BURTON'S ADR. *vs.* LOCKERT'S EXRS.

Walker brought suit against Moody, in Saline Chancery Court, for a family of negroes: Moody ran the negroes off: in the year 1836, Burton purchased Walker's interest in the suit, and agreed to give Lockert $250, to assist him in getting the negroes, on condition the suit was successful: Lockert accordingly obtained the negroes, and delivered them to the sheriff: the chancery suit was determined in February, 1844, and six out of eleven of the negroes decreed to Walker for the use of Burton's estate, who had, in the mean time, died: in July, 1844, Lockert presented his claim, for $250, to the probate court, for allowance against the estate of Burton: Burton's administrator objected to the allowance of the claim, 1st, because only a part of the negroes were recovered in the chancery suit, and Lockert was only entitled to compensation for his services *pro tanto*: 2d, that the claim was not presented to Burton's administrator for allowance within two years after the grant of letters: 3d, that, in October, 1842, Lockert became a bankrupt, and the claim passed to his assignee. HELD, that, inasmuch as Burton purchased the interest of Walker in the slaves, and the only condition upon which Lockert's claim was made to depend being the re-

covery of such interest, his claim could not be reduced by the failure of Burton to recover the whole of the slaves.

HELD, further, that the statute of *non*-claim (*Digest, ch.* 4, *sec.* 85) run against the claim of Lockert, not from the time of the grant of letters of administration on Burton's estate, but from the accruel of the cause of action on the determination of the chancery suit for the slaves: that this statute, like other statutes of limitation, runs from the time the cause of action accrues.

HELD, further, that though the cause of action had not accrued when Lockert was declared a bankrupt, it was an inchoate demand, and passed to his assignee, and this though he omitted to include it in his schedule.

Appeal from the Pulaski Circuit Court.

William S. Lockert filed, for allowance and classification, in the Probate Court of Pulaski county, a claim, against the estate of Alexander Burton, deceased, for $250, for services rendered, by Lockert, to Burton, in recovering certain slaves. The account was duly probated, and had previously been presented to Burton's administrator for allowance, and by him rejected. At the July term, 1844, of said Probate Court, Burton's administrator (Beebe) appeared and interposed three objections to the allowance of the claim: 1st, as to the amount of the charge: 2d, the statutes of *non-claim*: and 3d, the bankruptcy of Lockert; which objections are more fully stated in the opinion of this court. The Probate Court allowed the claim, Burton's administrator excepted, set out the evidence, and appealed to the Circuit Court.

The evidence was, in substance, as follows:

Lockert proved, by the deposition of Samuel J. Cook, Esq., that "Alexander Burton, having become interested in a certain suit of William C. Walker, against George Moody, in the year 1836, for a family of negroes, in the Saline Circuit Court, and said family of negroes having been run off by said Moody, the said Burton employed Lockert to assist him in the capture and re-taking of them, and agreed to pay him $250 if he, Lockert, would assist and get said negroes so run off, provided said Burton succeeded in said suit for them; said Lockert did go and assist in getting the negroes, and they were delivered to the sheriff of Saline county."

Lockert also proved that Hawkins, the original administrator

of Burton, had verbal notice of the existence of said claim from time to time, and within two years from the date of his letters of administration. That Burton only claimed the interest (whatever that might be) of Walker, in said suit in chancery, brought in the name of Walker, against Moody, for said family of negroes, which was finally decided at the February term, 1844, of the Saline Circuit Court. That the claim in question was not included in Lockert's schedule of assets in bankruptcy.

Burton's administrator proved that said suit in chancery, brought in the name of Walker, whose interest was claimed by Burton, was for the entire family of negroes in question, and that, by the final decree of the Saline Circuit Court, in chancery, rendered at the February term, 1844, said Walker, for the use and benefit of the estate of Burton, recovered six-elevenths of said negroes, or six slaves out of eleven, which six slaves were, at said term, specifically divided off and allotted to said estate. That Hawkins took out letters of administration upon the estate of Burton, on the 16th July, 1838, and continued to act as such administrator until the 19th August, 1844, when his letters were revoked, and letters granted to Beebe. That, on the 6th October, 1842, Lockert was, by decree of the District Court of the United States for the District of Arkansas, in bankruptcy, finally and fully discharged of and from all debts owing by him at the time of the presentation of his petition, on the 31st March, 1842, to be declared a bankrupt, according to the act of Congress in that behalf.

The circuit court, in June, 1846, (CLENDENIN, J., presiding,) affirmed the judgment of the Probate Court, and Burton's administrator appealed to this court. In the meantime, Brunaugh succeeded Beebe in the administration of Burton's estate, and, afterwards, Lockert's death was suggested, and his executor's substituted.

WATKINS & CURRAN, for the appellant, contended that, as Burton only recovered a portion of the negroes, upon the recovery of which the claim depended, in any view of the case the allowance in favor of Lockert could only have been *pro tanto*: that, as

the claim was presented for allowance before the contingency had occurred, he was not entitled to recover: but, if the claim was, in that respect, properly presented for allowance, still he could not recover, as more than two years had then elapsed since the grant of administration: that all Lockert's interest in the claim passed to his assignee in bankruptcy, although the claim was not embraced in his schedule, and his assets remain in the assignee, where they vested by operation of law upon the decree declaring him a bankrupt. 5 *Law Reporter,* 22, 23, *in re Cheeney. ib.* 71, *in re Foster. Ib.* 307, *Ex parte, Newhall, assignee of Brown. Ib.* 322, *in re McCarty.*

RINGO & TRAPNALL, contra. Until the happening of the contingency upon which Burton bound himself to pay the sum demanded, Lockert had no debt or legal demand against him: the indebtedness of Burton and right of action of Lockert accrued when the decree was pronounced, so that Lockert, at the date of his bankruptcy, possessed no vested right to the demand, and was not bound to embrace the contract in the schedule of his effects, and could not lawfully have done so: as two years had not elapsed after the right of action accrued before Lockert presented his demand for allowance, the statute of limitations could not have run against him. *Pougue, use, &c. vs. Joyner,* 1 *Eng.* 244. *McDonald vs. Bovington,* 4 *T. R.* 825. 2 *M. & S.* 551, 4 *M. & S.* 333. 5 *Taunt.* 778. *Bacon's Abr.* 425. 1 *Wash. C. C. R.* 178. 20 *John. R.* 153. 4 *Burr. R.* 2439. 1 *John. Cas.* 73. 6 *John. R.* 126. 15 *John. R.* 467.

JOHNSON, C. J. The administrator of Burton interposed in the probate court three several objections against the claim of Lockert; *First*: "That the alleged promise of Burton was contingent, depending upon the finding of the negroes, and also upon his success in the suit; and that upon the trial of the case he only recovered a portion of the negroes in controversy, and that in any event, the allowance to Lockert should be only *pro rata; Second*: That the alleged promise could not be enforced, because

the claimant had suffered more than two years to elapse since the grant of administration on the estate of Burton, without presenting his claim or giving any notice of it as required by law, and that consequently the same was barred: and, *Thirdly*: That on the 6th of October, A. D. 1842, Lockert was, by the decree of the district court of the United States in bankruptcy, for the District of Arkansas, finally decreed and finally discharged of and from all his debts owing by him at the time of the presentation of his petition, on the thirty-first day of March, A. D. 1842, to be declared a bankrupt, that the said claim was or ought to have been embraced in the schedule of his assets to be distributed among his creditors, and that during the course of the administration of his assets in bankruptcy did not, nor had he in any manner since become the lawful owner of the claim, and that consequently he had no right to demand the amount from the estate." These are all the objections urged against the allowance of the claim, and in case that either is well founded in law, it is clear that the judgment is erroneous, and consequently ought to be reversed.

It appears, from the testimony, that William C. Walker had instituted a suit in the Saline circuit court against George Moody for a family of negroes, that Alexander Burton, whose estate is sought to be subjected to the claim in question, after having purchased Walker's interest in the suit, made a contract with Lockert, and agreed that if he would assist him in getting the negroes, which had been run off by Moody, and in case he should succeed in the suit, he would pay Lockert for his services two hundred and fifty dollars. We think that, upon a fair construction of the contract, it would not be material as to the amount of the recovery, in order to fix the liability of Burton for the sum stipulated. He had purchased the interest of Walker, and the only contingency, upon which Lockert's claim was made to depend, was the recovering such interest. This view of the agreement is fortified by the fact that Lockert's service could neither be increased nor diminished by the amount of Burton's recovery. We think, therefore, that Burton's liability

was not made to depend upon the fact whether he recovered six-elevenths or the whole of the property in controversy, but that it became fixed upon the recovery of Walker's interest in the subject matter of the suit.

The second objection involves the construction of the statute prescribing and limiting the time within which claims are required to be presented against the estates of deceased persons. It is declared, by the last clause of the eighty-fifth section of chapter four, of the Digest, that "all demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred." This statute cannot be considered as any thing else than an act of limitations, and, if so, can operate only upon rights of action actually subsisting. Acts of limitation operate alone upon the remedy, and it would be flatly absurd to say that the remedy is destroyed before the right of action had accrued, and consequently before the remedy existed. To give the act in question such a construction as to bar an action upon a contract that only created an inchoate right and before any right of action had actually accrued, would be to place it in the power of the legislature to pass a law, not merely to impair the obligation of a contract, but actually to destroy the contract itself. The form of the affidavit required of all persons presenting claims against an estate is conclusive, to show that the law only contemplated such demands as had fallen due and were actually owing at the time of their presentation. The right of action had not only not arisen upon the contract in question, but on the contrary, the contingency upon which the debt was made to depend, had not happened at the expiration of the two years after the date of the letters of administration. It is not to be presumed that the legislature intended to deprive all persons of their claims against the estate of deceased debtors, in cases where their right of action had not arisen; and even if such had been the design, it could not have succeeded without a plain and manifest violation of the constitution of the United States.

The third and last objection is, that, inasmuch as Lockert had

obtained his final discharge under the bankrupt act, and that the contract in question had been made before he filed his petition for the benefit of that act, therefore he had no legal right to commence and prosecute the suit. It appeared, from the schedule of his effects, that the claim now sought to be enforced was not included. The administrator contends that, notwithstanding the omission of the claim in the schedule, the legal title, upon the rendition of the decree of bankruptcy, *ipso facto,* passed to and vested in the assignee, and that, from that instant, the bankrupt lost all control over it. The third section of the act declares that, "the assignee, in virtue of the decree of bankruptcy, shall become invested with all the property and rights of property of the bankrupt, and shall be vested with all the rights, titles, powers and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully to all intents and purposes as if the same were vested in, or might be exercised by such bankrupt, before or at the time of his bankruptcy declared as aforesaid, and all suits at law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt." It is clear that the circumstance of the failure of the bankrupt to insert any part of his effects in his schedule, cannot in any degree affect the title of the assignee. He does not depend upon the schedule for his title, for the law by its own mere force and operation passes the title to all his effects of whatsoever character or description to the assignee, and vests it in him for the benefit of the creditors of the bankrupt. The only doubt that could by possibility arise in relation to the matter is, whether it is such a right of property as, in the nature of things, could pass to and vest in the assignee. True it is, that, at the date of his petition, it had not matured into a debt, as the contingency, upon which it was made to depend, might or might not happen; yet we conceive, to say the least of it, it was an inchoate right and such as in the spirit and under the policy of

the bankrupt act was transferable to the assignee, and could be enforced by him when the contingency had happened which fixed the liability. We think it clear, that the ground of the last objection is fully tenable, and that for the error in overruling it alone, if there were no others, the judgment of the court below ought to be reversed.

The judgment of the circuit court of Pulaski county herein rendered, is therefore reversed, and the case remanded to be proceeded in according to law and not inconsistent with this opinion.