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# Bankrupt's Standing to Sue for Losses Caused by Bankruptcy

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# BANKRUPT'S STANDING TO SUE FOR LOSSES CAUSED BY BANKRUPTCY

In *Reichert v. General Insurance Co. of America*,[1] the Supreme Court of California held that the trustee in bankruptcy was vested with the bankrupt insured's claim against fire insurers for loss due to bankruptcy caused by the insurer's failure to promptly settle. The majority of a divided court held that the bankrupt had no standing to sue despite the fact that the damage sustained occurred after he had gone into bankruptcy. The case raises the question of when, if ever, a bankrupt has standing to sue for damages suffered after bankruptcy but caused by wrongful failure to settle an insurance claim prior to bankruptcy.[2] The purpose of this Note is to examine this area of the law and evaluate the *Reichert* decision in light of that examination.

In *Reichert*, the owner of a heavily mortgaged motel was forced into bankruptcy as a result of the failure of his insurers to fulfill their obligations under the contract of insurance. The question is whether the damage suffered in losing his equity in the motel when he was forced into bankruptcy was grounds for a separate and distinct cause of action vesting in the bankrupt. To resolve this problem one must first look to the federal statute. The pertinent part of the Bankruptcy Act, section 70[3] reads:

> (a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a process under this title . . . to all the following kinds of property wherever located.

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1. 442 P.2d 860, 69 Cal. Rptr. 328 (1968).

2. Plaintiff Reichert purchased a motel worth $1,500,000 and, as part of the transaction, received assignments of four insurance policies then in effect. Nineteen days after the plaintiff purchased the motel a fire caused $424,000 worth of damage, but the defendant insurance companies refused to honor the plaintiff's claim. The plaintiff was adjudicated an involuntary bankrupt, after which an $850,000 deed of trust on the motel was foreclosed. Charging that the defendant's actions were made pursuant to a conspiracy to defraud him, the plaintiff asked for actual damages of $1,500,000 and punitive damages of $5,000,000. The District Court of Appeals sustained the defendant's demurrers on the ground, among others, that the plaintiff lacked the capacity to sue. 53 Cal. Rptr. 693 (1966). The Supreme Court reversed, 428 P.2d 860, 59 Cal. Rptr. 724 (1967), but on rehearing vacated its original opinion and affirmed the decision sustaining the demurrers. 442 P.2d 860, 69 Cal. Rptr. 328 (1968).

Although the issue presented in *Reichert* serves as a basis for this Note, the scope of this examination is expanded to include areas that were not covered by that case.

3. 11 U.S.C. § 110 (1964).

> . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered. . . . (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property.

If the right of action arose prior to the petition in bankruptcy, under this section of the Bankruptcy Act the trustee acquires title to the property (right of action) at the time the petition is filed.[4] Conversely, if the property is acquired subsequent to the filing of the petition it is after-acquired property belonging to the bankrupt,[5] clear of any claims discharged by the bankruptcy.[6] The bankrupt's property will pass to the trustee if such property could have been transferred by the bankrupt[7] or levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered.[8] If either of these conditions are met, the property will pass to the trustee;[9] otherwise it will not.[10]

The alternatives open to the bankrupt in the *Reichert* situation are (1) to bring a contract action based on breach of the insurance contract; (2) bring an *ex delicto* action for "personal injury" which will not normally pass to the trustee in bankruptcy; or (3) show that the trustee has abandoned the right of action in which case the bankrupt himself may bring the suit. These possibilities will be considered in order.

### Bankrupt's Rights in Contract

Insurance is essentially a personal contract to pay money to

4. Segal v. Rochelle, 382 U.S. 375 (1966); Allen v. Watkins, 234 F.2d 925 (5th Cir. 1956); *In re* Lustron Corp., 184 F.2d 789 (7th Cir. 1950), *cert. denied*, 340 U.S. 946 (1951); Tuffy v. Nichols, 120 F.2d 906 (2d Cir.), *cert. denied*, 314 U.S. 660 (1941); *In re* Park Beach Hotel Bldg. Corp., 96 F.2d 886 (7th Cir.), *cert. denied*, 305 U.S. 638 (1938); 4A Collier, Bankruptcy § 70.07 (14th ed. 1967).

5. *See, e.g.*, Sparhawk v. Yerkes, 142 U.S. 1 (1891); 4A Collier, Bankruptcy § 70.09 (14th ed. 1967).

6. 1 Collier, Bankruptcy § 17.30 (14th ed. 1967) and cases cited therein.

7. Whether or not the property can be transferred is determined by the applicable state law. Adelman v. Centaur Corp., 145 F.2d 573 (6th Cir. 1944); Mutual Life Ins. Co. v. Menin, 115 F.2d 975 (2d Cir. 1940); *In re* Landis, 41 F.2d 700 (7th Cir. 1930).

8. Bankruptcy Act § 70(a)(5); 11 U.S.C. § 110(a)(5) (1964). *See, e.g.*, Young v. Handwork, 179 F.2d 70 (7th Cir. 1949); Adelman v. Centaur Corp., 145 F.2d 573 (6th Cir. 1944); *In re* Baxter, 104 F.2d 318 (6th Cir. 1939).

9. *See, e.g.*, Young v. Handwork, 179 F.2d 70 (7th Cir. 1949); Adelman v. Centaur Corp., 145 F.2d 573 (6th Cir. 1944).

10. *See, e.g., In re* Baxter, 104 F.2d 318 (6th Cir. 1939).

protect the insured,[11] involving contractual security against anticipated loss.[12] A cause of action is deemed to accrue when facts exist which enable one party to maintain an action against another party.[13] A cause of action arising out of contractual relations normally accrues as soon as the contract or agreement is breached, that is, when there is a failure to do the thing agreed.[14] Where the failure to do the thing agreed is the failure to promptly settle a claim, and that failure is the cause of the bankruptcy, the breach of contract must necessarily occur prior to the bankruptcy. Since the breach occurs prior to the bankruptcy, the cause of action on that breach will vest in the trustee.[15]

The question then arises as to whether the bankrupt has a separate cause of action which may properly be severed from the cause of action on the original breach of contract. The general rule is that a plaintiff must recover all damages arising from the operative facts in a single action.[16] A single cause of action, being a violation of one fundamental right, may not be split and used as a basis for separate suits.[17] This is true even though a plaintiff may not have suffered all his foreseeable damages.[18] He must prove not only such damage as has already been suffered but also prospective damages to which he may legally be entitled.[19] Similarly, the bankrupt has but a single cause of action which accrues at the time the contract was breached. He will not be allowed to split the cause of action so that the damages resulting from bankruptcy would be a new cause of action accruing at the time the petition was filed.

In *Reichert*, the bankrupt asserts that he is seeking recovery for damages which were *caused by* his going into bankruptcy. Although numerous exceptions are cited to the general rule that a

11. Utica v. Park-Mill Corp., 41 N.Y.S.2d 248 (1943).

12. Jordan v. Group Health Ass'n., 107 F.2d 239 (D.C. Cir. 1939).

13. *See, e.g.*, Great Am. Ins. Co. v. Louis Lesser Enterprises, Inc., 353 F.2d 997 (8th Cir. 1965).

14. *See, e.g.*, Great Am. Ins. Co. v. Louis Lesser Enterprises, Inc., 353 F.2d 997 (8th Cir. 1965); H.P. Cummings Const. Co. v. Marbleoid Co., 51 F.2d 906 (3d Cir. 1931); Guild v. Hopkins, 271 App. Div. 234, 63 N.Y.S.2d 522 (1946); Guarantee Trust and Safe Deposit Co. v. Home Mut. Fire Ins. Co., 180 Pa. Super. 1, 117 A.2d 824 (1955). *But see* note 31 *infra*.

15. "It is clear that a 'cause of action' is an asset or a property right of the individual to whom it belongs. It is equally clear that, under the Bankruptcy Act, the title to a 'cause of action' which belongs to the individual prior to bankruptcy passed to the trustee in bankruptcy. . . ." Gochenour v. George & Francis Ball Foundation, 35 F. Supp. 508, 514 (S.D. Ind. 1940), *aff'd*, 117 F.2d 259 (7th Cir.), *cert. denied*, 313 U.S. 566 (1941).

16. *See, e.g.*, Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967); Woodbury v. Porter, 158 F.2d 194 (8th Cir. 1946); Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 P. 425 (1911); McCaffery v. Wiley, 103 Cal. App. 2d 621, 230 P.2d 152 (1951).

17. Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 P. 425 (1911); McCaffery v. Wiley, 103 Cal. App. 2d 621, 230 P.2d 152 (1951).

18. Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 P. 425 (1911).

19. *Id.*

cause of action in contract accrues at the time of the breach,[20] this line of reasoning is fallacious. Analogizing *Reichert* to the prime authority cited for the proposition that a cause of action will not arise until the time of the injury will not help in the situation at hand. Reichert did, however, attempt to analogize his situation to those found in *Comunale v. Traders & General Insurance Co.*[21] and *Brown v. Guarantee Insurance Co.*[22] These two cases involved insurance companies wrongfully denying coverage of claims by third persons against the insured, and on that basis, refusing settlements within the policy limits. Judgments in excess of the policy limits were subsequently recovered against the insured parties. It was held that a cause of action for wrongful refusal to settle accrued at the time of the injury when the judgments in excess of the policy limits became final, and not at the time of the wrongful conduct.

These cases are, however, easily distinguishable from the *Reichert* situation. Although a cause of action generally accrues at the time of the wrongful act, before the act can be wrongful there must be an invasion of the rights of the injured party.[23] In *Linkenhoger v. American Fidelity & Casualty Co.*,[24] a situation similar to *Comunale* and *Brown*, the court said that the petitioner

> could not have maintained this present suit until such time as his liability and the extent thereof had been determined by a final judgment in the former case. Until then his rights had not been invaded by respondent's failure to accept the terms of the settlement offered and the tort was not complete.[25]

In the present situation, as soon as the defendant insurance companies refused to settle, a right of action arose in favor of the bankrupt. By virtue of his inability to collect the money due under the policies, he suffered immediate loss, even though the extent of his loss could not then be determined. By contrast, in *Comunale*, *Brown*, and *Linkenhoger*, the insured suffered no immediate legal detriment when the insurers refused to settle. If the third party suit against the insured had resulted in a judgment for the third party, but within the limits of the insurance policies, the insured would never have suffered any loss. It was not until a judgment was handed down which exceeded the policy limits

20. See note 31 *infra*.
21. 50 Cal. 2d 654, 328 P.2d 198 (1958).
22. 155 Cal. App. 2d 679, 319 P.2d 69 (1957).
23. Linkenhoger v. American Fidelity & Cas. Co., 152 Tex. 534, 260 S.W.2d 884 (1953).
24. *Id.*
25. *Id.* at 539, 260 S.W.2d at 887.

that the plaintiff suffered any loss. Therefore, there was no right of action until the time of the injury, even though the injury stemmed from the defendant's wrongful conduct at some time prior to the injury.

Closer on point, and cited as authority that a separate cause of action vests in the bankrupt for damage sustained after bankruptcy is *Wooten v. Central Mutual Insurance Co.*[26] In that case, an insured party under an automobile liability policy was forced into bankruptcy as a result of a judgment in excess of the policy limits. The trustee in bankruptcy, in addition to seeking recovery of the excessive portion of the judgment, claimed a separate cause of action for damages for loss of reputation and credit of the bankrupt. The court permitted the trustee to recover the portion of the judgment in excess of the insurance policy but held that a separate cause of action for the bankrupt's loss of credit and reputation vested in the bankrupt and could not be brought by the trustee. The damage was sustained as a result of the bankruptcy and, thus, after the petition of bankruptcy was filed. The cause of action therefore accrued at the time of the filing for bankruptcy, which was the time of the injury and not the time of the wrongful conduct which caused the injury.

*Wooten*, although more difficult to distinguish, is still not persuasive. The great weight of authority is contra. The case appears to be based on a peculiarity of Louisiana law which recognizes a distinct and separate cause of action for recovery of damages for loss of reputation and credit. The more persuasive position is taken in *Patton v. Fidelity-Philadelphia Trust Co.*[27] In a factual setting similar to *Wooten*, the court held that there was no separate cause of action for impairment of credit and reputation. The gravamen of the action arose in contract and the cause of action therefore vested in the trustee under section 70(a)(6) of the Bankruptcy Act.[28]

Moreover, *Wooten* is not persuasive authority as the claim there is fundamentally different from the *Reichert* case. The separate cause of action in *Wooten* was for loss of reputation and credit while in *Reichert* it was for recovery of damages for loss of property. Although the *Wooten* court specifically declined to decide the case on this distinction, a cause of action for injury to reputation and credit has been held to be a "personal injury" which would not vest in the trustee anyway.[29] A cause of action for damage to property will, however, vest in the trustee.[30]

There are, of course, many other examples showing that a

26. 182 So. 2d 146 (La. App. 1966).
27. 246 F. Supp. 1015 (E.D. Pa. 1965).
28. 11 U.S.C. § 110(a)(6) (1964).
29. Boudreau v. Chesley, 135 F.2d 623 (1st Cir. 1943); Gurfein v. Howell, 142 Va. 197, 128 S.E. 644 (1925). See discussion on p. 693 *infra*.
30. Bankruptcy Act § 70; 11 U.S.C. § 110 (1964).

cause of action, under the proper circumstances, accrues at the time of the injury, and not the time of the wrongful conduct which causes the injury.[31] In each of the cases cited, there was a compelling reason why it should stand as an exception to the general rule, either because none of the plaintiff's rights were invaded by the wrongful conduct,[32] or the injury could not, with reasonable diligence, be discovered until sometime after the wrongful conduct,[33] or some other reason such as a suspension of a cause of action pending the outcome of third party litigation.[34] Therefore, if a separate cause of action is to be allowed for the bankrupt for damages caused by bankruptcy, some compelling reason must be found to justify an exception to the rule that the cause of action accrues at the time of the breach. There appears to be none. The bankrupt knew that the failure of the insurance companies to settle his claim immediately invaded his right under the insurance contract. He suffered immediate detriment. The act which caused his detriment was not concealed from him in any way. He should have been aware of the fact that he had a right of action. In such a case there is no practical consideration which warrants departure from the general rule.

If this suit is to be an action in contract then it must be recognized that the cause of action accrued when the insurance companies breached the contract. To rule otherwise would be to confuse a cause of action with consequential damages resulting from a cause of action. There is no new cause of action simply

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31. Examples cited in *Reichert* include: Tu-Vu Drive-In Corp. v. Davies, 66 Cal. 2d 435, 426 P.2d 505, 58 Cal. Rptr. 105 (1967); Day v. Greene, 59 Cal. 2d 404, 380 P.2d 385, 29 Cal. Rptr. 785 (1963); Amen v. Merced County Title Co., 58 Cal. 2d 528, 375 P.2d 33, 25 Cal. Rptr. 65 (1962); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961); Bellman v. County of Contra Costa, 54 Cal. 2d 363, 353 P.2d 300, 5 Cal. Rptr. 692 (1960); Brewer v. Simpson, 53 Cal. 2d 567, 349 P.2d 289, 2 Cal. Rptr. 609 (1960); Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Costs v. Southern Pac. Co., 49 Cal. 2d 805, 322 P.2d 460 (1958); Bennett v. Hibernia Bank, 47 Cal. 2d 540, 305 P.2d 20 (1956).

32. Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Brown v. Guar. Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1957).

33. Day v. Greene, 59 Cal. 2d 404, 380 P.2d 385, 29 Cal. Rptr. 785 (1963); Amen v. Merced County Title Co., 58 Cal. 2d 528, 375 P.2d 33, 25 Cal. Rptr. 65 (1962); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961); Coots v. Southern Pac. Co., 49 Cal. 2d 805, 322 P.2d 460 (1958); Bennett v. Hibernia Bank, 47 Cal. 2d 540, 305 P.2d 20 (1956). *See also* Alter v. Michael, 64 Cal. 2d 480, 413 P.2d 153, 50 Cal. Rptr. 553 (1966).

34. Tu-Vu Drive-In Corp. v. Davies, 66 Cal. 2d 435, 426 P.2d 505, 58 Cal. Rptr. 105 (1967).

because new damages result from the original wrong. To conclude that the bankrupt and not the trustee, takes title to the consequential damages caused by the insurer's delay in payment reaches the anomalous result of allowing both the trustee and the bankrupt to bring suit to recover different elements of damage under a single cause of action. The insurance companies would then be subject to multiple litigation based on a single cause of action. Such a result is contrary to the law.[35]

Thus if the bankrupt bases his action on breach of the insurance contract, unless some compelling reason would justify exception to the general rule, there is but a single cause of action which accrues at the time of the breach and therefore passes to the trustee.

### Bankrupt's Rights in Tort

If the plaintiff cannot show that his cause of action in contract should accrue at the time of the bankruptcy, his alternative would be to show that he has a separate cause of action not based on contract, which would not pass to the trustee.

Section 70(a)(5) of the Bankruptcy Act[36] sets apart certain kinds of *ex delicto* actions which do not normally pass to the trustee in bankruptcy. These actions are for damages of a more personal nature—injury to the bankrupt's person, feeling, or reputation—which do not belong to his creditors.[37] The section reads:

> Rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative . . . shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process. . . .

It will be noted that a bankrupt's actions for personal injuries belong solely to him unless the applicable state law subjects such a right of action to actions by a creditor.[38] Since transferability is determined by state law, no general rule can be laid down with regard to the bankrupt's standing to sue for possible tort claims.

Actions for impairment of the bankrupt's reputation and credit have been held to be of such a personal nature so as not to pass to

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35. Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 P. 425 (1911); McCaffery v. Wiley, 103 Cal. App. 2d 621, 230 P.2d 152 (1951).

36. 11 U.S.C. § 110(a)(5) (1964).

37. *See, e.g.*, Charness v. Katz, 48 F. Supp. 374 (E.D. Wis. 1943). "It is not, and never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish, or outraged feelings of a bankrupt." Sibley v. Nason, 196 Mass. 125, 131, 81 N.E. 887, 889 (1907).

38. *See, e.g., In re* Buda, 323 F.2d 748 (7th Cir. 1963); *In re* Leibowitt, 93 F.2d 333 (3d Cir. 1937). In California, the jurisdiction of *Reichert*, even actions based on purely personal injuries, such as for libel and slander, may vest in the trustee since such actions are subject to judicial process in California. *See also* Carmona v. Robinson, 336 F.2d 518 (9th Cir. 1964); *In re* Farris, 217 F. Supp. 598 (N.D. Cal. 1963).

the trustee.[39] However, where the gravamen of the action arose in contract, as in the *Reichert* situation, it has been held that there is no separate cause of action for impairment of reputation and credit. Rather, there is a single cause of action which includes these elements of damage and which is vested in the trustee.[40]

Actions for injury which impairs future earning power is likewise considered to be personal, and, as such, will not normally pass to the trustee.[41] In *Local Loan Co. v. Hunt*,[42] the Supreme Court said ". . . earning power of an individual is the power to create property; but it is not translated into property within the meaning of the Bankruptcy Act until it has brought earnings into existence."[43] Earning power is in the nature of a personal liberty, not a property right, and to allow such a right to be transferred to the use of one's creditors would defeat the purpose of the Bankruptcy Act.[44]

Actions for conspiracy to defraud and financially ruin a plaintiff are not normally construed as a "personal injury" within the meaning of the Bankruptcy Act.[45] The cases hold that such an injury lessens the bankrupt's estate, that is, the damage is actually to the bankrupt's property, not his person.[46] Recognizing

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39. Boudreau v. Chesley, 135 F.2d 623 (1st Cir. 1943); Gurfein v. Howell, 142 Va. 197, 128 S.E. 644 (1925); *cf.*, Wooten v. Central Mut. Ins. Co., 182 So. 2d 146 (La. App. 1966).

40. Patton v. Fidelity-Philadelphia Trust Co., 246 F. Supp. 1015 (E.D. Pa. 1965).

41. Local Loan Co. v. Hunt, 292 U.S. 234 (1934); Boudreau v. Chesley, 135 F.2d 623 (1st Cir. 1943). Injury which impairs future earning power is considered a "personal injury" on the ground that to give the creditors power over such rights would place the bankrupt in a kind of "involuntary servitude" after his supposed discharge. *In re* Leibowitt, 93 F.2d 333 (3d Cir. 1937).

42. 292 U.S. 234 (1934).

43. *Id.* at 243.

44. *Id.* at 245.

45. Gochenour v. Cleveland Terminal Bldg., 118 F.2d 89 (6th Cir. 1941); Tamm v. Ford Motor Co., 80 F.2d 723 (8th Cir. 1936); Hermsmeyer v. A.L.D., Inc., 239 F. Supp. 740 (D. Colo. 1964); Constant v. Kulukundis, 125 F. Supp. 305 (S.D.N.Y. 1954); *In re* Gay, 182 F. 260 (D. Mass. 1910); *In re* Harper, 175 F. 412 (N.D.N.Y. 1910). Although the defendant's fraud is a possible basis for a separate cause of action, "the failure to perform a duty prescribed by contract cannot be converted into a tort by reason of the motive of the party guilty of the breach." Baumgarten v. Alliance Assur. Co., 159 F. 275, 278 (N.D. Cal. 1908).

46. The courts favor a broad interpretation of section 70 of the Bankruptcy Act, tending toward increased transferability of the bankrupt's property. *See, e.g.*, Gochenour v. Cleveland Terminal Bldg., 118 F.2d 89 (6th Cir. 1941):

> The object of the Bankruptcy Act is to benefit creditors by making all the pecuniary means and property of the bankrupt available to their payment, and in furtherance of this object, there

the favored broad interpretation of section 70, any injury which affects the estate of the bankrupt, or that diminishes it in some way, is deemed to be an injury to the bankrupt's property and not his person for purposes of transferability to the trustee. However, a fraud action has been held to be personal and non-assignable and did not, therefore, pass to the trustee.[47]

If the bankrupt is to have a separate action sounding in tort which does not pass to the trustee, that action must not be transferable under the law of the state.[48] However, if the injury sustained, even though apparently by a personal tort, goes directly toward diminishing the value of the bankrupt's estate, the courts will usually determine that this is a right of action arising upon ". . . the unlawful taking or detention of or injury to his property"[49] and will therefore pass to the trustee.[50]

### Abandonment by the Trustee

The only other means by which the bankrupt can acquire the right to pursue his claim is to show that the right of action was rejected by the trustee.[51] Although the trustee is vested with title to the bankrupt's property when the petition of bankruptcy is filed,[52] the trustee is not bound to accept property which he feels is too burdensome or unprofitable to be of any advantage to the estate.[53] In such a case, the trustee may abandon the asset, in which case title reverts to the bankrupt.[54] Normally, it takes

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passes to the trustee, not only what in strictness may be called the property of the bankrupt, but all those rights of action to which he was entitled for the purpose of recovering real or personal property, or damages respecting that which has been unlawfully diminished in value, withheld, or taken from him.

*Id.* at 93; Tamm v. Ford Motor Co., 80 F.2d 723 (8th Cir. 1936); Hermsmeyer v. A.L.D., Inc., 239 F. Supp. 740 (D. Colo. 1964); *In re* Goodson, 208 F. Supp. 837 (S.D. Cal. 1962); Constant v. Kulukundis, 125 F. Supp. 305 (S.D.N.Y. 1954).

47. Jones v. Hicks, 358 Mich. 474, 100 N.W.2d 243 (1960). The court noted that the decision was based on ". . . the long recognized rule in this State that an action for damages for fraud may not be prosecuted by an assignee thereof."

48. *See, e.g., In re* Buda, 323 F.2d 748 (7th Cir. 1963); *In re* Leibowitt, 93 F.2d 33 (3d Cir. 1937).

49. Bankruptcy Act § 70(a)(6); 11 U.S.C. § 110(a)(6) (1964).

50. *See, e.g.*, Gochenour v. Cleveland Terminal Bldg., 118 F.2d 89 (6th Cir. 1941); Tamm v. Ford Motor Co., 80 F.2d 723 (8th Cir. 1936); Hermsmeyer v. A.L.D., Inc., 239 F. Supp. 740 (D. Colo. 1964); *In re* Goodson, 208 F. Supp. 837 (S.D. Cal. 1962); Constant v. Kulukundis, 125 F. Supp. 305 (S.D.N.Y. 1954).

51. *See, e.g.*, Colson v. Monteil, 226 F.2d 614 (8th Cir. 1955); *In re* Webb, 54 F.2d 1065 (4th Cir. 1932); United States v. Verrier, 179 F. Supp. 336 (D. Me. 1959); Hill v. Larcon Co., 131 F. Supp. 469 (W.D. Ark. 1955).

52. Bankruptcy Act § 70; 11 U.S.C. § 110 (1964). See note 4 *supra.*

53. *See, e.g.*, Stanolind Oil & Gas Co. v. Logan, 92 F.2d 28 (5th Cir. 1937), *cert. denied*, 303 U.S. 636 (1938).

54. *See, e.g.*, Colson v. Monteil, 226 F.2d 614 (8th Cir. 1955); *In re* Webb, 54 F.2d 1065 (4th Cir. 1932); United States v. Verrier, 179 F.Supp. 336 (D. Me. 1959); Hill v. Larcon Co., 131 F. Supp. 469 (W.D. Ark. 1955).

an express rejection of the asset by the trustee in order for the title to that property to revest in the bankrupt.[55] The burden is on the bankrupt to show that the property in question has been abandoned by the trustee.[56] Thus, the bankrupt can claim the right to sue in his own name only if he can show that the trustee has failed to enforce the claim.

## Conclusion

Of the possible actions available to the bankrupt for damages suffered after bankruptcy but caused by wrongful conduct prior to bankruptcy, only in limited circumstances will the bankrupt have standing to bring a suit on his own for those damages. There are two possibilities which would allow a bankrupt to sue: (1) an action for personal injuries, such as loss of reputation and credit or impairment of future earning power, in a state where the right of action for such injuries is not ". . . subject to attachment, execution, garnishment, sequestration, or other judicial process;" and (2) where the bankrupt can show that the trustee has abandoned the claim. All other rights of action are vested in the trustee in bankruptcy pursuant to section 70 of the Bankruptcy Act.

A right of action in contract, which an action on an insurance policy would normally be, will not be severable into two distinct causes of action, one accruing prior to bankruptcy and one accruing after bankruptcy. A single breach gives rise to but a single cause of action accruing prior to bankruptcy and therefore vesting in the trustee. Unless there is some compelling policy reason why the cause of action should not accrue until the full extent of the injury can be ascertained, the bankrupt will not have standing to sue. To hold otherwise would allow a new right of action for what are merely consequential damages stemming from the original injury and which are recoverable under the original cause of action.

In view of this examination, the *Reichert* court came to the proper decision that the cause of action on which the bankrupt brought suit had vested in the trustee in bankruptcy.

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55. *See, e.g., In re* Newkirk Min. Co., 238 F. Supp. 1 (E.D. Pa. 1964); *In re* Yalden, 109 F. Supp. 603 (D. Mass. 1953); Schram v. Tobias, 40 F. Supp. 470 (E.D. Mich. 1941); Beck v. Unruh, 37 Cal. 2d 148, 231 P.2d 13 (1951).

56. *See, e.g., In re* Aldrich's Estate, 35 Cal. 2d 20, 215 P.2d 724 (1950); Galbraith v. Baker, 193 Tenn. 228, 245 S.W.2d 625 (1951).