

more than a merely erroneous conclusion arrived at on consideration of all the facts. One test of such a mistake is that it is of such a kind, and so obvious, that when brought to the notice of the arbitrator who is to decide the question, it would induce him to alter the result to which he had come in the particular specified. It must be a mistake as to a fact upon which the judgment of the superintendent or arbitrator has not passed as a part of his investigation, and of such a nature, and so proved, as to lead to a reasonable belief that he was misled and deceived by it, and that if he had known the truth he would have come to a different result. *Boston Water-power Co. v. Gray*, 6 Metc. 131. In the language of one of the decisions cited on the argument, the mistake, to be available in such a case, must be one which shows clearly that the superintendent was misled, deluded, or so far misapprehended the facts that he did not exercise his real judgment in the case. *McAuley v. Carter*, 22 Ill. 57.

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Considering all the testimony bearing on the subject, with the suggestions in relation thereto which have been urged by counsel, you will determine whether the non-production of the certificate is avoided or excused. If it is, and if the contract was fully performed, then the defendants are entitled to recover on their counter-claim for the unpaid balance of the contract price. If the production of the certificate is not avoided or excused, then the defendants are not entitled to recover on that counter-claim, notwithstanding you may think that the apparatus satisfied the requirements of the guaranty.

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Pending the trial, the plaintiff Mack, by whom alone this suit was originally commenced, has amended his pleadings by making one Alexander Guiterman a co-plaintiff, and so a recovery of damages is sought in favor of both plaintiffs. This being so, if you find that the plaintiffs are not entitled to recover, and that the defendants are, your verdict will go against both the plaintiffs.

In re MERRILL and others, Bankrupts.

(District Court, N. D. New York. 1884.)

BANKRUPTCY—PROMISSORY NOTE—INDORSER—PART PAYMENT—NOTE FOR BALANCE—PETITION IN BANKRUPTCY.

The principle that the taking of a promissory note does not extinguish the original debt except by express agreement, has little application to a case where the parties sought to be charged are not makers but indorsers, and when, prior to the date of the second note, (given for balance after part payment of the first,) their legal *status* is completely changed by the filing of a petition in bankruptcy.

Prior to the filing of the petition the bankrupts were charged as indorsers on a note for \$1,500, made by one Gaylord. After the filing of the petition, the claimant, who was the holder of the note, received a payment of \$500 thereon and a new note similarly indorsed for the balance, \$1,000. The register found that this transaction was a payment of the \$1,500 note which was thereupon given up. The claimant first proved the \$1,000 note but subsequently offered to surrender it to the assignee and filed a supplemental proof for the balance alleged to be due on the original \$1,500 note. The register found that the \$1,000 note was provable because made and delivered before the actual adjudication in bankruptcy. The question now comes before the court upon exceptions filed by both parties to the report.

Richard C. Steele, for claimant.

Charles F. Durston, for assignee.

COXE, J. The original and supplemental proof should be expunged. The former, for the reason that the note upon which it is founded was made and delivered after the filing of the petition in bankruptcy; the latter, upon the authority of *In re Montgomery*, 3 N. B. R. 426.

The cases cited by the counsel for the claimant, holding that the taking of a promissory note, does not extinguish the original debt unless by express agreement, have, I think, but little application to a case where the parties sought to be charged are not makers but indorsers, and where, prior to the date of the second note, their legal status is completely changed by the filing of a petition in bankruptcy.

In re PEVEAR and another, Bankrupts.

(*District Court, N. D. New York. 1884.*)

BANKRUPTCY—FRAUD—ALLEGED RETAINING OF MONEY AND EFFECTS BY BANKRUPT.

In a proceeding against a bankrupt by his assignee for an alleged retaining of money and effects, fraud being charged and a summary remedy demanded, the court should be clearly satisfied that the accusations of the petition are sustained by the proof.

In September, 1880, the assignees of the above-named bankrupts presented to the court a petition representing that the bankrupts had fraudulently concealed and withheld from them \$10,500 in money, besides a large amount of merchandise. The petitioner's prayer is for an order directing the bankrupt to pay over said sum and return said merchandise. The court thereupon made an order referring it to the register in charge to take proof of the allegations of the petition and report the same to the court with his conclusions