f) - Contracts Made After Adjudication

Bankrupt's liability on contracts

20-053

A bankrupt is clearly responsible upon any contract which he makes *after* he has been adjudicated bankrupt.

After-acquired property

20-054

⚠ As has been said above, ²⁶¹ the effect of an adjudication in bankruptcy is to transfer to the trustee only such property as belongs to the bankrupt at the time of adjudication. A trustee can also obtain for the bankrupt's estate any "after-acquired" property, that is property which has devolved upon or which has been acquired by the bankrupt since the commencement of the bankruptcy. ²⁶² Such property does not automatically vest in a trustee; before it does so the trustee must serve notice on the bankrupt and the trustee's title will be deemed to relate back to the time when the property was acquired by the bankrupt. ²⁶³ The fact that the property does not automatically vest in the trustee allows the trustee to assess whether such vesting would be in the interests of the estate and avoids the cost of having to disclaim onerous property. ²⁶⁴ ⚠ Certain types of after-acquired property are excluded. ²⁶⁵ Protection is provided for the bona fide purchaser for value who deals with the bankrupt without notice of the bankruptcy, ²⁶⁶ it is important to note that it is notice of the bankruptcy that is the determinative factor. The trustee's ability to obtain after-acquired property is subject to a time limit: by s.309 no notice (except with leave of the court) relating to after-acquired property may be served on the bankrupt after the end of a period of 42 days beginning with the day on which "it first came to the knowledge of the trustee" that the property had vested in the bankrupt. ²⁶⁷ The trustee can also seek an order ("an income payments order") requiring the bankrupt to pay over to the trustee part of his income. ²⁶⁸ The court cannot make such an order where this would have the effect of reducing the income of the bankrupt below what is required to meet the reasonable domestic needs of the bankrupt and his family. ²⁶⁹

Action by bankrupt

20-055

An undischarged bankrupt may sue on a contract made by him after his adjudication, unless his trustee intervenes. ²⁷⁰ Thus he may sue on a bill of exchange indorsed to him after adjudication, ²⁷¹ or for rent in respect of premises let by him, ²⁷² or for work and labour done, ²⁷³ or for goods sold, ²⁷⁴ or for specific performance of a contract for the sale of land. ²⁷⁵ And he may sue for wrongful dismissal, occurring after his adjudication, from employment under a contract made before it. ²⁷⁶ Once

intervention is made by the trustee he cannot withdraw his intervention nor can the bankrupt deal in any way with the property. ²⁷⁷

Carrying on business of bankrupt

20-056

By s.314 of and Sch.5 to the 1986 Act, the trustee is given extensive powers to carry on the business of the bankrupt. Some of these powers can only be exercised with the consent of the creditors' committee, if there is one, and if one does not exist with the consent of the court. In certain circumstances a trustee in bankruptcy ²⁷⁸ can compel the suppliers of utilities ²⁷⁹ to continue to supply the business of a bankrupt. This power was introduced on the recommendations of the Cork Committee to deal with the practice of utilities insisting on the payment of old debts as a condition of future supply thus for all intents and purposes putting themselves in a preferential position. ²⁸⁰ If the trustee makes such a request to a utility covered by s.372, the utility may continue to supply the bankrupt but it cannot make it a condition of the continued supply that any outstanding charges owing by the bankrupt and arising before the bankruptcy order are paid. ²⁸¹ However, as a condition of continuing the supply the utility can make it a condition that the trustee guarantees the payment of any charges. ²⁸²

^{48.} This section does not profess to be a summary of the whole of the law of bankruptcy, but only of the effect of bankruptcy on contracts. See generally Muir Hunter on Personal Insolvency (London: Sweet & Maxwell). (Bankruptcy is now dealt with in the Insolvency Act 1986. The second group of parts of the Act which deal with individual insolvency is entitled "Insolvency of Individuals; Bankruptcy".)

^{261.} Above, para.20-019.

^{262.} s.307.

^{263.} s.307(3). This involves a reversal of the decision in *Re Pascoe [1944] Ch. 219* as was proposed by the Cork Report: see 1982, Cmnd.8558, Ch.26.

^{264.}  *Viscount St Davids v Lewis [2015] EWHC 2826 (Ch)* at [26].

^{265.} This is property which does not form part of the bankrupt's estate: see Insolvency Act 1986 s.307(2).

^{266.} s.307(4). This protection applies whether or not a notice relating to after-acquired property has been served. For authorities dealing with the concept of value and bona fides in previous bankruptcy legislation: see *Re Bennett [1907] 1 K.B. 149*; *Hunt v Fripp [1898] 1 Ch. 675*; *Re Stokes [1919] 2 K.B. 256*; *Re Behrend's Trust [1911] 1 Ch. 687* (marriage consideration); *Hosack v Robins (No.2) [1918] 2 Ch. 339*.

^{267.} s.309(1).

^{268.} s.310; see Cork Report, 1982, Cmnd.8558, paras 1158–1163.

^{269.} s.310(2).

^{270.} See above, para.20-054, dealing with after-acquired property.

^{271.} *Herbert v Sayer (1844) 5 Q.B. 965*: cf. *Drayton v Dale (1823) 2 B. & C. 293*; *Fyson v Chambers (1842) 9 M. & W. 460*.

^{272.} *Cook v Wellock (1890) 24 Q.B.D. 658*.

- [273.](#) *Jameson v Brick and Stone Co* (1878) 4 Q.B.D. 208; *Affleck v Hammond* [1912] 3 K.B. 162.
- [274.](#) *Cumming v Roebuck* (1816) Holt N.P.C. 172.
- [275.](#) *Dyster v Randall & Sons* [1926] Ch. 932.
- [276.](#) *Bailey v Thurston & Co Ltd* [1903] 1 K.B. 137. Where the wrongful dismissal occurred before the bankruptcy, the cause of the action passes to the trustee: *Beckham v Drake* (1849) 2 H.L.C. 579, 627. Above, paras 20-032—20-033.
- [277.](#) *Hill v Settle* [1917] 1 Ch. 319.
- [278.](#) Other office holders also have this right: see Insolvency Act 1986 s.372(1); for the equivalent in relation to companies see s.233.
- [279.](#) Gas, electricity and telecommunications: see Insolvency Act 1986 s.372(5).
- [280.](#) Cook Report, 1982, Cmnd.8558, Ch.33; on the legality of this practice see *Wellworth Cash & Carry (North Shields) Ltd v North Eastern Electricity Board* (1986) 2 B.C.C. 99, 265.
- [281.](#) s.372(2)(b).
- [282.](#) s.372(2)(a).

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 6 - Joint Obligations, Third Parties and Assignment
Chapter 20 - Death and Bankruptcy
Section 2. - Bankruptcy ⁴⁸
(g) - Second Bankruptcies

Second bankruptcies

20-057

Sections 334 and 335 deal with the special situation where a bankruptcy order is made against a person who is an undischarged bankrupt. These sections are designed to introduce the principle, indorsed by the Cork Committee, that:

“... in most second and subsequent failures, the assets available are in the main the proceeds of the credit given to the bankrupt by his later creditors and that, in effect, goods supplied by them constitute the assets, and the proceeds thereof should not be shared by them with the creditors in some prior bankruptcy.” ²⁸³

In other words, assets acquired subsequent to an earlier bankruptcy should be used to meet the claims of creditors in a later bankruptcy. Where a bankruptcy petition is presented against a person already subject to a bankruptcy order which has not been discharged, a prescribed notice may be served on the trustee of the earlier bankruptcy which renders void the disposition of certain assets in the bankrupt's estate unless a court order validating the disposition is obtained. ²⁸⁴ Broadly speaking the assets covered are those assets acquired by the trustee of the first bankruptcy since the commencement of the first bankruptcy which are new assets. These are: (i) after-acquired property ²⁸⁵; (ii) money derived from an order under s.310 (income payments) ²⁸⁶; and (iii) property derived from either of the above. ²⁸⁷ These assets are also deemed to form part of the bankrupt's estate in the second bankruptcy. ²⁸⁸ The trustee of the first bankruptcy can prove in the second bankruptcy for any unsatisfied balance of debts provable in the first bankruptcy but is not entitled to any dividend on them until the creditors in the second bankruptcy have been satisfied in full. ²⁸⁹

^{48.} This section does not profess to be a summary of the whole of the law of bankruptcy, but only of the effect of bankruptcy on contracts. See generally Muir Hunter on Personal Insolvency (London: Sweet & Maxwell). (Bankruptcy is now dealt with in the Insolvency Act 1986. The second group of parts of the Act which deal with individual insolvency is entitled “Insolvency of Individuals; Bankruptcy”).

^{283.} Cook Report, 1982, Cmnd.8558, para.1166.

^{284.} The court can also ratify such a disposition: see s.334(2).

^{285.} See above, para.20-054.

^{286.} See above, para.20-054.

[287.](#) See s.334(3).

[288.](#) s.335(1). They are, however, subject to a charge in favour of the trustee of the first bankruptcy for his bankruptcy expenses: see s.335(3).

[289.](#) s.335(5) and (6).

© 2018 Sweet & Maxwell

