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NOTICE OF APPEAL.

Acknowledged April 13, 1929.

Filed April 15, 1929.

In Chancery of New Jersey

Between CHARLES CLARK and MARGARET CLARK, his wife, *Complainants,* *and* LE ROY D. BADGLEY and KATHERINE C. BADGLEY, his wife, *Defendants.*	*On Bill, etc.* *Amended Notice of Appeal.*

To Joseph Zemel, Esq., solicitor for complainants, Prudential Bldg., Newark, N. J.

SIR:

The defendants, Le Roy D. Badgley and Katherine C. Badgley, his wife, hereby appeal from the final decree made in the above-entitled cause, which decree was made by the Chancellor on the advice of the Honorable Vice-Chancellor John H. Backes, on the twenty-sixth day of March, 1929, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated April 12, 1929.

HARLEY, COX & WALBURG,
Solicitors for and of Counsel with Defendants.

Notice of Appeal.

I conceive there is good cause for appeal in the above-entitled cause.

WILLIAM H. D. COX,
Of Counsel with Defendants.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

WALTER L. DAVIS, having been duly sworn on his oath according to law, deposes and says: That he served the within amended notice of appeal on Joseph Zemel, by leaving a copy of same with the person in charge of his office, Prudential Bldg., Newark, on April 13, 1929.

WALTER L. DAVIS.

Sworn and subscribed to before me
this 13th day of April, 1929.

HELEN R. COGAN,
Notary Public of N. J.

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey.

The complainants, Charles Clark and Margaret Clark, his wife, of the City of Newark, County of Essex and State of New Jersey, respectfully show unto your Honor:

1. On or about July 12, 1928, Le Roy D. Badgley and Katherine C. Badgley, his wife, were the apparent owners of premises in the City of East Orange, County of Essex and State of New Jersey, known as No. 267 Amherst street, in the said city, upon which was erected a two-family house and which premises are more particularly described as follows:

> BEGINNING on the westerly side of Amherst Street at a point distant 371 feet and 84 hundredths of a foot northerly from Elmwood Avenue; thence running along said Amherst Street northerly 29 feet; thence Westerly at right angles to Amherst Street 100 feet; thence Southerly parallel with Amherst Street 29 feet; thence easterly 100 feet to the place of BEGINNING.

2. On or about July 12, 1928, the said Le Roy D. Badgley and Katherine C. Badgley, his wife, who are the defendants herein, entered into a contract for the sale of the said premises to and with your complainants, a copy of which contract is annexed hereto, expressly referred to and hereby made part hereof and marked Exhibit "A."

3. On the said date and immediately prior to the execution of the said contract, and in order to induce your complainants to enter into the said contract, the said Le Roy D. Badgley and Katherine C. Badgley, his wife, executed an affidavit in which the said Le Roy D. Badgley and Katherine C. Badgley, his wife; swore among other things that the said premises were at the said time, free and clear of all taxes, encumbrances or liens by mortgage, decree, judgment or by statute, or by virtue of any proceeding in any Court or filed in the office of any Clerk in any County in this State, except two certain mortgages, and the said Le Roy D. Badgley and Katherine C. Badgley further swore that there were, at the time aforesaid, no judgments or decrees or attachments or orders of any court for the payment of money against them or to which they are party of any officer of the United States or of this State, or any suit or proceeding pending anywhere affecting the said premises to their knowledge, information or belief, and that no proceedings in bankruptcy or insolvency have ever been instituted by or against the said Le Roy D. Badgley and Katherine C. Badgley, his wife, as a result of which any liens existed against the said premises.

4. Relying upon the statements contained in the said affidavit, complainants entered into the said contract with the defendants and paid a five hundred ($500.00) dollar deposit thereunder by the terms of which contract the defendants agreed to convey to complainants the said premises by deed of full covenant warranty, free and clear of all encumbrances, except a certain mortgage in the sum of nine thousand ($9,000.00) dol-

lars, said deed to be delivered on August 9, 1928.

5. On or about August 9, 1928, and until September 4, 1928, complainants were ready, able and willing to purchase the said premises in accordance with the terms of the said contract but the defendants were not ready and able and are not ready and able to comply with the terms of the said contract in that they can not and could not convey a good and sufficient marketable and unclouded title by deed of warranty, free from all encumbrances, although their contract provided, in that:

(a) At the said time there was and there still is a judgment open of record in the office of the Clerk of Essex County against the defendant Le Roy D. Badgley, a certain judgment obtained by the Monarch Electric Supply Co., Inc., a corporation of New Jersey, plaintiff, *v.* the said Le Roy D. Badgley and John C. Curtis, Jr., defendants, in the Essex County Circuit Court in an action at law on default, which judgment was entered August 19, 1927, in the sum of $621.21 damages, and $78.13 costs, making a total of $699.34, which judgment is recorded in Book CC-103 of Circuit Court judgments for the said Essex County, on page 180, and which judgment was and still is a lien upon the said premises.

(b) On September 21, 1927, the defendant Le Roy D. Badgley was adjudged a bankrupt in a District Court of the United States for the District of New Jersey, and the said Le Roy D. Badgley has not yet been discharged in the said bankruptcy proceedings.

(c) Taxes for one-half of the year 1928, amounting to $100.50 and interest and costs thereon, were and are a lien against the premises.

(d) There was and is open of record a certain mortgage recorded in the Register's Office of Essex County made by the said Le Roy D. Badgley to Peter E. Bruck, 2nd, and Frieda O. Bruck, his wife, which mortgage is in the sum of five hundred ($500.00) dollars, dated June 1, 1928, and affecting and mortgages the said premises to secure the payment of the said sum and interest thereon.

(e) The said premises were and are occupied by tenants having certain rights therein.

(f) The premises are encroached by certain electric wires.

6. At the time of entering into the said contract the defendants had knowledge of all the said facts and that certain of the said statements in the said allegations were untrue. The defendants nevertheless made the said statements, knowing that the complainants would rely thereon.

7. On or about September 4, 1928, complainants served upon the defendants by registered mail notice in the form of a letter in which complainants notified defendants that they would be prepared to perform their (the complainants) part of the said contract fully at the place set for the performance of the said contract on September 25, 1928, between the hours of two and four in the afternoon and in and by which letter complainants made the said time of the essence of the said contract and in and by which letter informed defendants that they would expect to receive a conveyance of title at the said time and place, entirely in accordance with the said contract. And complainants further informed defendants thereby that upon the failure of the defendants to convey such a title the complain-

ants would demand the return of their deposit, together with search fees and interest according to law.

8. On the said September 25, 1928, complainants were prepared to perform their said contract at the said time and place but defendants were unable to convey the said title in that title was unmarketable and encumbered by reason of the conditions set forth in the fifth paragraph hereof.

9. Complainants thereupon rescinded the said contract and demanded in return said deposit of five hundred ($500.00) dollars paid in accordance with the said contract, but the said defendants have refused so to return the same.

10. After the entering into of the said contract, the complainants, in order to examine the said title incurred liability for an examination of title, amounting to $147.41.

Complainants are without adequate remedy in the courts of law and therefore pray:

1. That the said Le Roy D. Badgley and Katherine C. Badgley, his wife, may answer this bill of complaint and each statement therein made.

2. That the defendants be decreed and enjoined to repay to complainants the sum of five hundred ($500.00) dollars paid as deposit under the said contract together with reasonable expenses for examining title and lawful interest thereon.

3. That the said contract be delivered up for cancellation upon the payment of the said sums

of money aforementioned, by the said defendants and duly cancelled by the said parties.

4. That the sum of five hundred ($500.00) dollars, together with interest and search fees be impressed as a lien upon the said lands and premises and in the event the said defendants do not pay the same to the complainants, that the said property be sold to raise the said sum due to the complainants.

5. That this Court grant these complainants such full and further relief as the Court may deem just and equitable under the circumstances.

6. That a writ of subpoena may issue commanding the defendants to answer this bill of complaint without oath (answering under oath being hereby expressly waived) and to abide by such decree as this Court may make in the premises.

JOSEPH ZEMEL,
Solicitor for and of Counsel with Complainants.

EXHIBIT "A."

ARTICLES OF AGREEMENT, made the twelfth day of July, in the year of Our Lord One Thousand Nine Hundred and twenty-eight,

BETWEEN Le ROY D. BADGLEY and KATHERINE C. BADGLEY, his wife of the Township of Maplewood, in the County of Essex and state of New Jersey, party of the first part;

AND CHARLES CLARK and MARGARET CLARK, his wife of the City of Newark, in the County of Essex and State of New Jersey, party of the second part,

WITNESSETH, That the said party of the first part, for and in consideration of the sum of —Eleven Thousand ($11,000.00) dollars—to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of full covenant warrant, free from all encumbrance except as hereinafter set forth, on or before the ninth day of August, 1928, next ensuing the date hereof, all that lot, tract or parcel of land and premises, hereinafter particularly described situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey, known and designated as No. 267 Amherst street, East Orange, containing a two-family house and which premises are more particularly described as follows:

BEGINNING on the westerly side of Amherst Street at a point distant 371 feet and 84 hundredths of a foot northerly from Elmwood Avenue; thence running along said Amherst Street northerly 29 feet; thence westerly at right angles to Amherst Street 100 feet; thence Southerly parallel with Amherst Street 29 feet; thence easterly 100 feet to the place of BEGINNING.

Being the same premises conveyed to Le Roy D. Badgley by deed recorded in the Register's Office of Essex County in Book B-78 of Deeds for said County, page 435.

AND the said Charles Clark and Margaret Clark, his wife, for themselves, their heirs, execu-

tors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of—Eleven Thousand ($11,000.00) dollars—as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement, for which this is also a receipt. $500.00

On delivery of deed, subject to adjustments, cash. $500.00

By taking the premises subject to the present Building & Loan mortgage. 9,000.00

On Bond and mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at six (6%) per cent. payable semi-annually, for three years.—$1,000.00 and value of Building & Loan back shares as hereinafter set forth. The sellers agree to execute to the purchasers an assignment of the Building & Loan Association shares and the withdrawal value of the said shares in accordance with the statement of the Secretary of the said Association shall be added to the said mortgage.

The said mortgage shall be amortized as follows:

At the end of one year from the date thereof, the sum of two hundred and fifty ($250.00) dollars shall be paid. At the end of two years an

additional sum of two hundred and fifty ($250.00) dollars shall be paid, and at the end of the third year the balance shall be paid.

It is further understood and agreed that the parties of the first part will re-decorate ceilings of two of the bedrooms on the third floor of the house.

It is further understood and agreed and it is hereby represented that the said house and each and every part thereof, as well as all the plumbing and heating work therein is in good and proper and working order, and the purchasers are hereby given the privilege of going in or upon the said premises for the making of any examination for the purpose of ascertaining the condition of the premises.

This contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the first part hereby agrees to pay to
a commission of %
on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, their heirs and assigns may enter into and upon the said land and premises on the ninth day of August, 1928, next ensuing the date hereof, and from thence take the rents, issues and profits to their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of full cove-

nant warranty shall be delivered and received at the office of Joseph Zemel, Esq., 763 Broad Street, Newark, New Jersey, between the hours of ten in the forenoon and four o'clock in the afternoon, on the said ninth day of August, 1928, next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned, and allowed as of the day of delivery of said deed.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments, and that no adjoining premises encroach thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House

Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the sale of Land for non-payment of the municipal taxes or assessments, or adverse or color of title possession.

It at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purpose of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed. Unconfirmed improvements or assessments, if any, shall be paid and allowed by the seller on account of the purchase price, if the improvement or work has been completed.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of
which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands

and seals the day and year first above mentioned.

Le Roy D. Badgley (L. S.)
Katherine C. Badgley (L. S.)
C. Clark (L. S.)
Margaret Clark (L. S.)

Signed, Sealed and Delivered
in the presence of

Joseph Zemel

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to—at same hour and place.

Witness our hands and seals this
day of A. D., 19

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ESSEX. }

BE IT REMEMBERED, That on this twelfth day of July in the year of our Lord One Thousand Nine Hundred and twenty-eight, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared

Le Roy D. Badgley and Katherine C. Badgley, his wife who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

Bill of Complaint—Exhibit "A."

And the said
Katherine C. Badgley, wife of Le Roy D. Badgley, being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

Joseph Zemel,
A Master in Chancery of New Jersey.

ANSWER.

IN CHANCERY OF NEW JERSEY.

CHARLES CLARK and MARGARET CLARK, his wife, *Complainants,* *vs.* LE ROY D. BADGLEY and KATHERINE C. BADGLEY, his wife, *Defendants.*	*On Bill, etc.* *Answer.*

The defendants, Le Roy D. Badgley and Katherine C. Badgley, his wife, of the Township of Maplewood, County of Essex and State of New Jersey, answering the complainants' bill of complaint, say that:

1. On or about July 12, 1928 the defendants were the owners of premises known as #267 Amherst street in the City of East Orange, County of Essex and State of New Jersey, and more particularly described as set forth in the complainants' bill.

2. The defendants admit that on July 12, 1928 they entered into a contract for the sale of the said premises to the complainants, but they refer to the contract for greater certainty.

3. They admit the allegations of paragraph 3.

4. They admit the allegations of paragraph 4.

5. The defendants deny that the complainants were ready, able and willing to purchase said premises in accordance with the terms of the contract on or about August 9, 1928 and until

September 4, 1928 and they deny that they were not ready and able to comply with the terms of the said contract and they deny that they could not convey a good and sufficient marketable and unclouded title by deed of warranty, free from all encumbrances, other than those specified in the contract hereinbefore referred to.

The defendants admit that there was a judgment and still is a judgment open on record in the office of the Clerk of Essex County against the defendant, Le Roy D. Badgley obtained by the Monarch Electric Supply Co., Inc., a corporation of New Jersey, against the said Le Roy D. Badgley and John C. Curtis, Jr., defendants, in the Essex County Circuit Court on August 19, 1927 in the total amount of $699.34, but they further say that on September 21, 1927, and within four months of the time of the entering of the said judgment, the defendant, Le Roy D. Badgley, was adjudged a bankrupt in the District Court of the United States for the District of New Jersey and turned over all of his assets to a trustee in bankruptcy appointed in said proceedings, and said Le Roy D. Badgley has not as yet been discharged in such bankruptcy proceedings.

The defendants were ready on August 9, 1928 and at all times subsequent thereto and still are ready to tender to the complainants a warranty deed to the property and in all ways to fulfill the contract entered into between the complainants and the defendants, but the defendants were advised on various occasions before tendering the said deed to the complainants that the said complainants would refuse to accept the said deed because of the existence of the judgment against

the defendant on record in the office of the Clerk of Essex County, the defendants being notified by the complainants that the said judgment was their only reason for refusing to accept said warranty deed as tendered; the defendants also refusing to satisfy the said judgment as the said judgment constitutes no lien upon the premises, which are the subject of this action, as said judgment was obtained against the said Le Roy D. Badgley, one of the defendants herein, within four months of the time that he was adjudged a bankrupt, while the said property, which is the subject of this action, was not acquired by the said Le Roy Badgley until subsequent to the time that he was adjudged a bankrupt.

The defendants further state that the said premises were rented to tenants with the permission, authorization and at the request of the complainants.

The defendants deny that the property is encroached by electric wires and if the said wires do encroach upon the said premises, the complainants saw and knew of the said wires' existence on and before the time of entering into the contract with the defendants, referred to in the bill of complaint.

6. The defendants deny that they made any statements or allegations which were untrue.

7. The defendants admit the allegations of paragraph 7.

8. The defendants deny the allegations of paragraph 8 and say that on the 25th day of September, 1928 they tendered to the complainants' attorney, the complainant not being present and failing to appear at the time set forth in the let-

ter, a warranty deed in accordance with the contract and were ready, able and willing to perform all the terms of the said contract, said warranty deed, however, being refused by the attorney for the complainants on behalf of the complainants by reason of the existence of the judgment of the Monarch Electric Supply Co., Inc., against Le Roy D. Badgley aforesaid and it being agreed at that time by the attorney for the complainants on behalf of the complainants that the said judgment was the only reason for the complainants' refusal to accept the said warranty deed.

9. The defendants deny that the complainants rescinded the said contract, but allege that the complainants breached the said contract. Wherefore the defendants have refused to return the deposit made by the complainants with the defendants.

10. The complainants have no knowledge or information sufficient to form a belief as to the allegations of paragraph 10 and, therefore, deny the same.

11. The complainants have the full, complete and adequate remedy at law.

WHEREFORE, the defendants pray that the complainants' bill of complaint be dismissed and that the defendants be allowed such costs against the complainants as they shall be entitled to under this action.

HARLEY, COX & WALBURG,
Solicitors of Defendants.

NOTICE TO STRIKE OUT ANSWER.

IN CHANCEY OF NEW JERSEY.

CHARLES CLARK and MARGARET CLARK, his wife, *Complainants,* *vs.* LE ROY D. BADGLEY and KATHERINE C. BADGLEY, his wife, *Defendants.*	*On Bill, etc.* *Notice.*

To Harley, Cox & Walburg, Esqs., solicitors for defendants.

SIRS:

TAKE NOTICE that on Tuesday, October 30, 1928 at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall move before the Chancellor at Chancery Chambers at 1060 Broad St., Newark, N. J., to strike out the answer filed herein by you on behalf of the defendants on the ground that the said answer fails to set forth a valid defense to this action in that the defendants by the said answer admit the existence of the judgment set forth in paragraph 5A of the bill of complaint.

JOSEPH ZEMEL,
Solicitor for and of Counsel with Complainants.

AMENDED ANSWER.

IN CHANCERY OF NEW JERSEY.

CHARLES CLARK and MARGARET CLARK, his wife, *Complainants,* *vs.* LE ROY D. BADGLEY and KATHERINE C. BADGLEY, his wife, *Defendants.*	*On Bill, etc. Amended Answer.*

The defendants, Le Roy D. Badgley and Katherine C. Badgley, his wife, of the Township of Maplewood, County of Essex and State of New Jersey, answering the complainants' bill of complaint, say that:

1. On or about July 12, 1928 the defendants were the owners of premises known as #267 Amherst street, in the City of East Orange, County of Essex and State of New Jersey, and more particularly described as set forth in the complainants' bill.

2. The defendants admit that on July 12, 1928 they entered into a contract for the sale of the said premises to the complainants, but after they refer to the contract for greater certainty.

3. They admit the allegations of paragraph 3.

4. They admit the allegations of paragraph 4.

5. The defendants deny that the complainants were ready, able and willing to purchase said premises in accordance with the terms of the contract on or about August 9, 1928 and until Sep-

tember 4, 1928 and they deny that they were not ready and able to comply with the terms of the said contract and they deny that they could not convey a good and sufficient marketable and unclouded title by deed of warranty, free from all encumbrances, other than those specified in the contract hereinbefore referred to.

The defendants admit that there was a judgment and still is a judgment open on record in the office of the Clerk of Essex County against the defendant, Le Roy D. Badgley, obtained by the Monarch Electric Supply Co., Inc., a corporation of New Jersey, against the said Le Roy D. Badgley and John C. Curtis, Jr., defendants, in the Essex County Circuit Court on August 19, 1927 in the total amount of $699.34, but they further say that the said judgment was obtained against the said Le Roy D. Badgley at a time when the said Le Roy D. Badgley was insolvent and that on September 21, 1927 and within four months of the time of the entering of the said judgment, the defendant, Le Roy D. Badgley, was adjudged a bankrupt in the District Court of the United States for the District of New Jersey, and turned over all his assets to a trustee in bankruptcy appointed in the said proceedings and listed the said debt of the Monarch Electric Supply Company, Inc., in his schedule annexed to the petition to be adjudicated a bankrupt and that the said Le Roy D. Badgley turned over all of his assets to a trustee in bankruptcy appointed in the said proceedings. The said Le Roy D. Badgley had not been discharged in the said bankruptcy proceedings up to and including September 25, 1928.

The defendants were ready on August 9, 1928 and at all times subsequent thereto and still are

ready to tender to the complainants a warranty deed to the property and in all ways to fulfill the contract entered into between the complainants and the defendants, but the defendants were advised on various occasions before tendering the said deed to the complainants that the said complainants would refuse to accept the said deed because of the existence of the judgment against the defendant on record in the office of the Clerk of Essex County, the defendants being notified by the complainants that the said judgment was their only reason for refusing to accept said warranty deed as tendered; the defendants also refusing to satisfy the said judgment as the said judgment constitutes no lien upon the premises, which are the subject of this action, as said judgment was obtained against the said Le Roy D. Badgley, one of the defendants herein, within four months of the time that he was adjudged a bankrupt, while the said property, which is the subject of this action, was not acquired by the said Le Roy D. Badgley until subsequent to the time that he was adjudged a bankrupt.

The defendants further state that the said premises were rented to tenants with the permission, authorization and at the request of the complainants.

The defendants deny that the property is encroached by electric wires and if the said wires do encroach upon the said premises, the complainants saw and knew of the said wires' existence on and before the time of entering into the contract with the defendants, referred to in the bill of complaint.

6. The defendants deny that they made any statements or allegations which were untrue.

Amended Answer.

7. The defendants admit the allegations of paragraph 7.

8. The defendants deny the allegations of paragraph 8 and say that on the 25th day of September, 1928 they tendered to the complainants' attorney, the complainant not being present and failing to appear at the time set forth in the letter, a warranty deed in accordance with the contract and were ready, able and willing to perform all the terms of the said contract, said warranty deed, however, being refused by the attorney for the complainants on behalf of the complainants by reason of the existence of the judgment of the Monarch Electric Supply Company, Inc., against Le Roy D. Badgley aforesaid and it being agreed at that time by the attorney for the complainants on behalf of the complainants that the said judgment was the only reason for the complainants' refusal to accept the said warranty deed.

9. The defendants deny that the complainants rescinded the said contract, but allege that the complainants breached the said contract. Wherefore the defendants have refused to return the deposit made by the complainants with the defendants.

10. The complainants have no knowledge or information sufficient to form a belief as to the allegations of paragraph 10 and, therefore, deny the same.

11. The complainants have the full, complete and adequate remedy at law.

WHEREFORE, the defendants pray that the complainants' bill of complaint be dismissed and that the defendants be allowed such costs against

the complainants as they shall be entitled to under this action.

HARLEY, COX & WALBURG,
Solicitors of Defendants.

SPECIAL REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between

CHARLES CLARK, *et al.*,
Complainants,

and

LE ROY D. BADGLEY, *et al.*,
Defendants.

Special Replication.

In reply to the defense stated in paragraphs 5, 8 and 9 of the amended answer and not anticipated in the bill of complaint, complainants by leave of the Court, say that:

1. They deny the allegations contained in paragraph 5 of the amended answer except the second subdivision thereof and except insofar as the same amends the allegations contained in the complaint.

2. They deny the allegation contained in paragraph 8 of the amended answer.

3. They deny the allegation contained in paragraph 9 of the amended answer.

Complainants join issue upon the remainder of the answer.

JOSEPH ZEMEL,
Solicitor for Complainants.

Consent is hereby given to the filing of the foregoing special replication as of time.

HARLEY, COX & WALBURG,
Solicitors for Defendants.

AGREED STATE OF FACTS.

70-221.

IN CHANCEY OF NEW JERSEY.

Between CHARLES CLARK, *et al.*, *Complainants,* *and* LE ROY D. BADGLEY, *et al.*, *Defendants.*	*On Bill, etc.* *Agreed State of Facts.*

It is hereby agreed by and between the complainants and the defendants, by their attorneys, to submit the above-entitled matter to the Court on the following state of facts:

1. The defendants, Le Roy D. Badgley and Catherine C. Badgley, are and were at all times hereinafter mentioned husband and wife, and on July 12, 1928 were the title holders, as disclosed by the records of Essex County, of the property which is the subject matter of this litigation.

2. On July 12, 1928 the complainants and the defendants entered into a contract whereby the complainants agreed to buy and the defendants agree to sell the aforementioned property, and by the terms of the contract title was to pass on or about August 9, 1928, the complainants making a deposit of Five Hundred Dollars ($500) with the defendants to bind the contract and to be applied toward the purchase price of the property in accordance with the provisions of the contract. Time was not made of the essence by

the contract. An affidavit of title was executed by the defendants at the same time which will be presented in evidence at the time of the trial of this case.

3. On the nineteenth day of August, 1927 a judgment was entered against Le Roy D. Badgley and in favor of the Monarch Electrical Supply Company, Inc., a corporation, in the amount of Six Hundred Twenty-one Dollars and Twenty-one Cents ($621.21), which together with Seventy-eight Dollars and Thirteen Cents ($78.13) costs, made a judgment of record against the said Le Roy D. Badgley of Six Hundred Ninety-nine Dollars and Thirty-four Cents ($699.34), which judgment was still uncancelled of record on July 12, 1928 and at all other dates hereinafter mentioned. The said judgment was entered against the defendant, Le Roy D. Badgley, upon a certain note made by the said Le Roy D. Badgley and endorsed by him to the Monarch Electrical Supply Company, Inc. At the time the said judgment was entered against Badgley he was insolvent.

4. On September twenty-first, 1927 said Le Roy D. Badgley filed a voluntary petition in bankruptcy with the United States District Court for the District of New Jersey and was on that day adjudicated bankrupt. The schedules in bankruptcy filed by him included the Monarch Electrical Supply Company as a creditor of his, and the said Le Roy D. Badgley turned over all of his property and assets to the Trustee in Bankruptcy appointed to administer the estate.

5. The said Le Roy D. Badgley did not own the property which is the subject matter of this suit at or before the time that he was adjudicated

bankrupt, but acquired the property on the twenty-ninth day of March, 1928 with assets which were not in existence at the time of the adjudication of bankruptcy.

6. At the time of the signing of the aforementioned contract on July 12, 1928 the defendant, Le Roy D. Badgley, had not petitioned the United States District Court for his discharge, but the said Le Roy D. Badgley filed a petition for his discharge in bankruptcy on or about the twentieth day of August, 1928. Upon his petition being filed he was notified that his petition would be heard by the Court on October 29, 1928 at which time he was discharged as a bankrupt.

7. Various adjournments for the closing in this matter were had and finally on or about September 4, 1928, the complainants sent to defendants a letter in which they set September 25, 1928 as the date for the closing of the matter and by which they made time of the essence of the said contract. The original letter will be produced at the trial by the defendants and receipt thereof admitted.

8. The defendants were advised at various times by the complainants that the complainants would not accept the defendants' deed to the property in question because of the fact that the judgment of the Monarch Electrical Supply Company, Inc., was still uncancelled of record and because of the fact that the said Le Roy D. Badgley had not yet been discharged as a bankrupt, and the defendants were advised several days prior to September 25, 1928, the day set for the closing of title, that the complainants would not accept the warranty deed if it were tendered by the defendants, as the judgment of the Monarch

Electrical Supply Company, Inc. was still uncancelled of record and the said Le Roy D. Badgley had not yet been discharged as a bankrupt and would not be discharged as a bankrupt by September 25, 1928.

9. On September 25, 1928 the defendants tendered a warranty deed to the complainants at the office of the complainants' attorney in accordance with the letter written them. They advised the complainants' attorney that they understood that he would not accept the warranty deed because of the fact that the judgment aforementioned still remained uncancelled of record and that the said Le Roy D. Badgley had not been discharged as a bankrupt. The defendants advised the complainants' attorney that if he would accept this deed that they would then entirely perform the contract by paying taxes and paying off a second mortgage then against the property in accordance with the terms of the contract. After some discussion between the attorneys for the defendants and the attorney for the complainants, the attorney for the complainants refused to accept the deed on behalf of his clients, again stating that his ground for refusing to accept it was that there was the aforementioned judgment of record against the said Le Roy D. Badgley which had not yet been cancelled from the records and that the said Le Roy D. Badgley had not yet been discharged as a bankrupt. The complainants were ready and willing to perform their part of the contract but refused to do so, giving as their reason the existence of the said judgment and the said bankruptcy proceedings.

10. There were on the 25th day of September, 1928 taxes in the amount of One Hundred Dollars

and Fifty Cents ($100.50) unpaid upon the property in question in the suit, the said taxes not being paid by the defendants because of the fact that the complainants advised the defendants prior to the date set for passing of title, that they would not accept the title so long as the judgment of the Monarch Electrical Supply Company remained of record and the defendant, Le Roy D. Badgley, was not discharged as a bankrupt.

11. The complainants notified the defendants on the 25th day of September, 1928 that they held the defendants in default upon the contract to purchase the property, and the defendants notified the complainants that they held the complainants in default upon the contract.

12. Subsequently thereto the present bill was filed by the complainants against the defendants, asking a rescission of the contract entered into by the complainants with the defendants on the ground that they had been induced by fraud to enter into the contract; and the said bill asked as further relief the return of the Five Hundred Dollars ($500) deposit made by the complainants to the defendants on the said contract, together with the sum of One Hundred Forty-seven Dollars and Forty-one Cents ($147.41) costs incurred by the complainants in having a search made of the property and the title examined, and further asked that a lien be impressed upon the property for the amount of the complainants' claim until it is paid.

13. The defendants by their amended answer deny that the complainants are entitled to the relief which they seek and deny that there was fraud upon the part of the defendants, which

induced the complainants to enter into a contract with the defendants, and further state that the complainants breached the contract above referred to and are, therefore, not entitled to the return of any money.

14. The complainants reserve the right to introduce testimony at the time of trial to show that the defendants had leased premises in the property, which is the subject matter of this action, and that tenants were occupying them, having certain rights therein, and the defendants reserve the right to introduce testimony that this was with the knowledge, consent and approval of the complainants.

JOSEPH ZEMEL,
Solicitor for Complainants.

HARLEY, COX & WALBURG,
Solicitors for Defendants.

OPINION OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

Between

CHARLES CLARK, *et als.*,
Complainants,

and

LE ROY BADGLEY, *et als.*,
Defendants.

Opinion.

On final hearing.

A judgment recovered against an adjudged bankrupt within four months prior to the filing of the petition in bankruptcy is not void as to after acquired property unless and until the bankrupt is discharged.

For complainants, Mr. Joseph Zemel.

For defendants, Messrs. Harley, Cox & Walburg.

BACKES, *Vice-Chancellor:*

The bill is to recover down money on a contract made by defendants to sell their property to complainants. The ground of recovery is that the title was unmarketable in this respect: There was of record a judgment against one of the defendants. Within four months after the recovery of the judgment he had been petitioned in bankruptcy but not discharged at the time the contract was to be performed. Time was of the essence of the contract. The property was acquired after the bankruptcy proceedings. The complainants insist that the judgment was a lien and that a discharge in bankruptcy was required to release

it, while the defendants claim that it was void under section 67f of the Bankruptcy Act, which provides:

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person, who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

The provision is obviously in aid of the administration of the bankrupt's estate. The judgment is null and void only as to the assets of the bankrupt to be administered. Kobrin *v.* Drazin, 97 N. J. Eq. 400. It was not intended to benefit the bankrupt, and as to him the judgment becomes defunct only upon his discharge. If he is refused a discharge the judgment survives. Kinmouth *v.* Braeuntigam, 63 N. J. Eq. 103; Smith *v.* Soldier's Business Messenger & Dispatch Co., 35 N. J. L. 60; American Woolen Co. *v.* Maaget, 86 Conn. 234; Smith *v.* First Nat. Bk., 76 Colo. 34; Chicago B. & Q. R. R. Co. *v.* Hall, 229 U. S. 511, is not inconsistent with this view. That case involved a garnishment of wages of a bankrupt. The wages were part of the bankrupt's estate and

passed to the trustee but were exempt to the bankrupt. The United States Supreme Court held the wages to be unaffected by the lien of the judgment and approved the ruling in Re Forbes, 186 Fed. Rep. 79, that section 67f was for the benefit of the bankrupt to the extent that it "annuls all liens both as against the property which the trustee takes and that which may be set aside to the bankrupts as exempt." The property here in question was not a part of the bankrupt estate. As the bankrupt had not been discharged and the judgment released on the day of performance the title was unmarketable and the complainants of right rescinded the contract and are entitled to recover.

The decree will provide for a lien on the premises for the down money only, as in Goldstein *v.* Ehrlick, 96 N. J. Eq. 52. The prayer for a lien marks the distinction between the cited case and San Giacomo *v.* Oraton Inv. Co., 6 N. J. Adv. R. 1365, and Bailey *v.* B. Holding Co., 7 Adv. R. 414.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between	
CHARLES CLARK, *et al.*, *Complainants,*	*On Bill, &c.*
and	*Final Decree.*
LE ROY D. BADGLEY, *et al.*, *Defendants.*	

This matter coming on to be heard on the eighteenth day of February, 1929, in the presence of Joseph Zemel, solicitor for the complainants, and Harley, Cox & Walburg, solicitors for the defendants, and the Court having examined the pleadings and considered the statements of counsel in open court and heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the Court that on the twelfth day of July, 1928, the defendants Le Roy D. Badgley and Katherine C. Badgley, his wife, entered into a contract in writing whereby they agreed to convey to the complainants for the sum of eleven thousand ($11,000.00) dollars on or before the ninth day of August, 1928, all those certain lands and premises situate in the City of East Orange, County of Essex and State of New Jersey, known as No. 267 Amherst street, East Orange, and more particularly described as follows:

> BEGINNING on the westerly side of Amherst Street at a point distant three hundred seventy-one feet and eighty-four hundredths of a foot northerly from Elmwood

Avenue; thence running along said Amherst Street northerly twenty-nine feet; thence westerly at right angles to Amherst Street one hundred feet; thence southerly parallel with Amherst Street twenty-nine feet; thence easterly one hundred feet to the place of BEGINNING.

And it further appearing that the complainants paid to the defendants a deposit of five hundred ($500.00) dollars as down money on the said contract and that by written notice duly served by the complainants upon the defendants the twenty-fifth day of September, 1928, was set for the closing of the said contract and which date was made the essence of the said contract.

And it further appearing to the Court that on the said date so made of the essence of the said contract the defendants were unable to convey to the complainants good and sufficient title by reason of the existence of a judgment of the Monarch Electric Company, and it further appearing to the Court that the complainants thereupon rescinded the said contract;

And the Court being of the opinion that the complainants are entitled to the return of their down money of five hundred ($500.00) dollars, together with interest thereon, and search fees amounting to $147.41, as prayed for by them in the bill of complaint filed herein,

It is on this 26th day of March, 1929, ORDERED, ADJUDGED and DECREED that the defendants, Le Roy D. Badgley and Katherine C. Badgley, pay to the complainants Charles Clark and Margaret Clark, his wife, or to their solicitors, the sum of five hundred ($500.00) dollars with interest there-

on from the twelfth day of July, 1928, amounting to $20.00, and making a total of $520.00, together with the sum of $147.41 search fees, together with taxed costs of this suit as hereinafter allowed.

And it is further ordered, adjudged and decreed that the said sum of five hundred ($500.00) dollars, together with interest thereon from July 12, 1928, amounting to $20.00, and making a total of $520.00, and taxed costs of this suit shall be and become and they hereby are impressed as a lien upon the said lands and premises in favor of the said complainants to the end that said lands and premises may, upon the subsequent application of the complainants, be sold pursuant to law and under the direction of this court to satisfy such lien. And that in case a deficiency should arise upon such sale, the said defendants may be ordered by this court to pay such deficiency.

And it is further ordered that the said defendants pay to the said complainants the cost of this suit to be taxed, including a counsel fee of one hundred ($100.00) dollars, which is hereby allowed to the said complainants, and that in default of such payment, execution issue therefor according to the practice of this court against the goods and chattels, lands, tenements, hereditaments and real estate of the said Le Roy D. Badgley and Katherine C. Badgley, his wife.

Respectfully advised.

PETITION OF APPEAL.

Filed April 2, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES CLARK and MARGARET CLARK, his wife, *Complainants-Appellees,* *vs.* LE ROY D. BADGLEY and KATHERINE C. BADGLEY, his wife, *Defendants-Appellants.*	*On Petition from the Court of Chancery.* *Petition of Appeal.*

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Le Roy D. Badgley and Katherine C. Badgley, appellants in the above-entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 26th day of March, 1929 in a certain cause in said Court of Chancery wherein the said Charles Clark and Margaret Clark, his wife, were complainants, and Le Roy D. Badgley and Katherine C. Badgley, his wife, were defendants, in this respect, to wit: that the said decree adjudges:

> "This matter coming on to be heard on the eighteenth day of February, 1929, in the presence of Joseph Zemel, solicitor for the complainants, and Harley, Cox and Walburg, solicitors for the defendants, and the court

having examined the pleadings and considered the statements of counsel in open court and heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the court that on the twelfth day of July, 1928, the defendants Le Roy D. Badgley and Katherine C. Badgley, his wife, entered into a contract in writing whereby they agreed to convey to the complainants for the sum of eleven thousand ($11,000.00) dollars on or before the ninth day of August, 1928, all those certain lands and premises situate in the City of East Orange, County of Essex and State of New Jersey, known as #267 Amherst Street, East Orange, and more particularly described as follows:—

BEGINNING on the westerly side of Amherst Street at a point distant three hundred seventy-one feet and eighty-four hundredths of a foot northerly from Elmwood Avenue; thence running along said Amherst Street northerly twenty-nine feet; thence westerly at right angles to Amherst Street one hundred feet; thence southerly parallel with Amherst Street twenty-nine feet; thence easterly one hundred feet to the place of BEGINNING.

And it further appearing that the complainants paid to the defendants a deposit of five hundred ($500.) dollars as down money on the said contract and that by written notice duly served by the complainants upon the defendants the twenty-fifth day of September, 1928, was set for the closing of the said contract and which date was made the essence of the said contract.

And it further appearing to the court that on the said date so made of the essence of the said contract the defendants were unable to convey to the complainants good and sufficient title by reason of the existence of a judgment of the Monarch Electric Company, and it further appearing to the court that the complainants thereupon rescinded the said contract;

And the court being of the opinion that the complainants are entitled to the return of their down money of five hundred ($500.) dollars, together with interest thereon, and search fees amounting to $147.41, as prayed for by them in the Bill of Complaint filed herein,

It is on this twenty-sixth day of March, ORDERED, ADJUDGED and DECREED that the defendant, Le Roy D. Badgley and Katherine C. Badgley, pay to the complainants Charles Clark and Margaret Clark, his wife, or to their solicitors, the sum of five hundred ($500.) dollars with interest thereon from the twelfth day of July, 1928, amounting to $20.00, and making a total of $520.00, together with the sum of $147.41 search fees, together with taxed costs of this suit as hereinafter allowed.

And it is further ordered, adjudged and decreed that the said sum of five hundred ($500.) dollars, together with interest thereon from July 12, 1928, amounting to $20.00, and making a total of $520.00, and taxed costs of this suit shall be and become and they hereby are impressed as a lien upon the said lands and premises in favor of the said complainants to the end that said lands and

premises may, upon the subsequent application of the complainants, be sold pursuant to law and under the direction of this court to satisfy such lien. And that in case a deficiency should arise upon such sale, the said defendants may be ordered by this court to pay such deficiency.

And it is further ordered that the said defendants pay to the said complainants the cost of this suit to be taxed, including a counsel fee of one hundred dollars ($100), which is hereby allowed to the said complainants, and that in default of such payment, execution issue therefor according to the practice of this court against the goods and chattels, lands, tenements, hereditaments and real estate of the said Le Roy D. Badgley and Katherine C. Badgley, his wife."

The petitioners appeal from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that:

1. The said judgment referred to therein does not constitute a lien upon the premises contracted by the defendants to be sold to complainants for the reason that the said judgment was entered against the said defendant, Le Roy D. Badgley, within four months of his adjudication of bankruptcy and at a time when the said Le Roy D. Badgley was insolvent; and for the further reason that the premises in question contracted to be sold by the defendants to the complainants were acquired by the said defendant Le Roy D. Badgley after the adjudication of the said Le Roy D. Badgley as a bankrupt and were acquired with assets of the said Le Roy D. Badgley which were not in existence at the time of the said adjudication.

2. The defendants are and were on the twenty-fifth day of September, 1928, able to convey to the complainants good and sufficient title to the premises in question, the said judgment referred to in the decree not constituting a lien upon the said property nor rendering the defendants' title thereto in anywise unmarketable.

The petitioners, therefore, pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court may seem proper.

HARLEY, COX & WALBURG,
Solicitors for and of Counsel with
Defendants-Appellants.

ANSWER TO PETITION OF APPEAL.

Filed April 2, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES CLARK and MARGARET CLARK, *Complainants-Appellees,* *vs.* LE ROY D. BADGLEY and KATHERINE C. BADGLEY, *Defendants-Appellants.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

The answer of Charles Clark and Margaret Clark, his wife, the above named complainants-appellees to the petition of appeal of Le Roy D. Badgley and Katherine C. Badgley, his wife, the above named appellants.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was, on the twenty-sixth day of March, 1929, made and entered in the Court of Chancery of New Jersey, in a cause wherein Charles Clark and Margaret Clark, his wife, are complainants and Le Roy D. Badgley and Katherine C. Badgley, his wife, are the defendants, for the purposes in the said petition mentioned and as therein set forth. But as to the substance and form of the said decree, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and verily believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

JOSEPH ZEMEL,
Solicitor for and of Counsel with Appellees.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between CHARLES CLARK and MARGARET CLARK, his wife, *Complainants-Appellees,* *and* LEROY D. BADGLEY and KATHERINE C. BADGLEY, his wife, *Defendants-Appellants.*	*On Bill, etc.* *On Appeal from the Court of Chancery.*

BRIEF OF APPELLANTS.

This matter is before the court on the complainants' bill for rescission of a contract for the purchase by the complainants of certain real property located in the City of East Orange, County of Essex, and State of New Jersey.

The admitted facts in the case in the order in which they may be most readily considered for the disposition of the question raised by the defendants are as follows:

On July 12, 1928, the defendants entered into a contract with the complainants for the sale to the complainants of certain real property. On August 19, 1927, a judgment was entered against the defendant, LeRoy D. Badgley, in favor of the Monarch Electric Supply Company in the Essex County Circuit Court. Badgley was insolvent at the time. On September 21, 1927, LeRoy Badgley filed a voluntary petition in bankruptcy and was adjudged a bankrupt on that day. This judgment was included in the schedule of liabilities attached to the petition. The property in question was acquired on March 29, 1928, after the filing of the petition and was

purchased with assets which were not in existence when the petition was filed. Time was made of the essence of the contract September 25, 1928. Badgley's petition for discharge was filed August 20, 1928, and his discharge granted October 29, 1928.

It is the complainants' contention that the judgment constitutes a lien on the premises and the defendants', that it does not.

POINT I.

Since the property in question was acquired after Badgley's adjudication of bankruptcy, it does not pass to his trustee and was not subject to the claims of his old creditors.

It is admitted in the case at bar that the property in question was acquired after Badgley's adjudication and before his discharge and was purchased with assets which were not in existence at the time of the adjudication. Such property under the universally accepted rule belongs absolutely to the bankrupt, exempt from the claims of his prior creditors.

Section 70a of the Bankruptcy Act provides as follows:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except insofar as it is to property, which is exempt, to all (1) documents relating to his property; (2) interest in patents, patent rights, copyrights, and trade marks; (3) powers which he might have exercised for his own benefit, but not those he might have exercised for some other person; (4) property transferred by him in fraud of his cred-

itors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon or sold under judicial process against him; (6) rights of action arising upon contracts or from the unlawful taking or detention of or injury to, his property'' [(1898) 30 Stat. L. 566].

Under this section it is obvious that property acquired after the adjudication does not pass to the trustee and is therefore not subject to the claims of the bankrupt's old creditors. The authorities seem to be uniform upon this point.

Remington (Vol. 4, Sec. 1395) says:

> ''Property acquired after adjudication does not pass to the trustee at all, but belongs to the debtor's new estate and is subject only to the claims of new creditors.''

Collier, another eminent authority, is in accord with this view. 2 Collier on Bankruptcy, 1641:

> ''The trustee only acquires such property as belonged to the bankrupt as of the time the petition was filed. Property not then owned but acquired after the adjudication, and before the discharge, does not vest in the trustee, but becomes the bankrupt's clear of the claims of creditors, save those after the commencement of the proceedings or those, who for statutory reasons are not affected by the discharge. Property acquired between the filing of the petition and the adjudication is subject to the same rule as after acquired property and belongs to the bankrupt. This rule is especially applicable in case of earnings by labor and services performed subsequent to the filing of the petition.''

Loveland also agrees (Vol. I, p. 775):

> ''In this country after acquired property does not go to the trustee as a part of the estate but belongs to the debtor's new estate. * * * Property acquired by a bankrupt

after his adjudication is clearly after acquired property."

Because the status of after acquired property is of the utmost importance, the defendants have made an exhaustive search for decisions concerning controversies either analogous or identical with that before the court for determination. Without desiring to appear unnecessarily lengthy in the discussion of the point, they would like to cite a few of those which appear helpful.

In the case of *In re Rennie,* 2 A. B. R. 182, the matter was before the Referee in Bankruptcy for the United States District Court for Southern District of Indian Territory on objection to the bankrupt's discharge. Rennie, a Chickasaw Indian, acquired an undivided interest in the lands of the Chickasaw nation by virtue of a treaty between the said nation and the United States, which treaty was consummated after the adjudication of bankruptcy. While the object of the creditors in opposing the discharge does not appear in the opinion it is fairly inferable that they sought to have Rennie's interest in the lands charged with his debts.

The referee said:

"And as to the question raised in the third specification, it is shown upon its face that it is property acquired after the bankrupt's adjudication. Hence it is no part of the assets of the bankrupt's estate and would not now become so by operation of law."

In re Lineberry, 183 Fed. 337, the syllabus is as follows:

An assignment to secure a debt of wages to be earned in the future creates no lien until the wages have been earned and where prior to that time the debtor is adjudged a bankrupt, and is subsequently discharged, the debt is

extinguished from the date of the adjudication, and no lien arises as to wages earned thereafter, which become the property of the bankrupt, free from the claims of all creditors, including the assignee.

The Court, per *Gubb, D. J.*, said:

> "As to earnings after adjudication the case is different. Such earnings form no part of the bankrupt estate but belong to the bankrupt. As against dischargeable debts, the bankrupt is to be protected in the enjoyment of them, unless they are affected with a lien at the date of adjudication. In Mosby *v.* Slute, 7 Ala. 301, the Court said: 'It would seem, therefore, entirely reasonable that, in the interval which must elapse between the decree and the final hearing for the bankrupt's discharge, he should be permitted to hold property subsequently acquired, as otherwise he would not be able to support himself and family * * *. Doubtless the bankrupt has an inchoate right to the enjoyment of such property free from the claims of his scheduled creditors. How is he to be protected in the judgment of this right?"

Hackett's Exr's. v. *Hackett's Trustee,* 118 S. W. 377 (Ky.) involved an application by executors for the construction of their testator's will. Testator left life estate in certain real property to bankrupt. Trustee intervened to have interest in land subjected to the payment of debts. Trustee's petition failed to set forth whether devise was made prior or subsequent to the adjudication. Court, therefore, assumed that it was subsequent to the adjudication and dismissed the petition of trustee.

In *Conley* v. *Nelin,* 128 S. W. 424 (Tex.), the Court said:

> "The title to after acquired property does not vest in the trustee in bankruptcy, but

> belongs to and becomes the property of the bankrupt; for which reason we do not think appellee could set up such proceedings to defeat the rights of a creditor to such after acquired property.
>
> * * * * * * *
>
> It is evident from these authorities that the cotton planted and raised upon appellee's own homestead after adjudication in bankruptcy could not be regarded as property that should have been scheduled by the trustee, and hence was free from the claim of his creditors, and that the bankruptcy proceedings could in no way affect it. To hold otherwise would be taking the earnings of the bankrupt after adjudication for the satisfaction of his creditors which would defeat the very object of the proceedings and, contravene, not only the letter but the spirit of the bankrupt law."

In *Jackson* v. *Jetter,* 142 N. W. 431, (Ia.), the syllabus reads:

Where a husband, who was the head of a family and was involved, conveyed exempt property to his wife, with the intention of defrauding his creditors, such property cannot be reached by his trustee in bankruptcy; for the property not being subject to the demands of the creditors when in the hands of the husband, cannot be reached in the hands of the wife.

2.

As the Bankruptcy Act does not give the trustee title to a bankrupt's after acquired property, crops planted by a bankrupt subsequent to his adjudication are not subject to the payment of his debts.

The court ruled:

> "The property which is subject to the control of the bankruptcy court is that owned by the debtor at the time he is adjudicated to be insolvent. After acquired property may not be taken for the payment of bankrupt debts."

The case of *Bank of Elbertor* v. *Swift,* 268 F. 305, indicates the length to which the courts go in protecting after acquired property. The syllabus reads as follows:

Under Bankruptcy Act, sec. 59a, permitting any qualified person to file a petition for voluntary bankruptcy and sec. 14 entitling him to a discharge except for acts therein set forth, the fact that a voluntary bankrupt who had practically no assets, filed his petition to protect from his creditors a legacy he expected to receive shortly from his mother, does not warrant setting aside his adjudication as a bankrupt, since the purpose of the Bankruptcy Act was to protect after acquired property from creditors, and the fact that he has some special property in view does not change his rights.

The court asserted this principle:

> "The statute, as already pointed out, specifically sets forth the grounds of objection to a discharge. But nowhere is it declared to be a ground of objection that after acquired property would be unaffected by the claims of creditors. On the contrary, one of the main purposes of the act is to relieve after acquired property from such claims."

In re West, 259 F. 205:

> The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors."

In re Swift, 259 F. 612:

> "It is well understood, of course, that the trustee in bankruptcy takes only the property of the bankrupt at the time of adjudication, which relates back to the filing of the petition. After acquired property does not go to the trustee and is not distributed among his creditors."

See also *In re Pease,* 4 A. B. R. 578; *In re Burka,* 105 F. 326; *In re Morris,* 258 F. 712; *In re Harris,* 2 A. B. R. 359.

To the same effect is Corpus Juris:

> "Property acquired by the bankrupt after adjudication of bankruptcy does not pass to the trustee." (7 C. J. 132, sec. 244).

The above quoted authorities indicate emphatically the intent of the act to protect property acquired by the bankrupt after the adjudication and to permit him to retain or put to whatever use he desires, property so acquired—free from the claims of his former creditors. Such property goes to form the nucleus of his new estate for the purpose of giving him a new start in life. The bankrupt starts anew after the adjudication and subsequently acquired property is his to do with what he will. Were the rule otherwise, the bankrupt would be unable to conduct a business of any character between the adjudication and the discharge since the title to whatever property he acquired or sold would be tainted with the doubt created by the bankruptcy proceedings. The statute is obviously designed to permit the bankrupt between the adjudication and the discharge to engage in any character of business and to deal therein unhampered by and immune from the claims of his old creditors.

POINT II.

The judgment against Badgley having been obtained within four months of the filing of his petition in bankruptcy and while he was insolvent, the consequent lien is void and cannot affect the property in question.

The stipulated facts show that the judgment which the complainants assert renders the title to the premises unmarketable was obtained August 19th, 1927; and that Badgley was adjudicated a bankrupt September 21st, 1927.

Sec. 67-F of the Bankruptcy Act provides as follows:

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person, who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

The learned Vice Chancellor in his opinion ruled that this section of the Act is for the benefit of the bankrupt's estate alone and not for the benefit of the bankrupt.

The opinion concedes that the property was not part of Badgley's estate and consequently did not pass to the trustee but holds that since Sec. 67-F. is only for the benefit of the estate,

the judgment attached to and constituted a lien on this after acquired property.

The precise question as to whether this section inures to the benefit of the bankrupt as well as to his estate has never been directly raised in this state. Prior to 1912 there was considerable conflict of opinion between State and Federal authorities and even among the Federal authorities themselves on this point. However, in 1912 the Supreme Court of the United States rendered a decision in the case of *Chicago, B. & Q. R. R. Co.* v. *Hall,* 229 U. S. 511, 33 Sup. Ct. 885, which seems to be regarded as dispositive of the matter.

In that case Hall, the bankrupt, worked as a switchman for the railroad company in Nebraska and his wages were exempt from garnishment by the laws of that state. While temporarily absent in Iowa, two suits were there brought against him, summons of garnishment being served upon the railroad's agent in Iowa, where it had been held that the Nebraska exemption statute had no extra-territorial effect.

While those two suits were pending in Iowa, Hall returned to Nebraska, was adjudged a bankrupt and claimed his wages as exempt. No defense was made to the Iowa suits, and in both cases judgment was entered against the railroad as garnishee. It was contended that these judgments were nullified by Sec. 67-F of the Bankruptcy Act.

The Supreme Court by Justice Lamar said:

> "But if they were nullified by 67-F of the Bankruptcy Act, they are entitled to no faith and no credit. That they were so nullified is Hall's contention; for he insists, that if there was a lien against his wages, it was obtained by garnishment served within four

months of his bankruptcy, and discharged by virtue of the provisions of 67-F, which declares that 'all * * * liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt.' (30 Stat. at L. 565, Chap. 541, U. S. C. S. 1901, p. 3450.)

The railroad, on the other hand, contends that under Sec. 70 the trustee acquires no title to 'property which is exempt' and that liens thereon are not discharged by Sec. 67-F, since that section has reference only to liens on property which can 'pass to the trustee as part of the estate of the bankrupt.'

On this question, there is a difference of opinion, some State and Federal courts holding that the bankruptcy act was intended to protect the creditors' trust fund, and not the bankrupt's own property, and that therefore liens against the exempt property were not annulled even though obtained by legal proceedings within four months of filing the petition. Re Driggs, 17-F. 897; Re Durham, 10 F. 231. On the other hand, Re Tune, 15 F. 906; Re Forbes, 108 C. C. A. 191, 186 F. 79, hold that 67-F, annuls all liens, both as against the property which the trustee takes and that which may be set aside to the trustee as exempt.

This view we think is supported both by the language of the section and the general policy of the act, which was intended not only to secure equality among creditors, but for the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt.

> *Both of these objects would be defeated if judgments like this present were not annulled, for otherwise the two Iowa plaintiffs would not only obtain a preference over other creditors, but would take property which it was the purpose of the bankruptcy act to secure to the debtor * * *"*

Remington in his rather exhaustive work on bankruptcy has accepted this view. He says:

> "The lien is not dissolved except for the benefit of the estate and of the bankrupt." (Vol. 4, sec. 1864).

He further says, citing the above decision of the Supreme Court:

> "It was for a long time a disputed question whether liens by legal proceedings obtained within the four months period upon exempt property were nullified by the bankruptcy, but the question has been definitely set at rest by the Supreme Court of the United States to the effect that liens by legal proceedings on exempt property are nullified equally with those on non-exempt property." (Sec. 1877).

Still another reason suggests itself for the adoption of this view. The judgment creditor is possessed of an obligation which arose before the adjudication of bankruptcy. His judgment was obtained when his debtor was insolvent, at a time when the law considers all general creditors on the same footing and when the law, desiring equality in distribution of the estate assets, refuses to award a preference to one general creditor over another. The creditor who has obtained the judgment during the four month period is therefore not debarred from all remedy. He may prove his claim as an unsecured debt for the purpose of sharing in the estate dividends (4 Remington, sec. 1921). He is also permitted

to prove his costs (id). To accord him the privilege of not only proving his claim to the trustee but also of attacking exempt property of the bankrupt would be granting him a preference entirely contrary to the spirit of the act.

Corpus Juris, as well as Remington, has conceded that the question of whether or not Sec. 67-F operates in favor of the bankrupt has been settled affirmatively. Sec. 294 is as follows:

> "Where process has been levied on property which is exempt under the general law but the cause of action is one against which the exemption is not available, the lien is not according to some authorities dissolved by the adjudication of bankruptcy against the defendant but other authorities hold to the view that liens on exempt as well as non-exempt property are discharged, and as the latter rule has recently been established by the Supreme Court of the United States, the cases opposed thereto cannot now be regarded as authoritative."

This well considered opinion of the Supreme Court and the view thereof adopted by the text writers certainly support the appellant's contention that Sec. 67-F is intended to benefit him personally as well as his estate.

As outlined under Point I, after acquired property such as is involved in this case does not pass to the trustee and is not subject to claims of the bankrupt's old creditors. This after acquired property, therefore, occupies the same status between the adjudication and the discharge as the exempt property in the Hall case and may be disposed of free from this judgment which the complainants insist constitutes a lien.

The principal insistment of the complainants is that this judgment did not become extinguished until Badgley was granted a discharge and since the discharge had not been granted at the time fixed for performance of the contract, the title to the property contracted to be sold was unmarketable. To adopt such a principle would be to render nugatory the entire intent of the act as to after acquired property and to preclude a bankrupt from engaging in any business between the time of his adjudication and discharge.

The intent of the Bankruptcy Act is remedial. It is the result of years of study and aims to accomplish a dual purpose, namely, to turn over to the creditors the unexempted assets of the bankrupt which are in existence at the time of the filing of the petition for pro rata distribution among them; and secondly, to give the bankrupt a new start in life by protecting certain exempt and after acquired property on which the creditors cannot be said to have relied in extending credit.

This thought is well expressed by the court in the case of *Brown* v. *Barker,* 8 A. B. R. 453, 74 N. Y. Supp. 43:

> "We may take judicial notice that the present bankruptcy act is the result of a long continued agitation and discussion and that it is our duty, if possible, to so construe its provisions, liberally if necessary, as to secure the objects for which it was created, rather than, by a narrow technical construction to defeat them."

The contention of the complainants if followed by this court will defeat the very liberal purpose sought to be created. It will render practically valueless one of the most liberal constructions of the act, namely, that after ac-

quired property does not pass to the trustee and is not subject to the claims of the old creditors. It will not only restrict but will practically paralyze the bankrupt's business activities between the time of his adjudication and his discharge. It will cause him to sit idly by during the interim since all his business dealings will be clouded with the possibility of a refused discharge.

The statement that every statute should be construed reasonably and if a remedial one, liberally, needs no citation of authority to support it. As set forth above the bankruptcy act is remedial legislation and should, therefore, be given the most liberal construction possible to effectuate its purposes. In the present case the appellants respectfully urge that their opinion of the situation is the only reasonable one that can be adopted.

Since that after acquired property under the decisions is not subject to the claims of old creditors, that property should be permitted to be alienated or disposed of in any manner to bona fide purchasers between the adjudication and the discharge and if a discharge is subsequently refused then the trustee should take title to all property of the bankrupt as of the date of the refusal. This principle, if adopted, would perpetuate the liberal intent of the act, permit the bankrupt to associate himself with the business world between the adjudication and the discharge and would recognize the ad interim bona fide business transactions as valid. Probably the soundest reason for accepting this view is that the old creditors, who will on the refusal of the discharge share in whatever property the bankrupt has acquired and has in his possession at the time of the refusal, never extended

credit to the bankrupt on the strength of this after acquired property—their credit having been extended on the basis of his financial condition prior to the filing of the petition. The acceptation of this view by the court would do justice to the creditors and eliminate an almost insurmountable obstacle to business activity by the bankrupt between his adjudication and his discharge.

Section 70-D of the act seems to lend some additional strength to the argument of the appellants. Sect. 70-D provides:

> "Wherever a composition shall be set aside, or discharge revoked, the trustee shall upon his appointment and qualification, be vested as herein provided with the title to all property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge."

This language indicates an intent to recognize and not to disturb bona fide transactions of the bankrupt between the confirmation of the composition or granting of the discharge, and the setting aside of the composition or the revocation of the discharge. It settles definitely the question of whether the setting aside of the composition or the revocation of the discharge relates back to the date of the adjudication and taints with illegality every transfer of title to property and every business transaction in the interim. There seems no good reason why the transactions of the bankrupt should be recognized in the one case and not in the other. The act specifically fixes the time limit within which a composition may be set aside or a discharge revoked. It also sets forth the time within which the bankrupt may be discharged. If the revocation of a discharge does not affect intervening transactions of the bankrupt, cer-

tainly the rule should apply equally to transactions between the adjudication and the discharge when the intervening transactions concern after acquired property which is not subject to the claims of the old creditors.

Under the above exposition of the law appellants respectfully urge that the lien of the judgment against them is void and that since the property in question was acquired between the adjudication and the discharge and consequently is not subject to the claims of old creditors, they can and could on September 25th, 1928 convey good and marketable title to complainants.

HARLEY, COX & WALBURG,
Solicitors for and of Counsel
with Defendants-Appellants.

William H. D. Cox,
Of Counsel.

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New Jersey Court of Errors & Appeals

CHARLES CLARK and MARGARET CLARK, *Complainants-Appellees,* and LEROY D. BADGLEY and KATHERINE C. BADGLEY, *Defendants-Appellants.*	*On Appeal from Chancery.*

BRIEF OF JOSEPH ZEMEL.

Solicitor for Complainants-Appellees.

This is an appeal from a decree of the Court of Chancery advised by Vice-Chancellor Backes in favor of the complainants on a bill for the rescission of a contract for the purchase of real estate and the return of a deposit and to impress a lien upon the lands to secure the return thereof.

Facts.

The facts, so far as pertinent to the question here raised, are very concisely set out by the learned Vice-Chancellor in his opinion (Case, page 3, line 30) as follows:

The ground of recovery is that the title was unmarketable in this respect: There was of record a judgment against one of the defendants. Within four months after the recovery of the judgment he had been petitioned in bankruptcy but

not discharged at the time the contract was to be performed. Time was of the essence of the contract. The property was acquired after the bankruptcy proceedings. The complainants insist that the judgment was a lien and that a discharge in bankruptcy was required to release it while the defendants claim that it was void under Section 67F of the Bankruptcy Act.

The Vice-Chancellor held that the judgment in question was a lien on the premises and advised a decree for the complainants. The defendants appeal, setting forth two grounds. First, that the judgment in question was not a lien on the property on September 25th, 1928, and second that the title was not unmarketable by reason of the existence thereof and that therefore they could convey good title on September 25th, 1928. Both grounds will be considered together.

POINT I.

A judgment recovered against an adjudged bankrupt within four months prior to the filing of the petition in bankruptcy is not void as to after acquired property unless and until the bankrupt is discharged.

I. A mere adjudication of bankruptcy does not void the lien or effect of a judgment, nor does it release the bankrupt from liability. A discharge is necessary in order to have this result.

1. Obviously if there had been no bankruptcy proceedings there would be no question but that the judgment was a lien. The question then pre-

sented is whether an adjudication in bankruptcy without a discharge has the effect of wiping out the lien or force of a judgment. Whenever this question has been before the courts they have uniformly declared that it has not this effect.

(a) In the case of *Watson vs. Merrill,* 136 Federal 359, the Court says:

> "It is the discharge of bankruptcy alone, not the adjudication, that releases him from liability."

(b) In the case of *American Woolen Co. vs. Maaget,* 85 Atl. 583, the Supreme Court of Errors of Connecticut (1912) said:

> "First, the cause of action underlying the claim is never held merged in the judgment of allowance, unless the bankrupt secures his discharge. When, as in this case, the bankrupt is denied a discharge, the cause of action survives. This was the construction placed upon the bankruptcy act of 1867 (act March 2, 1867, c. 176, 14 Stat. 517) and decisions upon this point are equally applicable to the present act. Both acts permit the creditor proving his claim to object to the discharge. If the allowance of the claim ends the cause of action arising from the existence of the claim, contesting the discharge could not affect the rights of the creditor and such a course would be futile. If the allowance merged the cause of action and the discharge was denied because of fraud, the creditor could not avail himself of fraud. The true rule is that the denial of the discharge remits the creditor to all the rights and remedies which may have been suspended by the proceedings in bankruptcy."

(c) In the case of *Miller vs. O'Kain,* 5 Hun. (N. Y.) 39, at page 40, the Supreme Court of

New York, in discussing the case of *Dingee vs. Becker,* 9 Nat. Bankr. Reg. 509, says:

> "The latter case discusses the question quite fully, and, we think, shows quite conclusively that the original section was never intended to cut off absolutely the rights of the creditor by mere proof of his debt, and that such provision was merely provisional in its effect and operation, and designed to take effect only upon the condition that the debtor duly prosecute his proceedings in bankruptcy to a final discharge. It is the discharge and not the mere proof of the debt, that finally discharges such debt and the debtor absolutely. Any other construction of the section would, we think, be repugnant to the whole scope and design of the bankrupt act."

2. Even as to property owned by the bankrupt at the time of his adjudication, the lien and effect of judgments are void only at the election or application of the trustee in bankruptcy.

(a) In the case of *Kobrin vs. Drazin,* 97 N. J. Eq. 400, the Court of Chancery says:

> "Furthermore, judgments recovered within four months of the filing of the petition are not automatically dissolved by the adjudication. Insolvency of the bankrupt, at the time they were recovered, is an indispensable condition to the operation of the act. Insolvency must be established as a fact. *Simpson v. Van Etten,* 108 Fed. Rep. 199. The right to annul such judgments is in the trustee for the benefit of the bankrupt estate. He alone may invoke the act. He cannot assign the privilege, or abandon it to the bankrupt. 7 C. J. 197, 199."

3. Not only is the lien or effect of the judgment not dissolved by bankruptcy proceedings, but it has been held that the bankruptcy proceed-

ings do not act *ipso facto* as a stay of proceeding in state courts, but in order to secure such stay an application must be made therefor.

(a) In the case of *In re Winter,* 17 Fed. (2), page 153, the Court held that where a Court has properly acquired jurisdiction of a suit to enforce the adverse claim of a lien on or title to certain land and a petition in bankruptcy is thereafter filed against the owner but suit is not stayed by the bankruptcy court or intervention sought by an officer, a judgment thereafter rendered will be recognized by the bankruptcy court.

4. In order to wipe out the effect of a judgment, a discharge is necessary and indispensable. If the discharge is refused, all rights of creditors are restored. Pending discharge the rights of creditors are merely suspended.

American Woolen Co. vs. Maaget, 85 Atl. 583 *(supra).*

Miller vs. O'Kain, 5 Hun. (N. Y.) 39 *(supra).*

(a) In the case of *Smith vs. Soldiers Business, etc., Company,* 35 N. J. Law 60, the New Jersey Supreme Court, speaking through the late Chief Justice Beasley, held that:

> "A creditor, by proving his claim in a bankrupt proceeding, does not thereby by force of the twenty-first section of the act of the United States relating to bankruptcy, destroy his right of action; the effect of such act being to merely suspend such right of action during the pendency of the proceedings. Under such circumstances, the proper course is to apply to the court where the action is pending to stay the proceedings."

The Court says, page 61:

> "But after a careful consideration of the general scope of the act, and a collation of its several parts, I have reached the conclusion that the purpose of the clause in question was to suspend, and not permanently to destroy the creditor's right of action. The opposite view is inconsistent with other provisions of this law."

The Court then quotes Chancellor Walworth in the case of *Haxton vs. Corse,* 2 Barb. C. R. 530, in which Chancellor Walworth says:

> "I conclude, therefore, notwithstanding the general language contained in the fifth section of the act, that the creditors who come in and prove their debts shall not be allowed to maintain any suit at law or in equity therefor. The law-makers did not intend that the proving of debts, by creditors, should be an absolute abandonment of all claim against the future acquisitions of their debtor, if his discharge was refused, or if it was void for any of the frauds specified in the act, but merely that the proving of debts, under the decree should be a waiver of the right of creditors to institute any suits or proceedings at law or in equity, which were in any way inconsistent with the election of such creditors to obtain satisfaction of their debts out of the property of the bankrupt under the decree."

And the Court then proceeds:

> "The result is, that as the right of action is not destroyed, but only suspended, by the act of the creditor in proving his debt, such circumstances cannot be pleaded in bar."

(b) In the case of *Maas vs. Kuhn,* 130 App. Division, 68, 114 N. Y. S. 444, the Supreme Court of New York held that a motion to set aside an

execution should be denied where the moving papers merely show that though adjudicated a bankrupt, the debtor has not been granted a discharge and the Court says:

> "A mere adjudication of bankruptcy does not operate to discharge a defendant nor does it operate as a stay against prosecution of a claim."

(c) In the case of *Esterbrook Co. vs. Ahern*, 31 N. J. Eg. 3, Chancellor Runyon cites with approval the case of *Eyster vs. Gaff*, 1 Otto 521, and says:

> "The Court, in *Eyster vs. Gaff*, declared that it is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in state or other Courts the instant one of the parties is adjudged a bankrupt, and added that there is nothing in the act which sanctions such a proposition."

5. In the event of the failure of a bankrupt to obtain his discharge, the lien attaches to property acquired after adjudication.

(a) In the case of *Kinmouth vs. Braeutigam*, 63 N. J. Eq. 103, Vice-Chancellor Reed says:

> "The sentiment of the Federal Courts seems to be that section 67, paragraph F applies only to the lien of judgments, and not to the judgments themselves. The judgment itself may remain until it is ascertainable whether the bankrupt will or will not be discharged. In case of a discharge of the bankrupt, the judgment is released. In case of the failure of the bankrupt to obtain his discharge, the judgment remains. But even in the latter event it can never be enforceable against any property owned by the bankrupt at the time he filed his petition in bankruptcy,

but can only be used against after acquired property. This view, in respect to the entry of a judgment after the filing of the petition in bankruptcy, as well as in regard to the force of such judgment as a lien, is supported by the provisions of section 63, paragraph A, subdivision 5 of the Bankruptcy Act."

(b) In the case of *Smith vs. First National Bank,* 227 Pac. 826, no trustee had ever been appointed for the bankrupt, and the Court, in holding that the mere bankruptcy proceedings did not avoid the lien of the judgments, says:

"No trustee was ever appointed in the bankruptcy proceedings involved in this case. In *Miller vs. Barto,* 247 Ill. 104, 93 N. E. 140, it was held that, where property of a bankrupt never passed to a trustee, a judgment lien thereon was not divested. In *Rochester Lumber Co. vs. Loche,* 72 N. H. 22, 54 Atl. 705, it was held that the provisions of the United States Bankruptcy Act of 1898 that the liens obtained within four months prior to the filing of a petition shall be void and the property of the bankrupt shall be released therefrom was enacted solely for the benefit of creditors, and does not effect a lien created by attachment as against the bankrupt himself. Liens are avoided only against the trustee in bankruptcy and those claiming under him. 7 C. J. 197. There having been no trustee appointed, it was not error in view of the foregoing authorities to overrule the motion to quash execution."

6. Of course until a discharge is actually obtained, there is no way of knowing positively whether or not it will be obtained and therefore the said judgment, on September 25th, 1928, constituted such a lien as to make the title unmarketable.

POINT II.

This point is given over to an analysis of the cases cited by the appellants in their brief.

1. The appellants cite (page 10) the case of *Chicago B. & Q. Railroad vs. Hall,* 229 U. S. 511, and state that the United States Supreme Court in that case considered this point. Defendants have eliminated from their statement of this case, however, the very important fact that in that case the bankrupt had been discharged. That case is further not in point because the subject matter of it was exempt property. In the case at bar the property in question is not exempt property. The Bankruptcy Act provides that property shall be exempt which is exempt by the State laws enforced at the time of the filing of the petition. There is nothing in the statute of New Jersey (Comp. Stat. Page 2245) exempting after acquired property from the operation of the State laws.

(a) Appellants have omitted the paragraph following their excerpt from this case and the appellees include the said paragraph here:

> "Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four months period in which a creditor cannot obtain an advantage over other creditors, nor a lien against the debtor's property. 'All liens obtained by legal proceedings' within that period are declared to be null and void. That universal language is not restricted by the later provision that 'the property affected by the lien shall be released from the same and pass to the trustee as a part of the estate of the

bankrupt.' It is true that title to exempt property does not vest in the trustee and can not be administered by him for the benefit of the creditors. But it can 'pass to the trustee as a part of the estate of the bankrupt' for the purposes named elsewhere in the statute, included in which is the duty to segregate, identify and appraise what is claimed to be exempted. He must make a report 'of the articles set off to the bankrupt, with the estimated value of each article' and creditors have twenty days in which to except to the trustee's report. Section 47 (11) and General Orders in Bankruptcy, 17. *In other words the property is not automatically exempted but must 'pass to the trustee as a part of the estate' * * * not to be administered for the benefit of creditors but to enable him to perform the duties incident to setting apart to the bankrupt what, after a hearing, may be found to be exempt.* (Italics are mine). Custody and possession may be necessary to carry out these duties and all levies, seizures and liens obtained by legal proceedings within the four months that may or do interfere with that process are annulled, not only for the purpose of preventing the property passing to the trustee as a part of the estate, but for all purposes, including that of preventing their subsequent use against property that may ultimately be set aside to the bankrupt. This property is withdrawn from the possession of the trustee not for the purpose of being subjected to such liens, but on the supposition that it needed no protection inasmuch as they had been nullified.''

This paragraph immediately shows why the whole case is not in point. It holds, and correctly, that in order to be exempt, property must pass to the trustee. Of course there is no claim in the case at Bar that the property in question ever passed to the trustee.

2. Appellants under Point I refer to some universally accepted rule that property acquired after adjudication and before discharge with newly acquired assets, is exempt from the claims of prior creditors. This statement is neither the rule nor has it any universality or acceptance. Appellees concede as a matter of law that if the bankrupt is discharged then this rule applies but if the bankrupt is not discharged, all property so acquired is still subject to the claims of all creditors, new and old.

3. The case of *In re Rennie,* 2 A. B. R. 182, (page 4) simply holds that the mere fact that a bankrupt acquires property after adjudication is no ground for opposing a discharge. It also holds that such property does not pass to the trustee. The appellees admit the soundness of both these propositions of law.

4. The defendants cite the case *In re Lineberry,* 183 Fed. 338 (page 4), holding that the discharge, when granted, relates back to the date of adjudication and that property acquired by the bankrupt between the filing of the petition and the granting of discharge is not appropriated to the payment of debts. Complainants fully agree with this statement of the law. The defendants insert a quotation from this case, but assiduously overlook the conclusion of the opinion which says:

> "As to wages earned by the bankrupt, after adjudication, an order will be entered restraining the Birmingham Loan & Discount Company from attempting to collect or from receiving the subsequently earned wages from the railroad company until the expiration of twelve months from the date of ad-

judication herein, unless the bankrupt shall sooner apply for a discharge and in such case until the question of such discharge shall be determined."

Of course, the only inference to be drawn from this wording is that if a discharge should be granted, the wages in question would be entirely free from the lien of the judgment but if the discharge should be refused the restraining order would be vacated and judgment permitted to proceed. If this were not the true meaning, why should the court expressly continue the restraining order to such time as the question of discharge should be disposed of?

5. The appellants also cite the cases of *Hackett Executors vs. Trustee,* 118 Southwestern 377 (page 5); *Conley vs. Nelin,* 128 Southwestern 424 (page 5); and *Jackson vs. Jetter,* 142 Northwestern 431 (page 6). In the *Conley* case there is an express statement that the bankrupt was discharged, while in the other two cases there is no statement as to whether or not he was discharged. These cases are therefore not in point as the appellant was not discharged on the date set for passing of title.

6. Appellants cite *Bank of Ellerton vs. Swift,* 286 Fed. 305 (page 7). Here again there is no indication as to whether the bankrupt had been discharged or not at the time in question. Further this case simply holds that acquisition of property after adjudication is no valid reason for refusing a discharge.

7. Defendants (at the foot of page 7), cite the case of *In re West,* 128 Fed. 205, quoting therefrom one sentence. The complainants feel that a few sentences preceding the sentence quoted may be helpful to the court in determining the meaning of this particular sentence. The court says:

> "The discharge in bankruptcy operated to discharge these obligations as of the date of adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors."

With which statement of the law complainants are in accord. They do not deny that the effect of the discharge is to wipe out the lien of the judgment but they urge that only a discharge can have this effect, and inasmuch as at the time set for the performance the bankrupt had not been discharged, therefore the lien of the judgment was in force.

The appellees therefore urge that the learned Vice-Chancellor correctly ruled that the judgment in question constituted a lien upon the premises and that the judgment should be affirmed on this ground.

POINT III.

Even if it should be held that the judgment in question was not a lien upon the property, the title would still be dependent upon such a doubtful question of law as to render it unmarketable.

1. A title is unmarketable when its validity is doubtful even though that doubt may ultimately be resolved in favor of the title and it is unmarketable if there is any reasonable ground for saying that the question is not settled by previous decisions.

(a) In the case of *Wilson vs. Vogel,* 87 Eq. 584, the Court says:

> "The rule appears to be settled that if a doubt raised depends upon a question involving the application of general principles of law, it is the practice of courts of equity to decide the point of law in a suit for specific performance, but that in such cases specific performance should not be decreed if there is reasonable ground for saying that the question is not settled by previous decisions, or if there are dicta of weight which indicates that courts might differ as to the determination of the point involved, and that one of the categories in which the courts decline to compel specific performance is where the doubt as to the vendor's power to convey a good title arises in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument."

In the case of *Lippincott vs. Wikoff,* 54 Eq. 107, on page 118, the late Vice-Chancellor Emery, ~~speaking for this Court~~, says:

> "As to this decision in *Alexander vs. Mills,* and its effect upon the previous decision of

Pyrke v. Waddingham, Lord Selbourne, in *Palmer vs. Locke,* 18 Ch. Div. 381 (Court of Appeals, 1881), says (at page 388) that there are many cases in which it is necessary and proper to say positively and finally (in a suit for specific performance) that the law is one way or the other on the point argued; but when you have a question raised upon the construction of a general statute, if there is any reasonable ground for saying that that question is not determined by previous authorities, or that the previous authorities are conflicting, then, in the terms of Lord-Justice Turner's judgment in *Pyrke v. Waddingham,* that can not be treated as a question of general law so settled as to exclude that kind of question which the court has paid regard to when it sees there is a doubtful question of title which cannot be forced upon a purchaser."

* * *

"When the court finds, he added, according to the principles explained in that case, that there is a question open to doubts of the kind there mentioned, and that a title ought not to be forced upon the purchaser, it is neither necessary nor generally convenient or desirable that the court whatever may be the opinion it has formed upon the question and on the materials presented on a suit for specific performance, should think that that should conclude all questions as against persons who are not before it."

* * *

"But, then, I think it must appear, to the judge who decides it, that there were no decisions or dicta of weight which show that another judge or another court having the question before it might come to a different conclusion. The court, I take it, must feel such confidence in its own opinion as to be satisfied that another court would not adopt another conclusion." In this case, Mr. Justice Chitty held that the question of the construction of the statute was, by reason of the dicta, of Sir

George Jessel and Sir James Hanner, in the decision of previous cases, left in such a state of doubt, that although it was the question of the construction of a general act of parliament, he could not say with the certainty which was required of him to say that no other court would come to a different conclusion.

2. The Chancery Court could not have declared the lien of the judgment invalid as to this property because the judgment creditor was not before the Court. Absence as parties to the suit of persons who might have a vested or contingency in or claim to the property, renders the title unmarketable for the Court can not make a title open to reasonable doubt, marketable by passing upon an objection dependent on a disputed question of fact or a doubtful question of law in the absence of the party in whom the outstanding right is vested. He would not be bound by the adjudication and could raise the same question in a new proceeding. The cloud on the purchaser's title would remain, although the Court undertook to decide the fact or the law, whatever moral weight the decision might have. The Monarch Electric Company, the judgment creditor, not being before the Chancery Court, the Chancery Court could not make a decree adjudging that their lien against this property was void.

Conclusion.

The complainants-appellees therefore respectfully urge that inasmuch as the judgment in question was a lien and was not avoided by the bankruptcy proceedings, the title was unmarketable at

the time set for performance and that therefore the Court of Chancery properly granted the complainants the relief prayed for, and they respectfully submit that the decree appealed from be affirmed.

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