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THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY NATHANIEL BENTLEY
VOLUME I
PUBLISHED BY
J. B. BENTLEY
1822

NOTICE AND GROUNDS OF APPEAL.

Served July 3, 1930; filed July 7, 1930.

ESSEX COUNTY CIRCUIT COURT.

CHARLES CLARK, <i>et al.</i> , <i>Plaintiffs,</i> <i>vs.</i> LEROY D. BADGLEY, <i>et al.</i> , <i>Defendants.</i>	}	<i>Action at Law.</i>	10
		<i>Notice and Grounds of Appeal.</i>	

To Harley, Cox & Walburg, Esqs., attorneys for
the defendant, 60 Park Place, Newark, New
Jersey.

20

SIRS:

TAKE NOTICE that the plaintiffs, Charles Clark
and Margaret Clark, hereby appeal to the New
Jersey Court of Errors and Appeals in the last
resort in all causes from the whole of the judg-
ment of the Essex County Circuit Court entered
in the above-entitled cause on June 26, 1930, and
each and every part thereof, on the following
grounds, to wit:

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1. The Essex County Circuit Court erred in
giving judgment in favor of the defendants and
against the plaintiffs, whereas it should have
given judgment in favor of the plaintiffs and
against the defendants for the amount sued for.

2. The Essex County Circuit Court erred in
ruling that the defendants were not in default in
the performance of the contract in question and
that the defendants had not breached the said
contract on September 25, 1928.

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Notice and Grounds of Appeal.

3. The Essex County Circuit Court erred in holding as a matter of law that between the adjudication and discharge in bankruptcy of the defendant, no lien could attach on a judgment obtained within four months of the bankruptcy.

10 4. The Essex County Circuit Court erred in holding that the judgment of the Monarch Electrical Supply Co., Inc., was not a lien on the said property on September 25, 1928.

5. The Essex County Circuit Court erred in holding that the title of the defendants to the premises in question was good on September 25, 1928, and in holding that the plaintiffs were not justified in refusing to take title to the said premises.

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JOSEPH ZEMEL,
Attorney for Plaintiffs.

Dated, July 3, 1930.

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ORDER.

#70—221

IN CHANCERY OF NEW JERSEY.

*Between*CHARLES CLARK, *et al.*,
*Complainants,**and*LEROY D. BADGLEY, *et al.*,
*Defendants.**Order.*

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This matter being opened to the court by Joseph Zemel, solicitor for and of counsel with the complainants, upon notice duly given to the solicitors of the defendants, and it appearing to the court that the Court of Errors and Appeals has reversed the decree heretofore rendered in this cause, upon the ground that the Court of Chancery had no jurisdiction to hear and determine the controversy, it is on this 29th day of April, 1930, on motion of Joseph Zemel, solicitor as aforesaid,

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ORDERED, That the above-entitled cause shall be transferred with the record thereof and all papers filed in this cause, for hearing and determination to the Essex County Circuit Court.

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E. R. WALKER,
C.

Respectfully advised.

JOHN H. BACKES,
V.-C.

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AGREED STATE OF FACTS.

70—221

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> CHARLES CLARK, <i>et al.</i> , <i>Complainants,</i> <i>and</i> LEROY D. BADGLEY, <i>et al.</i> , <i>Defendants.</i>	} <i>On Bill, &c.</i> } <i>Agreed State</i> } <i>of Facts.</i>
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20 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, LeRoy 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.

30 2. On July 12, 1928, the complainants and the defendants entered into a contract whereby the complainants agreed to buy and the defendants agreed 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
 40 the contract. An affidavit of title was executed

Agreed State of Facts.

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 LeRoy 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 LeRoy D. Badgley of Six Hundred Ninety-nine Dollars and Thirty-four Cents (\$699.34), which judgment was still uncanceled of record on July 12, 1928, and at all other dates hereinafter mentioned. The said judgment was entered against the defendant, LeRoy D. Badgley, upon a certain note made by the said LeRoy 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 LeRoy 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 LeRoy D. Badgley turned over all of his property and assets to the Trustee in Bankruptcy appointed to administer the estate.

5. The said LeRoy 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

Agreed State of Facts.

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

10 6. At the time of the signing of the aforementioned contract on July 12, 1928, the defendant, LeRoy D. Badgley had not petitioned the United States District Court for his discharge, but the said LeRoy 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.

20 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.

30 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 uncanceled of record and because of the fact that the said LeRoy 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
40 Electrical Supply Company, Inc., was still un-

Agreed State of Facts.

cancelled of record and the said LeRoy 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 uncanceled of record and that the said LeRoy 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 LeRoy D. Badgley which had not yet been cancelled from the records and that the said LeRoy 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

Agreed State of Facts.

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,
10 LeRoy 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.

20 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
30 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.

40 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

Agreed State of Facts.

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. 10

JOSEPH ZEMEL,
Solicitor for Complainants.

HARLEY, COX & WALBURG,
Solicitors for Defendants. 20

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NOTICE.

ESSEX COUNTY CIRCUIT COURT.

10	CHARLES CLARK, <i>et als.</i> , <div style="text-align: right;"><i>Plaintiffs,</i></div> <div style="text-align: center;"><i>vs.</i></div> LEROY D. BADGLEY, <i>et als.</i> , <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Action at Law. Notice.</i>
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To Harley, Cox & Walburg, Esqs., attorneys for
the defendants;

SIRS:

20 TAKE NOTICE that on Thursday, May 29, 1930,
at 9:30 o'clock in the forenoon (daylight saving
time), or as soon thereafter as counsel can be
heard, I shall appear before the Honorable Nel-
son Y. Dungan, Esq., Judge of the Essex County
Circuit Court, at the said Essex County Circuit
Court, in the Essex County Hall of Records,
Newark, New Jersey, and shall move to enter a
summary judgment in this matter in favor of the
30 plaintiffs and against the defendants. And my
application will be based upon the agreed state
of facts heretofore filed in this cause.

JOSEPH ZEMEL,
Attorney for Plaintiffs.

DECISION.

SUPREME COURT.

ESSEX CIRCUIT.

Thursday, May 29, 1930. 10

CHARLES CLARK and MARGARET CLARK, <i>vs.</i> LEROY D. BADGLEY and KATH- ERINE BADGLEY.	}	<i>Application of Plaintiffs for Entry of Judgment on An Agreed State of Facts. Decision.</i>	20
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Joseph Zemel, Esq., for plaintiffs.

Harley, Cox & Walburg (by John J. Francis,
 Esq.) for defendants.

DUNGAN, J.:

Under the agreed state of facts in this case,
 it appears that the defendant was adjudicated a
 bankrupt; that prior to the adjudication and
 within four months of such adjudication, a judg- 30
 ment has been obtained against him. Subsequent
 to the adjudication in bankruptcy, the defendant
 purchased a property, which he agreed to sell to
 the plaintiff, and upon which the plaintiff paid
 \$500. At the time fixed for the taking of title,
 it was agreed between the plaintiff and the de-
 fendant that the time should be extended, but at
 the time to which the closing of the transaction
 had been extended, the defendant had not yet
 been discharged in bankruptcy.

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Decision.

The plaintiff claims that by reason of that fact, and the possibility that the defendant might not thereafter be discharged, this constituted a cloud upon the title, which permitted him, under the New Jersey statute of 1915, to require the defendant to repay the deposit, including any
10 search fees, and fees for survey. In this case there was no survey.

This suit is brought to recover the \$500 deposited, with interest from the date of its payment, which was July 12, 1928, and also search fees, amounting to \$147.41.

The question, therefore, is, what the status of the judgment as to this property was between the date of adjudication and the date of discharge, the plaintiff claiming that since, upon failure of
20 discharge, the judgment-creditor might enforce his judgment against an after-acquired property, the plaintiff was justified in refusing to take the title; the defendant claiming that between the adjudication and the discharge in bankruptcy, if applied for within the time required by the Bankruptcy Law, no lien could attach on a judgment obtained within four months of bankruptcy, until after the discharge had been denied.

Regardless of the effect of Section 67-f, whether
30 for the benefit of the creditors or both the creditors and the debtor, I think we ought to consider the beneficent purposes of the Bankruptcy Act. There seem to be some decisions that 67-f is for the benefit of the creditors only; some to the effect that it is for the benefit of both the creditors and the debtor, that section holding that any judgment obtained within four months is absolutely void as to such judgment-creditors, but the Bankruptcy Act, as a whole, is for the benefit
40 of both the creditors and the debtor, regardless,

Decision.

as I have said, of the effect of that particular section. It is designed to provide for a pro-rata distribution of the bankrupt's property among all of his debtors, up to the time of the adjudication in bankruptcy. It is also designed, it has been said, to release, as practically dead wood in the commercial life of our country, those who are hampered by debts which they cannot pay, and to enable them to get a fresh start in life. Therefore, a liberal construction of the Bankruptcy Act—and it must be liberally construed—must provide a time when the bankrupt can start out upon his new adventures, become something in the commercial world, and support his family. 10

What is that time? It seems to me that time must be from the time of the adjudication in bankruptcy, depending, of course, upon his eventual discharge. All the events covered by the agreed state of facts in this case occurred, as I have already said, between the adjudication and the time when the bankrupt might obtain his discharge. A reading of the Bankruptcy Act would indicate, and the decided cases would indicate, that during that period he might go ahead and transact his business, free from any lien or interference of those who were his creditors prior to the time of his adjudication, and that any property which he acquired after his adjudication, and before his discharge, would not be subjected to the lien of his creditors who were such prior to that adjudication, certainly if that property were disposed of before the discharge. 20 30

This, of course, makes it unnecessary to decide the question of whether or not, if his discharge had been applied for and refused, the judgment debt would have been a lien subsequent to such refusal. 40

Decision.

In this case the property was after-acquired, as I have already stated. The time when the property was to be conveyed under the agreement was prior to the time when application might have been made for the bankrupt's discharge, and the date to which it was extended
10 was prior to that time; so that the time when it was agreed that the plaintiff in this case should take title to the property was prior to the time when the defendant might have obtained his discharge, and the proofs show that he actually did obtain his discharge after that time.

The result of these views is to deny the motion to strike out the answer; and, under the agreement that the Court may give judgment in this case upon this agreed state of facts, judgment
20 will be given for the defendant and against the plaintiff.

An exception will be noted as ground of appeal.

NELSON Y. DUNGAN,
Judge.

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ORDER.

ESSEX COUNTY CIRCUIT COURT.

CHARLES CLARK and MARGARET
CLARK,

Plaintiffs,

vs.

LEROY D. BADGLEY and KATH-
ERINE C. BADGLEY,

Defendants.

*Action
at Law.*

Order.

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This matter having been presented to the
Court by Joseph Zemel, Esq., attorney for the
plaintiffs, and Messrs. Harley, Cox and Walburg,
attorneys for the defendants, and the Court hav-
ing considered the stipulation of facts and the
arguments of counsel for the plaintiffs, it is on
this 17th day of June, 1930,

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ORDERED that judgment be entered for the de-
fendants.

NELSON Y. DUNGAN,
C. C. J.

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JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

53526

10	CHARLES CLARK and MARGARET CLARK, <div style="text-align: right;"><i>Plaintiffs,</i></div> <div style="text-align: center;"><i>vs.</i></div> LEROY D. BADGLEY and KATH- ERINE C. BADGLEY, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Action at Law. By Order of Court Judgment Entered June 25, 1930. Costs \$73.10.</i>
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20 Harley, Cox & Walburg, attorneys for defend-
ants:

Judgment by order in the above-entitled action was rendered on the twenty-fifth day of June, A. D. Nineteen Hundred and Thirty in favor of the defendants LeRoy D. Badgley, Katherine C. Badgley and against the plaintiffs Charles Clark, Margaret Clark for the sum of seventy-three dollars and ten cents, costs of suit.

Judgment signed and entered June 25, 1930.

30 WILLIAM S. GUMMERE,
C. J.

Book 111, page 59, C. C. Judgments.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

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

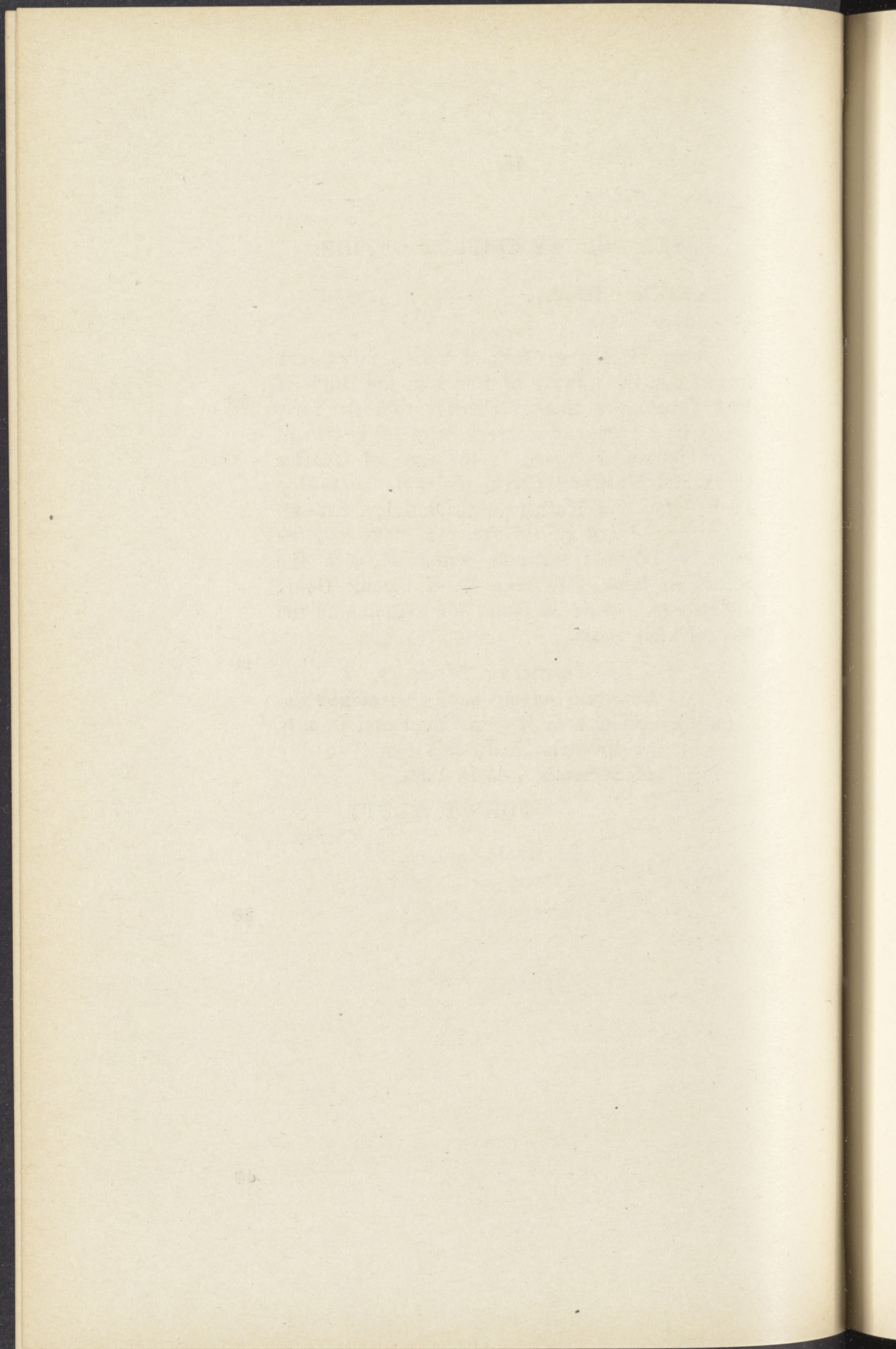
I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, Do HEREBY CERTIFY that the foregoing is a true and correct copy of a Circuit Court judgment record in the case of Charles Clark and Margaret Clark, plaintiffs, *v.* LeRoy D. Badgley and Katherine C. Badgley, defendants, entered and signed June 25, 1930, and the same is taken from and compared with the record in Book 111, page 59 of Circuit Court Judgments, and as the same now remains on the files of said court. 10

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this twentieth day of September, A. D. 1930. 20

JOHN H. SCOTT,
Clerk.

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New Jersey Court of Errors and Appeals

CHARLES CLARK, <i>et al.</i> , Plaintiffs-Appellants, <i>vs.</i> LEROY D. BADGLEY, <i>et al.</i> , Defendants-Appellees.	}	On Appeal from the Essex County Circuit Court.
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BRIEF OF APPELLANTS.

This is an appeal from a judgment of the Essex County Circuit Court. The matter was tried upon an agreed state of facts by consent of counsel in open court, before the Honorable Nelson Y. Dungan, Esq., Circuit Court Judge, sitting without a jury, who rendered a judgment in favor of the defendants.

Facts.

The facts, so far as pertinent to the question here raised, are as follows:

On July 12, 1928, the defendants were the owners of property on Amherst street, East Orange, New Jersey. On that date they agreed to convey it to plaintiffs, free and clear of all encumbrances, and the plaintiffs paid the defendants a deposit of five hundred (\$500.00) dollars on account of the purchase price. The date for performance was extended until September 25, 1928, which date was made of the essence of the contract. On that date plaintiffs refused to accept a conveyance and demanded the return of their deposit, on the ground that the title was unmarketable in that there was a judgment of record against the defendant LeRoy D. Badgley.

The judgment in question had been obtained in the Essex County Circuit Court by the Monarch Electrical Supply Company on August 19, 1927, in the sum of \$699.34, including costs. On September 21, 1927, the said LeRoy D. Badgley was adjudicated a bankrupt in the United States District Court for the District of New Jersey. On March 29, 1928, he acquired the property in question. On that date he had not been discharged in the bankruptcy proceedings, and on the date finally set for the performance of the contract, he had not yet been discharged in the bankruptcy proceedings. The plaintiff claimed that the judgment was a lien against the property.

On September 25, 1928, there was due on the property taxes in the sum of \$100.50 which were unpaid and were a lien. Plaintiffs claimed that the title was unmarketable, and refused to accept the conveyance and this action was brought to recover the down payment of \$500.00 together with search fees amounting to \$147.41.

This action started as a bill in chancery by the vendee to rescind the contract and impress a vendee's lien upon the property for the deposit, because the title was unmarketable and encumbered, and on the further ground that the defendants, in order to induce the plaintiffs to enter into the contract in question, had represented to the plaintiffs by affidavit, that the property was not encumbered by any judgments. The matter came on for final hearing before Vice-Chancellor Backes, who wrote an opinion reported 7 Adv. Rep. 482, 145 Atl. 232 (not yet officially reported), and advised the granting of the relief prayed for. The defendants appealed to this court. This court, in an opinion of former Justice Black, 105 N. J. Eq. 534, 148 Atl.

736, reversed the decree on the ground that that court had no jurisdiction.

The meritorious questions involved, namely, whether the complainants were entitled to the return of their money, was not considered in Justice Black's opinion. Application was made to this court for a re-hearing, because on the appeal to this court the question of jurisdiction had not been raised and consequently not argued, and the complainants prayed an opportunity to argue the question of the Chancery Court's jurisdiction. The application was denied and the case was remitted to the Chancery Court. That court thereupon, on application of the complainants, transferred the action to the Essex County Circuit Court under the Transfer of Causes Act. Thereupon the plaintiffs moved for judgment on the agreed state of facts and at the argument of the motion it was stipulated by counsel that the said argument should be regarded as the trial of the cause on the facts as stipulated, and the matter was thereupon submitted to the court for its judgment. The court ordered a judgment entered for the defendants. Hence this appeal.

POINT I.

Under this point will be considered grounds three and four, namely: That the Essex County Circuit Court erred in holding as a matter of law that between the adjudication and discharge in bankruptcy of the defendant, no lien could attach on a judgment obtained within four months of the bankruptcy, and that the Essex County Circuit Court erred in holding that the judgment of the Monarch Electrical Supply Co., Inc., was not a lien on the said property on September 25, 1928.

I. A mere adjudication in bankruptcy without a discharge does not avoid the lien of a prior judgment as against after acquired property.

1. In the absence of the bankruptcy proceedings there is no question but that the judgment in question would be a lien upon the defendant's property.

a. An Act concerning judgments, Compiled Statutes, Vol. 2, page 2955, section I, provides:

“That all lands, tenements, hereditaments and real estate shall be and hereby are made liable to be levied upon and sold by executions to be issued on judgments which are or shall be obtained in any court of record in this state (except Justice's court, constituted for the trial of small causes) for the payment and satisfaction of the debt, damages, sum of money and costs so recovered or to be recovered. * * *

b. It is obvious therefore that in order to avoid the lien of the said judgment some express provision of the Bankruptcy Act must be relied upon.

II. A thorough examination of the Bankruptcy Act discloses only two sections providing for the avoidance of judgments and liability. These are sections 67-f and the section concerning discharges. We need not concern ourselves with the effect of a discharge because at the time finally set for delivery of the deed, the bankrupt had not yet been discharged.

1. The judgment in question was not avoided by section 67-f because

a. This section applies only to property passing to the trustee in bankruptcy and no other property.

(a) In the case of *Smith v. First National Bank*, 227 Pac. 826, the court, in holding that the mere bankruptcy proceedings did not avoid the lien of the judgments, said:

“No trustee was ever appointed in the bankruptcy proceedings involved in this case. In *Miller v. 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. v. 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 affect 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.”

(b) In the case of *Chicago, B. & Q. Railroad v. Hall*, 229 U. S. 511, the United States Supreme Court said:

“* * * 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. * * *”

b. Only the trustee can take advantage of Section 67-f.

(a) *Kobrin v. Drazin*, 97 N. J. Eq., 400.

(b) In the case of *Swaney v. Hasara*, 205 N. W. 274, the Supreme Court of Minnesota, says:

“The effect of the act is to annul and vacate all liens obtained within four months prior to the adjudication of the debtor as a bankrupt. The provisions are for the benefit of the creditor *and not for the benefit of the debtor*. The act does not operate upon and dissolve liens obtained by execution, levy or other processes, as against all the world. *It operates only as against the trustee and those claiming under him.* *Frazer v. Nelson*, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391; *McKenney v. Cheney*, 118 Ga. 387, 45 S. E. 433; *Black on Bankruptcy* (3d Ed.) 831; *Miller v. Barto*, 247, Ill. 104, 93 N. E. 140; *Rochester Lumber Co. v. Locke*, 72 N. H. 22, 54 A. 705. The property here in controversy never passed to the trustee, nor did he ever demand the same or make any effort to obtain possession thereof. *Under the provisions of the act, levies or other liens, so obtained, are deemed null and void only in case the debtor is adjudged a bankrupt and the property passes to the trustee.*”

(c) Other cases are collected in United States Code Annotated under Bankruptcy, title 11, chapter 7, page 190, note 154, and all the cases there cited are uniformly to the effect that this provision is only for the benefit of the trustee.

c. Section 67-f is not for the benefit of the bankrupt. *Kobrin v. Drazin*, 97 N. J. Eq., 400.

d. This section only applies where the bankrupt was insolvent at the time the judgment was obtained.

(a) In the case of *Liberty National Bank v. Bear*, 265 U. S. Reports, 365. Justice Sanford, says:

“This section 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. * * *’ It applies only to liens obtained in legal proceedings against a person who was ‘insolvent’ when the lien was acquired. If the debtor was then solvent the lien is not invalidated although it was obtained within four months prior to the filing of the petition in bankruptcy. *Taubel-Scott-Kitzmilller Co. v. Fox*, 264 U. S. 426. *To invalidate the lien the person challenging it must show that the debtor was insolvent when it was obtained. * * * Such insolvency must be both alleged and proved. Stone-Ordean-Wells Co. v. Mark, supra*, p. 978.”

III. 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 to accomplish 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 presented is whether an adjudication in bankruptcy without a discharge has the effect of wiping out the lien or force of a judgment. This question has been uniformly answered in the negative.

(a) In the case of *Watson v. 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. v. 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 v. O’Kain*, 5 Hun. (N. Y.) 39, at page 40, the Supreme Court of New York in discussing the case of

Dingee v. 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 v. 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 privileges, 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. v. Maaget, 85 Atl. 583, (*supra*);

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

(a) In the case of *Smith v. 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 collection 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 v. 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 v. Kuhn*, 130 App. Division, 68, 114 N. Y. S. 444, the Supreme Court of New York held that a mo-

tion 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. v. Ahern*, 31 N. J. Eq. 3, Chancellor Runyon cites with approval the case of *Eyster v. Gaff*, 1 Otto 521, and says:

“The Court, in *Eyster v. 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.”

(d) In *re Van Buren*, 164 Federal 883. In this case a judgment was entered against Van Buren on October 6, 1908. On October 8, 1908, an execution was issued, authorizing the creditor to take 10% of the salary of the judgment debtor. On October 22, 1908, the debtor was adjudicated a bankrupt. Judge Holt says:

“But the judgment was recovered before the adjudication in bankruptcy. All the bankrupt’s property, down to the time of the adjudication, is applicable to the payment of that judgment ratably with the bankrupt’s other debts; but the discharge of the bankrupt, if it shall be granted, is a bar to the enforcement of that judgment against any property subsequently acquired. Under these circumstances, I think that the enforcement of the judgment against any portion of the bank-

rupt's present salary should be enjoined until the question is determined whether he shall receive a discharge. *But as, if the entire salary were paid to the bankrupt, the probability is that the judgment creditor would never collect the tenth to which he is entitled if a discharge is refused, an order will be made directing the bankrupt's employers to withhold a tenth of the salary until that question is determined.*"

This case was followed in the matter of Beck, 238 Federal, 653.

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 v. 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."

6. Appellants concede as a matter of law that a discharge in bankruptcy under certain conditions wipes out the liability to pay a judgment

where the claim is discharged. But in this case, at the time set for performance of the contract, the defendant, the bankrupt, had not yet been discharged. *Until a discharge is actually obtained, there is no way of knowing positively that it will be obtained.* There are cases in the reports where discharges have been refused. In the instant case, the discharge was not even applied for until almost a year after the adjudication, although the law requires the application to be made within a year.

7. What would have happened if the plaintiffs had taken title and then the defendant, for some reason or other, had been refused a discharge? The lien of the judgment would have been a lien against the property because such a judgment is a lien against after acquired property.

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

“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.*”

8. Respondents may argue that the property in question was exempt property and therefore not subject to the liens of creditors. This argument is unsound. The Bankruptcy Act provides that property shall be exempt which is exempt by the state laws in force at the time of filing the petition. There is nothing in the statute of New Jersey, Compiled Statutes, page 2254, exempting after acquired property from the operation of state laws.

POINT II.

Under this point will be argued ground five, namely: The Essex County Circuit Court erred in holding that the title of the defendants to the premises in question was good on September 25, 1928, and in holding that the plaintiffs were not justified in refusing to take title to the said premises.

I. Inasmuch as the judgment of the Monarch Electric Supply Company, Inc., was a lien upon the premises in question at the time set for passing title, obviously the defendants could not give a good title on that date. The title was further defective and the plaintiffs were justified in refusing to take title because of the fact that there were unpaid taxes amounting to \$100.00 due and a lien upon the property at the time. (Paragraph 10 of Agreed State of Facts.) Of course the rule is that where encumbrances can be satisfied out of the purchase money their existence is not ground for refusing to take title. According to the contract, plaintiffs were to pay \$500.00 at the time of closing title, title to be taken subject to a first mortgage. But, at the date set for closing title there was a second mortgage open against the property in the sum of \$500.00 and interest and also the said taxes, making a total of over \$600.00, so that we can readily see that the encumbrances could not be paid out of the purchase money.

The appellants therefore submit that the title was not good on the date set for performance and that they were justified in refusing to take title.

POINT III.

Under this point will be considered grounds one and two, namely: The Essex County Circuit Court erred in giving judgment in favor of the defendants and against the plaintiffs, whereas it should have given judgment in favor of the plaintiffs and against the defendants for the amount sued for; and two, that the Essex County Circuit Court erred in ruling that the defendants were not in default in the performance of the contract in question and that the defendants had not breached the said contract on September 25, 1928.

What was said under Point One is equally applicable here. Inasmuch as the judgment in question was a lien against the property, obviously the defendants were in default and if defendants were in default and plaintiffs were not in default, judgment should have been given in favor of the plaintiffs.

In the trial court the defendants placed considerable reliance upon the cases of *Hall v. C. B. & Q. Railroad*, 229 U. S. 511, and inasmuch as they may rely upon that case in this court, the appellants beg leave to discuss it briefly and to show why it is not in point.

1. In the first place, it is not in point because it concerns exempt property while the case at Bar concerns after acquired property. In the second place it holds that in order for property to be exempt it must pass to the trustee. In the case at Bar the property in question never passed to the trustee. In the third place, in that case the bankrupt had been discharged at the time the controversy refers to. In the instant case the bankrupt had not been discharged at the time for performance of the contract. The defend-

ants also cited numerous other cases but in all of the cases there was either a discharge of the bankrupt, or else there was simply a holding that the acquisition of property after the adjudication was no ground for opposition to a discharge. None of these cases, of course, is in point.

CONCLUSION.

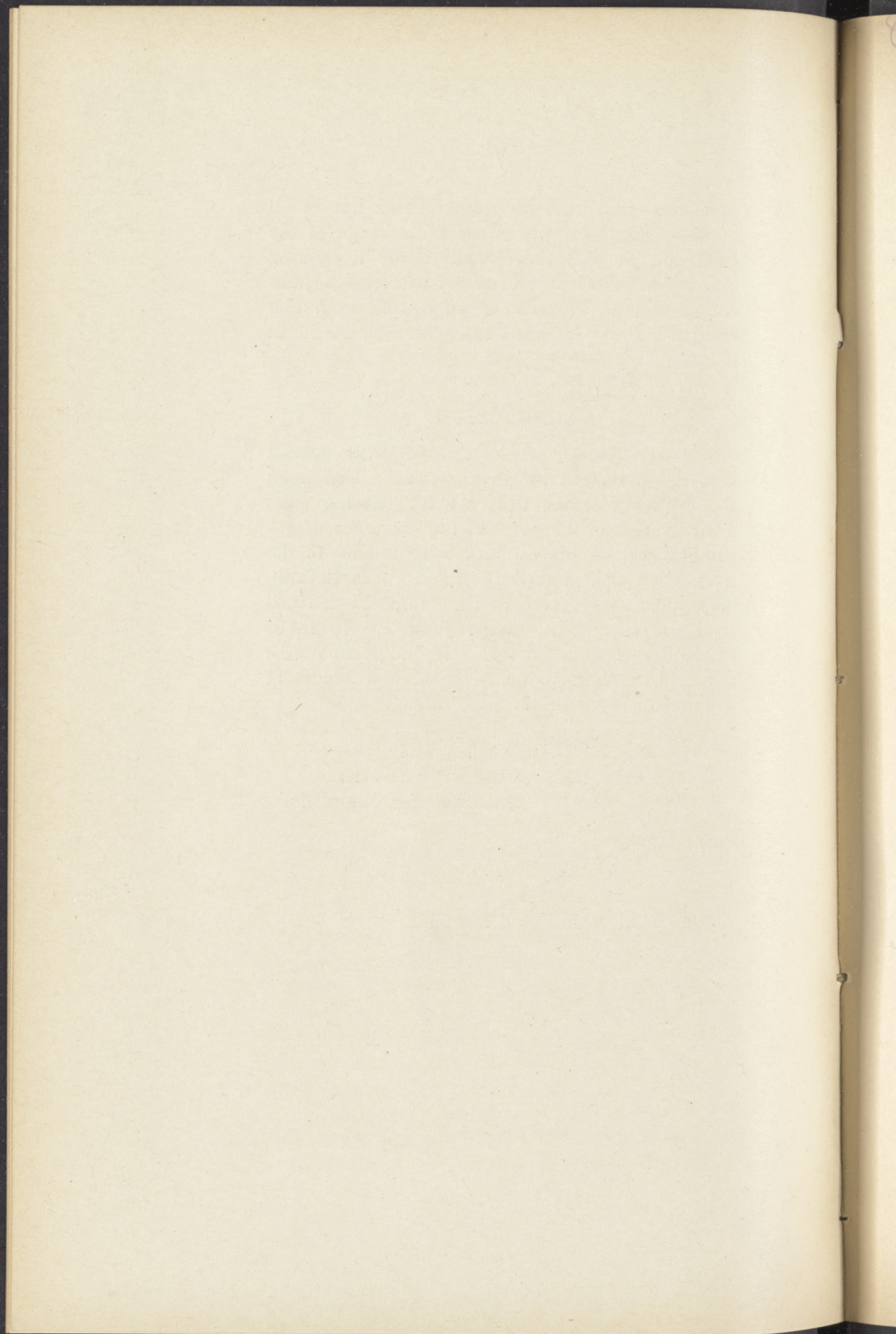
The appellants therefore respectfully submit that the judgment in question was a lien upon the property at the time set for passing title. That by reason thereof and the existence of encumbrances, the defendants were unable to deliver good title and were therefore in default. The appellants therefore urge that the learned trial court erred in giving judgment in favor of the defendants and that said judgment of the trial court ought to be reversed and judgment ordered in favor of the plaintiffs.

Respectfully submitted,

JOSEPH ZEMEL,
Attorney for Plaintiffs.

JOSEPH ZEMEL,
Of Counsel.

Note: All italics used are mine.



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New Jersey Court of Errors and Appeals.

CHARLES CLARK and
MARGARET CLARK,
Plaintiffs-Appellants,

vs.

LEROY D. BADGLEY and
KATHERINE C. BADGLEY,
Defendants-Appellees,

On Appeal
from the
Essex County
Circuit Court.

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BRIEF OF DEFENDANTS-APPELLEES.

This matter, which is now on appeal in this court, was submitted to the Honorable Nelson Y. Dungan, Judge of the Essex County Circuit Court on an agreed state of facts. After argument a judgment was entered in favor of the defendants and against the plaintiffs.

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 in-

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solvent at the time. On September 21, 1927, Le-Roy 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 plaintiffs' contention that the judgment constitutes a lien on the premises and the defendants', that it does not.

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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 creditors; (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 af-

fectured 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."

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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."

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Because the status of after acquired property is of the utmost importance, the defendants-appellees 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.

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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.

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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: 10

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. 20

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: 30
‘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?’ 40

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 prop-

erty 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.

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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.”

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The case of *Bank of Elberton 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.

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The court asserted this principle:

10 “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:

20 “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*:

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

40 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. 10
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. 20

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. 30

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 40

10 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, when this case was before the Court of Chancery, 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.

20 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.

30 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.

40 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.

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*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 * * **

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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).

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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 nulli-

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fied 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 appellees' contention that Sec. 67-F is intended to benefit Badgley 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
 10 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 appellants insist constitutes a lien.

The principal insistment of the plaintiffs is that this judgment did not become extinguished until Badgley was granted a discharge and since
 20 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
 30 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
 40 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 appellants 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 acquired 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 appellees respectfully urge that their opinion of the situation is the only reasonable one that can be adopted.

Since after acquired property under the decisions is not subject to the claims of old creditors, it 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,

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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 acceptance of this view by the court could do justice to the creditors and eliminate an almost insurmountable obstacle to business activity by the bankrupt between his adjudication and his discharge.

The opinion of Vice Chancellor Reed in *Kinmouth v. Braeutigam*, 63 Eq. 103, which is cited and relied upon by the appellant is not inconsistent with the contention of the defendants. The language indicates that a judgment would attach to after acquired property of the bankrupt, if a discharge were refused. But, as of when would the lien attach? The answer is obvious. Since the bankrupt holds after acquired property free from the claims of old creditors, the property could only become subject to the lien as of the date of the refusal of the discharge. If, however, the property had been disposed of through valid sale during the interim between adjudication and the refusal of the discharge, how could the property be in anywise affected by the lien of the judgment, which does not attach until the date of the refusal of the discharge?

There are points of difference also between the *Kinmouth* case and the present issue. The court

was not considering a judgment which was obtained within four months of the adjudication of bankruptcy and while the defendant was insolvent.

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, certainly 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, and that, therefore, the judgment in favor of the defendants should be affirmed.

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