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INSOLVENCY LAW REVIEW COMMITTEE

THIRTYFIRST MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row on Wednesday 13 June 1979 at 10.00 am.

A G E N D A

1 Minutes of the meeting on 16 May

2 Matters arising

3 Secretary's report

4 Housing and bankruptcy (see minutes of 30th Mtg, paras 23,24,25,26 and 27)

5 Disabilities of a bankrupt (ILRC 94, paras 50, 51 and Annex)

6 Discharge of the bankrupt (ILRC 94, paras 52-60)

7 Bankruptcy offences (ILRC 94, paras 61-63 and Annex)

8 Voluntary settlements (ILRC 87)

9 Any other business

10 Agenda for the next meeting (10 July)

Trevor Traylor

T H TRAYLOR
Secretary

30th Mtg
16.5.79

INSOLVENCY LAW REVIEW

Minutes of the Thirtieth Meeting of the Review Committee on 16 May 1979

Present:	Sir Kenneth Cork	(Chairman)
	PGH Avis	
	J S Copp	
	AIF Goldman	
	J M Hunter	
	MVS Hunter	
	D McNab	
	T R Penny	
	C A Taylor	
	E I Walker-Arnott	
	T H Traylor	(Secretary)
	E L Reeves	(Assistant Secretary)
In attendance:	J R Endersby	
	D Graham	
	G A Weiss	

1 The Committee met at 10.00 am. The minutes of the twenty-ninth meeting held on 24 April 1979 were discussed. The ninth line of para 34 was amended to read "provided the receiving order could be set aside.....". The minutes as amended were agreed and signed.

MATTERS ARISING

2 Mr Muir Hunter, referring to para 8 of the minutes of the twentyninth meeting, said that although he had not yet been able to meet Mr Millett because of pressure of Court work they planned to meet soon and he was preparing a paper for the sub-committee. For the purpose of the paper he had accepted that there should be no mechanistic acts or events and non-payment of a debt would be the basis for a petition. Working on from this however he foresaw problems and thought that the Committee should be aware of them. There were problems if a petition was presented without there being a demand. He was concerned about bankruptcy being pursued on a one to one basis, instead of "collectivisation", with the debtor paying off the petitioner; and also that advertisement of a bankruptcy petition against an individual would be destructive. It appeared that there was no relation back in Mr Millett's proposals. Mr Weiss thought that relation back would be coped with when the Committee dealt with preferences.

3 With regard to para 34 of the minutes, Mr Penny suggested that his and Mr Hunter's views should go to the sub-committee. This was accepted.

4 The Secretary said that he had nothing to report on Special Insolvency Courts (para 40) and a brief discussion followed. Mr Penny and Mr Goldman suggested that if nothing could be produced by the next meeting the matter should be taken in hand by a small sub-committee of legal members and this was agreed.

5 With regard to para 41 of the minutes, the Secretary said that he had written to the joint working party of the Bar and Law Society, to the Committee of London Clearing Bankers, to Mr Armstrong (co-ordinating evidence from Government departments) and to the CCAB; the latter had now indicated when their further evidence would be forthcoming. He had a few other bodies to write to including the Law Society of Scotland. It was agreed that all should be told that written evidence must be submitted by 30 September. It was also agreed that the Secretary should write to the Department asking what practical problems the existing law creates in partnership bankruptcy.

6 Mr Penny said, with regard to para 42 of the minutes, that the Registrars had agreed to assist and a memorandum and questionnaire was being sent to them.

SECRETARY'S REPORT

7 The Secretary said that Mr Drain, Mr Jack and Mr Millett had sent apologies for absence.

8 Papers placed before the Committee at the meeting were:-

(i) an extract from Blagden on the appropriation of a portion of bankrupt's pay or salary for the benefit of creditors, and

(ii) an extract from Trade & Industry on "Insolvencies in England and Wales - first quarter".

9 Regarding meetings in May, the Legal Panel had met on 9 May and the Penny sub-committee on 10 May. The Accountants' Panel were meeting on 18 May and the drafting sub-committee on 24 May.

STATEMENT OF INDEPENDENCE - ACCOUNTANTS

10 The Chairman drew attention to the statement being issued by the Institute of Chartered Accountants in England and Wales (agreed with the other accountancy bodies) which included a provision that where a partner or employee in a practice had been receiver of any of the assets of a company within the previous two years, no partner or employee of that practice should accept appointment as liquidator of the company. The Chairman added that this clause had been included against the advice of the Institutes' insolvency practitioners. The Committee were thinking on the lines that the receiver could become the joint liquidator and he thought that the Institute were pre-empting the Committee's recommendations. He suggested that a letter should be sent to the Institute saying that such a provision would make the Committee's work more difficult. The general feeling of the Committee was that although professional conduct was a matter for the Institute, they should be made aware that the Committee was likely to take a contrary view to their proposed instructions. The Secretary was asked to write to the Institute accordingly.

BANKRUPTCY - TRUST PROPERTY

11 The Committee returned to considering ILRC 94. The Secretary referred to para 38 of the minutes of the twentyninth meeting and asked whether there was anything further to be added.

12 Mr Muir Hunter said that the trust property concept attaching to a solicitor's moneys was now being extended to the insurance broking profession and to estate agents. A particularly difficult problem was what happened to the interest on other peoples' money. If trusts proliferated there was a danger of eroding the asset basis of bankruptcy. The Secretary suggested that a way of attacking these might be through antecedent transactions.

13 Mr Taylor said that he would resist taking away the right of a claim against a client's money for work done. Mr John Hunter said that in Northern Ireland there was rateable distribution of money in a deficient client's account amongst clients in the event of a bankruptcy, to save the expense of tracing.

14 It was recognised that it was impossible to avoid some trust moneys and that the Committee should not say what should or should not be included. It was suggested that express trusts should be excluded from the estate and that it should be left to the Courts to decide what was a trust. The matter was referred to the Legal Panel and the hope was expressed that some simple proposals could be put forward without having to become too deeply involved in trust law.

BANKRUPTCY - PERSONAL EARNINGS

15 The Committee agreed with para 130 of Bladgen that all bankrupts should be put on the same footing.

16 It was noted that Blagden had recommended that an order could be made for the payment of:-

(a) a certain sum in a specified period,
(b) a percentage of any remuneration payable during the period of the order, or
(c) an excess over a certain sum in a specified period.

17 Mr Penny pointed out that Attachment of Earnings had come into operation since Blagden and that the sub-committees were considering some method of collecting income in the lesser forms of insolvency proceedings; therefore, it seemed logical that full bankruptcy should have a tough effective method of getting at earnings.

18 Mr Taylor thought that the trustee should be entitled to see tax returns and assessments.

19 The Chairman suggested that instead of getting at earnings a specific debt against the bankrupt should be created which he would have to pay off from his future income.

20 The Committee recognised that there were a number of problems to be overcome. There was the question of how much a bankrupt should be allowed to keep and the extent that this should be varied as between individuals. There was the problem of the man drawing small sums as manager of a company of which his wife was managing director. There was the case of the bankrupt whose upkeep was paid for out of someone else's money.

21 It was agreed that the Penny sub-committee should look at the various methods for getting at a bankrupt's income and put forward proposals.

BANKRUPTCY - REFUNDS OF TAX

22 The Committee agreed with Blagden that a wife's tax refund should be excluded from a bankrupt's estate.

BANKRUPTCY - THE MATRIMONIAL HOME AND WIFE'S PROPERTY See Annex.

23 As regards the matrimonial home, Mr Muir Hunter pointed to a conflict of public interest: The Family Division and some of the Lord Justices thought the preservation of the family home was crucial but the Bankruptcy judges would take it away if possible. If the home was solely in the name of the husband, under the Matrimonial Property Act the wife can register her interest but registration would not avail against the trustee. On the other hand, if the home was genuinely in the name of the wife, the trustee seems to have the right to claim half in many cases. Mr Penny pointed out that in the matrimonial jurisdiction, there was no set rule and the Court had discretion to decide what proportion belonged to each party. Perhaps in bankruptcy there should also be discretion with the Court deciding whether the husband was solely to blame for the bankruptcy. Mr Copp thought that no one rule would do justice; if it was a valuable house, it could be sold and the wife could buy a smaller property. He thought injustice to the debtor did more harm than injustice to a creditor. Mr Taylor supported the rights of creditors to half the equity in a jointly owned property but thought that this need not involve the sale of the house.

24 The Committee then considered the proposal by Mr J H Farrar that the family home should be immune. Mr Taylor was against creditors losing their rights entirely, and Mr John Hunter and Mr Graham were against Mr Farrar's suggestion. Mr Avis agreed generally with Mr Graham but thought the Court should be given discretion about sale where the mortgage represented a substantial part of the value; Mr Walker-Arnott supported this. Mr Penny and Mr Copp were in favour in cases of essential homes, up to a specific value.

25 Mr Muir Hunter said that he would ask the Secretary to circulate the page proofs of Williams on this subject and he asked members to consider these and the views expressed in the minutes in time for the next meeting. He hoped that the subject would be placed on the agenda of that meeting. The question of setting up a panel to consider the matters was deferred.

26 As regards other property of the wife, it was suggested that this could be dealt with by the provisions of antecendent transactions. It was noted that s.36(2) (BA1914) was a trap for a married woman who had an interest in the trade or business carried on by her husband in that it could become part of the assets of his estate. Mr Penny felt that dishonest debtors get round the bankruptcy law and Mr Muir Hunter said that care had to be taken that s.42 was not cut down as it had been in the EEC draft Bankruptcy Convention as this was a way of off loading assets. What was wanted was a robust section with robust judges to sort out dishonest dispositions.

27 The Committee was flatly against proposals which had been received to the effect that the family unit should be the bankruptcy unit.

BANKRUPTCY - AFTER ACQUIRED PROPERTY

28 Mr Muir Hunter said that this did not apply in the US or Germany and many regarded it as an unjust burden, although this was being reduced by the acceleration of discharges. Mr Weiss said that a trustee rarely became aware of after-acquired property; it was usually the OR who became aware much later, after the trustee had ceased to act, and he then had trouble in finding the creditors. The Secretary said that it had been the view that such property did not vest in the trustee unless he intervened and claimed, but Re Pascoe (1944) had upset this by stating that it vested in the trustee immediately upon acquisition by the bankrupt; Blagden had recommended that the position should be restored to what had been thought as the position before Pascoe. Mr Muir Hunter said that the provision could also be used as a longstop so that property found in the possession of the bankrupt, but had been withheld, belonged to the trustee. He suggested that if we tightened up the rules relating to after-acquired earnings it might be acceptable to dispense with the vesting of other after-acquired assets.

29 Several members were in favour of abolishing the provision but Mr Walker-Arnott thought that the property should be available even if there were only a small number of cases. Mr Penny, Mr McNab and Mr Copp were concerned that if it were abolished some debtors would have income converted into capital sums and escape contributions.

30 Mr Penny pointed out that present thoughts were that after-acquired property would only figure in full bankruptcy. It was agreed that the subject would be discussed later after the Penny and Weiss sub-committees had had more meetings.

ANY OTHER BUSINESS

31 The suggestion was made that the Penny/Weiss sub-committees, which had largely common membership, should be split into two smaller working groups, with no one member serving on both groups, to deal with the bankruptcy items referred to them. Mr Weiss asked that there should be a lay member in each group and Mr Copp agreed to join the committee. The details of the structure of the two groups would be worked out at the Weiss sub-committee meeting on 11 June.

32 Considerable concern was expressed at the slow progress being made by the Committee and it was suggested that to cover all the remaining subjects, consideration of matters which had been put to the panels and sub-committees and the draft report might take another thirty six meetings. Mr Walker-Arnott asked for an up-dating of the programme, showing items still to be tackled and those to come back from panels and sub-committees, with an estimate of the number of meetings needed to deal with these; he thought that this should be dealt with in a short period at the beginning of the next meeting. The Secretary said that he expected that more frequent meetings would be feasible later in the year. The suggestion was made that members should send their comments to the Secretary on this before the next meeting. [NOTE: A list of outstanding matters is attached to these minutes].

NEXT MEETING

33 It was agreed that the Committee would meet at 10.00 am on Wednesday, 13 June 1979.

[NOTE: Page proofs of "Williams and Muir Hunter" referred to in para 25 above, are attached.]

LIST OF OUTSTANDING MATTERS

A. Matters yet to be discussed (ILRC 85 refers)

1 Completion of full bankruptcy procedure (ILRC 94)

2 Antecedent transactions:

ILRC 87 - Voluntary settlements

ILRC 88 - Fraudulent preferences

ILRC 89 - Sureties and guarantors

ILRC 90 - Fraudulent conveyances

ILRC 91 - General assignment of book debts

ILRC 92 - Avoidance of floating charges

3 Partnership bankruptcy

4 Criminal bankruptcy

5 Provable debts - proofs of debt

6 OR's Service

7 Special Insolvency Courts

8 The Administrator (working paper being prepared by the Accountants' Panel).

9 Company schemes of arrangement and compositions

10 Fixed charges (ILRC 22B)

11 Administration of deceased insolvent estates.

Payne Cttee had 67 meetings.
Payne Report 567 pp.
Crowther on consumer credit
Molony. Consr. Protn 55 mtgs

B. Matters referred to panels and sub-committees

1 A number of matters on receiverships arising out of the report of the Accountants' Panel (ILRC 73) are being looked at by the Accountants' Panel or the Legal Panel, or both.

2 Retention of title (both Panels)

3 Committees of creditors (the AP will be producing a working paper relating to all insolvency proceedings).

4 Liquidator's duties (both Panels)

5 Compulsory liquidations (AP to look at two or three matters arising from the Chairman's draft Report)

6 Compulsory bonding

7 Dealing with uncontested petitions

8 Delinquent directors

9 Fraudulent trading

10 Group trading

11 Grounds for presentation of petitions (Muir's S/Cttee)

12 Arrangement Orders (Ritchie's S/Cttee)

13 Voluntary arrangement of individual debtors (Gerry's S/Cttee)

14 Various bankruptcy matters (S/Cttees).

15 "Liquidation of Assets" (Gerry's S/Cttee).

C. Matters referred back for further discussion

1 Proprietory of floating charges

2 Alfred Goldman's proposed 10% levy

3 Bankruptcy deposits (29th Mtg para 13)

4 A number of matters on receiverships arising from the report of the AP (ILRC 73)

5 General powers of bankruptcy courts (s.105) and Jurisdiction as between Bankruptcy Courts of England, Scotland and N Ireland (26th Mtg, para 30)

6 Should public interest over-rule views of creditors where Secretary of State petitions for winding-up a company? (12th Mtg, para 20)

7 Landlord's rights (23rd Mtg, para 3)

8 Various matters arising in voluntary winding-up (9th Mtg)

9 British Eagle case

10 Rights of public utilities

11 Minimum paid up capital (26th Mtg, para 24)

12 Reputed ownership (16th Mtg, para 40)

13 Relation back (18th Mtg, para 41)

14 Public examination of company directors (29th Mtg, para 30)

15 Substituted service (29th Mtg, para 34)

Page proofs of "Williams & Muir Hunter" (19th edn).
The Matrimonial Home

Property vested in bankrupts merely *virtute ocffiii* (*e.g.* as executors, administrators and trustees in bankruptcy) does not pass to their trustees in bankruptcy [67]; as to the executor's right of action under the Fatal Accidents Act 1976, see *post*, p. 000.

On the bankruptcy of a trustee, the court has power to appoint a new one; see the Trustee Act 1925, s. 41: see also *post*.

Property held by bankrupt as trustee for sale, but with part beneficial interest in bankrupt

A bankrupt may hold property on trust for sale, either solely or jointly with another trustee, in circumstances where the beneficial interest is vested partly in the bankrupt and partly in another party; such other party may be the bankrupt's spouse, a " common law husband " or a " common law wife," or a child or other relative. This gives rise to particular problems where that property is the residence of the beneficiaries. The acquisition by that other party of his or her interest may have arisen either from a gift made to him or her by the bankrupt, or in consequence of a " purchase " by him or her for valuable consideration in money or money's worth.[68] Where the interested parties are husband and wife, or " common law spouses," their marriage, or their stable quasi-matrimonial relationship, may still be subsisting when the trustee in bankruptcy comes to assert his rights against the property,[69] or it may legally or practically have come to an end,[70] or be about to come to an end.[71] In the latter cases, the concept of the " matrimonial home " or the " quasi-matrimonial home " has ceased or is ceasing to be a relevant consideration for the purposes of affecting the rights and interests of the interested parties, that is to say, of the trustee in bankruptcy, claiming on behalf of the creditors, and of the other party, claiming either on his or her own behalf, in a capacity founded on status, or on status coupled with the existence of dependent children.[72]

Distinction between rights under matrimonial law and in bankruptcy

In this field, a clear distinction has to be drawn between on the one hand the principles of matrimonial law applying to spouses, and also (by analogy or by statute) to unmarried partners as between themselves, and on the other hand those which apply in bankruptcy, where the creditors comprise one interested party, whose rights have to be considered and weighed against those of the other interested party [73]; this is particularly relevant where the bankrupt's share in the value of the home, or in the equity therein, constitutes the largest, if not indeed the only asset, in the bankruptcy.[74]

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[67] See *Ludlow* v. *Browning* (1708) 11 Mod. 138; *Williams on Executors* (14th ed.), Vol. II, p. 1086.

[68] See, in the case of married persons, the Matrimonial Proceedings and Property Act 1970, s. 37.

[69] See *e.g. Re Turner* (*a Bankrupt*) [1974] 1 W.L.R. 1556, where *Jones* v. *Challenger* [1961] 1 Q.B. 176 and *Re Solomon* [1967] Ch. 573 (see *post*) were considered.

[70] As in *Re Bailey* [1977] 1 W.L.R. 278, D.C. (divorce).

[71] As in *Re Solomon*, *ante* (a case of desertion), applying *National Provincial Bank Ltd.* v. *Ainsworth* (*aliter*, *Hastings Car Mart Ltd.*) [1965] A.C. 1175, H.L. *Cf.* also *Waller* v. *Waller* [1967] 1 W.L.R. 451. In *Re Solomon*, the case of *St. Thomas' Hospital* v. *Richardson* [1910] 1 K.B. 271 (see *ante*), was not cited.

[72] See *Re Solomon*, *ante* (where it was held that the marriage which had been the motive for the joint tenancy was virtually at an end, and did not in itself confer any right on the wife to resist the trustee's demand for a sale) and *Re Bailey*, *ante*, at pp. 283–284.

[73] See *Re Bailey*, *ante*, and citation therefrom at note 86, *post*.

[74] As in *Re McCarthy* (*a Bankrupt*) [1975] 1 W.L.R. 807, *Re Bailey*, *ante*, and *Re Densham* [1975] 1 W.L.R. 1519. The rights conferred on the trustee in bankruptcy *vis-à-vis* the wife in general enure equally for the benefit of the husband's mortgagees: see *National Provincial Bank* v. *Ainsworth*, *ante*, *per* Lord Wilberforce at pp. 1258–1259 and *cf. Lloyds Bank* v. *O's Trustee* [1953] 1 W.L.R. 1460, and *Barclays Bank* v. *Bird* [1954] Ch. 274, cited *post*, at p. 000.

Ascertainment of equitable interests founded on contribution and status

In determining the rights and interests of one party in a piece of real property held wholly or partly by another, it may not greatly matter into whose name or names the property has been conveyed; for equity will be astute to identify and enforce equitable interests arising out of the respective contributions made by the acquirers to the purchase price, either on purchase or by virtue of mortgage or other payments for the exoneration or the improvement of the property after purchase.[75] Within the field of matrimonial causes, the Family Division tends as a general rule to recognise each spouse as entitled to a substantial share in the value of the home while as far as possible preserving it in being.[76]

Registration of spouse's interest invalid as against trustee in bankruptcy

Each spouse now possesses a statutory right to register his or her claimed interests against the title to the home, so as to preclude the other spouse from dealing with it to his or her detriment [77]; but such registration confers no title on that spouse valid as against the trustee in bankruptcy of the other.[78]

Voidability of interests conferred on other spouse by bankrupt without consideration or fraudulently

Any share or interest in the matrimonial home conferred by one spouse on the other, either by conveyance into the other's name or into joint names, whether as between married persons or common law spouses, may be impeached by the trustee of that party under section 42 of the Act as a voluntary disposition (if made within the statutory periods thereby prescribed [79]), or under section 172 of the Law of Property Act 1925, as a fraudulent conveyance,[80] unless the other spouse has provided a reasonable equivalent in actual value as the consideration for the conferment of that share or interest.[81] The mere assumption by the recipient of the whole or part of the liabilities of the bankrupt in relation to the property would appear not to satisfy this criterion.[82]

Trustee in bankruptcy entitled to enforce possession and sale

If, however, the recipient party had originally given, or later gave, consideration adequate to satisfy this criterion in defending that share or interest against

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[75] See *e.g. Gissing* v. *Gissing* [1971] A.C. 886, H.L., cited in *Re Densham*, *ante*, at pp. 1524–1526. *Cf. Tew* v. *Tew's Trustee* (1968) 207 E.G. 1111, D.C. (legal estate in lease in names of bankrupt and wife; all purchase moneys supplied by wife.)

[76] See *e.g. Williams* (*J. W.*) v. *Williams* (*M. A.*) [1976] Ch. 278, C.A., distinguished in *Re Bailey*, *ante*, and contrasted with *Burke* v. *Burke* [1974] 1 W.L.R. 1063, C.A. (both matrimonial causes).

[77] See the Matrimonial Homes Act 1967, ss. 1 and 2, and the Matrimonial Proceedings and Property Act 1970, s. 38.

[78] Or an assignee for the benefit of creditors or the administrator of a deceased insolvent's estate: see Matrimonial Homes Act 1967, s. 2 (5). That Act was passed *inter alia* to restore to a deserted wife remaining in occupation of the matrimonial home the right of occupancy which she had, in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, C.A., been recognised as possessing, even as against her husband's trustee in bankruptcy, but of which she had been deprived by the overruling of that decision in *National Provincial Bank Ltd.* v. *Ainsworth*, *ante* (see in particular *per* Lord Hodson at p. 1222); but the Act expressly did not restore any rights against the husband's creditors. By parity of reasoning, property adjustment orders made in matrimonial causes are impeachable by a spouse's trustee in bankruptcy: see Matrimonial Causes Act 1973, s. 39, and *post*.

[79] See s. 42, *post*, p. 000, and the Matrimonial Causes Act 1973, s. 39, *ante*.

[80] That enactment must be relied upon, if the settlor has died before bankruptcy: see the notes to s. 42, *post*, at p. 000. For a case involving a fraudulent lease in favour of a wife, see *Lloyds Bank Ltd.* v. *Marcan* [1973] 1 W.L.R. 1387, C.A.

[81] See *e.g. Re Densham*, *ante*, and *Re Windle* (1975) 1 W.L.R. 1629, (where *Re Charters* [1923] B. & C.R. 94 and *Re Morrison* [1965] 1 W.L.R. 1498 were criticised and distinguished).

[82] As in *Re Morrison* and *Re Windle*, both *ante*.

the trustee of the other party generally, it does not follow that the beneficial ownership of that share or interest can be defended against the trustee to the extent of asserting the right to retain possession of the home, or of resisting the trustee's application for an order, under section 30 of the Law of Property Act 1925, to enforce the trust for sale by a sale and a distribution of the parties' respective net portions of the proceeds.[83] That section gives the court the widest discretion [84]; in principle, it would seem that the trustee is entitled to such an order so as to unlock that portion of the bankrupt's assets for the benefit of the creditors,[85] although the order may be suspended so as to enable the other party either to arrange to buy out the trustee, or to secure an alternative home.[86] However, no general rules can be laid down in this field, and each case must be determined upon its own facts and the equities created thereby; but the existence of dependent children whose home or education would be broken up by such a compulsory sale will not, in principle, be regarded as a significant factor in dissuading the court from ordering a sale.[86]

Summary of the present law as to possession and sale

Where the wife (and also, it would seem, the husband) has a legal or beneficial interest in the home, " there is no automatic rule " (*viz.* as to whether the wishes of the trustee or the other spouse should prevail), " but it is the duty of the court to exercise a proper discretion in deciding whether to order a sale or not, and in exercising that discretion the court is under a duty to consider all the circumstances of the case . . . " [87]; " the guiding principle is not whether the trustee or the wife is being reasonable, but in all the circumstances whose voice in equity ought to prevail " [88]; presumably, the same principles could be applicable as between " common law spouses."

Cases have arisen where the joint owners of the property are not married spouses nor common law spouses, but, *e.g.* parent and child, or brother and sister.[89] In such cases, the same principles as stated above apply to the realisation of the bankrupt joint owner's interest, but *a fortiori*, since there is no matrimonial or quasi-matrimonial bond in existence.

For the position of the rights of the wife living in her bankrupt husband's house, apart from any beneficial interest vested in or registered by her, as above described, see note, " Wife's right to occupy bankrupt husband's house *qua* wife," *post*, p. ~~000~~. 270

Solicitor's clients' account

Moneys standing to the credit of a bankrupt solicitor's " clients, account " at his bank were held to be " held in trust for another person " under subsection (1), and accordingly did not vest in the trustee in bankruptcy, but remained vested in the bankrupt, and the court had jurisdiction under section 41 of the Trustee Act 1925, *ante*, to remove the bankrupt as trustee and appoint new

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[83] In *Re Solomon*, *ante*, the trustee in bankruptcy was held to be a " person interested " under that section: *cf. Stevens* v. *Hutchinson* [1953] Ch. 299, where a judgment creditor was held not to be. In *Re Solomon*, the judge had directed the bankrupt trustee to be joined as a respondent.

[84] *Re McCarthy* (*a Bankrupt*), *ante*, at p. 809: see also *Jones* v. *Challenger*, *ante* (application by a divorced spouse).

[85] *Re Turner* (*a Bankrupt*); *Re Bailey*, both *ante*.

[86] *Re Bailey*, *ante*, at pp. 283–284.

[87] *Re Bailey*, *ante*, at p. 281.

[88] *Re Turner* (*a Bankrupt*), *ante*, at p. 1558, cited in *Re Bailey*, *ante*, *ibid.*

[89] See *e.g. Re A Debtor* (24 *of* 1971) [1976] 1 W.L.R. 952 (father and son).

of the Court of Appeal) was that a licence granted for value, the revocation of which equity would restrain, is irrevocable so long as the licensee complies with the conditions of his licence, equity deeming that to be done which ought to be done, and the rules of equity now prevailing in all courts. Although that licence was to occupy a seat in a theatre, there seems no logical distinction between a licence to enter on or occupy land and a licence to seize chattels. The latter, if in writing, would be within the mischief of the Bills of Sale Acts: but a verbal licence might well be binding on the trustee in bankruptcy, who take subject to equities; *see ante*, pp. 000 *et seq.*

Re Wait: *Cotton* v. *Heyl*

It is submitted that neither *Re Wait* nor *Cotton* v. *Heyl*, *ante*, conflict with this view. The facts of *Re Wait* are set out at p. 00 *ante*. There the Divisional Court took the view that the 500 tons were " specific goods " within the meaning of sections 52 and 62 of the Sale of Goods Act 1893, the property in which passed at law, and decreed specific performance against the trustee: but the Court of Appeal (*dissentiente* Sargant L.J.) held that the goods were not specific and that there was no obligation to deliver any particular 500 tons so as to effect an equitable assignment thereof: the contract being an ordinary c.i.f. contract, there was no question of the purchaser having a licence to appropriate 500 tons for himself.

In *Cotton* v. *Heyl*, a contract to pay £4,000 out of the first moneys to be received out of the sale of rights in an invention was held to be a good equitable assignment of the £4,000; but *Re Wait* was not cited, and in principle is not easily reconcilable with this decision; but again no question of the licensee having a right to appropriate arose.[11] It seems from the judgment of Phillimore L.J. (who dissented in *Hurst's Case*) in *Re Lind*[11a] that the right of an equitable assignee is higher than the right to specific performance of a contract.

Where by a marriage settlement the husband covenanted to transfer all after-acquired property (except business assets) to the trustees, and then became bankrupt and obtained his discharge, but the trustees did not prove and the settlor again became bankrupt, it was held that the liability under the covenant was not released by the discharge: Cozens-Hardy L.J. said: " When once it has been decided that the covenant is one of which specific performance can be obtained, it follows that the right to specific performance is not barred by the bankruptcy. The covenant is not ancillary to a debt which was released by the bankruptcy."[11b] Now, however, by section 43, *post*, general assignments of book debts must be registered under the Bills of Sale Acts.

Wife's right to occupy bankrupt husband's house qua wife

264 Prior to the enactment of the matrimonial property legislation discussed at p. ~~000~~, *ante*, in relation to trusts for sale of the matrimonial home, the rights of a deserted wife to remain in occupation of her bankrupt husband's home had been considered in *Bendall* v. *McWhirter*,[12] from the aspect of licences granted by the bankrupt which may be binding upon the trustee. There the deserted wife

[11] See as to *Hurst's Case*, 31 L.Q.R. 217, and *cf. G.E. Ry.* v. *Lord's Trustee* [1909] A.C. 109.

[11a] [1915] 2 Ch. 345, C.A. at pp. 365–366.

[11b] *Re Reis* [1904] 2 K.B. 679, distinguishing *Collyer* v. *Isaacs* (1881) 19 Ch.D. 342, and *Hardy* v. *Fothergill* (1888) 13 App.Cas. 351. See also *ante*, pp. 00, 00; *Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1905] A.C. 454; *Ex p. South* (1818) 3 Swans. 392; *Jones* v. *Farrell* (1857) 1 D.F. & J. 208; *Diplock* v. *Hammond* (1854) 5 De G.M. & G. 320.

[12] [1952] 2 Q.B. 466, C.A., now overruled, see *post*.

[12a] *Lloyd's Bank* v. *O's Trustee* [1953] 1 W.L.R. 1460; *Barclays Bank* v. *Bird* [1954] Ch. 274.

[12b] Which was followed in several subsequent cases, later overruled with it.

of a man, later adjudged bankrupt, whom he had left in occupation of the matrimonial home (of which he was the legal owner) was held by the Court of Appeal to be a licensee with a special right, and as such entitled to retain possession not only against her husband (subject to section 17 of the Married Women's Property Act 1882), but also against his trustee in bankruptcy, by virtue of that licence by which the trustee's title to the property was incumbered. She was later held not to be entitled to retain possession against her husband's mortgagees.[12a]

The effect of that decision [12b] appeared to confer on the deserted wife of a bankrupt " a status of irremovability " in the enjoyment of what might be the bankrupt's main, if not his only, asset, which was not only prejudicial to the creditors generally, but also gave her a priority not recognised by the bankruptcy law itself. In *National Provincial Bank* v. *Ainsworth*,[13] however, that case was overruled; the rights of a wife (whether deserted or not) were there held to be purely personal to herself, deriving from her status as a wife,[13a] and not to be treated as binding upon the realty comprising the matrimonial home, or upon the trustee in bankruptcy of her husband. She was not without protection.[13b] or remedies against unjust dispossession; for she was entitled to obtain an injunction to restrain her husband's disposal of the home to the prejudice of her rights, and to apply to set aside sham or fraudulent transactions therewith, or dispositions intended to defeat her right to maintenance.[14]

Although this case concerned the rights of a deserted wife against her husband's mortgagee, the speeches clearly state that no distinction can be drawn between a mortgagee and a trustee in bankruptcy.[14a]

The Matrimonial Homes Act 1967 now confers on spouses certain rights to the matrimonial home, which are capable of being registered; by section 2 (5) these do not prevail against a spouse's trustee in bankruptcy or trustee under a deed of arrangement, or the personal representative of a deceased insolvent spouse. See notes to p. 000, *ante*, on these statutes.

For the position where the matrimonial home is held by the bankrupt and his (or her) spouse jointly on trust for sale, see *ante*, pp. 000–000.

Cheques drawn by debtor

In *Hopkinson* v. *Forster*,[14b] a cheque was held not to be an equitable assignment of a part of the drawer's bank balance, (see now section 53 (1) of the Bills of Exchange Act 1882); this accords with the decisions that death determines the banker's authority to pay the cheque, which are inconsistent with the operation of a cheque as an appropriation. Similarly, where a debtor gave her creditor a cheque, drawn upon her overdrawn account, which was paid into the creditor's account before, but not cleared by the debtor's bank until after, the debtor presented her own petition and was adjudicated; the creditor could not retain the proceeds of the cheque.[15] As to the point of time at which the clearing of a

[13] *National Provincial Bank* v. *Ainsworth* (in H.L., v. *Hastings Car Mart Ltd.*) [1965] A.C. 1175; see in particular the speeches of Lord Upjohn and Lord Wilberforce.

[13a] One foundation for the arguments on which the decision in *Bendall* v. *McWhirter* had been based, *viz*, the husband's inability to sue his wife in tort for ejectment, had been removed by the Law Reform (Husband and Wife) Act 1962: see *ibid. per* Lord Upjohn at pp. 1234–1235.

[13b] *Ibid. per* Lord Wilberforce at pp. 1258–1259.

[14] *Ibid.*; see the facts at p. 1180.

[14a] Lord Wilberforce there said (*ibid.* at p. 1256) that the law of England does not recognise " homestead right " of the wife, as do other countries such as U.S.A. and Canada, but not, it seems, Australia; *ibid.* p. 1258. See now the 1967 Act, *ante*.

[14b] (1874) L.R. 19 Eq. 74; and see *Schroeder* v. *Central Bank of London* (1876) 34 L.T. 735 and *Exp. Richdale* (1881) 19 Ch.D. 409, and *cf. Re Keever* [1967] Ch. 182, *post*, pp. ppp, 000, 000–000.

[15] *Re Hone* [1951] Ch. 85; see also *post*, pp. 000–000, 000.