

THE CONCEPT OF BANKRUPTCY (*AL-IFLĀS*) UNDER  
ISLAMIC LAW: A COMPARISON WITH ENGLISH AND  
MALAYSIAN PERSONAL BANKRUPTCY LAWS

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## Abstract

This research deals with the concept of bankruptcy (*al-iftlās*) under Islamic law in detail with special reference to Sunni schools of law (*al-madhāhib*). To do this, the Qur'ān, Ḥadīth, their commentaries and classical manuals of Sunni schools are consulted. It also deals with English and Malaysian Personal Bankruptcy Laws as a comparison with Islamic law. Thus, this research excludes any discussion pertaining to partnership and company law unless they are relevant to the interpretation of Personal Bankruptcy Law.

This research is divided into six chapters. Chapter One deals with the concept of bankruptcy petition and the jurisdictions of the court upon hearing the petition. Chapter Two deals with the legal consequences of the bankruptcy order. Chapter Three deals with the concept of repossession and the application of right of repossession. Chapter Four deals with the concept of realisation of the bankrupt's estate and the matters relating to it. Chapter Five deals with the concept of distribution. Chapter Six deals with the concept of discharge, its legal consequences and annulment of bankruptcy order.

It has been established in this research that Islamic law provides a systemisation of bankruptcy law. Moreover, this research shows that there are similarities and differences between Islamic Bankruptcy Law, English and Malaysian Personal Bankruptcy Laws. It is hoped that, through comparison of these legal systems, a clearer understanding on Islamic Law of Bankruptcy is achieved.

Declaration/Statements

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed.....                      γ...

Date.....

STATEMENT 1

This thesis is the result of my own investigation, except here otherwise stated.

Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

Signed.....

Date....

STATEMENT 2

I hereby give consent for my thesis, if accepted, to be available for photocopying and for inter-library loan, and for the summary to be made available to outside organisations.

....

Date.....



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The present researcher is aware, both as student and a Muslim about man's inability and weaknesses in his search of knowledge, unless assisted and willed by Allah. In this respect, I record the normative statement, as a celebrated dictum, with which the Muslim jurists concluded their writings: "This written work is accomplished only by the grace of Allah and He knows best what is true and right. All gratitude and praise be only to Him."

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### Note of Transliteration

Transliteration used in this work is based on the *Encyclopaedia of Islam* (New Edition), with some modifications. All letters are fully represented which means that *tā' marbūṭah* at the end of a word is vocalised as *h*, instead of be omitted. When *tā' marbūṭah* occurs in the first member of a genitive (*iḍāfah*), it is represented as *t*.

#### Consonants

a	ا	b	ب	t	ت
th	ث	j	ج	ḥ	ح
kh	خ	d	د	dh	ذ
r	ر	z	ز	s	س
sh	ش	ṣ	ص	ḍ	ض
ṭ	ط	ẓ	ظ	‘	ع
gh	غ	f	ف	q	ق
k	ك	l	ل	m	م
n	ن	w	و	y	ي

hamzah



Long Vowels

ā      ā

ī      ī

ū      ū

Short Vowels

ā      ā      a

ī      ī      i

ū      ū      u

Diphthongs

aw

ay

Doubled

uwwa

iyya

## Lists of Abbreviations

The following is a list of the abbreviations for the references referred to in the footnotes.

Ābād	Ābādī, <i>‘Awn al-Ma‘būd Sharḥ Sunan Abī Dāwūd</i> .
Ābī	al-Ābī, <i>Al-Thamar al-Dānī fī Taqrīb al-Ma‘ānī</i> .
‘Ābid Ḥ.	Ibn ‘Ābidīn, <i>Ḥāshiyyah Radd al-Mukhtār ‘alā al-Darr al-Mukhtār : Sharḥ Tanwīr al-Abṣār</i> .
AC	<i>Appeal Cases</i> .
‘Adaw	al-‘Adawī, <i>Ḥāshiyyah ‘alā Kifāyat al-Ṭālib al-Rabbānī li Risālat</i> .
Afen	Dāmād Afendī, <i>Majma‘ al-Anḥur fī al-Sharḥ Muntaqā al-Abḥār</i> .
Alam M.	El-Alami, <i>The Marriage Contract in Islamic Law in the Shari’ah</i> .
Alam T.	El-Alami, ‘Mut‘at al-Talaq under Egyptian and Jordanian Law’.
Ali	Ali, ‘An Outline of the New Discharge Provision in the Malaysian Bankruptcy Act 1967’.
Alla	‘Abd Allah, <i>Al-Kawākib al-Durriyyah fī Fiqh al-Mālikiyyah</i> .
Allc	Allcock, ‘Romalpa Clauses and Reputed Ownership’.
All ER	<i>All England Reports</i> .
AMR	<i>All Malaysian Reports</i> .
Anṣā A.	al-Anṣārī, <i>Asnā al-Muṭālib Sharḥ Rawḍ al-Ṭālib</i> .
Anṣā T.	al-Anṣārī, <i>Tuḥfat al-Ṭullāb bi Sharḥ Tanqīḥ al-Lubāb</i> .
Anas M.	Anas, <i>Al-Muwatta’</i> .
Anas K.	Anas, <i>Al-Mudawwanah al-Kubrā</i> .
As‘ad	As‘ad, <i>Al-Fatāwā al-Musammah ‘Iddat Arbāb al-Fatwā</i> .
Asyū	al-Asyūṭī, <i>Jawāhir al-‘Uqūd wa Mu‘īn al-Quḍāt wa al-Shuhūd</i> .
Atiy	Atiyah, <i>The Sale of Goods</i> .

‘Aynī B.	al-‘Aynī, <i>Al-Bayānah fī Sharḥ al-Hidāyah</i> .
‘Aynī S.	al-‘Aynī, <i>Sharḥ al-Kanz</i> .
‘Aynī U.	al-‘Aynī, <i>Umdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī</i> .
Bagh	al-Baghdādī, <i>Irshād al-Sālik</i> .
Bagha	al-Baghawī, <i>Sharḥ al-Sunnah</i> .
Bahū	al-Bahūtī, <i>Kashshāf al-Qinā ‘an Matn al-Iqnā ‘</i> .
Bail	Bailey-Harris, ‘Commentary of Cloughton’s case’.
Bakr	al-Bakrī, <i>I‘ānat al-Ṭālibīn</i> .
Banā	al-Banānī, <i>Ḥāshiyyah</i> .
Bāqī	al-Bāqī, <i>Al-Mu‘jam al-Mufahras li Alfāz al-Qur’ān</i> .
Baṣī	al-Baṣīr, <i>Al-Nihāyah Sharḥ ‘alā Matn al-Ghāyah wa al-Taqrīb</i> .
Baṣr	al-Baṣrī, <i>Al-Tafrī</i> .
Bayh	al-Bayhaqī, <i>Al-Sunan al-Kubrā</i> .
Bayj	al-Bayjūrī, <i>Ḥāshiyyah al-Bayjūrī ‘alā Sharḥ ibn al-Qāsim</i> .
BCC	<i>British Company Cases</i>
BCLC	<i>Butterworths Company Law Cases</i>
Benj	<i>Benjamin’s Sale of Goods</i> .
Benn	Bennett, ‘Attachment of Chattels to Land’.
Berr	Berry, <i>Personal Insolvency</i> .
BPIR	<i>Bankruptcy and Personal Insolvency Reports</i> .
Brid	Bridge, <i>The Sales of Goods</i> .
Bukh	al-Bukhārī, <i>Ṣaḥīḥ al-Bukhārī</i> .
Bula	al-Bulayhī, <i>Al-Salsabīl fī Ma‘rifat al-Dalīl</i> .
CA	Court of Appeal.
Ch D	Chancery Division.

<i>Chit</i>	<i>Chitty on Contracts.</i>
CLR	<i>Current Law Reports.</i>
CLY	<i>Current Law Yearly.</i>
Conv	<i>Conveyance</i>
<i>Cork</i>	<i>Cork Report.</i>
Cost	Costley-White, 'Bankruptcy – Back to Basics'
Dard Ş.	al-Dardīr, <i>Al-Sharḥ al-Şaghīr.</i>
Dard K.	al-Dardīr, <i>Al-Sharḥ al-Kabīr,</i>
Dāri	al-Dārimī, <i>Sunan.</i>
Dāru	al-Dāruqutnī, <i>Sunan al-Dāruqutnī.</i>
Dasū	al-Dasūqī, <i>Ḥāshiyyah al-Dasūqī 'alā Sharḥ al-Kabīr.</i>
Dave C.	Davey, 'Case Commentary : De Rothschild v. Bell (A Bankrupt) [1999]'.
Dave I.	Davey, 'Insolvency and the Family Home'.
Davi E.	Davies, <i>Effective Retention of Title.</i>
Davi U.	Davies, 'United Kingdom'.
Dāwu	Abū Dāwud, <i>Sunan Abī Dāwud.</i>
Dima	al-Dimasqī, <i>Kifāyat al-Akhyār fī al-Ḥāl.</i>
Dobs	Dobson, <i>Charlesworth's Business Law.</i>
EG	<i>Estate Gazette.</i>
EGLR	<i>Estate Gazette Law Reports.</i>
<i>Enca</i>	<i>Encarta World English Dictionary.</i>
Fam Law	<i>Family Law.</i>
Farḥ	Ibn Farḥūn, <i>Tabṣīrat al-Ḥukkām fī Usūl al-Aqḍiyyah wa Manāḥij al-Aḥkām.</i>
Fash	al-Fashaynī, <i>Tuḥfat al-Ḥabīb bi Sharḥ Nuḥun Ghāyat al-Taqrīb.</i>
<i>Fatā</i>	<i>Al-Fatāwā al-Hindiyyah.</i>



Fayr	al-Fayrūzābādī, <i>Al-Tanbīh fī al-Fiqh ‘alā Madhhab al-Imām al-Shāfi‘ī</i> .
FC	Federal Court.
Flet	Fletcher, <i>The Law of Insolvency</i> .
FLR	<i>Family Law Reports</i> .
Frie	Frieze, <i>Handbook on Bankruptcy and Personal Insolvency</i> .
Gham	al-Ghamarātī, <i>Al-Sirāj al-Wahhāj Sharḥ ‘alā Matn al-Minhāj</i> .
Ghaz S.	al-Ghazzalī, <i>Al-Wasīṭ fī al-Madhhab</i> .
Ghaz W.	al-Ghazzalī, <i>Al-Wajīz fī Fiqh Madhhab al-Imām al-Shāfi‘ī</i> .
Ghaz	al-Ghazī, <i>Sharḥ Majallat al-Aḥkām al-‘Adliyyah fī Qism al-Ḥuqūq al-Madaniyyah</i> .
Good C.	Goode, <i>Commercial Law</i> .
Good P.	Goode, <i>Proprietary Rights and Insolvency in Sales Transactions</i> .
Grie	Grier, <i>Personal Bankruptcy</i> .
Grif	Griffith, ‘Personal Insolvency as a Restriction in Company Management’.
Ḥajr	Ibn Ḥajr al-‘Asqalānī, <i>Fath al-Bārī bi Sharḥ al-Bukhārī</i> .
Ḥākim	al-Ḥākim, <i>Al-Mustadrak ‘alā al-Ṣaḥīḥayn</i> .
Halb 27(1)	<i>Halbury’s Law of England</i> , vol. 27(1).
Halb 3(2)	<i>Halbury’s Law of England</i> , vol. 3(2).
Ḥaṭṭ	al-Ḥaṭṭāb, <i>Kitāb Mawāhib al-Jalīl li Sharḥ Mukhtaṣar Khalīl</i> .
Ḥayd	Ḥaydar, <i>Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām</i> .
Hayt	al-Haytamī, <i>Al-Fatāwā al-Kubrā</i> .
Ḥayy	Ibn Ḥayyān, <i>Akhbār al-Quḍāh</i> .
Hawā	al-Hawārī, <i>Baḥth fī al-Ḥajr wa Athrihi fī Ḥimāyat Amwāl li Mustahqiqihā</i> .
HC	High Court.

HL	House of Lords.
Humā	Ibn Humām, <i>Taklimat Sharḥ Fath al-Qadīr ‘alā al-Hidāyah</i> .
Hunt	Hunter, <i>Personal Insolvency</i> .
Huss	Hussain, ‘Malaysia : Report of the Official Assignee/Receiver’.
‘Ik	al-‘Ik, <i>Mawsū‘at al-Fiqh al-Mālikī</i> .
‘Ilyā F.	‘Ilyash, <i>Fath al-‘Alī al-Mālik fī al-Fatwā ‘alā Madhhab al-Imām Mālik</i> .
‘Ilyā M.	‘Ilyash, <i>Manḥ al-Jalīl Sharḥ ‘alā Mukhtaṣar Sayyidī Khalīl</i> .
Ja‘al	al-Ja‘alī, <i>Sirāj al-Sālik Sharḥ Ashal al-Masālik</i> .
Jaco	Jacobs, <i>The European Convention on Human Rights</i> .
Jayy	Abū Jayyib, <i>Mawsū‘at al-Ijmā‘ fī al-Fiqh al-Islāmī</i> .
Juza	Ibn Juzay, <i>Al-Qawānīn</i> .
Karm	al-Karmanī, <i>Al-Bukhārī bi Sharḥ al-Karmanī</i> .
Kath	Ibn Kathīr, <i>Tafsīr al-Qur’ān al-‘Azīm</i> .
Khān	<i>Fatāwā Qādī Khān</i> .
Kāsā	al-Kāsānī, <i>Kitāb Badā’i‘ al-Ṣanā’i‘</i> .
KB	King Bench.
Kūha	al-Kūhajī, <i>Zādd al-Muhtāj bi al-Sharḥ al-Minhāj</i> .
Lati I	Latif, ‘Easy and quick discharge from bankruptcy Part I’.
Lati II	Latif, ‘Automatic discharge subject to conditions Part II’.
LJ	Lord Justice.
Lubn	al-Lubnānī, <i>Sharḥ al-Majallah</i> .
Maḥa	al-Maḥallī, <i>Sharḥ</i> .
Maḥm F.	Maḥmaṣṣānī, <i>Falsafat al-Tashrī‘ fī al-Islām</i> .
Maḥm M.	Maḥmaṣṣānī, <i>Al-Mabādī al-Shar‘iyyah</i> .
Maḥm N.	Maḥmaṣṣānī, <i>Nazāriyyah al-‘Āmm li al-Mūjibāt</i> .

<i>Maja</i>	<i>Majallat al-Aḥkām al-‘Adliyyah.</i>
Māja	Ibn Mājah, <i>Sunan.</i>
Maqd K.	al-Maqdisī, <i>Al-Kāfī fī Fiqh al-Imām al-Mubajjal Aḥmad ibn Ḥanbal.</i>
Maqd S.	al-Maqdisī, <i>Al-Sharḥ al-Kabīr ‘alā Matn al-Muqni’.</i>
Mard	al-Mardāwī, <i>Al-Inṣāf fī Ma‘rifat al-Rājiḥ.</i>
Marg	al-Marghīnānī, <i>Al-Hidāyah Sharḥ Bidāyat al-Mubtadi.</i>
Māwa	al-Māwardī, <i>Al-Ḥāwī al-Kabīr.</i>
Mawā	al-Mawāq, <i>Al-Tāj wa al-Aklīl li Mukhtaṣar Khalīl.</i>
Mawd	Mawdūd, <i>Al-Ikhtiyār Sharḥ al-Mukhtār.</i>
<i>Maws</i>	<i>Al-Mawsū‘ah al-Fiqhiyyah.</i>
McCo	McCormack, <i>Reservation.</i>
McLo	McLoughlin, <i>Commercial Leases and Insolvency.</i>
Mill	Miller, ‘Transactions Prejudicing Creditors’.
Miṣr	al-Miṣrī, <i>‘Umdat al-Sālik.</i>
MLJ	<i>Malayan Law Journals.</i>
Moha	Mohamed, ‘Stipulation for the Benefit of Third Parties in Islamic Law of Contracts’.
Moss	Moss, <i>Insolvency.</i>
Mubā	al-Mubārakfūrī, <i>Tuḥfat al-Aḥwadhī.</i>
Mufl	Ibn Mufliḥ, <i>Kitāb al-Furū’.</i>
Muḥa	al-Muḥasanī, <i>Sharḥ al-Majallah al-Aḥkām al-‘Adliyyah.</i>
Mūsā	Mūsā, <i>Mukhtaṣar Khalīl fī Fiqh al-Imām Mālik.</i>
Musl	Muslim, <i>Ṣaḥīḥ.</i>
M & W	<i>Meeson &amp; Welsby’s Exchequer Reports.</i>
Nafr	al-Nafrāwī, <i>Al-Fawākih al-Dawānī Sharḥ ‘alā Risālah.</i>
Najd	al-Najdī al-Ḥanbalī, <i>Hidāyat al-Rāghib li Sharḥ ‘Umdat al-Ṭālib.</i>



Nama	al-Namarī, <i>Al-Kāfī fī Fiqh Ahl al-Madīnah al-Mālikī</i> .
Nawa Ṭ.	al-Nawawī, <i>Minhāj al-Ṭālibīn</i> .
Nawa M.	al-Nawawī, <i>Al-Majmū‘ Sharḥ al-Muhadhdhab</i> .
Nawa R.	al-Nawawī, <i>Rawdat al-Ṭālibīn wa ‘Umdat al-Muftīn</i> .
Nawa S.	al-Nawawī, <i>Sharḥ Muslim</i> .
Nawa T.	al-Nawawī, <i>Matan al-Arba‘īn al-Nawawiyyah fī al-Aḥādīth al-Ṣaḥīḥah al-Nabawiyyah</i> .
Nays	al-Naysābūrī, <i>Al-Ishrāf ‘alā Madhāhib Ahl al-‘Ilm</i> .
NLC	<i>National Land Code</i> .
Nuja A.	Ibn Nujaym, <i>Al-Ashbāh wa al-Nazā’ir ‘alā Madhhab Abī Ḥanīfah</i> .
Nuja B.	Ibn Nujaym, <i>Al-Baḥr al-Rā’iq Sharḥ Kanz</i> .
Palm	Palmer, ‘Reservation of Title’.
Parr	Parris, <i>Effective Retention of Title Clause</i> .
Pawl	Pawlowski, <i>The Forfeiture of Lease</i> .
P & CR	<i>Property and Compensation Reports</i> .
Qadū	al-Qadūrī, <i>Matn al-Qadūrī fī al-Fiqh ‘alā Madhhab al-Imām Abī Ḥanīfah</i> .
Qaly	Qalyūbī, <i>Ḥāshiyyah</i> .
Qarā	al-Qarāfī, <i>Al-Dhakhīrah</i> .
Qasṭ	al-Qasṭalānī, <i>Irshād al-Sārī li Sharḥ Ṣaḥīḥ al-Bukhārī</i> .
Qayr	al-Qayrawānī, <i>Risālah</i> .
QC	Queen Counsel.
Qayy	Ibn Qayyim al-Jawziyyah, <i>I‘lām al-Muwaqqi‘īn</i> .
Qudā	Ibn Qudāmah, <i>Al-Mughnī li ibn Qudāmah</i> .
Qurṭ	al-Qurṭūbī, <i>Al-Jāmi‘ li Aḥkām al-Qur’ān</i> .
Raja	Ibn Rajab, <i>Al-Qawā‘id</i> .

Raml F.	al-Ramlī, <i>Fatāwā</i> .
Raml N.	al-Ramlī, <i>Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj</i> .
Rāfi	al-Rāfi‘ī, <i>Taqrīrāt al-Rāfi‘ī ‘alā Ḥāshiyyah ibn ‘Ābidīn</i> .
Rāfi‘	al-Rāfi‘ī al-Qazawaynī, <i>Al-‘Azīz Sharḥ al-Wajīz al-Ma‘rūf bi al-Sharḥ al-Kabīr</i> .
Raṣā	al-Raṣā, <i>Sharḥ al-Ḥudūd</i> .
Rāzī	al-Rāzī, <i>Al-Tafsīr al-Kabīr wa Mafātīḥ al-Ghayb</i> .
Rush F.	Ibn Rushd, <i>Fatāwā Ibn Rushd</i> .
Rush B.	Ibn Rushd, <i>Bidāyat al-Mujtahīd wa Nihāyat al-Muqtasid</i> .
Rush M.	Ibn Rushd, <i>Al-Muqaddimāt al-Mumahhadāt li Bayān</i> .
Rush T.	Ibn Rushd, <i>Al-Bayān wa al-Taḥṣīl</i> .
Ṣābū	al-Ṣābūnī, <i>Mukhtaṣar Tafsīr Ibn Kathīr</i> .
SAR	Senior Assistant Registrar.
S.A.W	<i>Ṣallā Allah ‘alayh wa Sallam</i> ( peace be upon him).
SC	Supreme Court.
Ṣan‘ā	al-Ṣan‘ānī, <i>Subul al-Salām Sharḥ Bulūgh al-Marām min Adillah al-Aḥkām</i> .
Sara	al-Sarakhsī, <i>Kitāb al-Mabsūt</i> .
Ṣalā	Ibn Ṣalāh, <i>Fatāwā wa Masa’il Ibn Ṣalāh</i> .
Ṣāwī	al-Ṣāwī, <i>Bulghat al-Sālik li Aqrab al-Masālik</i> .
Sayū A.	al-Sayūṭī, <i>Al-Ashbāh wa al-Nazā’ir</i> .
Sayū T.	al-Sayūṭī, <i>Tanwīr al-Ḥawālik</i> .
Seal	Sealy, <i>Annotated Guide to the Insolvency Legislation</i> .
Shab	al-Shabramilsī, <i>Ḥāshiyyah</i> .
Shad	Ibn Shaddād, <i>Dalā’il al-Aḥkām</i> .
Shar	al-Sharqāwī, <i>Ḥāshiyyah ‘alā Tuḥfah al-Ṭullāb</i> .

Shar M.	al-Sharbīnī, <i>Mughnī al-Muhtāj</i> .
Shaw	al-Shawkānī, <i>Nayl al-Awtār</i> .
Shay J.	al-Shaybānī, <i>Al-Jāmi' al-Ṣaghīr</i> .
Shay K.	al-Shaybānī, <i>Kitāb al-Hujjah 'alā Ahl al-Madīnah</i> .
Shā d	al-Shādhālī, <i>Kifāyat al-Ṭālib al-Rabbānī li Risālat</i> .
Shā f M.	al-Shāfi'ī, <i>Musnad</i> .
Shā f U.	al-Shāfi'ī, <i>Al-Umm</i> .
Siho	Sihombing, <i>National Land Code A Commentary</i> .
Su'ūd	Abū Su'ūd, <i>Fath</i> .
Subk A.	al-Subkī, <i>Al-Ashbāh wa al-Nazā'ir</i> .
Subk F.	al-Subkī, <i>Fatāwā</i> .
Sugh	al-Sughdī, <i>Al-Nutaf fī al-Fatāwā</i> .
Sula	al-Sulamī, <i>Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām</i> .
Ṭabr	al-Ṭabrānī, <i>Al-Mu'jam al-Ṣaghīr</i> .
Ṭabrī	al-Ṭabrīzī, <i>Mishkāṭ al-Maṣābīḥ</i> .
Tagh	Ibn Abī Taghlib, <i>Nayl al-Ma'ārib bi Sharḥ Dalīl al-Ṭālib</i> .
Ṭarā	al-Ṭarābulṣī, <i>Al-Fatāwā al-Kāmalīyyah</i> .
Ṭarās	al-Ṭarāsūsī, <i>Al-Fatāwā al-Ṭarāsūsī</i> .
Ṭayl	al-Ṭaylasī, <i>Musnad</i> .
Taym	Ibn Taymiyyah, <i>Majmū' Fatāwā</i> .
Tirm	al-Tirmidhī, <i>Al-Jāmi' al-Ṣaḥīḥ wa huwa Sunan al-Tirmidhī</i> .
TLR	<i>Times Law Reports</i> .
Tolm	Tolmie, <i>Introduction to Corporate and Personal Insolvency Law</i> .
Ṭūrī	al-Ṭūrī, <i>Takmilat</i> .
'Umay	'Umayrah, <i>Hāshiyyah</i> .

Walk	Walker, <i>The Oxford Companion to Law</i> .
Walt	Walton, 'The Landlord, his distress, the insolvent tenant and the stranger'.
Wans	al-Wanshuraysī, <i>Al-Mi'yār al-Ma'arab wa al-Jāmi' al-Mugharab 'an Fatāwā Ahl Ifrīqiyyah wa Andalus wa al-Maghrib</i> .
Whee	Wheeler, <i>Reservation of Title Clause Impact and Implication</i> .
WLR	<i>Weekly Law Reports</i> .
Wood	<i>Woodland Landlord and Tenant</i>
Ya'lā	Abū Ya'lā, <i>Al-Masā'il al-Fiqhiyyah min Kitāb al-Riwāyatayn wa al-Wajhayn</i> .
Zark	al-Zarkashī, <i>Sharḥ</i> .
Zarq S.	al-Zarqānī, <i>Al-Sharḥ al-Muwaṭṭa'</i> .
Zarq Z.	al-Zarqānī, <i>Sharḥ al-Zarqānī 'alā Mukhtaṣar Sayyidī Khalīl</i> .
Zarqā	al-Zarqā, <i>Sharḥ al-Qawa'id al-Fiqhiyyah</i> .
Zayl	al-Zayla'i, <i>Tibyayn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq</i> .
Zuḥa	al-Zuḥaylī, <i>Al-Fiqh al-Islāmī wa Adillatuh</i> .



## Cases Referred and Cited

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<i>Agricultural Mortgage Corporation Plc v Woodward and Another</i> (1994) TLR 310 CA.	51
<i>Allen, Re (Re a Debtor 367 of 1992)</i> [1998] BPIR 319 Ch D.	20
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<i>Bray-Poat and Arthur v. Allen</i> (No. 177-63) March 30, 1994 Ch D. (unreported), quoted by Hunter, p. 3042/1.	18
<i>Bremner (A Bankrupt), Re</i> [1999] 1 FLR 912	193
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<i>Chin Kon Nam v Chai Yun Phin Development Sdn Bhd</i> [1996] 4 MLJ 271 HC.	88
<i>Chong Chin Shoong v Development &amp; Commercial Bank Bhd</i> [1990] 2 MLJ 285 HC.	30
<i>Chua Chun Eng, ex parte Tractors Malaysia (1982) Sdn Bhd, Re</i> [1995] 3 AMR HC.	26
<i>Chua Tin Hong, Re: Ex parte Castrol (M) Sdn Bhd</i> [1997] 2 AMR 1253 HC.	70, 87
<i>Church of Scientology v Scott</i> [1997] BPIR 418 CA.	85
<i>Citro (Domenico) (A Bankrupt), Re; Citro (Carmine) (A Bankrupt), Re</i> [1991] 1 FLR 71.	193

<i>Civil Service Co-operative v McGrigor's Trustee</i> [1923] 2 Ch 347.	154
<i>Claughton v Charalambous</i> [1998] BPIR 558 Ch D.	47, 193
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<i>Coney, Re</i> [1998] BPIR 333 Ch D.	25
<i>Cook, Beck v Grant, In re</i> [1948] Ch 212.	180
<i>Couchman v Hill</i> [1947] KB 554.	147
<i>Curtis v Chemical Cleaning &amp; Dyeing Co</i> [1951] 1 KB 805.	147
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<i>Davis v Trustee in Bankruptcy of the Estate of Davis</i> [1998] BPIR 572 Ch D.	85
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<i>Debtor, A, Re (No. 784 of 1991)</i> [1992] Ch 554.	18
<i>Devaynes v Noble, Clayton's Case</i> 35 ER 781.	181
<i>Doe d. Lloyd v Ingleby</i> (1846) 15 M & W 465	153
<i>EON Bank Bhd v The Official Assignee of the Property of Sia Ti Hua, Bankrupt</i> [1998] 5 MLJ 669 HC.	75
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<i>Ezekiel v Orakpo</i> [1977] QB 260 CA.	153
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<i>Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and Anor</i> [1991] 1 MLJ 426 SC.	30
<i>Flint, Re</i> [1993] Ch 319.	52

<i>Foley v Hill</i> (1871) 2 HL Cas 28.	119
<i>Fong Yuan Kwong, ex p Chung Khiaw Bank Ltd, Re</i> [1995] 4 MLJ 612 HC.	31
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<i>Gee v Harwood</i> [1933] Ch 712 CA.	155
<i>Governors of St. Thomas's Hospital v Richardson</i> [1910] 1 KB 271.	181
<i>Gurubachan Singh v Seagrott &amp; Campbell</i> (1962) 29 MLJ 309.	29
<i>Haig v Aitken</i> [2000] 3 All ER 809 Ch D.	161
<i>Hallet Estate, Re</i> (1880) 13 Ch D 696.	181
<i>Haroun Al-Rashid bin Mohd Yusof, ex p Daya Leasing Sdn Bhd, Re</i> [1996] 5 MLJ 317.	32
<i>Hardy v Focus Insurance Co Ltd</i> [1997] BPIR 77 Ch.	238
<i>Harris v Truman</i> (1882) 9 QBD 264.	180
<i>Heath v Tang and Another</i> [1993] 1 WLR 1421 Ch D.	85
<i>Hendy Lennox (Industrial Engines) Ltd v Graham Puttick Ltd</i> [1984] 1 WLR 111	149
<i>Holmes v Official Receiver (Re a Debtor No. 26 of 1991)</i> [1996] BCC 246 Ch D.	239
<i>Houlder, Re</i> [1929] 1 Ch. 205.	75
<i>Howard v Crowther</i> 151 ER 1179.	85
<i>Hussain (A Bankrupt), Re, reported as Davis v. Martin-Sklan</i> [1995] BCLC 483.	38
<i>Jacob v Official Receiver</i> [1998] BPIR 711 Ch D.	239
<i>John Snow &amp; Co Ltd v DBG Woodcroft &amp; Co</i> [1985] BCLC 54.	146, 147
<i>Judd v Brown, Re Bankrupt (Nos 9587 and 9588 of 1994)</i> [1999] 1 FLR 360 Ch D.	193
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<i>Kho Kak Siew, ex p MUI Bank Bhd, Re</i> [1993] 1 MLJ 208 HC.	31
<i>Khoo Chee Tong, ex p Unik (M) Sdn Bhd, Re</i> [1996] 5 MLJ 39 HC.	30
<i>Khoo Kim Hock, Re</i> [1974] 2 MLJ 29 HC.	88
<i>Khor Bak Kee, Re</i> [1936] MLJ 5 CA.	28
<i>Kilvert v Flackett</i> [1998] 2 FLR 806.	163
<i>Krasner v Dennison and Others; Lawrence v Lesser</i> [2000] All ER 234 CA.	160
<i>Kwong Aik Bank v Hah Chiew Yin</i> [1985] 2 MLJ 452 FC.	259
<i>Landau, Re</i> [1997] BPIR 229 Ch D.	160
<i>Leo Hoon Hong, Re</i> (1951) 17 MLJ 222 HC.	29
<i>Lim Boon Peng v United Orient Leasing Co Bhd</i> [1991] 1 MLJ 292 SC.	30
<i>Liverpool Property v Oldbridge Investments</i> [1985] 2 EGLR 11 CA.	154
<i>Lo Koh Wah, ex p Jupiter Securities Sdn Bhd, Re</i> [2000] 5 MLJ 180 HC.	29
<i>London and County (A &amp; D) v Wilfred Sportsman</i> [1971] Ch 964.	153
<i>Lord's Trustee v. Great Eastern Railway Co.</i> [1908] 1 KB 195.	85
<i>Law Hieng Yee, a bankrupt, In the matter of</i> [2000] 1 MLJ 59 HC.	92, 165
<i>Low Hong alias Liew Ah Heng v Tan Hor Choon</i> (1953) 19 MLJ 223.	260
<i>Matthews v Smallwood</i> [1910] 1 Ch 777.	153
<i>Michael Chong Ngion Fong v Syarikat Fong Sam Timber &amp; Anor</i> [1977] 1 MLJ 263 HC.	26
<i>Mohd Afsar Yunus v. Handal Utama Sdn Bhd</i> [1995] 1 AMR 224 HC.	88
<i>Mohd Nor Rahmat v Bank Bumiputra Malaysia Berhad</i> [1998] 4 AMR 3583 HC.	88
<i>Moon v Franklin</i> [1996] BPIR 196 Ch D. cited in [1996] 3 CL 102 para 323.	51
<i>Mordant Mordant and Halls, Re</i> [1995] BCC 209.	161
<i>Morgan v Swansea Urban Sanitary Authority</i> (1878) 9 Ch D 582.	181

<i>Mott (A Bankrupt) ex parte Trustee of the Property the Bankrupt v Mott and McQuitty, Re</i> [1987] CLY 212.	193
<i>National Bank of Kuwait v Menzies</i> [1994] 2 BCLC 256.	50, 51
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<i>Oakes v Simms</i> [1997] BPIR 699 CA.	252
<i>Official Assignee of the estate of Koh Liang Hee (a bankrupt) v Koh Thong Chuan &amp; Anor</i> [1997] 5 MLJ 136 HC.	27
<i>Official Assignee of the Property of Senator Ibrahim bin Haji Yaakob, Bankrupt v Siti Ramlah bte Bajau</i> [1991] 2 MLJ 479 HC.	54
<i>Official Assignee v Ngu Ung Yong</i> [1988] 2 MLJ 264 HC.	53, 181
<i>Official Assignee, States of Malaya v Tat Fatt Shirts Manufacturer</i> [1969] 2 MLJ 1.	28
<i>Official Custodian for Charities v Parway Estate Development Ltd</i> [1985] Ch 151 CA.	155
<i>Official Receiver v Milborn</i> , The Independent, July 26, 1999, Ch D.	238
<i>Olley v Marlborough Court Ltd.</i> [1949] 1 KB 532.	147
<i>Ooi Thean Chuan v Banque Nationale de Paris</i> [1992] 2 MLJ 526 HC.	32
<i>Paine, Re</i> [1879] 2 QB 122.	74
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<i>Pearson v Gee Braceborough Spa Ltd</i> [1934] AC 272 HL.	155
<i>Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan</i> [1993] 2 MLJ 423 SC.	31
<i>Pike (A Bankrupt) v Cork Gully</i> BPIR 723 CA.	171, 173
<i>Platts v TSB Bank Pls</i> , Times Law Reports, March 4, 1998.	19
<i>Pravinchandra Doshi (t/a M/S P Doshi &amp; Co) v Ismail bin Syed Mohamed &amp; Anor</i> [1999] 1 MLJ 35 HC.	87, 253
<i>Rabindera Singh s/o Arjan Singh, ex p Malaysian International</i>	

<i>Merchant Banker Bhd</i> [1989] CLJ 858 HC.	31
<i>Rae, Re</i> [1995] BCC 102 Ch D.	160
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<i>Rooney v Das and Others</i> [1999] BPIR 404.	48
<i>Rose v Buckett</i> [1901] 2 KB 449.	85
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<i>Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd and Ors</i> [1992] 2 MLJ 588 HC.	87
<i>Sama Credit &amp; Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia</i> [1995] 1 MLJ 274 SC.	260
<i>Sass, Re</i> [1896] 2 QB 12.	74
<i>Scarfe v Jardine</i> (1882) 7 App Cas 345.	153
<i>Sharifah Aini binte Syed Jaafar v. Karangraf Shd Bhd</i> [1989] 2 CLJ 1269.	87,88
<i>Sharpe (A Bankrupt) Ex parte the Trustee of the Bankrupt v Sharpe and Another, Re</i> [1980] 1 All ER 198.	194
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<i>Supreme Finance (M) Bhd v Mohamad Noor bin Yusuf t/a Everway Food Centre &amp; Ors</i> [1993] 2 MLJ 29 HC.	87



<i>Tan Ah Poi, Ex p Multi Purpose Finance Bhd, Re</i> [1999] 2 CLJ 694 HC.	29
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<i>Wilson, ex p. Vine, Re</i> (1878) 8 Ch D 364.	85
<i>Yii Heng Kiew &amp; Anor. Ex parte Siong Ling (Pte) Ltd, Re</i> [1987] 2 MLJ 479 HC.	56
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<i>Zandfarid v BCCI</i> [1996] BPIR 501.	21

## INTRODUCTION

Protection of the creditors constitutes one of the main objectives of bankruptcy law. The need for protection arises due to inability of a debtor to settle the debts. The protection is subject to following certain rules and procedures.

## OBJECTIVES OF RESEARCH

The research aims to examine the concept of bankruptcy in Islamic law in detail. For this purpose, reference is made to both the primary and secondary sources of Islamic law, i.e. the *Qur'ān* and the *Ḥadīth* and the works of early Muslim jurists. At the same time, the research intends to establish that Islamic law regulates a system of bankruptcy law. Moreover, the research means to compare the Islamic Bankruptcy Law with English and Malaysian Personal Bankruptcy Laws with an intention to show that there are similarities and differences between these three legal systems. Comparison with English and Malaysian laws are based on the existence and the latest development of law from both jurisdictions. It is hoped that this study will make a contribution to a better understanding of the Islamic, English and Malaysian laws of bankruptcy.

## SCOPE OF RESEARCH

The primary concern of this study is to examine the systematisation of Islamic Bankruptcy Law. It is also concerned, in so far as a theoretical study of this sort, to chart the dichotomy between legal concept and practice as it developed from

the early centuries of Islam. In this respect the consonance of the Divine Sources of law are weighed against the eclectic sources and legal methodologies, and the influence of both is marked throughout the exposition of the system of bankruptcy.

The present study therefore seeks to focus its attention primarily on the perspective of the law, and particularly, the law of bankruptcy in Islam. The emphasis is on the Sunni conception of this law. The decision to restrict the study to this sect is due to the exhausting number of references and divergences of opinion between its constituent rites.

It must be remarked that any example or reference relating to *dinār* currency mentioned in the classical texts has been changed to dollar. This is to avoid confusion among the readers. Moreover, any reference to the male gender means to include female unless stated otherwise.

This research then proposes a comparative exposition of the Islamic Bankruptcy Law, English and Malaysian Personal Bankruptcy Laws. So, all rules and principles relating to partnership and company laws are excluded unless they are relevant to the interpretation of personal bankruptcy law.

## METHODOLOGY OF RESEARCH

The research on the Islamic Personal Bankruptcy Law concerns with the prescriptions of the *Qur'ān* and the *Ḥadīth* and their interpretations and commentaries in the classical manual of Islamic law. Additionally, the research



examines and analyses the classical legal manuals of Sunni schools of law (*madhāhib*) particularly those offering specific treatment on bankruptcy. Books of legal opinions (*fatāwā*) containing opinions of the jurisconsults of various localities offering valuable legal thoughts are consulted. To mention a few examples, *Fatāwā al-Subkī*, *Fatāwā Al-Hindiyyah*, *al-Fatāwā al-Kubrā* and the like. Certain books of Islamic legal rules (*qawā'id al-fiqhiyyah*) are referred too. They include *al-Ashbāh wa al-Nazā'ir* by both al-Sayūṭī and Ibn Nujaym, *Kitāb al-Qawā'id fi al-Fiqh al-Islāmī* by Ibn Rajab al-Ḥanbalī and *Qawā'id al-Aḥkām fi Maṣāliḥ al-Anām* by 'Izz al-Dīn 'Abd al-Salām. The research also relies on the *Ottoman Majallat al-Aḥkām al-'Adliyyah* together with its commentaries like that by Rustam Salīm Bāz, 'Alī Ḥaydar and others. All the classical manuals of Islamic law and references mentioned above are based on the collection available in the Library of the Faculty of *Sharī'ah*, University of *al-Azhār*, Egypt; Library of the Faculty of Law, University of Cairo, Egypt; Library of International Islamic University Malaysian and Library University of Wales, Lampeter.

In regard to English Personal Bankruptcy Law, the main references are the statutory provisions for instance, *Insolvency Act 1986* and *Insolvency Rules 1986*. For judicial decisions, the research concentrates on the cases, which are related to the interpretation of the current legislation. Thus, the *pre-Insolvency Act 1986* law and cases are not referred to unless they are relevant in explaining the laws. As the courts are minded to interpret the bankruptcy sections of *Insolvency Act 1986* in their own light and are not necessarily going to take advantage of earlier



interpretation of similar provisions in the 1914 Act. Thus in *Re a Debtor (No. 1 of 1987)*<sup>1</sup> Nicholls LJ declares,

“I do not think that on this new bankruptcy code simply incorporates and adopts the same approach as the old code. The new code has made many changes in the law of bankruptcy, and the court’s task, with regard to the new code, must be to construe the new statutory provisions in accordance with the ordinary canons of construction, unfettered by previous authorities.”

More recently in the House of Lords ruling in *Smith v Braintree District Council*<sup>2</sup> which was concerned with the interpretation of section 285 of the *Insolvency Act 1986*, Lord Jauncey reinforces this view on the modus operandi of interpretation,

“ . . . the *Act of 1986*, although re-enacting many provisions from earlier statutes, contains a good deal of fresh material derived from the *Insolvency Act 1985*. In particular, the legislation now emphasises the importance of the rehabilitation of the individual insolvent, it provides for automatic discharge from bankruptcy in many cases, and it abolishes mandatory public examinations as well as enabling a bankrupt to be discharged without public examination. Thus not only has the legislative approach to individual bankruptcy altered since the mid-nineteenth century, but social views as to what conduct involves delinquency, as to punishment and as to the desirability of imprisonment have drastically changed . . . In these circumstances, I felt justified in construing section 285 of the Act of 1986 as a piece of new legislation without regard the 19<sup>th</sup> century authorities or similar provisions of repealed *Bankruptcy Act [1914]*. ”

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<sup>1</sup> [1989] 1 WLR 271 CA, at 276.

It must be noted that in addition to the statutory legislations and judicial decisions, there is also 'common law' of bankruptcy, which contains rules and principles not to be found in the statutes. The research refers to them too.

Relevant textbooks and journals relating to English Personal Bankruptcy Laws are referred to.

For Malaysian Personal Bankruptcy Law, main references are *Bankruptcy Act 1967* and *Bankruptcy Rules 1969*. *Malaysian Bankruptcy Act 1967* is modelled along the English *Bankruptcy Act 1914*. Hence, some English law cases are referred to interpret some Malaysian law especially the provisions in Malaysian Act that are *in pari materia* with the words in provision of 1914 Act. Even though such decisions are not binding but they are very valuable guide and have great respect. Furthermore, relevant textbooks and written articles on Malaysian Personal Bankruptcy Law are consulted.

It is important to note here that the research on English and Malaysian Personal Bankruptcy Laws is based on sources available up to 15 June 2000.

## CONTENT OF RESEARCH

This research is divided into six chapters. Chapter One discusses the concept of bankruptcy petition under Islamic, English and Malaysian laws. Included in this

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<sup>2</sup> [1990] 2 AC 215 HL, at 237-238.

Chapter the discussion on various jurisdictions of the court from Islamic, English and Malaysian laws perspective upon hearing the bankruptcy petition.

Chapter Two deals with the legal consequences of bankruptcy order under Islamic, English and Malaysian laws. They are divided under various sub-headings such as legal consequences before, during and after the bankruptcy order. This Chapter also discusses legal consequences on specific issues including legal consequences to legal proceedings.

Chapter Three explains in detail the concept of repossession under Islamic law with comparison with similar concept discussed by English and Malaysian laws. This Chapter also deals with the application of such right of repossession according to these three legal systems.

Chapter Four deals with the realisation of the bankrupt's estate. It starts with the concept of the bankrupt's assets under Islamic law and follows with English and Malaysian laws. This Chapter also covers issues relating to exempt assets, assets subject to the right of third party, sale of the available assets and the sale of the matrimonial house from these three jurisdictions.

Chapter Five deals with the concept of distribution, starting with Islamic law and followed by English and Malaysia laws respectively. Moreover, this Chapter determines the issue pertaining to priority of distribution among the creditors, distribution to a late claimant and distribution to the wife of the bankrupt.

Finally, Chapter Six enquires into the concept of discharge under Islamic, English and Malaysian laws. This Chapter also covers the discussion on legal consequences of the discharge, application for the subsequent bankruptcy order and concept of annulment of bankruptcy order.



## CHAPTER ONE

### BANKRUPTCY PETITION

Bankruptcy procedures start with a bankruptcy petition presentation to the court for a bankruptcy order. This chapter deals firstly with the concept of bankruptcy petition and its related issues under Islamic, English and Malaysian laws. It also deals with the hearing on the bankruptcy petition by the court for these three legal systems.

#### 1.1 Concept of Bankruptcy Petition

Bankruptcy petition is considered the first stage of proceedings for a bankruptcy order. There is no bankruptcy without the petition.

##### 1.1 .1 Islamic Law

Muslim jurists disagree on bankruptcy petition for a bankruptcy order. The majority of them such as Abū Yūsuf and Muḥammad al-Shaybānī,<sup>1</sup> the Shāfi'is,<sup>2</sup> Mālikis<sup>3</sup> and Ḥanbalis<sup>4</sup> maintain that bankruptcy petition to the court for the bankruptcy order to protect the interest of the creditors is permissible. Their views are based on the following *Ḥadīth*, "The Prophet (S.A.W) had prevented Mu'ādh

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<sup>1</sup> Marg, vol. 3, p. 285; Sara, vol. 24, p. 164; Humā, vol. 9, p. 274; Qadū, p. 43.

<sup>2</sup> Nawa R., vol. 4, p. 165; Kūha, vol. 2, p. 165.

<sup>3</sup> Anas K., vol. 4, p. 116; Rush B., vol. 2, p. 213; Mūsā, p. 185.

<sup>4</sup> Qudā, vol. 4, p. 452; See also *Maws*, vol. 5, p. 301.

[whose debts are more than his assets] from disposing of his property and sold the property and paid the debt to the creditors."<sup>5</sup>

This *Ḥadīth* shows that petition for a bankruptcy order is in accordance with the Islamic law. If this were not so, the Prophet (S.A.W) would not prevent Mu'ādh from disposing of his property. The *Ḥadīth* suggests also that the court is ultimately responsible for selling all the bankrupt's assets and distributing all the proceeds of sale amongst the creditors.

This view is also supported by the practice of the Companions. For example, it is reported by 'Abd Raḥmān ibn Dalāf al-Muzannī that a man from the *Juhaynah* tribe went bankrupt and his matter was brought before 'Umar ibn al-Khaṭṭāb, the second caliph (634-644), who said; "O People! Al-USayfi', al-USayfi' of the *Juhaynah*, was satisfied with his religion (*dīn*) and his trust because it was said of him that he arrived before the others on the Pilgrimage (*Ḥajj*). He used to incur debts but he did not care to repay, so all of his property has been eaten up by it. Whosoever has a debt against him, let him come to us tomorrow and we will divide his property between his creditors. Beware of debts! Their beginning is a worry and their end is destitution."<sup>6</sup>

The decision of 'Umar is considered as a consensus of opinion (*ijma'*) on the legality of bankruptcy petition and order, since there was no dispute about the

<sup>5</sup> Dāru, vol. 2, p. 20(no. 4505); Shaw, vol. 5, p. 340; Bayh, vol. 6, p. 48; This *Ḥadīth* is authentic based on the conditions agreed upon by al-Bukhārī and Muslim. Ḥāki, vol. 2, p. 58.

<sup>6</sup> Anas M., p. 547; See also Bagha, vol. 4, p. 342; Bayh, vol. 6, p. 49.

validity of it amongst the Companions.<sup>7</sup> The decision reveals that the bankruptcy order shall only be made when it is proven that the debtor is bankrupt and therefore, unable to settle his debts because the debts are more than his property. It also indicates that it is the judge's duty to distribute the bankrupt's assets amongst his creditors. The distribution must be done as soon as possible as after such a decision. Furthermore, 'Umar's decision shows that the bankruptcy order must be made public, so as to allow the creditors to claim their dues and to prevent any further public transactions with the bankrupt.

The legality of petition for bankruptcy order is also based on the principle of 'death sickness' (*marḍ al-mawt*).<sup>8</sup> If a person suffering from death sickness could be interdicted from disposing of his property to protect the interests of his legal heirs, it is therefore more appropriate for the debtor to be declared bankrupt so as to protect the interest of the creditors.<sup>9</sup> This is because a debtor's property belongs to his creditors. By contrast, in the case of death sickness, the property remains with him and does not go to the legal heirs.<sup>10</sup>

On the contrary, according to Imām Abū Ḥanīfah, there can be no bankruptcy petition and order against the debtor<sup>11</sup> because if the creditors apply to the court for the adjudication the judge does not have any jurisdiction to prevent him

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<sup>7</sup> Baṣī, vol. 2, p. 43; Qarā, vol. 8, p. 167; Sara, vol. 24, p. 164.

<sup>8</sup> Death sickness is defined by the *Majallah*, article 1595 as, "a sickness where in the majority of cases death is imminent, and, in the case of a male, where such person is unable to deal with his affairs outside his home, and in the case of female, where she is unable to deal with her domestic duties, death having occurred before the expiration of one year by reason of such illness, whether the sick person has been confined to bed or not".

<sup>9</sup> Rush B., vol. 2, p. 214; See also Māwa, vol. 7, p. 345.

<sup>10</sup> Māwa, vol. 7, p. 385.



from disposing of his property. This is considered as maltreatment and disregards the competency and legal capacity of the debtor.<sup>12</sup> As such then, it is a great hardship (*ḍarar 'azīm*) to the debtor that could not be substituted by the specific hardship (*ḍarār khāṣ*).<sup>13</sup>

Furthermore, this is contrary to the injunctions of the Qur'ān and the *Aḥādīth* that clearly provide that every transaction should be based on mutual consent amongst the contracting parties.<sup>14</sup> The *Qur'ān* states, "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you by mutual consent."<sup>15</sup> The Prophet (S.A.W) is also reported to have said, "It is not permissible for a Muslim to take his fellow Muslim's property except in proper manner."<sup>16</sup>

The interdiction of the debtor and the sale of his property are considered as taking property wrongfully and without the consent that are contrary to the above injunctions.<sup>17</sup>

Imām Abū Ḥanīfah, however, allows creditors to apply to the court to imprison the debtor until he sells his property to discharge his debts.<sup>18</sup> This is based

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<sup>11</sup> Qadū, p. 43; Sugh, p. 459; According to Imām Abū Ḥanīfah, there are only three grounds of interdiction (*ḥajr*) i.e. insanity, infancy and slavery. See Kāsā, vol. 7, p. 169.

<sup>12</sup> See Humā, vol. 9, p. 27; *Maws*, vol. 5, p. 301.

<sup>13</sup> 'Aynī, vol. 1, p. 224.

<sup>14</sup> See Marg, vol. 3, p.285; Sara, vol. 24, p. 163.

<sup>15</sup> *Al-Qur'ān, sūrat al-Niṣa'*, 4:29.

<sup>16</sup> Daru, vol. 2, p. 20(nos. 2862, 2863); See also Shaw, vol. 5, p. 341.

<sup>17</sup> Ṣan'ā, vol. 3, p. 56.

<sup>18</sup> See Marg, vol. 3, p. 284; Sara, vol. 24, p. 164.



on the *Ḥadīth*, "The delay of payment of debt by one who can afford to pay, justifies defamation and punishment by the lender."<sup>19</sup>

It seems obvious that the view of the majority is preferred due to the fact that many debtors nowadays try to conceal their property from creditors by way of gifts and endowment to their close relatives and friends. The right of the creditors are at risk if these practices remain unhindered. Moreover, Abū Yūsuf and Muḥammad al-Shaybānī are of the cautious opinion that the debtor might act collusively or might declare that the property in his possession belongs to a particular person, notwithstanding that it actually belongs to himself and not to other; he merely does not want his property to go to his creditors. This will not happen if the proceedings against the debtor are authorised by law.<sup>20</sup>

This is also contrary to the concept of trust (*amānah*) that has been emphasised by Islām as the *Qur'ān* states, "Verily! Allah commands that you should render back the trusts to those, to whom they are due."<sup>21</sup> Repayment of debt is an integral part of trust.

Furthermore, according to al-Ṣan'ānī, the *Ḥadīth* and the verse used by Imām Abū Ḥanīfah are general injunctions (*'āmm*) that are specified by the *Ḥadīth* of

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<sup>19</sup> Bukh, vol. 3, p. 85.

<sup>20</sup> See Marg, vol. 3, p. 285.

<sup>21</sup> *Al-Qur'ān, sūrat al-Nisā'*, 4:58.

Mu'ādh.<sup>22</sup> And injunctions (*adillah*), the majority of Muslim jurists use are strong and persuasive.<sup>23</sup>

In addition to the above-mentioned arguments, some Muslim scholars argue that the parameter used to determine the viability of the bankruptcy regulations in Islam is the doctrine of public interest (*maṣlaḥah*). In this respect, Ibn 'Abd al-Salām observes, "A bankruptcy order against a bankrupt (*mufliṣ*) is an injury (*mufsidah*) on his right. Nevertheless, it has become an acceptable norm (*thabata*) that such injury is overruled by the interest (*maṣlaḥah*) of the creditors (*ghuramā*). If you wish, you can say that the interest of the creditor is given priority over the interest of the debtor."<sup>24</sup>

Majority of Muslim jurists agree that bankruptcy petition must be presented to the court.<sup>25</sup> This is because the order of bankruptcy requires the decision of the court,<sup>26</sup> that means the bankruptcy cannot be made by the initiative of the court.<sup>27</sup> The petition may be presented by an individual creditor or creditors, for the right of debtor's estate belongs to the creditor. Accordingly, al-Bahūtī is of the view that it is

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<sup>22</sup> Ṣan'ā, vol. 3, p. 56.

<sup>23</sup> Hawa, p. 222; al-Qarāfī observes that the analogy (*qiyās*) of taking property without the consent used is not suitable for the bankrupt. Qarā, vol. 8, 168.

<sup>24</sup> Sula, p. 79; *Majallah*, article 26 provides, "A private injury is tolerated in order to ward off a public injury"; This legal rule is also stated by Ibn Nujaym. He says, "The application of it includes, the permissibility of interdiction to a free, sane and puberty person according to Abū Ḥanīfah is for three person, i.e. an insane juristconsult (*al-muftī al-mājin*), ignorant doctor (*al-ṭabīb al-jāhil*) and bankrupt tenant (*al-mukārī al-mufliṣ*), in order to ward off a public injury.", Nuja, p. 85; See also Khān, vol. 3, p. 634.

<sup>25</sup> Mard, p. 281. (However al-Shaykh Taqī al-Dīn preferred that the bankrupt becomes bankrupt without the decision of judge. This is a narration from Imām Aḥmad); Mūsā, p. 185.

<sup>26</sup> Farḥ, vol. 1, p. 98; According to Abū Yūsuf and Muḥammad, the interdiction of the debtor is only valid with a judge's declaration of bankruptcy (*al-iflās*) and then the declaration of interdiction. Rāfi, vol. 1, p. 281; See also Sara, vol. 24, p. 164; Lubn, p. 555; Sayū A., p. 460.

<sup>27</sup> Māwa, vol. 7, p. 385; Rāfi, vol. 5, p. 5.

illegal to pronounce a judgement without the petition from the holder of the rights, i.e. the creditor.<sup>28</sup>

Therefore, the court will not entertain the petition of the third parties because they do not have legal power (*lā wilāyah*) against the debtor,<sup>29</sup> except the guardian of interdicted person (*mahjūr 'alayh*).<sup>30</sup>

The need for the creditor's petition is also emphasised by the *Majallah* stating, "A person who is in debt may also be interdicted by the Court upon the petition of the creditors".<sup>31</sup>

In commenting on the above provision, 'Alī Ḥaydar mentions that the interdiction of debtor is similar to the interdiction of prodigal that is by the judge. The interdiction of the debtor is complete only after the judge pronounces him bankrupt.<sup>32</sup> He further says that Muslim jurists have agreed that the interdiction of the debtor is dependent on the adjudication of the judge.<sup>33</sup>

Creditor's petition shall be accepted even though it is made by one creditor whose credit qualifies for order of bankruptcy.<sup>34</sup> The bankruptcy order does not only

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<sup>28</sup> Bahū, vol. 2, p. 423.

<sup>29</sup> Qudā, vol. 4, p. 485.

<sup>30</sup> Baṣī, vol. 2, p. 44.

<sup>31</sup> *Maja*, article 959.

<sup>32</sup> Ḥayd, vol. 2, p. 669.

<sup>33</sup> Ibid.

<sup>34</sup> al-Dasūqī maintains that all indebted debts to the bankrupt are calculated in order to establish whether the debts of the bankrupt are more than his property. Dasū, vol. 3, p. 264.



affect the petitioning creditor but also other creditors,<sup>35</sup> notwithstanding opposition on their parts unless they are willing to pay the applicant's debt either from the debtor's property or their money.<sup>36</sup> The bail out by paying the petitioning creditor should be encouraged, for the declaration of bankruptcy will cause hardship to the bankrupt, i.e. he is not free to exercise his right of disposition, his property will be sold and be distributed to the creditors and so on.

The petition for bankruptcy order is based on the following situations:

- (a) if it is felt that the bankrupt is wasting his property by trading;
- (b) if that the property will be smuggled away from the creditors;
- (c) if that the property will be transferred to other.<sup>37</sup>

The creditor's petition may only be presented if,

- (a) the debt<sup>38</sup> is currently due for payment (*ḥāl*) and legally enforceable against the debtor (*lāzim*). So, there will be no bankruptcy order for a deferred payment debt (*mu'ajjal*).<sup>39</sup> This is because the creditors of deferred payment do not have any claim before the agreed date and the debts are not obliged to be paid. Moreover, the non-legally binding (*ghayr lāzim*) debts such as the right of instalment

<sup>35</sup> Nawa R., vol. 4, p.128; Rāfi', vol. 5, p. 6; Zarq Z., vol. 5, p. 265; Dasū, vol. 3, p. 264; 'Adaw, vol. 2, pp. 290-291; *Maws*, vol. 5, p. 302.

<sup>36</sup> 'Ilyā M., vol. 6, p. 19.

<sup>37</sup> *Maja*, article 999.

<sup>38</sup> The Arabic term for debt is *dayn*. The *Qur'ān* mentions the term *dayn* in at least five places, i.e. one in *sūrat al-Baqarah*, 2: 282, one in *ṣurat al-Nisā'*, 4: 11 and three in the same *sūrat*, 4:12., See Bāqī, pp. 267-268; The *Majallah* defines debt as "the thing which is proved to be owing". For example A certain sum of money lent to A and owed by him. *Maja*, article 158.

<sup>39</sup> Nawa R., vol. 4, p. 129; Ghaz W., p. 138; Rāfi', vol. 5, p. 6; Raml N., vol. 4, p. 310; Zarq Z., vol. 5, p. 265; Maqd K., vol. 2, p. 167; 'Adaw, vol. 2, p. 291; Ja'al, vol. 2, p. 148; *Maws*, vol. 5, p. 303.



payment for manumission (*nujūm al-kitābah*) and wife's maintenance for tomorrow are not considered part of current debts<sup>40</sup> as the creditor can relinquish them.<sup>41</sup>

(b) The debts must exceed the value of the debtor's assets. If his assets counter balance the debts and the debtor can also gain remuneration through labour, there would be no grounds for the order.<sup>42</sup> The debtor's assets are those actually possessed and owned by the debtor. They include whatever property owned by the debtor through gift (*hibah*), inheritance (*mīrāth*) or donation (*ṣadaqah*).<sup>43</sup> They are included as the debtor's assets because they can be used to pay the debts. However, things such as impounded (*maghṣūb*) and lost property,<sup>44</sup> and the unpaid debt considered part of non-existence property (*ma'dūm*) of the denier (*jāḥid*)<sup>45</sup> are excluded from the debtor's assets.

The debtor may also petition for his bankruptcy according to the Shāfi'is.<sup>46</sup> This view stands on one *Ḥadīth* that states, "Mu'ādh ibn Jabal was the kindest philanthropist among the youths till he possessed nothing. His debts exceeded all his assets. He came to see the Prophet (S.A.W) to tell about his situation and advised him to speak with his creditors about that and said to them: "If I want to settle the

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<sup>40</sup> Shar, vol. 2, p. 168.

<sup>41</sup> Kūha, *Zādd*, vol. 2, p. 165; Shar M., vol. 3, p. 97; Fash, p. 146.

<sup>42</sup> Nawa R., vol. 4, p. 129; Ghaz W., p. 138; Rāfi', vol. 5, p. 6; Zarq Z., vol. 5, p. 265; Dard Ṣ., vol. 3, p. 351; Maqd K., vol. 2, p. 169; Tagh, vol. 1, p. 351; Najd, p. 358; Zark, vol. 4, pp. 63-64; 'Adaw, vol. 2, p. 291; Bahū, vol. 3, p. 418; There are two views amongst the Mālikis about the inclusion of deferred payment debts. For example, the bankrupt has \$200 in form of debt, i.e. \$100 is a current debt and the balance is a deferred debt. He has only \$150. The view of *madhhab* is that, the bankrupt should be declared bankrupt even though he is able to provide a surety to pay. Dard S., vol. 3, p. 264; See also Dasū, vol. 3, p. 264; It seems that there is a justification for the view for the declaration of bankruptcy would make the deferred debt becomes due.

<sup>43</sup> Ja'al, vol. 2, p. 148.

<sup>44</sup> Baṣī, vol. 2, p. 44.

<sup>45</sup> Ṣalā, vol. 2, p. 589.

<sup>46</sup> Ghaz S., vol. 4, p. 99; Raml, vol. 4, p. 314; Kuhā, vol. 2, p. 166; Shar M., vol. 3, p. 99; Cf. Ṣāwī, vol. 2, p. 126; Dasū, vol. 3, p. 264; Dard S., vol. 3, p. 264.

matter, I would have left it to the Prophet". Afterwards, the Prophet (S.A.W) sold Mu'ādh's property and divided its proceeds among the creditors. As a result Mu'ādh had nothing".<sup>47</sup>

This shows that the debtor can initiate the bankruptcy proceeding when he finds his debts exceed his estate. Furthermore, al-Nawawī says, "And if there is no petition of bankruptcy being made even by one of the creditors, and the debtor himself presents a petition for the order, he would be declared bankrupt, according to the preferred view, because it involves the debtor's interest."<sup>48</sup>

In addition to creditor's and debtor's petitions, there are exceptional circumstances that allow the bankruptcy order to be made without bankruptcy petition. The court may declare a debtor bankrupt if the debts involve insane persons, minors or interdicted prodigal. The judge can declare the debtor bankrupt in order to protect their interests.<sup>49</sup> This rule is also applicable to cases involving the public interest such as for mosques and the poor.<sup>50</sup>

### 1.1.2 English and Malaysian Laws

Similar to Islamic law, English law provides that a bankruptcy petition<sup>51</sup> may be presented to the court by one of the individual's creditors<sup>52</sup> or jointly by more than one of them.<sup>53</sup>

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<sup>47</sup> Shaw, vol. 5, p. 340.

<sup>48</sup> Nawa R., vol. 4, p. 128.

<sup>49</sup> Ibid, pp. 127-128.

<sup>50</sup> Baṣī, vol. 2, p. 44.

<sup>51</sup> "Bankruptcy petition" means a petition to the court for a bankruptcy order. *Insolvency Act 1986*, section 381.

There are five alternative jurisdictional qualifications for a debtor<sup>54</sup> before the bankruptcy petition is presented;

(i) the debtor is domiciled in England,

(ii) the debtor is personally present in England on the day on which the petition is presented,<sup>55</sup>

(iii) the debtor at any time in the period of three years ending preceding the petition has been ordinarily resident, or

(iv) the debtor has had a place of residence in England, or

(v) the debtor has carried on business in England (during the period of three years).<sup>56</sup> Thus, a person does not cease to carry on business until arrangements have been made to settle business debts.<sup>57</sup>

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<sup>52</sup> "Creditor" in relation to the bankrupt means a person to whom any of the bankruptcy debt is owed. "Bankrupt debt" is defined as meaning to the following types of indebtedness, namely;

(i) any debt or liability to which he is subject at the commencement of the bankruptcy.

(ii) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy.

(iii) any interest provable.

"Creditor" in relation to an individual to whom a bankrupt petition relates, means a person who would be creditor in the bankruptcy if a bankruptcy order were made on that petition. *Insolvency Act 1986*, section 383(1).

<sup>53</sup> *Insolvency Act 1986*, section 264(1)(a); It was held (on appeal) that this enables a petition to be presented jointly by several persons, each with separate debts, and is not confined to permitting a petition to be presented by more than one petitioner in respect of joint debts. *Bray-Poat and Arthur v. Allen (No. 177-63)* March 30, 1994 Ch D, Ferris J. (unreported), quoted by Hunt, p. 3042/1.

<sup>54</sup> "The debtor" in relation to a bankruptcy petition, means the individual to whom the petition relates. *Insolvency Act 1986*, section 385(1)(b).

<sup>55</sup> In *Re Thulin* [1995] 1 WLR 165 Ch D, a non resident Swede was bankrupted by the English court to facilitate the international collection of his assets.

<sup>56</sup> *Insolvency Act 1986*, section 265 (1).

<sup>57</sup> *Re a Debtor (No. 784 of 1991)* [1992] Ch 554 where Hoffman J followed *Theophile v Solicitor General* [1950] AC 186; See also *Wilkinson v IRC* [1998] BPIR 418 Ch D.



The petition<sup>58</sup> by creditor may be presented if the following conditions are fulfilled. They are as follows:

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level<sup>59</sup> currently is seven hundred fifty pounds.<sup>60</sup> Thus, if the net sum after deducting the maximum value of the cross-claim from the debt is seven hundred fifty pounds or more, the court still makes a bankruptcy order.<sup>61</sup>

It is possible for two or more creditors, to whom as individuals debts of less than seven hundred fifty pounds are separately owed by the debtor, to consolidate their petition so that it becomes based upon an aggregate sum equal to or in excess of the statutory minimum figure.<sup>62</sup> They can jointly present a single bankruptcy petition.<sup>63</sup>

In quantifying the amount of the petitioning creditors' debt for the purpose of establishing that it at least equals the prevailing bankruptcy level, it is permissible to include interest for periods before the date on which the petition is presented, provided that such interest was properly payable by virtue of the contract or alternatively, if a demand in writing for payment had previously been made upon the

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<sup>58</sup> There are four forms for creditor's petition set out in Schedule 4 to the Rules,

(i) Form 6.7 is for failure to comply with a statutory demand for a liquidated sum payable immediately.

(ii) Form 6.8 is for failure to comply with a statutory demand for a liquidated sum payable at a future date.

(iii) Form 6.9 is where execution or other process on a judgement has been returned unsatisfied in whole or in part.

(iv) Form 6.10 is for default in connection with voluntary arrangement.

<sup>59</sup> *Insolvency Act 1986*, section 267(2)(a).

<sup>60</sup> *Insolvency Act 1986*, section 267(4). The court should dismiss the petition if the debtor is able to show a *bona fide* dispute of so much or that debts to leave less than £750 as the undisputed balance. *Re a Debtor (49 and 50 of 1990)* [1994] 3 WLR 847 CA .

<sup>61</sup> *Platts v TSB Bank Pls*, *Times Law Reports*, March 4, 1998 Ch D.

<sup>62</sup> Flet, p. 102; Frie, p. 6.



debtor containing notice that interest will be payable from the date of the demand to the date of the payment.<sup>64</sup>

(b) the debt, or each of the debts, is for a liquidated sum.<sup>65</sup> Claims in tort are in their very nature unliquidated until judgement is actually given, or until a binding settlement has been concluded between the parties; until then the plaintiff may furnish an indication of a sum of damages, which he believes to be appropriate. Claims in contract, on the other hand are generally liquidated in nature at all stages, but if the sum includes an element which is to be “penal”, this will render the claim an unliquidated one.

Likewise, if the true quantum of loss directly and naturally resulting from a breach of contract or a breach of covenant cannot immediately and definitely be established, the claim must be considered as unliquidated for the time being.<sup>66</sup> Thus, this prevents a landlord from petitioning on the ground of breach of a covenant such as a covenant to repair the leased premises. If there is such a breach, the landlord will not be able to petition without obtaining judgement first for damage.<sup>67</sup>

Moreover, there are categories of debts, which have not been accepted as liquidated for this purpose. Any debt, claim or indebtedness, which requires or awaits some further act or proceeding, or of a passage of a further period of time, in

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<sup>63</sup> *Re Allen (Re a Debtor 367 of 1992)* [1998] BPIR 319 Ch D.

<sup>64</sup> Flet, p. 102.

<sup>65</sup> *Insolvency Act 1986*, section 267(2)(b).

<sup>66</sup> Flet, p. 104.

<sup>67</sup> McLo, p. 20.

order to mature, or in order to reach a certain and fixed value, will be categorised as unliquidated and as incapable of supporting a petition.<sup>68</sup>

The liquidated sum must be payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain future time. This imposes the requirement that the liability giving rise to the petitioning creditor's debt must be existing, and not contingent. If the debtor has assumed a liability to pay a specific amount of money which will, however, only become payable provided that some event happens or fails to happen, or provided that certain steps are taken consequent upon that contingency, the requirement of section 267(2)(b) will in this respect be unfulfilled unless all those necessary developments have place before the petition is presented.<sup>69</sup>

(c) the debt or each of the debts is unsecured.<sup>70</sup> This does not exclude a secured creditor from presenting a bankruptcy petition. The secured creditor must either give up his security so that its proceeds may be shared by all the creditors jointly or give an estimate of the value of his security. After deducting the value so estimated, the secured creditor may be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.<sup>71</sup> The secured creditor may also petition for bankruptcy if the petition is in respect of an unsecured part of the same debt.<sup>72</sup>

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<sup>68</sup> Hunt, p. 3042/1.

<sup>69</sup> Flet, p. 105.

<sup>70</sup> Section 267(2)(b) gives formal expression to this principle, but the sub-section itself has to be read in conjunction with section 269 of the Act, which has an overriding role in this matter. Flet, p. 106.

<sup>71</sup> *Insolvency Act 1986*, section 269(1)(a)(b); See also sections 258(4) & 285(2).

<sup>72</sup> See *Zandfarid v BCCI* [1996] BPIR 501 Ch D.



(d) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay.<sup>73</sup> The debtor will be deemed unable to pay debt if he fails to meet a demand in the prescribed form served on him within three weeks or an execution judgement has been returned unsatisfied in whole or in part.<sup>74</sup> The debtor appears to have no reasonable prospect of being able to pay debt if, but only if, the debt is not immediately payable and:

(i) the petitioning creditor to whom it is owed has served on the debtor a demand also known as "the statutory demand"<sup>75</sup> in the prescribed form requiring him to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due,

(ii) at least three weeks have elapsed since the demand was served, and the demand has been neither complied with nor set aside in accordance with the rules.<sup>76</sup>

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<sup>73</sup> *Insolvency Act 1986*, section 257(2)(c).

<sup>74</sup> *Insolvency Act 1986*, section 268(1)(a)(b); In *Re a debtor (No 340 of 1992)* [1995] TLR 141 CA, the question was whether the execution had been "returned unsatisfied in whole or in part" with the meaning of section 268(1)(b). The Appeal Court held that the section contemplated the carrying out of execution and endorsement of a manner in which the execution was carried out. If the sheriff was unable to gain entry to the premises in which the execution to be carried out, then there was no execution and the proper endorsement could be made under the section. Accordingly, the creditors had been unable to bring themselves within the section and were not entitled to present the petition.

<sup>75</sup> A statutory demand is a document prepared by the creditor in the prescribed form requiring the debtor to pay the debt referred in the demand or provide security to pay the debt within 3 weeks after the demand is served. There three forms of statutory demand set out in Schedule 4 of the Rules,

(a) Form 6.1 demands for a debt presently due but not based on a judgement.

(b) Form 6.2 demands for a debt presently due based on a judgement or order of the court.

(c) Form 6.3 demands for a debt due at a future time.

When completing the form, the full name of the debtor be given, along with the full name and address of the creditor. Only one debt can be included as the debt on the form. The amount of the debt must be stated and interest if claimed. As a statutory demand can only be made for an unsecured debt and if the creditor holds any security, he must specify what it is and put a value on it so that the amount of unsecured portion of the debt can be identified. The demand must be signed by the creditor himself or someone authorised on his behalf such as a solicitor. If the debtor does not comply with the demand within three weeks the debtor is deemed as unable to comply with the demand.

<sup>76</sup> *Insolvency Act 1986*, section 268(2).

(e) there is no outstanding petition to set aside a statutory demand served in respect of the debt or any of the debts.<sup>77</sup> If such petition is pending, it falls outside the category of qualifying debt.<sup>78</sup>

The petition must contain the following information:

- (a) the debtor's name, place of residence and occupation (if any),
- (b) the name or names in which he carries on business, if other than his true name, and whether alone or jointly with others,
- (c) the nature of his business and address or addresses at which he carried on business,
- (d) any name or names, other than his true name in which he has carried on businesses at or after the time when the debt was incurred and whether alone or jointly with others,
- (e) any address or addresses at which he has resided or carried on business at or after that time and the nature of that business.<sup>79</sup>

The petition must also state:

- (a) the amount of the debt, the consideration for it and the fact that it is owed to the petitioner,
- (b) when the debt was incurred or become due,
- (c) if the debt includes any charge by way of interest not previously notified to the debtor as a liability of his or any other charge accruing from time to time, the amount or the rate of the charge (separately identified) and the grounds on which it is

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<sup>77</sup> *Insolvency Act 1986*, section 267(2)(d).

<sup>78</sup> Seal, p. 318.

<sup>79</sup> *Insolvency Rules 1986*, rule 6.7(1).



claimed to form part of the debt provided that the amount or rate must be the case of a petition based upon a statutory demand be limited to that claim in the demand,

(d) either (i) that the debt is for a liquidated sum payable immediately and the debtor appears unable to pay it or (ii) that the debt is for a liquidated sum payable at some certain future time and the debtor appears to have no reasonable prospect of being able to pay. In either case, that the debt is unsecured.<sup>80</sup>

A bankruptcy petition must be verified by an affidavit that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief.<sup>81</sup> The affidavit is prima facie evidence of the truth of the statements in the petition to which it relates.<sup>82</sup>

A bankruptcy petition may also be presented to the court by the debtor himself<sup>83</sup> on the ground of his inability to pay the debts.<sup>84</sup> Inability is not whether the debtor's assets exceeds his liabilities at the relevant time but whether he is unable to pay those debts at the time they are due. In other words the test for inability to pay debts appears to be based upon current liquidity and not upon asset values.<sup>85</sup>

The debtor's act of presenting his own petition has the immediate effect of removing both himself and his property from any separate course of action to which

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<sup>80</sup> *Insolvency Rules 1986*, rule 6.8(1).

<sup>81</sup> *Insolvency Rules 1986*, rule 6.12(1).

<sup>82</sup> *Insolvency Rules 1986*, rule 6.12(6).

<sup>83</sup> *Insolvency Act 1986*, section 264(1)(b); "Debtor's petition" means a bankruptcy petition presented by the debtor himself. *Insolvency Act 1986*, section 385(1).

<sup>84</sup> *Insolvency Act 1986*, section 272(1); The term debt is defined by section 385(1) as to be construed in accordance with section 382(3). That subsection includes within the term "debt or liability" any debt or liability, present or future, certain or contingent, for an amount fixed or liquidated, capable of being ascertained by fixed rules or as a matter of opinion.

his unsecured creditors might otherwise resort. He will thus put an end to the inconvenience and dissipation of resources caused by multiple executions and other forms of enforcement process.<sup>86</sup> The petition must be accompanied by a statement of affairs containing particulars of his creditors' debts, liabilities and assets together with other information may be prescribed.<sup>87</sup>

In addition to the mentioned petitions, English law also permits the supervisor of, or a person for the time being bound by,<sup>88</sup> the voluntary arrangement<sup>89</sup> to petition for a bankruptcy order.<sup>90</sup> This qualification must refer to the need to show that the voluntary arrangement is still in force, and has not been set aside, either expressly after successful challenge under section 262, or by operation of law, in consequence of bankruptcy order having had the effect of setting the arrangement aside.<sup>91</sup>

Where a debtor, who has entered into a voluntary arrangement with his creditors, is made bankrupt by the bankruptcy order obtained by a creditor not bound by the arrangement, or by a post-arrangement creditor, on a petition presented under sub-section (1)(c), the only available assets will be those, if any (whether current or

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<sup>85</sup> *Re Coney* [1998] BPIR 333 Ch D.

<sup>86</sup> Flet, p. 117.

<sup>87</sup> *Insolvency Act 1986*, section 272(2).

<sup>88</sup> Such as a creditor, and possibly also a surety for the terms of the arrangement. Hunt, p. 3058.

<sup>89</sup> Voluntary arrangement is an arrangement between an individual debtor and his creditors agree to accept something less than 100 p in the £ on their debts or agree to some deferment of the time for payment of their debts and also agree not to force the debtor into bankruptcy. Frie, p. 143.

<sup>90</sup> *Insolvency Act 1986*, section 264(1)(c).

<sup>91</sup> Hunt, p. 3033.

future, e.g. future earning), which the debtor has not assigned to the nominee/supervisor under the arrangement.<sup>92</sup>

If the petition is presented on the grounds of the debtor's misfeasance or defaults in preparing and carrying out the arrangement and the debtor is in fact guilty of such delinquencies, it is right that the supervisor and the arrangement creditors should be able to bring the arrangement to an end.<sup>93</sup>

Likewise, Malaysian law allows the bankruptcy petition<sup>94</sup> to be presented to the court by a creditor.<sup>95</sup> The petition by creditor is subject to the following conditions:

(a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to ten thousand ringgits.

(b) the debt is a liquidated sum payable either immediately or at some certain future time.<sup>96</sup> Therefore, the petition may be set aside due to the failure to indicate in the petition that the debt owing by the debtor is a liquidated sum payable either immediately or at some certain future time.<sup>97</sup>

(c) the debtor is domiciled in Malaysia or any State or within one year before the date of presentation of the petition has ordinarily resided<sup>98</sup> or had a dwelling

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Bankruptcy petition includes a petition for a receiving order. *Bankruptcy Act 1967*, section 2.

<sup>95</sup> *Bankruptcy Act 1967*, section 4.

<sup>96</sup> This appears to mean that a petition could validly be presented for a future debt.

<sup>97</sup> *Michael Chong Ngion Fong v Syarikat Fong Sam Timber & Anor* [1977] 1 MLJ 263 HC.

<sup>98</sup> In *Re Chua Chun Eng, ex parte Tractors Malaysia (1982) Sdn Bhd* [1995] 3 AMR 2269 HC, the court held that as the debtor was not, and still is not a person domiciled in Malaysia,



house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period of member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager; and

(d) the petition must be based on the acts of bankruptcy committed by a debtor that occurred within six months before the presentation of the petition.<sup>99</sup>

There are circumstances that acts of bankruptcy are committed to such as conveying or assigning all property to a trustee or trustees for the benefit of his creditors generally, making a fraudulent conveyance, gift, delivery or transfer of all or part of his property and conveying or transferring or creating a charge upon all or part of his property so as to amount a fraudulent preference if he were adjudged bankrupt.<sup>100</sup>

A fraudulent conveyance connotes a positive action rather than the instrument of transfer of property, or the document which evidenced an agreement to transfer. It refers to an act of transfer where the title of property of a person would by law be considered passed from one to another.<sup>101</sup> An example for a fraudulent conveyance is

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or in any State, or within one year before the date of presentation of the petition, or who has during the said period, ordinarily resided in Malaysia or any State, the debtor does not meet the requirement of section 5(1)(d) of the Act. This is based on the fact that there is evidence to indicate that at the relevant time, the creditor, through its manager, knew that the debtor was in Australia. Furthermore the debtor has established the *animus* and *factum* of his domicile in Australia. He bought a house in Australia in 1986, obtained permanent resident status in 1988, moved his wife and children to Australia in 1988, and he and his family have not been back to Malaysia, the debtor does not carry on business here, and he acquired Australia citizenship in 1991.

<sup>99</sup> *Bankruptcy Act 1967*, section 5(1).

<sup>100</sup> *Bankruptcy Act 1967*, section 3(1)(a)(b)(c).

<sup>101</sup> *Official Assignee of the estate of Koh Liang Hee (a bankrupt) v Koh Thong Chuan & Anor* [1997] 5 MLJ 136 HC.



where a debtor conveys to his wife his interest in certain land for a small consideration on the day before he closed his business.<sup>102</sup>

The act of bankruptcy also arises where a debtor is filing in the court a declaration of his inability to pay his debts, presenting a bankruptcy petition against himself, making an offer of composition with his creditors or a proposal for a deed of arrangement<sup>103</sup> of his affairs with his creditors and possessing no property liable for seizure carried out by the officer charged with the execution of a writ of attachment or giving notice to any of his creditors that he has suspended or about to suspend payment of his debt.<sup>104</sup> To constitute a notice, it is enough to send a letter to all creditors stating, "We regret to have to inform you that we are unable to pay our debts in full at the present time and we propose to call a meeting of all our creditors".<sup>105</sup>

The acts of bankruptcy are also committed if, with intent to defeat or delay his creditors, a debtor is (i) departing, being or remaining out of Malaysia<sup>106</sup> or (ii) departing from his dwelling-house or otherwise absenting himself, beginning to keep

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<sup>102</sup> *Re Khor Bak Kee* [1936] MLJ 5 CA.

<sup>103</sup> "Deed of arrangement" includes any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of the creditors generally. (a) an assignment of property; (b) a deed or agreement for a composition; and in cases where creditors of a debtor obtain any control over the property or business (c) a deed of inspectorships entered into for the purpose of winding up or carrying on a business; (d) a letter of licence authorising the debtor or any other person to manage, carry on, realise, or dispose of a business with a view to the payment of debts; and (e) any agreement or instrument entered into for the purposes of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise or dispose of the debtor's business with a view to the payment of his debts. *Bankruptcy Act 1967*, section 2.

<sup>104</sup> *Bankruptcy Act 1967*, section 3(1)(f)(g)(h)(j).

<sup>105</sup> *Re K Muhammad Ibrahim & Co., ex parte Ramchand* (1940) 9 MLJ 90.

<sup>106</sup> See *Official Assignee, States of Malaya v Tat Fatt Shirts Manufacturer* [1969] 2 MLJ 1 HC.

house or close his place of business,<sup>107</sup> or (iii) submitting collusively or fraudulently to an adverse judgement or order for the payment of money; and if execution issued against him has been levied by seizure of his property under process in an action or in any civil proceeding in the High Court, Sessions Court or Magistrates Court where the judgement, including costs, is for an amount of one thousand ringgits or more.<sup>108</sup>

A failure to comply with the requirements of a bankruptcy notice,<sup>109</sup> such requirement as to pay the judgement debt or sum orders to be paid obtained or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it satisfaction of the creditor or the court, by a creditor within seven days is also one of the acts of bankruptcy.<sup>110</sup> The bankruptcy notice must have been issued at the instance of a creditor who has obtained a final judgement<sup>111</sup> or order.<sup>112</sup>

Since the debtor is entitled to know exactly the actual sum that he has to pay to avoid the commission of the act of bankruptcy, it is essential that the notice must quantify the total sum required to be paid for the purpose of that particular

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<sup>107</sup> It was held that closing down a place of business is not an act of bankruptcy unless the closing is done to defect or delay creditors. *Re Varghese & Co* [1946] MLJ 2.

<sup>108</sup> *Bankruptcy Act 1967*, section 3(1)(d)(e).

<sup>109</sup> *Gurubachan Singh v Seagrott & Campbell* (1962) 29 MLJ 309; A bankruptcy notice shall be in the prescribed and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner. *Bankruptcy Act 1967*, section 3(2).

<sup>110</sup> *Bankruptcy Act 1967*, section 3(1)(i).

<sup>111</sup> A final judgment includes a summary judgment entered against the judgment debtor. This is so, when the Senior Assistant Registrar (SAR) heard the arguments from both sides upon affidavit evidence. *Re Lo Koh Wah, ex p Jupiter Securities Sdn Bhd* [2000] 5 MLJ 180 HC; It also includes a judgment in default for the sum claimed by the creditor against the debtor after the debtor had defaulted in failing to appear in court to counter the claim. *Re Tan Hwee Earn, Ex p the People Insurance Co (M) Sdn Bhd* [1999] 4 MLJ 248 HC; Moreover, the judgment is final and conclusive notwithstanding the fact that it is subject to an appeal or under appeal and there is a possibility that the Court of Appeal will allow the appeal. *Re Tan Ah Poi, Ex p Multi Purpose Finance Bhd* [1999] 2 CLJ 694 HC.

<sup>112</sup> In *Re Leo Hoon Hong* (1951) 17 MLJ 222 HC, the court held that an order of payment of cost is not a final order.



bankruptcy notice.<sup>113</sup> The debtor does not have to make calculation or inquire.<sup>114</sup> The notice should also be clearly stated and any reasonable person reading the notice should be left in no doubt at all.<sup>115</sup> So, failure to quantify the amount of interest up to the date of the issue of the bankruptcy notice renders the bankruptcy notice a nullity *ab initio* as this is the intention of the Parliament.<sup>116</sup>

An act of bankruptcy is completed at the last moment of the last day (excluding the day of service) prescribed for compliance.<sup>117</sup> However, the debtor does not commit such an act of bankruptcy if within seven days he complies with such requirement indicated in the bankruptcy notice or satisfies the court that he has counter claim, set-off or cross demand which equals or exceeds the amount of the judgement debt or sum to be paid by filing an affidavit.<sup>118</sup> It is therefore wrong for the debtor to file a notice of motion.<sup>119</sup>

If a debtor files an affidavit that he has counterclaim, three ingredients must be satisfied before the existence of a counterclaim by the debtor can be a defence to a judgement creditor's petition. These are, (a) the counterclaim must be capable of being quantified in terms of money and the affidavit must quantify it; (b) the counter claim must be put forward in good faith and must have a reasonable probability of

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<sup>113</sup> *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and Anor* [1991] 1 MLJ 426 SC.

<sup>114</sup> *Chong Chin Shoong v Development & Commercial Bank Bhd* [1990] 2 MLJ 285 HC.

<sup>115</sup> *Lim Boon Peng v United Orient Leasing Co Bhd* [1991] 1 MLJ 292 SC.

<sup>116</sup> *Re Undoh bin Asai* [1995] 4 MLJ 382 HC.

<sup>117</sup> *Re Arif bin Sionggong, ex p Arab Malaysian Finance Bhd* [1995] 3 MLJ 252 HC.

<sup>118</sup> *Bankruptcy Act 1967*, section 3(1)(i); The affidavit is ineffective and bad in law if it does not disclose that the judgement debtor had a counterclaim, set-off or cross demand which equalled or exceeded the amount of the judgement debt, *Re Tio Chee Hing, ex p Chung Khiaw Bank Ltd* [1995] 4 MLJ 612 HC.

<sup>119</sup> *Re Khoo Chee Tong, ex p Unik (M) Sdn Bhd* [1996] 5 MLJ 39 HC; *Re Yong Chooi Fong, ex p Perwira Habib Bank Malaysia Bhd* [1992] 2 CLJ 1262 HC.

success; and (c) the affidavit must show that the counterclaim could not have been set up in the action in which the judgement relied on was obtained by the creditor.<sup>120</sup>

The act of bankruptcy is complete at the very moment the court dismisses the application to set aside the bankruptcy notice as if no affidavit has been filed.<sup>121</sup>

If the petitioning creditor is a secured creditor,<sup>122</sup> he must in his petition either state that he is willing to give up his security for the benefit of the creditors, in the event of the debtor being adjudged bankrupt, or give an estimate<sup>123</sup> of the value of his security. In the latter case he may estimate this value to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.<sup>124</sup>

The creditor's petition must be verified by an affidavit of the creditor.<sup>125</sup> However, if a petitioning creditor is unable himself to verify all the statements, an

<sup>120</sup> *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423 SC; See also *Datuk Lim Kheng Kim v Malayan Banking Berhad* [1993] 2 AMR 1285 SC.

<sup>121</sup> *Soh Bok Yew v Cindee Development Sdn Bhd* [1977] 1 MLJ 242 FC; *Re Fong Yuan Kwong, ex p Chung Khiaw Bank Ltd* [1995] 4 MLJ 612 HC.

<sup>122</sup> "Secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgement. *Bankruptcy Act 1967*, section 2; "Secured creditor" is a person who holds property belonging to the debtor as security for the debt due to creditors from the debtor. Therefore, a creditor who is holding a charge on a property belonging to a third party is not a secured creditor. *Re Kho Kak Siew, ex p MUI Bank Bhd* [1993] 1 MLJ 208 HC; See also *Rabindera Singh s/o Arjan Singh, ex p Malaysian International Merchant Banker Bhd* [1989] CLJ 858 HC.

<sup>123</sup> "The word "estimate" means an approximate judgement of a value and not an exact, precise value." *Re Fong Yuan Kwong, ex p Public Bank Bhd* [1996] 4 MLJ 42 HC, per Low Hop Bing J. at 51 C-D.

<sup>124</sup> *Bankruptcy Act 1967*, section 5(2).

<sup>125</sup> *Bankruptcy Act 1967*, section 6(1); *Bankruptcy Rules 1969*, rule 106(1).



affidavit made by some person who can depose to them must be filed.<sup>126</sup> The petition has to be annexed to the verifying affidavit. The petition must be tied to or affixed to or stapled to the verifying affidavit, so as to avoid dispute on what exactly is being verified. If the petition is not annexed to the verifying affidavit, that will render the proceedings a nullity.<sup>127</sup>

The bankruptcy petition may also be presented by a debtor himself.<sup>128</sup> This is indeed an act of bankruptcy. The petition shall allege his inability to pay his debts.<sup>129</sup> The debtor must insert his name, National Registration Identity Card number, description, his address at the date when the petition is presented, and any address at which he has resided or carried on business and at which he has incurred debts and liabilities remaining unpaid or unsatisfied at the date of the petition.<sup>130</sup>

## 1.2 Hearing of Bankruptcy Petition

It is a duty of the court to declare a debtor bankrupt. There is no bankruptcy unless there is a court hearing.

### 1.2.1 Islamic Law

On hearing the bankruptcy petition presented by the creditor, the court will not entertain the petition unless the creditors can prove by one of the following two ways that the debts are due to them:

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<sup>126</sup> *Bankruptcy Rules 1969*, rule 106(2).

<sup>127</sup> *Re Teoh Thean Peng, ex p D & C Leasing Sdn Bhd* [1993] 2 MLJ 1 HC; *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526 HC; *Re Haroun Al-Rashid bin Mohd Yusof, ex p Daya Leasing Sdn Bhd* [1996] 5 MLJ 317 HC.

<sup>128</sup> *Bankruptcy Act 1967*, section 4.

<sup>129</sup> *Bankruptcy Act 1967*, section 7(1).

<sup>130</sup> *Bankruptcy Rules 1969*, rule 100(1).

- (a) through the admission (*al-iqrār*) of the debtor, or
- (b) through the evidence (*al-bayyinah*) such as testimony of witnesses.<sup>131</sup>

The court will then look into the value of bankrupt's estate whether he is able to settle the debts or not. The court will dismiss the petition if the debtor is able to settle his debts. If he is not able to settle them, the judge shall declare him bankrupt after the creditors debts are proven, without taking into consideration whether the petition is made by all creditors or some, for leaving the bankrupt to dispose the property freely will squander their debts and loss of rights.<sup>132</sup> The deferred debt indebted to the bankrupt will not be taken into consideration because the creditors' rights are not fallen due.<sup>133</sup> Thus, the making of the bankruptcy order marks the moment of commencement of bankruptcy for the individuals in question; he will not be released from the condition and status of a bankrupt until he gains his discharge.

Additionally, according to one view of the Shāfi'is, the court will further examine the debtor's position even if his property is enough or more to settle the debt. The judge will look into whether there are signs of bankruptcy (*amārāt al-iflās*) such as inability to work for livelihood, disposing property excessively and so on. If there are apparent signs of bankruptcy, the court may declare the debtor bankrupt to prevent him from disposing of his property, an act that will cause loss to him and creditors.<sup>134</sup> This opinion seems particularly good for a debtor who uses his property unjustly.

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<sup>131</sup> Māwa, *Al-Ḥāwī*, vol. 7, p. 385; Qudā, vol. 4, p. 484.

<sup>132</sup> Māwa, vol. 7, p. 385.

<sup>133</sup> Ṣalā, vol. 2, p. 589.

The creditor's petition may be heard *ex parte* without the presence of the debtor unless he is known to be solvent.<sup>135</sup> The proof of bankruptcy is established either by confession, evidence of witness or legal documents (*ṣukūk*).<sup>136</sup> The *Majallah* provides, "It is not essential that the person whom the Court intends to interdict should be present. He may be interdicted in his absence. Such person must, however, be informed of the interdiction; and the interdiction does not take effect until he has been so informed. Consequently, any contracts or admissions made by him up to that date are valid."<sup>137</sup> The *ex parte* hearing seems to be workable especially for the debtor who tries to smuggle or hide away his property from the creditors and uses his property extravagantly. Thus, the hardship to the creditors is prevented.

The *ex parte* hearing is based on the judgement passed by the Prophet (S.A.W) against Abū Sufiyān. It is reported that Hind (Abū Sufiyān's wife) came to the Prophet and complained, "Abū Sufiyān is a stingy person. He did not provide adequate maintenance for me and children except I took his wealth secretly without his knowledge. Is there any sin against me?" The Prophet replied, "Take from his property what may suffice for you and your children."<sup>138</sup>

The *Ḥadīth* shows that the judgement passed by the Prophet (S.A.W) is without the presence of Abū Sufiyān. Thus, *ex parte* judgement is permissible.

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<sup>134</sup> Māwa, vol. 7, pp. 385-386.

<sup>135</sup> Mūsā, p. 185.

<sup>136</sup> Ja'al, vol. 2, p. 148.

<sup>137</sup> *Maja*, article 962; See also *Fatā*, vol. 5, p. 61; *Ṭarā*, p. 204; For further explanation see *Maws*, vol. 5, pp. 303-304.

<sup>138</sup> Bagha, vol. 4, p. 353(no. 2343); *Shad*, vol. 2, p. 145.



According to al-Baghawi, referring to Imām Mālik<sup>139</sup> and al-Shāfi‘ī, this *Ḥadīth* permits passing a judgement on the absent party. On the contrary, the majority including the Ḥanafis do not allowed *ex parte* judgement.<sup>140</sup>

When the debtor presents the petition, the court may adjudge the debtor bankrupt after proving the evidence of his inability to settle the debts. The bankrupt, moreover, must take an oath about his situation according to Imām Mālik and al-Shāfi‘ī.<sup>141</sup>

### 1.2.2 English and Malaysian Laws

The court under English law, on hearing the creditor's petition, must not make a bankruptcy order unless it is satisfied that the debt or one of the debts, in respect of which the petition was presented, is either:

- (a) a debt which has been neither paid nor secured nor compounded for;
- (b) a debt due at a future time in which the debtor has no reasonable prospect of being able to pay when it falls due.<sup>142</sup>

The court will not make a bankruptcy order and will dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied:

- (a) that the debtor has made an offer to secure or compound for a debt in respect of the petition;

<sup>139</sup> The decision on the absent defendant is allowed in matters relating to the rights, the agencies (*al-wakāla*), partnerships (*al-muqāsamāt*), all transactions (*al-mu‘āmalāt*) and loans and debts (*al-mudāyanāt*). Baṣr, p. 239.

<sup>140</sup> Bagha, vol. 4, p. 353. This is also the view of Shurayḥ, ‘Umar ibn ‘Abd al-‘Azīz, Ibn Abī Laylā; See also Shad, vol. 2, pp. 145-146.

<sup>141</sup> Asyū, vol. 1, p. 165.

<sup>142</sup> *Insolvency Act 1986*, section 271(1).



(b) that the acceptance of that offer would have required the dismissal of the petition;

(c) that the offer has been unreasonably refused.<sup>143</sup>

In order to determine whether the creditor's refusal of a lesser sum in settlement was unreasonable, the court has to be satisfied that no reasonable hypothetical creditor in this position would have refused the offer.<sup>144</sup>

There is no statutory requirement to the effect that the debtor must appear, although it is highly desirable that he should do so, especially if he wishes to mount any effective opposition to the making of a bankruptcy order. If the debtor does not appear, the hearing may proceed and the court may make a bankruptcy order if all other legal requirements are met.<sup>145</sup>

On the hearing of the petition made by the debtor, the court may;

(a) make a bankruptcy order,

(b) make a bankruptcy order and issue a certificate for a summary administration of the bankrupt's estate where the total debts do not exceed the 'small bankruptcies level' currently at twenty thousand pounds, and the bankrupt has not been adjudicated bankrupt before in the last five years; nor has he entered into any composition with his creditors or scheme of arrangement.<sup>146</sup>

(c) appoint an insolvency practitioner to prepare a report.<sup>147</sup>

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<sup>143</sup> *Insolvency Act 1986*, section 271(3).

<sup>144</sup> *In Re A Debtor (No 32 of 1993)* [1995] 1 All ER 628 Ch D.

<sup>145</sup> Flet, p. 131.

<sup>146</sup> *Insolvency Act 1986*, section 275(1)(2)(a)(b).

<sup>147</sup> See *Insolvency Act 1986*, section 273.

The court shall not make a bankruptcy order if it appears to the court that:

(a) if a bankruptcy order were made on the aggregate amount of the bankruptcy debts, so far as unsecured, would be less than the small bankruptcies level (currently set at twenty thousand pounds);

(b) if a bankruptcy order were made on the value of the bankrupt's estate that would be equal to or more than the minimum amount (currently set at two thousand pounds);

(c) within the period of five years ending with the presentation of the petition, the debtor has neither been adjudged bankrupt nor made a composition with his creditors in satisfaction of his debts or a scheme of arrangement of his affairs;

(d) it would be appropriate to appoint a person to prepare a report as to whether it would be possible to make a voluntary arrangement.<sup>148</sup>

Most of the information on which the court will make all four of these findings will be obtainable from the statements contained in the debtor's statement of affairs, a required attachment to his petition.<sup>149</sup>

For a petition presented by the supervisor of the voluntary arrangement, the order shall not be made unless the court is satisfied with either:

(a) that the debtor has failed to comply with his obligations under the voluntary arrangement;<sup>150</sup>

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<sup>148</sup> *Insolvency Act 1986*, section 273(1).

<sup>149</sup> *Insolvency Rules 1986*, rule 6.41; Form 6.28.

<sup>150</sup> Failure is a matter to be considered objectively and not subjectively, culpability on the part of the debtors is not required. *Re Keenan* [1998] BPIR 205 Ch D.

(b) that information which was false or misleading in any material particular or which contained material omissions<sup>151</sup> was contained in any statement of affairs or other document supplied by the debtor under Part viii to any person or was otherwise made available to his creditors at or in connection with a meeting summoned under that Part; or

(c) that the debtor has failed to do all such things as may for the purposes of the voluntary arrangement have been reasonably required of him by the supervisor of the arrangement.<sup>152</sup>

In considering a petition for bankruptcy orders, a judge is entitled to take into account the fact that the debtor failed to co-operate to such an extent that the contribution agreed in meeting the supervisor's proper expenses, represented by insolvency practitioner's time and correspondence.<sup>153</sup>

The making of the bankruptcy order under section 264(1)(c) petition terminates the voluntary arrangement. It causes the assets in the arrangement, previously held by the supervisor on trust for the arrangement creditors, to become part of the bankrupt's estate, but subject to that charge for expenses.<sup>154</sup>

Under Malaysian law, on hearing of the creditor's petition, the court shall require proof of;

(a) the debt of the petitioning creditor;

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<sup>151</sup> 'False and misleading' and 'contained material omission' suggest that the debtor has committed deliberate and culpable acts. Hunt, p. 3058.

<sup>152</sup> *Insolvency Act 1986*, section 276(1).

<sup>153</sup> See *Vadher v Weisgard* [1997] BCC 219.

<sup>154</sup> In *Re Hussain (A Bankrupt)*, reported as *Davis v Martin-Sklan* [1995] BCLC 483 Ch D.



(b) the act of bankruptcy or, if more than one act of bankruptcy alleged in the petition, someone of the alleged acts of bankruptcy;

(c) if the debtor does not appear, the service of the petition, and if satisfied with the proof may make a receiving order.<sup>155</sup>

The court may dismiss the petition if it is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied that the debtor is able to pay his debts, or that for any other sufficient cause no order ought to be made.<sup>156</sup>

If the debtor denies his indebtedness to the petitioner or is indebted to such an amount that would justify the petitioner in presenting a petition against him, the court may, instead of dismissing the petition, stay all proceedings on the petition to enable the question relating to the debt to be tried.<sup>157</sup>

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<sup>155</sup> *Bankruptcy Act 1967*, sections 6(2), 4; A receiving order is an official order made by the bankruptcy court. Where the matters stated in the bankruptcy petition are correct and that a debtor has no defence, the court may make a receiving order against the debtor. *Bankruptcy Act 1967*, section 4; On the making of the receiving order, the Official Assignee becomes the receiver of the property of the debtor and no creditor has any remedy against the property or the debtor himself in respect of the debt. *Bankruptcy Act 1967*, section 8(1); Further, no creditor can commence any action or other legal proceeding except by leave of the court. *Bankruptcy Act 1967*, section 8(1); However, the receiving order does not affect the power of any secured creditor to realise or deal with his security. *Bankruptcy Act 1967*, section 8(2). The receiving order does not have the effect of making the debtor bankrupt; he is a bankrupt only if adjudged so by the subsequent adjudication order, if any. The receiving order does not deprive the debtor of the ownership of his property. He is only deprived of the possession and control of the property. The aim of the receiving order is to protect the debtor's property. Thus, the receiving order is not divestive but protective.

<sup>156</sup> *Bankruptcy Act 1967*, section 6(3).

<sup>157</sup> *Bankruptcy Act 1967*, section 6(5).

Where proceedings are stayed, the court may make a receiving order on the petition of some other creditor and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed.<sup>158</sup>

At the time of making a receiving order, the court shall adjudge the debtor bankrupt unless the debtor can show to the satisfaction of the court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors.<sup>159</sup>

For the petition of the debtor, the court may make an order that is called receiving order for the protection of the estate<sup>160</sup> and at the same time adjudge the debtor bankrupt.<sup>161</sup> Nevertheless, the court may dismiss the debtor's petition upon the failure of the debtor to appear on the hearing.<sup>162</sup>

### 1.3 Summary

Majority of Muslim jurists permit the petition for bankruptcy order to the court, but their minority disallow it. This issue does not arise in the English and Malaysian legal systems. This is because there are acts of Parliament that allow the bankruptcy petition and order. For example, the *Insolvency Act 1986* and *Insolvency Rules 1986* are governing the English Bankruptcy Law, whereas the *Bankruptcy Act 1967* and the *Bankruptcy Rules 1969* are controlling the Malaysian Bankruptcy Law.

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<sup>158</sup> *Bankruptcy Act 1967*, section 6(6).

<sup>159</sup> *Bankruptcy Act 1967*, section 24(1).

<sup>160</sup> *Bankruptcy Act 1967*, section 4.

<sup>161</sup> *Bankruptcy Act 1986*, section 24(2); *Bankruptcy Rules 1969*, rule 114(1).

<sup>162</sup> *Bankruptcy Rules 1969*, rule 119.

The petition of bankruptcy order, in order to valid and enforceable, must be presented to the court. This rule is recognised by all three legal systems.

The petition may be presented by a creditor as Islamic, English and Malaysian laws provide. Each legal system provides different conditions for the validity of the petition especially relating to a debt. For example, Islamic law requires that the debt must be current and exceed the debtor's assets. On the contrary, English and Malaysian legal systems rule that debt must equally exceed certain amount of bankruptcy level, i.e. seven hundred and fifty pounds for English law and ten thousand ringgits for Malaysian law. The debt must also be a liquidated payable either immediately or at some certain future time. Moreover, English law requires the debt is unsecured, unable to be paid or no prospect of being payable, in which case a statutory demand is not set aside. As compared to Malaysian law that obliges the bankruptcy petition be presented only to the court when the debtor commits to an act of bankruptcy.

The three legal systems also concur in that a debtor may petition for his bankruptcy by proving that his inability to pay the debt.

More to this, English law provides an extra party eligible to petition for a bankruptcy order, i.e. the supervisor of, or any person who is for the time being bound by, a voluntary arrangement, a requirement which is still in force.

The three legal systems concur on hearing the creditor's petition. The court may declare the debtor bankrupt or dismiss the petition in the Islamic, English and



Malaysian laws. But Malaysian law further provides the court with discretionary powers, to make a receiving order.

The court may make a bankruptcy order on hearing the petition presented by the debtor himself. The three legal systems confer on the court. And the English law provides that the court may make a bankruptcy order and issue a certificate for a summary administration or appoint an insolvency practitioner to prepare a report. Under Malaysian law, in addition to the power to declare a debtor bankrupt, the court may make a receiver order.

For the petition presented by the supervisor of, or a person bound by, the voluntary arrangement, the court may make a bankruptcy order according to English law. The court neither under the Islamic law nor Malaysian law has such jurisdiction, since there is no provision on the voluntary arrangement.

## CHAPTER TWO

### LEGAL CONSEQUENCES OF BANKRUPTCY ORDER

A bankrupt is generally deprived of his legal capacity and hence prohibited from performing the role of an ordinary, legally competent person. There are some legal consequences resulting from a bankruptcy order made by the court. This chapter concentrates on the outcome of the activities, dispositions and transactions entered into by a bankrupt before and after the order. It also deals with effects of bankruptcy order on guarantee, deferred payment debt, action and legal proceeding. Included in the discussion are effects of the order on travelling. This chapter also deals with other related consequences of bankruptcy order such as arrest, detention, disabilities and disqualification of the bankrupt. All discussions, if possible, are examined on the basis of comparative approach between Islamic, English and Malaysian laws.

#### 2.1 Pre Bankruptcy Order Transactions

Pre bankruptcy order transactions comprise of transactions entered into by a debtor before the court declares him bankrupt.

##### 2.1.1 Islamic Law

There are two types of transaction entered into by a debtor before the bankruptcy order, i.e. synallagmatic transactions (*al-mu'awwaḍāt*) that include sale (*al-bay'*), lease (*al-ijārah*); and gratuitous transactions (*al-tabarru'āt*) that include gift, donation and endowment (*al-waqf*). For the synallagmatic transactions, most of

Muslim jurists authorise the debtor to dispose of his property. They have, however, different views about gratuitous transactions. The majority of them, such as the Ḥanbalis<sup>1</sup> and Imām al-Shāfi‘ī,<sup>2</sup> permit the debtor to make gift, donation and the like as far as his legal capacity is not restricted. His position is similar to an ordinary person who is free from any restriction notwithstanding whether his debts exceed his property.

The Mālikis,<sup>3</sup> on the contrary, disallow the debtor from disposing of his property in gratuitous transactions when his debts are more than his property. Such transactions shall be those, which are not his usual practice<sup>4</sup> during his state of ability to settle the debts.<sup>5</sup> The restriction, according to one view of the Mālikis, is only to close relatives and friends.<sup>6</sup> But there is an exception to such a principle. The disposition, nevertheless, is allowed if the debtor has no knowledge that his debts are more than the property. The permission is also applicable to the payment of maintenance for the divorced wife for a period of one year; even if the husband

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<sup>1</sup> Qudā, vol. 4, p. 484; Zark, vol. 4, pp. 79-80; Mard, vol. 5, 282; Raja, p. 14; *Maws*, vol. 5, p. 305.

<sup>2</sup> See Bagh, vol. 4, p. 342.

<sup>3</sup> Rush, vol. 2, p. 214; Dard, Ş., vol. 3, pp. 345-347; Qarā, vol. 8, p. 160; Mūsā, p. 185; Juza, p. 315; ‘Ik, vol. 2, p. 355; According to ‘Ilyash, citing *al-Mudawwanah*, says that the deferred payment creditors are allowed to prevent the bankrupt from entering into the gratuitous transactions. ‘Ilya M., vol. 6, p. 5.

<sup>4</sup> This includes giving something to the asking needy, maintenance for two festivals (*‘aydān*), immolation (*udḥiyyah*), and moderate maintenance to the family and the parent. al-Dard K., vol. 3, p. 262; al-Dasūqī considers immolation is a recommendable and not a gratuitous; and the maintenance to the family and the parent is an obligatory. Dasū, vol. 3, p. 262; For practising polygamy, there are two views amongst the Mālikis about the practice of polygamy by the debtor. The preferred view disallows the practice. To the contrary, some of them, for the marriage more than one wife is part of necessary (*al-ḥājjiyyah*). See ‘Ilya M., vol. 6, p. 14; Dard K., vol. 3, p. 263.

<sup>5</sup> ‘Ilya M., vol. 6, p. 5.

<sup>6</sup> Nama, p. 420.



becomes bankrupt six months after the payment for maintenance. Such maintenance should be made without excessive favour.<sup>7</sup>

The Mālikīs' view concurs with the view of Ibn Qayyim al-Jawziyyah. Ibn Qayyim considers this view in accordance with the basic fundamentals of law (*usūl al-sharʿ*) and its rules (*al-qawāʿid*) because the debtor's property is subject to creditors' rights. This is to protect the creditors' interests by all means and to prevent dishonest practices<sup>8</sup> as the *Ḥadīth* states, "Who took the property of the other with the intention to fulfil it, Allah will fulfil it; and who took it in order to spoil then Allah will spoil it."<sup>9</sup> There is a clear indication that the charitable deed is one of taking possession of the other's property. So, how can this transaction be allowed when the Prophet (S.A.W) has disapproved it?<sup>10</sup>

The latter's view appears to be good, since it prevents a malpractice of the debtor who may transfer property to other parties with *mala fide* intention not to pay the debts to his creditors. Preventing the debtor from disposing of his property for gratuitous purposes is better, for repayment of debts to creditors is more important. As a result, if the debtor is still not adhered to this restriction, the court should be allowed to invalidate and set aside the transaction in order to protect the interest of the creditors.

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<sup>7</sup> 'Ilyā M., vol. 6, p. 5.

<sup>8</sup> Qayy, vol. 3, p. 6; See also Raja, p. 14.

<sup>9</sup> Bukh, vol. 3, p. 82.

<sup>10</sup> Qayy, vol. 4, p. 6.

The Mālikis, too, during this period of time, forbid the debtor from paying the debts either to some creditors or to the creditors whose debts are not yet due.<sup>11</sup> Not only that, but the bankrupt is also not allowed to admit his responsibility to his close relative even before the court.<sup>12</sup>

In addition to the above principles, according to one view of the Mālikis, the debtor is also not allowed to pay his debts to some creditors between the presentation of bankruptcy petition and the bankruptcy order.<sup>13</sup> This view suggests that, during such a period of time, any disposition of property by the debtor should not be permitted.

### 2.1.2 English and Malaysian Law

Similar to Islamic law, English law deals with some pre-bankruptcy order transactions such as transaction at undervalue. The trustee may apply to the court for relief where a debtor who is subsequently made bankrupt entered into a transaction at undervalue. It is a transaction entered into by a debtor at a relevant time if the transaction is (i) a gift, (ii) for no consideration, (iii) in consideration of marriage, or (iv) for a consideration that is significantly less than the value of consideration provided by the bankrupt.<sup>14</sup> The relevant time for a transaction at undervalue is any time within the period of five years before the presentation of bankruptcy petition.<sup>15</sup>

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<sup>11</sup> 'Ilyā M., vol. 6, p. 12; On the contrary al-Namarī maintains that repayment of debt to some of the creditors is permissible during this state. Nama, p. 420; See also Dard K., vol. 3, p. 262.

<sup>12</sup> Ja'al, vol. 2, p. 148; The closed relative includes the children, brothers and sisters, wife and closed friend. Dard K., vol. 3, p. 262.

<sup>13</sup> However, Aṣḡagh upholds that it is valid until the order is made. 'Ilyā M., vol. 6, p. 7.

<sup>14</sup> *Insolvency Act 1986*, section 339(3).

On hearing the application, the court may make such an order as it thinks fit for restoring the position to what it would have been if the transaction were not entered into.<sup>16</sup> The court may set aside the transaction at undervalue, without any further inquiry as to the debtor's circumstances, if the transaction was entered into at anytime in the period of two years ending with the day of the petition presentation. In *Claughton v Charalamabus*,<sup>17</sup> the court declares that the gift of the matrimonial home which had been registered in the sole name of the husband conveyed by deed of gift to the wife on the Valentine's Day 1992 was a transaction at undervalue and void as the husband was made bankrupt in September that year.

However, if it was entered into at any time more than two years before the day of the petition is presented, but no more than five years before that day, the setting aside of such a transaction can only be made with a condition that one of two additional criteria to the debtor, who has later becomes bankrupt is fulfilled. The debtor was either (a) insolvent at the time when the transaction was entered into or (b) became insolvent in consequence of transaction itself.<sup>18</sup> The test of insolvency is either (a) such a debtor is unable to pay his debts as they fall due or (b) the value of his assets is less than the amount of his liabilities.<sup>19</sup>

The trustee may also apply to the court for relief in a case where the bankrupt, at the relevant period, does anything or allows anything to be done which has a consequent effect of putting the recipient into a better position than he would

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<sup>15</sup> *Insolvency Act 1986*, section 341(1)(a).

<sup>16</sup> *Insolvency Act 1986*, section 339(2).

<sup>17</sup> [1998] BPIR 558 Ch D.

<sup>18</sup> *Insolvency Act 1986*, section 341(1)(a),(2).

<sup>19</sup> *Insolvency Act 1986*, section 341(3).



have been had that act not been done and the recipient is one of the bankrupt's creditors or a guarantor.<sup>20</sup> The onus of proof is on the trustee. The motivation for paying the debts driven by a desire to avoid legal proceedings and stop hassling is not preference.<sup>21</sup>

Relevant time for a preference is any time within the period of six months before the presentation of the bankruptcy petition unless the recipient is an associate in which case the period is two years.<sup>22</sup>

On hearing the application to set aside a preference, the court may make such an order as it thinks fit, for restoring the position to what it would have been if that individual had not been given that preference.<sup>23</sup> The order can only be made upon the satisfaction that at the time of giving the preference, the debtor must either be insolvent or have become insolvent in consequence of the preference.<sup>24</sup>

The court must not make the order against the recipient requiring him to return what he received from the bankrupt, unless the bankrupt has influent in deciding to make the transfer or payment to the recipient by desire to prefer him.<sup>25</sup> If the recipient was an associate of the bankrupt, then it is presumed, unless the contrary is proved, that the bankrupt was influenced by a desire to prefer the recipient.<sup>26</sup>

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<sup>20</sup> *Insolvency Act 1986*, section 340(1)(3).

<sup>21</sup> *Rooney v Das and Others* [1999] BPIR 404 Ch D.

<sup>22</sup> *Insolvency Act 1986*, section 341(1)(b)(c).

<sup>23</sup> *Insolvency Act 1986*, section 340(2).

<sup>24</sup> *Insolvency Act 1986*, section 341(2).

<sup>25</sup> *Insolvency Act 1986*, section 340(4).

<sup>26</sup> *Insolvency Act 1986*, section 340(5).

In addition to the order for restoring the position to what it would have been, the court is given additional specific powers to make orders of various kinds for a transaction at undervalue and preference. The court may (a) require any property transferred to be vested in the trustee; (b) require the proceeds of sale of any property or money which may currently exist in any person's hand to be vested in the trustee; (c) may release or discharge (in whole or in part) any security given; (d) require any person to pay, in respect of benefits received by him; (e) reimpose the obligation of any guarantor, released as a result of a payment to the creditor.<sup>27</sup>

However, the order shall not prejudice the position of a person who has acquired an interest in property for value in good faith.<sup>28</sup> If such person had notice of the relevant circumstances<sup>29</sup> and relevant proceedings,<sup>30</sup> or was an associate or connected person to the bankrupt, there is a presumption that he did not act in good faith.<sup>31</sup>

Moreover, the trustee may apply to the court for reopening any credit transaction involving a provision of credit to the bankrupt that was extortionate provided that it was entered into within three years of the presentation of the bankruptcy petition. A transaction is to be regarded as extortionate if the terms of it

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<sup>27</sup> *Insolvency Act 1986*, section 342(1).

<sup>28</sup> *Insolvency Act 1986*, section 342(2).

<sup>29</sup> "Relevant circumstances" means either (a) the fact that the bankrupt entered into the transaction at an undervalue or (b) the circumstances which amounted to the giving of the preference by that individual. *Insolvency Act 1986*, section 342(4).

<sup>30</sup> "Relevant proceedings" means either the fact that (a) the bankruptcy petition has been presented or (b) the adjudication of bankruptcy has been made. *Insolvency Act 1986*, section 342(5).

<sup>31</sup> *Insolvency Act 1986*, section 342(2A).

were such to require grossly extortionate payments to be made or it otherwise grossly contravened ordinary principle of dealing having regard to the risk accepted by the person giving the credit.<sup>32</sup>

On hearing the application, the court may make an order that may include the setting aside wholly or partly of any obligation created by the transaction; the varying of the terms or the transaction, or of the terms on which the security is held; a restitutional order whereby money or property must be transferred over to the trustee; and provision for taking of account.<sup>33</sup>

Not only the mentioned transactions, a transaction to defraud creditors may be set aside through application to the bankruptcy court for leave made by the Official Receiver, the supervisor of, or a creditor under or bound by the voluntary arrangement, or the trustee or a victim of the transaction.<sup>34</sup> The justification for the need to obtain leave before initiating proceedings is the need to take general account of both the interests of the general body of creditors and the view of responsible insolvency practitioner, who is normally the proper plaintiff.<sup>35</sup>

The transaction to defraud creditors arises when the bankrupt enters into a transaction at an undervalue<sup>36</sup> for the purpose of putting assets beyond the reach of creditors or prejudicing their interest in relation to their claims.<sup>37</sup> In other words, the

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<sup>32</sup> *Insolvency Act 1986*, section 343(1)(3).

<sup>33</sup> *Insolvency Act 1986*, section 343(2)(4).

<sup>34</sup> *Insolvency Act 1986*, section 424(1)(a)(b)(c).

<sup>35</sup> See *National Bank of Kuwait v Menzies* [1994] 2 BCLC 256.

<sup>36</sup> The term 'transaction' and 'at an undervalue' bear the same meaning as they are under section 339 of the *Insolvency Act 1986*.

<sup>37</sup> *Insolvency Act 1986*, section 423(1)(a)(b)(c); For detail discussion, see Mill, pp. 362-379.



essential matters to be proved are (i) the precise identification “the transaction” sought to be impeached, and that it had the effect of diminishing the assets, or of prejudicing another person, as distinct from recording some other or earlier transaction and (ii) the presence of one of the specific “purposes” prescribed as putting assets beyond the reach of a claimant or prejudicing the claimant.<sup>38</sup>

In *Agricultural Mortgage Corporation Plc v Woodward and Another*,<sup>39</sup> a tenancy agreement of a mortgaged property was created by an insolvent farmer in favour of his wife. This is to ensure that the creditor did not get vacant possession of the property. The issue before the Court of Appeal was whether the tenancy agreement was caught by section 423 of the *Insolvency Act 1986*. It was held that it could be set aside. Sir Christopher Slade (as then he was) said:

“The tenancy if effective, gave the wife the threefold benefits of safeguarding the family home, enabling her to acquire and carry on the family business, a surrender value. Furthermore, if the tenancy was effective, the creditor would have to negotiate with and pay a high price to her before it could obtain vacant possession of the farm and sell it for the purpose of enforcing the security and repayment of the debt owed to it by the husband.”<sup>40</sup>

In *Moon v Franklin*,<sup>41</sup> the court held that the transfers of all assets, including the matrimonial house, into the wife's name, the wife's acquisition of a flat with money (given to her by the debtor which was then put in their joint names) were transactions at an undervalue which could be construed as gifts. These gifts were in

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<sup>38</sup> See *National Bank of Kuwait v Menzies* [1994] 2 BCLC 256.

<sup>39</sup> (1994) TLR 310 CA

<sup>40</sup> *Supra*.

fact in recognition for all the help she had given him in building up the debtor's profession. Furthermore, based on the evidence, the intention was to put assets out of the reach of the creditors. So, the relief under section 423 of the *Insolvency Act 1987* was available to the creditors.

The test under section 423 of 1987 Act is not only an objective one, but also the purpose of the bankrupt has to be investigated. The objective of the transaction has to put the assets beyond the reach of the creditors.<sup>42</sup> In *Barclays Bank plc v Eustice*,<sup>43</sup> the Court of Appeal held that before the order could be made under section 423 of the *Insolvency Act 1986*, the court had to be satisfied that a transaction had been entered into at an undervalue and for a prohibited purpose. There was a strong prima facie case that the purpose of the transaction was to frustrate the bankrupt's interest.

In addition, any disposition of property is void when it takes place between the presentation of the petition and the bankruptcy order unless with consent of the court or is subsequently ratified by the court.<sup>44</sup>

In *Re Flint*,<sup>45</sup> the court held that a transfer of property order made by a divorce court under section 24 of the *Matrimonial Causes Act 1973*, in respect of

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<sup>41</sup> [1996] BPIR 196 Ch D. cited in [1996] 3 CL 102 para 323.

<sup>42</sup> *Royscot Spa Leasing Ltd. v Lovett* [1995] BCC 502 CA cited in [1996] 1 CL102 para 322.

<sup>43</sup> [1995] 1 WLR 1238 CA.

<sup>44</sup> *Insolvency Act 1986*, section 284(1)(2)(3); The distinction between "the consent of the court" and "ratification of the court" (which implies that the initial [disposition] payment is considered to have been void, and only capable of being validated by such ratification) presumably may also refer to settlements made in the face of the court, as against those made outside court and only ratified by it. Hunt, p. 3082/6 .

<sup>45</sup> [1993] Ch 319.

property held by a person against whom a petition had been presented was a disposition of property by that person and was void, unless subsequently ratified by the court dealing with the bankruptcy. The disposition is void notwithstanding that the property is not, or would not be, comprised in the bankrupt's estate.<sup>46</sup>

The disposition is, nevertheless, valid where a person has received any property or payment from the debtor, and has done so in good faith, for value and without notice that the petition has been presented.<sup>47</sup>

Similar to Islamic and English laws, the Malaysian law deals with some pre-bankruptcy order transactions that the bankruptcy affects. For example, any settlement<sup>48</sup> of property can be void against the Official Assignee if the settlor becomes bankrupt within two years after the date of the settlement except in the following cases:

- (a) a settlement made before and in consideration of marriage, or
- (b) a settlement made in favour of a purchaser<sup>49</sup> or incumbrancer in good faith and for valuable consideration,<sup>50</sup> or
- (c) settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife.<sup>51</sup>

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<sup>46</sup> *Insolvency Act 1986*, section 284(6); Property not comprised in the bankrupt's estate seems to refer to or to include after acquired property which the trustee may claim and exempted property which the trustee is entitled to recover for the purpose of replacing it with items of less value, but which until recovered by the trustee belong in law to the bankrupt himself. Hunt, p. 3082/7.

<sup>47</sup> *Insolvency Act 1986*, section 284(4).

<sup>48</sup> "Settlement" includes any conveyance or transfer of property, bill, bond, note, security for money or covenant for payment of money and any gift of money. *Bankruptcy Act 1967*, section 52(3).

<sup>49</sup> "Purchaser" is to be construed in the ordinary commercial sense and means a person who has given value. *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ 264 HC.



The settlement is also void against the Official Assignee if the settlor becomes bankrupt at any subsequent time within five years after the date of settlement. However, it is valid if the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement and the interest of property has passed.<sup>52</sup>

Moreover, the fraudulent preferences are also void as against the Official Assignee. Thus, every conveyance or transfer of property or charge made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor<sup>53</sup> or any person in trust for any creditor shall be deemed to have given such a creditor a preference over other if it was made within six months on a presentation of bankruptcy petition.<sup>54</sup>

There are five elements to be proved in order to set aside the fraudulent preferences:

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<sup>50</sup> The onus of proof of the lack of good faith and the lack of valuable consideration is on the Official Assignee. *Supra*.

<sup>51</sup> *Bankruptcy Act 1967*, section 54(1)(a)(b)(c)(d)(i)(ii); "Property which has accrued to the wife" means that the property must be in the name of the wife. It is immaterial whether she acquired it before or after the marriage. The property is accrued to the husband solely by virtue of his position as husband when the wife dies intestate. *Official Assignee of the Property of Senator Ibrahim bin Haji Yaakob, Bankrupt v Siti Ramlah bte Bajau* [1991] 2 MLJ 479 HC.

<sup>52</sup> *Bankruptcy Act 1967*, section 52(1).

<sup>53</sup> "Creditor" includes a surety or guarantor for the debt due to that creditor. *Bankruptcy Act 1967*, section 53(3).

<sup>54</sup> *Bankruptcy Act 1967*, section 53(1).

(a) that transaction satisfies the description of one of the types of the transactions;

(b) that it took place within six months prior to a presentation of a bankruptcy petition;

(c) that it took place at the time when the debtor was insolvent;

(d) that the person in whose favour the transaction was affected stood in relation of creditor to the debtor;

(e) the effect of the transaction was to confer a preference on the person.<sup>55</sup>

The rule does not affect the rights of any person making title in good faith and for value consideration through or under a creditor of the bankrupt.<sup>56</sup>

Likewise, the pre-transactions such as sale, lease, supply of property or service may be reviewed by the court if they were entered into within twelve months before the debtor becomes bankrupt. The review is made upon the application of the Official Assignee to inquire whether the bankrupt gave or received a fair market value in consideration for the property or services at the time of that transaction.<sup>57</sup> The application must indicate what were the fair market value and the consideration given or received by the bankrupt.<sup>58</sup>

On hearing the application, the court may give a judgement in favour of the Official Assignee after finding that the consideration given or received by the

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<sup>55</sup> See *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd* [1997] 1 MLJ 499 CA.

<sup>56</sup> *Bankruptcy Act 1967*, section 53(2).

<sup>57</sup> *Bankruptcy Act 1967*, section 53C(1).

<sup>58</sup> *Bankruptcy Act 1967*, section 53C(3).

bankrupt in the transaction under review was conspicuously in excess of or conspicuously lower than the fair market value of the property or services at the time of the transaction. Such a judgement shall be for the difference between the value of the consideration given or received by the bankrupt and the fair market value of the property or services at the time of the transaction.<sup>59</sup>

In *Re Yii Heng Kiew & Anor. Ex parte Siong Ling (Pte) Ltd*,<sup>60</sup> the court declared that the consideration for the conveyance of land by the bankrupt was lower than the fair market value at the time of the said conveyance. Thus, the judgement was given to the applicant for the sum being difference between the value of the consideration received by the bankrupt and the fair market value of the subject land at the time of the said conveyance.

On the contrary, acts such as a payment, delivery, conveyance, assignment, contract, dealing or transaction made, executed or entered into for valuable consideration<sup>61</sup> shall be valid if (i) they were taking place before the date of the receiving order and (ii) there was no notice<sup>62</sup> of any available act of bankruptcy committed by the bankrupt.<sup>63</sup>

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<sup>59</sup> *Bankruptcy Act 1967*, section 53C(2).

<sup>60</sup> [1987] 2 MLJ 478 HC.

<sup>61</sup> "Valuable consideration" means a consideration of fair and reasonable money value in relation to, a) the value of the property conveyed, assigned or transferred; or, b) the known or reasonably anticipated benefits of the contract, dealing or transaction. *Bankruptcy Act 1967*, section 54(2).

<sup>62</sup> "Notice" includes knowledge of an act of bankruptcy or of any bankruptcy proceedings or of facts sufficient to indicate to the person dealing with the debtor the commission of an act of bankruptcy. *Bankruptcy Act 1967*, section 54(3).



## 2.2 Effects on Incomplete Transactions

Incomplete transactions refer to any transaction entered that may not be completed due to inability to fulfil certain legal requirements.

### 2.2.1 Islamic Law

The bankruptcy order also affects certain incomplete transactions under Islamic law. For example, the gift becomes void (*batil*) in a case where the donee (*al-mawhūb lah*) does not take possession of it until the donor becomes bankrupt.<sup>64</sup> This is based on the statement made by Abū Bakr, first caliph (632-634), to ‘Ā’ishah, “[I]f you had cut them and taken possession of them, they would have been yours.”<sup>65</sup> This is due to the fact that the disposition is not complete except by taking possession.<sup>66</sup> This rule is emphasised by one legal rule stating, “Gratuitous transaction becomes absolute only when delivery thereof is taken.”<sup>67</sup>

Similar rule is applied to the cases of endowment and loan (*al-qarḍ*). Endowment is only complete by the beneficiary’s taking possession of endowment property. If there is no possession, upon the bankruptcy of the executor (*al-wāqif*), the endowment becomes null and void.<sup>68</sup> The loan alike, becomes incomplete when

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<sup>63</sup> *Bankruptcy Act 1967*, section 54(1).

<sup>64</sup> Qayr, p. 411; Ja‘al, vol. 2, p. 189; Bagh, p. 105.

<sup>65</sup> Anas M., p. 433(no.1434); It is also reported that ‘Umar ibn al-Khaṭṭāb says, “Whosoever gives a gift and does not hand it over to the one to whom it was given, the gift is invalid and, if he dies, it belong to the heirs in general.” pp. 433-434(no. 1435); Bagha, vol. 4, p. 431(no. 2197).

<sup>66</sup> ‘Ilyā F., vol. 1, p. 218.

<sup>67</sup> *Maja*, article 57; See also Zarq, p. 299.

<sup>68</sup> Ja‘al, vol. 2, p. 188; ‘Adaw, vol. 2, p. 212; Shād, vol. 2, p. 212.

the lender (*al-muqridh*) becomes bankrupt before taking possession of the subject matter of loan (*al-muqtariḍ*).<sup>69</sup>

Similarly, the mortgage becomes invalid if the debtor becomes bankrupt before taking possession of the mortgaged property. The property, supposed to be a subject matter of the mortgage, falls into the category of bankrupt's asset that should be distributed amongst the creditors.<sup>70</sup> This is because taking possession is one of the important aspects for the validity of mortgage as the *Qur'ān* states, "And if you are on a journey and cannot find a scribe, then let there be a pledge with possession."<sup>71</sup> Al-Qurṭūbī in interpreting the verse, even says that there is no legal effect to the contract of mortgage if there is an oral agreement between the parties, but there is no handing over the mortgaged property.<sup>72</sup> To avoid this situation, the creditor shall take possession of the mortgaged property as soon as possible.

If the mortgagor becomes bankrupt after the mortgagee has taken possession of the mortgaged property, the mortgagee has the right over the mortgaged property in preference over other creditors.<sup>73</sup>

### 2.2.2 English and Malaysian Laws

There are also incomplete transactions affected by a bankruptcy order under English law. For example, a general assignment of the book debts due to the bankrupt is void against the trustee as regards any book debts which had not been

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<sup>69</sup> Dasū, vol. 3, p. 284.

<sup>70</sup> Shāf U., vol. 3, p. 238; Ja'al, vol. 2, pp. 146-147; Bagh, p. 92.

<sup>71</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:283.

<sup>72</sup> Qurṭ, vol. 3, p. 410, issue no. 7.

<sup>73</sup> *Fatā*, vol. 5, p. 433; Juza, p. 329.

paid at the commencement of the bankruptcy unless the assignment was registered under the *Bills of Sale Act 1878*.<sup>74</sup> This rule excludes the assignment of specific debts, present or future, and the assignment of debts included in a transfer of a business made in good faith and for value.<sup>75</sup>

In addition to the above, the execution by a creditor against the goods or land of the bankrupt or an attached debt due to the bankrupt from another person, cannot retain the benefit of his actions as against the official receiver or trustee, unless the execution or attachment was completed or the sums due were paid before the bankruptcy order was made.<sup>76</sup>

The same as English law, Malaysian law provides that a creditor shall not be entitled to retain the benefit of execution or attachment against the Official Assignee unless he has completed the execution<sup>77</sup> or attachment<sup>78</sup> before the date of the receiving order and before the notice of presentation of any bankruptcy petition, or of the commission of any act of bankruptcy by the debtor.<sup>79</sup>

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<sup>74</sup> *Insolvency Act 1986*, section 344(2).

<sup>75</sup> *Insolvency Act 1986*, section 344(2)(3)(b).

<sup>76</sup> *Insolvency Act 1986*, section 346(1).

<sup>77</sup> An execution against goods or land is completed by seizure and sale, or in the case of an equitable interest in land by the appointment of a receiver. *Bankruptcy Act 1967*, section 50(2)(a).

<sup>78</sup> An attachment of a debt is completed by receipt of the debt and an attachment of property is completed by the sale of such property and the satisfaction out of the proceeds of such sale of the judgement in execution of which the attachment was made. *Bankruptcy Act 1967*, section 50(2)(a)(b).

<sup>79</sup> *Bankruptcy Act 1967*, section 50(1).



Moreover, an assignment<sup>80</sup> of the existing or future book debts or any class or part thereof shall be void against the Official Assignee in respect of any book debts that had not been paid at the date of an available act of bankruptcy unless it has been registered or made *bona fide* and for valuable consideration.<sup>81</sup>

In addition to the above principles, any covenant or contract in consideration of marriage for future settlement on or for the settlor's wife or children of any money or property becomes void against the Official Assignee when the property or money has not been actually transferred or paid pursuant to the contract or covenant.<sup>82</sup>

### 2.3 Effects on Post Bankruptcy Order Transactions

Post bankruptcy transactions include any transaction entered into by a debtor after the court made him bankrupt.

#### 2.3.1 Islamic Law

The bankruptcy order restricts the bankrupt from entering into any transaction, particularly a gratuitous one, after the bankruptcy order. It is a consensus of opinion amongst Muslim jurists that gratuitous transactions, i.e. gift, endowment and bequest (*al-waṣiyyah*), are not valid if they are made after the bankruptcy order.<sup>83</sup> Such transactions are detrimental to the creditors.

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<sup>80</sup> "Assignment" includes assignment by way of security or other charge on book debts. *Bankruptcy Act 1967*, section 53A(4).

<sup>81</sup> *Bankruptcy Act 1967*, section 53A(1)(2)(3).

<sup>82</sup> *Bankruptcy Act 1967*, section 52(2).

<sup>83</sup> Jayy, vol. 1, p. 223; al-Namarī allows the gift and donation with the permission of the creditors. The bankrupt, however, is not allowed to waive half of his or her dowry. Nama, p.

According to al-Marghīnānī, a bequest becomes null and void, for payments of debts have a priority over a bequest. This is due to the fact that discharge of a debt is an absolute duty (*al-farḍ*); whereas a bequest is gratuitous and voluntary. Therefore, the most indispensable must be considered first unless the creditors permit it or relinquish their claims. Hence, a bequest becomes valid only upon the removal of the obstacle.<sup>84</sup>

The bankrupt cannot become involved in the synallagmatic transactions as the majority of Muslim jurists (other than Abū Yūsuf and Muḥammad al-Shaybānī) agree.<sup>85</sup> This is so, for the estate of the bankrupt, i.e. mortgage property (*‘ayn or dayn*) or usufruct (*manfa‘ah*), is subject to the right of creditors in accordance with the court adjudication of bankruptcy.<sup>86</sup> The creditors’ right is known as ‘right relevant to the fulfilment of right’ (*ḥaqq al-ta’aluq li istīfā’ al-ḥaqq*)<sup>87</sup> that excludes the rights of Allah such as almsgiving (*zakāh*), vow (*nadhrah*) and expiation (*kaffārah*).<sup>88</sup> The bankrupt is thus prevented from disposing of his property that affects the creditors<sup>89</sup> even though he sells all or some of his property to his creditors in order to settle all his debts.<sup>90</sup>

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421; According to Abū Yūsuf and Muḥammad al-Shaybānī the transactions such as gift and donation are not valid. Whereas, Abū Ḥanīfah says they are valid. See Ḥayḍ, vol. 2, p. 720.

<sup>84</sup> Marg, vol. 4, p. 234.

<sup>85</sup> Nawa Ṭ., p. 50; Shar M., vol. 3, p. 99; Qaly, vol. 2, p. 286; Qudā, vol. 4, p. 453; Kūha, vol. 2, p. 167; Zark, vol. 4, p. 65-66; Maqd K., vol. 2, p. 171.

<sup>86</sup> Nawa Ṭ., p. 50; Shar M., vol. 3, p. 99; Qaly, vol. 2, p. 286; Qudā, vol. 4, p. 453; Kūha, vol. 2, p. 167; Zark, vol. 4, pp. 66-66; Maqd K., vol. 2, p. 171.

<sup>87</sup> Raja, pp. 193, 195.

<sup>88</sup> Shar M., vol. 3, p. 100; Qaly, vol. 2, p. 286; al-Bahūtī writes, “The payment of expiation (*kaffarah*) by the bankrupt from his property causes harm to the creditors. So it is encouraged to settle it through fasting (*ṣawm*) as an alternative.”, Bahū, vol. 3, p. 423; See also Ghaz W., p. 139.

<sup>89</sup> Ḥaṭṭ, vol. 5, p. 34.

<sup>90</sup> Bahū, vol. 3, p. 423.

The consequences of this restriction are varied amongst Muslim jurists. According to the Ḥanbalis,<sup>91</sup> the majority of Shāfi'is<sup>92</sup> and Mālikis,<sup>93</sup> the disposition becomes void and ineffective. According to one view of the Shāfi'is, such disposition is valid on a condition that the transaction provides a benefit<sup>94</sup> such as sale that increases the bankrupt's assets and release from liability (*al-ibrā'*) that reduces the bankrupt's debts.<sup>95</sup> According to one view of the Mālikis, the validity of such disposition made by the bankrupt is subject to either the permission of the judge<sup>96</sup> or the permission of the creditors if the judge has decided to claim possession of property from the bankrupt.<sup>97</sup>

According to the Ḥanafis (except Abū Yūsuf and Muḥammad al-Shaybānī), the disposition is considered not enforceable (*'adam nāfidh*) and not become void.<sup>98</sup> However, Abū Yūsuf and Muḥammad al-Shaybānī suggest that the contract of sale would still be valid if there is an adequate consideration. This is because the creditors' rights are not affected.<sup>99</sup> The bankrupt is thus allowed to sell on condition

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<sup>91</sup> Bahū, vol. 3, p. 423, "His disposition is invalid similar to a case of disposition of mortgage's property and the bankrupt is like a spendthrift whose disposition is invalid due to the interdiction." Maqd S., vol. 4, pp. 463.

<sup>92</sup> Nawa R., vol. 4, p. 130; Sayū A., p. 286.

<sup>93</sup> 'Ilyā M., vol. 6, p. 21.

<sup>94</sup> Nawa Ṭ., p. 50; Nawa R., vol. 4, p. 130; Sayū A., p. 286; This effect is similar to the case of the interdiction to the spendthrift. Māwa, vol. 7, p. 452.

<sup>95</sup> Shar M., vol. 3, p. 100, He also opined that the sale transaction with the creditors is invalid unless with the judge's permission.; This is similar to the case of the contract into by the death sickness person that is subject to the permission of the legal heirs. Māwa, vol. 7, p. 452.

<sup>96</sup> 'Ilyā, vol. 6, p. 21.

<sup>97</sup> Zarq Z., vol. 5, p. 266; See also Dasū, vol. 3, p. 265.

<sup>98</sup> Ghaz, vol. 2, p. 248.

<sup>99</sup> See Marg, vol. 2, p. 284; *Fatā*, vol. 5, p. 62; Mawd, vol. 1, p. 369; According to Abū Yūsuf and Muḥammad, there is no connection between the bankrupt and the creditors (*ḥāl baynahu wa bayn al-ghuramā'*) upon the declaration of bankruptcy by the judge unless the creditors have proven that the bankrupt has received some property. Qadū, p. 44.



that the sale price is adequate, even though the sale is only to his creditors.<sup>100</sup> This means that a bankrupt is only prevented from entering a contract of sale when its price is less than its 'exemplary price' (*thaman mithlī*), or it involves misrepresentation, either trivial (*ghabn al-yasīr*) or flagrant (*ghabn al-fāhish*).<sup>101</sup>

The bankrupt is also not allowed to pay debts to some creditors<sup>102</sup> since he no longer has any relationship with the creditors (*ḥall baynahu wa bayn al-ghuramā*) unless there are new assets.<sup>103</sup> This is because the court would settle all his debts, if any.

The bankruptcy order also restricts an admission that the bankrupt makes on his property. His admission is not admissible during the bankruptcy proceedings.<sup>104</sup> According to the Ḥanafis, it is only enforceable after all the debts have been settled.<sup>105</sup> The same rule is provided by the *Majallah*, it states, "Any admission made to any other person in respect to a debt relating to any property is invalid. After the

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<sup>100</sup> Afen, vol. 2, p. 442.

<sup>101</sup> Flagrant misrepresentation is defined by the *Majallah* as misrepresentation of value of goods which is practised with regard to no less than one twentieth in the case of merchandise (*'urūd*), one tenth in the case of animals; and one fifth in the case of real property (*'aqār*). *Maja*, article 165; 'Aynī, vol. 2, p. 134; *Fatā*, vol. 5, p. 62; Issue: 'whether the judge has to invalidate a sale transaction entered into by the bankrupt based on favourable consideration (*al-muḥābāh*). What will happen to the price if the bankrupt has used them? The judge is duty bound not to permit this type of transaction to take place and he has to invalidate it. If the price has not been paid, then the buyer is not liable to pay. If it has been paid and the subject matter of sale still exist then the buyer can take it.', *Ṭarā*, p. 205.

<sup>102</sup> Baṣr, vol. 2, p. 254; Cf. It is stated that the payment of debts to some creditors is not valid even though with some of the assets. 'Ilyā M., vol. 6, p. 10; *Insolvency Act 1986*, section 285(3)(a).

<sup>103</sup> Qadū, *Matn*, p. 44.

<sup>104</sup> Mard, p. 282; Bahū, vol. 3, p. 423; See also 'Ilyā M., vol. 6, p. 418; Anṣā T., p. 80.

<sup>105</sup> *Fatā*, vol. 5, p. 62; Afen, vol. 2, p. 443; Mawd, vol. 1, 369; *Ṭūrī*, vol. 8, p. 95.

interdiction has been removed, however, the admission is valid, and he is liable to make payment therefore.”<sup>106</sup>

There are some exceptions to this. The bankrupt can dispose of property that the court granted for the purpose of providing maintenance.<sup>107</sup> The bankrupt also has a greater freedom in the transactions entered into before the bankruptcy order.<sup>108</sup> As a result, he is allowed to return goods bought before the bankruptcy order for reasons that amount to exercising option of defect (*khiyār al-‘ayb*) or exercising option of stipulation (*khiyār al-sharṭ*), misrepresentation or fraud (*tadlīs*) and the like. This is because the right is exercised to complete the transactions entered into before the bankruptcy order.<sup>109</sup> Furthermore, if this were not allowed, the main objective of contract of sale, i.e. mutual consent (*tarāḍ*) as the *Qur’ān* emphasises, “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you by mutual consent”<sup>110</sup> would not be satisfied.

Could the seller exercise his right of option (*khiyār*) for the contract entered into during the bankruptcy proceeding? There are three views amongst the Shāfi‘is<sup>111</sup> and Ḥanbalis<sup>112</sup> on the right to exercise the option on the transaction concluded during the bankruptcy proceeding.

<sup>106</sup> *Maja*, article 1002.

<sup>107</sup> Shar M., vol. 3, p. 100; Qalyūbī, citing al-Azra‘ī, says that the bankrupt is allowed to dispose of the property for maintenance and clothes. Qaly, vol. 2, p. 287.

<sup>108</sup> Shar M., vol. 3, p. 100; Qaly, vol. 2, p. 286; al-Ramlī says that the bankruptcy order does not affect the contract entered into before the order. Raml N., vol. 4, p. 318.

<sup>109</sup> Bahū, vol. 3, pp. 423-424.

<sup>110</sup> *Al-Qur’ān, sūrat al-Nisā’*, 4:29.

<sup>111</sup> Ghaz S., vol. 4, p. 10; See also Raml N., vol. 4, p. 319; Nawa M., vol. 14, p. 54.

<sup>112</sup> Qudā, vol. 4, pp. 455-456; Maqd S., vol. 4, pp. 467-468; Maqd K., vol. 2, p. 171.

The first view is that the seller could repudiate the contract because his contract is still within the time of repudiation. Thus, he does not lose his right of repudiation. This is similar to the case of a woman married with a poor man who is not able to pay the maintenance to repudiate the contract of marriage.

The second view is that the seller does not have any right of repudiation because he concluded the contract after knowing that the bankrupt has lost his responsibility. This rule is similar to the principle in a case where the buyer bought something with the knowledge of its defect. Thus, he does not have any option.

The third view is that the seller has the right of repudiation if he does not know about the bankruptcy order. This rule is similar to the right of option that establishes the right of repudiation against defective goods. It seems that this third view is the most appropriate view for a purchaser in good faith, for value and without notice of the bankruptcy. He should be allowed to exercise the right of option, for his ignorance of the fact is excusable.

The bankrupt can also enter into a contract that only involves liability (*al-dhimmah*). This is because a prevention of disposition is only applied to property matters. Therefore, he is allowed to enter into a contract for delivery with prepayment (*bay' al-salam*)<sup>113</sup> and make a purchase by stipulating a delay in payment.<sup>114</sup> These future obligations and responsibilities are his own liability, and do

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<sup>113</sup> Contract for delivery with prepayment is a sale of goods in which the price is paid immediately for goods which are to be delivered later, but which are specified in the contract. Ḥass, p. 66.

<sup>114</sup> Sayū A., p. 523.



not affect his property.<sup>115</sup> This 'liability' is payable after the termination of a bankruptcy order.<sup>116</sup>

In addition to the above exceptions, the majority of Muslim jurists permit the bankrupt such personal rights as marriage (*al-zawāj*). This is because they consider marriage as not part of property's dispositions. One view of the Mālikis allows the marriage but restricts it to the disposition of property that a bankrupt receives after the bankruptcy order.<sup>117</sup> Another view of the Mālikis, however, disallows the marriage to be solemnised after the bankruptcy order, for marriage during such period is a disposition of property.<sup>118</sup>

The view that restricts the bankrupt to marry seems to be a preferable one. This is due to the fact that marriage is encouraged only to those who have ability to support their wife as the Prophet (S.A.W) is reported to have said, "O young men, those amongst you can support a wife should marry, for it restrains eyes from casting [evil glances] and preserves one from immorality."<sup>119</sup> Relatively, a man who has a financial constraint is forbidden to marry. This also would cause hardship to the spouse because of inability of the bankrupt to dispose of all his property as they are subject to the rights of the creditors.

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<sup>115</sup> Nawa Ṭ., p. 50; Shar M., vol. 3, p. 101; Baṣī, vol. 2, p. 46; Fash, p. 147; Qudā, vol. 4, p. 468; Mawā, vol. 5, p. 39; 'Ilyā M., vol. 6, pp. 22-23.

<sup>116</sup> Mard, vol. 5, p. 285; Bahū, vol. 3, p. 424.

<sup>117</sup> Anas K., vol. 4, p. 122

<sup>118</sup> Dasū, vol. 3, p. 265; 'Ilyā M., vol. 6, p. 21.

<sup>119</sup> Musl, vol. 2, p. 1020(nos.1,3); See also Bukh, vol. 2, pp. 228-229 and vol. 6, p. 117; Dāwu, vol. 3, p. 219(no. 2036); Dāri, vol. 2, p. 132; Bagha, vol. 5, p. 4(no. 2229).

Furthermore, due to his inability, the bankrupt is also unable to provide dowry (*al-mahr*) that is one of the requirements for the validity of marriage as the *Qur'ān* states, (a) “And give to the women their dowry.”<sup>120</sup> and (b) “So with those of whom you have enjoyed sexual relation, give them their dowry as prescribed.”<sup>121</sup> Hence, it is better not to allow the bankrupt to get married in order to avoid the marriage be invalidated.

Moreover, marriage is only recommendable when a person has a financial ability, otherwise it is discouraged; whereas paying debts are obligatory as the Prophet (S.A.W) says, “The soul of the believer is suspended unless he settles his debt.”<sup>122</sup> Thus, the priority should be given to discharge of the obligatory duty, i.e. repayment of debts.

The same rule applies in case of a non-married woman. She is free to exercise her personal freedom. She, however, could not be forced to get married in order to get a dowry to increase her assets in case of her bankruptcy,<sup>123</sup> for the dowry is considered not enough to settle all the debts. There is a legal rule which states, “The ability to gain a property through getting marriage is not a significant wealth”.<sup>124</sup> Moreover, according to one view of the Mālikis, if she gets married and takes her dowry, the creditors have no right to her dowry.<sup>125</sup> This view is in line with the established legal principle that dowry is an absolute property of the wife.

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<sup>120</sup> *Al-Qur'ān, sūrat al-Nisā'*, 4:4.

<sup>121</sup> *Al-Qur'ān, sūrat al-Nisā'*, 4:24.

<sup>122</sup> Tirm, vol. 3, pp. 389-390(nos. 1078-1079); See also Dāri, vol. 2, p. 262

<sup>123</sup> Raja, p. 296; Sara, vol. 24, p. 164.

<sup>124</sup> Raja, p. 296, rule 131.

The permission to marry should extend to other rights such as right of divorce through compensation to the husband (*al-khul'*), divorce (*al-ṭalāq*) or return to the marriage (*al-ruj'ah*).<sup>126</sup>

Divorce through compensation to the husband is permitted due to the fact that the bankrupt receives and gets something from the wife or reduces the amount of owed dowry.<sup>127</sup> Furthermore, the expenses of the husband could be reduced due to the fact that he is no longer obliged to provide shelter to the wife as the *Ḥadīth* mentions, "The Prophet (S.A.W) has allowed the wife [who has been divorced under divorce through compensation to the husband] to stay in her parent's house."<sup>128</sup> The rule is not applicable to the wife because the divorce through compensation to the husband caused her to dispose of the property. So, it is detrimental to the creditors.<sup>129</sup>

Divorce is permitted because it could lessen the burden of the bankrupt.<sup>130</sup> The opinion appears to be acceptable if the pronouncement of divorce is irrevocable. This is because the bankrupt is not obliged to provide maintenance and shelter for the divorced wife as mentioned in the *Ḥadīth* narrated by Fāṭimah bint Qays who was divorced with three divorces, "There is neither maintenance allowance nor lodging for you."<sup>131</sup>

<sup>125</sup> Qarā, vol. 8, p. 163.

<sup>126</sup> Nawa Ṭ., p. 50; Fash, p. 147; Mūsā, p. 185; Zaraq Z., vol. 6, pp. 266-267.

<sup>127</sup> Dard Ṣ., vol. 3, p. 352; Ṣāwī, vol. 2, p. 127.

<sup>128</sup> See Anas M., pp. 384-385(no. 1190); Shaf M., pp. 262-263.

<sup>129</sup> Dard Ṣ., vol. 3, p. 352; Ṣāwī, vol. 2, p. 127; It is stated in Banā, vol. 5, pp. 266-267, that the bankrupt woman also has the right of divorce through compensation to the husband similar to the woman's right to get married.

<sup>130</sup> Dasū, vol. 3, p. 265.

<sup>131</sup> Musl, vol. 2, pp. 1114 -1121(nos. 42, 44, 46, 51, 54).



One view of the Mālikis maintains that divorce could be exercised notwithstanding the deferred payment of dowry becomes due. As a result, the wife shares the unpaid dowry with other creditors.<sup>132</sup>

The divorce, even though it is permissible, should be exercised with due care and genuine reason because Islām discourages it as the Prophet (S.A.W) says, “Of all the lawful acts, the most detestable to Allah is divorce.”<sup>133</sup>

If the bankrupt is authorised to exercise his right of divorce, he should also be permitted to exercise his right of return to the marriage so long as the wife is still in her waiting period ( *'iddah*) and the divorce is a revocable one. Saving the marriage is better than separating and reunion of the husband and wife could also protect the affairs of the children.

### 2.3.2 English and Malaysian Laws

Similar to Islamic law, English law restricts a disposition by a bankrupt. He is deprived of the power to deal with his property; the official receiver, upon adjudication, is to act as receiver and manager of the bankrupt's estate. The official receiver controls the bankrupt's estate between the date of the bankruptcy order and when the trustee takes control.<sup>134</sup> Moreover, all the bankrupt's estate shall vest in the trustee immediately upon his appointment, without the need for conveyance, assignment or transfer.<sup>135</sup>

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<sup>132</sup> Dard K., vol. 3, p. 265; See also 'Ilyā M., vol. 6, p. 22.

<sup>133</sup> Dāwu, vol. 2, p. 254-255(no. 2178).

<sup>134</sup> *Insolvency Act 1986*, section 287(1).

Any disposition of his property after the date of presentation of the petition and before vesting of the bankrupt's estate in a trustee is void (except to the extent it was made with the consent of the court or ratified subsequently by the court)<sup>136</sup> unless the recipient acted in good faith for value, without notice of the petition had been presented.<sup>137</sup> If a payment is void, the person paid shall hold the sum paid for the bankrupt as part of the estate.<sup>138</sup>

Where after the bankruptcy order, a bankrupt has incurred a debt to a banker or other person by reason of a payment that is void, the debt is deemed to have been incurred before the bankruptcy order unless (a) the banker or other person had notice of the bankruptcy before the debt was incurred or (b) it is reasonably practicable for the amount of payment to be recovered from the person to whom it is made.<sup>139</sup>

Likewise, under Malaysian law, the bankrupt is not able to dispose of his property after adjudication due to the fact that all his properties are vested in the Official Assignee.<sup>140</sup> Therefore, all his dispositions are void *ab initio* except in the case of transfer of land by the bankrupt. In *Chua Tin Hong, Re: Ex parte Castrol (M) Sdn Bhd*,<sup>141</sup> the bankrupt, after adjudication, transferred a piece of land of which he

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<sup>135</sup> *Insolvency Act 1986*, section 306.

<sup>136</sup> *Insolvency Act 1986*, section 284(1)(3).

<sup>137</sup> *Insolvency Act 1986*, section 284(4)(b).

<sup>138</sup> *Insolvency Act 1986*, section 284(3).

<sup>139</sup> *Insolvency Act 1986*, section 284(5).

<sup>140</sup> *Bankruptcy Act 1967*, section 24(4); See also section 55 of the Act.

<sup>141</sup> [1997] 2 AMR 1253 HC.; Cf. *Official Assignee of the Estate of Koh Liang Hee (a bankrupt) v Koh Thong Chuan & Anor.* [1997] 5 MLJ 136 HC., The court in this case held that 1) section 349(3) of the NLC 1965 and section 24 of the Act 1967 could co-exist and complement each other. Section 24(4) of the Act vest upon the Official Assignee the bankrupt's property upon bankruptcy. When it involved land, registration of his interest under section 349 of the NLC became necessary for the purpose of dealing with the land. In between this period of registering his interest with the Registrar of Land Titles and after he was vested with the bankrupt's property under section 24(4) of the Act, the land was vested



was the registered proprietor to his nephew without any consideration. The nephew later on transferred the property to a purchaser for a consideration of RM79,964. The Official Assignee filed an application for a declaration that the transfer of the property by the bankrupt to his nephew and to the purchaser be treated void *ab initio*. The Senior Assistant Registrar (SAR) granted an order that the transaction between the bankrupt and his nephew was void *ab initio* as the latter had failed to obtain the sanction as required by section 38(1)(a) of the *Bankruptcy Act 1967 (the Act)*. He also held that the subsequent transaction was also void. The appeal was made to the High Court. The High Court allowed the appeal and held that the reliance by the SAR on section 38(1)(a) of the Act is misconceived as the word “action” in the section, which had not been defined by the Act, must be given its plain meaning as civil act, and not to the conveyance of the property. The court also held that under section 24(4) of the Act, the property of the adjudicated bankrupt would vest in the Official Assignee, resulting any subsequent dealing with the property being void as against the Official Assignee. However, as the subject matter involved is land, the provision of the *National Land Code (NLC)* must be analysed in order to determine whether they affect the operation of section 24(4) of the Act.

Section 349(3) of the NLC states that no land shall vest in the Official Assignee until it has become registered in his name pursuant to the section. Therefore, as far as land is concerned, section 24(4) of the Act must be interpreted as

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in him in equity. 2) since the conveyance between the father and his son was fraudulent and therefore void, the title of the son in the property had determined. When it determined, the concept of indefeasibility no longer applied by virtue of section 340(4) of the NLC 1965, and since it determined by reason of the transfer being void, it related back to the time of the transfer. This meant that the son had no title at any time to the property. Since the son had no title to the property, he could not have created legal charges in favour of the other party since



being qualified by section 349 of the NLC. The title to, or interest in, property of the Official Assignee which consists of land will vest and divest only on registration. The registered title of a bankrupt does not vest in the Official Assignee until transmission is registered in his official capacity as "The Official Assignee of the property of a bankrupt". If the bankrupt had transferred his interest in land to some person who had registered the transfer before any transmission was registered by the Official Assignee, then the bankrupt's interest would, notwithstanding his bankruptcy, have passed to such person. As no transmission of the said property of the bankrupt had been registered by the Official Assignee in accordance with section 349 of the Code the conveyance to the second respondent cannot be impugned in the absence of the Official Assignee bringing his case within section 340(2) of the Code.

In order to ensure that a registered proprietor of land, who had been adjudged a bankrupt, does not deal with the land before it is vested in the Official Assignee, the Official Assignee ought to caveat the land under section 323 of the NLC to protect his interest.<sup>142</sup>

The bankrupt also is not allowed to enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company except with the previous permission of the Official Assignee or of the court.<sup>143</sup>

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the legal charges subsisted on the strength of the son's claim to the title. They too had no protection of indefeasibility offered under section 340(1) of the NLC 1965.

<sup>142</sup> Siho, p. 865.

<sup>143</sup> *Bankruptcy Act 1967*, section 38(1)(d).

The bankrupt, too, is not able to engage in the management or control of any business carried by or on behalf of, or be in the employment of his family business.<sup>144</sup>

## 2.4 Effects on Guarantee

Guarantee provides a security to a creditor in a case where a debtor fails to settle his debt accordingly.

### 2.4.1 Islamic Law

The guarantor is liable to the debtor's creditors when the debtor becomes bankrupt.<sup>145</sup> This is based on the *Ḥadīth*, "A guarantor is liable."<sup>146</sup> This means that the guarantor who undertakes to pay the debt for the debtor is obliged to fulfil his undertaking.<sup>147</sup>

The guarantor, however, is not liable if he is not able to fulfil the responsibility against the creditors due to his bankruptcy.<sup>148</sup> Here, the liability is remains upon the original debtor.<sup>149</sup> This seems to indicate that the creditor has to share his debt from the distribution of the assets of the bankrupt like any other ordinary creditors.

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<sup>144</sup> *Bankruptcy Act 1967*, section 38(1)(e).

<sup>145</sup> Nafr, vol. 2, p. 323; Juza, p. 322; Query: whether the guarantor has right of proof for his contingent liability upon the bankruptcy of a principal debtor?

<sup>146</sup> Dāwu, vol. 3, pp. 296-297(no. 3565).

<sup>147</sup> Ābād, vol. 9, p. 379.

<sup>148</sup> Jayy, vol. 1, p. 361.

<sup>149</sup> Anas M., p. 432; Shād, vol. 2, p. 212.

If a guarantor becomes bankrupt, the deferred payment debt is fallen due. As a result, the creditors may share the assets of the bankrupt notwithstanding that the debtor is present and solvent. This right is, nevertheless, subject to the right of the creditors to sue the debtor upon the expiration of the term. The debt, though not expired in term, becomes due upon the bankruptcy of the debtor.<sup>150</sup>

#### 2.4.2 English and Malaysian Laws

Where the principal debtor becomes bankrupt, the guarantor has a right of proof in respect of his contingent liability to make payment upon the debtor's failure to do so.<sup>151</sup>

The creditor, on his part, is entitled to receive up to a hundred pence in the pound in satisfaction of his debt. He is accordingly entitled to prove for his full debt in the bankruptcy of the principal debtor, besides seeking payment from the guarantor up to the limit for which that guarantor has engaged himself.<sup>152</sup> If any guarantor settles the debt in full, the creditor is obliged to make over to him any dividend he may already have received from the bankrupt's assets, since otherwise the creditor would have received payment in excess of one hundred pence in the pound.<sup>153</sup>

Where a guarantor becomes bankrupt, the creditor to whom the debt is owed may prove in the bankruptcy on the basis that of the guarantor's contingent liability to pay the principal debt. Once again, if the guarantor's undertaking extends to the

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<sup>150</sup> 'Ilya M., vol. 6, p. 217.

<sup>151</sup> *Re Paine* [1879] 2 QB 122.

<sup>152</sup> *Re Sass* [1896] 2 QB 12.



full amount of the debt, the creditor must be admitted to prove for that figure, without allowance being made for anything he may have received from the principal debtor provided that the creditor does not ultimately receive a total sum in excess of one hundred pence in the pound in respect of that debt.<sup>154</sup>

A creditor may prove against the estate of a bankrupt surety on his guarantee. However, he must establish the surety's liability, and, in the absence of agreement, it cannot be done merely by showing that the debtor had admitted the debt and that judgement for it has been signed against him.<sup>155</sup>

Similar to English law, in Malaysia, a creditor has always the right to prove against a debtor on his guarantee, since the debt is a present one to which the debtor is subject at the date of the receiving order. It is a provable debt under section 40 of the *Bankruptcy Act 1967*.<sup>156</sup>

## 2.5 Effects on Deferred Payment Debt

Deferred payment debt is a debt payable at a future date as a debtor and creditor agree.

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<sup>153</sup> Flet, p. 268.

<sup>154</sup> *Re Houlder* [1929] 1 Ch. 205.

<sup>155</sup> *Halb* 3(2), para 493.

<sup>156</sup> *EON Bank Bhd v The Official Assignee of the Property of Sia Ti Hua, Bankrupt* [1998] 5 MLJ 669.

### 2.5.1 Islamic Law

There are different views amongst Muslim jurists on the effect of bankruptcy order to the deferred payment debt whether it becomes due. The Shāfi'is,<sup>157</sup> Ḥanbalis<sup>158</sup> and Ḥanafis<sup>159</sup> are of the view that the deferred payment debt would stand. The payment should be made on the date agreed upon by the contracting parties because it is the bankrupt's right. There is one legal rule to this effect, "The deferred time would not become due (*Inna al-mu'ajjal lā yuṣīru ḥāllan*)".<sup>160</sup> But if it becomes due before the distribution, the deferred payment debtor shares the bankrupt's assets.<sup>161</sup>

However, the Mālikis<sup>162</sup> and one view of the Shāfi'is<sup>163</sup> suggest that it becomes due and the creditors, whose debts are supposed to be paid in the future, would share the estate of the bankrupt with other current creditors. This is due to the fact that the position of bankruptcy is similar to that of death, where the responsibility liability no longer exists upon the death.<sup>164</sup> The difference between

<sup>157</sup> Shāf U., vol. 3, p. 242; Shar M., p. 98; This is based on the rule that the declaration of bankruptcy to the debtor is similar to the interdiction to a spendthrift person. This is because the debt of the spendthrift person does not become payable because of the interdiction. Māwa, vol. 7, p. 456.

<sup>158</sup> Maqd K., vol. 2, p. 184; Najd, p. 359; Zark, vol. 4, p. 76; See also Ya'lā, p. 375.

<sup>159</sup> 'Ābid T., vol. 6, p. 212; See also Ḥayd, vol. 2, p. 721.

<sup>160</sup> Subk A., vol. 1, pp. 269-270; "The agreed time is only fallen due before its time except in a case of debtor's death.", Sayū A., p. 329.

<sup>161</sup> Zark, vol. 4, p. 76.

<sup>162</sup> This view is a well-known rule of the school. However, there are other views, i.e. the deferred payment debts would not become due according to al-Sayūṭī.; would become due unless there is a surety to pay when it becomes due as says by al-Lakhamī; and becomes due only for assets and not merchandise according to Ibn Rushd, referring to Shahnūn. 'Ilyā M., vol. 6, pp. 23-24; Mūsā, p. 185; Rush B., vol. 2, p. 215; 'Ik, vol. 2, p. 355; Dard Ṣ., vol. 3, pp. 352-353; Anas K., vol. 4, p. 121; Nama, p. 418; Jall, vol. 2, p. 249; Qayr, p. 457; Bagh, p. 95.

<sup>163</sup> Shar M., vol. 3, p. 98; 'Umay, vol. 2, pp. 285-286; Raml N., vol. 4, p. 312.

<sup>164</sup> 'Ābī, p. 457; According to al-Māwardī, there are two views amongst the Muslim jurists about the effect of deferred payment debt on the death of the debtor. The jurists of *al-amṣār* maintain that the deferred payment becomes payable because of the death. Whereas, al-

death and bankruptcy is that the former becomes due indefinitely without any consideration whether debts are more, equal or less, or whether the period of payment is near or far. On the other hand, in bankruptcy debts should be more or equal according to some Muslim jurists.<sup>165</sup>

Another issue is in the case of hire, whether the rental instalment payment becomes due when there is a bankruptcy order. Muslim jurists vary on this issue. The preferred view demonstrates that the rent would not become due because of the bankruptcy of hirer, and who becomes bankrupt before occupying the house. It is not due even if part of the rental has not been paid. This is because taking possession of the rented house for completion of staying is not taking possession for stayed. Another view states that the rent becomes dissolved upon the bankruptcy of the hirer. Receiving the first rental is considered receiving all rental. The hirer is allowed to occupy the house for rental based on debt. The owner of the house has the option either to take the house or give the house to the bankrupt and share the rental with other creditors.<sup>166</sup>

But this principle is not applicable when there is an agreement between the bankrupt and the creditor that the debt would not become due in the event of

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Ḥasan al-Baṣrī and ibn Abī Laylā say that the payment is according to the contract. Māwa, vol. 7, p. 454; al-Maqdisī states that there are differences of opinion amongst the Muslim jurists about whether the debt becomes due because of the death of the debtor. Ibn Sīrīn, 'Ubayd Allah bin al-Ḥasan, Ishāq and Abī 'Abīd are of the view that the debt does not become due on the death of the debtor if the legal heirs are willing to undertake the payment. On the other hand, al-Shu'bī, al-Nakha'ī, Sawār, Mālik, al-Thawrī, al-Shāfi'ī and the jurists of Ḥanafī school are of the view that the debt becomes due on the death of the debtor. Maqd S., vol. 3, p. 265.

<sup>165</sup> Shād, vol. 2, p. 290.

<sup>166</sup> Rush F., pp. 989-991.



bankruptcy.<sup>167</sup> It seems that this view is not contrary to the *Ḥadīth*, “Muslims are bound by their stipulations excepts stipulations that make permissible becomes prohibited and prohibition becomes permissible.”<sup>168</sup>

Debts that should be paid to the bankrupt in a future date would not become due because of his bankruptcy,<sup>169</sup> notwithstanding there is an agreement stipulated that the debts would become due upon the bankruptcy of the creditor. This stipulation is unacceptable because the stipulation of unknown period (*ajal majhūl*) causes the agreement invalids.<sup>170</sup>

Current creditors share all the bankrupt's assets if the bankrupt has passed away, notwithstanding that there are unpaid deferred creditors. This is subject to the bankrupt's legal heirs' agreement to undertake to settle the unpaid deferred debts when they become due. If there is no undertaking, then the unpaid deferred debts become due and the unpaid deferred creditors share the bankrupt's estate with other current creditors. This is in order to prevent injustice because if the unpaid deferred debtors wait until the due time, they receive nothing.<sup>171</sup>

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<sup>167</sup> Dard Ş., vol. 3, p. 354; Dard K., vol. 3, pp. 265-266; Alla, vol. 3, p. 131; 'Ilyā M., vol. 6, p. 23; al-Dasūqī asserts that the deferred payment debts are still due notwithstanding that some deferred payment debtors' request not to be included amongst the current creditors. This is because the bankrupt has a right to reduce his burden of the debt/liability as provided by the law. On the contrary, the law allows if all the deferred payment debtors request to contract out from the effect of the bankruptcy order. The repayment, therefore should be paid according to the agreed duration. Dasū, vol. 3, pp. 265-266: Cf. *Insolvency Rules 1986*, rule 6.112(1)(2) provides “In the case of rent and other payments of a periodical nature, the creditor may prove for any amount due and unpaid up to the date of the bankruptcy order; Where at that date any payment was accruing due, the creditor may prove for so much as would have fallen due at that date, if accruing from day to day.”

<sup>168</sup> Dāru, p. 21(no. 2869); See also Dāwu, vol. 3, p. 304(no. 3594).

<sup>169</sup> Anas K., vol. 4, p. 121; Bagh, p. 95; Qayr, p. 457; 'Ilyā M., vol. 6, p. 23.

<sup>170</sup> 'Adaw, vol. 2, p. 291.

### 2.5.2 English and Malaysian Laws

English law provides that a creditor may prove for a debt of which payment was not yet due at the date of the bankruptcy order.<sup>172</sup> Such a creditor is entitled to a dividend equally with other creditors.<sup>173</sup> The dividend is calculated with the amount of the creditor's admitted proof shall be reduced by a percentage calculated between the date of declaration of dividend and the date when payment of the creditor's debt would otherwise be due.<sup>174</sup>

Likewise, under Malaysian law, future debt and liability to which the debt is subject at the date of receiving order or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.<sup>175</sup>

A creditor may prove for a debt not payable when the debtor committed an act of bankruptcy as if it were payable presently and may receive dividends equally with the other creditors, deducting only there out a rebate of interest at the rate of six per centum per annum, computed from the declaration date of the dividend to the date when the debt would have become payable according to the contracted terms.<sup>176</sup>

### 2.6 Effects on Action and Legal Proceedings

The issue is whether a bankruptcy order permits the bankrupt and creditor to commence a legal action and proceedings.

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<sup>171</sup> Maqd K., vol. 2, p. 185.

<sup>172</sup> *Insolvency Rules 1986*, rule 6.114.

<sup>173</sup> *Insolvency Rules 1986*, rule 11.13(1).

<sup>174</sup> *Insolvency Rules 1986*, rule 11.13(2).

<sup>175</sup> *Bankruptcy Act 1967*, section 40(3).

### 2.6.1 Islamic Law

The bankruptcy order under Islamic law allows a bankrupt to maintain an action pertaining to the application of law of retaliation (*qiṣāṣ*), or grant pardon in accordance with it, especially where it does not involve monetary compensation.<sup>177</sup> The right to apply for law of retaliation is given to the bankrupt if he is an avenger of blood (*walī al-damm*) for an 'intentional murder' (*al-qatl al-'amd*). And the *Ḥadīth* states accordingly, "And if someone is killed, his closest relative has the right to choose one of two things, i.e., either the blood-money or retaliation by having the murderer killed."<sup>178</sup>

The application of this retaliation law is confirmed by the *Qur'ānic* verse, "O you who believe! *al-Qiṣāṣ* is prescribed for you in case of murder; the free for the free, the slave for the slave and the female for the female. But if the relatives of the killed person forgive the murderer, then the relatives should demand blood money in a reasonable manner and the murder must pay with handsome gratitude. This is an alleviation and a mercy from your Lord."<sup>179</sup> Ibn 'Abbās says that forgiveness of retaliation in the verse means 'to accept the blood-money in an intentional murder.'<sup>180</sup> Ibn Kathīr says that Imām Mālik, Abū Ḥanīfah and his followers, al-Shāfi'ī and Aḥmad ibn Ḥanbal are of the opinion that the avenger of blood should

<sup>176</sup> *Bankruptcy Act 1967*, section 42, Schedule C, para 25.

<sup>177</sup> Nawa Ṭ., p. 50; Fash, p. 147; Mūsā, p. 185; Zarq Z, vol. 5, p. 266-267.

<sup>178</sup> Bukh, vol. 8, p. 38; Dāwu, vol. 4, p. 172(no. 4505); See also Shāf M., p. 343.

<sup>179</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:178.

<sup>180</sup> Bukh, vol. 8, p. 39; Ibn 'Abbās's view concurs with the view of Abū al-Āliyyah, Abū al-Sha'a, Mujāhid, Sa'id bin Jubayr, 'Aṭā', al-Ḥasan, Qatādah and Muqātī bin Ḥayyān., Kath. vol. 1, p. 216.



not forgo the blood money in the intentional murder unless there was a consent from the victim. Other jurists say he has the right to do so.<sup>181</sup>

It seems obvious that the bankrupt should choose the blood money instead of retaliation. This is so, for the amount of blood money is enormous as the *Ḥadīth* of the Prophet (S.A.W) states, "It is one hundred camel for a life."<sup>182</sup> Thus, the bankrupt would be able to settle some of the debts.

For an intentional injury, according to Imām al-Shāfi'ī, the bankrupt could either inflict retaliation or take compensation (*al-irsh*) if he has been injured intentionally. The infliction of retaliation prevents him from taking the compensation even if the offender offers him the money.<sup>183</sup> And according to the Ḥanbalis the bankrupt should take the monetary compensation if he was inflicted with a compensatory injury. His pardon is invalid since the creditors' rights are attached to that compensation.<sup>184</sup>

The bankrupt should be also competent to maintain an action for a torturous act that causes injury to his person and that is subject to a compensation to which creditors' right becomes attached to it.<sup>185</sup> The bankrupt should be also able to agree

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<sup>181</sup> Kath, vol. 1, p. 216; Al-Rāzī even says that it is a consensus among the Muslim jurists, that is not possible for the avenger of blood to forgo blood money. He is obliged to take the blood money after forgiving the murderer by not taking retaliation's right. He also considers it is a mercy from the God to choose the blood money as the Qur'ān states, "This is an alleviation and a mercy from your Lord.", Rāzī, vol. 5, p. 45.

<sup>182</sup> Anas M., p. 611(no. 1545).

<sup>183</sup> Shāf U., vol. 3, p. 232; See also Māwa, vol. 7, p. 457.

<sup>184</sup> Qudā, vol. 4, p. 496.

<sup>185</sup> Māwa, vol. 7, p. 457.

to the attachment of paternity (*nasab*)<sup>186</sup> and to exercise mutual imprecation (*li'ān*)<sup>187</sup> against him.<sup>188</sup>

In addition to the above-mentioned rules, the creditor cannot, however, take legal action against the bankrupt for his debt. This is because the creditor and bankrupt do not have any relation between themselves.<sup>189</sup> The landlord cannot also take possession of the bankrupt's movable assets in the bankrupt's house for an unpaid rent.<sup>190</sup>

However, there is no restriction of action to the victim of injury caused by the bankrupt. The compensation paid to the victim is coming from the bankrupt's assets because the compensation of injury is part of the liability of the bankrupt which is similar to the responsibility to the payment of debts.<sup>191</sup> The owner of property destroyed by the bankrupt has similar right. He may share the bankrupt's assets with other creditors as far as the assets are not yet distributed.<sup>192</sup>

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<sup>186</sup> This right seems good if it is exercised after the bankruptcy order. The claim sometimes would become costly if the proof were needed. The bankrupt has to call for expert evidence and to do DNA test. Furthermore, if he wins his claim, the bankrupt has to provide maintenance for his 'new member of his family'.

<sup>187</sup> See *al-Qur'ān, sūrat al-Nūr*, 24:6-9.

<sup>188</sup> Shar M., vol. 3, p. 101; Nawa R., vol. 4, p. 131; Baṣī, vol. 2, p. 46; Raml N., vol. 4, p. 316; Dard Ṣ., vol. 3, pp. 353-354; Qarā, vol. 8, p. 171.

<sup>189</sup> Qadū, p. 44.

<sup>190</sup> 'Ilyā M., vol. 6, p. 64.

<sup>191</sup> Qudā, vol. 4, p. 448; Maqd K., vol. 2, p. 171; Mawd, vol. 1, p. 369; Cf. Nawa M., vol. 14, p. 29.

<sup>192</sup> Shāf U., vol. 3, p. 232; Mawd, vol. 1, p. 369; *Fatā*, vol. 5, p. 62; Afen, vol. 2, p. 443; However, there are two possibilities when the distribution has been made. Firstly, the victim and property's owner may share the bankrupt's assets if the injury and destruction had taken place before distribution because their rights are enforceable before distribution. Secondly, they may not share when the injury and destruction happened after distribution because the creditors have gained ownership to the assets and the assets are no longer belonged to the bankrupt. Shāf U., vol. 3, p. 232.

Other issue is whether a creditor of the transfer of debt transaction (*al-hawālah*) can claim his debt from the original debtor when the transferee becomes bankrupt. Muslim jurists differ in opinion about it. Imām Mālik,<sup>193</sup> al-Shāfi'ī<sup>194</sup> and Abū Ḥanīfah<sup>195</sup> are of the opinion that the creditors have nothing to claim from the original debtor. It seems that the creditor of transfer of debt transaction has to share the transferee's assets as an ordinary creditor.

There are, nevertheless, a few exceptions to this view. Creditors could claim from the original debtor if there is fraudulent act committed by the latter,<sup>196</sup> such as a transfer of debt is made to insolvent person.<sup>197</sup> This is because the transfer of debt transaction is concluded on a presumption (*ẓann*) that the transferee is a rich person, but he is actually not. Thus, there is no concluded transfer of debt as the Prophet (S.A.W) allows transfer of debt to the solvent person (*al-mālī*) only.<sup>198</sup> He says, "Delay in payment by a rich man is injustice; but when one of you is referred to a solvent man for payment, let him accept the referral."<sup>199</sup> The original debtor would be asked to pronounce an oath if it is presumed that he knew of the bankruptcy of the transferee.<sup>200</sup>

<sup>193</sup> Anas M., p. 432; Jall, vol. 2, p. 288; Qayr, p. 456; Shurayḥ is reported to have decided that there is no claim against the first debtor in a case where the transferee becomes bankrupt particularly the evidence shows that the transfer has taken place with the knowledge of the bankruptcy. Ḥayy, vol. 2, p. 296; In Mūsā, p. 193, it is stated that there are two views amongst the Mālikis on the issue.

<sup>194</sup> Shāfi' U., vol. 3, pp. 261-262; See also Sayū A., p. 281; Ghaz W., p. 147; Fash, p. 152.

<sup>195</sup> Sugh, p. 462.

<sup>196</sup> Qayr, p. 456; Juza, p. 322.

<sup>197</sup> Abī, p. 456; Shād, vol. 2, p. 291; See also Qarā, vol. 9, p. 249; Mūsā, p. 193; 'Ilyā M., vol. 6, p. 194.

<sup>198</sup> Maqd S., vol. 5, pp. 62-63.

<sup>199</sup> Bukh, vol. 3, p. 55; Anas M., p. 469(no. 1368); Dāwu, vol. 3, p. 236(no. 3345).

<sup>200</sup> Mūsā, p. 193; See 'Ilyā M., vol. 6, p. 195.



Creditors could also claim from the original debtor if there is a condition in the agreement stating that “Upon the bankruptcy of the transferee, the claim for repayment of debt is referred to the original debtor.”<sup>201</sup> Such a claim could also be made if before the transfer of debt transaction, the creditors disagreed about it.<sup>202</sup> Abū Yūsuf and Muḥammad al-Shaybānī, on the other hand, are of the view that the creditors could claim from the original debtor.<sup>203</sup>

### 2.6.2 English and Malaysian Laws

Under English law, following a bankruptcy petition presentation, the court may stay any action, execution or other legal process against the debtor or his property.<sup>204</sup> This includes action against the person of the debtor such as committal for non-payment of rates.<sup>205</sup>

The bankruptcy order restricts the bankrupt from taking any legal action relating to the property. Such action is one of the powers conferred to the trustee. The trustee, with sanction from the court, may bring, institute or defend any action or legal proceeding relating to the property comprised in the bankrupt’s estate.<sup>206</sup> Thus, the trustee is empowered to take whatever steps are necessary to realise the value represented by any chose in action which has vested in the said trustee as a consequence of the bankruptcy order.<sup>207</sup> Where the trustee employs a solicitor, if

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<sup>201</sup> ‘Ilyā M., vol. 6, p. 194.

<sup>202</sup> Jayy, vol. 1, p. 366.

<sup>203</sup> Sugh, p. 462.

<sup>204</sup> *Insolvency Act 1986*, section 285(1).

<sup>205</sup> *Smith v Braintree District Council* [1989] 3 All ER 897.

<sup>206</sup> *Insolvency Act 1986*, section 314, Schedule 5, Part I, para 2.

<sup>207</sup> Flet, p. 192.

there is a creditor's committee,<sup>208</sup> he must give notice to the committee about exercising this power.<sup>209</sup>

The above rule appears applicable only to matters of property. It seems, then, that the bankrupt is permitted to take action on matters pertaining to damages to his person. Thus, the exception exists in respect of torts of a "personal" character such as claim for defamation<sup>210</sup> or injury to credit or reputation or for "wounded feeling."<sup>211</sup> The exception is clearly stated by Millet LJ in *Church of Scientology v Scott*,<sup>212</sup> "So actions for personal injury or defamation for example, do vest in the trustee in bankruptcy, but may continue to be litigated by the bankrupt. When the bankrupt is a defendant, there is no question of any property as such vesting in the trustee, but, nevertheless, since any claim for monetary relief or for the return of property will be a claim which will have to be brought against the trustee in bankruptcy, since the subject matter of the proceeding will have been vested in the trustee in bankruptcy, the bankrupt has no continuing interest in defending the proceeding. On the other hand again, some actions seeking relief of injunctions against the bankrupt personally which do not directly concern his estate can still be maintained against the bankrupt himself, and he is entitled to defend them and, if losses, to appeal."

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<sup>208</sup> The committee shall consist of between three and five creditors, who have lodged proofs of debts which have not been disallowed for voting or dividend purposes. A body of corporate may be a member of the committee and act by an authorised representative. *Insolvency Rules 1986*, rule 6.150.

<sup>209</sup> *Insolvency Act 1986*, section 314(6).

<sup>210</sup> *Davis v Trustee in Bankruptcy of the Estate of Davis* [1998] BPIR 572 Ch D; *Heath v Tang and Another* [1993] 1 WLR 1421 Ch D at 1423; *Re Wilson, ex p. Vine* (1878) 8 Ch D 364; *Wilson v United Counties Bank Ltd* [1920] AC 102 HL (In this case the bank's negligence causing plaintiff's bankruptcy, and loss of reputation as well as injuring his estate.)

<sup>211</sup> *Howard v Crowther* 151 ER 1179; *Rose v Buckett* [1901] 2 KB 449; *Lord's Trustee v. Great Eastern Railway Co.* [1908] 1 KB 195.

The bankrupt also has the capacity and the authority to instruct solicitors to take proceedings, except those which relate to his property now comprised in the bankrupt's estate, and vested in the trustee.<sup>213</sup> A solicitor who, unaware of his client's bankrupt status, commences proceedings relating to property in the bankrupt's estate, does not warrant that his client has a good cause of action, and should not be ordered to pay the costs of the proceedings.<sup>214</sup>

At the same time, the bankruptcy order restricts a creditor of the bankrupt in respect of a debt provable in the bankruptcy to have any remedy against the property or person of the bankrupt. The creditor cannot commence any action or other legal proceedings against the bankrupt unless with the leave of the court and on such terms as the court may impose.<sup>215</sup> This includes liabilities in tort.<sup>216</sup>

This compels unsecured creditors of the bankrupt to look solely to bankruptcy procedures as a remedy to secure payment of their debts once the bankruptcy order has been made.<sup>217</sup>

The above restrictions, however, are not applicable to a secured creditor who may enforce his security<sup>218</sup> and a landlord who may distrain over the bankrupt's goods in respect of unpaid rent for a period of six months.<sup>219</sup>

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<sup>212</sup> [1997] BPIR 418 CA, at 424.

<sup>213</sup> Hunt, p. 3080/3.

<sup>214</sup> See *Nelson v Nelson & Ors* [1997] 1 WLR 233 CA.

<sup>215</sup> *Insolvency Act 1986*, section 285(3)(a)(b).

<sup>216</sup> See *Insolvency Act 1986*, section 382(2).

<sup>217</sup> Seal, p. 350.

<sup>218</sup> *Insolvency Act 1986*, section 285(4).



Likewise, under Malaysian law, the court may after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor.<sup>220</sup>

Malaysian Bankruptcy Law also restricts the action and legal proceeding by the bankrupt since he is not competent to maintain<sup>221</sup> any action<sup>222</sup> without the previous sanction of the Official Assignee.<sup>223</sup> In deciding whether to give sanction or not, the Official Assignee has to look after not only the interest of the creditors, but also that of the bankrupt as well. However, in a proper case, balancing the bankrupt's interest and that of the creditors, the sanction could be conditional on provision of security for the expenses and the costs.<sup>224</sup> The requirement for sanction includes the filing of an application to set aside a default judgement.<sup>225</sup> This is because the right of action relating to a bankrupt's property passes to the Official Assignee.<sup>226</sup> The Official Assignee, subject to any general or special orders of the court, may bring, institute or defend any action or other legal proceeding relating to the property of the

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<sup>219</sup> *Insolvency Act 1986*, sections 285(3), 347(1); For detail discussion see Walt, pp. 47-53.

<sup>220</sup> *Bankruptcy Act 1967*, section 10(2).

<sup>221</sup> "Maintain" does not mean that a bankrupt cannot keep alive any action without the previous sanction of the Official Assignee as such interpretation would work injustice to the bankrupt to require him or her to withdraw the action and file afresh upon obtaining sanction. *Richland Trade & Development Sdn Bhd v. United Malayan Banking Corp Bhd* [1996] 4 MLJ 233 HC.

<sup>222</sup> "Action" is not defined by the Act and should therefore be given its plain meaning. The plain meaning of "action" is civil action. Its operation is confined to civil proceedings in court and to a conveyance of property. *Chua Tin Hong: Ex parte Castrol (M) Sdn Bhd* [1997] 2 AMR 1253 HC.

<sup>223</sup> *Bankruptcy Act 1967*, section 38(1)(a); See *Pravinchandra Doshi (t/a M/S P Doshi & Co) v Ismail bin Syed Mohamed & Anor* [1999] 1 MLJ 35 HC.

<sup>224</sup> *Re Cheong Sooi Loong, ex p Hong Leong Finance Bhd* [1992] 2 MLJ 591 HC.

<sup>225</sup> *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd and Ors* [1992] 2 MLJ 588 HC; *Supreme Finance (M) Bhd v Mohamad Noor bin Yusuf t/a Everway Food Centre & Ors* [1993] 2 MLJ 29 HC.

<sup>226</sup> *Sharifah Aini binte Syed Jaafar v. Karangkrak Shd Bhd* [1989] 2 CLJ 1269 HC.

bankrupt.<sup>227</sup> In order to bring an action, he may employ a solicitor for such responsibility. The employment of a solicitor is subject to a written permission of the Attorney General.<sup>228</sup>

Moreover, the sanction of the Official Assignee is required, in a case where the cause of action involves an allegation of breach of contract that accrues before the bankruptcy order. This is because such a cause of action is vested to the Official Assignee upon adjudication. Hence, if the sanction is not obtained, the bankrupt is deemed incompetent to take action in his own name. If so, he is incompetent to employ an advocate and solicitor to represent him.<sup>229</sup>

The above restriction is not applicable in an action for damages in respect of an injury to his person.<sup>230</sup> The injury to his person means any injury which the bankrupt suffers in mind or body, which might give rise to an action for damages, and which cause of, or chose in action, or right to sue remained in the bankrupt after the bankruptcy.<sup>231</sup> In *Sharifah Aini binte Syed Jaafar v. Karangraf Shd Bhd*,<sup>232</sup> the court held that the bankrupt's suit against the defendants is of a personal nature [defamation] and does not touch upon her property. Her action against the defendants

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<sup>227</sup> *Bankruptcy Act 1967*, section 61(b).

<sup>228</sup> *Bankruptcy Act 1967*, section 61(c).

<sup>229</sup> *Chin Kon Nam v Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271 HC; See also *Re Khoo Kim Hock* [1974] 2 MLJ 29 HC.

<sup>230</sup> *Bankruptcy Act 1967*, section 38(1)(a).

<sup>231</sup> *Mohd Afsar Yunus v Handal Utama Sdn Bhd* [1995] 1 AMR 224 HC., per Tee Ah Sing JC at 225; See *Mohd Nor Rahmat v Bank Bumiputra Malaysia Berhad* [1998] 4 AMR 3583 HC as the court held that negligence was actionable in *personam* and not a right that passes to the estate of the bankrupt, because damages are a claim in *personam* that can only be estimated by reference to pain and suffering caused to the body, mind or character of the bankrupt.

<sup>232</sup> [1989] 2 CLJ 1269 HC.



is for damages for injury to her reputation. Therefore, no sanction from the Official Assignee was required.

Similar to English law, Malaysian law restricts an action taken against a bankrupt by creditors but on the making of the receiving order. Hence, the creditor shall not have any remedy against the property or person of the debtor in respect of debt. The creditor shall not proceed or commence any action or legal proceedings in respect of such debt unless with the leave of the court on such terms as the court may impose.<sup>233</sup>

However, a secured creditor may enforce his security;<sup>234</sup> and a landlord may distrain over the bankrupt's goods in respect of unpaid rent for a period of three months.<sup>235</sup>

## 2.7 Effects on Travelling

The issue is whether a debt and bankruptcy order restrict the freedom of movement of a debtor.

### 2.7.1 Islamic Law

There are three situations about how the debt is fallen due, i.e. either before, during or after the time of travelling. The issue here is whether the creditor has the right to prevent the bankrupt from travelling. In the first situation, the creditors are allowed to prevent the debtor from travelling.<sup>236</sup> This is because the repayment of

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<sup>233</sup> *Bankruptcy Act 1967*, section 8(1).

<sup>234</sup> *Bankruptcy Act 1967*, section 8(2).

<sup>235</sup> *Bankruptcy Act 1967*, section 45(1).

<sup>236</sup> Ghaz W., p. 139; Nawa M., vol. 14, p. 8; Mard, vol. 5, p. 273; Qarā, vol. 8, p. 172; Nafr, vol. 2, p. 323; Rāfi', vol. 5, p. 17; al-Nawawī, citing the view of the Shāfi'ī jurists, says that



debt is obligatory compared to travelling unless the bankrupt appoints an agent to pay his debt on his behalf.<sup>237</sup>

For the second situation, Muslim jurists are divided. The Mālikis,<sup>238</sup> and Ḥanbalis<sup>239</sup> allow the creditors to prevent the bankrupt from travelling. Travelling is allowed only if a mortgage or guarantor is provided, for the harm of not paying the debt would disappear.<sup>240</sup> The fact that the travelling of the debtor could not delay the payment of debt when it becomes due. Prevention is therefore necessary unless such mentioned safeguards are put in place.

For a situation that the debt is only fallen due after the travelling, the point to consider is whether the debtor is safe to travel. If the journey is safe, according to the Shāfi'is<sup>241</sup> and one view of the Ḥanbalis,<sup>242</sup> the creditors could not prevent the bankrupt from travelling since they do not have any claim due during the journey. Thus, neither security, mortgage, guarantor nor attestation of witness (*al-ishhād*) is necessary. The rule is also applied to a short or long distance journey.<sup>243</sup> On the contrary, a view of the Ḥanbalis maintains that the creditors could prevent the bankrupt because his return is uncertain and unclear.<sup>244</sup>

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the prevention of travelling unlike the prevention of travelling by a husband to his wife, but it is to distract the bankrupt from travelling by bringing the matter to the court until the payment of debt is made. Nawa R., vol. 4, p. 136.

<sup>237</sup> Shar M., vol. 3, p. 116.

<sup>238</sup> Mūsā, p. 185.

<sup>239</sup> Qarā, vol. 8, p. 172; Maqd S., vol. 4, p. 457; There are three conditions for preventing the debtor from travelling, i.e. the debt becomes due when the debtor is travelling, the debt could be settled easily and the debt has not been asked to be paid by someone. Ṣāwī, vol. 2, p. 125.

<sup>240</sup> Maqd S., vol. 4, p. 457; Qudā, vol. 4, pp. 503.

<sup>241</sup> Nawa R., vol. 4, p. 136; See also Ghaz W., p. 139; Nawa M., vol. 14, p. 3; Fayr T., p. 71.

<sup>242</sup> Maqd K., vol. 2, p. 167; Mard, vol. 5, pp. 273-275.

<sup>243</sup> al-Rūyānī is of the opinion that for the long distance journey that the period of payment is approaching, the bankrupt should provide a guarantor. See Nawa R., vol. 4, p. 136.

<sup>244</sup> Maqd K., vol. 2, p. 167; Mard, vol. 5, pp. 273-275.

For unsaved travelling, such as going to a holy war (*al-jihād*) or travelling by sea, the Muslim jurists are divided in opinion. The most authentic view of the Shāfi'ī disallows the creditors to prevent the bankrupt from travelling.<sup>245</sup> However, some Shāfi'īs allow the creditors to prevent the bankrupt from travelling if the journey involves the risk of delay or no return.<sup>246</sup> Travelling for a holy war is not allowed for the fear of the bankrupt might become martyred (*al-shāhid*); thus, causing the loss of right to his creditors.<sup>247</sup> Permission of travelling is only given if the bankrupt provides a mortgage as security or a guarantor.<sup>248</sup> Another view says that the permission is given if the bankrupt is a soldier in the armed services.<sup>249</sup>

### 2.7.2 English and Malaysian Laws

English law permits a bankrupt to travel as there is no specific provision under the *Insolvency Act 1986* that restricts a bankrupt's freedom of movement.<sup>250</sup> Moreover, the restriction to travel would violate the provision on freedom of movement of Protocol 4 of the *European Convention of Human Rights* as Article 2 provides:

(a) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(b) Everyone shall be free to leave any country, including his own.

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<sup>245</sup> Nawa R., vol. 4, p. 136.

<sup>246</sup> Nawa M., vol. 14, p. 3; In Fayr T., p. 71, it is stated that the travelling to the holy war is not permitted; al-Rūyānī says that holy war is allowed only if the guarantor is appointed to settle the debt. See Nawa R., vol. 4, p. 136.

<sup>247</sup> Qudā, vol. 4, pp. 503-504.

<sup>248</sup> Mard, vol. 5, p. 273; Qudā, vol. 4, p. 503.

<sup>249</sup> Nawa R., vol. 4, p. 136.

(c) No restriction shall be placed on the exercise of these rights other than such are in accordance with law and necessary in a democratic society in the interests of national security or public safety, for the maintenance of the *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedom of others.<sup>251</sup>

On the contrary, Malaysian law restricts a bankrupt from travelling. The bankrupt shall not leave Malaysia without previous permission from the Official Assignee or of the court.<sup>252</sup> The bankrupt, however, may be prevented from travelling out of Malaysia upon notice made by the Official Assignee issued to any immigration officer.<sup>253</sup> This means that the prevention is not automatically effective upon appearing of the name of bankrupt in the announcement in the newspapers or upon being declared bankrupt by the court.<sup>254</sup> The immigration officer then shall take necessary measures to give effect the notice of the Official Assignee.<sup>255</sup> He has the right to seize and deliver to the Official Assignee any passport or travel document belonging to the bankrupt who is attempting to leave Malaysia, without a previous permission of the Official Assignee.<sup>256</sup>

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<sup>250</sup> Cf. *Cork*, p. 416, paras 1851-1852.

<sup>251</sup> For detail discussion on the provision, see Jaco, pp. 277-280.

<sup>252</sup> *Bankruptcy Act 1967*, section 38(1)(c); This means that a bankrupt is entitled to engage an advocate and solicitor to represent him in the application to the court for permission to leave Malaysia without a prior sanction from the Official Assignee. *In the matter of Law Hieng Yee, a bankrupt* [2000] 1 MLJ 59 HC.

<sup>253</sup> *Bankruptcy Act 1967*, section 38A(1).

<sup>254</sup> 'Dept Gets Travel Ban Notice Three Weeks After Umni Hafilda's Departure', *Utusan Express* 30 March 2000, <http://www.utusan.com.my>.

<sup>255</sup> *Bankruptcy Act 1967*, section 38A(2).

<sup>256</sup> *Bankruptcy Act 1967*, section 38A(3).



## 2.8 Detention

Detention is necessary in order to investigate and make sure that a bankrupt does not conceal anything from his creditors.

### 2.8.1 Islamic Law

One view of the Shāfi'is<sup>257</sup> and Mālikis<sup>258</sup> consider detention<sup>259</sup> is one of the legal rules (*ḥukm*) relating to bankruptcy order. Other view of the Mālikis, however, maintains that the detention of a bankrupt and the bankruptcy order are two different things. The bankruptcy order is a better solution than detention, for detention needs some observations.<sup>260</sup>

The purpose of detention is to establish the insolvency ( *'usr*) of the bankrupt if his situation and assets are unknown.<sup>261</sup> One views of the Ḥanafis, however, maintains that the judge is allowed to detain the bankrupt as a punishment if it is a practice of the bankrupt to take other's property and to declare his bankruptcy.<sup>262</sup> According to one view of the Mālikis, the detention should be directed to the bankrupt who uses to delay in payments and his disputed character becomes apparent character.<sup>263</sup> Moreover, the bankrupt who appears to possess means but pretends to

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<sup>257</sup> Ghaz W., p. 139.

<sup>258</sup> 'Ilyā M., vol. 6, p. 49; Mawā, vol. 5, p. 47.

<sup>259</sup> The legality of detention is based on the *Qur'anic* verses such as *sūrat Yūsuf*, 12:32-33, the *Ḥadīth* indicates, "The Prophet (S.A.W) detains a man in a case of accusation (*al-tuhmah*)". Dāwu, vol. 3, p. 314(no. 3630) and the practice of the Companions.

<sup>260</sup> 'Ilyā M., vol. 6, p. 49.

<sup>261</sup> Mūsā, p. 187; See also Dard Ṣ., vol. 3, p. 368.

<sup>262</sup> Sugh, p. 461.

<sup>263</sup> 'Ilyā M., vol. 6, p. 55.

be insolvent, or who promises to pay but requests a delay for a day, should be detained unless he furnishes a surety.<sup>264</sup>

Upon detention, the bankrupt is not allowed to get out from the prison for performing his Friday prayers or participate in a holy war.<sup>265</sup> He should be in the prison even if he is staying with his enemy as detention is a hardship. He would, only, be transferred to another detention centre, if staying with the enemy causes death or injury.<sup>266</sup>

But there are circumstances that permit the bankrupt to leave the prison on a temporary basis. He should be allowed to leave if he becomes insane, subject to his being detained again if he recovers.<sup>267</sup> This temporary leave requires a guarantor to return the bankrupt after his recovery.<sup>268</sup>

He should be permitted to leave the prison to be sentenced for the determined punishment (*ḥadd*)<sup>269</sup> such as false accusation of adultery (*qadhāf*), drinking liquor, adultery, theft and murder<sup>270</sup> as the consensus of Muslim jurists agrees that an admission made by the bankrupt on the crime that he commits is admissible.<sup>271</sup>

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<sup>264</sup> Mūsā, p. 187.

<sup>265</sup> Mūsā, p. 187; The Ḥanafis disallow the detainee to be released to celebrate the month of Ramaḍān, two festivals, to attend either Friday or congregational prayer and to perform pilgrimage. There are two views about the release to visit the death of his closed relatives. One view says he could not be released at all; another says he could be released if a guarantor (*kafīl*) is provided. Ḥayḍ, vol. 2, p. 723.

<sup>266</sup> Dard Ṣ., vol. 3, pp. 372-373.

<sup>267</sup> Dasū, vol. 3, p. 282.

<sup>268</sup> Mawā, vol. 5, p. 49; Khur, vol. 5, p. 280.

<sup>269</sup> Mūsā, p. 187.

<sup>270</sup> 'Ilyā M., vol. 6, p. 55.

<sup>271</sup> Jayy, vol. 1, p. 318.

He is also allowed to visit his father, mother, child or very near relative in case of grave illness, subject to his producing a guarantor to answer for his person.<sup>272</sup>

The bankrupt is released from the prison when his assets are made known to the judge, unless he requests to be set free on procuring a surety<sup>273</sup> in which case, should he fail to appear, the surety should pay for him even though his insolvency is unclear but subsequently will be established.<sup>274</sup> The bankrupt whose means remain doubtful, should be released from prison after a fixed time in accordance with the importance of the insolvency and the status of the bankrupt.<sup>275</sup> One view of the Mālikis suggests that half-month detention for a small debt, two months for medium debt and four month for huge debt.<sup>276</sup>

Furthermore, Abū Ḥanīfah, Abū Yūsuf and Muḥammad al-Shaybānī are of the opinion that the judge should detain the bankrupt and later on question him about his condition. If he finds the bankrupt is insolvent, he is released<sup>277</sup> according to the *Qur'ānic* verse, "And if the debtor is in a hard time, then grant him time till it is easy for him to pay."<sup>278</sup> Thus, there is no detention if the evidence shows that he is insolvent.<sup>279</sup>

<sup>272</sup> Mūsā, p. 189; Dard K., vol. 3, p. 282; Mawā, vol. 5, p. 49.

<sup>273</sup> There are various views amongst the Mālikis. One group says that it is a personal surety and other group says, it is a property surety. 'Ilyā M., vol. 6, p. 50.

<sup>274</sup> Mūsā, p. 187; See also Dard Ṣ., vol. 3, p. 368.

<sup>275</sup> Mūsā, p. 187; See also Dard Ṣ., vol. 3, p. 371.

<sup>276</sup> See Mawā, vol. 5, p. 48.

<sup>277</sup> Sugh, p. 459.

<sup>278</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:280.

<sup>279</sup> Mawā, vol. 5, p. 32; Ghaz W., p. 139; Dard Ṣ., vol. 3, p. 368; Nafr, vol. 2, p. 322; This is afraid that the bankrupt has concealed his property. Dasū, vol. 3, p. 265.



The insolvency is determined through evidence and the testimony of witnesses<sup>280</sup> stating that there is no apparent and hidden property owned by the bankrupt. The bankrupt has, at the same time, to take oath to declare that he has no knowledge of his ownership of property.<sup>281</sup> There should be a testimony of two reliable witnesses about his condition.<sup>282</sup> One view of the Shāfi'is suggests that the testimony is not accepted in this case unless there are three witnesses. This is based on the *Ḥadīth* that reported that a man was suffering from overburden of responsibility more than his debt and asked for a donation. The Prophet (S.A.W) says, "A person who is smitten by poverty, the genuineness of which is confirmed by three intelligent members of his people, for him begging is permissible till he gets what will support him, or will provide him subsistence."<sup>283</sup>

If the witnesses declare that the bankrupt has neither apparent nor hidden property, the debtor should take an oath and promise to pay as soon as he has the means, whereupon all proceedings should be stayed.<sup>284</sup> The prosecutor should to make an oath if the bankrupt maintains that the former knows him to be insolvent.<sup>285</sup> In a case of contradiction, the evidence of the witness who affirms solvency and proves concealment of assets should be preferred.<sup>286</sup>

Another point to consider is whether it is allowed to search the bankrupt's house to find the concealed assets. There are two views amongst the Mālikis about

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<sup>280</sup> Abū al-Ḥasan says that the witnesses should be more than two just witnesses. See 'Ilyā M., vol. 6, p. 53.

<sup>281</sup> Dard Ṣ., vol. 3, p. 370.

<sup>282</sup> Fayr, p. 71.

<sup>283</sup> Musl, vol. 2, p. 722(no. 109 (1004)).

<sup>284</sup> Mūsā, p. 187.

<sup>285</sup> Ibid.

the investigation and search of the house of the bankrupt in order to find the hidden property. One view allows the search. The other view maintains prohibition especially after the testimony of witnesses and the bankrupt's oath about his state of insolvency.<sup>287</sup>

### 2.8.2 English and Malaysian Law

Similar to Islamic law, English law authorises detention. The power of detention is vested in the court. The detention proceeds on a warrant of arrest issued by the court to authorise a constable or prescribed officer of the court<sup>288</sup> for, (a) the arrest of a debtor to whom a bankruptcy petition relates, or of an undischarged bankrupt or of a discharged bankrupt whose estate is still being administered; (b) the seizure of any books, papers, records,<sup>289</sup> money or goods in the possession of a person arrested under the warrant.<sup>290</sup>

The court power of arrest arises when it appears probable that the bankrupt has absconded, or is about to do so, in order to avoid, delay or disrupt the proceedings in bankruptcy or any examination of his affairs; and if it appears that he is about to remove his goods to delay or prevent their seizure by the official receiver

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<sup>286</sup> Ibid.

<sup>287</sup> Dasū, vol. 3, p. 280; See also 'Ilyā M., vol. 6, p. 55; Cf. *Bankruptcy Act 1967*, section 56(2) provides, "Where the court is satisfied that there is reason to believe that property of the bankrupt is concealed in a house or place not belonging to him, the court may if it thinks fit grant a search warrant to any police officer or officer of the court, who may execute it, according to its tenors."

<sup>288</sup> "Officer of the court" refers to the tipstaff and his assistants in the case of the High Court, and the Registrar and the bailiffs in the case of County Court. *Insolvency Rules 1986*, rule 7.21(2).

<sup>289</sup> "Record" includes computer records and other non-documentary records. *Insolvency Act 1986*, section 436.

<sup>290</sup> *Insolvency Act 1986*, section 364(1)(a)(b).

or trustee or that he has concealed or destroyed any of his goods or any books or papers or records or about to do so.<sup>291</sup>

The bankrupt may be arrested also if he removes any goods in his possession whose value exceeds five hundred pounds,<sup>292</sup> without the leave of the official receiver or trustee.<sup>293</sup> Failure to attend any examination order by the court can also invoke an order for arrest.<sup>294</sup>

When a person is arrested, the officer apprehending him must deliver him into the custody of the governor of the prison named in the warrant, who shall keep him in custody until such time as the court orders otherwise. The prison governor from time to time shall produce him before the court as it may direct.<sup>295</sup>

Likewise, detention is one of the legal rules relating to bankruptcy under Malaysian law. The court, on making a receiving order, may detain the debtor if he is present. If the debtor is not present, the court may order the debtor to be arrested and brought out before the court by warrant addressed to a police officer or officer of the court. The detention is made only on an application by or on behalf of a creditor.<sup>296</sup>

The debtor may be committed to a civil prison and be kept there until the close of his public examination or until otherwise ordered. The debtor may not be

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<sup>291</sup> *Insolvency Act 1986*, section 364(2)(a)(b)(c).

<sup>292</sup> The sum of £500 is prescribed by the *Insolvency Proceedings (Monetary Limits) 1986*.

<sup>293</sup> *Insolvency Act 1986*, section 364(2)(d).

<sup>294</sup> *Insolvency Act 1986*, section 364(2)(e); See also section 366.

<sup>295</sup> *Insolvency Rules 1986*, rule 7.22(a).



detained if he gives security to the satisfaction of the court that he will not leave Malaysia without a previous permission in writing from the Official Assignee or of the court.<sup>297</sup> Any breach of the conditions of such security by the debtor causes the realisation of the security and the proceeds of it shall be deemed to be the property of the debtor. When he is adjudged bankrupt, such property shall vest in the Official Assignee.<sup>298</sup>

The cost of maintaining the detained debtor shall be prepaid by the applicant from time to time accordingly to prison authority.<sup>299</sup>

In addition to the above situation, the court may, by warrant addressed to any police officer or officer of the court cause a debtor to be arrested in a variety of circumstances. These include when the court in probable cause for believing that the debtor is hiding, or has absconded or about to do so in order to avoid or delay or complicate proceedings in bankruptcy, and that also the debtor is about to remove his goods, has concealed or destroyed any of his goods or any books, documents or writings which might be of use to his creditors in the course of bankruptcy.<sup>300</sup>

The bankrupt may be arrested also if he removes any goods in his possession and whose value exceeds fifty ringgits, without the leave of the Official Assignee.<sup>301</sup>

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<sup>296</sup> *Bankruptcy Act 1967*, section 9(1).

<sup>297</sup> *Bankruptcy Act 1967*, section 9(1).

<sup>298</sup> *Bankruptcy Act 1967*, section 29(2).

<sup>299</sup> *Bankruptcy Act 1967*, section 9(4).

<sup>300</sup> *Bankruptcy Act 1967*, section 28(1)(a)(b).

<sup>301</sup> *Bankruptcy Act 1967*, section 28(1)(c).

Failure to attend any examination order by the court can also result an order for arrest.<sup>302</sup>

The arrest may be made upon reports made by the Official Assignee to the court that the assets will not be sufficient to pay dividend of fifty ringgits per centum and that the debtor has committed any punishable offence.<sup>303</sup>

## 2.9 Disabilities and Disqualification<sup>304</sup>

English law makes the bankrupt ineligible from being appointed or acting as a justice of the peace;<sup>305</sup> being a member of a regional local land drainage committee;<sup>306</sup> engaging in estate agency work of any description except as an employee of another person;<sup>307</sup> being appointed as a superintendent registrar or registrar of births and deaths or registrar of marriage.<sup>308</sup>

A bankruptcy order against a solicitor immediately suspends any practising certificate of that solicitor for the time being in force.<sup>309</sup> An accountant's membership of the Institute of Chartered Accountants ceases on bankruptcy; an accountant's membership of the Chartered Association of Certified Accountants ceases two

<sup>302</sup> *Bankruptcy Act 1967*, section 28(1)(d).

<sup>303</sup> *Bankruptcy Act 1967*, section 28(1)(e).

<sup>304</sup> There is no discussion on Islamic law under this sub-heading. This is due to the fact that a bankruptcy order, under Islamic law, only affects a bankrupt right of disposition and liability. Cf. pp. 60-63.

<sup>305</sup> *Justices of the Peace Act 1979*, section 63A (see the *Statute Law (Repeal) Act 1989*, Schedule 2).

<sup>306</sup> *Land Drainage Act 1976*, section 3(9).

<sup>307</sup> *Estate Agents Act 1979*, section 23(1).

<sup>308</sup> *Registration of Births, Deaths and Marriages Regulation 1968*, SI 1968/2049, regulation 5(a)(i).

<sup>309</sup> *Solicitor Act 1974*, section 15(1).

months after a bankruptcy order is made against him;<sup>310</sup> a member of the Royal Institute of British Architects must forthwith vacate his office if he is adjudged bankrupt;<sup>311</sup> a member of the Stock Exchange faces a resolution of the Council to determine his membership;<sup>312</sup> a member of the Royal Institution of Chartered Surveyors is liable to suspension and expulsion on bankruptcy as a disciplinary matter;<sup>313</sup> and membership of the Incorporated Society of Valuers and Auctioneers ceases on bankruptcy unless the Council of the Society decrees otherwise.<sup>314</sup> The bankrupt may not act as director of, or directly or indirectly take part in or be concerned in the promotion, formation or management of a company without leave of the court,<sup>315</sup> and by so acting without leave the bankrupt commits an offence.<sup>316</sup>

Under Malaysian law, the bankrupt shall be disqualified from being appointed or acting as a Session Court Judge or Magistrate; being nominated or elected to or holding or exercising the office of Councillor of a local authority.<sup>317</sup> If he holds any of the above positions, his office shall thereupon become vacant.<sup>318</sup> The undischarged bankrupt is also unfit and disqualified from being an advocate and solicitor.<sup>319</sup> If the bankrupt is an advocate and solicitor, he is liable to be struck off

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<sup>310</sup> *Byelaw* 33(b), 76(e).

<sup>311</sup> *Under Byelaw* 5; see *Practice Memorandum Issue* 89, October 1992.

<sup>312</sup> *Stock Exchange Rules*, rule 966.2.

<sup>313</sup> *Byelaw* 25(2).

<sup>314</sup> *Article* 23.

<sup>315</sup> *Company Directors Disqualification Act 1986*, section 11(1); For further discussion on disabilities of director of a company, see Grif, pp. 199-205.

<sup>316</sup> *Company Directors Disqualification Act 1986*, section 13.

<sup>317</sup> *Bankruptcy Act 1967*, section 36(1).

<sup>318</sup> *Bankruptcy Act 1967*, section 37.

<sup>319</sup> *Legal Profession Act 1976*, section 11(1)(b)(ii).



the roll or suspended from practice for any period.<sup>320</sup> The undischarged bankrupt is also disqualified from being a member of either House of Parliament.<sup>321</sup>

The bankrupt is neither able to take part in the management of any business partnership directly nor indirectly unless with a previous permission of the Official Assignee.<sup>322</sup> This restriction is very wide in its scope. It is certainly wide enough to prohibit the deponent from holding himself, out of his affidavit as a “general manager” when the deponent is undischarged bankrupt at the time of affirming his affidavits.<sup>323</sup>

## 2.10 Summary

There are various legal consequences on the transactions entered into by a debtor before the bankruptcy order. According to Islamic law, the debtor whose liabilities exceed his property is not allowed to enter into gratuitous transactions that endanger the right of the creditors. Likewise, English and Malaysian laws provide that there are transactions that the debtor may not be able to conclude before his bankruptcy. The court may set such transactions aside. Moreover, Malaysian law, however, considers some pre-bankruptcy order transactions void as against the Official Assignee upon a debtor’s adjudication.

Islamic law, nevertheless, allows the bankrupt to marry before the bankruptcy order even though he is insolvent. He is also permitted to dispose of his property in

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<sup>320</sup> *Legal Profession Act 1976*, sections 29(2)(b), 33(2)(f).

<sup>321</sup> *Federal Constitution*, Article 48(1)(b); *Fan Yew Teng v Setia Usaha, Dewan Rakyat* [1975] 2 MLJ 40 HC, at 41.

<sup>322</sup> *Bankruptcy Act 1967*, section 38.

<sup>323</sup> *The Topps Co Inc v Molly Jaya Sdn Bhd* [1998] 5 MLJ 74 HC.

consideration of marriage, even to his divorced wife. On the contrary, English law does not have such rule because if the marriage is allowed, it is afraid that marriage and any transaction in consideration of marriage will fall under the transaction at undervalue that the court has power to set aside. But Malaysian law seems to allow a the debtor to marry before his adjudication as a settlement of property in consideration of marriage is unaffected by a bankruptcy order.

All three legal systems consider payment of debt to some creditors before the bankruptcy order is not desirable. Islamic law, for example, disallows such transaction from taking place; whereas English law permits the trustee to apply to the court for a relief to restore the position that such payment was never been made: and Malaysian law regards it void against the Official Assignee.

In addition to the above rules, the court under the English legal jurisdiction may set aside a credit involving grossly exorbitant payments. Such rule appears not to have been discussed at all under Islamic Bankruptcy Law. This is due to the fact that the debtor is only liable to pay the amount that he owes. No interest is required as interest is considered as part of usury (*ribā*) that Islamic law prohibits.<sup>324</sup>

The court may, under English law, set aside a transaction to defraud creditors. On the contrary, Islamic Bankruptcy Law does not explain it. This does not mean that Islamic law accepts this type of transaction. Such transaction is disallowed under

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<sup>324</sup> See *al-Qur'ān*, *sūrat al-Baqarah*, 2:275-276 and *sūrat Āl 'Imrān*, 3:130; Bukh, vol. 3, pp. 11-12; Dāwu, vol. 3, p. 244(no. 3333).

Islamic law due to the fact that fraud is prohibited as the Prophet (S.A.W) disapproves of committing a fraudulent act that is not his practice.<sup>325</sup>

As a result, the analysis demonstrates that these two legal systems prohibit the transaction entered into by a bankrupt to defraud the creditors.

Islamic, English and Malaysian laws concur that certain incomplete transactions are void when the court makes a bankruptcy order. Gifts, endowments, loans and mortgages are void under Islamic law if no possession takes place. Compare to English and Malaysian laws that provide incomplete attachment, execution and assignment of book debts are void.

Bankruptcy order causes any disposition of property by the bankrupt to be void despite the valuable consideration according to Islamic, English and Malaysian laws. This is so, for Islamic law considers the bankrupt's property subject to the creditor's rights. Under English and Malaysian laws, the authority over bankrupt's property is vested in the trustee and Official Assignee respectively. The bankrupt, however, may enter into a transaction that involves liability such as contract for delivery with prepayment and the like as Islamic law provides. The bankrupt may also exercise his personal rights such as the right of marriage, divorce and so on under Islamic law.

Another legal consequence of bankruptcy order is that the creditor may claim his debt from the guarantor. This rule is acceptable in Islamic English and Malaysian

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<sup>325</sup> See Bukh, vol. 4, p. 24.



laws. These three legal systems also allow the creditor to become one of the bankrupt guarantor's creditors.

Moreover, Islamic, English and Malaysian laws recognise that the creditors of deferred payment debts may prove their debts and share the bankrupt's assets as such debts become due on the bankruptcy order.

Islamic law permits the creditor to take action against the bankrupt. This permission is not subject to the leave of court. This is contrasted to that of the English and Malaysian laws because, for the creditor to take such action under English law, a leave of the court must be given; whereas Malaysian law requires the creditor to get a sanction for the Official Assignee.

As regard to action of the bankrupt, Islamic law permits him to have legal action in the law of retaliation. Neither English law nor Malaysian law allows such action because it is under the jurisdiction of the Public Prosecutor to initiate the proceedings. Moreover, murder, manslaughter and the like are dealt with in specific statutory legislation.

Islamic law also permits the bankrupt to answer and defend any legal action against him. This is contrary to the English and Malaysian laws that confer such rights on the trustee and Official Assignee accordingly.

According to Islamic law, during the time of bankruptcy order, the landlord cannot distrain goods of the bankrupt in order to pay a due rent. This is due to the

fact that any unpaid debt is considered a provable debt in a bankruptcy. Thus, the landlord gets his unpaid rent on distribution. In contrast, according to English and Malaysian laws, the landlord may distrain goods of the bankrupt.

Islamic, English and Malaysian laws allow a bankrupt to take action for an injury caused to his person. For other actions, Malaysian law requires a bankrupt to have a sanction from the Official Assignee.

In addition to the above mentioned rules and comparisons, Islamic law permits creditors to prevent the debtor from travelling and leaving his home town unless the latter appoints an agent to pay his debt in his absence or a guarantor to take care of his debt or the debtor provides security. The prevention of travelling may take place before the bankruptcy order. English law, however, permits a bankrupt to travel as a guarantee to his right of freedom of movement. On the contrary, there is a restriction on a bankrupt to travel in Malaysia. Malaysian law provides that the prevention may only be exercised by the Official Assignee or the court. It takes place after the receiving order.

Another legal consequence of the bankruptcy order is that the bankrupt may be detained. Islamic, English and Malaysian laws recognise this rule. Moreover, they allow the release of the bankrupt from detention if he provides a security for such a release.

The bankrupt is disqualified to hold certain offices upon his bankruptcy under English and Malaysian laws. But there is no such effect under Islamic law. Hence, the bankrupt is allowed to continue his profession.



## CHAPTER THREE

### RIGHT OF REPOSSESSION BY UNPAID CREDITOR

Repossession connotes “taking back goods or property from a buyer who has failed to keep up payments on them”.<sup>1</sup> It is one of the legal consequences of a bankruptcy order. The repossession is exercised after the owner of the property has decided not to share the bankrupt’s assets as an ordinary creditor for unpaid debt. Hence, this Chapter deals, first of all, with the concept of repossession according to Islamic, English and Malaysian laws. Then, the application of the repossession right under these three legal systems is explained. The discussion includes how the right is exercised and what are the required conditions for repossession.

#### 3.1 Concept of Right of Repossession

Right of repossession is given to the owner of property who is one of the creditors of the bankrupt. The exercise of right may also be extended to a person who is in the owner’s position either through inheritance, gift,<sup>2</sup> donation, transfer of debt<sup>3</sup> or marriage.<sup>4</sup>

##### 3.1.1 Islamic Law

There are different views amongst Muslim jurists about whether or not the owner who finds his property in the bankrupt’s estate may repossess it. According to

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<sup>1</sup> *Enca*, p. 1593.

<sup>2</sup> Dard K., vol. 3, p. 282.

<sup>3</sup> ‘Ilyā M., vol. 6, p. 60; Zarq Z., vol. 5, p. 282; Khur, vol. 5, p. 281.

<sup>4</sup> Mawā, vol. 5, p. 50.

the majority of them, such as the Mālikis,<sup>5</sup> Shāfi'is<sup>6</sup> and Ḥanbalis,<sup>7</sup> the owner is allowed to repossess his property which remains intact. This is based on *Ḥadīth* that is narrated by Abū Hurayrah, "If a man finds his actual property with a bankrupt, he has more right to repossess them than anyone else."<sup>8</sup>

In commenting on the *Ḥadīth*, al-Ṣan'ānī says that when the seller finds his property in possession of the bankrupt purchaser, he has more right to it than other creditors. He may repossess it even though there are other creditors.<sup>9</sup> As a result, he becomes secured and may repossess his property in preference to the other creditors.

Another view, according to Ḥanafis, states that the owner is in the same position as other creditors, that is, he may not repossess his property.<sup>10</sup> The example given by them is that the contract of sale as Muḥammad al-Shaybanī says that Imām Abū Ḥanīfah is of the opinion, "If the seller found his property in the estate of the bankrupt that the bankrupt has received it, the seller has no privileged right on it. This is so, for the purchaser has possessed it by purchased. However, the property

<sup>5</sup> Anas M., p. 472; Anas K., vol. 4, p. 122; Mūsā, p. 187; Nama, p. 413; Ilyā M, vol. 6, p. 60.

<sup>6</sup> Shāf U., vol. 3, p. 229; Ghaz W., p. 140; Nawa R., vol. 4, p. 147; Anṣā T., p. 85.

<sup>7</sup> Maqd K., vol. 3, p. 174; Taql, p. 395; Mufl, p. 66; Mard, vol. 5, p. 286; This is also the view of 'Urwah, al-Auzā'ī, al-Anbarī, Ishāq, Abū Thawr and Ibn Mundhir. See Qudā, vol. 4, p. 453; Maqd S., vol. 4, p. 503; See also Bagha, vol. 4, p. 340; Shad, vol. 2, p. 144; And is the view of 'Aṭā', Abī Rabāh, Ṭāwas, al-Sha'bī, Aḥmad, 'Ubayd Allah ibn al-Ḥasan, Dāwud. See 'Aynī U., vol. 12, p. 238; Ābād, vol. 9, p. 342.

<sup>8</sup> Bukh, vol. 3, p. 85; Musl, vol. 3, p. 1193(no. 22); Shaw, vol. 5, p. 338; See also Dāwu, vol. 3, p. 286(no. 3519); Anas M., p. 472(no. 1371); Bayh, vol. 6, p. 45; al-Khaṭṭābī says that the *Ḥadīth* is accepted by the majority of the jurists. Ābād, vol. 9, p. 342.

<sup>9</sup> Ṣan'ā, vol. 3, p. 54.

<sup>10</sup> Humā, vol. 9, pp. 278-279; 'Aynī S., vol. 1, p. 225; 'Ābid, vol. 6, p. 152; Su'ūd, vol. 3, pp. 297-298; Afen, vol. 2, p. 443; *Fatā*, vol. 5, p. 6; This is also the view of al-Ḥasan, Ibrāhīm al-Nakha'ī and Ibn Shubramah, Qudā, vol. 4, p. 453; Maqd S., vol. 4, p. 503; Ābād, vol. 9, p. 342; See also Bagha, vol. 4, p. 340; Shad, vol. 2, p. 144.

does not belong to neither the bankrupt nor the creditors if they are not possessed by the bankrupt, unless the price of the property is paid by the purchaser."<sup>11</sup>

This view is further explained by al-Marghīnānī, "If the debtor becomes bankrupt having at the same time in his hands the property purchased from a particular person, this person is in equal footing with other creditors. This is because bankruptcy causes an inability to make specific delivery. He is not under any obligation to the contract and does not have the right of repudiation. But he is obliged to pay the debt."<sup>12</sup>

They contend that the seller's right of repossession is his until he receives payment. Thus, he may not repossess it due to bankruptcy. The rule is similar to the rule regarding mortgage. If the owner hands over the mortgaged property to the mortgagee, the former does not have any right to take it back unless the payment of debt is made.<sup>13</sup> Their argument is also based on the rule of the acquired right (*al-istiḥqāq*) [such as right of inheritance and pre-emption] in which everyone is treated equally.<sup>14</sup>

They have argued also that the *Ḥadīth* narrated by Abū Hurayrah is not a reliable *Ḥadīth*<sup>15</sup> because the narrator is doubtful whether Khaladah or Ibn Khaladah.

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<sup>11</sup> Shay K., p. 714.

<sup>12</sup> Marg, vol. 3, p. 287.

<sup>13</sup> Karm, vol. 8, p. 203; al-Qarāfī says that right in the mortgage relates to the property and right of the creditor relates only to the liability. Thus, there is difference between mortgage and bankruptcy. Qarā, vol. 8, p. 175.

<sup>14</sup> Qudā, vol. 4, p. 453; Maqd S., vol. 4, p. 503; Ābād, vol. 9, p. 342; See also Bagha, vol. 4, p. 340; Shad, vol. 2, p. 144.

<sup>15</sup> "We went to see Abū Hurayrah asking him about one of our man who was bankrupt. Abū Hurayrah says: "This is what had been judged by the Prophet (S.A.W) that if a man dies or



Al-Māwardī contends that the above argument is defective because of doubt on the narrator is not a condition to reject the *Ḥadīth*. Secondly, doubt on the respected persons is not a condition to reject the *Ḥadīth*, if both narrators are trustworthy (*thiqah*) then, the *Ḥadīth* shall be accepted. Furthermore, there is a contextual acceptable similar *Ḥadīth* reported by another narrator.<sup>16</sup> The Ḥanafis also say that the *Ḥadīth* was narrated by Abū Hurayrah alone and therefore becomes a solitary (*āḥād*).<sup>17</sup> The answer, according to al-Māwardī, is that there is another *Ḥadīth* reported to Ibn ‘Umar to the same effect and all of us have accepted some *Aḥādīth* that have been reported by Abū Hurayrah<sup>18</sup> such as, “The Prophet (S.A.W) forbade that a woman should be married to a man along with her paternal aunt (‘*ammah*) or maternal aunt (*khālah*).”<sup>19</sup> Thus, the doubt on the *Aḥādīth* reported by Abū Hurayrah should not arise at all.

The first view is preferred because the *Ḥadīth* used to support the argument is authentic for the issue. Thus, the argument that the repossession rule is contrary to the basic principle of Islamic law could not be accepted.<sup>20</sup> Besides, there is a verdict by ‘Uthmān ibn ‘Affān, the third caliph (644-656) that supports the above conclusion. Sa‘īd ibn al-Musayyab reports that ‘Uthmān gave a verdict that if a creditor took something from his debtor before the latter was declared bankrupt, it would belong to him (i.e. the other creditors would have no right to take it); if the

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becomes bankrupt, the owner of the property has a prior right over others if he could find his property.”, Shāf M., p. 329; Bagha, vol. 4, p. 341(no. 2127).

<sup>16</sup> Māwa, vol. 7, p. 388.

<sup>17</sup> See Ḥajr, vol. 5, p. 49.

<sup>18</sup> Māwa, vol. 7, p. 389.

<sup>19</sup> Bukh, vol. 6, p. 128; Musl, vol. 2, pp. 709-710(nos. 3268-3276); Bagha, vol. 5, p. 53(no. 2270); Anas M., p. 361(no. 1120).

creditor recognised his things he has more right to repossess them.<sup>21</sup> Moreover, according to al-Khaṭṭābī, similar verdict was passed by 'Alī, the fourth caliph (656-661) and no Companions of the Prophet (S.A.W) were against the decision.<sup>22</sup>

Muslim jurists agree that the right of repossession applies to a sale transaction. This is based on the *Ḥadīth*, "Whenever a man sells wares and he recognises his wares intact with the man who is declared bankrupt and the seller has not taken any of the price, he is more entitled to it. And if he received the payment for that then he is the same as other creditors with respect of it."<sup>23</sup> Thus, the seller may exercise his repossession right.

The right of repossession is also applied to a contract of lease. This is because usufruct (*al-manfa'ah*) is considered similar to the subject matter of sale transaction.<sup>24</sup> Therefore, a landlord may exercise his right of repossession.

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<sup>20</sup> Shaw, vol. 5, p. 339; al-Nawawī says that the interpretations by Abū Ḥanīfah are weak and rejected. Nawa S., vol. 10, p. 222; Ibn Ḥajr, citing view of al-Qurṭūbī, says that the interpretation of some of the Ḥanafīs do not have any basis. Ḥajr, vol. 5, p. 49.

<sup>21</sup> Bukh, vol. 3, pp. 85-86; Bayh, vol. 6, p. 46; Ibn Ḥajr, quoting opinion of Ibn Munzir, says that there is no dispute on the 'Uthmān's decision amongst the Companions. Ḥajr, vol. 5, p. 49; See also Shaw, vol. 5, p. 339.

<sup>22</sup> Ābād, , vol. 9, p. 342; See also Shad, vol. 2, p. 144; Mubā, vol. 4, p. 397.

<sup>23</sup> Dāwu, vol. 3, pp. 286-287(no. 3520); Anas M., p. 472(no. 1370); Ibn 'Abd al-Barr says that this *Ḥadīth* is authentic (*ṣaḥīḥ*) according to the narration of al-Ḥijāziyyin and al-Baṣriyyin and agreed upon by majority of jurists of al-Madīnah, al-Ḥijāz, al-Baṣrah and al-Shām even though some of them differ on branches rules (*furū'*). The *Ḥadīth*, however, is rejected by al-Kufiyyin, Abū Ḥanīfah and his disciples who claim that the *Ḥadīth* is part of *Aḥādīth* that has been rejected and therefore is not considered as an authentic one. Thus, they argue that the property is the property of the purchaser and the price is under his liability and the creditors have the right over them similar to other property. Ibn 'Abd al-Barr further says that if the rejection of this well-known *Ḥadīth*, that is acceptable by the jurists of al-Madīnah and others, is allowed because of suspicion (*al-wahm*) and mistake (*al-ghalat*), it is afraid that the *Ḥadīth* becomes decreased and reduced. It is, therefore, not appropriate to reject this *Ḥadīth*. Zarq S., vol. 3, p. 418.



The owner in contract for delivery with prepayment may also exercise repossession. This is because, according to Qalyūbī, liability is the same as property.<sup>25</sup> Moreover, a capital provider may also repossess his capital in dormant partnership contract (*al-muḍārabah*).<sup>26</sup>

The repossession applies also to loan transaction according to the Shāfi'is,<sup>27</sup> Ḥanbalis<sup>28</sup> and Imām Mālik and most of his followers.<sup>29</sup> Hence, the lender may repossess his property upon the bankruptcy of the borrower. This right is applicable notwithstanding whether the borrower owns it by taking possession (*bi al-qabḍ*) or disposition (*bi al-taṣarruf*). This view is based on the *Ḥadīth*, "If a man finds his very things with a bankrupt, he has more right to repossess them than anyone else."<sup>30</sup> The *Ḥadīth* gives a general rule and does not specify whether it is for sale or loan.<sup>31</sup> They also argue that the right of repossession for loan is better than other transactions.<sup>32</sup>

On the contrary, some of the Mālikis including Ibn Mawāz, Ibn 'Arfaḥ and Ibn Rushd say otherwise. Ibn al-Mawāz argues that the above *Ḥadīth* has been specified by another *Ḥadīth*, "Whenever a man sells wares and then the purchaser

<sup>24</sup> Nawa R., vol. 4, pp. 151-152; Nawa M., vol. 14, p. 105; Maḥa, vol. 2, pp. 293-294; Ḥajr, vol. 5, p. 50; Raml N., vol. 4, p. 338; Anṣā A., vol. 2, p. 196.

<sup>25</sup> Qaly, vol. 2, p. 293.

<sup>26</sup> *Al-muḍārabah* is synonymous with other Arabic terms which are used to designate this contract: *al-qirāḍ* and *al-muqāraḍah*. *Al-muḍārabah* denotes a fiducial contract or an arrangement whereby a capital provider (*rabb al-māl*) entrusts capital or merchandise to an agent-manager (*'āmil/muḍārib*) as part of an investment to be carried out by the agent – manager so as the profits are shared between them based on their agreed terms. See Hass, pp. 86-87.

<sup>27</sup> Nawa M., vol. 14, p. 109; Nawa R., vol. 4, p. 154.

<sup>28</sup> Qudā, vol. 4, p. 457; Maqd S., vol. 4, p. 507.

<sup>29</sup> 'Ilyā M., vol. 6, pp. 66-67.

<sup>30</sup> Dāwu, vol. 3, p. 286(no. 3519); Anas M., p. 472(no. 1371); Bayh, vol. 6, p. 45.

<sup>31</sup> 'Ilyā M., vol. 6, pp. 66-67; According to al-Bukhārī, the right of repossession is also applicable to a case of loan and safekeeping (*al-waḍī'ah*), Bukh, vol. 3, p. 85.

<sup>32</sup> Shaw, vol. 5, p. 339.



becomes bankrupt and the seller has not taken any of the price and he finds some of his property intact with the purchaser, he has more entitled to it than anyone else. If the purchaser dies, then the seller is the same as other creditors with respect to it.”<sup>33</sup> That explains that the right of repossession is only applicable in a contract of sale.<sup>34</sup> Al-Shawkanī considers this view belongs to the majority jurists (*jumhūr*).<sup>35</sup>

This right, however, is not applicable in case of annulment of marriage (*al-faskh*), divorce through compensation to the husband<sup>36</sup> and reconciliation (*al-ṣulh*) due to inability of getting the consideration.<sup>37</sup> This right is also inapplicable to gift, donation and present (*hadiyyah*).<sup>38</sup>

### 3.1.2 English and Malaysian Laws

Contrary to Islamic law, English law does not recognise such right of automatic repossession by the unpaid creditor particularly upon a debtor bankruptcy. In a contract of sale for example, a general rule is that title of goods passes on delivery as the law states that where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both, is postponed.<sup>39</sup> Thus, goods supplied to a buyer normally become his property as soon as he has obtained possession of them and before he has paid for

<sup>33</sup> Dāwu, vol. 3, pp. 286-287(no. 3520); Anas M., p. 472(no. 1370).

<sup>34</sup> ‘Ilyā M., vol. 6, pp. 66-67; Khur, vol. 5, p. 283.

<sup>35</sup> Shaw, vol. 5, p. 339.

<sup>36</sup> al-Qarāfī says that divorce through compensation to the husband is not subject to repossession because this contract could not repudiate like the contract of sale. Qarā, vol. 8, p. 174.

<sup>37</sup> Ghaz W., p. 140; Raml N., vol. 4, p. 337; Shar M., vol. 3, p. 118; See also Anṣā A., vol. 2, p. 196; See also Zarq Z., vol. 5, pp. 282-283.

<sup>38</sup> Shar, vol. 2, p. 171.

them. If the buyer becomes bankrupt the goods will be part of his assets. They will be sold and the proceeds divided among his creditors.<sup>40</sup> As a result, under English law where goods of any kind are sold in circumstances where all or part of the purchase price is to be paid at a later date the seller assumes the role of creditors in relation to the buyer until the balance of the price is paid. If in the meantime the buyer becomes bankrupt there is generally little prospect that the seller, along with other non-preferential creditors, will receive payment in full. Conversely, the buyer may either have dissipated the value represented by the goods supplied if still extant within the bankrupt's estate, it will in practice be transmitted to the buyer's secured and preferential creditors.<sup>41</sup>

In order to reserve the ownership in goods to him until the price is paid in full, notwithstanding that the goods are delivered to the buyer, the seller has to incorporate in the contract of sale "reservation of title clause."<sup>42</sup> The purpose of such clause is to confer upon the seller some degree of security against the bankruptcy of the buyer. *Prima facie* at least, if the buyer becomes bankrupt before the price is fully paid, the seller will be able to reclaim possession of the goods.<sup>43</sup> Such provision aiming to retain title must provide that legal title to the goods is to be retained. For a purported retention of equitable title will be construed as operating in two stages: a

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<sup>39</sup> *Sale of Goods Act 1979*, sections 18.

<sup>40</sup> *Cork*, p. 359, para. 1588.

<sup>41</sup> *Flet*, p.216.

<sup>42</sup> A reservation of title clause (sometimes called a retention of title clause) is a clause in an agreement whereby the party who is transferring property under that agreement seeks to reserve to itself the ownership of that property until certain specified conditions have been met. *McCo*, p. 1.

<sup>43</sup> *Atiy*, p. 455; *McCo*, pp. 2-3; Goods can be prevented from passing into the ownership of the debtor also by way of leasing and by hire purchase. *Cork*, p. 360, para 1596; *Dobs*, p. 361; It allows the owner to seize the property should the debtor fail in one of his primary obligation. *Davi U.*, p. 102; See also *Palm*, p. 175.

transfer of title from the seller to the buyer followed by the creation by the buyer of an equitable interest vested in the seller.<sup>44</sup>

The validity of such clause is based on the provision in the *Sale of Goods Act 1979* as section 17 provides that where there is a contract for sale of specific goods or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.<sup>45</sup> Thus, a straightforward reservation of title is considered as a legitimate application of the provision.<sup>46</sup>

Other legislative basis for reservation of title clauses is section 19 of the Act provides, "Where there is a contract for the sale of specific goods<sup>47</sup> or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of<sup>48</sup> the goods until certain conditions are fulfilled". In such a case, notwithstanding the delivery of the goods to the buyer, the property in goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.<sup>49</sup>

Moreover, in view of the abolition of the doctrine of reputed ownership from the law of bankruptcy, and in the absence thus far of any statutory requirement of registration of reservation of title clauses as a precondition to their validity in the

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<sup>44</sup> Berr, p. 583.

<sup>45</sup> The section goes on to provide that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

<sup>46</sup> See Palm, pp. 175-176.

<sup>47</sup> Specific goods means goods which are identified and agreed upon at the time a contract of sale is made. *Sale of Goods Act 1979*, section 61(1).

<sup>48</sup> "Right of disposal" clearly encompasses a situation where ownership is retained as well as the reservation of power to re-sell the goods. McCo.



event of bankruptcy, it would appear to be possible for such clause to play a more prominent role than hitherto in the law of bankruptcy. It should be possible for the seller not only to protect himself by means of a clause reserving the legal title to the goods, but also to provide that his interest shall attach to the proceeds of any sub-sales of the goods supplied, so that if identifiable and kept separately from other monies they should admit of tracing by the unpaid supplier.<sup>50</sup> By agreeing this, the parties to the contract do no more than displace the general rule that title passes on delivery.<sup>51</sup> In *Clough Mill Ltd. v. Martin*<sup>52</sup> the Court of Appeal upheld a clause in this form as a retention of title by the seller as opposed to a transfer of title followed by regrant by the buyer for the purpose of securing the price.

As a seller of goods is able to protect himself by adopting reservation of title clauses, similar protection is not available to the supplier of consumables or of services. Fuel supplied to heat furnaces, or fodder supplied for livestock, diapers on consumption and paint applied to the fabric of a factory becomes attached to the realty; the supplier on credit is necessarily left with unsecured claim in insolvency of the customer. The canteen operator, the contractor who cleans the factory, the pension consultant, all extend credit with no means of protection similar to that of the supplier of goods. It is their concern that the estate of an insolvent customer is

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<sup>49</sup> Ibid., p. 1.

<sup>50</sup> Flec, p. 217; Alternatively, if the goods have been sold, the original seller's claim lies against the proceeds of sale. Where the goods have been incorporated into other products, or formed part of the raw material for a process of manufacture, the seller may have an entitlement to the finished product, either alone or in common with others. McCo, p. 3.

<sup>51</sup> Berr, p. 582.

<sup>52</sup> [1985] 1 WLR 111 CA.

maximised, since it is only from a dividend out of the estate that any recovery in the event of the customer's insolvency is possible.<sup>53</sup>

Similar to the contract of sale, a repossession right is also possible to a landlord upon the bankruptcy of the tenant. This right is known as a forfeiture right. The landlord is not entitled to forfeit the lease merely because the tenant becomes bankrupt. The lease must contain an express provision [known as forfeiture clause] which entitles him to do so.<sup>54</sup> In broad terms, a right of forfeiture may be defined as "a right to determine a lease by a landlord if (a) when exercised, it operates to bring the lease to an end earlier than it would "naturally" terminate; and (b) it is exercisable in the event of some default by the tenant".<sup>55</sup> The reference to the natural termination of a lease means, in the case of a fixed term, the contractual expiry date and in the case of a periodic tenancy, the date on which it could be terminated by notice to quit.<sup>56</sup>

The repossession right may also be possible in a hire-purchase contract. This is subject to the agreement between the seller and purchaser. Such agreement shall automatically come to an end on the hirer's bankruptcy. Hence, the seller is entitled to terminate the contract and retake possession of the subject matter of the contract.<sup>57</sup>

A depositor who paid money to a banker, however, is not able to repossess his money upon the banker becomes bankrupt. This is because the banker-customer

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<sup>53</sup> *Cork*, p. 365, para 1619.

<sup>54</sup> *Wood*, p. 16/48, para 16.101.

<sup>55</sup> *Clays Lane Co-operative v Patrick* (1984) 49 P & C R, per Fox LJ.

<sup>56</sup> *Wood*, p. 17/22, para 17.057.

<sup>57</sup> See Pawl, p. 17.

relationship is that of debtor and creditor. The money paid to the banker becomes the banker's money.<sup>58</sup>

Similar to English law, Malaysian law also allows the seller of goods to incorporate a reservation of title clause as the *Sale of Goods Act 1957* allows the transfer of goods at such time as the parties to the contract intend it to be transferred.<sup>59</sup> Moreover, the Act also permits that the seller by term of the contract reserves the right of disposal of the goods until certain conditions are fulfilled.<sup>60</sup> This seems to suggest that principles relating to reservation of title clause apply in England are applicable also in Malaysia.

However, there is a difficulty for the seller to claim his right under the reservation of title clause due to the existence of the principle of reputed ownership property that is the property is not owned by the bankrupt but happened to be in his possession at the commencement of bankruptcy.<sup>61</sup> The purpose of reputed ownership principle was to preclude a trader from obtaining false credit by the apparent and ostensible ownership of the property in the form of trade goods which in reality belonged to other people.<sup>62</sup> Such property would pass to the Official Assignee. The effect of this principle prevents the suppliers of goods from relying on clauses the object which is to prevent title passing.<sup>63</sup> Furthermore, the court has power to order such goods to be held for the benefit of his creditors.<sup>64</sup>

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<sup>58</sup> *Foley v Hill* (1871) 2 HL Cas 28.

<sup>59</sup> *Sale of Goods Act 1957*, section 19.

<sup>60</sup> *Sale of Goods Act 1957*, section 25.

<sup>61</sup> *Bankruptcy Act 1967*, section 48(b)(iii).

<sup>62</sup> See McCo, p. 152.

<sup>63</sup> See Berr, p. 581.

<sup>64</sup> McCo, p. 151; McLo, p. 83.



Such ownership could be rebutted by proving the existence of a notorious custom that goods of the particular description are in the possession of persons who are not the owner.<sup>65</sup> It is also suggested that separate storage and clear labelling would negate the reputation of ownership. But nowadays a creditor is more likely to be misled by the accounts of the business, rather than by the appearance of the goods themselves. In such a case, separate storage and labelling should not protect the true owner.<sup>66</sup> To avoid the goods from falling into the buyer's reputed ownership, the seller should require the buyer to indorse a memorandum to the effect that goods of stated description are supplied subject to the reservation of title.<sup>67</sup>

The repossession right may also be possible in a hire-purchase contract. This is subject to the agreement agreed between the seller and purchaser such as they agree that the agreement shall automatically come to an end on the hirer's bankruptcy, the seller is entitled to terminate the contract and retake possession of the subject matter of the contract. However, the seller under the agreement may be deprived of his title if at the commencement of the bankruptcy, the goods in possession are subject to the reputed ownership principle whereby the Official Assignee is entitled to claim.

### 3.2 Application of Right of Repossession

There are procedures to follow in order to exercise a right of repossession. Certain conditions have to be fulfilled before repossession can be carried out.

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<sup>65</sup> See *Cork*, p. 249, para 1087.

<sup>66</sup> *Allc*, p. 943.

<sup>67</sup> *Ibid*, p. 944.

### 3.2.1 Islamic Law

Upon the bankruptcy of the debtor, Islamic law confers two alternatives to the unpaid creditor, i.e. either to share the bankrupt's assets for unpaid price based on rule of distribution [proportionate distribution] or to exercise his right of repossession by repudiating the contract.<sup>68</sup> Imām al-Shāfi'ī describes that the exercise of right by the owner of the property is similar to right of pre-emption (*al-shuf'ah*). This is because the owner, if he likes, he may repossess it. If he does not wish so, he may leave it.<sup>69</sup>

When the owner decides to repossess his property, he should exercise it instantaneously (*al-fawr*) according to the preferred view of the Shāfi'is<sup>70</sup> and one view of the Ḥanbalis.<sup>71</sup> This is similar to the exercise of option of defect (*khiyār al-'ayb*).<sup>72</sup> If he defers, this could cause hardship to the creditors, for they should receive their rights as soon as possible.<sup>73</sup> The owner may defer his repossession (*al-tarāqī*), however, according to the other view of the Shāfi'is<sup>74</sup> and Ḥanbalis.<sup>75</sup> This is

<sup>68</sup> Jall, vol. 2, p. 249; Shād, vol. 2, pp. 288-289; Qayr, p. 456; Şāwī, vol. 2, p. 135; Qarā, vol. 8, p. 172; Maqd K., vol. 2, p. 174; Fayr, pp. 71-72; Cf. 'Umay, vol. 2, p. 293, states that according to Ibn Ḥarbawīyyah, there is no repudiation of sale [i.e. repossession's right] but the payment of price should take preference similar to mortgage; Al-Māwardī says that the view of Ibn Ḥarbawīyyah is wronged and contrary to a consensus. Māwa, vol. 8, pp. 391-392; al-Sharqāwī says that the owner could repudiate the contract and then repossess his property. Shar, vol. 2, p. 170; See also Anṣā A., vol. 2, p. 194; Nawa S., vol. 10, p. 222.

<sup>69</sup> Shāf U., vol. 3, p. 229; al-Bahūtī says that whether the property has equal value or not [increase or decrease]. Bahū, vol. 3, p. 425.

<sup>70</sup> Nawa Ṭ, p. 51; Nawa R., vol. 4, p. 147; Māwa, vol. 7, p. 392; Ghaz S., vol. 4, p. 25; Rāfi', vol. 5, p. 30; Shar, vol. 2, p. 170.

<sup>71</sup> Qudā, vol. 4, p. 454; Bahū, vol. 3, p. 429; Maqd S., vol. 4, p. 504; Maqd K., vol. 2, p. 174.

<sup>72</sup> Ghaz S., vol. 4, p. 25; Raml N., vol. 4, p. 336; Maḥa, vol. 2, p. 293; al-Shabrāmilsī says that the exception to this is in the case loan whereby the lender could repossess it on the deferment basis if the property is still owned by the bankrupt. Shab, vol. 4, p. 336; See also Kūha, vol. 2, p. 176; Shar M., vol. 3, p. 117; Anṣā A., vol. 2, p. 191; Qasṭ, vol. 4, p. 224.

<sup>73</sup> Maqd S., vol. 4, p. 504; Maqd K., vol. 2, p. 174.

<sup>74</sup> Nawa R., vol. 4, p. 147.



similar to the exercise of option of return of gift (*khiyār al-rujū' fī al-hibah*) from the father<sup>76</sup> where the father is allowed to delay to exercise his right of option. Furthermore, his right of repossession exists as far as he has a right to demand the payment. This is similar to the right of claiming divorce in case of an oath on the part of the husband that he will abstain from sexual intercourse (*al-ilā'*).<sup>77</sup> However, one view of the Shāfi'is only allows the deferment for three days.<sup>78</sup>

It seems apparent that the view to permit deferment is preferred. This is in order to allow the owner to consult the other party whether to repossess his property. His deferment, however, should be restricted to a reasonable time until there is no hardship to the creditors.

The owner should prove by producing evidence<sup>79</sup> or admission of the bankrupt before the bankruptcy order that the property belongs to him.<sup>80</sup> However, there are views about the effect of admission after the bankruptcy order. One view says that the admission is acceptable with or without the oath by the owner. The second view states that the admission is not acceptable unless the creditors are taking oath, stating that the property is not belonged to the bankrupt. The third view observes that the admission is acceptable if there is evidence.<sup>81</sup>

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<sup>75</sup> Qudā, vol. 4, p. 454; Bahū, vol. 3, p. 4

<sup>76</sup> Rāfi', vol. 5, p. 20; Maḥa, vol. 2, p. 293; Shar M., vol. 3, p. 117.

<sup>77</sup> Ghaz S., vol. 4, p. 25.

<sup>78</sup> Maḥa, vol. 2, p. 293; See also Nawa R., vol. 4, p. 147.

<sup>79</sup> It is a proof with evidence. 'Adaw, vol. 2, p. 289; Nafr, vol. 2, p. 323.

<sup>80</sup> Dard Ṣ., vol. 3, p. 373; Zarq Z., vol. 5, p. 282; Cf. Maqd S., al-Maqdisī, vol. 4, p. 534, states that the right of repossession could be exercised without knowing the subject matter even though when the right of repossession is exercised the property has changed its original state but when it repossesses its original state is unchanged.

<sup>81</sup> Dasū, vol. 3, p. 282; 'Ilyā M., vol. 6, p. 60; Banā, vol. 5, p. 282; al-Ṣāwī, however, says that there are four possibilities, i.e. (a) admission is acceptable with the oath taken by the owner. (b) admission is accepted without the oath. (c) admission is not accepted at all and



The right is exercised without waiting to the judge's decision according to the Ḥanbalis,<sup>82</sup> Mālikis<sup>83</sup> and the most authentic view of the Shāfi'is<sup>84</sup> since this right is established by the *Ḥadīth*. Ibn Ḥajr considers this the most authentic view.<sup>85</sup> Imām Aḥmad emphasises that even though with the judge's decision to put the seller in the same position with other creditors, the decision would be annulled if the seller chooses to exercise his right of repossession.<sup>86</sup> According to other view of the Shāfi'is, the judge's decision is necessary.<sup>87</sup>

The repossession may be exercised either by a clear word or action similar to repudiation in case of option of session (*khiyār al-majlis*) and option in three days (*khiyār al-sharṭ*) according to one view of the Shāfi'is. However, according to other view of the Shāfi'is, it may be exercised only by a clear word. This is because

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the creditors take an oath saying that they do not know that the property belong to the other. (d) admission is accepted if there is evidence. Ṣāwī, vol. 2, p. 135; See also Qarā, vol. 8, pp. 176-177.

<sup>82</sup> Qudā, vol. 4, p. 454; Maqd S., vol. 4, p. 504; Najd, p. 359; Bahū, vol. 3, p. 429; Maqd K., vol. 2, p. 174.

<sup>83</sup> Ṣāwī, vol. 2, p. 135, states that there is no need of the decision particularly there is no dispute about this right amongst the creditors.; al-Ḥaṭṭāb says that the decision is not necessary if the creditors have handed over the property to the bankrupt. However, if not the decision is necessary. Ḥaṭṭ, vol. 5, p. 50.

<sup>84</sup> Nawa R., vol. 4, p. 148; Nawa M., vol. 14, p. 53; Shar M., vol. 3, p. 117; Kūha, vol. 2, p. 175; Shab, vol. 4, p. 337; Anṣā A., vol. 2, p. 195; See also Gham, p. 226.

<sup>85</sup> Ḥajr, vol. 5, p. 50; See also Shaw, vol. 5, p. 340.

<sup>86</sup> Bahū, vol. 3, p. 429; Maqd S., vol. 4, p. 505; Maqd K., vol. 2, pp. 174-175; al-Sharbīnī says that the right of repossession is not affected if the judge decides to prevent the seller from exercising his right. Shar M., vol. 3, p. 117; Cf. Anṣā A., vol. 2, pp. 194-195. states that if the judge decides to prevent the repudiation and repossession by the owner, the judgement could be annulled because the judgement is part of *ijtihādiyyah* matters. This is contrary to the statement that repudiation is not subject to the judge's decision due to the existence of legal injunction (*al-naṣ*) and legal rule (*al-qā'idah*), "The decision of the judge is annulled if it is contrary to the legal injunction and clear analogy." Al-Anṣārī says that the judgement is not contrary to the legal injunction. The injunction is on the right of repossession and not for right of repudiation. The injunction is also indicates that the owner has two alternative choices, i.e. repossession of the property or repayment of the price; al-Nawawī says that the judge's decision could not be annulled. Nawa R., vol. 4, p. 148.

ownership in bankruptcy is different from ownership of purchaser during the time of option.<sup>88</sup> According to this view, the repossession is not valid if exercised by disposition such as sale,<sup>89</sup> gift and the like.<sup>90</sup> The seller could say, "I repossess my property.", "I repudiate the sale."<sup>91</sup>

The owner of the property is required to fulfil certain conditions in order to exercise his right of repossession. Such conditions are varied amongst the Muslim jurists. They agree on 1) the property should remain intact, 2) the bankrupt owns the property and 3) the bankrupt is indebted to the owner. But they disagree on two conditions, 1) the property is inseparably increased, 2) the bankrupt should be alive.

Muslim jurists agree on the following conditions but vary on various issues relating to them.

### 1) Property Should Remain Intact

This condition is based on the *Hadīth*, "Whenever a man sells wares and he recognises his wares intact with the man who is declared bankrupt and the seller has not taken any of the price, he is more entitled to it. And if he received the payment for that then he is the same as other creditors with respect of it."<sup>92</sup> So, when the seller finds that his property remains intact among the bankrupt's assets he has ultimate right over it than other creditors. Similarly, the landlord may repossess his leased

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<sup>87</sup> Nawa M., vol. 14, p. 53; Rāfi', vol. 5, p. 30.

<sup>88</sup> Māwa, vol. 7, p. 392.

<sup>89</sup> Nawa T., p. 51; Nawa R., vol. 4, p. 148.

<sup>90</sup> Kūha, vol. 2, p. 176; Shar M., vol. 3, p. 118.

<sup>91</sup> Bahū, vol. 3, p. 429; See also Maḥa, vol. 2, p. 293; Raml N., vol. 4, p. 337; Najd, p. 359; Nawa R., vol. 4, p. 148.

<sup>92</sup> Dāwu, vol. 3, pp. 286-287(no. 3520); Anas M., p. 472(no. 1370).



property if its usufruct is unused<sup>93</sup> as the lessor becomes bankrupt before the leasing starts.<sup>94</sup> In addition to this, the capital provider in contract for delivery with prepayment may also exercise his right of repossession on his capital upon fulfilling this condition.<sup>95</sup>

### Changing of Price

The right of repossession is also available, according to the Ḥanbalis, even though the value of the property is increased. This is because the right of repossession applies on the basis of bankruptcy.<sup>96</sup> Similarly, Imām Mālik allows repossession to the owner in the case where the creditors have decided not to repossess it. But, if they decide to repossess it, then the creditors choose between giving the owner of the property the price for which he sold it without compensating him for any loss or surrendering his property to him.<sup>97</sup> In this regard, however, Imām Abū Ḥanīfah says that the property be given to the creditors.<sup>98</sup>

According to Imām Mālik<sup>99</sup> and the Ḥanbalis,<sup>100</sup> if the price of the property has declined, the seller then has a choice. As his right, if he wishes he may repossess his property and, hence, he has no claim to any of his debtor's property. If he likes, he may be one of the creditors and take a portion of his due and not repossess his

<sup>93</sup> Nawa M., vol. 14, p. 105; Maḥa, vol. 2, pp. 293-294.

<sup>94</sup> Qudā, vol. 4, p. 456; Bahū, vol. 3, p. 426; Maqd S., vol. 4, p. 468.

<sup>95</sup> Nawa R., vol. 4, p. 149; Ghaz W., p. 140; Ghaz S., vol. 4, p. 22; Maḥa, vol. 2, p. 293; Bahū, vol. 3, p. 425.

<sup>96</sup> Maqd S., vol. 4, p. 504; Maqd K., vol. 2, p. 174.

<sup>97</sup> Anas M., pp. 679-680.

<sup>98</sup> Shay K., p. 715.

<sup>99</sup> Anas M., pp. 679-680.

<sup>100</sup> Maqd S., vol. 4, p. 504; Maqd K., vol. 2, p. 174.



property. However, according to Imām Abū Ḥanīfah, the seller is in a similar position with other creditors.<sup>101</sup>

### Mixture of fungible property

Mixture of fungible property may be classified into four categories, (a) mixture with similar quality, (b) mixture with inferior quality, (c) mixture with better quality, and (d) mixture with different things.

For the first category, the seller could repossess the same amount of his property according to the Shāfi'is<sup>102</sup> and Mālikis.<sup>103</sup> An example of mixture is between raisin with raisin, rice with rice, soybeans and soybeans. In this stipulation, the Ḥanbalis are of the view that the right of repossession by the seller ceases because of the difficulty to determine his actual property.<sup>104</sup>

For the mixture with an inferior quality, the seller may repossess the same amount of his property according to the Shāfi'is.<sup>105</sup> Whereas, the Mālikis say that no repossession is available.<sup>106</sup>

According to the Shāfi'is,<sup>107</sup> Mālikis<sup>108</sup> and Ḥanbalis,<sup>109</sup> the seller may no longer exercise the right of repossession if his property is mixed with one of a better quality.

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<sup>101</sup> Shay K., p. 715.

<sup>102</sup> Nawa R., vol. 4, p. 169; Anṣā T., p. 85; Anṣā A., vol. 2, p. 203.

<sup>103</sup> Alla, vol. 3, p. 138; Khur, vol. 5, p. 282; See also Jall, vol. 2, p. 251 ; See also Nama, p. 418, it is stated that if *dinar* mixes with *dinar*, the owner could repossess it by weight.

<sup>104</sup> Qudā, vol. 4, p. 460; Maqd S., vol. 4, p. 480; Maqd K., vol. 2, pp. 176-177.

<sup>105</sup> Nawa R., vol. 4, p. 169; Anṣā T., p. 85; Anṣā A., vol. 2, p. 203.

<sup>106</sup> Alla, vol. 3, p. 138.

Furthermore, there is no repossession if the property mixes with different subject matter such as barley and wheat according to the Mālikis<sup>110</sup> and Shāfi'is<sup>111</sup> due to difficulty of isolating them.<sup>112</sup>

### Damage of Property

The right of repossession could not be exercised, according to the Ḥanbalis, if the property is damaged partially. For example, part of the house is damaged or part of the cloth is cut.<sup>113</sup> The rule is similar to leasing contract where the landlord could not repossess the usufruct if it is used for some period, an analogy similar to the case where the subject matter of the sale is damaged partially. It is also difficult to estimate the rental period.<sup>114</sup>

This view seems contrary to the Mālikis and Shāfi'is who divide the right of repossession in accordance with the causes of damage. The Shāfi'is<sup>115</sup> and Mālikis<sup>116</sup> claim that if the property is accidentally damaged, the owner may repossess it. Hence, al-Ghazzālī regards the rule similar to property damaged in the hand of the seller before taking possession.<sup>117</sup>

<sup>107</sup> Fayr, p. 72; Nawa Ṭ., p. 51; Anṣā Ṭ., p. 85; Anṣā A., vol. 2, p. 203; Shar, vol. 2, p. 172; Miṣr, p. 408.

<sup>108</sup> Zarq Z., vol. 5, p. 283.

<sup>109</sup> Maqd K., vol. 2, pp. 176-177.

<sup>110</sup> 'Ilyā M., vol. 6, p. 63; Dard Ṣ., vol. 3, p. 374; Alla, vol. 3, p. 138; Mūsā, p. 187; Zarq Z., vol. 5, p. 283; Mawā, vol. 5, p. 51.

<sup>111</sup> Anṣā A., vol. 2, p. 203; Shar, vol. 2, p. 172.

<sup>112</sup> Shar M., vol. 3, p. 126; Khur, vol. 5, p. 282.

<sup>113</sup> Bahū, vol. 3, p. 427; Maqd S., vol. 4, pp. 471-472; Tagh, vol. 1, p. 396.

<sup>114</sup> Qudā, vol. 4, p. 456; Bahū, vol. 3, p. 426; Maqd S., vol. 4, p. 506; Maqd K., vol. 2, p. 175.

<sup>115</sup> Nawa Ṭ., p. 51.

<sup>116</sup> Dard Ṣ., vol. 3, p. 374; Alla, vol. 3, p. 138; Khur, vol. 5, p. 284.

<sup>117</sup> Ghaz S., vol. 4, p. 26.

According to the Mālikis<sup>118</sup> and the Shāfi'is, the owner may repossess his property, if the bankrupt caused the damage. The Shāfi'is, nevertheless, allow the seller to share the depreciation value from the bankrupt's assets.<sup>119</sup> For example, if the value of property before damage is one hundred dollars and becomes ninety dollars later on, the owner then shares ten dollars from the bankrupt's assets.<sup>120</sup> For the damage caused by the third party, the Shāfi'is permit the repossession and share of depreciated value as similar to the damage caused by the bankrupt. But, for to the Mālikis, the right of repossession no longer exists.<sup>121</sup>

Muslim jurists differ on the issue of damage to one of two quantities of things, for instance two clothes or two slaves. The Shāfi'is,<sup>122</sup> Ḥanbalis<sup>123</sup> and Mālikis<sup>124</sup> are of the opinion that the seller could repossess the one which remains intact. For the latter, he shares the current value of the bankrupt's assets as an ordinary creditor.<sup>125</sup> The rule is the same in the contract for delivery with prepayment. Therefore, if some of the capitals are damaged and they may be

<sup>118</sup> Alla, vol. 3, p. 138; Khur, vol. 5, p. 289; Ḥaṭṭ, vol. 5, p. 53; The owner could repossess even though the bankrupt receives the compensation from third party. Dard Ṣ., vol. 3, pp. 374-375; Alla, vol. 3, p. 138.

<sup>119</sup> Nawa Ṭ., p. 51; Ghaz S., vol. 4, p. 26, al-Ghazzālī, however, says that there are two views amongst the Shāfi'is about damage caused by the bankrupt, i.e. (a) similar to accidental damage. (b) similar to damage by a third party.

<sup>120</sup> Gham, p. 227; Maḥa, vol. 2, p. 295; Kūha, vol. 2, p. 177.

<sup>121</sup> Alla, vol. 3, p. 138; Khur, vol. 5, p. 289; Ḥaṭṭ, vol. 5; p. 53.

<sup>122</sup> Nawa R., vol. 4, p. 157; Gham, p. 226; Anṣā A., vol. 2, p. 99; Imām al-Shāfi'ī, in his second period (*qawl al-jadīd*), says that the right of repossession is not invalidated by the fact that the seller receives half the total price on the condition that both are in equal value. See Nawa Ṭ., p. 51; On the contrary, in his first period (*qawl al-qadīm*), al-Shāfi'ī says that there is no repossession but share the price with other creditors based on the *Ḥadīth* reported by al-Darāqutnī which is according to al-Maḥallī is a disconnected *Ḥadīth*. See Maḥa, vol. 2, p. 295.

<sup>123</sup> Bahū, vol. 3, p. 427; Maqd S., vol. 4, p. 473; Maqd K., vol. 2, p. 175; Ya'lā, vol. 1, p. 372.

<sup>124</sup> 'Ilyā M., vol. 6, p. 70; Dard Ṣ., vol. 3, p. 375; Alla, vol. 3, pp. 138-139.



separated under the contract, the existing capital may be repossessed. The owner shares the damaged capital as an ordinary creditor.<sup>126</sup>

Imām Aḥmad in one of his views, however, is of the view that the seller could not repossess the balance and is, therefore, in a similar position with other creditors.<sup>127</sup> This is because the damaged property is considered as one entity.<sup>128</sup> And based on the *Ḥadīth*, if there is no repossession for a damaged property, no repossession is permissible for two quantities since the case is similar to the damaged part of a thing.<sup>129</sup>

#### Changing of Nature

If the property changes its nature, causing the change of name such as wheat to flour, oil to soap, wool to cloth, according to the Ḥanbalis<sup>130</sup> and Mālikis<sup>131</sup> the owner could not exercise his right of repossession. The Shāfi'is,<sup>132</sup> however, allow the owner to repossess it without paying for any extra work done if there is no increase of value. If the value increased, al-Nawawī says that the clearest view amongst the Shāfi'is is that the property should be sold, a part of proceeds be proportionated to the increase in value and be returned to the bankrupt.<sup>133</sup>

<sup>125</sup> 'Ilyā M., vol. 6, p. 70.

<sup>126</sup> Raml N., vol. 4, p. 348.

<sup>127</sup> Qudā, vol. 4, p. 485; Bahū, vol. 3, p. 428.

<sup>128</sup> Maqd K., vol. 2, p. 175.

<sup>129</sup> Ya'lā, vol. 1, pp. 372-373.

<sup>130</sup> Maqd S., See also Maqd K., vol 2, p. 177; Tagh, vol. 1, p. 396; Alla, vol. 3, p. 38; Cf. Anṣā A., vol. 2, p. 203, states that if the price is increased, the seller becomes partner for the price.

<sup>131</sup> Dard Ṣ., vol. 3, p. 374; Mūsā, p. 187.

<sup>132</sup> Nawa Ṭ., p. 51; Anṣā A., vol. 2, p. 203.

<sup>133</sup> Nawa Ṭ., p. 51; See Maḥa, vol. 2, p. 297; Anṣā A., vol. 2, p. 205; al-Anṣārī describes this type of increase as consequential increased (*ziyādat al-athār*). Anṣā T., p. 85; Qalyūbī says that the purchaser gets nothing from the increase value due to the market forces. Qaly, vol. 2, p. 297.

## 2) Bankrupt Owns The Property

This means that the bankrupt purchaser is still the owner of the property, for there is no right of repossession if he is no longer its owner.<sup>134</sup> If the possession of property is transferred to another by way of sale, gift or endowment, the repossession may not be exercised.<sup>135</sup> This is because, it is subject to other party's right.<sup>136</sup> It may not be exercised, according to al-Maqdisī, even though the bankrupt may repossess it by exercising his option of price defection or repossession of gift by the father.<sup>137</sup>

What if the bankrupt regains ownership of the property after transferring it to the third party? This arises either through repurchasing, gift, inheritance or will. According to one view of the Ḥanbalis<sup>138</sup> and Shāfi'is,<sup>139</sup> the seller may repossess the property on the basis of the *Ḥadīth* because his property is free from ownership of the other. However, the Mālikis,<sup>140</sup> another view of the Ḥanbalis<sup>141</sup> and the most authentic view of the Shāfi'is<sup>142</sup> report that the seller may not exercise his repossession right because the ownership of property is transferred to the bankrupt by the third party. Hence, it reaches an invalid state for repossession. The transfer could be either through repurchasing, gift, inheritance or will. Thus, the right of repossession ceases.

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<sup>134</sup> Nawa Ṭ., p. 51.

<sup>135</sup> Nawa R., vol. 4, p. 155; Raml N., vol. 4, p. 341; See also Kūha, vol. 2, p. 177.

<sup>136</sup> Maqd U., p. 239; Maqd K., vol. 2, p. 178.

<sup>137</sup> Maqd S., vol. 4, p. 515.

<sup>138</sup> Raja, p. 52; Maqd S., vol. 4, p. 515; Bahū, vol. 3, p. 425.

<sup>139</sup> Nawa M., vol. 14, pp. 62-63; Ghaz S., vol. 4, p. 25..

<sup>140</sup> Wans, vol. 6, p. 220; 'Ilyā M., vol. 6, p. 68; Zarq Z., vol. 5, p. 285; Khur, vol. 5, 284. The Mālikis say that the sharing of the bankrupt's assets by the seller is not affected by discovering that the property has been transferred back to the bankrupt through gift, will, buying, mutual recession or inheritance. This is considered as having new ownership/possession of property.

<sup>141</sup> Raja, p. 52; Maqd S., vol. 4, pp. 515-516.

In addition to the above views, one view of the Ḥanbalis<sup>143</sup> and the Mālikis<sup>144</sup> says that the seller may repossess his property if the transfer is made on to an option, either defect or stipulation. This is so, for the ownership of the property belongs to the bankrupt.

The second seller has more right of repossession than the first seller in a situation where the purchaser sells the property and buys it again without paying the price upon bankruptcy.<sup>145</sup> However, if the first and second sellers claim their right, according to al-Bahūtī, and voting is exercised to determine the right.<sup>146</sup> If the second seller waives his right of repossession and shares with other creditors, then it is whether the first seller entitles for repossession. There are two views. They are similar to the previous two possibilities.<sup>147</sup>

For a third sale by the purchaser who buys again and then becomes bankrupt without paying the price, the third seller will have more right of repossession. What if the third seller waives his right? The point is whether the first and second sellers have right of repossession. There are three possibilities: (a) neither one of them has the right of repossession, (b) the second seller has the right of repossession because he is more close and (c) both of them have the right of repossession by dividing the property into two halves. One half will be shared amongst the creditors.<sup>148</sup> The last

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<sup>142</sup> Sayū A., p. 176; Māwa, vol. 7, p. 393; See also Ghaz S., vol. 4, p. 25.

<sup>143</sup> Raja, p. 52; Maqd S., vol. 4, p. 515.

<sup>144</sup> Khur, vol. 5, p. 284.

<sup>145</sup> Shar, vol. 2, p. 171.

<sup>146</sup> Bahū, vol. 3, p. 425.

<sup>147</sup> Māwa, vol. 7, pp. 393-394.

<sup>148</sup> Māwa, vol. 7, p. 394; Nawa R., vol 4, pp. 155-156; Maḥa, vol. 2, p. 294.



possibility seems to be more appropriate in order to establish justice and avoid dispute amongst them.

Another situation is whether the right of repossession may be exercised if the property is subject to mortgage. According to the Ḥanbalis<sup>149</sup> and Shāfi'is,<sup>150</sup> there is no repossession also if the property is subject to mortgage even though it remains intact. This is because repossession causes hardship to the mortgagee for hardship could not be set aside with another hardship<sup>151</sup> and, therefore, the right of mortgagee takes preference.<sup>152</sup>

More to this, as the Prophet (S.A.W) says, "If a man finds his actual property with a bankrupt, he has more right to take them back than any one else."<sup>153</sup> Thus, the mortgaged property are not in the hands of the bankrupt. Consequently, the seller does not have right to it.<sup>154</sup> But, the Mālikis are of the view that the seller could repossess the property by paying the debt of the bankrupt to the mortgagee and would share the redemption amongst the creditors.<sup>155</sup>

<sup>149</sup> Qudā, vol. 4, p. 476; There could be repossession if the mortgage comes to an end before a bankruptcy order is made, the mortgagee relinquishes the debts or the debts are settled by a third party. Maqd S., vol. 4, p. 514.

<sup>150</sup> Ghaz S., vol. 2, p. 27; Miṣr, p.408.

<sup>151</sup> Qudā, vol. 4, p. 476; See also Sayū A., p. 86.

<sup>152</sup> Bahū, vol. 3, p. 428; See also Maqd K., vol. 2, p. 178.

<sup>153</sup> Bukh, vol. 3, p. 86; Musl, vol. 3, p. 1193(no. 22).

<sup>154</sup> Qudā, vol. 3, p. 476.

<sup>155</sup> 'Ilyā M., vol. 6, p. 67; However, al-Bahūtī says that if the mortgaged property value is more than the debt, then the mortgagee gets the payment from the sale of the mortgaged property and the surplus of the sale to be returned to the bankrupt's assets and be distributed amongst the creditors. The seller could not take the surplus. However, if the sale involved two things but the mortgage is made to one of them, then the seller has the right to repossess the one still in the assets of the bankrupt. Bahū, vol. 3, p. 427.

What if the property is subject to right of pre-emption? There are various views on this issue. Firstly, the pre-emption claimant (*shāfi'*) has the right over the property because his right precedes to the sale and is determined by the contract (*al-'aqd*). The seller's right is here determined by the interdiction (*al-ḥajr*).<sup>156</sup> Secondly, the seller has the right on it. If he takes the property, two hardships are exterminated. Thus, he repossesses his property. Whereas the pre-emption claimant only exterminates one hardship that is hardship against the purchaser i.e. the bankrupt.<sup>157</sup> Thirdly, combining two rights the bankrupt returns the property to the pre-emption claimant, takes the price and pays to the purchaser. Hence, combination of two rights is better than removal of one's right.<sup>158</sup> In addition to these, if the pre-emption claimant claims his right of pre-emption, he has more right to the property, if not, the seller may exercise his right of repossession.<sup>159</sup>

The most authentic view (*al-aṣaḥ*), according to al-Māwardī, is the first view where the pre-emption claimant has right of pre-emption prior to sale and the seller has the right of return upon bankruptcy which is recent. Thus, the pre-emption claimant is more pertinent to exercise his right.<sup>160</sup> For the third possibility, al-Maqdisī says that it is not appropriate, since the right of the seller is on the property

<sup>156</sup> Raml N., vol. 4, p. 341; Maqd S., vol. 4, p. 475; al-Anṣārī says that if pre-emption claimant wishes to repossess the property, he should pay the price to the bankrupt. The price is distributed amongst the creditors. Anṣā A., vol. 2, p. 199.

<sup>157</sup> al-Maqdisī, quoting opinion of Ibn Ḥamid, says that the seller could repossess the property based on the *Ḥadīth*. The hardship to the pre-emption claimant is no longer exist because his position is backed to the original state. Maqd S., vol. 4, p. 475; See also Maqd K., vol. 2, pp. 172-173.

<sup>158</sup> Nawa M., vol. 14, pp. 59-60.

<sup>159</sup> Maqd S., vol. 4, pp. 514-515.

<sup>160</sup> Māwa, vol. 7, p. 394; See also Nawa R., vol. 4, p. 156.

itself. If he should get the price, it is considered as relevant to liability in which the creditors have equal right to it.<sup>161</sup>

The other point is whether the purchaser gets preference for the price paid. There are two possibilities, (a) The purchaser should get the payment before other creditors because, in the first place he has the right of repossession, or (b) He is like other creditors present in the case of damage to property.<sup>162</sup>

### 3) Bankrupt Is Indebted to the Owner

In order to repossess the property, the owner should establish that the price is due and the payment is not made.<sup>163</sup> The payment is either due on original term or before the bankruptcy order.<sup>164</sup> The payment cannot be made if the bankruptcy is declared notwithstanding that the price can be paid.<sup>165</sup>

The landlord, therefore, can repossess his leased property by repudiating the contract if the whole rental is not paid.<sup>166</sup> He cannot do so in the case where whole rental is paid. He shall allow the bankrupt to use the property until the period of leasing expires. If the property becomes vacant, the judge may rent to get the income in the interest of the creditors. For example, if the leaseholder pays the rental for one

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<sup>161</sup> Maqd S., vol. 4, p. 515.

<sup>162</sup> Māwa, vol. 7, p. 394; See also Nawa R., vol. 4, p. 156.

<sup>163</sup> This means a full payment. If half or some amounts of price are paid, then the owner could repossess the property for unpaid price. Shar, vol. 2, p. 170.

<sup>164</sup> Maḥa, vol. 2, p. 294; Deferred payment seller could not repossess his property because he does not have the right to claim the price., Kūha, vol. 2, p. 176; Shar M., vol. 3, p. 118.

<sup>165</sup> Ghaz W., p. 140; Nawa T., p. 51.

<sup>166</sup> Gham, p. 226; Kūha, vol. 2, p. 176; Shar M., vol. 3, p. 118.



month and becomes bankrupt in the middle of the month, the remaining period does not give the landlord the right of repossession.<sup>167</sup>

According to the Mālikis, the owner of property no longer has the right of repossession of the property if the creditors have agreed to indemnify him by paying the price.<sup>168</sup> Ibn 'Arfah says that if the creditors wish to take it by paying the price to the owner, this is their right.<sup>169</sup> However, the Shāfi'is<sup>170</sup> and Ḥanbalis<sup>171</sup> are of the opinion that the owner may still repossess the property even if the creditors want to pay its price. Nevertheless, al-Zarkashī says that the owner cannot repossess such property if the offer made by the bankrupt who received the price through an offer by the creditors or gift. This is because of inability in receiving the price from the bankrupt no longer exists.<sup>172</sup>

And the owner of property has no right also when there is a guarantor to pay the price of property on behalf of the bankrupt.<sup>173</sup>

<sup>167</sup> Anṣā A., vol. 2, p. 196; See Nawa M., vol. 14, p. 106.

<sup>168</sup> Mūsā, p. 187; Ḥaṭṭ, vol. 5, p. 50; Alla, vol. 3, p. 138; 'Ilyas considers the principle is one of the conditions for repossession. 'Ilyā M., vol. 6, p. 62; See also Khur, vol. 5, 281; al-Dardīr says that it is better to indemnify from the bankrupt's assets. Dard Ṣ., vol. 3, p. 373; On the contrary, Ibn Kinānah says that indemnify is not from the creditors' property, see Māwa, vol. 5, p. 50.

<sup>169</sup> See 'Ilyā M., vol. 6, p. 62.

<sup>170</sup> Shāf U., vol. 3, p. 229; Nawa M., vol. 14, p. 54; Raml N., vol. 4, p. 340; Ghaz S., vol. 4, p. 21; Anṣā A., vol. 2, p. 195; Nawa R., vol. 4, pp. 148-149 states that the buyer could still exercise his right of repossession even though, the buyer dies and his legal heir offers to pay the price. However, one view amongst the Shāfi'is says that if the legal heir says that he is paying with his own money, then the owner should accept it because he is considered as "successor of the deceased" (*khalīfah al-mayyit*).

<sup>171</sup> Qudā, vol. 4, p. 455; Zark, vol. 4, p. 69; Bahū, vol. 3, p. 425; Maqd S., vol. 4, p. 505; Maqd K., vol. 2, p. 175.

<sup>172</sup> Zark, vol. 4, p. 69; See also Maqd S., vol. 4, pp. 505-506; Cf. Anṣā A., vol. 2, p. 195, states that the owner could still repossess the property even though the creditors give the money as gift to the bankrupt to settle the payment.

<sup>173</sup> Raml F., vol. 2, p. 180; Raml N., vol. 4, p. 339; Shar M., vol. 3, p. 119; Dard K., vol. 3, p. 282; Zarq Z., vol. 5, p. 282; Khur, vol. 5, p. 281; Mawā, vol. 5, p. 50.

Moreover, there is also no repossession when there is a mortgage to cover the payment sufficiently.<sup>174</sup>

Muslim jurists differ if part of the debt was paid. According to the Ḥanbalis,<sup>175</sup> when the seller receives part of the price of the property, he does not have any right to repossess his property. This is evident from the *Ḥadīth* that Abū Hurayrah narrates, “Whenever a man sells wares and he recognises his wares intact with the man who is declared bankrupt and the seller has not taken any of the price, he is more entitled to it. And if he received the payment for that then he is the same as other creditors with respect of it.”<sup>176</sup> Ābādī says that the *Ḥadīth* is an evidence by the majority of Muslim jurists for the case where the seller is like any other creditors if the purchaser has paid some of the price.<sup>177</sup> They also contend that the property is considered partially belonging to the purchaser.<sup>178</sup> If repossession is allowed, it will cause hardship to divide for unpaid price.<sup>179</sup> Furthermore, allowing repossession makes the contract divided. It is, thus, not permissible.<sup>180</sup>

Nevertheless, the Mālikis are of the opinion that the seller could repossess his property by returning the paid price to the bankrupt. For example, the price is ten

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<sup>174</sup> Shar M., vol. 3, p. 119.

<sup>175</sup> Maqd S., vol. 4, p. 511.

<sup>176</sup> Dāwu, vol. 3, pp. 286-287(no. 3520); Anas M., p. 472(no. 1370).

<sup>177</sup> Ābādī, vol. 9, p. 344; See also Ṣan‘ā, vol. 3, p. 54; Shaw, vol. 5, p. 339.

<sup>178</sup> Qudā, vol. 4, p. 476; Zark, vol. 4, p. 74; Bahū, vol. 3, p. 427.

<sup>179</sup> Bahū, vol. 3, p. 426; Maqd S., vol. 4, p. 472.

<sup>180</sup> Maqd K., vol. 2, p. 178; See also Tagh, vol. 1, p. 396.

dollars but only five dollars is paid before the bankruptcy. In order to repossess his property, he should return the paid price.<sup>181</sup>

Another point to consider is whether the seller may still repossess his property if he sell two items of similar quality to the purchaser who pays one half of the total price. Later on the purchaser becomes bankrupt and one of the items is with him and the other is sold. According to the Mālikis,<sup>182</sup> and one view of the Shāfi'is,<sup>183</sup> if the seller wants to repossess the one item which is still in the bankrupt's possession, he has to pay half of the paid price [i.e. one quarter of whole price] to the bankrupt because the paid price is for two items.

What if both items are in the bankrupt's possession but the price was paid partially? The Mālikis are of the opinion that the seller is given an alternative. If he likes, he may return the paid price and repossess the whole of his property. If he wants, he may join other creditors for the balance of the price.<sup>184</sup> This view is clearly explained by Imām Mālik, "What the purchaser has distributed does not prevent the seller from taking whatever of it he finds. It is the seller's right if he received any of the price from the purchaser and he wants to return it to take what he finds of his wares, and in what he does not find he is like the other creditors."<sup>185</sup> Conversely,

<sup>181</sup> Khur, vol. 5, pp. 284-285; See also Ḥaṭṭ, vol. 5, p. 53; Mawā, vol. 5, p. 53; Bagh, p. 95.

<sup>182</sup> Ḥaṭṭ, vol. 5, p. 53; Khur, vol. 5, p. 285; Ilyā M., vol. 6, p. 70; Dard Ṣ., vol. 3, p. 375; Jall, vol. 2, p. 250; Alla, vol. 3, p. 138.

<sup>183</sup> Maḥa, vol. 2, p. 295; Raml N., vol. 4, p. 344; See also Anṣā A., vol. 2, p. 199.

<sup>184</sup> Rush B., vol. 2, p. 216; Dasū, vol. 3, p. 286; Dard K., vol. 3, p. 286; 'Ilyā M., vol. 6, pp. 69-70; Ḥaṭṭ, vol. 5, p. 53; Mawā, vol. 5, p. 53.

<sup>185</sup> Anas M., p. 472.



according to the Shāfi'is, the creditors may only repossess the property that is unpaid for.<sup>186</sup>

Muslim jurists also differ on whether the right of repossession is applicable to the deferred payment debt. The Mālikis say that he may repossess his property.<sup>187</sup> Al-Ghazzālī considers this as a remote view.<sup>188</sup> According to the Ḥanbalis<sup>189</sup> and one view of the Shāfi'is,<sup>190</sup> the seller may exercise his repossession right but only after the payment becomes due. The property cannot be sold because the seller's right attaches to it.

According to the most authentic view of the Shāfi'is, the deferred payment seller may not repossess his property because the deferred payment debt shall not become due on the bankruptcy.<sup>191</sup> As a result, the property shall be sold to settle the debt due to the creditors. Current debts take priority over undue debts.<sup>192</sup> Nevertheless, if the deferred payment debt becomes due before distribution, he may repossess.<sup>193</sup>

There is no right of repossession [i.e. repudiation of lease], according to one view of the Shāfi'is, if the rental becomes due at the end of every month for

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<sup>186</sup> Nawa Ṭ., p. 51.

<sup>187</sup> Qarā, vol. 8, p. 172.

<sup>188</sup> Ghaz S., vol. 4, p. 21.

<sup>189</sup> Bahū, vol. 3, p. 432; al-Maqdisī says, according to Imām Aḥmad, that the right of repossession is deferred until the time of payment is due. Maqd S., vol. 4, pp. 533-534; Maqd K., vol 2, p. 181.

<sup>190</sup> Ghaz S., vol. 4, p. 21; Nawa M., vol. 14, p. 61.

<sup>191</sup> Ḥajr, vol. 5, p. 50; See also Ghaz S., vol. 4, p. 21.

<sup>192</sup> Nawa M., vol. 14, p. 61.

<sup>193</sup> Ghaz S., vol. 4, pp. 21, 24.

deferment must occur.<sup>194</sup> The repossession can only be exercised after the expiry of rental period.<sup>195</sup>

Muslim jurists, however, disagree on the following conditions.

### 1) Property Is Not Inseparably Increased

The purchaser may still exercise the right of repossession if there is an inseparable increase to the property such as growth of animals or growth of trees according to the Shāfi'is,<sup>196</sup> Mālikis<sup>197</sup> and Imām Aḥmad.<sup>198</sup> But, the Ḥanbalis prevent the seller from repossessing them because the increase happened when the property is in the bankrupt's possession.<sup>199</sup>

The repossession right is also not affected in a separable increase such as baby animals for animals and fruits for the trees. The seller may repossess only the original thing according to the Shāfi'is<sup>200</sup> and Ḥanbalis.<sup>201</sup> The increase belongs to the bankrupt based on the *Ḥadīth*, "Profit follows responsibility (*Al-kharāj bi al-damān*)".<sup>202</sup> The *Ḥadīth* indicates that the increase and yield belong to the

<sup>194</sup> Qaly, vol. 2, p. 293; 'Umay, vol. 2, p. 293.

<sup>195</sup> Raml N., vol. 4, p. 338; Qaly, vol. 2, p. 293.

<sup>196</sup> Shāf U., vol. 3, p. 229; Raml N., vol. 4, p. 344; Anṣā A., vol. 2, p. 200; Nawa R., vol. 4, p. 159; Nawa Ṭ., p. 51.

<sup>197</sup> Jall, vol. 2, p. 250; Qarā, vol. 8, p. 179.

<sup>198</sup> Maqd S., vol. 4, p. 516.

<sup>199</sup> Qudā, vol. 4, p. 464; Maqd S., vol. 4, pp. 516-517.

<sup>200</sup> Shāf U., vol. 3, p. 230; Ghaz S., vol. 4, p. 27; Nawa R., vol. 4, p. 167, The Shāfi'is have divided the issue into two situations. If the animal becomes pregnant after the sale then the offspring belongs to the bankrupt and the animal belongs to the seller. If the animal was pregnant before the sale, then the seller could repossess both of them.; Nawa Ṭ., p. 51; Anṣā A., vol. 2, p. 200; Anṣā T., p. 85; Nama, p. 418; Ṣāwī, vol. 2, p. 136; Qarā, vol. 8, p. 179.

<sup>201</sup> Bahū, vol. 3, pp. 429-430; Qudā, vol. 4, p. 467.

<sup>202</sup> Dāwu, vol. 3, p. 284(nos. 3508-3510); See also the *Majallah*, article 85 that provides, "The enjoyment of a thing is the compensating factor for any liability attaching thereto".

bankrupt<sup>203</sup> as compensation (*al-ḍamān*) is his.<sup>204</sup> Abū Ya‘lā says that the increase belongs to the bankrupt purchaser because the increase does not become part of the original as accepted by all.<sup>205</sup> According to Imām Aḥmad<sup>206</sup> and Imām Mālik (“If the creditors desire it, they should pay the seller his complete due”),<sup>207</sup> the seller may also repossess the increase, i.e. similar to inseparable property case. Abū Ya‘lā in commenting on Imām Aḥmad’s view says, “perhaps the repossession of the increase is allowed because the seller sells the animal when she becomes pregnant.”<sup>208</sup>

What is the position if the subject matter of sale is a piece of land upon which the bankrupt erects a building or plants trees? According to the Mālikis<sup>209</sup> and the clearest view of the Shāfi‘is,<sup>210</sup> the seller cannot repossess the land and whatever property on it, since the land has changed its original state. He will become a partner to the creditors in it. When explaining the legal rule “A harm cannot be removed by the commission of another harm (*al-ḍarar lā yazāl bi al-ḍarar*)”, al-Sayūṭī says that the seller cannot repossess the land if it is planted with trees or built with buildings, for uprooting the trees and removing the buildings will decrease the value of the land and, thus, causing hardship to the bankrupt and his creditors.<sup>211</sup>

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<sup>203</sup> Maqd S., vol. 4, p. 478., al-Maqdisī describes, “There is no differences of opinion amongst the Ḥanbalis on the issue.”

<sup>204</sup> Maqd U., p. 239; See also Maqd K., vol. 2, p. 180.

<sup>205</sup> Ya‘lā, vol. 1, p. 373-374.

<sup>206</sup> Ibid.

<sup>207</sup> Anas M., p. 473; See also Alla, vol. 3, p. 139.

<sup>208</sup> Ya‘lā, vol. 1, p. 373-374.

<sup>209</sup> Rush B., vol. 2, p. 217; Anas M., p. 679.

<sup>210</sup> Nawa Ṭ., p. 51.

<sup>211</sup> Sayū A., p. 86; See also Kūha, vol. 2, p. 180-181; Shar M., vol. 3, p. 126.



Conversely, the Ḥanbalis<sup>212</sup> and other view of the Shāfi'is<sup>213</sup> postulate that the seller can repossess the land if the bankrupt and the creditors agree to remove the buildings and uproot the trees for the seller would receive a possession of land free from any ownership. If they do not wish the removal and uprooting, the seller cannot force them. He can, therefore, repossess the land with the crops or buildings on it. Upon repossession, he can either (a) appropriate the crops and buildings and pay their value to the bankrupt or (b) uproots and removes them at his own risk, and then deliver them to the bankrupt, plus damage, if any.

However, if the seller is not willing to pay compensation and loss to the bankrupt, there are two views amongst the Shāfi'is<sup>214</sup> and Ḥanbalis.<sup>215</sup> Firstly, he may still repossess the land. Secondly, he will claim no right of repossession.

In the case where the land and trees are bought from different persons, both parties may repossess their property. The owner of trees may uproot them in a proper manner and will have to pay for any deterioration caused to the land. If uprooting will decrease the land value, there are two possibilities, (a) prevention from uprooting if there is no compensation and (b) allow it because the sale of trees are subject to uprooting.<sup>216</sup> In addition to this, the landowner may offer the payment to the owner of the trees. It is up to the latter whether to accept or not.<sup>217</sup>

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<sup>212</sup> Qudā, vol. 4, p. 472; Bahū, vol. 3, p. 431; Maqd S., vol. 4, pp. 529-530.

<sup>213</sup> Shāf U., vol. 3, p. 230; Nawa R., vol. 4, p. 167; Nawa T., p. 51; Nawa M., vol. 14, p. 89; Anṣā A., vol. 2, p. 202.

<sup>214</sup> Nawa M., vol. 14, p. 89.

<sup>215</sup> Maqd S., vol. 4, pp. 530-531.

<sup>216</sup> Nawa M., vol. 14, p. 96; Bahū, vol. 3, p. 432; Maqd S., vol. 4, p. 533.

<sup>217</sup> Maqd S., vol. 4, p. 533.

The right of repossession is not affected in a case where a bankrupt bleaches and stains the purchased cloth with some dye belonging to him according to the Shāfi'is<sup>218</sup> and Ḥanbalis,<sup>219</sup> with a condition that the value is not increased. If the value is increased, according to one view of the Ḥanbalis, no repossession is allowed.<sup>220</sup>

The Shāfi'is<sup>221</sup> and some of the Ḥanbalis<sup>222</sup> are of the opinion that the seller may only repossess the property but the increased price will be given to the bankrupt because the increase resulted from the bankrupt's action. The bankrupt will share the increased value. If the seller offers to pay the increased price, the bankrupt shall accept the offer as it will waive the hardship. Al-Nawawī says that the clearest view amongst the Shāfi'is is that the property shall be sold and a part of price proportionate to the increase in value, shall be returned to the bankrupt.<sup>223</sup>

## 2) Bankrupt Should Be Alive<sup>224</sup>

The Mālikis<sup>225</sup> and Ḥanbalis<sup>226</sup> are of the view that if the bankrupt dies, the creditors, finding their property in the bankrupt's estate, are on the same footing as

<sup>218</sup> Nawa Ṭ., p. 51; Anṣā A., vol. 2, p. 203.

<sup>219</sup> Maqd S., vol. 4, pp. 520-521.

<sup>220</sup> Ibid.

<sup>221</sup> Nawa Ṭ., p. 51; See Maḥa, vol. 2, p. 297; Anṣā A., vol. 2, p. 205; al-Anṣārī describes this type of increase as a consequential increase. Anṣā T. p. 85; Qalyūbī says that the purchaser gets nothing from the increase value due to the market forces. Qaly, vol. 2, p. 297.

<sup>222</sup> Bahū, vol. 3, p. 430.

<sup>223</sup> Nawa Ṭ., p. 51; See Maḥa, vol. 2, p. 297; Anṣā A., vol. 2, p. 205; Anṣā T., p. 85.

<sup>224</sup> There are two views amongst the Ḥanbalis about whether there is condition for the seller to be alive, i.e. (a) The right of repossession is given to the seller only not to the legal heirs. (b) The right of repossession could be exercised by the legal heirs. Bahū, vol. 3, pp. 428-429.

<sup>225</sup> Anas K., vol. 4, p. 122; Rush B., vol. 2, p. 217; Qayr, p. 456; Mūsa, p. 187; 'Ik, vol. 2, p. 356; ; Dard Ṣ., vol. 3, p. 373; Jall, vol. 2, p. 251; Alla, vol. 3, p. 138; See also Qarā, vol. 8, pp. 173-174; Qaṣṭ, vol. 4, p. 224.

<sup>226</sup> Qudā, vol. 4, p. 502; Zark, vol. 4, p. 84; Bahū, vol. 3, p. 426; Maqd S., vol. 4, pp. 508-509; Tagh, vol. 1, p. 396.

other creditors with respect to it. Their views are based on the *Ḥadīth*, "If the bankrupt dies, the owner of the property is the same as other creditors with respect of it".<sup>227</sup> Al-Bahūtī, in interpreting the *Ḥadīth*, says that if the purchaser dies, the seller becomes like any other creditors whether the bankruptcy order is made before or after the death. This is so, for the ownership of the property is transferred to the legal heirs.<sup>228</sup> The *Ḥadīth* indicates that if the purchaser dies without paying any price, and the property remains intact, the seller is like any other creditors.<sup>229</sup>

There is a provision of the *Majallah* to the effect, "If the purchaser dies bankrupt after having taken delivery of the thing sold, but without having paid the price, the vendor could not demand the return of the thing sold, but becomes one of the creditors."<sup>230</sup>

Moreover, the right of repossession no longer exists because the property of the bankrupt after his death will immediately belong to his legal heirs; the responsibility of the bankrupt no longer exists.<sup>231</sup> Hence, it will cause hardship to the creditors if the property is specifically given to a specific person.<sup>232</sup>

On the other hand, the Shāfi'is are of the opinion that the sellers have the right over the other creditors. For them, the position is the same whether the bankrupt is alive or dead.<sup>233</sup> This is based on the *Ḥadīth* narrated by Ibn Khaldah al-

<sup>227</sup> Dāwu, vol. 3, pp. 286-287(no. 3520); Anas M., p. 472(no. 1370).

<sup>228</sup> Bahū, vol. 3, p. 426; See also Maqd K., vol. 2, p. 179.

<sup>229</sup> Ābād, vol. 9, pp. 343-344.

<sup>230</sup> *Maja*, article 295.

<sup>231</sup> Dard Ş., vol. 3, p. 373; See also Khur, vol. 5, p. 281.

<sup>232</sup> Maqd S., vol. 4, p. 509; See also Qast, vol. 4, p. 224.

<sup>233</sup> Shāf U., vol. 3, p. 229; Qaly, vol. 2, p. 293; See also Ḥajr, vol. 5, p. 50.



Zarqi who was the judge in Madinah, “We went to see Abū Hurayrah asking him about one of our man who was bankrupt. Abū Hurayrah says: “This is what had been judged by the Prophet (S.A.W) that if a man dies or becomes bankrupt, the owner of the property has a prior right over others if he could find his property”.<sup>234</sup>

Imām Shāfi‘ī contends that the position of heir is similar to the deceased bankrupt. Hence, if the bankrupt cannot prevent the seller from repossessing his property, it is more appropriate for the heirs to allow the seller to exercise his right.<sup>235</sup> According to al-Şan‘ānī, also basing his view on the general application of the *Ḥadīth*,<sup>236</sup> “If a man finds his very things with a bankrupt, he has more right to take them back than anyone else”.<sup>237</sup>

Al-Māwardī contends that the *Ḥadīth* used by the Mālikis is the discontinued or disconnected *Ḥadīth* (*mursal*),<sup>238</sup> which cannot be used as proof. The *Ḥadīth* covers also one of these two interpretation.

(a) it covers the person who dies solvent, or

(b) it covers the seller who did not repossess his property.<sup>239</sup>

To reconcile both views, we can say that if the bankrupt dies and does not pay the price of the property, the seller can repossess his property. If he pays the

<sup>234</sup> Shāf M., p. 329; Bagha, vol. 4, p. 341(no. 2127); al-Qarāfī says that chain of narration of the *Ḥadīth* is weak. Qarā, vol. 8, p. 176.

<sup>235</sup> See Māwa, vol. 7, p. 396.

<sup>236</sup> Şan‘ā, vol. 3, p. 55; See also Nawa S., vol. 10, p. 222.

<sup>237</sup> Bukh, vol. 3, p. 599; Musl, vol. 3, p. 1193.

<sup>238</sup> An incomplete Tradition in the *isnād* (chain) of which a Companion (*ṣahābī*) is omitted, e.g. A *ṭabī‘ī* says, the Prophet (S.A.W) says....for details see Kama, p.100.

<sup>239</sup> Māwa, vol. 7, p.397; See also ‘Ilyā M., vol. 6, p. 61.

price in part, the seller then will be equal to other creditors.<sup>240</sup> If there is a will of the bankrupt, the will shall be honoured.

### 3.2.2 English and Malaysian Laws

Similar to the Islamic law, English law also gives two alternatives to the unpaid creditor upon the bankruptcy of the buyer. The creditor may either claim the unpaid price from the bankrupt's estate as an ordinary creditor or to repossess the goods as stipulated under the reservation of title clause agreed upon by the contracting parties. If he decides to share the bankrupt's estate, it is afraid that he will get nothing as all the bankrupt's estate are eaten up by all preferential and secured creditors.<sup>241</sup> If he decides to exercise his right based on the reservation of title clause then the leave of court is needed in order to repossess the goods, especially after the making of a bankruptcy order and before the bankrupt is discharged.<sup>242</sup> As a result, no steps may be taken to repossess goods, which are under reservation of titles in the bankrupt's possession, save with the leave of the court.<sup>243</sup>

In order for the seller to repossess the goods under the reservation of title clause, three essential requirements must be met:

- 1) The reservation of title must be a term of the contract.
- 2) The goods held by the buyer or his trustee must be identifiable as those, or as including those, supplied by the seller under reservation of title.

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<sup>240</sup> See Hass S., vol. 2, p. 1000.

<sup>241</sup> See Flet, p. 216.

<sup>242</sup> *Insolvency Act 1986*, section 285(3).

<sup>243</sup> See McCo, p. 239.

- 3) The amount secured by the reservation of title must be wholly or partly unpaid.<sup>244</sup>

### 1) Making Reservation of Title a Term of the Agreement

There are various forms of acceptable reservation of title clause such as, “the seller shall retain ownership in the goods delivered as against the buyer until the full price for goods has been paid” or “the seller shall retain ownership in the goods delivered as against the buyer until all debts or other obligation owed by the buyer to the seller have been discharged.”<sup>245</sup> Other examples of such clauses are, “the seller shall retain ownership in the goods as against the buyer and any sub-buyer either until the full price for goods has been paid or until all debts owed by the buyer to the seller have been paid” and “the seller retains ownership in the goods as against the buyer. And if the goods are re-sold to a sub-buyer, then the seller acquires ownership either of the proceeds of sale or of the right to sue the sub-buyer for the proceeds of sale.”<sup>246</sup>

It is necessary to the seller to show that his stipulation as to reservation of title was effectively incorporated as a term of the contract. Incorporation of contractual terms may be established through embodiment of the term in a contract document signed by the buyer.<sup>247</sup> If the document in which the clause is contained has been signed, and if it is indeed a contractual document rather than say, just a publicity leaflet or a receipt, then the law presumes that the party who has signed has

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<sup>244</sup> Good P., p. 104.

<sup>245</sup> *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339.

<sup>246</sup> See McCo, p. 2.

<sup>247</sup> *John Snow & Co Ltd v DBG Woodcroft & Co* [1985] BCLC 54.



read and understood the clause.<sup>248</sup> This presumption can be rebutted if there has been a misrepresentation as to the effect of the clause<sup>249</sup> and if there has been an oral statement purporting to override the clause.<sup>250</sup>

The establishment of incorporation may also through embodiment of the term in an unsigned document which the buyer was aware contained contract terms, even if he was not aware of their purport.

In addition to this, incorporation may also through embodiment of the term in an unsigned document where the seller has done all that was reasonably sufficient to bring the terms to his notice. In this case, it is not necessary for the seller to show that the buyer knew the document contained contractual provisions. What constitutes reasonable notice depends on the circumstances. Where a particular term relied on is very unusual, so that a party would have no reason to suspect its incorporation in the document, it may be necessary for the term to be drawn to his attention specifically.<sup>251</sup> Reservation of title clauses are now so common provided that the seller does what is necessary to bring the existence of the terms as a whole to the buyer's notice; this suffices to give contractual effect to such a clause even if it is not specifically drawn to the buyer's attention.

An alleged stipulation for reservation of title will not be effectively incorporated if the term sought to be imposed after making of the contract.<sup>252</sup> And, to

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<sup>248</sup> McCo, p. 63.

<sup>249</sup> *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805.

<sup>250</sup> *Couchman v Hill* [1947] KB 554.

<sup>251</sup> *John Snow & Co Ltd v DBG Woodcroft & Co* [1985] BCLC 54.

<sup>252</sup> *Olley v Marlborough Court Ltd.* [1949] 1 KB 532.

print it on the back of an invoice is far too late, for the contract of sale has been made much earlier. It may be effective where there are continuing transactions between the parties so that the court can infer that these terms had been accepted. But in the case of the first orders, it is essential that the supplier should, with his offer of the goods, specify in detail the terms on which they are offered; and that any orders placed on inconsistent terms are rejected.<sup>253</sup>

## 2) Identification of the Goods as, or as Including, the Seller's Goods

So long as the goods remain identifiable as those comprised in the contract, the seller can repossess them. The onus is generally on the seller to show that the goods taken over by the buyer's trustee, are the goods of the seller and not those of the buyer or a third party. The seller must show to the satisfaction of the trustee in bankruptcy that the goods he claims can be linked to a specific invoice recorded as unpaid by the buyers' records.<sup>254</sup> This may be difficult if the buyer obtains goods of the same description from several suppliers; if the seller is wise, he will seek to identify his goods by a serial number or other identifying mark not readily removable.<sup>255</sup>

Where fungible goods have been mixed into a greater bulk of goods of the same nature, this identification will no longer be possible. In this case, the tenancy in common provision shall be incorporated.<sup>256</sup> However, if the seller is able to show that his goods are included in the bulk, he may be able to claim that he is a co-owner of the bulk to the extent that it is made up of his goods. Whether he can prove this

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<sup>253</sup> Parr, pp. 144-145; Moss, vol. 2, p. H14/3, para H14.02.

<sup>254</sup> Whee, p. 28.

<sup>255</sup> Good, p. 105; Parr, p. 146.

will depend on whether the buyer who caused the goods to commingle is entitled to do so under the contract or not. If not, the seller will be entitled to claim a share of ownership of the bulk. Hence, the claim may depend on whether the contract includes an obligation to store the goods separately until paid for by the buyer.<sup>257</sup>

Where the goods supplied to the bankrupt have been mixed with other goods or materials so that they lose their original identity for example part of a process manufacture, this may serve to defeat the right of the unpaid seller under the reservation of title clause.<sup>258</sup> According to Templeman LJ,

“When the resin was incorporated into the chipboard, the resin ceased to exist, the seller’s title to the resin became meaningless and the seller’s security vanished. There was no provision in the contract for the buyer to provided substituted or additional security. The chipboard belonged to the buyer.”<sup>259</sup>

If the goods so mixed with other goods not belonging to the supplier, have nevertheless retained their essential integrity and are capable of being separated, even though the process of recovery may be costly the supplier's right may remain intact and enforceable. In *Hendy Lennox (Industrial Engines) Ltd v Graham Puttick Ltd*,<sup>260</sup> the diesel engines were sold subject to a reservation of title clause and were incorporated into diesel generator sets. The process of incorporation did not in any way alter or destroy the substance of the engines and it could be removed from the sets without serious injury, if necessary, within several hours. The court held that the

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<sup>256</sup> Davi E., p. 129.

<sup>257</sup> Berr, p. 583.

<sup>258</sup> Cf. *Re Bond Worth Ltd* [1980] Ch 228; *Borden (U.K) Ltd. v Scottish Timber Products Ltd.* [1981] Ch. 25; *Re Peachdart Ltd.* [1983] 3 All ER 204.

<sup>259</sup> *Borden (U.K) Ltd. v. Scottish Timber Products Ltd.* [1981] Ch. 25, at 44.



proprietary rights of the sellers in the engines were not effected when the engines were wholly or partially incorporated into by the generator set. The title of the original seller remained because the diesel engines could be removed without serious injury or destruction of the whole so formed. The case seems to establish that goods used in the manufacturing process, but which remain identifiable in their original state and can be removed from the finished product are recoverable.<sup>261</sup>

There is different consideration if goods, supplied subject to a reservation of title clause, may have become so attached to land so as to form part of the land based on the maxim *quid quid plantatui solo, solo cedit* (whatever is affixed to the ground, becomes part of it). If the buyer incorporates materials or goods under the reservation of title to land or building in such a way that they cannot be severed without material damage to the goods or to the land or building, the goods lose their identity as chattels and become fixtures forming part of the property that pass into the ownership of landowner subject to the right of severance.<sup>262</sup> But the seller shall reserve to himself in the contract a right to enter premises to which the chattels have been affixed and to remove the same. A clause of this nature will not prevent the chattels from becoming a fixture.<sup>263</sup>

If the seller's title has been extinguished by reason of the incorporation of the goods into a new product, the contract may provide that title to the new goods will vest in the seller. The possibility that a clause in this form may be effective has been

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<sup>260</sup> [1984] 1 WLR 111.

<sup>261</sup> Whee, p. 30.

<sup>262</sup> Good P., p. 89; See also *Chit*, vol. 2, p. 1175, para 41-14.

<sup>263</sup> McCo, p. 194; *Benj*, pp. 274-275; See also Benn, pp. 307-324.

recognised by the Court of Appeal in *Clough Mill Ltd v Martin*.<sup>264</sup> To achieve this end the parties must have intended that the seller obtains the windfall of the value of his goods added to his goods by the work done by the buyer and by the addition of other material into the goods.<sup>265</sup>

### 3) Establishing that the Sum Secured by the Reservation of Title is Unpaid

Finally, the seller must show that the buyer has failed to discharge the indebtedness, secured by the reservation of title clause. Where the clause secures the whole of the buyer's indebtedness, all the seller needs to do is to prove the unpaid balance, and it is not necessary for him to allocate the buyer's payments between one item of goods and another.<sup>266</sup> Suppose the seller has reserved title in goods until the buyer has paid the price (two thousand pounds) and before the buyer had gone into bankruptcy, he had paid part of the price, say five hundred pounds. At the same time the seller is able to sell the goods elsewhere for two thousand pounds, as such the seller would have to refund.

If the seller were able to sell the goods elsewhere for more than two thousand pounds, then the seller will retain the extra. If, however, he is able to sell them elsewhere only for, say, one thousand eight hundred pounds, he will deduct that loss, i.e. two hundred pounds from the amount of the refund he pays to the buyer. If the buyer does not make part of payment before bankruptcy, the buyer will claim against the buyers' trustee in bankruptcy for two hundred loss.<sup>267</sup>

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<sup>264</sup> [1985] 1 WLR 111 per Robert Goff LJ at 119, per Oliver LJ at 123-4.

<sup>265</sup> Berr, p. 584.

<sup>266</sup> Good P., p. 106.

Even though the buyer is still indebted to the seller, where goods have been delivered the buyer may nevertheless be permitted to sell the goods to a sub-buyer. In many retention of title cases, the buyer is expressly given the right to sell goods that form part of the subject matter of a retention of title clause. In many other instances power of resale can be implied. For example, a reservation of title clause may provide that the seller is to retain ownership of the goods until they are resold by the purchaser, in which case the seller's rights shall be attached to the proceeds of the sale.<sup>268</sup> By that sub-sale, the sub-buyer will obtain good title by virtue of section 25 of the *Sale of Goods Act 1979*. Any claim of the seller to the goods will be lost.<sup>269</sup>

Similar to the right of repossession by the seller under reservation of title clause, a landlord in a lease contract is given two choices once the landlord's right to forfeit has arisen. The landlord can elect either to end or continue it.<sup>270</sup> This is due to the fact that an act of forfeiture on the part of the tenant only renders the lease voidable at the instance of the landlord. This is so even where the proviso for re-entry expressly provides that the lease shall be 'void' or 'cause to have effect' upon the tenant bankruptcy. Since the lease is only made voidable, the landlord is obliged to make an election either to forfeit the lease or to treat the lease as continuing, i.e. to waive the forfeiture.<sup>271</sup>

If the landlord decides to waive the forfeiture, there are various ways of waiver. For example, a demand for rent will cause a waiver in law irrespective of the

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<sup>267</sup> See *Clough Mill v Martin* [1985] 1 WLR 111 CA.

<sup>268</sup> McCo, p. 169.

<sup>269</sup> Berr, p. 584; See also *Benj*, pp. 272-273; *Good C.*, p. 246; *Palm*, p. 190.

<sup>270</sup> See *McLo*, p. 87.

<sup>271</sup> *Pawl*, p. 4; See also *Halb* 27(1), p. 468, para 502.



subjective intention of the landlord, and the waiver occurs even though the demand was inadvertent and the landlord had no actual intention to waive.<sup>272</sup> A waiver can occur also where the landlord, with the knowledge of facts upon which his right to re-enter arises, does some unequivocal act, recognising the continued existence of the lease.<sup>273</sup> The act in question must be communicated to the tenant, otherwise it does not amount to an election.<sup>274</sup>

If the landlord decides to forfeit the lease, forfeiture or re-entry can be effected. It is not necessary to obtain a leave from the court in order to commence forfeiture proceedings.<sup>275</sup> The importance is that the landlord must show that the event, i.e. bankruptcy order, falls within the scope of the forfeiture clause. Where the proviso entitled the landlord to forfeit if the lessee or his executors, administrators and assignees should become bankrupt, the landlord is not entitled to forfeit when the original tenant becomes bankrupt after he assigns the lease.<sup>276</sup>

The forfeiture is either by physical re-entry, or often called as peaceable re-entry, or by action, that is by legal proceeding.<sup>277</sup> For forfeiture by legal proceeding,

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<sup>272</sup> McLo, p. 88.

<sup>273</sup> *Matthews v Smallwood* [1910] 1 Ch 777, per Parker J at 786.

<sup>274</sup> *Scarfe v Jardine* (1882) 7 App Cas 345, at 360; *London and County (A & D) v Wilfred Sportsman* [1971] Ch 964.

<sup>275</sup> *Ezekiel v Orakpo* [1977] QB 260 CA. In this case, the plaintiff claimed possession of shop premises let to the defendant on the ground that the defendant's lease of the premise was forfeited for non-payment of rent. He also claimed payment of arrears of rent and mesne profits. It was held that an action for possession following the forfeiture of a lease for non-payment of rent was not a remedy against the property of the debtor in respect of a debt because the consequence of forfeiture was to determine the lessee's interest, nor was it a remedy enforcing payment of the rent due. Accordingly the proceedings were duly constituted in so far as they related to the claim for possession.; Cf. *Exchange Travel Agency Ltd v Triton Property Trust Ltd* [1991] 35 EG 120.

<sup>276</sup> *Wood*, vol. 1, p. 16/49, para 16.103; *Doe d. Lloyd v Ingleby* (1846) 15 M & W 465.

<sup>277</sup> *Woodfall*, vol.1, p. 17/34, para 17.087; See also *Halb* 3(2), pp. 216-217, paras. 401-402 and vol 27(1), p. 477, para 508.

the issue and service of a writ claiming possession against the tenant is well established to be sufficient indication of the landlord's intention to claim forfeiture. The writ must be served on the tenant for the time being. And the claim for possession must be unequivocal.<sup>278</sup>

During the first year of the bankruptcy, the landlord is obliged to serve a notice to forfeit the lease.<sup>279</sup> If the proceeding is made after the first year, the landlord does not need to serve notice.<sup>280</sup>

The notice of forfeiture is not required if the lease is of (a) agricultural or postural land; (b) mines or minerals; (c) a house used or intended to be used as a public house; (d) a house let as a dwelling-house with the use of any furniture, books, work of arts, or other chattels; and (e) property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or any person holding under him.<sup>281</sup>

In addition to the right of forfeiture by the landlord, the tenant is also given the right to apply for relief of forfeiture. There is no determination of the lease so long as there is a subsisting application for relief from forfeiture.<sup>282</sup>

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<sup>278</sup> See *Wood*, vol. 1, pp. 17/35-17/36, para 17.090.

<sup>279</sup> *Law of Property Act 1925*, section 146(10).

<sup>280</sup> *Civil Service Co-operative v McGregor's Trustee* [1923] 2 Ch 347.

<sup>281</sup> *Law of Property Act 1925*, section 146(9).

<sup>282</sup> *Liverpool Property v Oldbridge Investments* [1985] 2 EGLR 11 CA.

The tenant, through the trustee in bankruptcy, may apply for relief as soon as the forfeiture notice has been served on him.<sup>283</sup> The trustee can only apply for relief within the first year of the bankruptcy.<sup>284</sup> So long as the application is made during the year, the court jurisdiction to grant relief does not cease with the expiration of the year.<sup>285</sup> If the trustee fails to sell the lease within the year the court has no jurisdiction thereafter to relieve from forfeiture.<sup>286</sup>

### 3.3 Summary

Islamic law permits the owner of property to repossess his property upon the bankruptcy of the debtor from the bankrupt's estate. This right is applicable to various forms of contract including contract of sale, contract of lease, contract for delivery with prepayment and loan. On the other hand there is no such principle in Malaysian and English laws. The only way that the creditor could reclaim his property is through the stipulation of certain clauses in the contract. For instance, in order for the seller to repossess the goods a "reservation of title clause" must be incorporated in the contract of sale. For a contract of lease, a landlord has to incorporate a "forfeiture clause" in order to repossess the lease.

The incorporation of certain clauses, i.e. reservation of title and forfeiture clauses in the contracts appears not contrary to Islamic law as the Prophet (S.A.W) is

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<sup>283</sup> *Wood*, vol. 1, p. 17/75, para 17.159.

<sup>284</sup> *Law of Property Act 1925*, section 146(10).

<sup>285</sup> *Gee v Harwood* [1933] Ch 712 CA, affd *Pearson v Gee Braceborough Spa Ltd* [1934] AC 272 HL.

<sup>286</sup> *Official Custodian for Charities v Parway Estate Development Ltd* [1985] Ch 151 CA.



reported to have said, "The Muslims are bound by their conditions"<sup>287</sup> The *Ḥadīth* indicates that such condition is allowed.<sup>288</sup>

The exercise of this right of repossession under Islamic law is subject to the fulfilment of certain conditions such as the goods remain intact and they are still in the ownership and possession of the bankrupt. This is contrasted to Malaysian and English law. English law requires that there shall be embodiment of the term of right of repossession in the agreement that has signed by the contracting parties. The other difference is that in case of contract of lease, the landlord has no right of forfeiture if he decided to waive his right of forfeiture and if the court granted relief of forfeiture to the tenant.

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<sup>287</sup> Bukh, vol. 3, p. 52 ; Dāwu, vol. 3, p. 304(no 3594).

<sup>288</sup> For detail discussion on conditions, see Zuḥa, vol. 4, pp. 197-212; Moha, pp. 7-20.

## CHAPTER FOUR

## REALISATION OF ESTATE OF THE BANKRUPT

Realisation indicates “translating something into a particular amount of money, usually by selling it.”<sup>1</sup> Thus, this Chapter, firstly, analyses the concept of bankrupt’s estate and follows with matters relating to the estate such as exempt assets and property subject to the rights of third party according to Islamic, English and Malaysian laws. Then, this Chapter explains in detail the sale of bankrupt’s estate including sale of the matrimonial house under these three systems. It also deals with the maintenance to the bankrupt and his family, and liability in case of any destruction of some of the bankrupt’s assets during the time of realisation as they are relevant to the realisation discussion.

## 4.1 Concept of Bankrupt’s Estate

It is important to determine what is the bankrupt’s estate to ensure that realisation is carried out only to the property belonging to the bankrupt. This is to prevent an appropriation of the property of others unlawfully.

## 4.1.1 Islamic Law

According to Islamic law, bankrupt’s estate consists of property (*māl*)<sup>2</sup> that a bankrupt owns for distribution to his creditors in settlement of his debts. The estate

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<sup>1</sup> *Enca*, p. 1564.

<sup>2</sup> Property consists of something desired by human nature and which can be put aside against time of necessity. It comprises movable and immovable property. *Maja*, article 126.

includes perishable goods (i.e. vegetables and fruits), movable property<sup>3</sup> and immovable or real estate property.<sup>4</sup> It also comprises an unclaimed compensation for injury inflicted against the bankrupt before the bankruptcy order,<sup>5</sup> and rental of usufruct of lease contract on the bankrupt's property. According to one view of the Shāfi'is, the amount of debts owed to the bankrupt is also part of his estate<sup>6</sup> but excludes from the estate are impounded and lost properties.<sup>7</sup>

According to the Ḥanbalis and the clearer view of the Shāfi'is,<sup>8</sup> a newly acquired property is also considered as part of the bankrupt's estate as al-Rafi'ī maintains, the objective of bankruptcy procedures is to pay the debt's of the creditors. Thus, his estate should not be limited to what is owned during the order.<sup>9</sup> As a result, anything that a bankrupt receives either through hunting, bequest or purchase cannot be disposed of.<sup>10</sup> In addition, a gift that a bankrupt receives during the bankruptcy procedures is considered part of the bankrupt's estate even though he is not obliged to accept it at the first place.<sup>11</sup>

To the contrary, the Mālikis,<sup>12</sup> Ḥanafis<sup>13</sup> and one view of the Shāfi'is<sup>14</sup> consider after acquired property is not subject to the bankruptcy procedures except

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<sup>3</sup> Movable property consists of property, which can be transferred from one place to another. This includes cash, merchandise, animals, things estimated by measure of capacity and things estimated by weight. *Maja*, article 128.

<sup>4</sup> Immovable property consists of property such as houses and land which are called real property and which cannot be transferred to another place. *Maja*, article 129

<sup>5</sup> Shāf U., vol. 3, p. 232.

<sup>6</sup> Raml N., vol. 4, p. 312; See also Baṣī, vol. 2, p. 44.

<sup>7</sup> Raml N., vol. 4, p. 312.

<sup>8</sup> Rāfi, vol. 5, p. 12; Ghaz W., p. 138.

<sup>9</sup> Rāfi, vol. 5, p. 12.

<sup>10</sup> Raml N., vol. 4, p. 319.

<sup>11</sup> Shāf U., vol. 3, p. 232.

<sup>12</sup> Qarā, vol. 8, p. 171.

<sup>13</sup> Sara, vol. 24, p. 163; *Fatā*, vol. 5, p. 62; Ṭarā, p. 205.



with new bankruptcy order.<sup>15</sup> This is so, for the purpose of bankruptcy is to prevent the bankrupt from disposing of whatever is in his possession. Therefore, the bankrupt's estate does not extend to the property owned after the order. This is similar to the prevention of the mortgagor who is disallowed only to dispose of the mortgaged property.<sup>16</sup> The *Majallah* provides a similar rule, "Interdiction on account of debt only applies to property of the debtor in existence at the time of declaration of interdiction. It does not apply to any property accruing to the debtor after the interdiction."<sup>17</sup>

Al-Ghazī in explaining the above provision, maintains that there are three types of property owned by the bankrupt, i.e. (a) the property owned during the bankruptcy order that are subject to the bankruptcy procedure. (b) the property owned after termination of the order that is not affected by the order at all. (c) property owned after the order but before its termination that is not affected by the order.<sup>18</sup>

The inclusion of after acquired property to be part of the bankrupt's estate seems to be the most appropriate view. This is relevant to the fact that one of the objectives of bankruptcy procedures is settlement of the bankrupt's liabilities as much as possible. If this were not allowed, this objective would not be achieved. For the contention that the rule of mortgage should be applicable to after acquired property seems to be inappropriate. The mortgage is on specific property but the

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<sup>14</sup> Ghaz W., p. 138.

<sup>15</sup> Qarā, vol. 8, p. 171.

<sup>16</sup> Rāfi, vol. 5, p. 12.

<sup>17</sup> *Maja*, article 1001.

<sup>18</sup> Ghaz, vol. 2, p. 249.

bankruptcy is hinged on the responsibility that would not settle unless the payment is made.

In addition to after acquired property, an extra from the income of the bankrupt, after deducting the expenses for maintenance for himself and his family, is considered as part of the bankrupt's estate. Thus, the extra should be used in paying the debts.<sup>19</sup>

#### 4.1.2 English and Malaysia Laws

The concept of bankrupt's estate is also discussed in English Bankruptcy Law. Bankrupt's estate is defined as "all property belong or vested in the hand of the bankrupt at the commencement of the bankruptcy."<sup>20</sup> The property includes "money, goods, thing in action, land and every description of property wherever situated<sup>21</sup> and also obligation and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property."<sup>22</sup> Included in the definition of property is any entitlement incidental to property,<sup>23</sup> a continuation tenancy<sup>24</sup> and right under retirement annuity and pension policies.<sup>25</sup>

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<sup>19</sup> Shar, vol. 2, p. 170.

<sup>20</sup> *Insolvency Act 1986*, section 283(1)(a); Bankruptcy commences at the date of the order and lasts until discharge. *Insolvency Act 1986*, section 278.

<sup>21</sup> This includes property outside jurisdiction, such as India. *Singh v The Official Receiver* [1997] BPIR 530 Ch D.

<sup>22</sup> *Insolvency Act 1986*, section 436.

<sup>23</sup> *Re Rae* [1995] BCC 102 Ch D, In this case, the trustee argued successfully that entitlement, although not legally enforceable, to be considered for the grant of fishing licences was as much an asset vesting in him as the fishing vessels concerned.

<sup>24</sup> *Rothschild v Bell* [1999] BPIR 300 CA; For detail commentary on this case see Dave C., pp. 46-51.

<sup>25</sup> *Re Landau* [1997] BPIR 229, In this case the court held that the policy vested in the trustee in bankruptcy being a contractual right existing at the date of the bankruptcy order. This enabled the trustee to obtain not only the lump sum payable to the bankrupt but also the annuity; See also *Krasner v Dennison and others*, *Lawrence v Lesser* [2000] 3 All ER 234 CA.

Book debts and other moneys due to the debtor at the commencement of the bankruptcy are part of the bankrupt's estate as they are vested in the trustee, regardless of the date of collection. These include receivables in respect of work in progress, or work completed but not billed and fees due to a bankrupt barrister notwithstanding the inhibition on pursuing the same.<sup>26</sup>

If the bankrupt has been in business, either as a sole trader or a partner, then his business assets or share thereof are as much a part of his estate as his personal effects and the business or its assets should be realised for the benefit of creditors.<sup>27</sup>

However, the expectation of an award of compensation by the Criminal Injuries Compensation Board, for serious injuries sustained by the bankrupt from a criminal assault before the bankruptcy order, was held not to constitute "property" vests in the trustee.<sup>28</sup> Furthermore, monies ordered to be paid to a husband's solicitor as ancillary relief for the purpose of protecting his wife's interest were not property comprised in the husband's estate when he was made bankrupt.<sup>29</sup> A bankrupt's personal correspondence also does not constitute part of his estate even though such correspondence might be worth a considerable sum to the media. This is because, making the bankrupt's personal correspondence available for publication to the world at large would result in a gross and repugnant invasion of privacy.<sup>30</sup>

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<sup>26</sup> Grie, pp. 114-115.

<sup>27</sup> Ibid., p. 107.

<sup>28</sup> See *Re a Bankrupt* (145 of 1995) [1996] BPIR 238 Ch D.

<sup>29</sup> *Re Mordant Mordant and Halls* [1995] BCC 209.

<sup>30</sup> *Haig v Aitken* [2000] 3 All ER 80 Ch D.



As regard to after acquired property, it forms part of the bankrupt's property. It applies to assets, which are in effect windfalls, such as a legacy, and not to assets which merely change their character, such as the vesting of a contingent interest in settled property or the payment of proceeds of a policy on its maturity.<sup>31</sup>

The trustee may, by notice in writing to the bankrupt, claim for the benefit of the bankrupt's estate.<sup>32</sup> The notice must be made within forty-two days of the trustee first knowledge that the property in question had been acquired by or had devolved upon the bankrupt.<sup>33</sup> The bankrupt shall be obliged to inform his trustee within twenty-one days of his acquisition of any property. Once his trustee has served a notice on him, the bankrupt is under obligation not to dispose of that property without leave of his trustee within the period of forty-two days after notifying the trustee. If the bankrupt disposes of such property in contravention of this rule or prior to receiving notice from his trustee, the bankrupt must inform his trustee of the name and address of the donee.<sup>34</sup> The trustee can then serve notice on the donee to claim the property as a part of the estate but such notice must be served within twenty eight days of the trustee's awareness of the donee's identity and address at which he can be served.<sup>35</sup>

Moreover, income of the bankrupt that comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including payment in respect of the carrying on of any

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<sup>31</sup> *Rooney v Cardona & others* [1999] 1 WLR 1388 CA, per Robert Walker LJ, at 1396.

<sup>32</sup> *Insolvency Act 1986*, section 307(1).

<sup>33</sup> *Insolvency Act 1986*, section 309(1).

<sup>34</sup> *Insolvency Act 1986*, section 333(2); *Insolvency Rules 1986*, rule 6.200(1)(2).

<sup>35</sup> *Insolvency Rules 1986*, rule 6.201.

business or in respect of any office or employment,<sup>36</sup> may form part of the bankrupt's estate as the trustee may apply to the court to make "an income payment order".<sup>37</sup> Income, for the purposes of an income payment order, is widely interpreted and is not confined to wages or salary. It includes every payment in the nature of income to which the bankrupt becomes entitled including any payment in respect of carrying on any business.<sup>38</sup> In *Kilvet v Flackett*,<sup>39</sup> the court made an income payment order against the tax-free lump sum of fifty thousand pounds arising on the bankrupt becoming entitled to his NHS pension, six months after his bankruptcy.

The court must not, however, require the bankrupt to make such payment from his income below what appears to the court necessary for meeting the reasonable domestic needs of himself and his family.<sup>40</sup> The aim is to allow the bankrupt a fresh start and encourage him to continue earning during the period of bankruptcy.<sup>41</sup>

In *Re Rayatt*,<sup>42</sup> the court held that an expenditure on private school fees of eight hundred and forty-four pounds per month to be necessary. The court considered what was necessary 'for meeting the reasonable domestic needs of the bankrupt and his family', not what was 'necessary to enable the bankrupt to live'. The question was whether particular expenditure fell within the family's reasonable domestic needs, and it was not helpful to ask a general question whether expenditure on

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<sup>36</sup> *Insolvency Act 1986*, section 310(7).

<sup>37</sup> *Insolvency Act 1986*, section 310(1).

<sup>38</sup> *Insolvency Act 1986*, section 310(7); See also Frie, p. 73.

<sup>39</sup> [1998] 2 FLR 806.

<sup>40</sup> *Insolvency Act 1986*, section 310(2).

<sup>41</sup> Cost, p. 182.

<sup>42</sup> [1998] 2 FLR 264.

private education was a proper expenditure to take into account in bankruptcies. This decision offers the bankrupt scope for a considerable degree of ingenuity in arguing for all sorts of expenditure which the person on the street might not consider to be reasonable.<sup>43</sup>

The order also cannot be made after the bankrupt has obtained his discharge. Even if obtained before discharge, it cannot be effective after discharge unless its making was a condition of being granted by order of the court. If discharge was obtained by effluxion of time, the court making the order directed it to continue after discharge but, in such cases the maximum duration of the order is three years.<sup>44</sup>

Similar to English law, Malaysian law defines the bankrupt's estate. It includes (a) the property belonging to or vested in the bankrupt at the commencement of the bankruptcy,<sup>45</sup> or such as might be acquired by or devolve on him until before his discharge, (b) the capacity to exercise power in respect of property for his own benefit, and (c) goods in his "reputed ownership".<sup>46</sup>

The property of the bankrupt composes of what is divisible among his creditors.<sup>47</sup> Property includes, "money, goods, things in action, land and every description of property, whether real or personal and whether situate in Malaysia or

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<sup>43</sup> Cost, p. 184.

<sup>44</sup> *Insolvency Act 1986*, section 310(6).

<sup>45</sup> The time of the commencement of the bankruptcy has to be the actual moment of the day when the act of bankruptcy was committed. See *Bankruptcy Act 1967*, section 47(1).

<sup>46</sup> *Bankruptcy Act 1967*, section 48(b)(i)(ii)(iii); "Reputed ownership" property is that is not owned by the bankrupt but happened to be in his possession at the commencement of bankruptcy.



elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property".<sup>48</sup> This would include a devise or bequest, which is received as a beneficiary under a will.<sup>49</sup>

In addition, the bankrupt's estate also comprises the bankrupt's wages as the Official Assignee may ask the direction of the court for appropriation of portion of pay or salary of the bankrupt who is a civil servant of the Government of Malaysia.<sup>50</sup> The direction of court is also necessary in the case where a bankrupt is a recipient of a salary or income or is entitled to any half-pay or pension or compensation.<sup>51</sup>

#### 4.2 Exempt Assets

There are certain property that should be left for the use of the bankrupt and his family such as foods, clothes and the like. These are exempt assets that are not subject to sale.

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<sup>47</sup> *Bankruptcy Act 1967*, section 48; Cf. *Bankruptcy Act 1967*, section 24(4) that provides, "When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee.

<sup>48</sup> *Bankruptcy Act 1967*, section 2; Thus, the international passport of the bankrupt cannot be turned into an asset for payment of debts to the creditors. *In the matter of Lau Hieng Yee, a bankrupt* [2000] 1 MLJ 59.

<sup>49</sup> See *Re Pascoe* [1944] Ch 219.

<sup>50</sup> *Bankruptcy Act 1967*, section 57(1).

<sup>51</sup> *Bankruptcy Act 1967*, section 57(1).

#### 4.2.1 Islamic Law

##### (a) Foods

The bankrupt should be left in possession of some food, which is sufficient for his needs.<sup>52</sup> Such foods and drinks should be left to maintain sufficiently the bankrupt and his family up to the date of realisation of the bankrupt's estate. If the time for realisation is prolonged for a certain period, then they should be left until the distribution is finished.<sup>53</sup>

##### (b) Clothes

Similarly, clothes should also be left to the bankrupt, his children and family to cover their pudendum (*'awrah*) and to be used for prayer (*ṣalāh*).<sup>54</sup> This is to preserve their dignity.<sup>55</sup> The rule relating to clothes is similar to maintenance<sup>56</sup> because it is part of the basic need.

The command to provide clothes is mentioned after maintenance as Allah says, "[B]ut the father of the child should bear the costs of the mother's foods and clothing on a reasonable basis (*al-ma'rūf*)."<sup>57</sup> In this regard, there is a *Hadīth* that mentions the command for maintenance is side by side with the command for clothing, "Fear Allah concerning women! Verily you have taken on the trust of Allah, and intercourse with them has been made lawful unto you by words of Allah.

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<sup>52</sup> Mūsā, p. 186.

<sup>53</sup> Shāf U., vol. 3, p. 232.

<sup>54</sup> Mawā, vol. 5, p. 47; See also Anṣā A., vol. 2, p. 193.

<sup>55</sup> Ghaz S., vol. 4, p. 14; See also Maqd K., vol. 4, pp. 538-539.

<sup>56</sup> Zark, vol. 4, p. 81; Shar M., vol. 3, p. 110; Raml N., vol. 4, p. 329; Qaly, vol. 2, p. 290; However, Ibn Kinānah maintains that the bankrupt should not be left with clothes because a basic rule (*al-aṣl*) indicates that the creditors and others are in similar position in sharing the estates. see Qarā, vol. 8, p. 166.

<sup>57</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:233.

Their rights upon you are that you should provide them with food and clothing in a fitting manner”.<sup>58</sup> This *Ḥadīth* spells out clearly that the husband should provide clothes to the wives in order to fulfil the trust (*amānah*). The fulfilment of trust is further emphasised in the *Qur’ānic* verse which states, “Verily! Allah commands that you should render back the trust to those, to whom they are due.”<sup>59</sup> The command to discharge the trust covers every aspect<sup>60</sup>, which includes the duty of the husband to provide clothes to the wives.

Muslim jurists are of different opinion on how many sets of clothes should be left to the bankrupt and his dependants. According to the Mālikis,<sup>61</sup> Shāfi‘is<sup>62</sup> and some Ḥanafis,<sup>63</sup> one set of clothes should be left for the bankrupt and his dependants. It includes shirt, turban, trouser and shoes.<sup>64</sup> To the contrary, according to some Ḥanafis, two sets of clothes are left because when one set is washed, then the bankrupt could wear the other set.<sup>65</sup> But if the clothes are expensive then they are sold. Instead less expensive ones should be bought. Such clothes must suit a middle class status person similar to that of the bankrupt.<sup>66</sup> The sale applies only to the bankrupt’s expensive clothes and not to his dependants. It is not allowed to change

<sup>58</sup> Musl, vol. 2, pp. 887-892 at pp. 891-892; See also Bagha, vol. 5, p. 232.

<sup>59</sup> *Al-Qur’ān, sūrat al-Nisā’*, 4:58.

<sup>60</sup> Rāzī, vol. 10, p. 111.

<sup>61</sup> Mūsā, p. 186; Dard S., vol. 3, p. 277.

<sup>62</sup> Ghaz S., vol. 4, p. 14; Fash, p. 137.

<sup>63</sup> ‘Aynī S., vol. 1, p. 224; ; Afen, vol. 2, p. 443; See *Maja*, article 999.

<sup>64</sup> Ḥaṭṭ, vol. 5, p. 47; ‘Ilyā M., vol. 6, p. 48.

<sup>65</sup> ‘Aynī S., vol. 1, p. 224; ; Afen, vol. 2, p. 443; Zayl, vol. 5, p. 200; Ḥayd, vol. 2, p. 721; The Ḥanafis’ view on whether to leave one or two sets of the clothes to the bankrupt is clearly laid down in the *Majallah*, article 999, “One ore two suits of clothes shall be left for a bankrupt”; See also Khān, vol. 3, p. 634.

<sup>66</sup> Shāf U., vol. 3, p. 232; Māwa, vol. 7, p. 461; See also Maqd S., vol. 4, p. 538.



their clothes to the less expensive because the bankrupt no longer has the right over their clothes.<sup>67</sup>

The *Majallah* provides the same rule, "But if the debtor's clothes are costly, and inferior clothes can be sufficient, those clothes are also sold; and from the proceeds, a cheap set of clothes is bought for the debtor and the balance is paid to his creditors".<sup>68</sup>

The bankrupt and his family should be left with winter clothes if the order is made during the wintertime<sup>69</sup> in order to prevent hardship that might cause death.<sup>70</sup>

### (c) Tools

The working tools especially the ones necessary for the bankrupt's livelihood, should also be left to the bankrupt according to the Ḥanbalis<sup>71</sup> and one view of the Mālikis.<sup>72</sup> Al-Bahūtī emphasises that tools of necessity are similar to clothes and house that the bankrupt should retain.<sup>73</sup> However, their sale becomes necessary if the bankrupt does not need them or the prices of tools are high. So, if the value of them is low and the bankrupt needs them then there is no need to sell.<sup>74</sup>

<sup>67</sup> Māwa, vol. 7, p. 461; See also Maqd K., vol. 4, p. 538.

<sup>68</sup> *Majā*, article 999.

<sup>69</sup> Shāf U., vol. 3, p. 232.

<sup>70</sup> Mawā, vol. 5, p. 47; See also Anṣā A., vol. 2, p. 193.

<sup>71</sup> Bahū, vol. 3, p. 434; Tagh, vol. 1, p. 394.

<sup>72</sup> Mūsā, p. 186; Mawā, vol. 5, p. 42; Al-Dardīr says that there is no sale if the tools are necessary to the bankrupt. Dard Ṣ., vol. 3, p. 358.

<sup>73</sup> Bahū, vol. 3, p. 434.

<sup>74</sup> 'Ilyā M., vol. 6, p. 33; Ja'al, vol. 2, p. 149.

The Shāfi'is<sup>75</sup> and other view of the Mālikis<sup>76</sup> are on the contrary. They are of the opinion that the tools should be sold, for the bankrupt should survive by way of employment. Here, al-Ramlī maintains that the tools are sold if the bankrupt is a professional.<sup>77</sup>

#### (d) Books

Books are also considered part of the exempt assets for a bankrupt teacher according to the Shāfi'is.<sup>78</sup> Thus, the books of a bankrupt's teacher are left for him if the endowment books are not enough.<sup>79</sup> Moreover, according to one view of the Shāfi'is, a copy of the *Qur'ān* (*maṣḥaf*) should also be left to the bankrupt if there is no memoriser (*ḥāfiẓ*) surrounding him.<sup>80</sup>

The Mālikis, nevertheless, are of the opinion that the books are subject to sale in order to increase the bankrupt's estate even though they are necessary to the bankrupt. This is so, for knowledge is acquired through memorisation.<sup>81</sup> According to the majority of the Mālikis, the sale includes religious books such as jurisprudence (*fiqh*), *Ḥadīth*, commentary of *al-Qur'ān* (*tafsīr*) and the like.<sup>82</sup> They allow the sale on the basis of a case where Muḥammad bin 'Abd al-Ḥakam has allowed a person to

<sup>75</sup> Raml N., vol. 4, p. 329.

<sup>76</sup> Mūsā, p. 186; Mawā, vol. 5, p. 42.

<sup>77</sup> Raml N., vol. 4, p. 329.

<sup>78</sup> Raml N., vol. 4, p. 329.

<sup>79</sup> Bakr, vol. 3, pp. 67-68; Qaly, vol. 2, p. 291; Shar M., vol. 3, p. 111; See also Sayu A., p. 376; Shab, vol. 4, p. 329; Bayj, vol. 1, p. 544.

<sup>80</sup> Qaly, vol. 2, p. 291; Raml N., vol. 4, p. 329; Cf. Shar M., vol. 3, p. 111.

<sup>81</sup> Zarq Z., vol. 5, p. 270; See also Ja'al, vol. 2, p. 148; Dard K., vol. 3, p. 270.

<sup>82</sup> Dasū, vol. 3, p. 270.

sell Ibn Wahab's books with eight hundred *dinārs*.<sup>83</sup> Whereas, Imām Mālik did not like or allow these books to be sold.<sup>84</sup>

It seems that permission to sell the books should be upheld without considering the type of books, especially, nowadays there are many libraries open to the public that provide loan services.

#### (e) Vehicles

Muslim jurists differ on whether assets not subject to sale include a vehicle. According to the Ḥanbalis, a vehicle is a non-saleable bankrupt's assets if it is a necessity as there is a legal rule on this issue, "The house, servant and transport which are necessary are not formed part of the bankrupt's estate".<sup>85</sup> On the contrary, the Shāfi'is are of the opinion that a vehicle should be sold notwithstanding it is a necessity.<sup>86</sup> This is because the vehicle may be rented easily.<sup>87</sup>

The Shāfi'is' opinion seems to be a preferable one due to the fact that public transportation services such as buses, underground, monorail and the like are cheap, reliable and effective. Moreover, the vehicle needs maintenance that will increase the bankrupt's spending and at the same time affect the settlement of debts. Paying debts should be given priority.

<sup>83</sup> Banā, vol. 5, p. 260; 'Ilyā M., vol. 6, p. 32; Rush M., vol. 2, p. 324.

<sup>84</sup> This is based on the book of Ibn al-Mawāz, that is reported in *al-Mudawwanah*, however, the opinion is different in the report made by Ibn al-Qāsim. Rush M., vol. 2, p. 324.

<sup>85</sup> Raja, rule 130, p. 295.

<sup>86</sup> Fash, p. 147; Nawa R., vol. 4, p. 146.



#### 4.2.2 English and Malaysian Laws

Under English law, exempt assets consist of assets that should be left to the bankrupt because they are necessary to him and his family. These assets are put into two categories as follows:

- (a) Such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation and
- (b) Such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family.<sup>88</sup>

In the case of the first category, to qualify for exemption it is essential that the item must be: (a) necessary, (b) for the personal use of the bankrupt, and (c) in the context of earning his livelihood.<sup>89</sup> It seems that these words, however widely construed, would not include “stock in trade” a bankrupt uses in the course of his business<sup>90</sup> since the expression tools of trade is intended to mean those a workman requires in order to continue his employment.<sup>91</sup> An example of tools of trade is a horsebox a bankrupt uses to earn income of significant amount, i.e. one thousand pounds.<sup>92</sup> Accordingly, although he might keep his vehicle and other equipment, he

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<sup>87</sup> Ansa A., vol. 2, p. 193; Raml N., vol. 4, p. 328; Kūha, vol. 2, p. 172.

<sup>88</sup> *Insolvency Act 1986*, section 283(2); “Family”, in relation to a bankrupt, means the persons (if any) who are living with him and are dependent on him. *Insolvency Act 1986*, section 385(1).

<sup>89</sup> Flet, p. 219.

<sup>90</sup> Hunt, p. 3080.

<sup>91</sup> The exemption will still not be extended to the substantial business assets such as workshop full of expensive equipment to be operated by a team of employees. Grie, p. 113.

<sup>92</sup> *Pike (A Bankrupt) v Cork Gully* BPIR 723 CA.

would not be able to continue trading without independent means or outside finance.<sup>93</sup>

The second category of exempt assets allows the bankrupt and his family to retain such listed items as are necessary for satisfying their basic domestic needs.<sup>94</sup>

The above analysis shows that there is no maximum value for these exempt items. A practical view was taken in that bankrupts should retain personal effects, which were not extravagant, or were necessary to continue their employment and domestic existence.<sup>95</sup> It is a question of fact requiring the trustee to exercise his judgement in the light of actual circumstances.<sup>96</sup>

The trustee, however, is given power to give notice<sup>97</sup> in writing to the bankrupt that any property which would otherwise be exempted shall vest in him as trustee if it appears that the realisable value exceeds the loss of a reasonable replacement.<sup>98</sup> Replacement does not mean another asset of a similar value to that

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<sup>93</sup> Hunt, p. 3080.

<sup>94</sup> Flet, p. 219; The question still remains, at what level of provision the clause is intended to be pitched, for example, would a washing machine be deemed to satisfy "a basic domestic need" and be protected, but a dishwasher fail to qualify? Hunt, p. 3080/1.

<sup>95</sup> Grie, p. 113.

<sup>96</sup> Flet, p. 219.

<sup>97</sup> A notice cannot be served more than 42 days after the property in question first came to the knowledge of the trustee unless the court gives leave. *Insolvency Act 1986*, section 309(1)(b).

<sup>98</sup> *Insolvency Act 1986*, sections 308(1); Property is a reasonable replacement for other property if it is reasonably adequate for meeting the needs met by the other property. *Insolvency Act 1986*, section 308(4); The trustee's duty to apply the estate funds in a reasonable replacement of assets of excess value reclaimed from the bankrupt takes precedence over his duty to distribute the estate. Hunt, p. 3141.

which has been seized, but a less expensive asset that would be reasonable for the bankrupt to use for the purpose of his business.<sup>99</sup>

In *Re Rayatt*, Michael Hard QC says, "The bankrupt is to keep his car if it is needed for his employment, but if a cheaper one would serve equally well, the trustee can claim the car and allow a cheaper one to be purchased. The excess value falls into the estate, but the bankrupt is not impeded in his employment. The trustee's claim has to be timeously made".<sup>100</sup>

Accordingly, if the bankrupt possesses, for example, an antique dining table and gold plated cutlery, the trustee would serve notice claiming such items.<sup>101</sup> He can apply funds in the estate for the purchase of the replacement in priority to his obligation to distribute such funds to the bankrupt's creditors.<sup>102</sup> He is under no obligation to apply funds to the purchase of a replacement of property vested in him unless and until he has sufficient funds in the estate for the purpose.<sup>103</sup> If the bankrupt wishes to retain, the third party agrees to pay, then the trustee may not possess them.<sup>104</sup>

The property, to which a notice relates, vests in the trustee upon service of the notice claiming it and the trustee's title to such property relates back to the

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<sup>99</sup> *Pike (A Bankrupt) v Cork Gully* BPIR 723 CA, per Millet LJ at 725.

<sup>100</sup> [1998] 2 FLR 264 Ch D, at 275.

<sup>101</sup> Grie, p. 114.

<sup>102</sup> *Insolvency Act 1986*, section 308(3).

<sup>103</sup> *Insolvency Rules 1986*, rule 6.187(2).

<sup>104</sup> *Insolvency Rules 1986*, rules 6.187, 6.188.



commencement of the bankruptcy except against a purchaser in good faith, for value and without notice of the bankruptcy.<sup>105</sup>

Similar to English law, Malaysian law recognises that tools used for trade by the bankrupt and the necessities of himself, his wife and children are regarded as exempt assets and non-divisible property. The difference is only that Malaysian law limits that their value shall not exceed five thousand ringgits.<sup>106</sup>

#### 4.3 Assets Subject to Right of Third Party

Assets subject to right of third party are excluded from the realisation process since realising these assets may prejudice a right of third party. Such assets include property subject to security, trust and right of repossession.

##### 4.3.1 Islamic Law

###### (a) Property Subject to Security

The judge's right to the bankrupt's estate are subject to the right of a secured creditor in the mortgage contract (*al-rahn*).<sup>107</sup> This is one of the advantages conferred to the mortgagee.<sup>108</sup> This is due to the fact that other creditors do not have any right to the mortgaged property unless the mortgagee is paid from the sale of the mortgaged property.<sup>109</sup> Ibn Nujaym says, "The priority is given to the right establishes to the property such as the mortgage rather than to the liability".<sup>110</sup>

<sup>105</sup> *Insolvency Act 1986*, section 308 (2).

<sup>106</sup> *Bankruptcy Act 1967*, section 48(a)(ii).

<sup>107</sup> Mortgage connotes, "setting aside property from which it is possible to obtain payment or satisfaction of some claims.", *Maja*, article 701.

<sup>108</sup> See Qudā, vol. 4, p. 448; Maqd S., vol. 4, p. 541.

<sup>109</sup> Ḥayd, vol. 2, p. 721.

<sup>110</sup> Nuja, p. 360.

The principle to such right is also extended to lien.<sup>111</sup> Thus, a manufacturer [such as tailor, carpenter] has the right to retain the manufactured property until the payment of service is made where its owner becomes bankrupt before paying the service.<sup>112</sup>

Similarly, a carrier of property and a ship or transport's owner for carrying property has the right over the property in the case of bankruptcy of the hirer.<sup>113</sup> The landlord also has the right to the crops on his leased property upon the bankruptcy of the leaseholder who does not pay the rent.<sup>114</sup>

#### (b) Property Held on Trust

Apart from the restriction to the secured assets, the judge cannot acquire and sell the property held on trust by the bankrupt. Such property may include subject matter of "trust contracts". Trust contracts include contract of safekeeping (*al-wadī'ah*),<sup>115</sup> borrowing (*al-āriyyah*),<sup>116</sup> dormant partnership, agency (*al-wakālah*),<sup>117</sup> manufacturing (*al-istiṣnā'*)<sup>118</sup> and contract for delivery with prepayment.

<sup>111</sup> Rush M., vol. 2, pp. 337-338.

<sup>112</sup> Dard Ş., vol. 3, p. 376; 'Ilyā M., vol. 6, p. 73; Alla, vol. 3, p. 138; Jall, vol. 2, p. 252; Khur, vol. 5, pp. 286-287; See also al-Zarq S., vol. 5, p. 287; Bahū, vol. 3, p. 430; Anas M., vol. 4, p. 123; The right of lien is also applied even in non-bankruptcy cases such as *Majallah*, article 482 provides, "A person hired to do work, and whose work causes a change in the thing given to him to work upon, such as a tailor, a dyer, or a cleaner, and who has made no contract whereby his work is to be done on a credit basis, has a right of retention over the thing entrusted to him to work upon, for payment of his wage. If he exercises such right of retention and the property is destroyed while in his possession, he cannot be called upon to make good the loss. He cannot, however, claim his wages in addition."

<sup>113</sup> 'Ilyā M., vol. 6, p. 75.

<sup>114</sup> Jall, vol. 2, p. 252.

<sup>115</sup> Contract of safekeeping means "handling property to any particular person in order that it may be kept safely." *Maja*, article 763.

<sup>116</sup> Contract of borrowing means "conferring upon somebody the usufruct of a thing gratuitously, that is to say, without payment." *Maja*, article 765.

Property deposited with the bankrupt under the contract of safekeeping for specific purposes is not divisible to the creditors. This is because the bankrupt is considered as a trustee only. It, therefore, becomes a responsibility of a trustee to render the trust to its owner as the *Qur'ān* states, "then if one of you entrusts the other, let the one who is entrusted discharge his trust (faithfully)."<sup>119</sup>

The responsibility to discharge the trust accordingly is also emphasised by the Prophet (S.A.W) in the *Ḥadīth*, "Render the trust to whom gave it to you."<sup>120</sup>

For contract of borrowing, the borrower has to return the loan property to its owner as concluded upon in their agreement. This is based on the *Ḥadīth*, "A property on loan should be returned [as per the agreement]."<sup>121</sup>

The restriction on the judge to realise the bankrupt's property for these contracts is attached to the fact that the property is subject to repossession right. For example, a capital provider in dormant partnership may repossess his capital.<sup>122</sup> Likewise, the owner of contract for delivery with prepayment may repossess his capital.<sup>123</sup> This rule is also applicable to contract of manufacturing.

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<sup>117</sup> Contract of agency consists of one person empowering some other person to perform some act for him, whereby the latter stands in the stead of the former in regard to such act. *Maja*, article 1449.

<sup>118</sup> Contract of manufacturing consists of making a contract with any skilled person for the manufacture of any particular thing. *Maja*, article 124.

<sup>119</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:283.

<sup>120</sup> *Dāwu*, vol. 3, p. 290(no. 3535).

<sup>121</sup> *Dāwū*, vol. 3, pp. 296-297( nos. 3565, 3566).

<sup>122</sup> *Anas K*, vol. 4, p. 69.



### (c) Property Subject to Right of Repossession<sup>124</sup>

The judge's right to the bankrupt's assets is also subject to the right of the repossession. This right is given to the owner of property who is one of the bankrupt's creditors who has decided not to share the bankrupt's estate as an ordinary creditor. This principle is based on the *Ḥadīth*, "If a man finds his actual property with a bankrupt, he has more right to repossess them than anyone else."<sup>125</sup>

### 4.3.2 English and Malaysian Laws

#### (a) Property Subject to Security

Similar to Islamic law, English law recognises that property subject to a secured debt is not vested in the trustee. A debt is secured to the extent that a person to whom the debt is owed holds any security for the debt (whether a mortgage, charge, lien or other security) over any property of the person whom the debt is owed.<sup>126</sup> The security must be held in respect of a debt due to the creditor. Thus, the mere fact that the creditor happens to enjoy a right of security in respect of some other debt due to him from another party is irrelevant to the question of his status vis-à-vis the particular debtor against whom he is presenting his petition.<sup>127</sup>

The trustee, nevertheless, may repossess the bankrupt's estate that is subject to the right of a secured creditor, (a) where a secured creditor is the petitioner and

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<sup>123</sup> Qaly, vol. 2, p. 293.

<sup>124</sup> Detail discussion on the concept of repossession is explained in Chapter 3.

<sup>125</sup> Bukh, vol. 3, p. 85; Musl, vol. 3, p. 1193(no. 22); Shaw, vol. 5, p. 338; See also Dāwu, vol. 3, p. 286(no. 3519); Anas M., p. 472(no. 1371); Bayh, vol. 6, p. 45.

<sup>126</sup> *Insolvency Act 1986*, section 383(2).

<sup>127</sup> Flet, p. 109; See *Re Pearce* [1919] 1 KB 354 for further illustration.

has stated his willingness to give up his security for the benefit of all the bankrupt's creditors,<sup>128</sup> and (b) where rights have been given up.<sup>129</sup>

The trustee may also redeem the security at the value put upon it in the creditor's proof.<sup>130</sup> The cost for redemption is borne by the estate.<sup>131</sup>

The trustee, if dissatisfied with the value, may require the security to be offered for sale.<sup>132</sup> The terms of sale shall be such as may be agreed upon, or as the court may direct. And if the sale is by auction, the trustee and creditor may appear and bid.<sup>133</sup>

The trustee's right to the bankrupt's estate is also subject to liens. Liens over property may be general or specific, a general lien giving the holder the right to retain possession until all his claims have been met, whether or not in relation to the specific property being held. General liens are difficult to establish at common law; nevertheless those held by bankers or solicitors and warehousemen have been recognised. Moreover, a general lien may always be created by a specific agreement between the parties.<sup>134</sup>

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<sup>128</sup> *Insolvency Act 1986*, sections 283(5)(a), 269(1)(a); If he voluntarily surrenders his security for the general benefit of creditors, he may prove for his whole debt, and if it were unsecured. *Insolvency Rules 1986*, rule 6.109(2).

<sup>129</sup> *Insolvency Act 1986*, section 283(5)(b).

<sup>130</sup> *Insolvency Rules 1986*, rule 6.117(1); See also *Insolvency Act 1986*, section 311(5).

<sup>131</sup> *Insolvency Rules 1986*, rule 6.117(3).

<sup>132</sup> *Insolvency Rules 1986*, rule 6.118(1).

<sup>133</sup> *Insolvency Rules 1986*, rule 6.118(2).

<sup>134</sup> Grie, p. 153.

Specific liens are much more common, since they give the holder rights to retain possession until work done on property is paid for e.g. work done by a garage on a vehicle.<sup>135</sup>

A lien does not automatically carry with it the power of sale, notwithstanding many contractual liens have this right built in for additional protection of the holder. However, at common law the power of sale is limited although a statutory right of sale has been given in many cases, for example to carriers. Liens do not generally arise in the hands of employees who retain property belonging to the bankrupt against their claims for unpaid wages.<sup>136</sup>

Same as English law, Malaysian law recognises that certain part of the bankrupt's estate is not subject to realisation by the Official Assignee as it is subject to the right of a secured creditor. The secured creditor is "a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor."<sup>137</sup>

Realisation, however, is possible where a secured creditor is willing to give up his security to prove for the whole debt as if he is an unsecured creditor.<sup>138</sup>

The Official Assignee may also at any time value the security and redeem it on payment to the creditor of the assessed value.<sup>139</sup>

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<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> *Bankruptcy Act 1967*, section 2.

<sup>138</sup> *Bankruptcy Act 1967*, Schedule C, rule 10.

<sup>139</sup> *Bankruptcy Act 1967*, Schedule C, rule 12(a).



## (b) Property Held on Trust

English law also provides that property held by the bankrupt on trust for any other person is not included in the bankrupt's estate. Hence, it does not pass to his trustee for division amongst his creditors.<sup>140</sup> Therefore, a man cannot hold property in trust for himself, because in such a situation, the legal and beneficial interests are merged. It would, thus, be artificial to treat them as separate.<sup>141</sup>

In other situations, the law imposes a fiduciary responsibility on account of relationships existing between parties, with the consequence that certain monies in the bankrupt's hands may be impressed with a trust in favour of those to whom he stands in a fiduciary capacity.<sup>142</sup> Such is the case for example with solicitors, who may at any time have charge of clients' monies,<sup>143</sup> or with factors or with mercantile agent bankers or paying agents who may possess goods or money for application on behalf of their client or principal.<sup>144</sup>

Moreover, it is essential that the bankrupt should be merely a "bare" trustee of any property which is to escape transmission to his trustee in bankruptcy; if, in addition to being a trustee, the bankrupt enjoys a beneficial interest in the trust estate;

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<sup>140</sup> *Insolvency Act 1986*, section 283(3)(a).

<sup>141</sup> *Rooney v Cardona & Others* [1999] 1 WLR 1388 CA, per Robert Walker LJ at 1397; See also *In re Cook, Beck v Grant* [1948] Ch 212.

<sup>142</sup> Flet, p. 209; Cf. *Harris v. Truman* (1882) 9 QBD 264.

<sup>143</sup> *Re a Solicitor* [1952] Ch. 328.

<sup>144</sup> Flet, p. 209.

the property does not come within the exemption, which relates to property held on trust for "any other person."<sup>145</sup>

When there is a mixture between trust property and unprotected funds in one and the same banking account, the basic rule is derived from the rule in *Clayton's case*<sup>146</sup> that it is to be presumed that monies have been withdrawn in the same chronological order as they were paid in (first in, first out rule). If, however, there is a mixture between trust monies and his own money, such a person must be taken to have drawn out his own money first in preference to the trust money.<sup>147</sup>

Malaysian law, like English law, recognises that property held by the bankrupt on trust for any other person is not part of the bankrupt's estate and therefore does not pass to his Official Assignee for distribution to his creditors.<sup>148</sup>

### (c) Property Subject to Right of Repossession

The trustee may also not be able to repossess the property that is subject to the "retention clause". Retention clause is "a provision introduces into the contract of sale whereby ownership of the thing sold will not be transferred to the buyer until such time as the purchase price is fully paid."<sup>149</sup>

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<sup>145</sup> Flet, pp. 209-210; See *Morgan v. Swansea Urban Sanitary Authority* (1878) 9 Ch D 582; *Governors of St. Thomas's Hospital v. Richardson* [1910] 1 KB 271.

<sup>146</sup> *Devaynes v. Noble, Clayton's Case* 35 ER 781.

<sup>147</sup> *Re Hallet Estate* (1880) 13 Ch D 696.

<sup>148</sup> *Bankruptcy Act 1967*, section 48(a)(i); See also *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ HC, per Fai J at 268 G-I.

<sup>149</sup> Flet, p. 216.

Where the seller is an associate of the bankrupt,<sup>150</sup> the validity of a reservation of title clause is much less certain because, it would fall under the rule of preference,<sup>151</sup> the court is required to presume, unless the seller can prove to the contrary, that the bankrupt was influenced by the desire to confer the requisite advantage on the seller when assenting to the inclusion of the clause in their contract of sale.<sup>152</sup>

#### 4.4 Sale of Bankrupt's Estate

Sale of the bankrupt's estate should be carried out after determining whether the assets are saleable or not.

##### 4.4.1 Islamic Law

It is a duty of the judge to sell the bankrupt's estate under Islamic law. This is based on the *Ḥadīth*, "The Prophet (S.A.W) sold the property of Mu'ādh and divided its proceeds amongst the creditors. As a result, Mu'ādh had nothing".<sup>153</sup> This is also based on the decision of 'Umar ibn al-Khaṭṭāb on al-'Usayfī' who sold the latter's assets.<sup>154</sup> Al-Saraksī says that 'Umar's decision is not disputed about its correctness among the Companions. Thus, they agree on the legality of sale of the bankrupt's

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<sup>150</sup> A person is an associate of an individual if that person is the individual's husband or wife, or is a relative, or the husband or wife of a relative, of the individual, or of the individual's husband or wife. *Insolvency Act 1986*, section 435(2).

<sup>151</sup> *Insolvency Act 1986*, section 340(5).

<sup>152</sup> Flet, p. 218.

<sup>153</sup> Shaw, vol. 5, p. 340; Bayh, vol. 6, p. 48.

<sup>154</sup> Anas M., p. 547; See also Bagha, vol. 4, p. 342; Bayh, vol. 6, p. 49.



estate to pay the creditors.<sup>155</sup> The judge, however, is allowed to appoint a trustee to sell the estate.<sup>156</sup>

The sale is recommended to take place in the open market to maximise the number of potential buyers and profits.<sup>157</sup> This is also to get a fair price.<sup>158</sup> However, it is still permissible to sell in other places if the price is alike.<sup>159</sup>

Each object of the bankrupt's estate is sold at a reasonable price, payable immediately in local currency.<sup>160</sup> Nevertheless, the sale may be made for future payment and with other currency by permission of the bankrupt and his creditors.<sup>161</sup>

The bankrupt's assets are encouraged to be sold with a reserved right of option within three days.<sup>162</sup> This view is in accordance with the *Ḥadīth*, "If anyone buys sheep or goat whose udders has been tied up, he has option for three days."<sup>163</sup> The *Ḥadīth*, according to the majority of the Muslim jurists, indicates that the period of option available in the option of stipulation is three days. If the agreed duration is more than that, the sale is void according to Imāms al-Shāfi'ī and Abū Ḥanīfah. However, Abū Yūsuf is of the view that the duration can be more than three days but

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<sup>155</sup> Sara, vol. 24, p. 164.

<sup>156</sup> Shāf U., vol. 3, p. 237; See also Alla, vol. 3, p. 132; Dard Ṣ., vol. 3, p. 357; On the contrary, al-Anṣārī suggests that it is better for the owner or his agent [of the bankrupt] to conduct the sale subject to the permission of the judge. Therefore, the ownership of the property is not required to be established. However, if the judge makes the sale, then he has to make sure that the property belongs to the bankrupt. Anṣā A., vol. 2, p. 189.

<sup>157</sup> Maqd K., vol. 2, p. 173.

<sup>158</sup> Māwa vol. 7, p. 444; Anṣā A., vol. 2, p. 190.

<sup>159</sup> Maqd S., vol. 4, pp. 536-537; See also Bahū, vol. 3, p. 433; Kūha, vol. 2, p. 170; Gham, p. 224.

<sup>160</sup> Nawa R., vol. 4, p. 142; Ghaz S., vol. 4, p. 14; See also 'Aynī S., vol. 1, p. 224.

<sup>161</sup> Kūha, vol. 2, p. 170; Gham, p. 224.

<sup>162</sup> Mūsā, p. 186; This is in order to increase the price. 'Ilyā M., vol. 6, p. 32; This is also to examine the price thoroughly. al-Dard Ṣ., vol. 3, p. 357; Ja'al, vol. 2, p. 149.

with a specified condition. Imām Mālik maintains that the type of subject matter determines the duration. For instance, two or three days for clothes, one week or more for animals and a year or more for land and estate.<sup>164</sup>

The judge or the trustee should repudiate the sale if there is an increase to the sale property as far as the exercise of option is still available. This is because his sale is impossible to continue without it. Furthermore, if the option is no longer available, it is recommended to the trustee to ask the buyer to agree for mutual rescission (*al-iqālah*).<sup>165</sup> The buyer is encouraged to accept the offer of mutual rescission as this would help the bankrupt to settle his debts.<sup>166</sup> Moreover, Islām also recommends this practice as the Prophet (S.A.W) is reported to have said, "If anyone rescinds a sale with a Muslim, Allah regards his offence as undone [in the Day of Judgement]."<sup>167</sup>

The presence of the bankrupt is recommended in order to secure and get a good price. The bankrupt is expected to provide the explanation to the buyer, for the bankrupt knows about the price and quality of the goods, to give full satisfaction to the buyer when he buys the goods from the actual owner and to satisfy the bankrupt himself and to please his heart.<sup>168</sup> The creditors are also recommended to be in the sale session since the sale is purposely for their benefits. The creditors wish sometime to buy the goods by paying a good price to the interest of the bankrupt and

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<sup>163</sup> Musl, vol. 3, p. 1108(no. 25); Dāwu, vol. 3, p. 270(no. 3444).

<sup>164</sup> Bagha, vol. 4, p. 235.

<sup>165</sup> The rule relating to mutual rescission is allowed based on consensus of Muslim jurists. Ābād, vol. 9, p. 259.

<sup>166</sup> Bahū, vol. 3, p. 433.

<sup>167</sup> Dāwu, vol. 3, p. 277(no. 3460); Māja, vol. 2, p. 741.

<sup>168</sup> Qudā, vol. 4, pp. 490-491; Maqd K., vol. 2, p. 172; al-Maqd S., vol. 4, p. 535; Bahū, vol. 3, pp. 432-433; See also Māwa, vol. 7, p. 444; Anṣā A., vol. 2, p. 189; Raml N., vol. 4, p. 321; Rāfi, vol. 5, p. 18.



creditors as a whole; the creditors would be pleased with the sale and the insinuation would be prevented. The properties may be claimed by owners who find their respective actual properties still in the bankrupt's estate.<sup>169</sup>

The sale starts with the perishable goods, followed by the property that is subject to others such as mortgaged property,<sup>170</sup> then the animals, other movable goods and lastly immovable property as immovable property is not subject to destruction and stealing. The sale of immovable property begins with the building, then the land.<sup>171</sup> This is only a guideline to facilitate the sale that is based on predominant practice (*al-ghālib*). Thus, the judge is allowed to exercise his discretion and personal judgement (*ijtihād*).<sup>172</sup>

The sale of animals should be proceeded with as soon as possible.<sup>173</sup> However, Imām al-Shāfi'ī allows postponement of the sale of animal for three days, especially when they are too many and the postponement seems to increase their

<sup>169</sup> Qudā, vol. 4, pp. 490-491; Maqd K., vol. 2, p. 172; Bahū, vol. 3, p. 433; See also Māwa, vol. 7, p. 444.

<sup>170</sup> There is another view stating that the judge should start selling the property that is subject to the right of other such as mortgaged property first in order to settle the debt immediately. Anṣā A., vol. 2, p. 190; This is because the right of the mortgagee is attached to the property and the surplus of the sale could be distributed to the creditors. Māwa, vol. 7, p. 445; When the sale of mortgage property has taken place then the proceeds of sale should be handed over to the mortgagee after he has proven by way of oath about his right. The surplus should be put in the bankrupt's estate. However, if the proceed is not enough to settle the debt to the mortgagee, he has the right to share the unpaid debt with other ordinary creditors, Shāf U., vol. 3, p. 238; Māwa, vol. 7, p. 445; Rāfi, vol. 5, pp. 18-19; Maqd S., vol. 4, p. 499.

<sup>171</sup> Shar M., vol. 3, p. 104; Kūha, vol. 2, p. 169.

<sup>172</sup> Gham, p. 224.

<sup>173</sup> Mūsā, p. 186; They are changeable and need to be feed causing the decrease of the estate of the bankrupt. 'Ilyā M., vol. 6, pp. 35-36; The sale of animals should be done as soon as possible and the land would delayed up to two months. Ḥaṭṭ, vol. 5, p. 43; See also Dard Ṣ., vol. 3, p. 360; In Alla, vol. 3, p. 133, it is stated that in case of immovable property, it is allowed to defer the sale up to two months in order to get a higher price; However, al-Ja'alī suggests that the sale of immovable is allowed for more than three days. Ja'al, vol. 2, p. 149.



value.<sup>174</sup> The sale of a house may also be postponed if it is justified that the price is not its price or less than the market price.<sup>175</sup>

Moreover, the sale of lands and other assets may also be delayed until the price is right. The delay is also possible if delay creates more demand from people from other states as once they come to know about it the price increases.<sup>176</sup>

Apart from sale of the bankrupt's estate, the judge may sub-lease the vacant land rented by the bankrupt for any unused period. For example, the rent is paid for a period of one month and the debtor becomes bankrupt in the middle of the month. The second half-month may be sub-leased by the judge in order to increase the income of the estate, since the landlord cannot repudiate the lease contract in order to repossess his property.<sup>177</sup>

#### 4.4.2 English and Malaysian Laws

Contrary to Islamic law, English law provides two stages of sale of the bankrupt's estate. During the interval between bankruptcy order and the appointment of the trustee, the official receiver while acting as receiver or manager of the bankrupt's estate is entitled to sell or otherwise dispose of any perishable goods comprised in the estate and any other goods comprised of the value which is likely to diminish if they are not disposed of.<sup>178</sup> The law suggests that the sale of the

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<sup>174</sup> Shāf U., vol. 3, p. 239.

<sup>175</sup> Shāf U., vol. 3, p. 239; Imām Mālik says that the sale of house could be postponed for one to two months. See 'Ilyā M., vol. 6, p. 35.

<sup>176</sup> Shāf U., vol. 3, p. 239; It is stated that sale of immovable property could be delayed for two months. Mūsā, p. 186.

<sup>177</sup> Anṣā A., vol. 2, p. 196; Nawa M., vol. 14, p. 106.

<sup>178</sup> *Insolvency Act 1986*, section 287(2)(b).

bankrupt's estate starts with the perishable goods and goods, of which value may diminish if they are not sold.

After the appointment of the trustee, the sale of the bankrupt's estate becomes part of the duty of the trustee. The sale includes the goodwill and book debts of any business.<sup>179</sup> The goodwill of a business has been held to include secret unwritten formulae used in it.<sup>180</sup>

The trustee may, subject to conditions and stipulation as to security by the creditors' committee or the court as thinks fit, accept deferred payment on the sale of any of the bankrupt's property.<sup>181</sup> The trustee is not bound, and cannot be compelled to sell an asset of the estate, if the received offer is derisory.<sup>182</sup>

On top of that, the trustee may deal with any property comprised in the estate to which the bankrupt beneficially entitled as tenant in tail in the same manner of the bankrupt might have dealt with it.<sup>183</sup> He may also raise money by means of a mortgage or pledge of property comprised in the estate.<sup>184</sup>

Contrary to Islamic and English laws, in Malaysian law, duty to sell the bankrupt's estate is exercised by the Official Assignee. The sale includes all or any

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<sup>179</sup> *Insolvency Act 1986*, section 314, Schedule 5, Part II, para 9; If the bankrupt operated a one-man business, such as plumber, carpenter or handyman, there may be in reality be no business that can effectively be sold out but it may be expedient for the bankrupt himself to continue in business subject to the restrictions imposed upon him by bankruptcy and making use of the tools of his trade as exempt assets. Grie, p. 107.

<sup>180</sup> See *Re Keene* [1922] 2 Ch. 475 CA.

<sup>181</sup> *Insolvency Act 1986*, section 314, Schedule 5, Part I, para 3.

<sup>182</sup> See *Khan v Official Receiver* [1997] BPIR 109 CA.

<sup>183</sup> *Insolvency Act 1986*, section 314, Schedule 5, Part II, para 13.

part of bankrupt's property, good will of a business, book-debts and so on. The sale may be either by a public auction or private contract with the Official Assignee's power to transfer the property thereof to any purchaser.<sup>185</sup> The bankrupt does not have any right to have a motion for an order to restrain the Official Assignee from selling by public auction as it is the duty of the Official Assignee to realise the bankrupt's assets for the benefit of creditors. Furthermore, the court will not interfere with the discretion of the Official Assignee even at the instance of a creditor, unless his actions are so utterly unreasonable and absurd that no reasonable man would so act.<sup>186</sup>

The charges and expenses, connected with the sale by the auctioneer or agent of the Official Assignee, are to be paid from the proceeds of such sale.<sup>187</sup> The Official Assignee may give receipt for any money he receives to discharge the person paying the money from all responsibilities.<sup>188</sup>

The Official Assignee may, subject to the order of court, accept, as a consideration for the sale of any property of the bankrupt, a sum of money payable at a future time, subject to such stipulations as a security.<sup>189</sup>

Moreover, with sanction of the court, the Official Assignee may also mortgage, charge or pledge any part of the property of the bankrupt for purpose of raising money for the payment of the debts.<sup>190</sup>

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<sup>184</sup> *Insolvency Act 1986*, section 314, Schedule 5, Part I, para 4.

<sup>185</sup> *Bankruptcy Act 1967*, section 60(a).

<sup>186</sup> *Re Chew Kean Kor* (1957) 23 MLJ 34.

<sup>187</sup> *Bankruptcy Rules 1969*, rule 245.

<sup>188</sup> *Bankruptcy Act 1967*, section 60(b).



#### 4.5 Sale of Matrimonial House

The bankrupt's house is considered as his most valuable possession because of its substantial value. There will be a conflict of interest between a bankrupt's family and creditor if the house is sold. The issue is whether the house is subject to sale.

##### 4.5.1 Islamic Law

There are different views among Muslim jurists whether to leave or sell the bankrupt's house. The Mālikis,<sup>191</sup> Ḥanbalis,<sup>192</sup> Ḥanafis<sup>193</sup> and one view of the Shāfi'is<sup>194</sup> argue that the house should not be sold if it is the only house the bankrupt owns. They contend that the need for the house is similar to clothes that are a necessity. Therefore, if the bankrupt does not have a house then, one house should be rented for the bankrupt.<sup>195</sup> There is a legal rule on the issue, "The house, servant and transport which are necessary are not formed part of the bankrupt's estate".<sup>196</sup>

However, if the house of the bankrupt is to be a surplus or a matter of secondary importance, it should be sold. So, if the house is big, the judge may sell

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<sup>189</sup> *Bankruptcy Act 1967*, section 61(d).

<sup>190</sup> *Bankruptcy Act 1967*, section 61(e).

<sup>191</sup> Dard Ş., vol. 3, p. 358.

<sup>192</sup> Qudā, vol. 4, pp. 490 & 492-493; Maqd S., vol. 4, pp. 536-537; Zark, vol. 4, p. 81; Bahū, vol. 3, pp. 534-535.

<sup>193</sup> *Fatā*, vol. 5, p. 62; Ṭūrī, vol. 8, p. 95; Ḥayd, vol. 2, p. 722; See also Lubn, p. 555; *Maja*, article 999.

<sup>194</sup> Shar M., vol. 2, p. 169; Nawa R., vol. 4, p. 145, The house should be left behind if it is proper and not excessive (*la'iq*); See also Qaly, vol. 2, p. 291; Ḥayd, vol. 2, p. 721.

<sup>195</sup> Maqd K., vol. 2, p. 186; Maqd S., vol. 4, pp. 536-537.

<sup>196</sup> Raja, rule 130, p. 295.

that house and buy a suitable one for the occupation of bankrupt and his family. The balance of proceeds should be distributed to the creditors.<sup>197</sup>

A similar rule is provided in the *Majallah*, "[I]f the debtor has a large country house and a smaller one is sufficient for him, such country house should be sold and a suitable dwelling purchased from the sum realised, and the balance given to the creditors."<sup>198</sup> This provision does not mean all proceeds from the sale should be given to the creditors and the bankrupt should stay in a rented house.<sup>199</sup> If he dies, the house should be sold because the rights of creditors override that of the heirs.<sup>200</sup>

If the bankrupt has two houses, then the judge must sell one of them.<sup>201</sup> But, on the contrary, a house should be bought or left to the bankrupt in a case where the creditor, with a right to take it, wishes to own the house.<sup>202</sup>

However, Imām Mālik<sup>203</sup> and the majority of the Shāfi'is<sup>204</sup> maintain that the house should be realised and sold, even if it is a necessity. It forms a part of the bankrupt's estate. This is based on the *Ḥadīth* referring to a man who bought fruits and suffered loss through damage. Thus, his debt increases. So the Prophet (S.A.W) requested the people to give him charity but that was not enough to pay the debt in

<sup>197</sup> Raja, p. 295; Zark, vol. 4, p. 82; Dasū Ḥ., vol. 3, p. 270; Ṣāwī, vol. 2, p. 129; Mard, vol. 5, p. 303; Maqd S., vol. 4, p. 537; Bahū, vol. 3, p. 434.

<sup>198</sup> *Maja*, article 999; See also 'Aynī S., vol. 1, p. 224; Afen, vol. 2, p. 443; Zayl, vol. 5, p. 200.

<sup>199</sup> Ḥayd, vol. 2, p. 722.

<sup>200</sup> Lubn, p. 555; See also Muḥa, vol. 2, p. 358.

<sup>201</sup> Dard Ṣ., vol. 4, p. 358; Zark, vol. 4, p. 81.

<sup>202</sup> Tagh, vol. 1, p. 397.

<sup>203</sup> Mawā, vol. 5, p. 42.

<sup>204</sup> Shāf U., vol. 3, p. 232; Māwa, vol. 7, pp. 462-463; Ghaz W., p. 139; Ghaz S., vol. 4, p. 15; Sayū, p. 371; Fash, p. 147.

full. Consequently, the Prophet (S.A.W) said to his creditors, "Take whatever you find and there is nothing else for you than that."<sup>205</sup>

The contention on the house as a necessity like clothes is rejected, but not the clothes for the bankrupt needs clothes. Furthermore, according to the custom, renting a house is acceptable but renting clothes is not.<sup>206</sup>

The first view seems more acceptable as the house is a necessity for the protection of one's self and family, and selling it causes a harm that the Islamic law prohibits. To this effect, the Prophet (S.A.W) is reported to have said, "There should be neither harming nor reciprocating harm, if a person harms the other, Allah harms him and if a person causes trouble to other, Allah causes trouble for him."<sup>207</sup> Furthermore, it is the obligation of the husband to provide and the right of the wife and children to have a suitable matrimonial home as the *Qur'ān* states, "Lodge them (the divorced women) where you dwell, according to your means, and do not treat them in such a harmful way that they be obliged to leave."<sup>208</sup> The fact that this is obligatory for divorced women indicates by analogy that the same should apply to married women.<sup>209</sup>

It is also part of the liability of the husband to make sure that his family is protected. The shelter should be provided accordingly. This liability is clearly

<sup>205</sup> Musl, vol. 3, p. 1191(no. 18); Bagha, vol. 4, pp. 341-342(no. 2128); Bayh, vol. 6, pp. 49-50.

<sup>206</sup> Māwa, vol. 7, p. 462; According to al-Asnawī, renting house is much easier. See 'Umay, vol. 2, p. 290.

<sup>207</sup> Daru, vol. 2, p. 56 (no. 3060); See also Nawa T., pp. 106-107(no. 32).

<sup>208</sup> *Al-Qur'ān, sūrat al-Ṭalāq*, 65:6.

<sup>209</sup> Alam, p. 114.



provided by the *Ḥadīth*, “Everyone of you is responsible (for his wards). A man is a guardian of his family and responsible (for them). Beware! All of you are guardian and are responsible (for your wards).<sup>210</sup> Moreover, providing a suitable house is not only liability but also a trust that has been emphasised by Islam, as the *Qur’ān* states, “Verily! Allah commands that you should render back the trust to those, to whom they are due.”<sup>211</sup> Provision of matrimonial house is an integral part of trust the husband should provide.

#### 4.5.2 English and Malaysian Laws

English law allows the sale of a dwelling house.<sup>212</sup> This is because it forms part of the bankrupt’s estate that vested in the trustee. The possession of the house is, nevertheless, subject to some restrictions such as spouse’s right of occupation is a charge on the estate continues to subsist that binds the trustee of the bankrupt and persons deriving title under that trustee.<sup>213</sup> The possession, too, is subject to rights of occupation of a bankrupt and any persons under the age of eighteen.<sup>214</sup>

Sale of the house is also difficult to be carried out where a bankrupt and his spouse or former spouse are joint owners, and a trust for sale has arisen. The trustee, therefore, has to apply to the bankruptcy court for an enforced sale<sup>215</sup> under section 14 of the *Trust of Land and Appointment of the Trustees Act 1996*<sup>216</sup> or section 33

<sup>210</sup> Bukh, vol. 6, p. 146.

<sup>211</sup> *Al-Qur’ān, sūrat al-Nisā’*, 4:58.

<sup>212</sup> “Dwelling house” includes any building or part of a building which is occupied as a dwelling and any yard, garden, and occupied with it. *Insolvency Act 1986*, section 385(1).

<sup>213</sup> *Insolvency Act 1986*, section 336(1)(2)(a); For detail discussion, see Dave I., pp. 2-15.

<sup>214</sup> *Insolvency Act 1986*, section 337(1)(2).

<sup>215</sup> *Insolvency Act 1986*, section 336(2)(b).

<sup>216</sup> *Insolvency Act 1986*, section 335A(2)(b).

of the *Family Law Act 1996*.<sup>217</sup> On such an application, the court has a general discretion. The court can consider all the circumstances (including the interests of the family and creditors and the contribution of either party towards the bankrupt);<sup>218</sup> but if it is made more than one year after the vesting of the property in the trustee in bankruptcy, it will be the interests of the creditors that will prevail unless there are exceptional circumstances.<sup>219</sup>

The exceptional circumstances include 'hardship' upon an elderly lady, the mother of the bankrupt, by her being forced to leave her home of forty years standing,<sup>220</sup> very poor health in that the person suffers from a chronic renal failure and chronic osteoarthritis, resulting great difficulty to walk,<sup>221</sup> suffering from inoperable cancer with life-expectancy of six months that needs of a carer<sup>222</sup> and wife recovering from cancer would adversely affected by prospect of having to leave home.<sup>223</sup> In such exceptional circumstances, the order may be varied. The court may order sale and vacant possession but impose a condition to postpone the sale up to one year.<sup>224</sup>

However, it is not an exceptional circumstance if the fact shows that the wife with young children faces eviction and will be made homeless.<sup>225</sup>

<sup>217</sup> *Insolvency Act 1986*, section 336(3).

<sup>218</sup> *Insolvency Act 1986*, section 336(4).

<sup>219</sup> *Insolvency Act 1986*, section 336(5).

<sup>220</sup> *Re Mott (A Bankrupt) ex parte Trustee of the Property the Bankrupt v Mott and McQuitty* [1987] CLY 212.

<sup>221</sup> *Claughton v Charalambous* [1998] BPIR 558; For commentary of the case, see Bail, pp. 205-206.

<sup>222</sup> *Re Bremner (A Bankrupt)* [1999] 1 FLR 912.

<sup>223</sup> *Judd v Brown, Re Bankrupt (Nos 9587 and 9588 of 1994)* [1999] 1 FLR 360.

<sup>224</sup> *Re Raval* [1998] 2 FLR 718.

<sup>225</sup> *Re Citro (Domenico) (A Bankrupt); Re Citro (Carmine) (A Bankrupt)* [1991] 1 FLR 71.

The sale of house is also subject to the equitable principle of an irrevocable licence given by the bankrupt to a relative. In *Re Sharpe (A Bankrupt) Ex parte the Trustee of the Bankrupt v. Sharpe and Another*,<sup>226</sup> a bankrupt purchased a house with the help of his aunt as part of an arrangement whereby the aunt was to live with the bankrupt and his wife in the property. The trustee contracted to sell the property with vacant possession to a purchaser. The aunt made a claim, claiming either a beneficial interest under a resulting trust or alternatively a right under irrevocable licence to occupy the property until the repayment of the loan. It was held that the aunt had an irrevocable licence to occupy the house until the loan was paid. Furthermore, the aunt's irrevocable licence was not merely a contractual licence but arose under a constructive trust and as such conferred on her an interest in the property binding on the trustee in bankruptcy. Therefore, the trustee took the property subject to the aunt's irrevocable licence.

The trustee may apply to the court for an order to impose a charge on any property comprise in the bankrupt's estate which is occupied by the bankrupt or his spouse for the benefit of the bankrupt's estate. This is done in circumstances where the trustee is not able to dispose of the bankrupt's interest in a dwelling house by the time he has completed the remained of the administration of the estate.<sup>227</sup> This is a tilt of the balance more in favour of the bankrupt and his family when it comes to selling the family house.<sup>228</sup>

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<sup>226</sup> [1980] 1 All ER 198.

<sup>227</sup> *Insolvency Act 1986*, section 313(1).

<sup>228</sup> Seal, p. 367.



Similar to English law, in Malaysian law, the house is part of the bankrupt's estate that is subject to sale. This is because upon the adjudication, all property of the bankrupt are vested in the hand of the Official Assignee.<sup>229</sup> But where the Official Assignee fails to sell the house, he may mortgage, charge or pledge it for the purpose of raising money for the payment of the debts. However, this right is subject to the order of the court.<sup>230</sup>

#### 4.6. Maintenance

The issue is whether certain amounts of money should be set aside for maintenance of the bankrupt and his dependants during the period of realisation.

##### 4.6.1 Islamic Law

During realisation and before distribution, the judge must retain some of the proceeds from the sale for the payment of maintenance to the bankrupt, as maintenance is a basic necessity (*al-ḥājah al-aṣliyyah*).<sup>231</sup> In other words, the bankrupt should be left in possession of compulsory maintenance (*al-nafaqah al-wājibah*), which is sufficient for his, needs,<sup>232</sup> his wife,<sup>233</sup> children and poor parent.<sup>234</sup> According to the view of Imāms Ḥanafī, Mālik, al-Shāfi'ī and Aḥmad, the maintenance (*al-nafaqah*)<sup>235</sup> of the bankrupt and his dependants<sup>236</sup> is obligatory.

<sup>229</sup> *Bankruptcy Act 1967*, section 24(4).

<sup>230</sup> *Bankruptcy Act 1967*, section 61(e).

<sup>231</sup> Another example of a basic necessity is a marriage. So, the wife could share the estate of the bankrupt for her alike dowry if she gets married with the bankrupt. Ḥayd, vol. 2, p. 732.

<sup>232</sup> Mūsā, p. 186.

<sup>233</sup> The maintenance is for the wife who marries with the bankrupt before the bankruptcy order and not after that. Raml N., vol. 4, p. 327.

<sup>234</sup> Ḥaṭṭ, vol. 5, p. 47; Dard S., vol. 3, p. 277; See also Mawd, vol. 1, p. 269.

<sup>235</sup> The term *al-ma'ūnah* is used by some Muslim jurists to include maintenance, clothing (*kiswah*) and shelter (*suknā*) to the bankrupt and his family. See Anṣā T., p. 85.

<sup>236</sup> The maintenance of the wife who get married to the bankrupt before the bankruptcy order and not after that. Raml N., vol. 4, p. 327.

There seems to be no knowledge of other views besides this one.<sup>237</sup> This is also due to the fact that the maintenance is one of the necessities that is not affected by the interdiction involving an other party. This case is similar to that of the payment of dowry that does not exceed an alike dowry (*mahr mithlī*).<sup>238</sup>

Furthermore, the Ḥanafīs observe that the maintenance for the bankrupt and his dependants is the basic needs to be given priority over the creditors' rights.<sup>239</sup> Al-Sulamī says, "(H)is interest as regards to maintenance of himself and his dependants [from the day of bankruptcy declaration until the repayment of the debt] is given priority over the interest of his creditors."<sup>240</sup> The priority is based on the *Ḥadīth* referring to, "A person from the Banu 'Udhra set a slave free after his death. This news reached the Prophet (S.A.W) who consequently asked, "Do you have any property besides it?" He said, "No." Upon this the Prophet (S.A.W) said, "Who would buy it from me?" Nu'aym bin Abd Allah bought it for eight hundred *dirhams* and brought it to the Prophet (S.A.W) who returned it to the owner. As a consequent, the Prophet (S.A.W) advised imperatively, "Start with your own self and spent it on yourself, and if anything left, it should be spent on your family, and if anything left, it should be spent on your relatives and then like this and like this".<sup>241</sup> Another *Ḥadīth* on this point states, "The best alms given are those when you are rich; and you should support your dependants first."<sup>242</sup>

<sup>237</sup> Jayy, vol. 1, p. 223; This is contrary to the view of Ibn Kinānah who maintains that the maintenance should not be left at all. See Qarā, vol. 8, p. 166.

<sup>238</sup> Ghaz, vol. 2, p. 248.

<sup>239</sup> Marg, vol. 3, p. 286; 'Aynī S., vol. 1, p. 224; Afen, vol. 2, p. 443; Mawd, vol. 1, p. 369.

<sup>240</sup> Sula, vol. 1, p. 79.

<sup>241</sup> Musl, vol. 3, pp. 692-693 (no. 41).

<sup>242</sup> Bukh, vol. 6, p. 189.

According to Abū Yūsuf and Muḥammad al-Shaybānī, the maintenance is paid from the bankrupt's assets.<sup>243</sup> The *Majallah* has laid down the same rule, "The maintenance of the bankrupt and persons dependent upon him for support should be paid from the assets of the bankrupt during the period of interdiction"<sup>244</sup> for the bankrupt still has the ownership of the property.<sup>245</sup>

The maintenance is for a period of few days or a month according to Imām Mālik and his followers. They are of the opinion that it is for two or three days, an assumed duration of the bankrupt's ill health.<sup>246</sup> Al-Dardīr suggests that the maintenance period should be according to what the judge sees suitable and sufficient for the bankrupt until he starts earning a livelihood.<sup>247</sup> But the Shāfi'is says that the maintenance begins from the day of bankruptcy declaration until the repayment of the debt.<sup>248</sup> Whereas, the Ḥanbalis' view maintains that it is to the end of distribution.<sup>249</sup>

The application of maintenance is based on a suitable maintenance for insolvent persons (*al-mu'sirūn*) according to most of the Shāfi'ī jurists.<sup>250</sup> This is in contrary to one view of the Shāfi'is that asserts that the maintenance is for solvent

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<sup>243</sup> *Fatā*, vol. 5, p. 63.

<sup>244</sup> *Maja*, article 1000.

<sup>245</sup> *Zark*, vol. 4, p. 81.

<sup>246</sup> *Mawā*, vol. 5, p. 47.

<sup>247</sup> *Dard S.*, vol. 3, p. 270; See also 'Ilyā M., vol. 6, p. 47.

<sup>248</sup> *Shar M.*, vol. 3, p. 109; *Kūha*, vol. 2, p. 172; *Ghaz W.*, p. 139.

<sup>249</sup> *Bahū*, vol. 3, p. 434.

<sup>250</sup> *Kūha*, vol. 2, p. 172; *Maḥa*, vol. 2, p. 290; Imām al-Shāfi'ī says "the payment of daily maintenance to the bankrupt and his dependant is the minimum maintenance that enough for them.", *Shāf U.*, vol. 3, p. 232; See also *Nawa R.*, vol. 4, p. 145; al-Maqdisī maintains that the maintenance for the bankrupt is the minimum maintenance of his personal status within reason and for the wife is [includes children] is maintenance that is obliged upon him in his personal status. *Maqd S.*, vol. 4, p. 538; See also *Bahū*, vol. 3, p. 434, in which it is stated that the maintenance is with good manner.



persons (*al-mūsirūn*).<sup>251</sup> The first view appears the better of the two inasmuch as it corresponds to the injunctions of the *Qur'ān*, "No person should bear a burden laid on him greater than he can bear."<sup>252</sup> and "Let the rich man spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant him after hardship, ease."<sup>253</sup> Moreover, if the second view is accepted, it would cause hardship to the bankrupt, for him to get extra amount of money is a burden.

The maintenance would not be left to the bankrupt if he is able to work to support himself and his family, for his income is sufficient for it.<sup>254</sup> However, if there is an extra income from the employment, the bankrupt, after deducting the expenses the maintenance, should hand over the balance to be distributed to the creditors.<sup>255</sup> Similarly, this rule corresponds to the extra expenses withdrawn from a private endowment (*waqf ahli*).<sup>256</sup>

On the other hand, if the bankrupt were not able to work for income, the maintenance would be paid accordingly during the period of bankruptcy order.<sup>257</sup> He and his family should be supported by the Muslim common fund (*bayt al-māl*) like all poor people. If there is no Muslim common fund, they must be supported by the Muslim community.<sup>258</sup> This social responsibility should be practised in order to

<sup>251</sup> See Shar M., vol. 3, p. 109; Maḥa, vol. 2, p. 290.

<sup>252</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:233.

<sup>253</sup> *Al-Qur'ān, sūrat al-Ṭalāq*, 65:7.

<sup>254</sup> Maqd K., vol. 2, p. 187; Maqd S., vol. 4, p. 539; Fayr, p. 71, Anṣā T., p. 85; 'Ilyā M., vol. 6, p. 47.

<sup>255</sup> Shar, vol. 2, p. 170.

<sup>256</sup> Lubn, p. 555.

<sup>257</sup> Maqd K., vol. 2, p. 187; Fayr, p. 71, Anṣā T., p. 85.

<sup>258</sup> Misr, p. 408.

uphold justice in the society. It is unethical to leave the bankrupt begging for food to support his family.

#### 4.6.2 English and Malaysian Laws

However, there is no specific provision under English Bankruptcy Law that requires the trustee to set aside a certain amount of money from the proceeds of sale of the bankrupt's estate for the payment of allowance or maintenance for the bankrupt himself and his family. For the maintenance, the bankrupt is allowed to retain some amount of money from his salary or his personal earnings as may be necessary for himself and his family.<sup>259</sup>

Malaysian law, on the contrary, provides that the Official Assignee, as he thinks just, to use his discretion to provide allowance of maintenance for the bankrupt and his family.<sup>260</sup> The allowance shall be in money unless the creditors, by a special resolution, determine otherwise.<sup>261</sup>

This right of the Official Assignee is also subject to any general or special directions which the court may give. The Official Assignee, while in the possession of the property of a debtor, may make for the bankrupt such an allowance out of the property for support of himself and his family as may be just. In fixing the amount of such allowance, the assistance rendered by the debtor in the management of his business or other affairs may be taken into account.<sup>262</sup>

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<sup>259</sup> See *Insolvency Act 1986*, section 310.

<sup>260</sup> *Bankruptcy Act 1967*, section 68(2).

<sup>261</sup> *Bankruptcy Rules 1969*, rule 246.

#### 4.7 Liability for Destruction of Bankrupt's Estate

Who is liable for the destruction of bankrupt's estate during the time of realisation?

##### 4.7.1 Islamic Law

According to the Shāfi'is,<sup>263</sup> Ḥanafis,<sup>264</sup> Ḥanbalis,<sup>265</sup> and Imām Mālik,<sup>266</sup> a bankrupt is liable for any damage to the bankrupt's estate during realisation. The judge or his trustee is not liable as he acts on the bankrupt's behalf. The principle is similar to the principle of agency where the principal is liable for the act of the agent.<sup>267</sup> So, if the judge or his trustee sells the bankrupt's estate, the contractual right is on the bankrupt. The judge is not responsible if the contract is held back from the buyer. The buyer must refer to the bankrupt and not to the judge.<sup>268</sup>

According to one view of the Shāfi'is<sup>269</sup> the bankrupt's liability applies notwithstanding whether he is alive or dead. This is contrary to one view of the Mālikis that maintains that the liability is on the creditors upon the death of the bankrupt because of the difficulty on other parties to determine them.<sup>270</sup>

One view of the Mālikis restricts the bankrupt's liability if the damage happens before the sale of the bankrupt's estate, for the debts are still his

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<sup>262</sup> *Bankruptcy Rule 1969*, rule 256.

<sup>263</sup> Shāf U., vol. 3, p. 239; Māwa, vol. 7, pp. 449 & 465.

<sup>264</sup> Ḥayd, vol. 2, p. 721; See Māwa, vol. 7, p. 465.

<sup>265</sup> Qudā, vol. 4, p. 494; al-Maqd S., vol. 4, p. 540; Bahū, vol. 3, p. 435.

<sup>266</sup> Anas K., vol. 4, p. 157; See also Qarā, vol. 8, p. 191; Rush M., vol. 2, p. 325.

<sup>267</sup> Māwa, vol. 7, pp. 449 & 465.

<sup>268</sup> Ḥayd, vol. 2, p. 721; See Māwa, vol. 7, p. 465.

<sup>269</sup> Rāfi, vol. 5, p. 19; Nawa R., vol. 4, p. 142.

<sup>270</sup> Qarā, vol. 8, p. 191.



responsibility. Whatever loses after the sale, the liability is on the creditors as the sale is for their benefits. Moreover, there is no relationship between the judge and bankrupt during this time.<sup>271</sup> Likewise, another view of the Mālikis restricts the liability on the bankrupt, (a) if the damage is on the merchandise<sup>272</sup> or (b) if the creditors' debts are assets but the bankrupt's estate are merchandise.<sup>273</sup>

In addition to the above discussion, according to Imām Mālik<sup>274</sup> the creditors are liable if they have entrusted the property to the judge. This is based on the fact that the judge is their agent. Possession of an agent is a possession of a principal. Accordingly, Imām Mālik says that the creditors are also liable in these following situations: (a) if the judge sold the bankrupt's estate for the benefit of the creditors, then the proceeds are lost,<sup>275</sup> (b) if the estate is realised and sold but destroyed before distribution,<sup>276</sup> (c) if a person bought a thing from a bankrupt that has a defect and returns it back because it is sold for their benefits and they accept it,<sup>277</sup> and (d) if the creditors accept it. This is not unlike the liability of the price on the mortgagor until the mortgagee receives it.

#### 4.7.2 English and Malaysian Laws

Under English law, the trustee may be liable for any damage caused by him. The court may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property plus interest at such rate as the court thinks just,

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<sup>271</sup> Nama, p. 420.

<sup>272</sup> Dasū Ḥ., vol. 3, p. 277.

<sup>273</sup> Qarā, vol. 8, p. 191; Rush M., vol. 2, p. 325; See also Dasū Ḥ., vol. 3, p. 277.

<sup>274</sup> Qarā, vol. 8, pp. 191-192.

<sup>275</sup> Anas K., vol. 4, p. 157

<sup>276</sup> Anas K., vol. 3, p. 338; Nama, p. 420.

<sup>277</sup> Anas M., vol. 3, pp. 337-338.

but after satisfying that (a) the trustee of a bankrupt's estate has misapplied or retained any money or other property comprised in the bankrupt's estate, or (b) a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee of the estate in carrying out of his function.<sup>278</sup>

The order is upon the application of the official receiver, the Secretary of State, a creditor or the bankrupt himself (the bankrupt's application is subject to the leave of court).<sup>279</sup>

There will be no liability to the trustee: (a) if the property that he has seized or disposed of properties belonging to a third party or (b) if the trustee believes and has a reasonable ground for believing in his entitlement to the seizure or disposal of property. He is, nevertheless, liable if he acts negligently.<sup>280</sup>

Likewise, under Malaysian law, the Official Assignee or any person acting under his direction is not liable personally in any action or proceeding in respect of anything done or intended or omitted. This, however, allows any person aggrieved by the acts to apply to the court for direction. The court may thereupon give such directions or make such order, as it thinks fit.<sup>281</sup>

The costs, damages and expenses which the Official Assignee may have to pay, shall be paid out of the estate of the bankrupt in respect of anything done or

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<sup>278</sup> *Insolvency Act 1986*, section 304(1).

<sup>279</sup> *Insolvency Act 1986*, section 304(2).

<sup>280</sup> *Insolvency Act 1986*, section 304(3).

<sup>281</sup> *Bankruptcy Act 1967*, section 74.

default made by him when acting or in bona fide. He should have a reasonable belief that he is acting in pursuance of law or in execution of the power given to him.<sup>282</sup>

#### 4.8 Summary

Islamic, English and Malaysian laws maintain that the estate of the bankrupt must be realised in order to settle the debts. These three legal systems provide a wide concept on the bankrupt's estate including most items of value that belong to the bankrupt.

There are, however, differences and similarities between the three systems. Malaysian law considers "reputed ownership" property as a part of the bankrupt's estate. Neither Islamic nor English law recognises such a principle. The property owned by the bankrupt under English law is at the time of the bankruptcy order compares to Malaysian law at the actual moment of the day when the act of bankruptcy is committed.

The three legal systems also consider after acquired property as part of the bankrupt's estate. The difference between these three systems is only that English law requires the trustee to write a notice claiming the benefit for such property, whereas Malaysian law vests automatically such authority in the Official Assignee.

More to this, an income of the bankrupt may form part of the bankrupt's estate as concurred by the three legal systems. They differ in that English and

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<sup>282</sup> *Bankruptcy Rules 1969*, rule 267(1).



Malaysian laws require the trustee and the Official Assignee respectively to apply to the court for direction.

The realisation is part of the duty of the judge under Islamic law. In contrast, the trustee and the Official Assignee carry out this duty under English and Malaysian laws respectively. These two systems, in certain circumstances, require the realisation to be completed with the leave of the court or sanction of the creditors.

The realisation of bankrupt's estate is, nevertheless, subject to inability to include certain types of property known as exempt assets which include clothes, foods and the like. All three systems concur on the exclusion of such assets because they are necessities. The value of particular assets must not exceed five thousand ringgits as provided by Malaysian law. Neither Islamic nor English law limits the value of the exempt assets, but the categories of exempt assets under English law seem to be more expensive than the other two legal systems. The inclusion of a vehicle as an exempt asset supports this argument. Hence, a vehicle is not considered as an exempt asset under Islamic and Malaysian laws.

Islamic and English laws, nevertheless, allow certain expensive exempt assets to be realised and sold. This right may only be exercised after a suitable replacement is made.

Under Islamic, English and Malaysian laws, such realisation is not applicable to the bankrupt's properties that are subject to the right of the third party. They include the property subject to mortgage, charge and lien. In addition to such assets,



property subject to trust also cannot be realised due to the part that the ownership of the third party is attached to it.

All three legal systems allow a future payment sale but differ in the required condition. Islamic law requires the judge to get permission from the bankrupt and creditors before concluding such sale. Whereas, English law warrants a sanction from the creditor's committee or the court.

The matrimonial home is subject to sale according to one view of Muslim jurists. This view is similar to English and Malaysian laws. The sale under English law is subject to restrictions such as rights of occupation, trust of sale and equitable principle of irrevocable license. If the trustee is unable to dispose of the house, he may apply to the court to impose a charge.

During realisation, Islamic law requires the judge to set aside a certain amount of money from proceeds of sale of the bankrupt's estate for payment of maintenance to the bankrupt and his dependants. However, English law provides no such requirement. Malaysian law gives a discretionary power to the Official Assignee to provide allowance for maintenance to the bankrupt and his family.

Moreover, in realising the bankrupt's estate, the judge under Islamic law is not liable for any damage caused by him in carrying his duty. Similarly, English and Malaysian laws do not burden the trustee and the Official Assignee for any damage caused without their negligence.

## CHAPTER FIVE

## DISTRIBUTION OF AVAILABLE ASSETS

Distribution connotes “the process of dividing up and giving out something, for example money, when it is shared by a number of people.”<sup>1</sup> It takes place after the completion of realisation and sale of the bankrupt’s estate. Hence, this chapter analyses the concept of distribution under Islamic, English and Malaysian laws. It discusses whether there is priority of distribution to certain groups of creditors. It determines the issue on distribution to the late claimant. Finally, the position of wife in sharing the bankrupt’s assets is elucidated.

## 5.1 Concept of Distribution

Distribution constitutes one of the vital elements of the bankruptcy procedures. Without distribution, no settlement and payment of the debts would be made possible.

## 5.1.1 Islamic law

Distribution of proceeds from the sale of the bankrupt’s assets to the creditors is one of the functions of the judge under Islamic law. This is based on the *Ḥadīth* stating, “The Prophet (S.A.W) had prevented Mu‘ādh [whose debts are more than his assets] from disposing of his property, and sold the property and distributed the proceeds to the creditors.”<sup>2</sup>

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<sup>1</sup> *Enca*, p. 547.



The *Ḥadīth* suggests that the judge is ultimately responsible for distributing the proceeds of sale amongst the creditors according to the acts of the Prophet (S.A.W), as a judge, during his lifetime. This responsibility is carried out soon after all the assets are realised and sold.

The principle of distribution is further supported and explained by the decision of ‘Umar ibn al-Khaṭṭāb who says, “Whosoever has debt against him [the bankrupt], let him come to us tomorrow and we will divide his property between his creditors.”<sup>3</sup> The decision indicates that it is a duty of the judge to distribute the bankrupt’s assets to the creditors. It also shows that a public announcement must be made before the commencement of the distribution so as to allow the creditors to prove their debts. Furthermore, ‘Umar’s decision encourages that the distribution has to be carried out and to complete as soon as possible. This is to ensure that the bankrupt is released from the obligation and the creditors receive their portion of debts quickly.<sup>4</sup>

A postponement of distribution is, therefore, not allowed in avoidance of injustice against the creditors.<sup>5</sup> There are however exceptions for the postponement if the sums of the realised assets are too small and, thus, are impossible to distribute.<sup>6</sup> The postponement is permitted, too, in the event of the bankrupt’s death.<sup>7</sup> This is

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<sup>2</sup> Dāru, vol. 2, p. 20(no. 4505); Bayh, vol. 6, p. 48; Shaw, vol. 5, p. 340; Ḥāki, vol. 2, p. 58.

<sup>3</sup> Anas M., p. 547; See also Bagha, vol. 4, p. 342; Bayh, al-vol. 6, p. 49.

<sup>4</sup> Raml N., vol. 4, p. 321; ‘Umay, vol. 2, p. 289; Kūha, vol. 2, p. 169.

<sup>5</sup> Bahū, vol. 3, p. 432.

<sup>6</sup> Nawa Ṭ., p. 51; Anṣā A., vol. 2, p. 190.

<sup>7</sup> Mūsā, p. 186.

because death causes discontinuity of the liability in particular when the bankrupt owes some debts.<sup>8</sup>

The distribution of the bankrupt's assets is for creditors who can establish their rights either through evidence or admission of the bankrupt made before his bankruptcy to the non-disputable creditors (family members, close relatives and friends).<sup>9</sup> Thus, the creditors are not allowed to share the bankrupt's assets during the bankruptcy procedures if they fail to prove their debts accordingly.

In addition to the above rules, the judge must set aside certain amount of monies to meet portions of the absent creditors as Imām Mālik maintains.<sup>10</sup>

### 5.1.2 English and Malaysian Laws

English law, on the contrary, confers the duty of distribution of the bankrupt's assets on the trustee.<sup>11</sup> The trustee has to declare and distribute the dividends<sup>12</sup> when he has sufficient fund at his disposal, provided that he retains certain sums as necessary for the expenses of the bankruptcy.<sup>13</sup> He must give notice of his intention by public advertisement to all known creditors who did not prove their debts.<sup>14</sup> This notice must specify a date, not less than twenty-one days from the

<sup>8</sup> 'Ilyā M., vol. 6, p. 37; Ḥaṭṭ, vol. 5, p. 43; Khur, vol. 5, p. 272; See also Zarq Z., vol. 5, p. 272.

<sup>9</sup> Rush M., vol. 2, p. 319.

<sup>10</sup> Anas K., vol. 4, p. 118.

<sup>11</sup> *Insolvency Act 1986*, section 305(2); "The trustee", in relation to the bankruptcy and the bankrupt, means the trustee of the bankrupt's estate. *Insolvency Act 1986*, section 385(1).

<sup>12</sup> Dividends are the payments made by the trustee to the proving creditors.

<sup>13</sup> *Insolvency Act 1986*, section 324(1).

<sup>14</sup> *Insolvency Act 1986*, section 324(2); *Insolvency Rules 1986*, rule 11.2(1)(1A).

date of the notice, which constitutes the last date for lodging of proof by creditors as participants in the dividends.<sup>15</sup>

The notice is necessary, if the trustee is unable to pay any dividend, stating whether no funds have been realised, or that they have all been allocated for defraying the administrative expenditure.<sup>16</sup> Moreover, the trustee must give notice in the event he wishes either to declare a final dividend, no dividend or further dividends will be declared.<sup>17</sup>

In addition, the trustee should set aside funds to cover, (a) provable debts to creditors who may not have sufficient time to tender and establish their proofs by reason of the distance of their places of residence, (b) provable debts which have not been determined, and (c) disputed proofs and claims.<sup>18</sup>

The trustee is authorised to divide the bankrupt's property in its existing form among the creditors according to its estimated value in special circumstances. Such authorisation is exercised with the permission of the creditors' committee.<sup>19</sup>

For the execution of distribution, every creditor proves his debt by delivering or posting to the official receiver acting as receiver and manager, or to the trustee if one has been appointed, a written claim to the debt in the form known as a proof of

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<sup>15</sup> *Insolvency Rules 1986*, rule 11.2(2).

<sup>16</sup> *Insolvency Rules 1986*, rule 11.7.

<sup>17</sup> *Insolvency Act 1986*, section 330(1).

<sup>18</sup> *Insolvency Act 1986*, section 324(4).

<sup>19</sup> *Insolvency Act 1986*, section 326(1).



debt.<sup>20</sup> Such a documented proof must be verified by an affidavit that must be signed by the creditor or someone authorised on his behalf<sup>21</sup> if the official receiver or the trustee so requires.<sup>22</sup>

This proof may be admitted for dividend either for the whole amount claimed by the creditors or in part. If the trustee rejects a proof in whole or part, he must prepare a written statement of his reactions of doing so.<sup>23</sup> If the creditor is dissatisfied with the decision of the trustee, the court may, on the application of the creditor, reverse or vary the trustee's decision.<sup>24</sup>

For a secured creditor, he may prove for the balance of his debt if he realises his security.<sup>25</sup> He may, however, prove for his whole debt, if he voluntarily surrenders his security for the general benefit of creditors.<sup>26</sup>

Neither the judge nor the trustee is responsible for distributing the bankrupt's assets under Malaysian law. The Official Assignee performs the distribution. This responsibility is carried out with convenient speed. The Official Assignee must

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<sup>20</sup> *Insolvency Rules 1986*, rule 6.96(1)-(3); The following matters must be specified in the proof of debt, (i) the creditor's name and address, (ii) the total amount of his claim at the date of the bankruptcy order, (iii) whether or not that amount includes outstanding uncapitalised interest, (iv) whether or not the claim includes V.A.T., (v) whether the whole or any part is preferential, (vi) particulars of how and when the debt was incurred by the debtor, (vii) particulars of any security held, (viii) the name, address and authority of the person signing the proof (if other than the creditor himself). *Insolvency Rules 1986*, rule 6.98(1).

<sup>21</sup> *Insolvency Rules 1986*, rule 6.96(3).

<sup>22</sup> *Insolvency Rules 1986*, rule 6.99(1).

<sup>23</sup> *Insolvency Rules 1986*, rule 6.104.

<sup>24</sup> *Insolvency Rules 1986*, rule 6.105(1).

<sup>25</sup> *Insolvency Rules 1986*, rule 6.109(1).

<sup>26</sup> *Insolvency Rules 1986*, rule 6.109(2).

declare and distribute dividends amongst the creditors who have proved their debt, subject to the retention of certain sum as necessary for the cost of administration.<sup>27</sup>

The Official Assignee must give notice of his intention to do so, not more than two months before declaring dividends in the Gazette and at the same time to all known creditors mentioned in the bankrupt's statement of affairs who have not proved their debts. Such a notice shall specify the latest date, not less than twenty-one days of the notice, for lodging proof.<sup>28</sup>

The proof of the debts may be lodged as soon as after the making of a receiving order,<sup>29</sup> by delivering or sending through the post in a pre-paid letter to the Official Assignee on an affidavit verifying the debts.<sup>30</sup> The affidavit must contain the particulars of the debt in a statement of account and specify the vouchers, if any.<sup>31</sup> It must state whether the creditor is secured or not.<sup>32</sup>

For a secured creditor, he must state in his proof the particulars of his security, the date when it was given and the assessed value.<sup>33</sup> If the rules are not complied with, the secured creditor shall be excluded from all shares in any dividends.<sup>34</sup>

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<sup>27</sup> *Bankruptcy Act 1967*, section 62(1).

<sup>28</sup> *Bankruptcy Rules 1969*, rule 191(1).

<sup>29</sup> *Bankruptcy Act 1967*, section 42, Schedule C, rule 1.

<sup>30</sup> *Bankruptcy Act 1967*, section 42, Schedule C, rule 2.

<sup>31</sup> *Bankruptcy Act 1967*, section 42, Schedule C, rule 4.

<sup>32</sup> *Bankruptcy Act 1967*, section 42, Schedule C, rule 5.

<sup>33</sup> *Bankruptcy Act 1967*, section 42, Schedule C, rule 11.

<sup>34</sup> *Bankruptcy Act 1967*, section 42, Schedule C, rule 16.

The Official Assignee is permitted, in special circumstances, to distribute the bankrupt's property in specie amongst the creditors according to its value. This right may be carried out only with an order of the court.<sup>35</sup>

Apart from the duty of distribution, the Official Assignee must make provision for (a) provable debts of creditors whose residences are distant causing them having insufficient time to tender and establish their proofs, (b) debts provable in bankruptcy that are not yet determined and, (c) disputed proofs and claims.<sup>36</sup>

## 5.2 Priority of Distribution

There are various categories of creditors who share the bankrupt's estate. The question arises as to the order of distribution between them.

### 5.2.1 Islamic Law

Islamic law recognises that certain categories of the creditors are given preference over the others. The distribution of payment starts with the mortgagee (*al-murtahin*) according to the value of the mortgaged property, for he is considered as a secured creditor. Moreover, this is because he has more right to the price of mortgaged property over other creditors. His right is attached to the mortgaged property and liability of mortgagor contrary to the creditors who only have right over liability and not to the property. Therefore, the right of mortgagee is stronger than other creditors. This priority is also one of the advantages of mortgage.<sup>37</sup> Ibn

<sup>35</sup> *Bankruptcy Act 1967*, section 61(i).

<sup>36</sup> *Bankruptcy Act 1967*, section 64(1)(2).

<sup>37</sup> Qudā, vol. 4, p. 448; Maqd S., vol. 4, p. 541; al-Maqdisī suggests that the distribution to the mortgagee is for the price of the mortgaged property or the owed debts, which is lesser. Maqd U., p. 238; Ḥaydar considers the debt secured by the mortgage is a priority debt (*al-*



Qudāmah says that there are no differences of opinion amongst the Shāfi'is, Ḥanafis and others on this point.<sup>38</sup>

If the proceeds of the mortgaged property are less than the debt, the mortgagee becomes an ordinary creditor for the remaining debts. But if there is an excess sum from the proceeds, this excess may be distributed to other ordinary creditors.<sup>39</sup>

The later distribution is for lien holders according to one view of the Shāfi'is. This is so, if the payment for their services is not received, they could retain the property.<sup>40</sup>

After distributing payments for the secured creditors, the distribution is carried out to those involved in the realisation and sale of the bankrupt's assets.<sup>41</sup> They include an auctioneer (*al-dallāl*), owner of the property used for storage of the assets carrier/porter (*al-ḥammāl*), crier/announcer (*al-munādī*),<sup>42</sup> measurer (*al-kayyāl*) and weigher (*al-wazzān*). They deserve the priority as their rights are related to the bankruptcy procedures. This is only applied in circumstances where there is no

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*dayn al-mumtāz*). This due to the fact that the other creditors do not have any right to the mortgaged property unless the mortgagee is paid from the sale of mortgaged property. Ḥayḍ, vol. 2, p. 721; Ibn Nujaym states, "The priority is given to the right establishes to the property such as the mortgage rather than to liability." Nuja A., p. 360; Cf. *Insolvency Rules 1986*, rules 6.197, 6.199; *Bankruptcy Act 1967*, section 42, Schedule C, rules 18, 20.

<sup>38</sup> Qudā, vol. 4, p. 448; See also Maqd S., vol. 4, pp. 540-541.

<sup>39</sup> Miṣr. p. 408; Anṣā A., vol. 2, p. 190; Qudā, vol. 4, p. 448; Maqd S., vol. 4, p. 541.

<sup>40</sup> Qaly, vol. 2, p. 289; See also Maqd U., p. 238.

<sup>41</sup> Qaly, vol. 2, p. 289; Qarā, vol. 8, p. 171.

<sup>42</sup> Qalyūbī states that the bankrupt is not obliged to pay the service of the crier for the job done to the creditors. The latter is paid from public fund (*māl al-muṣaliḥ*). Qaly, vol. 2, p. 286; al-Shabramilsī states that the payment for a crier is taken from the assets of the bankrupt. However, it is taken from the Muslim common funds if the bankrupt possesses nothing. Shab, vol. 4, p. 315.

volunteer to carry out such acts and no pay provision is made for them from the Muslim common funds.<sup>43</sup>

The distribution to ordinary creditors could only be made from the surplus of the proceeds of sale, if any. There is no priority given to orphan children in the case where the bankrupt has damaged their property.<sup>44</sup> Servants, such as herdsmen or shopkeepers, have no prior claim in respect to their wages as against other creditors; nor can a buyer claim priority with regard to returned objects owing to a redhibitory defect, although he might have originally taken such an object in lieu of a debt payment.<sup>45</sup> Similarly, the compensation of tort committed by the bankrupt is on equal footing with other ordinary creditors.<sup>46</sup>

The above analysis indicates that the salary of the bankrupt's employees is regarded on the same footing with other ordinary creditors. Hence, they are not entitled to the payment before the ordinary creditors.

The distribution is proportioned according to the claims of the creditors.<sup>47</sup> For example, the assets of the bankrupt are ten dollars and his debts are twenty dollars and his creditors are only two, each creditor gets half of the assets. If the value of the

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<sup>43</sup> Nawa R., vol. 4, p. 133; Rāfi', vol. 5, pp. 13-14; See also Qarā, vol. 8, pp. 171, 200; Ghaz W., p. 138; Anṣā A., vol. 2, p. 189; Bahū, vol. 3, p. 435.

<sup>44</sup> Rush B., vol. 10, pp. 373-374.

<sup>45</sup> Mūsā, p. 188.

<sup>46</sup> Qudā, vol. 4, p. 448.

<sup>47</sup> Qadū, p. 43; Marg, vol. 3, p. 285; Zayl, vol. 5, 199; Sa'ūd, vol. 3, p. 298; Sara, vol. 24, p. 164; Ghaz W., p. 139; Bagh, p. 95; See also Ḥayd, vol. 2, p. 721; Bahū, vol. 3, p. 432.

assets is ten dollars and the debts are thirty dollars and creditors are three, each creditor shares one third of the estate.<sup>48</sup>

The rule of distribution is explained by one legal rule stating, "The combined rights between two or more parties are (a) entitled right to every individual is to be shared when each has a claim in the same whole thing and (b) right that to be shared proportionately according to specific individual shares."<sup>49</sup> An example of the first right is that the creditors, who cannot be paid all their debts from the assets of the bankrupt, have to share in proportions. They are similar to the holders of pre-emption [who share their rights proportionately].<sup>50</sup>

As a result, according to one view of the Ḥanbalis, if the judge or bankrupt pays the debt to some creditors, the payment becomes invalid because such creditors are still partners to the bankrupt's assets. Besides, they have equal right to matters relating to the bankrupt's liability on the ground of their shares due to equal and size protection right.<sup>51</sup>

There are, however, exceptions to some ordinary creditors who may be paid before other ordinary creditors. For example, creditors who have proven their rights through testimonies and evidences take priority over creditors who established their

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<sup>48</sup> Juza, p. 324; See also Alla, vol. 3, p. 133; Dard K., vol. 3, p. 271; Dard Ş., vol. 3, p. 360; Khur, vol. 5, p. 271; 'Ilyā M., vol. 6, p. 36; Zarq Z., vol. 5, p. 272.

<sup>49</sup> Raja, p. 261, rule 115; There is another legal rule that corresponds to the principle, "In the case when there are equivalent but irreconcilable interests we prioritise them due to competition between those of equal interest.", Sula, vol. 1, p. 68.

<sup>50</sup> Raja, p. 261; See also Sula, vol. 1, p. 125.

<sup>51</sup> Bahū, vol. 3, p. 437.



rights on the admission of the bankrupt. The latter will get only the surplus, if any.<sup>52</sup> The owner of leased land and the employee of land irrigation take priority over guarding employee of the land.<sup>53</sup> The landowner and the second irrigation employee take priority over the first irrigation employee who was unable to finish his work. The latter takes priority over the ordinary creditors.<sup>54</sup>

### 5.2.2 English and Malaysian Laws

The order of priority of distribution of the bankrupt's assets is also recognised by English law, but the distribution starts with the expenses of the bankruptcy<sup>55</sup> including all costs, charges and expenses incurred in the course of bankruptcy proceedings.<sup>56</sup> Other examples are such expenses incurred by the official receiver or the trustee in preserving, realising or getting in any assets of the bankrupt; expenses incurred or made in carrying on the business of a debtor or bankrupt, and the fee payable under any order for performance by the official receiver of his general duties as official receiver.<sup>57</sup>

Hence, if there is a surplus, the distribution continues to include the pre-preferential creditors such as apprentices or articulated clerks as the trustee is obliged to repay the fees paid to the bankrupt.<sup>58</sup> The priority is conferred on them by various

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<sup>52</sup> Nama, p. 421; Cf. 'Ilya M., vol. 6, p. 29, which states that the creditor who proves his case through admission before the bankruptcy order shares the assets of the bankrupt with the creditors who prove through testimony of witnesses.

<sup>53</sup> Rusd B., vol. 10, p. 541.

<sup>54</sup> Ibid., p. 544.

<sup>55</sup> *Insolvency Act 1986*, section 324(1).

<sup>56</sup> *Insolvency Rules 1986*, rule 12.2

<sup>57</sup> See *Insolvency Rules 1986*, rule 6.224.

<sup>58</sup> *Insolvency Act 1986*, section 348(3), (5).

statutory provisions especially designed to afford protection to the creditors in question.<sup>59</sup>

The next priority is that of preferential debts,<sup>60</sup> which are basically owed to the relevant public authorities<sup>61</sup> such as money owed to the Inland Revenue for income tax deducted source; VAT, car tax, betting and gaming duties; social security and pension scheme contributions; remuneration etc of employees. The preferential debts rank equally between themselves and shall be paid in full unless the bankrupt's estate is insufficient for meeting them, in which case they abate in equal proportions between themselves.<sup>62</sup>

Once the trustee has paid fully all debts and expenses to the above-mentioned creditors, he is next required to apply any remaining funds to the payment of the debts owed to the ordinary creditors.<sup>63</sup> They rank equally between themselves and abate rateably in the event of shortfall.<sup>64</sup> In other words, they are treated *pari passu*, that is on equal footing, sharing in proportion to the amount of their respective claims. Thus, if the sale of assets by the trustee in bankruptcy produces, after deduction of expenses, for example twenty five thousand pounds when liabilities are one hundred thousand pounds, each unsecured creditor will receive a dividend of twenty five pence in the pound.<sup>65</sup>

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<sup>59</sup> Flet, p. 290.

<sup>60</sup> *Insolvency Act 1986*, section 386(1); For further detail on categories of preferential debts, see Schedule 6 of the Act.

<sup>61</sup> *Insolvency Act 1986*, section 328(1).

<sup>62</sup> *Insolvency Act 1986*, section 328(2).

<sup>63</sup> *Insolvency Act 1986*, section 347.

<sup>64</sup> *Insolvency Act 1986*, section 328(3).

If there is any balance after the payment in full of all debts, the excess funds are to be applied in applying interest on the ordinary and preferential debts.<sup>66</sup>

The bankrupt is entitled to the surplus, if there is any, after payments in full with the interest to all the bankrupt's creditors and the expenses of the bankruptcy.<sup>67</sup> Where such a surplus arises, it is of course indicative of the fact that, whether the bankrupt knew it, he was in reality solvent, and need not have undergone adjudication at all.<sup>68</sup>

Distribution under Malaysian law, similar to English law, starts with the payment of administrative expenses<sup>69</sup> including expenses incurred in preserving of property, realising and getting in of the debtor's assets. The remaining assets, subject to order of the court, shall be liable to the following order of priority (a) actual expenses incurred in protecting the debtor's assets and in carrying on the debtor's business; (b) fees percentages and charges incurred by the Official Assignee; (c) deposit lodged by a petitioning creditor; (d) deposits lodged relating to an appointment of an interim receiver; (e) remuneration of the special manager, if any; (f) taxed costs of the petitioner; (g) remuneration and charges of the person, if any, appointed to assist the debtor in preparing his statement of affairs.<sup>70</sup>

Distribution continues to include the payment of all local tax and land tax; income tax and other assessed taxes; all wages or salary of any clerk, servant,

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<sup>65</sup> Good C., p. 636.

<sup>66</sup> *Insolvency Act 1986*, section 328(4).

<sup>67</sup> *Insolvency Act 1986*, section 330(5).

<sup>68</sup> Flet, p. 73.

<sup>69</sup> *Bankruptcy Act 1967*, sections 62(1), 64(2).



labourer or worker;<sup>71</sup> all amounts due in respect of contributions payable under any law relating to provident funds; all amounts due in respect of workers' compensation.<sup>72</sup>

Before payment of interest, the surplus, if any, must be paid to the other creditors on the basis of *pari passu* distribution.<sup>73</sup>

After payment of all debts and the said expenses, any surplus shall be applied to payment of interest from the date of receiving order at the rate of six ringgit per centum per annum on all debts proved in the bankruptcy.<sup>74</sup>

Any remaining surplus, after payments in full all the bankruptcy expenses, the bankrupt's creditors and the interest, must be given to the bankrupt.<sup>75</sup>

All unpaid dividends, after the final dividend has been declared, shall stand at the credit of the Bankruptcy Estates Account for seven years; if they remain unclaimed at the expiration of that period, such unclaimed dividends shall be credited to the Consolidated Fund.<sup>76</sup> If any claim is made to any part of unclaimed dividends or money so transferred to the Consolidated Fund and if such claim is

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<sup>70</sup> *Bankruptcy Rules 1969*, rule 85.

<sup>71</sup> The salary and wages are for the amount not more than one thousand ringgits for each. *Bankruptcy Act 1967*, section 43(1)(c).

<sup>72</sup> *Bankruptcy Act 1967*, section 43(1)(b)(c).

<sup>73</sup> See *Bankruptcy Act 1967*, section 43(1),(4).

<sup>74</sup> *Bankruptcy Act 1967*, section 43(5).

<sup>75</sup> *Bankruptcy Act 1967*, section 69.

<sup>76</sup> *Bankruptcy Act 1967*, section 134(5); Cf. English law, there appears to be no provision dealing with unclaimed dividends. See Seal, p. 380. But, the Secretary of State may regulate the manner in which the unclaimed funds and dividends be distributed. *Insolvency Rules 1986*, rule 12.1(1)(e).

established to the satisfaction of the Official Assignee, the amount certified by the Official Assignee to be due to the claimant shall be paid to him, without interest, from the Consolidated Fund.<sup>77</sup>

### 5.3 Distribution of Late Claimants

Sometimes there are some creditors of the bankrupt who are not able to get their proportionate share from the bankrupt's estate. This is because they fail to prove their debts on time. The issue is whether distribution shall be annulled and carried out again to accommodate the late claimants.

#### 5.3.1 Islamic Law

It is not the duty of the creditors to prove that there are other creditors.<sup>78</sup> According to the Mālikis<sup>79</sup> and Ḥanbalis,<sup>80</sup> the principle is contrary to inheritance where the legal heirs should establish that there are no other creditors. This is because a number of legal heirs are known to neighbours, friends and some members of public.<sup>81</sup> However, there is no difference between distribution to the creditors and the distribution to the legal heirs in case of inheritance according to Imām al-Shāfi'ī.<sup>82</sup>

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<sup>77</sup> *Bankruptcy Act 1967*, section 134(6).

<sup>78</sup> Bahū, vol. 3, p. 437; Māwa, vol. 7, p. 442; Nawa R., vol. 4, p. 143; Mūsā, p. 186; Dard Ş., vol. 3, p. 360.

<sup>79</sup> Alla, vol. 3, p. 133; See also Dard Ş., vol. 3, p. 360.

<sup>80</sup> Bahū, vol. 3, p. 437.

<sup>81</sup> Khur, vol. 5, p. 272; Zarq Z., vol. 5, p. 272; Ilya M., vol. 5, p. 37; Dard Ş., vol. 3, p. 360; See also Shar, vol. 3, p. 108.

<sup>82</sup> See Nawa R., vol. 4, p. 143.

It is adequate with the publicity of the bankruptcy order.<sup>83</sup> This is what has been done by 'Umar ibn al-Khaṭṭab who gave sermon without asking the creditors to provide evidence that there is no other creditors.<sup>84</sup> The publicity could, nowadays, be done through mass media such as newspaper, television, radio and internet. The government gazette posted in public places such as shopping centres, coach and train stations, police stations, court, mosque and the like could also be used.

Muslim jurists differ on the legal consequences of the appearance of the late claimant. According to the Mālikis,<sup>85</sup> the authentic view of the Shāfi'is<sup>86</sup> and one view of the Ḥanbalis,<sup>87</sup> such appearance does not annul the distribution. This is so, for the distribution is based on apparent rule that there are no other creditors except the existing ones.

The late claimant retains all his rights to his proportionate share of the bankrupt's assets. He may demand and claim his portion from the paid creditors. For example, the bankrupt has indebted to two creditors with one hundred dollars for each of them. He also indebted to the late claimant with one hundred dollars. The bankrupt only has one hundred and twenty dollars that have been distributed to the first two creditors. Each of them has received sixty dollars. Later on the late claimant appears and claims his portion i.e. forty dollars. Each of the two creditors has taken

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<sup>83</sup> Ghaz S., vol. 4, p. 14; Mūsā, p. 186; This is different from a case of death that ends the liability; the bankruptcy does not. 'Ilyā M., vol. 6, p. 37.

<sup>84</sup> Rāfi', vol. 5, p. 20.

<sup>85</sup> Mūsā, p. 186; See Maḥm N., p. 407.

<sup>86</sup> Nawa R., vol. 4, p. 143; Shar M., vol. 3, p. 108; Ghaz S., vol. 4, p. 14; This is different from a case of death that ends the liability; the bankruptcy does not. 'Ilyā M., vol. 6, p. 37.

<sup>87</sup> Bahū, vol. 3, p. 438; Bala, vol. 3, p. 128; Tagh, vol. 1, p. 397.



twenty dollars from the right of late claimant. So, they will be asked to refund twenty dollars, the share of the late claimant.<sup>88</sup>

If one of the first two creditors is unable to refund to the late claimant due to insolvency, there are two alternative solutions. The most authentic solution among the Shāfi'is is that the solvent creditor is considered recipient of all the bankrupt's assets and, therefore, the late claimant shares with his portion. Thus, sixty dollars received by the solvent creditor are distributed between him and the late claimant. As a result, each receives thirty dollars. They could claim from the insolvent creditor half of the share after he becomes solvent. This half share will be distributed among them.<sup>89</sup> Another solution is to claim from the solvent creditor of his proportionate portion, as if that there is no insolvency among the paid creditors. The insolvent creditor is therefore considered indebted to the late claimant.<sup>90</sup>

The late claimant could directly claim his portion of share from the bankrupt if the bankrupt receives new assets. The surplus, if any, should be distributed to the creditors.<sup>91</sup>

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<sup>88</sup> See Anas K., vol. 4, p. 118; Qarā, vol. 8, pp. 200-204; Ḥaṭṭ, vol. 5, p. 45; Dasū, vol. 3, p. 274; Māwa, vol. 7, p. 443; Shar M., vol. 3, p. 108; Anṣā A., vol. 2, p. 191; Rāfi', vol. 5, p. 20; Nawa R., vol. 4, p. 143; Kūha, vol. 2, p. 171; Bahū, vol. 3, p. 438; Najd, p. 360; Query: It is possible for the late claimant to claim from the bankrupt due to inability of payment by one of two paid creditors?

<sup>89</sup> Nawa R., vol. 4, p. 143; Sharb, vol. 3, p. 108.

<sup>90</sup> Anas K., vol. 4, p. 118; See also Qarā, vol. 8, pp. 200-204; Ḥaṭṭ, vol. 5, p. 45; Dasū, vol. 3, p. 274; Anṣā A., vol. 2, p. 191; Rāfi', vol. 5, p. 20; Nawa R., vol. 4, pp. 143-144; Kūha, vol. 2, p. 171; Query: It is possible for the absent creditor to claim from the bankrupt due to inability of payment by one of two paid creditors?

<sup>91</sup> Qaly, vol. 2, p. 289; Sharb, vol. 3, p. 108.

However, according to some Mālikis,<sup>92</sup> one view of the Ḥanbalis<sup>93</sup> and the Shāfi'is,<sup>94</sup> the distribution in such a case to be annulled. This principle, according to the Ḥanbalis, is similar to the appearance of a new creditor after the distribution of inheritance to the legal heirs; appearance of a third partner for a piece of land after the distribution to two partners; and appearance of a new heir after the distribution of deceased estate to the legal heirs.<sup>95</sup> If there is evidence to the contrary, then, the distribution should be annulled, which action is similar to the decision made by the judge when he discovers later on that there is an evidence to the contrary.<sup>96</sup>

It seems that the annulment of distribution, due to an appearance of a late claimant, is not necessary. It causes hardship to the bankrupt by prolonging the bankruptcy period because a late delaying of distribution is not encouraged at all, for the late claimant, whose debt remaining intact, could still claim his due from the bankrupt after the discharge.

### 5.3.2 English and Malaysian Laws

Late claimants under English law cannot upset properly declared dividends, but they may make a claim on any surplus available.<sup>97</sup> The trustee, however, may refuse to pay any dividends.

<sup>92</sup> Mūsā, p. 188; See Maḥm N., p. 407.

<sup>93</sup> Qudā, vol. 4, p. 488; Maqd K., vol. 2, p. 174; Maqd S., vol. 4, p. 547.

<sup>94</sup> Nawa Ṭ., p. 51; al-Māwardī provides two alternatives, i.e. (a) annulment of the distribution and redistribute the assets or (b) no annulment, but the absent creditor claims his proportionate right from the paid creditors. Māwa, vol. 7, p. 443.

<sup>95</sup> Qudā, vol. 4, p. 488; Maqd K., vol. 2, p. 174; Maqd S., vol. 4, p. 547; See also Kūha, vol. 2, p. 171.

<sup>96</sup> Nawa M., vol. 14, p. 115.

<sup>97</sup> *Insolvency Act 1986*, section 325(1).

The court may, if it thinks fit, order him to do so and also to pay, out of his own money, interest on the dividend for the time it was withheld.<sup>98</sup>

The correct procedure is, therefore, for the creditors to apply to the court for an order directing the trustee to pay a dividend, and if the application is successful, the trustee will personally be liable to bear the costs.<sup>99</sup>

This English law principle is similar to the Malaysian law. The Malaysian law, nevertheless, allows the late claimants to share any dividend or dividends in the hands of the Official Assignee before declaration of the dividends.<sup>100</sup>

#### 5.4 Position of Wife on Distribution

Every creditor gets his proportionate share from the bankrupt's estate. The point is whether wife of the bankrupt is entitled to share the bankrupt's estate if the wife can prove to be one of the creditors. If she manages to prove that the bankrupt owed her some money, the other point is whether she becomes an ordinary creditor.

##### 5.4.1 Islamic Law

Islamic law recognises that the wife of the bankrupt could become one of the creditors. This could be either in the form of the dowry, maintenance or some relevant amounts of money. She should provide evidence that her husband has owed her money in order to share her debts with other creditors.<sup>101</sup>

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<sup>98</sup> *Insolvency Act 1986*, section 325(2).

<sup>99</sup> Flet, p. 302.

<sup>100</sup> *Bankruptcy Act 1967*, section 65.



Her claim to the unpaid dowry ranks similar to those of the creditors just as they do in the case of her husband's death.<sup>102</sup> Her entitlement is only for exemplary dowry (*mahr mithlī*)<sup>103</sup> according to the Ḥanafis.<sup>104</sup>

The share to unpaid dowry applies also to a divorced wife. She should share the dowry before consummation. She does not have any right of option in marriage such as that of the seller of property when the buyer becomes bankrupt before delivery of the goods and the dowry is not a consideration for sexual intercourse, for Allah made it compulsory by the pronounced injunctions. Therefore, she shares it in case of death. She should share half of it because her entitlement for marriage contract entitles her to half of the dowry.<sup>105</sup> This is clearly stated in the *Qur'ān*, "And if you divorce them before you have touched (had a sexual relation with) them, you have appointed unto them the dowry, then pay half of that, unless they (the women) agree to forgo it, or he (the husband), in whose hands is the marriage tie, agrees to forgo and give (her the full dowry) is nearer to piety and righteousness (*al-taqwā*)."<sup>106</sup>

If she has received the entire dowry before consummation and later on divorces, the possibility is whether she has to return that which exceeded half or that

<sup>101</sup> Rusd B., vol. 10, p. 469; Proof with legal documents is also accepted. Ja'al, vol. 2, p. 149.

<sup>102</sup> Mūsā, p. 186; Qarā, vol. 8, pp. 197, 200; It is stated that the wife would not share the assets in the case of death. Jall, vol. 2, p. 253.

<sup>103</sup> It means "a similar dowry received by the bride's sisters, no less and no extra [the exact amount of dowry]", Sara, vol. 5, p. 62; In Alam, p. 109, it is stated that exemplary dowry signifies "the dowry which is appropriate to the status of a woman; it is reckoned to be the dowry of a woman who is her equal from her father's family or from another comparable one at the time of the contract. The comparison is made on the basis of the characteristics which make her desirable as a wife, such as religion, manners, intelligence, education, beauty, age and virginity."

<sup>104</sup> Mawd, vol. 1, p. 369.

<sup>105</sup> Qarā, vol. 8, p. 199; Sayū A., p. 324.

which exceeded the proportionate share of half dowry. The first possibility is one view of the Mālikis and the second is the other view of the Mālikis. The example for the second possibility is that if the dowry is one hundred dollars, she could share her portioned share of fifty dollars. So, if there are three creditors of the bankrupt whose assets are only one hundred dollars (the dowry of wife), i.e. the wife, Mr. A and Mr. B. If Mr. A's debt is one hundred dollars and Mr B's is fifty dollars, the wife would share only twenty-five dollars out of one hundred dollars. Mr. A shares fifty dollars and Mr. B shares twenty-five dollars.<sup>107</sup>

If she already received half of the dowry before the bankruptcy order and before divorce, one view of the Mālikis pronounces that there is no return of the dowry while another view asserts that half of the half (1/4) dowry has to be returned and another half to be shared amongst the creditors.<sup>108</sup>

If she receives nothing, then she shares half of her dowry with other creditors.<sup>109</sup> This view appears to be applicable in a case where the amount of dowry has been mentioned but not handed over.

The divorced woman could still share the bankrupt's assets even though the amount of dowry is not mentioned where divorce takes place before consummation and payment of dowry. Her share is known as compensation paid to a divorced

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<sup>106</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:237.

<sup>107</sup> 'Ilyā M., vol. 6, pp. 40-41.

<sup>108</sup> Qarā, vol. 8, p. 199.

<sup>109</sup> Ibid.

woman (*mut'ah*)<sup>110</sup> as the *Qur'ān* states, "There is no sin on you, if you divorce women while yet you have not touched them (had sexual relation with), nor appointed unto them their dowry. But bestow on them (a suitable gift), the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the those who do good."<sup>111</sup>

This verse according to al-Qurṭubī<sup>112</sup> and al-Rāzī,<sup>113</sup> indicates that payment of compensation to a divorced woman becomes obligatory due to the imperative expression of the verse, i.e. *wamatti'ūhumn*. It appears that if this view is upheld, the divorced wife has the right to share the bankrupt's assets for the payment of compensation. It is similarly obligatory as much as that of debt payment.<sup>114</sup>

The principle relating to payment of compensation to a divorced woman is also expressed in another *Qur'ānic* verse that states, "O you who believe! When you marry believing women, and then divorce them before you have sexual intercourse with them, no *'iddah* (divorce prescribed period) have you to count in respect of them. So give them compensation, and then set them free, i.e. divorce, in a handsome manner."<sup>115</sup>

<sup>110</sup> *Mut'ah* means literally as "gratification" or "gift". It refers to "a payment by a husband to his wife upon divorcing her.", Alam T., vol. 2, p. 54.

<sup>111</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:236.

<sup>112</sup> Qurṭ, vol. 3, p. 200, issue no. 6; See also Kath, vol. 1, p. 295.

<sup>113</sup> Rāzī, vol. 6, pp. 118-119.

<sup>114</sup> This opinion conforms with the statement made by Ibn 'Umar, "Every divorced woman has compensation except for the one who is divorced and is allocated a dowry and has not been touched [without consummation]. She has half of what was allocated to her.", Bagha, vol. 5, p. 98(no. 2300); Anas M., p. 392(no. 1207).

<sup>115</sup> *Al-Qur'ān, sūrat al-Aḥzāb*, 33:49.



Another issue to consider is how to share the bankrupt's assets, for the *Qur'ānic* verses which stipulate the payment of compensation do not specify any maximum value for compensation but only that it should be equitable and appropriate to the means of the husband. If the requirement of the payment of compensation is to be implemented in the law, however, it must be quantified in some manner and the countries which prescribe the compensation have generally devised formulae related to maintenance, which is likewise assessed according to the means of the husband, in order to calculate that which is equitable in the context of contemporary society.<sup>116</sup>

This rule is only applicable if the divorce is pronounced without her fault, otherwise, she does not have any right to claim.

The wife could also claim the expenses she has incurred in maintenance of herself, but not for that of his children by her.<sup>117</sup> Her maintenance for the children is considered consolatory without consideration.<sup>118</sup> This does not mean that the wife could not claim in future from her husband when he receives the property unless the judge decides otherwise. To claim her share, she has to prove that the maintenance was made during the husband's state of easiness and by order of the court.<sup>119</sup>

The wife could also share her maintenance for the parent of the bankrupt with three conditions: (a) there is order of the court for the payment of such maintenance; (b) the husband is indebted to the wife for the maintenance; and (c) there is an

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<sup>116</sup> Alam T., p. 58.

<sup>117</sup> Mūsā, p. 186; Qarā, vol. 8, p. 200.

<sup>118</sup> Qarā, vol. 8, p. 200.

agreement between them during the time of the husband's state of easiness. The rule is based on one opinion of the Mālikis.<sup>120</sup>

The irrevocable divorcee is in a better position than the creditor for the rented house if her husband has paid the rental. She is also in a better position than the creditors if she pays the rental for the house.<sup>121</sup> In case of gifts, charities and the like, she cannot share because the bankruptcy annuls those rights.<sup>122</sup>

#### 5.4.2 English and Malaysian Laws

Under English law, the claim of any person who is the debtor's spouse at the commencement of the bankruptcy (whether or not he or she was the bankrupt's spouse at the time of the credit was provided) shall rank after payment of other creditors and interest thereafter.<sup>123</sup> It seems only fair to the other creditors that a spouse's interests should be deferred.<sup>124</sup> This principle would ensure that interest is paid before any surplus is distributed to the bankrupt under section 330(5) of the 1986 Act.<sup>125</sup>

Likewise, under Malaysian law, the bankrupt's wife must be paid only after all claims of other creditors of her husband for valuable consideration in money or money's worth have been satisfied.<sup>126</sup>

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<sup>119</sup> Dasū, vol. 3, p. 274.

<sup>120</sup> Ibid.

<sup>121</sup> Rush B., vol. 10, p. 467.

<sup>122</sup> Qarā, vol. 8, p. 199.

<sup>123</sup> *Insolvency Act 1986*, section 329.

<sup>124</sup> Grie, p. 127.

<sup>125</sup> Hunt, p. 3146.

### 5.5 Summary

Islamic, English and Malaysian laws agree that distribution is made from the bankrupt's estate. They, however, differ on the officer of distribution duty. According to Islamic law, the distribution is under the care of the judge. Whereas the distribution duty, according to English law, is by the trustee; according to Malaysian law it is at the hand of the Official Assignee.

Before distribution, the judge must make a public announcement to notify the creditors according to Islamic law. This is contrasted to English law and Malaysian law, as the trustee and Official Assignee shall send notice of declaration and payment of the dividends to the creditors respectively.

Moreover, Malaysian law imposes a time limit for declaring and distributing dividends that is within twelve months after the adjudication to the Official Assignee. This is contrary to English law that provides no time-limit but does oblige the trustee to declare and distribute dividends, whenever he has sufficient funds in hand provided, it is assumed, that the size of dividend so distributable is not disproportionate to the cost of distribution.

In order to share the distribution of the bankrupt's assets, the creditors, according to Islamic law, have to prove that the bankrupt owed them through evidences or admission by the bankrupt himself. On the contrary, English law requires the proof of debt in form of written claim, known as proof of debt, delivered

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<sup>126</sup> *Bankruptcy Act 1967*, section 46(2).



to the trustee, but Malaysian law imposes on the creditors to send to the Official Assignee an affidavit verifying of their debts.

All three legal systems agree that the payment of expenditure relating to the administration of the bankrupt's assets is given priority. This priority under Islamic law is administered after the payment to the mortgagee and lien holder.<sup>127</sup> The payment of the administration expenses, on the other hand, according to English and Malaysian laws, is made before the payment to other categorised groups of the creditors.

After the bankruptcy expenses are settled (in the case where there is no provision from the Muslim common funds), the judge, according to Islamic law, must distribute the surplus to ordinary creditors. On the contrary, English and Malaysian laws provide that it is after the pre-preferential and preferential creditors are paid.

English and Malaysian laws provide that the next distribution is for the payment of interest, but the payment of interest on the loan is not part of the distribution process according to Islamic law. This is because the interest is considered part of the usury that is illegal and prohibited.<sup>128</sup> Thus, the payment of interest is not arising at all.

<sup>127</sup> Secured creditors have no special priority afforded to them under English law but they have those rights given to them by virtue of their security. See Frie, p. 82.

<sup>128</sup> See *al-Qur'ān, sūrat al-Baqarah*, 2:275-276 and *sūrat Āl 'Imrān*, 3:130; Bukh, vol. 3, pp. 11-12; Dāwu, vol. 3, p. 244(no. 3333).

The right of late claimants is not at risk under these three legal systems if there is a surplus after the distribution. Under Islamic law, the late claimants may share his proportionate share of the bankrupt's assets before the distribution. This may not happen in English and Malaysian legal systems. This is because both systems disallow distribution for the late claimants when the payment of dividends is declared.

In addition, Islamic law also differs in regard to the right of the wife in sharing the bankrupt's assets since it gives right to the wife to be in equal footing with the ordinary creditors for her claim of debts. On the contrary, English and Malaysian laws consider the wife as a postponed creditor. She is paid only after all other creditors are paid in full and with interests. This seems that the wife's right to her claims is taken care of under the jurisdiction of Islamic law. Hence, she is considered as one of the ordinary creditors.

## CHAPTER SIX

## DISCHARGE FROM BANKRUPTCY

Discharge means “to free a person adjudicated bankrupt from his debts and the disabilities of bankruptcy”.<sup>1</sup> It is one of the important aspects of the bankruptcy procedures. This is in order to determine whether the bankrupt is free to exercise his right of dispositions as before and whether he is relieved from liabilities and obligations. This chapter concentrates, first of all, on the concept of discharge according to Islamic, English and Malaysian laws. Then, it discusses the legal consequences of the discharge under these three legal systems. This chapter also deals with the application for the subsequent bankruptcy order and its legal consequences provided by three systems. Finally, it discusses the concept of annulment of bankruptcy order granted by English and Malaysian laws.

## 6.1 Concept of Discharge

Bankruptcy of an individual commences on the day on which a bankruptcy order is made against him, and continues until he is discharged. There are various ways of discharge.

## 6.1.1 Islamic law

There are variances of opinion amongst Muslim jurists about the concept of discharge from bankruptcy under Islamic law. According to Abū Yūsuf,<sup>2</sup> one view of

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<sup>1</sup> Walk, p. 362.

<sup>2</sup> Ṭūrī, vol. 8, p. 91, On the other hand, Muḥammad al-Shaybānī opines that the bankruptcy ceases automatically; See also *Takmilat Ibn ‘Ābidīn*, vol. 6, pp. 153-154.



the Shāfi'īs,<sup>3</sup> Ḥanbalīs<sup>4</sup> and Mālikis,<sup>5</sup> the discharge is only effective by an order of the court. This is because the court made such order. The judge, therefore, must decide whether to discharge the bankrupt or not. The discharge comes into being after the court has made a thorough observation and investigation. This rule is similar to the discharge of a spendthrift person from the interdiction that is by the judge.<sup>6</sup>

However, there are opinions that maintain that the court's decision is not necessary. According to another view of the Shāfi'īs,<sup>7</sup> Ḥanbalis<sup>8</sup> and Mālikis,<sup>9</sup> the discharge happens immediately after the distribution of the assets of the bankrupt to his creditors. This type of discharge is only valid according to the Mālikis, if one of the following conditions is satisfied: (a) that the bankrupt takes oath saying that he did not conceal any information about his property that is subject to the creditors' rights; or (b) that the creditors affirm that the bankrupt does not conceal anything from them.<sup>10</sup>

This type of discharge is similar to the discharge of interdiction on the insane person that is without a court decision. The insane is free to exercise his rights after

<sup>3</sup> Nawa R., vol. 4, p. 147; Nawa M., vol. 14, p. 110; Sayū, p. 259; Anṣā T., p. 84; Anṣā A., vol. 2, p. 194; See also Raml N., vol. 4, p. 330; Rāfi', vol. 4, p. 24; Qalyūbī states that some of the Shāfi'īs are of the opinion that the discharge of bankruptcy by the judge is allowed only after all the debts are settled. Qaly, vol. 2, p. 291.

<sup>4</sup> Qudā, vol. 4, p. 497; Maqd K., vol. 2, p. 187; Bahū, vol. 3, p. 441; Mard, vol. 2, pp. 317-318; Bala, vol. 5, p. 128; Najd, p. 360.

<sup>5</sup> Dard Ṣ., vol. 3, p. 361; Zarq Z., vol. 5, p. 269; Qarā, vol. 8, p. 214; 'Ilyā M., vol. 6, p. 30.

<sup>6</sup> *Majallah*, article 997 provides, "If the interdicted spendthrift person reforms, the interdiction only may be removed by the court."; Query, whether there shall be an application for discharge from the interdicted person or not?

<sup>7</sup> Asyū, vol. 1, p. 163; Nawa M., vol. 14, p. 110; Sayū A., p. 259; Rāfi', vol. 4, p. 24.

<sup>8</sup> Qudā, vol. 4, p. 497; Maqd K., vol. 2, p. 187; Bahū, vol. 3, p. 441; Mard, vol. 2, p. 318.

<sup>9</sup> Dard Ṣ., vol. 3, p. 361; Dard S., vol. 3, p. 268; Zarq Z., vol. 5, p. 269; Alla, vol. 3, pp. 133-134.

becoming sane.<sup>11</sup> They argue that the aim of the bankruptcy order is to preserve the bankrupt's assets and the effective cause (*al-‘illah*) of it is to prevent the bankrupt from concealing his property. By distributing the assets, the aim is achieved and the effective cause is ceased. Thus, the bankrupt should be discharged particularly when the effective cause no longer exists.<sup>12</sup>

The discharge without the order, according to one view of the Mālikīs, may also become effective through appropriation of the bankrupt's assets from the bankrupt.<sup>13</sup> It is subject to these conditions; (a) that the bankrupt takes the oath stating that he did not conceal any property, and (b) that the creditors accept his oath.<sup>14</sup>

According to one view of the Mālikīs, the order is not necessary to discharge the bankrupt if he possesses nothing. The discharge, however, is subject to the creditors' acknowledgement of it.<sup>15</sup> This rule is on the basis of the *Qur'ānic* verse, "And if the debtor is in a hard time (has no money), then grant him time till it is easy for him to repay."<sup>16</sup>

<sup>10</sup> Khur, vol. 5, p. 269; Zarq Z., vol. 5, p. 269; See also Dard Ş., vol. 3, p. 361.

<sup>11</sup> This is based on the *Ḥadīth*, "There are three whose actions are exempted from the accounts, i.e. an insane person till he becomes sane, a child till he reaches the age of puberty and a sleeping person till he wakes up.", Bukh, vol. 6, p. 168 at p. 169 & vol. 8, p. 21; Dāri, vol. 2, p. 171; Tabr, vol. 2, p. 980(no. 3287); See also Ṭayā, p. 15(no. 90).

<sup>12</sup> 'Adaw, vol. 5, p. 269; In Maḥm F., it is stated: "It is that, if the causes change or disappear, ruled based upon them must change or cease. Thus, one of the maxims of the sources says, "A *Sharī'ah* rule based upon a cause survives or ceases with it." Al-Mawla al-'Alā' says, "A *Sharī'ah* rule is based upon its cause; when it ceases the rule ceases"; See also Sula, vol. 2, pp. 190-191.

<sup>13</sup> Dasū, vol. 3, p. 268, al-Dasūqī considers this is a better view; See also 'Adaw, vol. 5, p. 265.

<sup>14</sup> 'Ilyā M., vol. 6, p. 30.

<sup>15</sup> Mawā, vol. 5, p. 42; See also Qarā, vol. 8, p. 214.

According to another view of the Ḥanbalis, the discharge is after all debts are settled. If there is no debt, the bankrupt should be discharged because the purpose of the bankruptcy order is to settle debts.<sup>17</sup>

Discharge may also be initiated by the creditors according to one of the Shāfi'is' views. The creditors agree among themselves to set the bankrupt free from bankruptcy. This action is permitted because the bankruptcy order is to protect their interests and the bankrupt's assets are subject to their rights. This rule is no different from a case of mortgagee who relinquishes his right to the mortgaged property. As a result, the debtor is free to use the mortgaged property.<sup>18</sup>

Discharge by the judge seems to be the best among other types that the Muslim jurists discuss. This is because the decision of the judge provides a satisfaction for the creditors, the bankrupt and the public at large. The decision is usually made after the judge has investigated the position of the bankrupt thoroughly to eliminate any possibilities of concealment of property by the bankrupt. Thus, the creditors would be satisfied. This decision would give the opportunity to the public to deal confidently with the bankrupt without any fear that their transactions would become invalid, for the bankrupt has been declared free from bankruptcy. The bankrupt would also become confident to continue his business and life as usual as before the order.

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<sup>16</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:280.

<sup>17</sup> Bahū, vol. 3, p. 441; Najd, p. 360.

<sup>18</sup> Rāfi', vol. 5, pp. 24-25; See also Nawa R., vol. 4, p. 147; Nawa M., vol. 14, p. 110; Sayū, p. 259; Anṣā T., p. 84; Anṣā A., vol. 2, p. 194.



Discharge through distribution seems to be good in order to alleviate the hardship off the bankrupt as soon as possible. Implementation for the order must be thorough in order to avoid the bankrupt's concealment of assets through transfer to their close relatives or even to the international banks. This is to put the property out of reach of the creditors.

Discharge through appropriation of the bankrupt's assets seems to be unrealistic unless with the fulfilment of certain requirements. Such requirements include, (a) the bankrupt shall take an oath declaring that he has handed over all his assets to the judge and (b) the judge shall confirm that there is no concealment of the bankrupt's assets. If there are no such requirements, it is feared that the objective of bankruptcy order would not be achieved, the rights of the creditors are at risk, and the justice could not be upheld accordingly. It is also feared that the debtor would abuse the bankruptcy proceedings. The debtor would allow himself to be declared bankrupt because he would be discharged easily. This would open the floodgate of abuse of the bankruptcy procedures.

Discharge by settlement of debts and agreement amongst the creditors appear to be appropriate provided that the evidence shows that (a) there is no other creditor, (b) the debts are paid to every creditor and (c) the agreements are made on consensus.

#### 6.1.2 English and Malaysian Laws

In contrast to Islamic law, there are only two types of discharge under English law, namely (a) automatic discharge and (b) discharge by order of the court.

Discharge will occur automatically upon the expiration of a three-year period. The period is shortened to two years where a certificate for the summary administration of the bankrupt's estate has been issued and is not revoked before the bankrupt's discharge. The period starts with the commencement of bankruptcy<sup>19</sup> on which the bankruptcy order was made.

The three-year and two-year periods, however, may be suspended upon the proof by the official receiver to the court that the bankrupt has failed or is failing to comply with his obligations in the bankruptcy. The suspension can only be applied by the official receiver.<sup>20</sup> The official receiver must file a report setting out his reasons. And upon receipt of the application, the court will fix a time and date for the hearing of the application and give notice of the hearing to the official receiver, the trustee and the bankrupt. Copies of the official receiver's report must be sent by him to the trustee and the bankrupt so as to reach them at least twenty-one days before the hearing.<sup>21</sup> The bankrupt can, not later than seven days before the hearing, file in court a notice specifying any statements in the report which he intends to deny and dispute. Copies of this notice must be sent by the bankrupt less than four days before.<sup>22</sup>

The power to suspend a bankrupt's discharge is exercised on proof of non-compliance with statutory requirement.<sup>23</sup> Other reasons for suspension include

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<sup>19</sup> *Insolvency Act 1986*, section 279(1)(b), (2).

<sup>20</sup> *Hardy v Focus Insurance Co Ltd* [1997] BPIR 77 Ch D.

<sup>21</sup> *Insolvency Rules 1986*, rule 6.215(1) - (4).

<sup>22</sup> *Insolvency Rules 1986*, rule 6.215(5).

<sup>23</sup> *Official Receiver v Milborn*, The Independent, July 26, 1999, Ch D.

permission for public examination to be conducted,<sup>24</sup> non disclosure of surplus income available for the creditors,<sup>25</sup> failure on the part of the bankrupt to attend at the office of the official receiver for interview on various occasions, and the failure to return the bankruptcy questionnaire despite few requests.<sup>26</sup>

The court may request that the period shall cease to run for a certain duration or until some condition or conditions, including a condition requiring the court to be satisfied of any matter, is or are fulfilled. The order should specify the period or the conditions.<sup>27</sup>

The automatic discharge is not available in the case of bankruptcy based on a criminal bankruptcy order or in the case of a second bankruptcy occurring within fifteen years of the first.<sup>28</sup>

For the above cases, the bankrupt may apply to the court for the discharge. The application could only be made after the end of the period of five years beginning with the commencement of the bankruptcy.<sup>29</sup>

On making the application, the bankrupt must give notice of it to the official receiver and deposit with him a required sum of money as to cover the costs of the application. Once the court is satisfied upon this fulfilled requirement, a hearing date will be fixed and the court must give at least forty two days notice of it to the

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<sup>24</sup> *Holmes v Official Receiver (Re a Debtor No. 26 of 1991)* [1996] BCC 246 Ch D.

<sup>25</sup> *Jacob v Official Receiver* [1998] BPIR 711 Ch D.

<sup>26</sup> *Singh v The Official Receiver* [1997] BPIR 530 Ch D.

<sup>27</sup> *Insolvency Act 1986*, section 279(3).

<sup>28</sup> *Insolvency Act 1986*, section 279(1)(a).



bankrupt and the official receiver, who in turn must give notice to the trustee and every creditor remaining unpaid not later than fourteen days before the hearing.<sup>30</sup> On the hearing of the application, the court may:

- (a) refuse the discharge;
- (b) give an absolute discharge; or
- (c) make an order for discharge subject to conditions in respect of any income which may become due to the bankrupt or in respect of any property acquired by him.<sup>31</sup>

The court may also make the order with an immediate effect, or have its effects suspended for a period of time, or until conditions laid down in the order are fulfilled.<sup>32</sup>

When a bankrupt has been discharged, the court must, at the request of the bankrupt, issue to him a certificate of his discharge and its effective date. The bankrupt can also require the Secretary of State in writing to advertise the discharge in the London Gazette and/or any newspaper in which the bankruptcy was advertised provided that the bankrupt prepays the costs of the advertisement.<sup>33</sup>

Similar to English law, there are two types of discharge but of different nature under Malaysian law. They are (a) discharge by order of the court and (b) discharge by certificate of the Official Assignee. For the first type, the bankrupt may,

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<sup>29</sup> *Insolvency Act 1986*, sections 279(1)(a), 280(1).

<sup>30</sup> *Insolvency Rules 1986*, rule 6.217.

<sup>31</sup> *Insolvency Act 1986*, section 280(2).

<sup>32</sup> *Insolvency Act 1986*, section 280(3).

<sup>33</sup> *Insolvency Rules 1986*, rule 6.220(1) – (3).

at any time after being adjudged as bankrupt, apply to the court for order of discharge.<sup>34</sup> He shall produce to the Registrar a certificate from the Official Assignee specifying the number of his creditors of whom he has notice whether they have proved or not.<sup>35</sup> The bankrupt is also required to file the report of the Official Assignee not less than seven days before the time for hearing the application.<sup>36</sup>

At the hearing, after taking into consideration the report of the Official Assignee as to the conduct and affairs of the bankrupt during the bankruptcy procedures, the court may either:

- (a) grant an absolute order of discharge;<sup>37</sup>
- (b) refuse an absolute order of discharge;
- (c) suspend the operation of the order for a specified time; or
- (d) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or with respect to his after acquired property.<sup>38</sup>

In case where the bankrupt has committed any offence under the Act or under section 421, 422, 423 and 424 of the Penal Code, the court may either:

- (a) refuse the discharge;
- (b) suspend the operation of the order until a dividend of not less than fifty percent has been paid to the creditors.

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<sup>34</sup> *Bankruptcy Act 1967*, section 33(1); A bankrupt is not entitled to have any of the costs incidental to his application for his discharge allowed to him out of his estate. *Bankruptcy Rules 1969*, rule 197.

<sup>35</sup> *Bankruptcy Rules 1969*, rule 194.

<sup>36</sup> *Bankruptcy Rules 1969*, rule 196(1).

<sup>37</sup> Such order is made where it is against public interest for an individual to remain bankrupt and such situation is of no benefit to anyone. *Re Ang Ah Kang* [1994] 2 CLJ 738 HC.

Further, on the proof of any of the following facts (a) failure to keep proper book of account, (b) continuing to trade after knowledge of insolvency, (c) contracting debts without reasonable expectation of ability to pay, (d) failing to account for loss or deficiency of assets, (e) rash, hazardous speculations, extravagance, gambling, culpable neglect of business affair, (f) defending an action frivolously or vexatiously, (g) bringing an action frivolously or vexatiously, (h) undue preference as form of conduct, (i) incurring liability, (j) previous bankruptcy or composition with creditors, (k) guilty of fraud or fraudulent breach of trust, (l) sending goods out of Malaysia, (m) the bankrupt's assets are not of a value equal to fifty dollars per centum of the amount of his secured liabilities,<sup>39</sup> the court may either:

- (a) refuse the discharge;
- (b) suspend the operation of the order for a specified time;
- (c) suspend the operation of the order until a dividend of not less than fifty per cent has been paid to the creditors.
- (d) grant an order of discharge subject to conditions.

The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently.<sup>40</sup>

The court may refuse or suspend or grant an order subject to condition, if it appears to the court that the fraudulent settlements were made to defeat or delay

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<sup>38</sup> *Bankruptcy Act 1967*, section 33(3).

<sup>39</sup> *Bankruptcy Act 1967*, section 33(6).

<sup>40</sup> *Bankruptcy Act 1967*, section 33(4).



creditors. Such settlements are (a) a settlement made before and in consideration of marriage where the settlor is not at the time of making it able to pay all his debts and (b) any covenant or contract made in consideration of marriage for future settlement for the settlor's wife or children.<sup>41</sup>

In addition to discharge by order of the court, the Official Assignee is given the discretionary power to issue a Certificate of Discharge to deserving cases. This discretion can only be exercised after a period of five years has elapsed, since the date the receiving order and the bankruptcy order were made effective.<sup>42</sup>

All cases that have reached the pre-condition of five years will be reviewed to ascertain whether they are deserving cases. The Official Assignee will take into consideration the circumstances in which the debts were incurred, the period of bankruptcy, the bankrupt's assets, his contributions to the bankruptcy's estate, the level of co-operation that the bankrupt has extended in the administration of his affairs, coupled with his general conduct during bankruptcy. Old age, the general health condition of a bankrupt, and old and inactive cases have also been included as special criteria for consideration.<sup>43</sup>

Before exercising his discretion in issuing the Certificate of Discharge, the Official Assignee shall serve on each creditor, who has filed a proof of debt, a notice of his intention to issue the certificate, together with a statement of his reasons for wanting to do so. A creditor who has been served with a notice may raise objection

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<sup>41</sup> *Bankruptcy Act 1967*, section 34.

<sup>42</sup> *Bankruptcy Act 1967*, section 33A (1) (2).

<sup>43</sup> Huss, pp. 261-262; Ali, p. 2; See also Lati I, pp. 8-9; Lati II, p. 8.

and reasons of doing so within twenty-one days from the date of service of notice. If the Official Assignee rejects the objection, such a creditor may make an application to the court for an order prohibiting the Official Assignee from issuing a certificate of discharge. The court may, if it thinks it just and expedient, either dismiss the application or make an order that prevents the Official Assignee from issuing a Certificate of Discharge for a period not exceeding two years.<sup>44</sup>

## 6.2 Effects of Discharge

There are various effects of discharge from bankruptcy. They include the effects on settlement of unpaid debts and right of disposition for newly possessed assets.

### 6.2.1 Islamic Law

The discharged bankrupt is free to exercise his disposition right.<sup>45</sup> Whatever he receives through his work or lawful ownership he is permitted to dispose of. His previous contracts such as gift, admission and release of debts (*ibrā'*) become valid and enforceable, because he is considered to have regained his previous position before the bankruptcy order.<sup>46</sup>

Dispositions of the discharged bankrupt are valid only to the newly acquired assets. Therefore, the dispositions are null and void against the concealed assets which are discovered after distribution of the bankrupt's assets and the discharge of bankruptcy. This is due to the fact that the bankruptcy order is considered continued

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<sup>44</sup> *Bankruptcy Act 1967*, section 33B(2)(4)(6).

<sup>45</sup> *Māwa*, vol. 7, p. 474; *Qaly*, vol. 2, p. 289.

<sup>46</sup> *Māwa*, vol. 7, p. 474.

to exist. As a result, the judge must continue the distribution of the assets to the creditors for their unpaid debts.<sup>47</sup>

The discovery of concealed assets may at the same time unveil other things. The judge may discover (a) the existence of unrealised assets, (b) the existence of late claimants, and (c) the existence of newly acquired assets. The judge must distribute the unrealised assets to the readily paid creditors and late claimants.<sup>48</sup>

There are, however, two possibilities if the unrealised assets are enough to pay only the proportionate share of the late claimants. Firstly, the distribution of assets before the present of the late claimants is considered null and void. Then, the judge has to gather the discovered assets and all the assets that are in hands of the creditor. The judge shall resume the distribution of the assets to the late claimants and other creditors. Secondly, the distribution is valid and the discovered asset is given to the late claimants based on the respective proportions received by other creditors. If there are extra assets, they shall be distributed to other creditors. If the discovered assets are not enough, the late claimants may take them all and then redeem proportionately further dues from every creditor.<sup>49</sup>

The second possibility seems more practical than the first. If the distribution to be invalidated, the hardship may happen as acquiring the paid debts from the paid creditors is not an easy task. They may dispose of all the proportionately received

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<sup>47</sup> Ibid., p. 443.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.



debts after from the distribution process. Consequently, this state of legal affairs causes difficulty not only to the judge but also to the creditors.

For the discovery of new assets, the judge may resume/renew the distribution of new assets received after the discharge of bankruptcy order amongst the paid creditors and late claimants.<sup>50</sup>

The bankrupt's debts that could not be settled during the bankruptcy procedure are still under the responsibility of the bankrupt.<sup>51</sup> He has to settle them, even if his bankruptcy is declared to have come to an end. This principle is based on the *Ḥadīth*, "The debt has to be paid."<sup>52</sup> The rule relating to obligation to pay the debt is also mentioned in the other *Ḥadīth*, "The soul of the believer is suspended unless he settles his debt."<sup>53</sup>

The obligation to settle the debt is not ceased, even though the debtor is a martyr who is yet considered the most respected person before Allah. This is based on the *Ḥadīth*, "I swear by Allah that a person who dies in the way of Allah, he is having life, dies and having life again and then is killed in the way of Allah, he could not enter the Paradise unless he pays the debt."<sup>54</sup> There is another *Ḥadīth* that emphasises about this obligation when a Companion of the Prophet asked about

<sup>50</sup> Māwa, vol. 7, pp. 443-444; Fash, p. 147; See also Anṣā A., vol. 2, pp 191-192.

<sup>51</sup> Maws, vol. 5, pp. 322 & 323.

<sup>52</sup> Dāwu, vol. 3, pp. 296-297(no. 3565).

<sup>53</sup> Tirm, vol. 3, pp. 389-390(nos. 1078-1079; See also Dāri, vol. 2, p. 262; Bagha, vol. 4, p. 352(no. 2140); Ṭabr, vol. 2, p. 133.

<sup>54</sup> Bagha, vol. 4, pp. 350-351(no. 2138).

whether such a person is pardoned all his sins and liabilities upon his martyrdom. The Prophet (S.A.W) answers, "Yes, except for debts. Jibril said that to me."<sup>55</sup>

The responsibility to settle unpaid debts does not mean that the bankrupt has to work to settle the unpaid debts according to the Shāfi'is,<sup>56</sup> the Ḥanafis,<sup>57</sup> one view of the Ḥanbalis<sup>58</sup> and the majority of the Mālikis.<sup>59</sup> The creditors have to wait until he is able to pay. They are not allowed to ask him to pay except when he is in a state of easiness.<sup>60</sup> This is according to the *Qur'ānic* injunction, "And if the debtor in a hard time (has no money), then grant him time till it is easy for him to pay".<sup>61</sup> The verse shows that Allah asks the creditors to wait for the payment of unpaid debts and not to ask the debtor to work in order to settle them.<sup>62</sup> These jurists establish their opinions also on the *Ḥadīth*, "Take whatever you find and there is nothing else for you than that."<sup>63</sup> This *Ḥadīth* does not require the bankrupt to work in order to settle the unpaid debts.

Again, the rule is established on the judgement of 'Umar ibn al-Khaṭṭāb in the case of al-Usayfi' of the Juhaynah<sup>64</sup> and the judgement of 'Umar ibn 'Abd al-

<sup>55</sup> Musl, vol. 3, p. 1501(no. 117 (1885) and see also p. 1502(no. 119 (1886); Māli M., pp. 306-307(no. 994); Dāri, vol. 2, p. 207; Nawawī, as quoted by al-Sayūṭī, is of the opinion that the holy war and martyrdom are part of good deeds that expiate all the rights of Allah (*ḥuqūq Allah*) but do not expiate the rights of human beings (*ḥuqūq al-ādamiyyin*). Sayū T., p. 386.

<sup>56</sup> Māwa, vol. 7, p. 458; Ghaz W., p. 139; Nawa R., vol. 4, p. 146; Anṣā A., vol. 2, p. 193.

<sup>57</sup> Sara, vol. 24, p. 164; Zayl, vol. 5, p. 199; Sugh, p. 753; According to Ibn Mundhir, this is the view of Imām Abū Ḥanīfah, Abū Yūsuf and Muḥammad al-Shaybānī. Nays, vol. 1, p. 151.

<sup>58</sup> Raja, pp. 297-298; Ya'lā, vol. 1, pp. 375-376; Mard, vol. 2, p. 317; Maqd K., vol. 2, p. 168.

<sup>59</sup> Mūsā, p. 186; Zarq Z., vol. 5, p. 271; Dard Ṣ., vol. 3, p. 360; See also Khur, vol. 5, p. 270.

<sup>60</sup> Dard Ṣ., vol. 3, p. 359.

<sup>61</sup> *Al-Qur'ān, sūrat al-Baqarah*, 2:280.

<sup>62</sup> Raml N., vol. 4, p. 330.

<sup>63</sup> Musl, vol. 3, p. 1191; Bagha, vol. 4, pp. 341-342 (no. 2128); Bayh, vol. 6, pp. 49-50.

<sup>64</sup> Anas M., p. 547.

‘Azīz, Umayyah caliph (717-720) relating to the bankruptcy of debtor<sup>65</sup> who did not ask the bankrupt to work to settle his debts.

The above ruling is summed up and complied with one legal rule stating, “the bankrupt should not be asked for something which is impossible to possess.”<sup>66</sup>

In addition to the above evidences, this is due to the fact that the debt is related to the liability of the bankrupt and not to his physical body,<sup>67</sup> notwithstanding the agreement between the bankrupt and creditors that the bankrupt has to work to settle the debt.<sup>68</sup> The bankrupt should not be asked to work even though the loan was made for immoral (*al-fasad*) and wrong purpose (*al-ma‘ṣiyyah*).<sup>69</sup> There are, however, circumstances that oblige the bankrupt to work. For example, the bankrupt should be asked to work if the debt is due by the commission of crime such as destroying intentionally<sup>70</sup> and appropriating wrongfully the other’s property.<sup>71</sup> The bankrupt should be obliged to work also as part of punishment and reprimand by the order of the court.<sup>72</sup>

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<sup>65</sup> Anas K., vol. 4, p. 120.

<sup>66</sup> Rafi‘, vol. 5, p. 23; See also Nawa R., vol. 4, p. 146; Anṣā A., vol. 2, p. 193; Subkī A., vol. 1, p. 308.

<sup>67</sup> Dard K., vol. 3, p. 270; Dard Ṣ., vol. 3, p. 359; Alla, pp. 132-133; However, al-Lakhwī is of the opinion that the bankrupt manufacturer (*al-ṣānī*) should be asked to work and not a businessman (*al-tājir*) because the former uses to work. See ‘Ilyā M., vol. 6, p. 33; ‘Adaw, vol. 5, p. 270; Zarqānī considers al-Lakhwī’s view is weak. Zarq Z., vol. 5, p. 271.

<sup>68</sup> Anas K., vol. 4, p. 120; Ṣāwī, vol. 2, p. 129; Dasū, vol. 3, p. 270.

<sup>69</sup> Sugh, p. 461; See also Bayj, vol. 1, p. 154.

<sup>70</sup> Shar M., vol. 3, p. 111; See also Kūha, vol. 2, p. 173; Gham, p. 225; Bayj, vol. 1, p. 544; Subk A., vol. 1, p. 308.

<sup>71</sup> See Anṣā A., vol. 2, pp. 193-194.

<sup>72</sup> Sugh, p. 461.



However, according to another view of the Ḥanbalis,<sup>73</sup> the bankrupt should be asked to work as part of punishment and reprimand. Their argument is based on the *Ḥadīth*, "The Prophet (S.A.W) sold *sarq*<sup>74</sup> to settle the debt. The sale is for his service/usufruct because usufruct is similar to subject matter of sale that makes the contract of sale valid."<sup>75</sup>

Their opinions are also based on the practice of 'Umar ibn al-Khaṭṭāb who is reported to employ the bankrupt [in order to settle his debt].<sup>76</sup> Moreover, their opinions are in accordance to one legal rule that provides, "The ability to acquire property by work is a must for one's maintenance and those under his support."<sup>77</sup>

The first view seems most appropriate between the two. If the bankrupt is asked to work, this would contradict the philosophy of the *Qur'ānic* verse that encourages the creditors to give time to the debtor to settle the debts.<sup>78</sup> Furthermore, the *Ḥadīth* used as a rule asking the bankrupt to work is not acceptable due to its discontinuity of chain as al-Māwardī maintains.<sup>79</sup>

<sup>73</sup> Raja, pp. 297-298; Bahū, vol. 3, 439l; Ya'lā, vol. 1, p. 375; Najd, p. 370; See also Qudā, vol. 4, pp. 495-496 who mentions the view is belonging to 'Umar bin 'Abd al-'Azīz, Sawār, al-Anbārī and Ishāq; Maqd K., vol. 2, pp. 167-168; Mard, vol. 5, p. 317; It is reported that, as Ibn Mundhīr states, Imām Aḥmad allows the bankrupt to work in order to settle his debt if he has extra capability. Nays, vol. 1, p. 151.

<sup>74</sup> *Sarq* is a name given by the Prophet (S.A.W) to a person who entered al-Madīnah and indebted to the people. He also was unable to settle the debts even though before taking the people's property he said that his property was to arrive soon. His matter was brought before the Prophet. The Prophet called the debtor as *sarq*. Bayh, vol. 6, p. 50.

<sup>75</sup> Qudā, vol. 4, p. 495.

<sup>76</sup> Māwa, vol. 7, p. 459.

<sup>77</sup> Raja, rule 132, p. 297.

<sup>78</sup> See *Al-Qur'ān, sūrat al-Baqarah*, 2:280.

<sup>79</sup> Māwa, vol. 7, p. 459.

The obligation to pay unpaid debts should not oblige the bankrupt to accept gift, charity, loan, will, divorce through compensation to the husband, getting married<sup>80</sup> and accepting blood money for law of retaliation in order to settle his unpaid debts.<sup>81</sup> The bankrupt could not be obliged to borrow, to exercise his right of pre-emption<sup>82</sup> or to give up his right to exercise the retaliation and accept blood-money or to revoke a gift made to his child.<sup>83</sup>

The bankrupt, however, is obliged to lease out the endowment property made to his favour.<sup>84</sup> The rental could be used for debt settlement and maintenance of the bankrupt's family.<sup>85</sup> The lease should continue until the debt is paid because the endowment property can be used indefinitely.<sup>86</sup> This is, since the endowment property could not be sold in order to settle debts. The lease of endowment property could not be made if there is a restriction made by the executor of endowment (*al-wāqif*).<sup>87</sup> This is because the condition made by the executor is like a legal injunction. There is a legal rule to this effect, "A decision passes by a judge is unenforceable if it is contrary to a condition made by the executor of endowment, for it is considered similar to the decision made in contrary to the legal rule (*al-naṣṣ*)".<sup>88</sup>

<sup>80</sup> A bankrupt single woman should not be asked to get married in order to get the dowry. There is a legal rule states, "The ability to gain a property with getting marriage is not a significant wealth.", Raja, rule 131, p. 296.

<sup>81</sup> Mard, vol. 3, p. 317; See also Nama, p. 421, It is stated that the bankrupt should not be forced to take them because the transaction is only complete with his acceptance (*al-qabūl*). Contrary to the inheritance that acceptance is not needed; Qudā, vol. 4, p. 496.

<sup>82</sup> Bahū, vol. 4, p. 146; 'Ilyāsh maintains that the bankrupt should not be asked to take that his portion of right of pre-emption after the property is sold to the other even though there are profits that are available for him to settle some or all of them. 'Ilyā M., vol. 6, p. 34.

<sup>83</sup> Mūsā, p. 186.

<sup>84</sup> Nawa Ṭ., p. 51, Bahū, vol. 3, 439; Cf. al-Ghazzālī who says that the Muslim jurists are varied on leased out endowment property. Ghaz W., p. 139.

<sup>85</sup> Kahū, vol. 2, p. 173.

<sup>86</sup> Shar M., vol. 3, p. 112.

<sup>87</sup> Raml N., vol. 4, p. 330; Shar M., vol. 3, p. 112.

<sup>88</sup> Nuja A., pp. 108 & 195; See also Sayū A., p. 105.



To settle unpaid debts, the bankrupt is obliged to take a compulsory monetary compensation for the crime inflicted against him. He should not pardon the wrongdoer.<sup>89</sup>

### 6.2.2 English and Malaysian Laws

According to English law, discharge of bankruptcy releases the bankrupt personally from all the "bankruptcy debts"<sup>90</sup> whether proved or provable. The release from all bankruptcy debts is subject to certain liabilities that remain. They are:

(a) liability continues in respect of any non-provable debt;<sup>91</sup>

(b) the bankrupt remains liable for certain provable debts. They are where the liability arises from fraud or fraudulent breach of trust, where the liability is in respect of any fine, and where the liability is for personal injuries<sup>92</sup> arising from negligence, nuisance, breach of contract, breach of statutory duty or any other duty or arising under any order made in matrimonial proceedings<sup>93</sup> unless the court orders to the contrary;<sup>94</sup>

<sup>89</sup> Dard S., vol. 3, p. 270; Anṣā A., vol. 2, p. 194.

<sup>90</sup> "Bankruptcy debt" means any debt or liability to which he is subject at the commencement of the bankruptcy; any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy; any amount specified in pursuance of section 39(3)(c) of the *Powers of Criminal Courts Act 1973* in any criminal order made against him before the commencement of the bankruptcy, and any interest provable as mentioned in section 322(2) of the Act. *Insolvency Act 1986*, section 382(1).

<sup>91</sup> *Insolvency Act 1986*, section 281(6).

<sup>92</sup> "Personal injuries" includes death and any disease or other impairment of a person's physical or mental condition. *Insolvency Act 1986*, section 281(8).

<sup>93</sup> "Family proceeding" means; (a) family proceeding within the meaning of the *Magistrate Court Act 1980* and any proceedings which would be such proceedings but for section 65(1)(ii) of the Act (proceeding for variation of order for periodical payments); and (b) family proceeding within the meaning of Part V of the *Matrimonial and Family Proceeding Act 1984*. *Insolvency Act 1986*, section 281(8).

<sup>94</sup> *Insolvency Act 1986*, section 281(1)-(6).



(f) the bankrupt remains liable for obligations which arise under a confiscation order made under section 1 of the *Drug Trafficking Act 1986*.<sup>95</sup>

Although the bankrupt may be released from liability for a debt, any co-obligor (e.g. a partner of the bankrupt, or co-trustee, etc.) and any person liable as surety for him is not so released.<sup>96</sup>

The discharge releases also the bankrupt from various disabilities for which undischarged bankrupt suffers. For example, the discharged bankrupt is allowed to sit or vote in the House of Lords or Commons. He is also allowed to sit or vote in a committee in either House.<sup>97</sup>

The undischarged bankrupt, nevertheless is not free from his statutory duties. For example, he is obliged to provide information and be prepared to assist the official receiver whenever are required,<sup>98</sup> as the powers to direct a bankrupt to attend a private examination survived his discharge from bankruptcy.<sup>99</sup> The bankrupt must also provide information and assistance to enable the trustee to carry out his duties.<sup>100</sup> The failure to discharge these obligations causes the bankrupt liable for contempt of court.<sup>101</sup>

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<sup>95</sup> *Insolvency Rules 1986*, rule 6.223.

<sup>96</sup> *Insolvency Act 1986*, section 281(7).

<sup>97</sup> *Insolvency Act 1986*, section 427(1)(a) - (c), (2).

<sup>98</sup> *Insolvency Act 1986*, section 291(4),(5).

<sup>99</sup> *Insolvency Act 1986*, section 366: See *Oakes v Simms* [1997] BPIR 699 CA.

<sup>100</sup> *Insolvency Act 1986*, section 333(1),(3).

<sup>101</sup> *Insolvency Act 1986*, sections 291(6), 333(4).

Under Malaysian law, the discharge also releases a bankrupt from all other debts provable in bankruptcy.<sup>102</sup> This is similar to the English law position. The release is subject to certain liabilities that continue. They are:

(a) any debt due to the Government of Malaysia or of any State, of any person for any offence under any written law relating to any branch of the public revenue, or at the suit of any public officer on a bail bond entered into for appearance of any person prosecuted for any such offence unless a certificate in writing is given from the authority concerned.<sup>103</sup>

(b) any debt or liability incurred by means fraud or fraudulent breach of trust to which he was a party.<sup>104</sup>

(c) any liability in respect of a fine imposed for an offence.<sup>105</sup>

Although the bankrupt may be released from liability for a debt, 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 was a surety or in the nature of a surety for him.<sup>106</sup>

The discharge also frees the bankrupt from various disabilities and disqualifications imposed upon the undischarged bankrupt. For example, the discharge allows the discharged bankrupt to pursue his action, by filing a summons-for-directions that he did not make during his bankruptcy.<sup>107</sup> Other examples, he may

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<sup>102</sup> *Bankruptcy Act 1967*, section 35(1).

<sup>103</sup> *Bankruptcy Act 1967*, sections 35(2)(a)(b)(3).

<sup>104</sup> *Bankruptcy Act 1967*, section 35(2)(c).

<sup>105</sup> *Bankruptcy Act 1967*, section 35(2)(d).

<sup>106</sup> *Bankruptcy Act 1967*, section 35(5).

<sup>107</sup> *Pravinchandra Doshi (t/a M/S P Doshi & Co) v Ismail bin Syed Mohamed & Anor* [1999] 1 MLJ 35 HC.

be appointed or acted as a Session Court Judge or Magistrate. The discharged bankrupt may also be nominated or elected to or holding or exercising the office of Councilor of a local authority.<sup>108</sup>

The bankrupt is, however, not released from his statutory duties. He may be committed for contempt of court if he willfully fails to perform his duties to provide assistance to the Official Assignee in the realisation and distribution of the property. The court may also, if it thinks fit, revoke his discharge but without prejudice to the validity of any sale, disposition or payment made or thing done subsequent to the discharge but before its revocation.<sup>109</sup>

### 6.3 Subsequent Bankruptcy Order

A question arises whether a debtor may be declared bankrupt for a second or third time.

#### 6.3.1 Islamic Law

It is permissible to make a debtor bankrupt for the second time. The conditions for the subsequent order are similar to the first order. For example, there shall be an application made by the creditors to the court, the debts shall exceed the bankrupt's assets and so on.<sup>110</sup> This means that one of the conditions of the application for second bankruptcy order is that the discharged bankrupt has received

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<sup>108</sup> *Bankruptcy Act 1967*, section 36(1)(a)(b), 2(b).

<sup>109</sup> *Bankruptcy Act 1967*, section 35A.

<sup>110</sup> For detail see pp. 15-16.



and possessed new assets. The application, according to one view of the Mālikis, would be entertained only after six month from the first bankruptcy order.<sup>111</sup>

There are different views amongst Muslim jurists on whether creditors of the first bankruptcy order are entitled to share with the creditors in the second bankruptcy order the bankrupt's assets realised for the second order. According to the Ḥanbalis<sup>112</sup> and Shāfi'is,<sup>113</sup> all creditors would share the bankrupt's assets. Hence, creditors in the first bankruptcy order will share the unpaid debts; whereas creditor in the second bankruptcy order will share all the bankrupt's assets.<sup>114</sup> They have equal right in bankrupt's liability and acquired right likewise there is only one bankruptcy order.<sup>115</sup>

According to the Mālikis, the creditors who are indebted to the bankrupt after the first bankrupt order are more entitled to the bankrupt's assets. The creditors in the first bankruptcy order only get the balance of their debts if there is excess of the bankrupt's estate.<sup>116</sup> The same rule applies, if the bankrupt is made bankrupt for the third time. Hence, the creditors of last bankruptcy order share the bankrupt's assets in priority of the creditors of the earlier bankruptcy orders. The creditors of the earlier bankruptcy orders will share the bankrupt's assets, if there is a surplus of assets.<sup>117</sup>

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<sup>111</sup> 'Ilyā M., vol. 6, p. 30; Khur, vol. 5, p. 269; See also Mawā, vol. 5, p. 42; Zarq Z., vol. 5, p. 269.

<sup>112</sup> Qudā, vol. 4, p. 498; Maqd K., vol. 2, p. 187.

<sup>113</sup> Māwa, p. 474.

<sup>114</sup> Maqd K., vol. 2, p. 187.

<sup>115</sup> Qudā, vol. 4, p. 498.

<sup>116</sup> Nama, p. 421; Jall, vol. 2, p. 255; See also 'Ilyā M., vol. 6, p. 31; Khur, vol. 5, p. 268.

However, there is an exception to the Mālikis' view as creditors in the first and second bankruptcy orders will share the bankrupt's assets in a case where the bankrupt receives the property through gift, inheritance or payment of compensation on crime committed against him.<sup>118</sup> They will also share the bankrupt's assets if the assets receives are a payment of divorce by compensation to the husband,<sup>119</sup> will, endowment, salary and buried treasure of the earth (*rikāz*).<sup>120</sup> However, Al-Māwardī, in rejecting the Mālikis view, states that if we allow the priority between two rights to exist, then it is better to give the priority to the first.<sup>121</sup>

### 6.3.2 English and Malaysian Laws

Undischarged bankrupt may be subject to further bankruptcy proceedings based upon any fresh debts that have been incurred after the date of the adjudication. Post-adjudication debts cannot be proved for in the existing bankruptcy and there is no rule or principle whereby successive bankruptcies may undergo consolidation.<sup>122</sup>

It is well established that the second, and any subsequent, bankruptcy takes priority of effect over any previous bankruptcy from which the bankrupt remains undischarged. The trustee in the earlier bankruptcy<sup>123</sup> becomes a creditor in the later

<sup>117</sup> Rush T., vol. 10, pp. 511-512.

<sup>118</sup> Anas K., vol. 4, p. 117; Jall, vol. 2, p. 255; Mūsā, p. 186.

<sup>119</sup> Zarq Z., vol. 5, p. 269.

<sup>120</sup> Dard Ş., vol. 3, pp. 361-362; Alla, vol. 2, p. 134.

<sup>121</sup> Māwa, vol. 7, p. 474.

<sup>122</sup> Flet, p. 80.

<sup>123</sup> "Earlier bankruptcy" means the bankruptcy (or, as the case may be, most recent bankruptcy) from which the bankrupt has not been discharged at the commencement of the later bankruptcy. *Insolvency Act 1986*, section 334(1)(b).

bankruptcy<sup>124</sup> but in respect to any unsatisfied balance debts provable in the bankruptcy of which he is a trustee.<sup>125</sup>

Creditors in the earlier, or in any prior, bankruptcy do not become creditors in the later bankruptcy in respect to same debts, since their claims are administered collectively by the trustee in the bankruptcy of which they have properly become proving creditors.<sup>126</sup>

Any amount provable in a later bankruptcy by the existing trustee in an earlier one ranks in priority after all the debts provable in the later bankruptcy and interest on those debts.<sup>127</sup>

Property which was comprised in the bankrupt's estate at the date of commencement of the earlier bankruptcy does not form part of the estate for the purposes of the later bankruptcy, and thus remains available for distribution to the creditors in the earlier administration.<sup>128</sup> In practice, however, the interests of the later creditors will be best safeguarded by their causing second, and subsequent, adjudications to take place.<sup>129</sup>

It is emphasised that these two sections operate only in relation to the second and subsequent bankruptcy of an undischarged bankrupt. Thus, if the later petition is

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<sup>124</sup> "Later bankruptcy" means the bankruptcy arising from that order. *Insolvency Act 1986*, section 334(1)(a).

<sup>125</sup> *Insolvency Act 1986*, section 335(5).

<sup>126</sup> *Insolvency Act 1986*, section 335(5).

<sup>127</sup> *Insolvency Act 1986*, section 335(6).

<sup>128</sup> *Insolvency Act 1986*, sections 335(1), (2), 334(3).

<sup>129</sup> Flet, p. 80.



presented against the bankrupt, but he obtains his discharge prior to the making of the later bankruptcy order, then section 334 and 335 will not apply. It is also to be borne in mind that most first bankruptcies will be the subject of automatic discharge three years after the commencement of the bankruptcy, by virtue of section 279.<sup>130</sup>

Malaysian law also provides a rule that relates to subsequent bankruptcy. The Official Assignee shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable in the last preceding bankruptcy against the property of the bankrupt in the subsequent bankruptcy.<sup>131</sup>

Any property acquired by the bankrupt, since he was last adjudged bankrupt, shall vest in the Official Assignee on account of the subsequent bankruptcy.<sup>132</sup>

#### 6.4 Annulment of Bankruptcy Order

The court in England can annul a bankruptcy order if it appears that on any grounds existing at the time the order was made, the order ought not to have been made, or that to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all been either paid or secured for to the satisfaction of the court.<sup>133</sup>

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<sup>130</sup> Hunt, p. 3151.

<sup>131</sup> *Bankruptcy Act 1967*, section 49(1).

<sup>132</sup> *Bankruptcy Act 1967*, section 49(1).

<sup>133</sup> *Insolvency Act 1986*, section 282(1).

The court which has jurisdiction may review, rescind or vary any order made by it in the exercise of that jurisdiction.<sup>134</sup> This confers a general "safety valve" power on the courts to review, rescind or vary orders on bankruptcy matters.<sup>135</sup>

The order of annulment restores the bankrupt to his pre-bankruptcy status and he remains fully liable for all bankruptcy debts. It is to be contrasted with discharge, whether automatic or by order, which releases the bankrupt from almost all the bankruptcy debts.<sup>136</sup>

This provides for the rectification of any injustice, and also to provide for those cases where the debtor seeks in the fullest way possible to expunge all the traces and connotation of bankruptcy from the established reputation. A further reason is in order to avert the onset of disqualifications to which he will be subject during bankruptcy, including the disqualification from certain categories of public office, which will inevitably take effect before any discharge from bankruptcy can come about under section 279 or section 280.<sup>137</sup>

Similarly, the court in Malaysia may also annul the adjudication where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full,<sup>138</sup> or where it appears to the court that proceedings are pending in the Republic

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<sup>134</sup> *Insolvency Act 1986*, section 375(1).

<sup>135</sup> Seal, p. 425.

<sup>136</sup> Berr, p. 160.

<sup>137</sup> Flet, pp. 322-323.

<sup>138</sup> The failure on part of the bankrupt to satisfy that the proved debt lawfully due to a creditor had been paid in full renders the annulment of bankruptcy order be set aside by the Higher Court, i.e. Federal Court. *Kwong Aik Bank v Hah Chiew Yin* [1985] 2 MLJ 452 FC.

of Singapore for the distribution of the bankrupt's estate and effects among his creditors.<sup>139</sup>

The power of the court to annul the adjudication order is discretionary, but it must consider all relevant facts and circumstances.<sup>140</sup> Where such an adjudication is annulled, all sales and dispositions of property and payment duly made, and all acts thereto done by the Official Assignee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoint.<sup>141</sup>

This would mean that the annulment of the adjudication order is an annulment of all consequences of the making of the receiving and adjudication orders that restored the defendant into his original position as if his bankruptcy has never occurred.<sup>142</sup>

The annulment of the adjudication order also has the effect of wiping out the bankruptcy altogether and puts the bankrupt in the same position as if there has been no adjudication. Accordingly, the annulment and rescission of the orders meant that the first respondent was not a bankrupt when the order was granted.<sup>143</sup>

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<sup>139</sup> *Bankruptcy Act 1967*, section 105(1).

<sup>140</sup> *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274 SC.

<sup>141</sup> *Bankruptcy Act 1967*, section 105(2).

<sup>142</sup> *Low Hong alias Liew Ah Heng v. Tan Hor Choon* (1953) 19 MLJ 223.

<sup>143</sup> *Dato' Haji Mohd Muslim bin Othman v. Shuaib bin Lazim & Anor*, [1993] 2 CLR 177 HC.



## 6.5 Summary

There are different ways discussed by the Muslim jurists about the discharge from bankruptcy order, i.e. by the order of the court, by the distribution of bankrupt's assets by the judge or by appropriation of the bankrupt's assets from the bankrupt. The discharge may also be made by the settlement of all debts to the creditors or agreement among the creditors to free the bankrupt from bankruptcy. However, English law provides that the discharge of bankruptcy is either with the lapse of certain period of time or by order of the court. The discharge by order of the court is part of the Malaysian law. In addition to this, Malaysian law also provides that discharge may be issued by the Official Assignee.

The above analysis shows that discharge by order of the court is compatible for all three legal systems. Islamic law, nevertheless, differs from the other two legal systems in the sense that the court is only allowed either to grant or refuse the discharge. Whereas, the English and Malaysian courts are not only permitted to grant and refuse the discharge but may grant discharge subject to the fulfilment of the conditions.

The analysis demonstrates also that the application for discharge in Malaysia law may be made at any time after bankruptcy. While, in English law, the application is only allowed after the period of five years after the commencement of bankruptcy.

Furthermore, under Islamic law, the bankrupt, after discharge, remains liable to settle the unpaid debts whether provable, non-provable, unsecured or secured. This is because settling unpaid debts is an obligatory duty. The bankrupt, even,

should be asked to work, according to one view, in order to settle the unpaid debts. Conversely, under English and Malaysian laws, the bankrupt is released from all provable debts except the liability arises from fraud or fraudulent breach of trust, breach of statutory duties and so on.

For the subsequent bankruptcy, Islamic law only allows it after the discharge is made. While, English and Malaysian laws permits the second bankruptcy to be made against discharged and undischarged bankrupt.

The assets from subsequent bankruptcy are divisible only to the later bankruptcy as provided by English and Malaysian laws, and by one view of Muslim jurists.

Finally, English and Malaysian laws give right to the bankrupt to apply for annulment of bankruptcy before his discharge. The annulment's right is subject to the fulfilment of certain conditions. In contrary, the annulment of bankruptcy is not part of the bankruptcy procedures as the Muslim jurists have not discussed it. Perhaps, this is because the bankrupt, under Islamic law, would not be jeopardised to hold any office. This is based on the *Ḥadīth* on Mu'ādh who had been appointed by the Prophet (S.A.W) as his governor in Yemen after his discharge.<sup>144</sup> Moreover, the bankruptcy order is only restricted to the bankrupt's liability, not to his body. Thus, the bankrupt is free to work in whatever jobs are suitable.

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<sup>144</sup> See Raml N., vol. 4, p. 310.

## CONCLUSION

The research shows that there are similarities between Islamic Bankruptcy Law, English and Malaysian Personal Bankruptcy Laws. According to these three legal systems, bankruptcy procedures start with a presentation of a bankruptcy petition to the court for a bankruptcy order. This is to protect the interests of the creditors. Moreover, if the presentation of bankruptcy petition is not allowed, the rights of the creditors are at risk as there are creditors who try to conceal their property by way of gifts and endowment to their close relatives and friends.

These three legal systems concur that a creditor or debtor may petition for a bankruptcy order. This is because bankruptcy order affects their interests. Thus, once a bankruptcy order is made, there are various legal consequences. For examples, certain incomplete transactions become void and a bankrupt is unable to dispose of his property. Other examples are that a creditor may claim his debt from the guarantor and, creditor of deferred payment debt may prove his debt and share the bankrupt's estate. Bankrupt order may subject a bankrupt to a detention. This is necessary in order to investigate and ensure that a bankrupt does not conceal any thing from his creditors.

Bankruptcy order also gives rise to a right of repossession to owner of property whose property intact is among the bankrupt's estate. Islamic law confers such right based on the *Aḥādīth*. Whereas, for English and Malaysian laws, it is based on a sanctity of the contract.



Furthermore, these three legal systems require a realisation of the bankrupt's estate to settle the debts. The estate includes most of valuable assets belonging to the bankrupt such as a matrimonial house. They also consider after acquired property and income of the bankrupt as part of the estate. This is to make sure that the settlement of debts is made as much as possible.

Islamic, English and Malaysian laws, moreover, agree that a realisation is subject to inability to include exempt assets, as they are necessities. Without excluding such assets, the bankrupt and his dependants may suffer a hardship that endangers their life. They also maintain that the property subject to the right of third party is excluded from realisation process due to the fact that a bankruptcy order does not affect such property.

These three legal systems guarantee that those responsible for realisation are not accountable to any damage caused during the time of realisation without their negligence. If they are liable to pay, nobody will carry out the realisation.

In addition, Islamic, English and Malaysian laws regulate that distribution takes place after a realisation and sale process. Payment of expenditure relating to administration of bankruptcy is given priority. Without paying them before others, it is afraid that the bankruptcy process might be carried out ineffectively.

Another similarity is that they recognise that discharge may be by order of the court. This is so discharge by order of court provides a satisfaction for the creditors, bankrupt and public at large. Discharge is usually made after the judge has

investigated the position of the bankrupt thoroughly to eliminate any possibilities of concealment of property. Thus, the creditors would be satisfied. This decision would give the opportunity to the public to deal confidently with the bankrupt without any fear that their transactions would become invalid, for the bankrupt has been declared free from bankruptcy. The bankrupt would also become confident to continue his business and life as usual as before the order.

The research also establishes that there are differences between Islamic Bankruptcy Law, English and Malaysian Personal Bankruptcy Laws. Islamic law permits the bankrupt to have his legal action in the law of retaliation or grant pardon in accordance with it, especially where it does not involve monetary compensation. There are injunctions from the *Qur'ān* and *Aḥādīth* that grant such right. If the court tries to interfere by preventing the bankrupt from exercising such right, it will be contrary to Islamic law. Neither English nor Malaysian law allows such action because it is under the jurisdiction of the Public Prosecutor to initiate the proceedings. Moreover, murder, manslaughter and the like are dealt with in specific statutory legislation.

Islamic law also differs as regard to right of distress during the time of bankruptcy order. Islamic law prohibits the landlord to distrain goods of the bankrupt in order to pay the unsettled rent. This is due to the fact that any unpaid debt is considered a provable debt in a bankruptcy. In contrast, English and Malaysian laws allow the landlord to distrain goods of the bankrupt for unpaid rent.

In addition, Islamic law permits creditors to prevent the debtor from travelling and leaving his hometown unless the latter appoints an agent to pay his

debt in his absence or a guarantor to take care of his debt or the debtor provides security. The prevention of travelling may take place before the bankruptcy order. This is to restrain the debtor from avoiding settlement of debt and to protect the right of the creditors. English law, however, permits a bankrupt to travel as a guarantee to his right of freedom of movement. On the contrary, there is a restriction on a bankrupt to travel in Malaysia. Malaysian law provides that the Official Assignee or the court may only exercise the prevention. It takes place after the bankruptcy order.

Another difference is that English and Malaysian laws disqualify a bankrupt from holding certain offices such as solicitors and directors of the company upon his bankruptcy. But there is no such effect under Islamic law. This is due to the fact that, under Islamic law, a bankruptcy order affects only property and disposition of the bankrupt.

During realisation, Islamic law requires the judge to set aside a certain amount of money from the proceeds of sale of the bankrupt's estate for payment of maintenance to the bankrupt and his dependants as maintenance is a basic necessity. However, English law provides no such requirement. For the maintenance, the bankrupt is permitted to retain some amount of money from his income. Malaysian law gives a discretionary power to the Official Assignee to provide allowance for maintenance to the bankrupt and his family. This is to balance the interests of creditors and family of the bankrupt.

These three legal systems provide a different rule relating to distribution. Islamic law encourages that distribution of the bankrupt's estate to finish as soon as



possible. Malaysian law imposes time limit for declaring and distributing dividends that is within twelve months after the adjudication to the Official Assignee. This is contrary to English law that provides no time-limit but does oblige the trustee to declare and distribute dividends, whenever he has sufficient funds in hand provided, it is assumed, that the size of dividend so distributable is not disproportionate to the cost of distribution. Moreover, English and Malaysian laws provide that distribution is for the payment of interest if there is surplus of assets. But the payment of interest on the loan is not part of distribution process according to Islamic law. This is because the interest is considered part of the usury that is illegal and prohibited on the basis of legal injunctions provided by the *Qur'ān* and *Aḥādīth*.

Islamic law varies with English and Malaysian laws on the right of wife to share the bankrupt's assets. Islamic law allows the wife to share the bankrupt's assets since it gives right to the wife to be in equal footing with the ordinary creditors for her claim of debts. On the contrary, English and Malaysian laws consider the wife as a postponed creditor. She is paid only after all other creditors are paid in full and with interests.

After discharge, the bankrupt remains liable to settle the unpaid debts whether provable, non-provable, unsecured or secured according to Islamic law. This is because, settling unpaid debts is an obligatory duty as the *Qur'ān* and *Aḥādīth* provide. The bankrupt, even, should be asked to work in order to settle the unpaid debts. Conversely, under English and Malaysian laws, the bankrupt is released from all provable debts except the liability arising from fraud or fraudulent breach of trust, breach of statutory duties and so on.

They differ as regard to annulment of bankruptcy order. English and Malaysian laws give right to the bankrupt to apply for annulment of bankruptcy before his discharge. In contrast, the annulment of bankruptcy is not part of the bankruptcy procedures. This is because the bankrupt, under Islamic law, would not be jeopardised to hold any office. Moreover, the bankruptcy order is only restricted to the bankrupt's liability, not to his body.

### Suggestions and Recommendations

There are few suggestions to be made in order to streamline Malaysian Personal Bankruptcy Law with the basic principle of Islamic law. Firstly, Malaysian law provides that the property of a bankrupt divisible amongst his creditors may include not only property belonging to him but also property owned by another person.<sup>1</sup> If property owned by another person is permitted to be distributed to the creditors, it is unjust and considered as taking the property of other unlawfully. This is contradict to the *Qur'ānic* injunction, "O you who believe! Do not devour one another's possession wrongfully except it be a trade amongst you by mutual consent."<sup>2</sup> Such rule also against the *Ḥadīth*, "It is not permissible for a Muslim to take his fellow Muslim's property except in proper manner."<sup>3</sup> Therefore, it is proposed that such provision to be revised.

Furthermore, the revision is necessary as such provision ceases to be part of English law after English Parliament accepted the recommendation that the Cork

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<sup>1</sup> *Bankruptcy Act 1967*, section 48(b)(iii); Cf. p. 164. .

<sup>2</sup> *Al-Qur'ān, sūrat al-Niṣa'*, 4:29.

<sup>3</sup> Daru, vol. 2, p. 20(nos. 2862, 2863); See also Shaw, vol. 5, p. 341.

Committee made on the matter.<sup>4</sup> Not only that, the *Australian Bankruptcy Act 1966* has omitted the provision, as has the *New Zealand Insolvency Act 1967*. The law on the matter has ceased to operate in Canada since 1949.<sup>5</sup>

Secondly, there are provisions in Malaysian law that allow the payment of interests to the creditors. For examples, the law provides that any surplus shall be applied in payment of interest<sup>6</sup> and the bankrupt is entitled to any surplus remaining after the payment in full of his creditors with interest.<sup>7</sup> The payment of interest is against the principle of Islamic law. This is due to the fact that the debtor is only liable to pay the amount that he owes. No interest is required as interest is considered as part of usury that Islamic law prohibits. The prohibition of usury is clearly stated in the *Qur'ān*, "Those who take usury will not rise up (on the Day of Resurrection) except like those maddened by Satan's touch. For they claim that trading is like usury, whereas Allah has made trading lawful and prohibited usury."<sup>8</sup> Such prohibition of usury is also based on the *Ḥadīth*, "The Prophet (S.A.W) cursed the one who accepted usury, the one who paid it, the witness to it and the one who recorded it."<sup>9</sup> Therefore, it is suggested that any provision relating to interest should be repealed.

<sup>4</sup> For detail discussion on the recommendations, see *Cork*, pp. 248-250, paras. 1081-1093; Cf. pp. 160-162.

<sup>5</sup> *Cork*, p. 250, para. 1091.

<sup>6</sup> *Bankruptcy Act 1967*, section 43(5).

<sup>7</sup> *Bankruptcy Act 1967*, section 69.

<sup>8</sup> *al-Qur'ān*, *sūrat al-Baqarah*, 2:275; See also *sūrat al-Baqarah*, 2:276 and *sūrat Āl 'Imrān*, 3:130; Bukh, vol. 3, pp. 11-12; Dāwu, vol. 3, p. 244(no. 3333).

<sup>9</sup> Dāwu, vol. 3, p. 244(no. 3333); See also Bukh, vol. 3, pp. 11-12;



Thirdly, Malaysian law provides that the discharge releases a bankrupt from all debts provable in bankruptcy.<sup>10</sup> This provision does not fit with the principle of Islamic law as the bankrupt's debts that could not be settled during the bankruptcy procedure are still under the responsibility of the bankrupt.<sup>11</sup> He has to settle them, even if his bankruptcy is declared to have come to an end. This principle is based on the *Ḥadīth*, "The debt has to be paid."<sup>12</sup> The rule relating to obligation to pay the debt is also mentioned in the other *Ḥadīth*, "The soul of the believer is suspended unless he settles his debt."<sup>13</sup>

Moreover, the obligation to settle the debt has not ceased, even though the debtor is a martyr who is yet considered the most respected person before Allah. This is based on the *Ḥadīth*, "I swear by Allah that a person who dies in the way of Allah, he is having life, dies and having life again and then is killed in the way of Allah, he could not enter the Paradise unless he pays the debt."<sup>14</sup> There is another *Ḥadīth* that emphasises this obligation when a Companion of the Prophet asked about whether such a person is pardoned all his sins and liabilities upon his martyrdom. The Prophet (S.A.W) answers, "Yes, except for debts. Jibril said that to me."<sup>15</sup> Therefore, it is recommended that the provision relating to a release of bankrupt from all provable debts after his discharge to be omitted.

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<sup>10</sup> *Bankruptcy Act 1967*, section 35(5); Cf. p. 253.

<sup>11</sup> *Maws*, vol. 5, pp. 322-323; Cf. p. 246-247.

<sup>12</sup> *Dāwu*, vol. 3, pp. 296-297(no. 3565).

<sup>13</sup> *Tirm*, vol. 3, pp. 389-390(nos. 1078-1079; *See also* *Dāri*, vol. 2, p. 262; *Bagha*, vol. 4, p. 352(no. 2140); *Ṭabr*, vol. 2, p. 133.

<sup>14</sup> *Bagha*, vol. 4, pp. 350-351(no. 2138).

<sup>15</sup> *Musl*, vol. 3, p. 1501(no. 117 (1885) and *see also* p. 1502(no. 119 (1886); *Māli M.*, pp. 306-307(no. 994); *Dāri*, vol. 2, p. 207.

Fourthly, Malaysian law considers that the matrimonial house is part of the bankrupt's estate that is subject to the sale. This is because upon the adjudication, all property of the bankrupt are vested in the hand of the Official Assignee.<sup>16</sup> Thus, the Official Assignee may sell such house immediately after the adjudication without taking care the consequences to the affairs of the bankrupt and his family. This is so, as the house is considered the substantial assets available for distribution to settle the debts. It is afraid that harm may be caused to the bankrupt and his dependants if there is no rule to restrict the power of sale of the house by the Official Assignee. Moreover, eviction from the house will often be a disaster not only for the bankrupt but also for those living with him. Hence, selling the house after the adjudication should be avoided, as it causes a harm that the Islamic law prohibits. To this effect, the Prophet (S.A.W) is reported to have said, "There should be neither harming nor reciprocating harm, if a person harms the other, Allah harms him and if a person causes trouble to other, Allah causes trouble for him."<sup>17</sup> Thus, to prevent harm to the bankrupt and family, the provision on sale of the matrimonial house under Malaysian law should be considered for review.

The review should include, for example, a provision that requires the Official Assignee to postpone the sale of the matrimonial house for a reasonable period of time such as, six months. This is to allow the bankrupt to find a suitable accommodation for his family. There should also be a provision that may allow the bankrupt or his dependants to apply to the court for an order extending the period of postponement when there is a necessity. Furthermore, the sale of the matrimonial house should only be carried out after the court sanctions it. Thus, conflicting of

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<sup>16</sup> *Bankruptcy Act 1967*, section 24(4); Cf. p. 195.

interests between the creditors and, the bankrupt and family may be redressed accordingly.

Finally, Malaysian law provides that the Official Assignee as he thinks just to use his discretion to provide allowance of maintenance for the bankrupt and his family.<sup>18</sup> This principle is not corresponding with the principle of Islamic law as the judge is obliged to retain some of the proceeds from the sale for the payment of maintenance to the bankrupt and his family, as maintenance is a basic necessity.<sup>19</sup> This is also due to the fact that the maintenance is one of the necessities that is not affected by the interdiction involving another party<sup>20</sup> and to be given priority over the creditors' rights.<sup>21</sup> Al-Sulamī says, "(H)is interest as regards to maintenance of himself and his dependants [from the day of bankruptcy declaration until the repayment of the debt] is given priority over the interest of his creditors."<sup>22</sup> The priority is based on the *Ḥadīth* referring to, "A person from the Banu 'Udhra set a slave free after his death. This news reached the Prophet (S.A.W) who consequently asked, "Do you have any property besides it?" He said, "No." Upon this the Prophet (S.A.W) said, "Who would buy it from me?" Nu'aym bin Abd Allah bought it for eight hundred *dirhams* and brought it to the Prophet (S.A.W) who returned it to the owner. As a consequent, the Prophet (S.A.W) advised imperatively, "Start with your own self and spent it on yourself, and if anything left, it should be spent on your family, and if anything left, it should be spent on your relatives and then like this and

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<sup>17</sup> Daru, vol. 2, p. 56 (no. 3060); See also Nawa T., pp. 106-107(no. 32).

<sup>18</sup> *Bankruptcy Act 1967*, section 68(2); Cf. p. 199.

<sup>19</sup> Ḥaṭṭ, vol. 5, p. 47; Dard S., vol. 3, p. 277; See also Mawd, vol. 1, p. 269; Raml N., vol. 4, p. 327; Jayy, vol. 1, p. 223; Cf. pp. 195-199.

<sup>20</sup> Ghaz, vol. 2, p. 248.

<sup>21</sup> Marg, vol. 3, p. 286; 'Aynī S., vol. 1, p. 224; Afen, vol. 2, p. 443; Mawd, vol. 1, p. 369.

<sup>22</sup> Sula, vol. 1, p. 79.



like this".<sup>23</sup> Therefore, it is proposed that the provision should read that it is a duty of the Official Assignee to provide maintenance to the bankrupt and his dependants.

In short, there are similarities and differences between Islamic Bankruptcy Law, English and Malaysian Personal Bankruptcy Laws.

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<sup>23</sup>

Vol. 3, pp. 692-693(no. 41).



## Glossary

‘adam nāfidh	: non-enforceable
adillah	: injunctions
āḥād	: solitary ḥadīth
ajal majhūl	: unknown period
āmīl	: an agent manager
‘āmm	: general
‘ammah	: paternal aunt
amānah	: trust
amārāt al-iflās	: signs of bankruptcy
‘aqār	: real property
‘aqd	: contract
‘āriyyah	: contract of borrowing
‘arūd	: merchandise/goods
aṣaḥ	: most authentic view
aṣl	: basic rule
‘awrah	: pudendum
‘aydān	: two festivals
bay‘	: contract of sale
bay‘ al-salam	: contract for delivery with prepayment
bāṭil	: void
bayt al-māl	: Muslim common fund
bayyinah	: evidence
dallāl	: broker/auctioneer
ḍamān	: compensation
damm	: blood-money
ḍarar ‘ām	: general hardship
ḍarar khāṣ	: specific hardship
dayn	: debt
dayn al-mu’ajjal	: deferred payment debt
dayn al-mumtāz	: priority debt
dhimmmah	: liability
dinār	: golden coin
dīn	: religion of Islām
diyyah	: blood money
faqir	: poor
fard	: absolute duty
fasad	: immoral act
faskh	: annulment
faskh al-nikāḥ	: annulment of marriage
fatāwā	: legal opinions
fawr	: instantaneously
fiqh	: jurisprudence
furū‘	: branch rules
ghabn	: misrepresentation
ghabn al-fāḥish	: flagrant misrepresentation

ghabn al-yasīr	: trivial misrepresentation
ghalat	: mistake
ghayr lāzim	: non-legally binding
ghālib	: predominant practice
ghuramā'	: creditors
ḥadd	: punishment determined by law
hadiyyah	: present
ḥāfiẓ	: memoriser of the Qur'ān
ḥajj	: pilgrimage
ḥājīyyah	: necessary
ḥajr	: interdiction
ḥāl	: current
ḥammāl	: carrier/porter
ḥaqq	: right
ḥawālah	: transfer of debt
hibah	: gift
ḥukm	: legal rule
ḥuqūq al-ādamiyyin	: rights of human beings
ḥuqūq Allah	: rights of Allah
ibrā'	: release from liability
'iddah	: waiting period
iflās	: bankruptcy
ijma'	: consensus of opinion
ijārah	: contract of lease
ijtihād	: personal judgement
ilā'	: an oath on the part of the husband that he will abstain from sexual intercourse
'illah	: effective cause
iqālah	: mutual rescission
iqrār	: confession
irsh	: compensation
ishhād	: attestation of witness
isnād	: chain of narrator
istiṣnā'	: contract of manufacturing
istiḥqāq	: acquired right
ististīfa'	: fulfilment
jāḥid	: denier
jihād	: holy war
jumhūr	: majority of Muslim jurists
kaffārah	: expiation
kafīl	: guarantor
kayyāl	: measurer
khālah	: maternal aunt
khalīfat al-mayyit	: successor of the deceased
khiyār	: option
khiyār al-'ayb	: option of defect
khiyār al-majlis	: option of session



khiyār al-shart	: option of stipulation
khul'	: divorce through compensation to the husband
kiswah	: clothing
lā wilāyah	: no legal power
lāzim	: legally enforceable
li'ān	: mutual imprecation
ma'dūm	: non-existence
ma'rūf	: reasonable basis
maṣḥaf	: copy of the Qur'ān
ma'ṣiyyah	: sinful act
madhhab/ madhāhib	: school of law
maghṣūb	: impounded
maḥr	: dowry
maḥr mithlī	: alike dowry
maḥjūr 'alayh	: interdicted person
māl	: property
māl al-muṣāliḥ	: public fund
malī'	: solvent
manfa'ah	: usufruct
marḍ al-mawt	: death sickness
maṣlahah	: public interest
mawhūb lah	: donee
mīrath	: inheritance
mu'awwadāt	: synallagmatic transactions
mu'ajjal	: deferred payment
mu'āmalāt	: transactions
mudāyanāt	: debts
muflis	: a bankrupt
mufsidah	: injury
muftī mājin	: an insane jurisconsult
muḥābah	: favourable consideration
mukārī muflis	: bankrupt tenant
munādī	: crier/announcer
muqāsamāt	: partnerships
muqrīḍ	: lender
muqtarīḍ	: subject matter of loan
mursal	: discontinued or disconnected ḥadīth
murtahīn	: mortgagee
mut'ah	: a payment by a husband to his wife upon divorcing her
mut'ah khāṣṣ	: specified mut'ah
nadhr	: vow
nafaqah wājibah	: compulsory maintenance
nafaqah	: maintenance
nasab	: attachment of paternity
nujūm al-kitābah	: instalment payment for manumission
qabd	: taking possession
qabūl	: acceptance
qadhif	: false accusation of adultery
qarḍ	: contract of loan
qatl al-'amd	: intentional murder

qawā'id	: rules
qawā'id fiqhiyyah	: Islamic legal rules
qawl al-jadīd	: new opinion of Imām al-Shāfi'ī
qawl al-qadīm	: old opinion of Imām al-Shāfi'ī
ghaṣīb	: who takes a thing wrongfully
qiṣāṣ	: law of retaliation
qirāḍ/muḍarabah	: dormant partnership
rabb al-māl	: capital provider
rahn	: mortgage
ribā	: usury
rikāz	: buried treasure of the earth
ruj'ah	: return to the marriage
safīh	: spendthrift person
ṣadaqah	: donation
ṣadāq musammā	: prescribed dowry
ṣaḥīḥ	: authentic ḥadīth
ṣalāh	: prayer
sāni'	: manufacturer
sawn	: fasting
shāhid	: martyr
shāfi'	: pre-emption claimant
shuf'ah	: pre-emption right
suknā	: shelter
ṣukūk	: legal documents
ṣulḥ	: reconciliation
sūrah	: chapter in the Qur'ān
ta'aluq	: relating
taṣarruf	: disposition
tabarru'āt	: gratuitous transactions
ṭabīb jāhil	: ignorant doctor
tadlīs	: fraud
tafsīr	: commentary of al-Qur'ān
tājir	: businessman
ṭalāq	: divorce
taqwā	: piety and righteousness
tarāḍ	: mutual consent
tarāqī	: defer
thabata	: norm
thaman mithlī	: exemplary price
thiqah	: trustworthy
tuhmah	: accusation
udḥiyyah	: immolation
'usr	: insolvent
uṣūl al-shar'	: basic fundamental of law
wadī'ah	: contract of safe keeping
wahm	: suspicion
waṣiyyah	: bequest

wakālah/ wakālāt	: agency
walī al-damm	: avenger of blood
waqf	: endowment
waqf ahlī	: private endowment
wazzān	: weigher
wāqif	: executor of endowment
zakāh	: almsgiving
zann	: presumption
zawāj	: marriage
zinā	: adultery
ziyādat al-athār	: consequential increase



## Bibliography

## A. Islamic Law References

## a) Qur'ān and Commentaries

al-Bāqī, Muḥammad Fu'ād 'Abd, *Al-Mu'jam al-Mufahras li Alfāz al-Qur'an al-Karīm*, Istanbul – Turkey : Al-Maktabah al-Islāmiyyah, 1984.

Ibn Kathīr, Abū al-Fidā' Ismā'īl, *Tafsīr al-Qur'ān al-'Azīm*, 2<sup>nd</sup>. ed., Beirut – Lebanon : Dār al-Ma'rifah, 1988.

al-Qurṭubī, Abū 'Abd Allah Muḥammad ibn Aḥmad, *Al-Jāmi' li Ahkām al-Qur'ān*, 3<sup>rd</sup>. ed., Dār al-Kātib al-'Arabī, 1967.

al-Rāzī, Fakh al-Dīn Muḥammad ibn 'Umar ibn al-Ḥusayn ibn al-Ḥasan ibn 'Alī al-Tamīmī al-Bakrā, *Al-Tafsīr al-Kabīr aw Mafātīḥ al-Ghayb*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-'Ilmiyyah, 1990.

al-Ṣābūnī, Muḥammad 'Alī, *Mukhtaṣar Tafsīr Ibn Kathīr*, 7<sup>th</sup>. ed., Beirut : Dār al-Qur'ān al-Karīm, 1991.

## b) Ḥadīth and Commentaries

Ābādī, Abū al-Tayyib Muḥammad Shams al-Dīn, *'Awn al-Ma'būd Sharḥ Sunan Abī Dāwud*, Beirut – Lebanon : Dār al-Fikr, 1995.

Abū Dāwud, Sulaimān ibn al-'Ash'ath al-Sajastanī al-'Azdī, *Sunan Abī Dāwud*, Dār al-Fikr, n.d.

Anas, Mālik, *Al-Muwatta'*, 11<sup>th</sup>. ed., Beirut : Dār al-Nafā'is, 1990.

al-'Aynī, Badr al-Dīn Abū Muḥammad Maḥmūd ibn Aḥmad, *Umdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī*, Beirut – Lebanon : Dār al-Fikr, n.d.

al-Bayhaqī, Abū Bakr ibn Aḥmad ibn al-Ḥusayn ibn 'Alī, *Al-Sunan al-Kubrā*, Dār al-Fikr, n.d.

al-Baghawī, Abū Muḥammad al-Ḥusaynī ibn Mas'ūd al-Farrā', *Sharḥ al-Sunnah*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-'Ilmiyyah, 1992.

al-Bukhārī, Abū 'Abd Allah Muḥammad ibn Ismā'īl ibn Ibrāhīm ibn al-Mughīrah ibn Barzabah, *Ṣaḥīḥ al-Bukhārī*, Istanbul – Turkey : Al-Maktabah al-Islāmiyyah, 1315 A.H.

al-Dārimī, Abū Muḥammad ‘Abd Allah ibn ‘Abd al-Raḥmān ibn al-Faḍl ibn Bahrām, *Sunan al-Dārimī*, Beirut - Lebanon : Dār al-Kutub al-‘Ilmiyyah, n.d.

al-Dāruqutnī, ‘Alī ibn ‘Umar, *Sunan al-Dāruqutnī*, Beirut - Lebanon : Dār al-Fikr, 1991.

al-Ḥākim, Abū ‘Abd Allah, *Al-Mustadrak ‘alā al-Ṣaḥīḥayn*, Beirut : Dār al-Ma‘rifah, n.d.

Hassan, Ahmad, *Sunan Abu Dawud: English Translation with Explanatory Notes*, Lahore : Sh. Muhammad Ashraf Publisher, 1984.

Ibn Ḥajr al-‘Asqalānī, Shihāb al-Dīn Abū Faḍl Aḥmad ibn Muḥammad, *Fath al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*, New ed., Egypt : Dār al-Ḥadīth, 1978.

Ibn Majāh, Abū ‘Abd Allah Muḥammad ibn Yazīd al-Qazwīnī, *Sunan*, Istanbul : Maktabah al-Islāmiyyah, n.d.

Ibn Shaddād, Baḥa’ al-Dīn, *Dalā’il al-Aḥkām*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1991.

al-Karmānī, Muḥammad ibn Yūsuf ibn ‘Alī ibn Sa‘īd Shams al-Dīn, *Al-Bukhārī bi Sharḥ al-Karmānī*, 2<sup>nd</sup>. ed., Beirut - Lebanon : Dār Iḥyā’ al-Turāth al-‘Arabī, 1982.

al-Mubārakfūrī, Abū al-‘Ulā Muḥammad ‘Abd al-Raḥmān ibn ‘Abd al-Raḥīm, *Tuḥfat al-Aḥwadhī bi Sharḥ Jāmi’ al-Tirmīdhī*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1990.

Muslim ibn al-Ḥajjāj, Abū al-Ḥusayn, *Ṣaḥīḥ Muslim*, 1<sup>th</sup>. ed., Cairo : Dār al-Ḥadīth, 1991.

al-Nawawī, Abū Zakarīyā Yaḥyā ibn Sharaf, *Sharḥ Muslim bi Sharḥ al-Nawawī*, 3<sup>rd</sup>. ed., Beirut – Lebanon : Dār Iḥyā’ al-Turāth al-‘Arabī, n.d.

\_\_\_\_\_, *Matan al-Arba‘īn al-Nawawiyyah fī al-Aḥādīth al-Ṣaḥīḥah al-Nabawiyyah* translated into English by Ezzeddin Ibrahim & Denys Johnson-Davies known as *An-Nawawī’s Forty Hadith an Anthology of the Sayings of the Prophet Muhammad*, 15<sup>th</sup>. ed., Beirut - Lebanon: Dar al-Koran al-Kareem, 1990.

al-Qaṣṭalānī, Abū ‘Abbās Shihāb al-Dīn Aḥmad ibn Muḥammad, *Irshād al-Sārī li Sharḥ Ṣaḥīḥ al-Bukhārī wa bi Hamishihi Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*, Beirut – Lebanon : Dār al-Turāth al-‘Arabī, n.d.

al-Ṣa‘ānī, Muḥammad ibn Ismā‘īl, *Subul al-Salām Sharḥ Bulūgh al-Marām min Adillah al-Aḥkām*, Beirut : Dār al-Fikr, n.d.

al-Sayūtī, Jalāl al-Dīn ‘Abd al-Raḥmān ibn Abī Bakr, *Tanwīr al-Ḥawālik Sharḥ alā Muwaṭṭa’ Mālik*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1997.



al-Shāfi'ī, Abū 'Abd Allah Muḥammad ibn Idris, *Musnad al-Imām al-Shāfi'ī*, 1<sup>th</sup>. ed., Cairo : Dār al-Rayyān li al-Turāth, 1987.

al-Shawkānī, Muḥammad ibn 'Alī ibn Muḥammad, *Nayl al-Awtār min Aḥādīth Sayyed al-Akhyār Sharḥ Muntaqa al-Akhyār*, Beirut : Dār al-Jalīl, 1973.

al-Ṭabrānī, Abū al-Qāsim Sulaymān ibn Aḥmad ibn Ayyūb al-Laghāmī, *Al-Mu'jam al-Ṣaghīr li Ṭabrānī*, Beirut – Lebanon, Dār al-Kutub al-'Ilmiyyah, 1983.

al-Ṭabrīsī, Muḥammad ibn 'Abd Allah al-Khaṭīb, *Mishkāṭ al-Maṣābīḥ*, 2<sup>nd</sup>. ed., Beirut : Al-Maktabah al-Islāmī, 1985.

al-Ṭayālīsī Sulaymān ibn Dāwud ibn al-Jārūd, *Musnad Abī Dāwud al-Ṭayālīsī*, Beirut – Lebanon : Dār al-Ma'rifah, n.d.

al-Tirmīdhī, Abū 'Īsā Muḥammad bin 'Īsā bin Sawrah, *Al-Jāmi' al-Ṣaḥīḥ wa huwa Sunan al-Tirmidhī*, Beirut – Lebanon : Dār al-Kutub al-'Ilmiyyah, 1987.

al-Zarqānī, Muḥammad ibn 'Abd al-Bāqī, *Sharḥ al-Zarqānī 'alā Muwaṭṭa' al-Imām Mālik*, 1<sup>st</sup>. ed., Beirut - Lebanon : Dār al-Kutub al-Islāmiyyah, 1990.

### c) Books of the Ḥanafī School

Abū al-Su'ūd, Muḥammad, *Ḥāshiyyah Abī al-Su'ūd Faṭḥ al-Mu'īn 'alā Sharḥ al-Kanz*, n.d.

al-'Aynī, Abū Muḥammad Maḥmūd ibn Aḥmad, *Al-Bayānah fī Sharḥ al-Hidāyah*, 2<sup>nd</sup>. ed., Dār al-Fikr, 1990.

\_\_\_\_\_, *Sharḥ al-Kanz*, 1285 A.H.

As'ad, 'Abd Allah, *Al-Fatāwā al-Musammah 'Iddat Arbāb al-Fatwā fī Madhhab al-Imām al-A'zam Abī Ḥanīfah al-Nu'mān*, 1<sup>st</sup>. ed., Būlāq - Egypt : Matba'at al-Kubra al-Amīriyyah, 1304 A.H.

Damād Afendī, 'Abd Allah ibn al-Shaykh Muḥammad ibn Sulaymān, *Majma' al-Anhar fī al-Sharḥ Multaqā al-Abhār*, Dār Iḥyā' al-Turāth al-'Arabī, 1317A.H.

al-Ghazī, Muḥammad Sa'īd Murād, *Sharḥ Majallat al-Aḥkām al-'Adliyyah fī Qism al-Ḥuqūq al-Madaniyyah*, Syria : Maktabat al-Ḥukūmah, 1920.

Ḥaydar, 'Alī, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*, Beirut – Lebanon : Dār al-Jayl, n.d.

Ibn 'Ābidīn, Muḥammad Amīn, *Ḥāshiyyah Radd al-Mukhtār 'alā al-Darr al-Mukhtār : Sharḥ Tanwīr al-Absār*, 2<sup>nd</sup>. ed., Dār al-Fikr, 1979.



Ibn al-Humām, Kamāl al-Dīn Muḥammad ibn ‘Abd al-Wāḥid al-Siwāsī, *Taklīm al-Sharḥ Faṭḥ al-Qadīr ‘alā al-Hidāyah : Sharḥ Bidāyat al-Mubtadī*, 2<sup>nd</sup>. ed., Beirut – Lebanon : Dār al-Fikr, n.d.

Ibn Nujaym, Zayn al-‘Abidīn ibn Ibrāhīm, *Al-Ashbāh wa al-Naẓā’ir ‘alā Madhhab Abī Ḥanīfah al-Nu‘mān*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1993.

\_\_\_\_\_, *Al-Baḥr al-Rā’iq Sharḥ Kanz al-Daqa’iq*, 3<sup>rd</sup>. ed., Beirut – Lebanon : Dār al-Ma‘rifah, 1993.

al-Kāsānī, ‘Alā al-Dīn Abū Bakr ibn Mas‘ūd, *Kitāb Badā’i’ al-Ṣanā’i’ fī Tartīb al-Sharā’i’*, 2<sup>nd</sup>. ed., Beirut – Lebanon : Dār al-Fikr, 1986.

*Majallat al-Aḥkām al-‘Adliyyah* [the Ottoman Islamic Civil Code of 1896 drafted by a team of ‘ulamā’], translated into English by C. J. Hooper as *The Civil Law of Palestine and Trans-Jordan*, vol. 1, Jerusalem, 1933.

Mawdūd, ‘Abd Allah ibn Maḥmūd, *Al-Ikhtiyār Sharḥ al-Mukhtār al-Musammā bi al-Ikhtiyār al-Ta’līl al-Mukhtār*, Egypt : Matba‘at wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1936.

al-Marghinānī, Burhān al-Dīn Abū al-Ḥasan ‘Alī ibn ‘Abd al-Jalīl al-Rusdānī, *Al-Hidāyah Sharḥ Bidāyat al-Mubtadī*, Last ed., Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, n.d.

al-Muḥāsani, Muḥammad Sa‘īd, *Sharḥ Majallat al-Aḥkām al-‘Adliyyah*, Damascus : Matba‘at al-Taraqī, 1927.

Nizām, al-Shaykh, *Al-Fatāwā al-Hindiyyah fī Madhhab al-Imām al-A‘zam Abī Ḥanīfah al-Nu‘mān*, Dār al-Fikr, 1991.

al-Qadūrī, Abū Ḥusayn Aḥmad ibn Muḥammad, *Matn al-Qadūrī fī al-Fiqh ‘alā Madhhab al-Imām Abī Ḥanīfah*, 3<sup>rd</sup>. ed., Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1957.

al-Rāfi‘ī, *Taqrīrāt al-Rāfi‘ī ‘alā Ḥāshiyyah ibn ‘Abidīn*, 2<sup>nd</sup>. ed., Beirut – Lebanon : Dār Ihyā’ al-Turāth al-‘Arabī, 1986.

al-Shaybānī, Abū ‘Abd Allah Muḥammad ibn Ḥasan, *Kitāb al-Ḥujjah ‘alā Ahl al-Madīnah*, 3<sup>rd</sup>. ed., Beirut : ‘Ālim al-Kutub, 1983.

al-Sughdī, Abū al-Ḥasan ‘Alī ibn al-Ḥusayn ibn Muḥammad, *Al-Nutaf fī al-Fatawā*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1996.

al-Ṭarābulṣī, Muḥammad Kāmal ibn Muṣṭafā ibn Maḥmūd, *Al-Fatāwā al-Kāmalīyyah fī al-Ḥawādīth al-Ṭarābulṣīyyah ‘alā Madhhab Abī Ḥanīfah al-Nu‘mān*, 1895.

al-Ṭarasūsī, Najm al-Dīn Ibrāhīm ibn ‘Alī ibn Aḥmad ibn ‘Abd al-Wāhid ibn ‘Abd al-Mun‘im ibn ‘Abd al-Ṣamad, *Al-Fatāwā al-Ṭarasūsīyyah aw Infa‘ al-Wasā’il ilā Taḥrīr al-Masā’il*, Matba‘at al-Shuruq, 1926.

al-Ṭūrī, Muḥammad ibn Ḥusayn ibn ‘Alī, *Takmilat al-Baḥr al-Rā’iq Sharḥ kanz al-Daqā’iq*, 3<sup>rd</sup>. ed., Beirut - Lebanon : Dār al-Ma‘rifah, 1993.

al-Zayla‘ī, Fakh al-Dīn ‘Uthmān ibn ‘Alī, *Tibyān al-Ḥaqā’iq Sharḥ Kanz al-Daqā’iq*, 2<sup>nd</sup>. ed., Egypt : Dār al-Kitāb al-Islāmī, 1315 A.H.

#### d) Books of the Ḥanbalī School

Abū Ya‘lā, *Al-Masā’il al-Fiqhiyyah min Kitāb al-Riwāyatayn wa al-Wajhayn*, 1<sup>st</sup>. ed., Riyāḍ : Maktabat al-Ma‘ārif, 1985.

al-Bahūtī, Manṣūr ibn Yūnus ibn Idrīs, *Kashshāf al-Qinā’ ‘an Matn al-Iqnā’*, Beirut - Lebanon : Dār al-Fikr, 1982.

al-Bulayhī, Ṣāliḥ ibn Ibrāhīm, *Al-Salsabīl fī Ma‘rifat al-Dalīl Ḥashiyyah ‘alā Zādd al-Mustaḥṣin*, 1<sup>st</sup>. ed., Makkah – Riyāḍ : Maktabat Nizār Muṣṭafā al-Bāz, 1996.

Ibn Abī Taghlib, ‘Abd al-Qādir ibn ‘Umar al-Shaybānī, *Nayl al-Ma‘ārib bi Sharḥ Dalīl al-Ṭālib*, 1<sup>st</sup>. ed., Kuwait : Maktabat al-Falāḥ, 1983.

Ibn Mufliḥ, Shams al-Dīn al-Muqaddisī Abī ‘Abd Allah Muḥammad, *Kitāb al-Furū’ wayalīhi Taṣḥīḥ al-Furū’*, 4<sup>th</sup>. ed., Beirut : ‘Ālim al-Kutub, 1984.

Ibn Qayyīm al-Jawziyyah, Shams al-Dīn Abū ‘Abd Allah Muḥammad ibn Abū Bakr, *A‘lām al-Muwaqqi‘īn ‘an Rabb al-‘Ālamīn*, Cairo : Dār al-Ḥadīth, 1987.

Ibn Qudāmah, Abū Muḥammad ‘Abd Allah ibn Aḥmad ibn Muḥammad, *Al-Mughnī li Ibn Qudāmah ‘alā Mukhtaṣar Abī al-Qāsim ‘Umar ibn Ḥusayn ibn ‘Abd Allah ibn Aḥmad al-Khuraḥī*, Cairo : Dār al-Baṣā’ir, n.d..

Ibn Rajab, Abū al-Faraj ‘Abd al-Raḥmān, *Al-Qawā’id fī al-Fiqh al-Islāmī*, Beirut - Lebanon : Dār al-Fikr, n.d.

Ibn Taymiyyah, Aḥmad, *Majmū‘ Fatāwā Shaykh al-Islām*, Beirut - Lebanon : Dār al-‘Arabiyyah, n.d.

al-Mardāwī, ‘Alā’ al-Dīn Abī al-Ḥasan ‘Alī ibn Sulaymān, *Al-Inṣāf fī Ma‘rifat al-Rājiḥ min al-Khilāf ‘alā Madhhab al-Imām Mubajjal Aḥmad ibn Ḥanbal*, 1<sup>st</sup>. ed., Cairo : Maktabat al-Sunnah al-Muḥammadiyyah, 1956.



al-Maqdisī, Abū Muḥammad Muwaffiq al-Dīn ‘Abd Allah ibn Qudāmah, *Al-Kāfī fī Fiqh al-Imām al-Mubajjal Aḥmad ibn Ḥanbal*, 5<sup>th</sup>. ed., Beirut – Damascus : Al-Maktab al-Islāmī, 1988.

al-Maqdisī, Bahā’ al-Dīn ‘Abd al-Raḥmān ibn Ibrāhīm, *Al-‘Uddah Sharḥ al-‘Umdah fī Fiqh Aḥmad Ibn Ḥanbal*, New ed., Beirut - Ṣaydā : Al-Maktabah al-‘Aṣriyyah, 1996.

al-Maqdisī, Shams al-Dīn Abī al-Faraj ‘Abd al-Raḥmān ibn Abī ‘Umar Muḥammad ibn Aḥmad ibn Qudāmah, *Sharḥ al-Kabīr ‘alā Matn al-Muqni’*, printed with Ibn Qudāmah, *Al-Mughnī*, Beirut - Lebanon : Dār al-Kutub al-‘Ilmiyyah, n.d.

al-Najdī, ‘Uthmān Aḥmad, *Hidāyat al-Rāghib li Sharḥ ‘Umdat al-Ṭālib*, 2<sup>nd</sup>. ed., Jeddah : Dār al-Bashīr, 1989.

al-Zarkashī, Shams al-Dīn Muḥammad ibn ‘Abd Allah, *Sharḥ al-Zarkashī ‘alā Mukhtaṣar al-Khurakhī fī al-Fiqh ‘alā Madhhab al-Imām Aḥmad ibn Ḥanbalī*, 1<sup>st</sup>. ed., Riyāḍ : Maktabat al-‘Ubaykān, 1993.

#### e) Books of the Mālikī School

‘Abd Allah, Muḥammad Jum‘ah, *Al-Kawākib al-Durriyyah fī Fiqh al-Mālikīyyah*, 7<sup>th</sup>. ed., Maktabat al-Azhariyyah li al-Turāth, n.d.

al-Ābī, Ṣāliḥ ‘Abd al-Samī’, *Al-Thamar al-Dānī fī Taqrīb al-Ma‘ānī*, in the margin of, al-Qayrawānī, *Risālah*, 2<sup>nd</sup>. ed., Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1944.

al-‘Adawī, al-Shaykh ‘Alī al-Ṣa‘aydī, *Ḥāshiyyah ‘alā Kifāyat al-Ṭālib al-Rabbānī li Risālat ibn Abī Zatīd al-Qayrawānī*, Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1938.

‘Alaysh, Abū ‘Abd Allah al-Shaykh Aḥmad Muḥammad, *Fath al-‘Alī al-Mālik fī al-Fatwā ‘alā Madhhab al-Imām Mālik*, Last ed., Egypt: Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1958.

\_\_\_\_\_, *Manḥ al-Jalīl Sharḥ ‘alā Mukhtaṣar Sayyidī Khalīl*, Dār al-Fikr, 1989.

Anas, Mālik, *Al-Muwatta’*, 11<sup>th</sup>. ed., Beirut : Dār al-Nafā’is, 1990.

\_\_\_\_\_, *Al-Mudawwanah al-Kubrā wa ma‘ahā Muqaddimāt ibn Rushd*, Dār al-Fikr, n.d.



al-Baghdādī, Shahāb al-Dīn ‘Abd al-Raḥmān *ibn* Muḥammad ibn ‘Askar al-Malikī, *Irshād al-Sālik ilā Ashraf al-Masālik fī Fiqh al-Imām Mālik*, 3<sup>rd</sup>. ed., Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādh, 1945.

al-Baṣrī, Abū al-Qāsim ‘Ubayd Allah al-Ḥusayn ibn al-Ḥasan ibn al-Jallāb, *Al-Tafrī*, 1<sup>st</sup>. ed., Beirut - Lebanon : Dār al-Gharb al-Islāmī, 1987.

al-Dardīr, Abū Barakāt Aḥmad ibn Aḥmad, *Al-Sharḥ al-Ṣaghīr*, Daulat al-Amāriyyah al-‘Arabiyyah al-Muttahidah, 1989.

\_\_\_\_\_, *Al-Sharḥ al-Kabīr*, in the margin of al-Dasūqī, *Ḥaṣhiyyat*, Cairo : Dār Iḥyā’ al-Kutub al-‘Arabiyyah, n.d.

al-Dasūqī, Shams al-Dīn Muḥammad ‘Arfaḥ, *Ḥaṣhiyyat al-Dasūqī ‘alā Sharḥ al-Kabīr*, Cairo : Dār Iḥyā’ al-Kutub al-‘Arabiyyah, n.d.

al-Ḥaṭṭāb, Abū ‘Abd Allah ibn Muḥammad ibn Muḥammad ibn ‘Abd al-Raḥmān, *Kitāb Mawāhib al-Jalīl li Sharḥ Mukhtaṣar Khalīl wa bi Ḥāmishah al-Tāj wa al-Aklīl li Mukhtaṣar Khalīl*, 2<sup>nd</sup>. ed., 1978.

Ibn Farḥūn, Burhān al-Dīn Ibrāhīm *ibn* ‘Alī *ibn* Abī al-Qāsim ibn Muḥammad, *Tabṣirat al-Ḥukkām fī Usūl al-Aqḍiyyah wa Manāhij al-Aḥkām*, in the margin of ‘Alaysh, *Faṭḥ al-‘Alī al-Mālik*, Last ed., Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādh, 1958.

Ibn Juzay, Abū ‘Abd Allah Muḥammad ibn Aḥmad ibn Muḥammad, *Al-Qawānīn al-Fiqhiyyah*, 2<sup>nd</sup>. ed., Beirut : Dār al-Kitāb al-‘Arabī, 1987.

Ibn Rushd, Abū al-Walid Muḥammad ibn Aḥmad ibn Muḥammad ibn Aḥmad, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid*, Dār al-Fikr, n.d.

\_\_\_\_\_, *Al-Bayān wa al-Taḥṣīl wa al-Sharḥ wa al-Tawjīh wa al-Ta’līl fī Maṣā’il al-Mustakhrajah*, 2<sup>nd</sup>. ed., Beirut – Lebanon : Dār al-Gharb al-Islāmī, 1988.

\_\_\_\_\_, *Fatāwā ibn Rushd*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Gharb al-Islāmī, 1987

Ibn Rushd al-Jadd, Abū al-Walid Muḥammad ibn Aḥmad ibn Muḥammad ibn Aḥmad *Al-Muqaddimāt al-Mumahhadāt li Bayān mā Iqṭaḍathu Rusūm al-Mudawwanah min al-Aḥkām al-Shar‘iyyah wa al-Taḥṣīlāt al-Maḥkamat li Ummahāt Masā’ilihā al-Mushkilāt*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Gharb al-Islāmī, 1988.

al-Ja‘alī, ‘Uthmān ibn Husayn Birrī, *Sirāj al-Sālik Sharḥ Ashal al-Masālik*, Last ed., Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādh, 1972.

al-Khurashī, Muḥammad ibn ‘Abd Allah, *Al-Khurashī ‘alā Mukhtaṣar Sayyidī Khalīl wa bi Ḥāmiṣhihi Hāshiyyah al-Shaykh ‘Alī al-‘Adawī*, Dār al-Fikr, n.d.

Mūsā, Khalīl ibn Ishāq, *Mukhtaṣar Khalīl fī Fiqh al-Imām Mālik*, Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1922.

al-Mawāq, Abū ‘Abd Allah Muḥammad ibn Muḥammad ibn ‘Abd al-Raḥmān al-Maghribī, *Al-Tāj wa al-Aklīl li Mukhtaṣar Khalīl*, in the margin of al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 2<sup>nd</sup>. ed., 1978.

al-Nafrawānī, Aḥmad ibn Ghanīn ibn Sālam ibn Muḥannā, *Al-Fawākih al-Dawānī Sharḥ ‘alā Risālah*, Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1955.

al-Namarī, Abū ‘Umar Yūsuf ibn ‘Abd Allah ibn Muḥammad ibn ‘Abd al-Barr, *Al-Kāfī fī al-Fiqh Ahl al-Madīnah al-Mālik*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1987.

al-Qarāfī, Shahāb al-Dīn Aḥmad Idrīs, *Al-Dhakhīrah*, 1<sup>st</sup>. ed., Dār al-Gharb al-Islāmī, 1994.

al-Qayrawānī, Ibn Abī Zayd, *Risālah wa bi Hamishihā al-Sharḥ al-Musammā al-Thamar al-Dānī fī Taqrīb al-Ma‘ānī*, 2<sup>nd</sup>. ed., Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1944.

al-Raṣā‘, Abū ‘Abd Allah Muḥammad al-Anṣārī, *Sharḥ Hudūd al-Mawsūm al-Hidāyah al-Kāfiyyah al-Shāfiyyah li Bayān Ḥaqāiq al-Imām ibn ‘Arfaḥ al-Wāfiyyah*, 1<sup>st</sup>. ed., Beirut - Lebanon : Dār al-Gharb al-Islāmī, 1993.

al-Ṣāwī, Aḥmad ibn Muḥammad, *Bulghah al-Sālik li Aqrab al-Masālik ila Madhhab al-Imām Mālik ‘alā al-Sharḥ al-Ṣaghīr*, Beirut - Lebanon : Dār al-Ma‘rifah, 1988.

al-Wanshuraysī, Abū al-‘Abbās Aḥmad ibn Yaḥyā, *Al-Mi‘yār wa al-Mu‘arab wa al-Jāmi‘ al-Mugharab ‘an Fatāwā Ahl Ifriqiyyah wa Andalus wa al-Maghrib*, Beirut : Dār al-Gharb al-Islāmī, 1981.

al-Zarqānī, Muḥammad ibn ‘Abd al-Bāqī, *Sharḥ al-Zarqānī ‘alā Mukhtaṣar Sayyidī Khalīl*, Beirut : Dār al-Fikr, Beirut, n.d.

\_\_\_\_\_, *Sharḥ al-Zarqānī ‘alā Muwaṭṭa’ al-Imām Mālik*, 1<sup>st</sup>. ed., Beirut - Lebanon : Dār al-Kutub al-Islāmiyyah, 1990.

#### f) Books of the Shāfi‘ī School

al-Anṣārī, Zakariyā Abū Yaḥyā, *‘Asnā al-Maṭālib Sharḥ Rawḍ al-Ṭālib*, Cairo : Dār al-Kutub al-Islāmī, n.d.



\_\_\_\_\_, *Tuḥfat al-Ṭullāb bi Sharḥ Taḥrīr Tanqīḥ al-Lubāb fī Fiqh al-Imām al-Shāfi'ī*, Egypt : Sharikat Maktabat wa Matba'at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1340 A.H.

al-Asyūṭī, Shams al-Dīn Muḥammad ibn Aḥmad al-Manḥājī, *Jawāhir al-'Uqūd wa Mu'īn al-Qudāh wa al-Shuhūd*, 2<sup>nd</sup>. ed., n.d.

al-Bakrī, Abū Bakr, *I'ānat al-Ṭālibīn*, Dār Iḥyā' al-Kutub al-'Arabiyyah, n.d.

al-Bayjūrī, Ibrāhīm, *Ḥāshiyyah al-Bayjūrī 'alā Sharḥ ibn al-Qāsim 'alā Matn Abī Shujā' fī Fiqh Madhhab al-Imām al-Shāfi'ī*, Beirut – Lebanon : Dār al-Fikr, 1994.

al-Dimashqī, Taqiyy al-Dīn Abī Bakr ibn Muḥammad al-Ḥusaynī al-Ḥuṣnī, *Kifāyat al-Akhyār fī Ḥall Ghāyat al-Ikhtisār*, 1<sup>st</sup>. ed., Beirut : Dār al-Khayr, 1994.

al-Fashaynī, al-Shaykh Aḥmad ibn al-Ḥijāzī ibn Badīr, *Tuḥfat al-Ḥabīb bi Sharḥ Nuḥun Ghāyat al-Taqrīb*, 2<sup>nd</sup>. ed., Egypt : Sharikat Maktabat wa Matba'at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1979.

al-Fīrūzābādī, Abū Ishāq Ibrāhīm ibn 'Alī ibn Yūsuf al-Shīrāzī, *Al-Tanbīh fī al-Fiqh 'alā Madhhab al-Imām al-Shāfi'ī*, Last ed., Egypt : Sharikat Maktabat wa Matba'at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1951.

al-Ghamarāwī, Muḥammad al-Zuhrī, *Al-Sirāj al-Wahhāj Sharḥ 'alā Matn al-Minhāj*, Dār al-Fikr.

al-Ghazzālī, Muḥammad ibn Muḥammad ibn Muḥammad, *Al-Wajīz fī Fiqh Madhhab al-Imām al-Shāfi'ī*, Beirut – Lebanon : Dār al-Fikr, 1994.

\_\_\_\_\_, *Al-Wasīd fī al-Madhhab*, Beirut – Lebanon : Dār al-Fikr, 1994.

al-Haytamī, ibn Ḥajr, *Al-Fatāwā al-Kubrā al-Fiqhiyyah wa bi Ḥāmishih Fatāwā al-'Alāmah Shams al-Dīn Muḥammad al-Ramlī*, Dār al-Fikr, 1983.

al-Khatīb, Muḥammad al-Sharbinī, *Mughnī al-Muḥtāj ilā Ma'rifat Ma'ānī Alāz al-Minhāj*, Egypt : Sharikat Maktabat wa Matba'at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādih, 1933.

al-Kūhajī, Al-Shaykh 'Abd Allah ibn al-Shaykh Ḥasan al-Ḥasanī, *Zādd al-Muḥtāj bi Sharḥ al-Minhāj*, Sida - Beirut : Al-Maktabah al-'Asriyyah, 1988.

al-Maḥallī, Jalāl al-Dīn, *Sharḥ 'alā al-Minhāj al-Ṭālibīn*, in the margin of Qalyūbī wa 'Umayrah, *Ḥāshiyyah*, Cairo : Dār Iḥyā' al-Kutub al-'Arabiyyah.

al-Māwardī, Abū al-Ḥasan 'Alī ibn Muḥammad ibn abb, *Al-Ḥāwī al-Kabīr*, Beirut – Lebanon : Dār al-Fikr, 1994.



al-Misr, Aḥmad ibn Naqib, *‘Umdat al-Sālik* translated from Arabic by Noah Ha Min Keller known as "The Reliance of the Traveller: A Classic Manual of Islamic Sacred Law", Dubai : Modern Printing Press, 1991.

al-Nawawī, Abū Zakarīyā Yahyā ibn Sharaf, *Al-Majmū‘ Sharḥ al-Muhadḍhab*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Fikr, 1996.

\_\_\_\_\_, *Minhāj al-Ṭālibīn wa ‘Umdat al-Muftīn fī al-Fiqh*, Singapore - Jeddah : Al-Haramain, n.d.

\_\_\_\_\_, *Rawḍat al-Ṭālibīn wa ‘Umdat al-Muftīn*, 3<sup>rd</sup>. ed., Beirut : Al-Maktabah al-Islāmī, 1991.

al-Naysābūrī, Muḥammad ibn Ibrāhīm ibn al-Mundhir, *Al-Ishrāf ‘alā Madhāhib Ahl al-‘Ilm*, 1<sup>st</sup>. ed., Qatar : Idārat Iḥyā’ al-Turāth al-Islāmī, 1986.

al-Qalyūbī, Shihab al-Dīn Aḥmad ibn Aḥmad ibn Salāmah, *Ḥāshiyah Sharḥ al-Mahallī ‘alā Minhāj al-Ṭālibīn*, Cairo : Dār Iḥyā’ al-Kutub al-‘Arabiyyah.

al-Rāfi‘ī al-Qazawaynī, Abū al-Qāsim ‘Abd al-Karīm ibn Muḥammad ibn ‘Abd al-Karīm, *Al-‘Azīz Sharḥ al-Wajīz al-Ma‘rūf bi al-Sharḥ al-Kabīr*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1997.

al-Ramlī, Shams al-Dīn Muḥammad ibn Abū ‘Abbās Aḥmad ibn Hamzah ibn Shihāb al-Dīn, *Nihāyat al-Muhtāj ilā Sharḥ al-Minhāj*, Last ed., Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādh, 1967.

\_\_\_\_\_, *Fatāwā al-‘Alāmah Shams al-Dīn Muḥammad al-Ramlī* in the margin of al-Haytamī, *Al-Fatāwā al-Kubrā al-Fiqhiyyah*, Dār al-Fikr, 1983.

al-Sayūtī, Jalāl al-Dīn ‘Abd al-Raḥmān Abī Bakr, *Al-Ashbāh wa al-Naẓa’ir fī Qawā‘id wa Furū‘ Fiqh al-Shāfi‘ī*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1983.

\_\_\_\_\_, *Tanwīr al-Ḥawālik Sharḥ ‘alā Muwaṭṭa’ Mālik*, 1<sup>st</sup>. ed., Beirut - Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1997.

al-Shāfi‘ī, Abū ‘Abd Allah Muḥammad ibn Idris, *Al-Umm*, 1<sup>st</sup>. ed., Beirut – Lebanon : Dār al-Kutub al-‘Ilmiyyah, 1993.

\_\_\_\_\_, *Musnad al-Imām al-Shāfi‘ī*, 1st. ed., Cairo : Dār al-Rayyān li al-Turāth, 1987.

al-Sharqāwī, ‘Abd Allah ibn Ḥijāzī ibn Ibrāhīm, *Ḥāshiyah ‘alā Tuḥfah al-Ṭullāb bi Sharḥ Taḥrīr Tanqīḥ al-Lubāb wa bi Hāmish Tuḥfah al-Ṭullāb bi Sharḥ Taḥrīr Tanqīḥ al-Lubāb Taqrīr al-Sayyid Muṣṭafā*, Egypt : Sharikat Maktabat wa Matba‘at Muṣṭafā al-Bābī al-Ḥalabī wa Awlādh, 1941.

al-Sulamī, 'Izz al-Dīn ibn 'Abd al-Salām, *Qawā'id al-Ahkām fī Maṣāliḥ al-Anām*, Beirut – Lebanon : Mu'assasat al-Rayyān, 1990.

al-Subkī, Tāj al-Dīn 'Abd al-Wahāb ibn 'Alī ibn 'Abd al-Kāfī, *Al-Ashbāh wa al-Nazā'ir*, 1<sup>st</sup>. ed., Beirut - Lebanon : Dār al-Kutub al-'Ilmiyyah, 1991.

\_\_\_\_\_, *Fatāwā al-Subkī*, Beirut - Lebanon : Dār al-Ma'rifah, n.d.

'Umayyrah, Shihāb al-Dīn Aḥmad al-Baralasī, *Hāshiyyah Sharḥ al-Mahallī 'alā Minhāj al-Ṭālibīn*, Cairo : Dār Iḥyā' al-Kutub al-'Arabiyyah.

#### g) Contemporary Islamic Law Books and Articles

Abū Jayyib, Sa'dī, *Mawsū'at al-Ijmā' fī al-Fiqh al-Islāmī*, Qatar : Idārat Iḥyā' al-Turāth al-Islāmī, 1985.

El-Alami, Dawoud S., *The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco*, London : Graham & Trotman, 1992.

\_\_\_\_\_, 'Mut'at al-Talaq under Egyptian and Jordanian Law', in Eugene Cotran & Chibli Mallat (ed.), *Yearbook of Islamic and Middle Eastern Law*, vol. 2, London : Kluwer Law International, 1995.

al-Hawārī, Muḥammad 'Abd al-Raḥmān 'Alī, *Baḥth fī al-Ḥajr wa Athrihi fī Ḥimāyat Amwāl li Mustahqiqihā*, Dār al-Hudā, Cairo, 1989.

Kamali, Muhammad Hashim, *Principles of Islamic Jurisprudence*, Malaysia : Pelanduk Publication, 1989.

Maḥmaṣṣānī, Subḥī, *Al-Mabādī' al-Shar'iyyah wa al-Qānūniyyah fī al-Hajr wa al-Nafaqāt wa al-Mawārith wa al-Waṣiyyah*, 7<sup>th</sup>. ed., Beirut – Lebanon : Dār al-'Ilm li al-Malāyīn, 1981.

\_\_\_\_\_, *Al-Nazāriyyah al-'Āmm li al-Mūjibah wa al-'Uqūd fī al-Sharī'ah al-Islāmiyyah*, 3<sup>rd</sup>. ed., Beirut – Lebanon : Dār al-'Ilm li al-Malāyīn, 1983.

\_\_\_\_\_, *Falsafat al-Tashrī' fī al-Islām* translated by Farhat J. Zaidi as "The Philosophy of Jurisprudence in Islam", Malaysia : Penerbitan Hizbi, 1987.

*Al-Mawsū'ah al-Fiqhiyyah*, 3<sup>rd</sup>. ed., Kuwait : Wazārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 1984.

Mohamed, Abdalla I., 'Stipulations for the Benefit of Third Parties in Islamic Law of Contracts' (1980) 9 *Journal of Islamic and Comparative Law* pp. 7-20.



al-Zarqā, al-Shaykh Aḥmad ibn al-Shaykh Muḥammad, *Sharḥ al-Qawā'id al-Fiqhiyyah*, 4<sup>th</sup>. ed., Damascus : Dār al-Qalam, 1996.

al-Zuḥaylī, Wahbah, *Al-Fiqh al-Islāmī wa Adillatuh*, 3<sup>rd</sup>. ed., Damascus : Dār al-Fikr, 1989.

## B. English and Malaysian Laws References

Ali, Rodiah, 'An Outline of the New Discharge Provision in the Malaysian Bankruptcy Act 1967', unpublished paper.

Allcock, Bob, 'Romalpa Clauses and Reputed Ownership' (1981) 31 *New Law Journal* pp. 942-944.

Atiyah, P. S., *The Sale of Goods*, 8<sup>th</sup>. ed., Pitman Publishing, London, 1990.

Bailey-Harris, Rebecca, 'Commentary of Cloughton's case' April [1999] *Fam Law* pp. 205-206.

Berry, Christopher and Anor., *Personal Insolvency Law and Practice*, 2<sup>nd</sup>. ed., London : Butterworths, 1993.

*Benjamin's Sale of Goods*, A. G. Guest (Gen. ed.), 5<sup>th</sup>. ed., London : Sweet & Maxwell, 1997.

Bennett, Howard N., 'Attachment of Chattels to Land', in *Interest in Goods* by Norman Palmer and Ewen McKendrick (ed.), London : Lloyd's of London Press, 1993, pp. 307-324.

Bridge, M. G., *The Sales of Goods*, Oxford : Clarendon Press, 1997.

*Chitty on Contract*, A. G. Guest (Gen. ed.), 27<sup>th</sup>. ed., London : Sweet & Maxwell.

Costley-White, Tim, 'Bankruptcy – Back to Basics' March [2000] *Fam Law* pp. 181-191.

Davey, Martin, 'Case Commentary : De Rothschild v. Bell (A Bankrupt) [1999] 2 All E.R. 722' [2000] *Insolvency Lawyer* pp. 46-51.

\_\_\_\_\_, 'Insolvency and the Family Home' [2000] *Insolvency Lawyer* pp. 2-15.

Davies, Iwan, *Effective Retention of Title*, London : Fourmat, 1991.

\_\_\_\_\_, 'United Kingdom', in *Retention of Title Clauses in Sale of Goods in Europe* by Davies, Iwan & Kaye, Peter (ed.), Aldershot : Dartmouth, 1999.



'Dept Gets Travel Ban Notice Three Weeks After Ummi Hafilda's Departure', *Utusan Express* 30 March 2000, <http://www.utusan.com.my>.

Dobson, Paul, and Schmitthof, Clive M., *Charlesworth's Business Law*, 15<sup>th</sup>. ed., London : Sweet & Maxwell, 1991.

Fletcher, Ian F., *The Law of Insolvency*, London : Sweet & Maxwell, London, 1996.

Frieze, A. Steven, *Handbook of Bankruptcy and Personal Insolvency*, 6<sup>th</sup>. ed., London : FT Law & Tax / Pearson Professional Ltd., 1996.

Goode, Roy, *Commercial Law*, 2<sup>nd</sup>. ed., London : Penguin Books, 1995.

Goode, R. M., *Proprietary Rights and Insolvency in Sales Transactions*, 2<sup>nd</sup>. ed., London : Sweet & Maxwell, 1989.

Grier, Ian S and Floyd, Richard E., *Personal Insolvency and Practical Guide*, 3<sup>rd</sup>. ed., London : Sweet & Maxwell, 1998.

Griffith, Alison and Parry, Rebecca 'Personal Insolvency as a Restriction in Company Management' [1999] *Insolvency Lawyer* pp. 199-205.

Hussain, Jalaldin, 'Malaysia : Report of the Official Assignee/Receiver' [1999] *Insolvency Lawyer* pp. 257-262 .

*Insolvency Law and Practice (Report of the Review Committee)*, Cmnd. 8558, London : Her Majesty Stationary Office, 1981.

Jacobs, Francis G. and White, Robin C. A., *The European Convention on Human Rights*, 2<sup>nd</sup>. ed., Oxford : Clarendon Press, 1996.

Latif, Samsar Kamar, 'Easy and quick discharge from bankruptcy Part I' *The Star* (Business) 26 January 1999 pp. 8-9.

\_\_\_\_\_, 'Automatic discharge subject to conditions Part II' *The Star* (Business) 2 February 1999 p. 8.

McCormack, Gerard, *Reservation of Title*, 2<sup>nd</sup>. ed., London : Sweet & Maxwell, 1995.

McLoughlin, Patrick, *Commercial Leases and Insolvency*, London : Butterworths, 1992.

Miller, Gareth, 'Transactions Prejudicing Creditors' [1998] *Conv* pp. 362-379.

Palmer, Norman, 'Reservation of Title Clause' (1992) 5 *Journal of Contract Law* pp. 175-198.

Parris, John, *Effective Retention of Title Clause*, London : Collins, Professional & Technical, 1986.

Pawlowski, Mark, *The Forfeiture of Leases*, London : Sweet & Maxwell, 1993.

Sealy, L. S. and Milman, David, *Annotated Guide to the Insolvency Legislation*, 5<sup>th</sup>. ed., Oxfordshire : CCH Editions Limited, 1999.

Sihombing, Judith, *National Land Code A Commentary*, 2<sup>nd</sup>. ed., Kuala Lumpur – Singapore : Malayan Law Journal, 1992.

Tolmie, Fiona, *Introduction to Corporate and Personal Insolvency Law*, London : Sweet & Maxwell, 1998.

Wheeler, Sally, *Reservation of Title Clauses Impact and Implication*, Oxford : Clarendon Press, 1991.

Walton, Peter, 'The Landlord, his distress, the insolvent tenant and the stranger' [2000] 16(2) *Insolvency Law & Practice* pp. 47-53.

*Woodfall Landlord & Tenant*, Kim Lewison (Gen. ed.), London : Sweet & Maxwell, 1993.

### C. Statutory Legislations

*Bankruptcy Act 1967*

*Bankruptcy Rules 1969*

*Bill of Sale Act 1878*

*Company Directors Disqualification Act 1986*

*Drug Trafficking Offences Act 1986*

*Estate Agents Act 1979*

*Family Law Act 1996*

*Federal Constitution*

*Insolvency Act 1986*

*Insolvency Rules 1986*

*Justices of the Peace Act 1979*

*Land Drainage Act 1976*

*Law of Property Act 1925*

*Legal Profession Act 1976*

*Magistrate Courts Act 1980*

*Matrimonial and Family Proceedings Act 1984*

*Matrimonial Causes Act 1983*

*National Land Code 1965*

*Penal Code*

*Power of Criminal Courts Act 1973*

*Registration of Births, Deaths and Marriages Regulation 1968*

*Sale of Goods Act 1957*

*Sale of Goods Act 1979*

*Solicitor Act 1974*

*Statute Law (Repeal) Act 1989*

*Stock Exchange Rules*

*Trusts of Land and Appointment of Trustees Act 1996*

#### D. Dictionary

al-Ba'albakī, Rohi, *Al-Mawrid - A Modern Arabic-English Dictionary*, 6<sup>th</sup>. ed., Beirut : Dār al-'Ilm li al-Malāyīn, Beirut, 1994.

*Encarta World English Dictionary*, London : Bloombury Publishing, 1999.  
Hans Wehr, *A Dictionary of Modern Written Arabic*, 3<sup>rd</sup>. Printing. Beirut : Librairie Du Liban, 1985.

Ibn Manzūr, Abū al-Faḍl Jamāl al-Dīn Muḥammad ibn Mukram, *Lisān al-'Arab*, Beirut : Dār Ṣādir, n.d.

Lane, E. W., *Arabic-English Lexicon*, Cambridge : The Islamic Texts Society, 1984.



Qal'ajī, Muḥammad Rawwas and Qunaibī, Ḥāmid Ṣadiq, *Mu'jam Lughat al-Fuqahā'*, 1<sup>st</sup>. ed., Beirut : Dār an-Nafā'is, 1985.

Walker, David M, *The Oxford Companion to Law*, Oxford : Clarendon Press, 1980.