POGUE, USE OF CALVERT *vs.* JOYNER.

Where a surety pays a debt, after the discharge of the principal as a bankrupt, the discharge is no bar to an action by the surety against the principal.
Where the demand is uncertain or contingent, such as cannot be proven under the commission, the discharge is no bar to a subsequent action.
Therefore, in a suit against a surety on a delivery bond, though the principal has been discharged by bankruptcy, he is not a competent witness, for the surety, to prove a performance of the condition of the bond, because in the event of a recovery against, and payment by the surety, the principal will be liable to him, and is, therefore, interested in the result of the suit.

Writ of error to the circuit court of Saline county.

THIS was an action of debt, on a delivery bond, by James Pogue, for the use of Robert Calvert, against Wm. S. Lockert, and Johnson J. Joyner, determined in the circuit court of Saline county, at the August term, 1844, before the Hon. J. J. CLENDENIN, judge.

The bond, as described in the declaration, bore date 5th February, 1842; was executed by Lockert as principal, and Joyner as security to Pogue, for the use of Calvert, and was conditioned, in substance, as follows:

It recited that Calvert had sued out an execution, on a judgment obtained by him against Lockert in the Saline circuit court, at the August term, 1841 which was placed in the hands of Owen, sheriff, for execution. That Owen had levied upon John, a slave, the property of Lockert, and the bond was to be void if Lockert delivered the slave to the sheriff, at the court house of Saline county, on

the 28th day of February, 1842. *Breach:* that the slave was not delivered according to the condition of the bond.

Lockert pleaded that, since the commencement of the suit, he had been discharged, as a bankrupt, from all his debts and liabilities, under the act of Congress, approved August, 1841, by a decree of the district court of the U. S. for the district of Arkansas. The plaintiff demurred to the plea, the court overruled the demurrer, and gave judgment for Lockert.

Joyner pleaded that the slave was delivered, in accordance with the condition of the bond, the plaintiff took issue, the case was submitted to a jury, and the defendant obtained verdict and judgment.

The plaintiff moved for a new trial on the ground, among others, that the court erred in permitting Joyner to introduce Lockert as a witness to prove the delivery of the slave. The court refused a new trial, and the plaintiff excepted, and took a bill of exceptions, from which it appears that Lockert was offered as a witness for Joyner, and after stating that he signed the delivery bond, sued on, as principal, had been discharged by the judgment of the court, (as above stated,) and that he had his certificate of discharge as a bankrupt, the plaintiff objected to his being introduced as a witness, but the court permitted him to be sworn, and to give evidence as to the delivery of the slave, to which the plaintiff excepted.

The plaintiff brought the case to this court by writ of error, and assigns as error, among other things, that the court below permitted Lockert to testify in the case.

TRAPNALL & COCKE, for the plaintiff. Was Lockert a competent witness for his co-defendant? He was principal in the delivery bond sued on, and after its execution had been released under the bankrupt law. This certainly released him from all obligation to the plaintiff under the bond, but the relations existing between him and his co-defendant, are entirely different. There are two contracts connected with the bond: the first, with the plaintiff, the obligee; the second was an inchoate one with the security, implied at law, that if judgment was rendered against him, or if he paid the money, or had it to pay, that he would repay it to him. But this contract,

an implied undertaking, did not become a liabilty until either one or the other of the above events took place. At the time of the decree in bankruptcy, Joyner had no claim upon Lockert, either in law or equity, that was "*proveable under that act,*" to entitle him to a distributive share of the assets; the plaintiff had, and could have proved up his claim, and obtained his proportionable share of money raised by the sale of the effects of the bankrupt: and, therefore, his debt, so far as Lockert was concerned, was satisfied by the decree. 9 *John.* 127. *Mechanics' & Farmers' Bank vs. Capron,* 15 *John.* 467. *Burl vs. Gordon,* 6 *John.* 120. *Frost vs. Carter,* 1 *John, cas.* 73.

The bankrupt act prescribes that all debts, contracts, &c., "*proveable under that act,*" shall be discharged by the decree, and the bankrupt released therefrom. Was the claim of Joyner against Lockert, under the contract implied in law, proveable under that act, so as to give him the benefit of it? If it was not, then the decree could not release him from it; and therefore, he was permitted to testify in a cause upon the event of which depended his liability. If judgment was rendered against him, he was liable; if there was not, he was not liable. *Murray vs. De Rollendam,* 6 *John. ch. Rep.* 65. 8 *East.* 317. 4 *Burr.* 2439. 3 *Willes* 282. 1 *Burr.* 436. 2 *M. & S.* 551. 4 *ib.* 333. 4 *Term. Rep.* 825. 2 *Campb.* 443.

HEMPSTEAD & JOHNSON, contra. Lockert, the principal, having specially pleaded his certificate of bankruptcy, and been discharged by the judgment of the court, had no direct or indirect interest in the event of the suit; either as to sustaining or overthrowing his certificate, or as to increasing any fund in which he could participate. Under the bankrupt law of 1841, the certificate constituted a bar to any action at the suit of the surety for the recovery of money paid in discharge of the original debt. *Van Sandau vs. Crosbie,* 3 *Barn. & Ald.* 13. 5 *Eng. C. L. Rep.* 219. *Reed vs. James,* 1 *Stark. N. P. Rep.* 134. *Morgan vs. Prior,* 2 *Barn. & Cress.* 14. *Ewens vs. Gold. Bull. N. P.* 43. *Butler vs. Cooke, Cowp.* 70. *Ex parte Burt,* 1 *Madd.* 46. 2 *Stark. Ev.* 352. *Stedman vs. Martinant,* 12 *East.* 664. *McCullough vs. Caldwell,* 5 *Ark. Rep.* 237. *Murphy, a bankrupt,* 1 *Sch. & Lef.* 44.

OLDHAM, J., delivered the opinion of the court.

This was an action brought upon a delivery bond against Lockert, as principal, and Joyner, as his security. Lockert pleaded his certificate of discharge as a bankrupt, and the court held him to be discharged, upon demurrer to his plea. The suit was then prosecuted against Joyner alone, and upon the trial the defendant introduced Lockert as a witness in his behalf, to which the plaintiff objected, but his objections were overruled by the court, and the correctness of the decision of the circuit court, in deciding Lockert to be a competent witness, is questioned by the assignment of errors.

In England, it has been decided that where a surety pays a debt, after the discharge of the principal as a bankrupt, the discharge is no bar to the action of the surety against the principal. *McDonald vs. Bovington,* 4 *Term. R.* 825. *Page vs. Russell,* 2 *Maul & Selw.* 551. *Welsh vs. Welsh & another,* 4 *Maul & Selw.* 333. In *Walker vs. Barns,* 5 *Taunt.* 778, GIBBS, C. J., said, "the question cannot be tried by a better rule than by examining whether an action could be brought for the demand. In 1 *Bacon's Abr.* 425 it is laid down, that "Where a man becomes bail for another, it is considered a contingent debt, and if the bail commit an act of bankruptcy before judgment, it cannot be proved under the commission. Accordingly where the defendant, on the 9th day of May, 1734, was bail on a writ of error, and on the 25th Oct., 1734, committed an act of bankruptcy, and after commission, obtained his certificate: on the 12th Nov., 1735, the judgment was affirmed, and in an action of debt, upon the recognizance, he pleaded his discharge, and that the cause of action arose before the bankruptcy, Lord Hardwicke, C. J., on the trial, held that the defendant was not discharged according to the case of *Tully vs. Sparkes:* for this was but a contingent debt, for which the plaintiff could not come in under the commission."

In New York, the same doctrine is held in relation to discharges der their insolvent laws. In *Burl vs. Gordon,* 6 *J. R.* 126, which was an action brought by the bail against the principal, who was discharged under the insolvent act, the court held that "the debt was not made certain until after the defendant's discharge: that it was like the case of a surety paying a debt after the discharge of the

principal: that the debt must be certain and fixed at the time of the insolvent's assignment." And so it has been held that the endorser of a promissory note, who, after his endorsement, and before the note becomes payable, obtains his discharge as an insolvent, is not protected from payment of the note; the endorsement not creating a certain debt but merely a liability, contingent on the non-payment of the note by the maker, and which liability, could not become fixed until after the discharge. *The president, &c., of the Mechanics' and Farmers' Bank, of the city of Albany vs. Capron,* 15 *J. R.* 467; and so, if the endorser of a note pay it after the discharge of the maker, he may, notwithstanding, recover from the maker. *Frost vs. Carter,* 1 *John. Cas.* 73. *S. C.* 2 *Caines cases in error,* 310. *McDonald vs. Bovington,* 4 *Term. R.* 825. *Mays vs. Stewart, Burr. Rep.* 2439. *Lucas vs. Winton,* 2 *Camp.* 443. *Ford vs. Andrews,* 9 *Wend. Rep.* 312.

In *Andrews vs. Warring et al,* 20 *J. R.* 153, it was held that a discharge under the insolvent act, of a defendant, who had executed a bond as a surety for a deputy sheriff, is not a good plea in bar, as the amount of damages sustained in consequence of the breaches of the condition of the bond was not ascertained or liquidated. In *Marsh et al. assignees vs. Baker et al.,* 1 *Wash. C. C. R.* 178, it was held that no debt but such as is due and owing can be proved under the commission; and consequently an endorser or acceptor of a bill of exchange drawn by the bankrupt who has not paid it before the bankruptcy, cannot prove the debt.

These cases conclusively establish the rule that where the demand is uncertain or contingent, such as cannot be proven under the commission, the discharge is no bar to the action brought subsequent to the discharge. In the case now before the court, Joyner, the surety, had no cause of action against the principal, Lockert, which he might have proved under the commission: nor will he have any demand against him, until he pays the amount for which he may be liable under his contingent and collateral undertaking, as surety upon the delivery bond. And upon a recovery against Joyner and payment by him, he will acquire a cause of action against Lockert, to which Lockert's discharge will be no bar, because the

right of action had not accrued at the time of the discharge and was not proveable under the commission. Lockert, therefore, had a direct and positive interest in the event of the suit, for if there should be a recovery against the surety, and he should pay it, Lockert would be liable to him, notwithstanding his discharge; and, therefore, it was to his interest that the plaintiff should not obtain a judgment against his surety, and he was, therefore, not a competent witness on the part of the defendant upon the trial. The circuit court consequently erred in permitting him to be sworn as a witness. The testimony of Lockert being excluded, there is no evidence establishing the delivery of the negro boy named in the delivery bond, or an offer to do so. A new trial should, therefore, have been granted the plaintiff.

We do not conceive it necessary to determine any other questions raised by the record or assignment of errors.

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