

In *Abbott v. Hicks*, 5 Bing. N.C. 578, the question was whether the defendant, in an action by the assignees of a bankrupt, could set off a demand which the bankrupt had undertaken to pay, and to indemnify the defendant against the payment of; and it was held that, as the defendant had not paid this demand, there was no debt due to him from the bankrupt. *ERSKINE, J.*, said, "It is no debt at all; and as the defendant may never be called on to pay it, it would be impossible to put a value on it. * * * This is not a debt payable on a contingency, but a mere liability which may or may not become a debt hereafter."

So, the instalments of an annuity for the payment of which a bankrupt was surety only, and which he covenanted to pay in case of default of the grantor, are not provable under a fiat against the surety, where they become due after his bankruptcy: *Thompson v. Thompson*, 2 Bing. N. C. 168. See also *In re Foster*, 9 C. B. 422.

In *Wooley v. Smith*, 3 C. B. 610, an action for not providing a cargo pursuant to a charter-party, the action had been brought in April, a fiat in bankruptcy issued against the defendant in May, and he obtained his certificate in August 1845, and in December following final judgment was signed against him in the suit. It was held, that the demand was for unliquidated damages which could not be proved under the fiat, and consequently the defendant was not protected by his certificate. *COLTMAN, J.*, delivering the judgment of the Court, said, "Where a contract has been broken, and the demand thereupon arising is not a debt, but damages, the amount of which may depend on various circumstances and which it is necessary that a jury should estimate, unless they are ascertained before the issuing of a fiat, they cannot be proved. That point was very fully discussed and considered in the recent case of *Green v. Bicknell*."

In *Ex parte Bateman*, 2 Jur. N. S. 265, where several of the previous cases were considered, the only question was, whether the value of certain timber which was claimed to be proved against the estate of a bankrupt, was a claim for unliquidated damages; or, whether its value could be fixed with certainty so as to be provable.

It is unnecessary to cite any further cases on the subject, as the same distinction will be found in the whole of them, except where the law has been altered by statute. Thus, it is said in *Park on Insurance*, 371, that formerly, if an underwriter became a bankrupt after he had subscribed a policy, and before a loss happened, the insured was not entitled to a dividend out of the bankrupt's estate; but this

being found a great inconvenience and discouragement to trade, Parliament was obliged to interfere, and alter the law in this respect by the Act 19 Geo. 2, c. 32. And see *Graham v. Russell*, 5 M. & S. 498.

The 57th section of the Insolvent Act, which refers to claims of creditors upon contracts, "dependent upon a condition or contingency," is somewhat similar to the provisions of the 56th section of the English Bankrupt Act, 6 Geo. 4, c. 16. But the construction given to that section was, that it only applied to debts payable on a contingency, and not to mere contingent liabilities which might never become debts: *Hinton v. Acraman*, 2 C. B. 409.

The 153rd section of the Bankruptcy Act of 1861, which authorised proof to be made against a bankrupt's estate in certain cases where the damages were unliquidated, was held to apply to such demands only, in the nature of damages, as were capable of being enforced against the bankrupt at the time of the adjudication, where the cause of action, at that time, was complete: *Ex parte Mendel*, 10 Jur. N. S. 189; *Ex parte Kempson*, 11 Jur. N. S. 165.

The distinction between contingent liabilities and debts payable upon a contingency is well established.

In 3 *Parsons on Contr.*, 505, it is said that provisions relating to the proof of contingent claims occur in the English Statute of Bankruptcy, 12 and 13 Vict. c. 106, in the late Bankruptcy Act, and in most of the statutes of the States on insolvency. The distinction on this subject is well settled between subsisting debts which are payable on a contingency, and contingent liabilities, which may never become debts; and it is held that the former only can be proved under a commission in bankruptcy. In *Ex parte Marshall*, 3 Dea. & C. 120, *ERSKINE, C.J.*, said, "In my judgment in *Ex parte Myers*, I have not sufficiently marked the distinction between contingent liabilities which may never become debts, and contingent debts that may never become payable. Upon the fullest consideration of all the reported decisions, I am satisfied that claims under the first class, upon which no debt has arisen till after the bankruptcy, cannot be proved under the 56th section; but that all claims falling within the latter class, that are either capable of valuation before the contingency happens, or have become payable by the happening of the contingency after the bankruptcy, and before proof is tendered, may be admitted." The case of *Ex parte Thompson*, 2 Dea. & C. 126, is an example of the first class. Here there was no debt due from any one till