

IN RE MONTGOMERY.

{3 Ben. 567;¹ 3 N. B. R. 429 (Quarto, 109).}

District Court, S. D. New York. Dec. 23, 1809.

BANKRUPTCY—INDIVIDUAL AND PARTNERSHIP ASSETS.

One member of a firm bought out the other, taking the notes and books of the firm, and agreeing to pay the debts of the firm, and he continued the business for fourteen months, replenishing the stock, mingling old and new, and selling from either indifferently, so that it was impossible to tell which were the firm's goods. He was then adjudicated a bankrupt, and the stock was sold by the assignee as his goods: *Held*, that the proceeds in the hands of the assignee were to be held to be the individual estate of the bankrupt, and to be subject to the payment of his individual debts, before they could be applied to the payment of the debts of the firm.

{Cited in *Re Rice*, Case No. 11,750.}

{This case was formerly heard upon application of bankrupt's attorney to be paid counsel fees. Application allowed. Case No. 9,726. It was again heard upon motion of assignee to strike out claim of Baldwin Griffin, a preferred creditor, who had voluntarily surrendered his preference. *Id.* 9,728. It was then heard upon motion of James B. Olney, a creditor, to be allowed to file supplemental proof of debt. *Id.* 9,729. Upon motion of assignee, the proof of debt filed by Jonathan B. Cowles was stricken out. *Id.* 9,730.}

The register {Theodore B. Gates} certified to the court a question, as to the class of creditors who were first entitled to dividends. 619 The Question arose on the following facts: Up to November 23d, 1867, the bankrupt and Sylvester B. Sage were copartners in business, under the name and style of Montgomery & Sage, at Prattsville, in Greene county, as country merchants. On the day named, Sage sold out his

interest in the store to Montgomery. The agreement contained this clause: "Also, that the said Henry B. Montgomery take the notes and books of the firm of Montgomery & Sage, and collect the same as far as can be, and, with the proceeds of the same, pay all the liabilities of the firm of Montgomery & Sage, which is this day dissolved, by mutual consent. But if there proves to be a deficiency, or not enough to pay the debts, the remainder is to be paid equally by both parties, and, in case there proves to be an overplus, or more than enough to pay the liabilities, then the balance is to be equally divided between both parties." On the 5th of January, 1869, Sage was adjudicated a bankrupt, on his own petition, and, about one month afterwards, Montgomery was adjudicated a bankrupt, upon the petition of certain of his creditors. Montgomery had continued the mercantile business as successor to Montgomery & Sage, and had, from time to time, replenished the stock of goods, mingling old and new together, and selling from either indifferently, so that it was impossible to tell which were the goods of Montgomery & Sage, and which were the goods of Montgomery alone. Moreover, the entire stock had been sold by the assignee of Montgomery as Montgomery's goods. The register gave his opinion, that the assets in the hands of the assignee should be regarded as belonging to Montgomery's individual estate, and liable, in the first instance, to the payment of Montgomery's individual debts in full, before any portion could be applied to the payment of the debts of Montgomery & Sage.

BLATCHFORD, District Judge. I concur with the register in his conclusion.

[NOTE. This case was again heard upon application of Thomas Montgomery to be allowed to file amended proof of debt. Case No. 9,731.]

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