

## Case No. 9,730.

## IN RE MONTGOMERY.

{3 Ben. 567;<sup>1</sup> 3 N. B. R. 426 (Quarto, 108).}

District Court, S. D. New York. Dec. 11, 1869.

BANKRUPTCY—PROOF OF CLAIM—NOTE—NEW  
NOTE GIVEN AFTER ADJUDICATION—OLD  
DEBT EXTINGUISHED.

Where a creditor had proved a claim as endorser upon a note made by the bankrupt, but it appeared that, after the adjudication of bankruptcy, a new note had been given, and the first note taken up: *Held*, that the proof of debt must be disallowed.

{Cited in *Re Parkes*, Case No. 10,754; *Re Broich*, Id. 1,921; *Re Merrill*, 21 Fed. 121.}

{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. Motion allowed. Id. 9,728. It was again heard upon motion of James B. Olney, a creditor, to be allowed to file supplemental proof. Id. 9,729.}

By THEODORE B. GATES, Register:

<sup>2</sup> [Jonathan B. Cowles, a supposed creditor of the above-named bankrupt, filed proof of a contingent claim against the said bankrupt on the 24th day of March, 1869. The claim is based upon a note made by [Henry B.] Montgomery on the 24th day of December, 1868, for five hundred dollars, indorsed by said Cowles, and at the time of the proof, held by the Farmers' National Bank of Catskill, where it had been discounted. The assignee in this matter obtained an order for the examination of said Cowles, and his evidence, on such examination, having been taken, the following facts seem to be established 622 by the

evidence, namely: On January 8, 1869, Montgomery made his note for five hundred dollars, payable to his own order three months after date, at the Farmers' National Bank, Catskill; the note was indorsed by H. B. Montgomery, Baldwin Griffin, and J. B. Cowles, in the order stated. That note existed and was owned by the Farmers' National Bank of Catskill, where Montgomery was adjudicated a bankrupt, and where said Cowles proved his claim thereon. The note subsequently fell due, and was protested for non-payment. On the 19th day of July, 1869, five months after Montgomery was adjudicated a bankrupt, a new note was again, for the same amount, made by Montgomery, and payable three months after date to the order of Baldwin Griffin, at the Farmers' National Bank. This note was indorsed by Baldwin Griffin, J. B. Cowles, and A. C. Cowles, and was used to take up the first-named note. This second note was protested for non-payment, and on the 19th day of October, 1869, another note was made for four hundred and fifty dollars, signed by Baldwin Griffin, to the order of J. B. Cowles, and indorsed by J. B. Cowles and A. C. Cowles, Montgomery's name not appearing on the paper. This note, together with fifty dollars in money advanced by J. B. Cowles, was used to pay the second note. [Case No. 9,726.] This last note will fall due on the 20th of January, 1870. Upon the evidence in the case the solicitor for the assignee moved to strike out Cowles' proof of claim upon the ground, First. The claimant being second indorser, and only liable upon Griffin's failure to pay, is not entitled to prove the claim.

[I think that Mr. Cowles would have been entitled to prove his claim upon the original note under the 6th clause of section 19 of the bankrupt law {of 1867 (14 Stat. 525)}, by way of security against the possible irresponsibility of any of the parties personally liable, and then his right to share in the dividends would

depend upon his having paid any or all of the note. But the real difficulty in the way of Mr. Cowles proving a debt upon the note seems to me to grow out of transactions subsequent to the maturity of the first note, which is doubtless the one Mr. Cowles based his proof upon, although he makes a mistake as to the date of it. From the moment a debtor is adjudicated a bankrupt, he is effectually separated from his estate and his contracts. These pass to the assignee, who becomes the trustee of the estate for the benefit of the creditors. The bankrupt may, after his adjudication, make new contracts and acquire property which his former bankruptcy does not affect, and which his creditors (if he is finally discharged) cannot reach. See cases cited at note 6, p. 53, *Bump, Bankr.* (2d Ed.). If, then, a creditor of the bankrupt shall, after the adjudication, accept a new obligation from the bankrupt in substitution of the debt existing at the time of the filing of the petition, he relinquishes his claim upon the estate of the bankrupt, and must look to his debtor alone for payment of his demand. In this case, Montgomery's note for five hundred dollars, indorsed by Griffin and Cowles, would have been provable by either Griffin, or Cowles, or by the bank, against the estate, and was so proven by Cowles; but subsequently the bankrupt and all the parties to this note agree to make a new note, with which to pay the old and overdue note at the bank. The bank accepts the new note, and surrenders the old. The original debt was thereby extinguished, and the liability ceased to be a proper claim upon the estate of the bankrupt. The discharge of Montgomery will not release him from this debt, and whoever finally pays this note may maintain an action against Montgomery for it upon showing the facts herein recited. Section 19 of the bankrupt act provides "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing, but not payable

until a future day, \* \* \* may be proved against the estate of the bankrupt." But the debt must continue to exist in the exact condition in which it was when the debtor was adjudicated a bankrupt. If he and his creditor bargain about it, after that time, and give it any essential modification, they detach it from the beneficial operation of the law, and carry it over to the new estate in which the debtor has been placed by the adjudication of bankruptcy. In re Williams [Case No. 17,705] it was held that when a judgment is rendered after the proceedings in bankruptcy upon a debt which existed before that time, neither the debt nor the judgment is provable. The debt is merged in the judgment, and the judgment did not exist at the time of the adjudication of bankruptcy.

[I am of the opinion that the proof of debt filed by Jonathan B. Cowles should be stricken out, and that no dividends should be paid upon it.]<sup>2</sup>

BLATCHFORD, District Judge. The decision of the register is correct.

[NOTE. This case was subsequently heard upon the question of the priorities of creditors. Case No. 9,727. It was again heard upon application of Thomas Montgomery to be allowed to file amended proof of claim. Id. 9,731.]

<sup>1</sup> [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

<sup>2</sup> [From 3 N. B. R. 426 (Quarto, 108).]

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