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Notice and Grounds of Appeal.

Filed August 4, 1945.

**ESSEX COUNTY COURT OF
COMMON PLEAS**

10

ACTION AT LAW.

CONTINENTAL PURCHASING Co., INC., a
corporation of N. J.,

Plaintiff,

vs.

FRANCES NORRELLI and ANTHONY NORRELLI,
Defendants.

20

To: JOSEPH C. CASSINI, Esq.,
Attorney for Defendants:

PLEASE TAKE NOTICE that plaintiff hereby appeals from the judgment, order and determination entered in this cause on the 30th day of July, A.D. 1945 to the New Jersey Supreme Court, on the following grounds:

1. Because the said judgment, order and determination is contrary to the evidence submitted to said Court and the law applicable thereto. 30

Yours, &c.

ALLAN L. TUMARKIN,
Attorney for Plaintiff.

Dated: August 1st, 1945.

(Served August 2, 1945.)

40

**Order to Show Cause and
Restraining Order.**

Filed May 18, 1945.

**ESSEX COUNTY COURT OF
COMMON PLEAS**

10

ANTHONY NORELLI,

Petitioner,

vs.

CONTINENTAL PURCHASING COMPANY, a corporation
of the State of New Jersey, and WILLIAM H.
BUTLER, III, Sheriff of Essex County,
Defendants.

20 This matter being opened to the Court by Joseph C. Cassini, Solicitor for Petitioner, and it appearing to the Court from the Petitioner that the Sheriff of Essex County did on the 16th day of April, 1945 by virtue of a Writ of Execution in the above entitled cause levy upon the lands, tenements, hereditaments and real estate of the said Anthony Norelli and the Court having read the Petition in the above entitled cause and the Affidavit thereto annexed;

30 It is on this 18th day of May, 1945, ORDERED that the Defendants, Continental Purchasing Company, a corporation of the State of New Jersey, and William H. Butler, III, Sheriff of the County of Essex show cause before the Essex County Court of Common Pleas at the Court House in the City of Newark, County of Essex and State of New Jersey, on the 28th day of May, 1945, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, why the de-
40 fendants should not be restrained and enjoined according to the prayer of said petitioner.

Order to Show Cause.

It is further Ordered that the said defendant, the Continental Purchasing Company, a corporation of New Jersey, its agents and servants, and William H. Butler, III, Sheriff of Essex County, in the meantime and until the further order of this Court desist and refrain from proceeding further with the execution and sale of the property located at No. 312 Park Avenue, Orange, New Jersey of said Petitioner and his son. 10

It is further Ordered that true, but uncertified copies of this Order, Petition and Affidavit, be served on the said Continental Purchasing Company, a corporation of New Jersey through its attorney, Allan L. Tumarkin, and William H. Butler, III, Sheriff of Essex County, within 3 days after the date hereof.

DANIEL J. BRENNAN, 20
Judge.

**Petition and Affidavit of Anthony Norelli,
Annexed to Foregoing Rule to Show Cause.**

Filed May 18, 1945.

ESSEX COUNTY COURT OF
COMMON PLEAS

ANTHONY NORELLI, 30
Petitioner,
vs.

CONTINENTAL PURCHASING COMPANY, a corporation
of the State of New Jersey,
Defendant.

To the Honorable DANIEL J. BRENNAN, Judge of 40
the Essex County Court of Common Pleas:

The Petition of Anthony Norelli residing at

Petition and Affidavit of Anthony Norelli.

#312 Park Avenue, in the City of Orange, County of Essex and State of New Jersey respectfully shows that:

10 1. Petitioner filed a voluntary Petition in Bankruptcy on the 24th day of November, 1942 and was thereupon adjudicated a bankrupt.

20 2. On the 8th day of December, 1942 Petitioner amended his Petition, Order and Schedule particularly to include a creditor who had been inadvertently omitted from the original schedule in bankruptcy, to wit: The Continental Purchasing Company, a corporation of the State of New Jersey, which had recovered a judgment against the Petitioner in the Second Judicial District Court of the County of Essex on the 7th day of January, 1937 in the sum of \$214.45 and costs of suit, which said judgment was docketed in our Court of Common Pleas of Essex County on the 26th day of January, 1945. The Amended Petition has thereon the name of the judgment creditor's attorney, Herbert I. Levine, and his office address as 17 William Street, Newark, New Jersey.

30 3. Petitioner further says that the original debt was incurred by him and his wife with the National Furniture Company, located at #73 Springfield Avenue, Newark, New Jersey. Which said debt was thereafter assigned and transferred to the Continental Purchasing Company, a corporation of the State of New Jersey. That the said debt due and owing to the National Furniture Company was included in the bankruptcy schedules filed by Petitioner.

40 4. That Petitioner had no knowledge or information that the Continental Purchasing Company, a corporation of the State of New Jersey,

Petition and Affidavit of Anthony Norelli.

was the assignee and transferee of the debt owing by the Petitioner to the National Furniture Company until March 4, 1945, on which date he received a letter from the new attorney of the Continental Purchasing Company. Thereupon Petitioner interviewed the new attorney of the Continental Purchasing Company and then discovered that the indebtedness of the Continental Purchasing Company was the same debt which Petitioner and his wife had incurred with the National Furniture Company. The National Furniture Company was included as a creditor in the bankruptcy schedule filed by your Petitioner. 10

5. At the time of the filing of the Petition in Bankruptcy Petitioner's attorney in his presence endeavored to discover the address of the Continental Purchasing Company, a corporation of the State of New Jersey, from Herbert I. Levine, the attorney of record for the Continental Purchasing Company, a corporation of the State of New Jersey, on or before December 8th, 1942 and he was informed by Herbert I. Levine, the attorney of record, that he still represented the defendant, and any notices required could be forwarded to him at his office address, #17 William Street, Newark, New Jersey. Thereupon an Amended Petition, Order and Schedule was filed to include the Continental Purchasing Company, a corporation of the State of New Jersey, and the name and address of the attorney of record who recovered the judgment against the bankrupt. This Amended Petition was filed with the Referee in Bankruptcy on December 8th, 1942. 20 30

6. The debt of the judgment creditor Continental Purchasing Company, a corporation of the State of New Jersey, was discharged as it is 40

Petition and Affidavit of Anthony Norelli.

properly included in the Amended Petition, Order, and Schedule filed in the Bankruptcy Petition of the petitioner. However notwithstanding that the debt of the bankrupt has been discharged, the Continental Purchasing Company, a corporation of New Jersey, had had issued an execution
 10 against the lands, hereditaments and real estate owned by the petitioner, Anthony Norelli, and of which he was seized on the 26th day of January, 1945 or at any time afterwards. The said execution was dated the 9th day of March, 1945 and was recorded in the County Clerk's office on the same date.

7. By virtue of a fi. fa., de bona et terra issued out of the Essex County Court of Common Pleas dated the 16th day of April, 1945, William H. Butler, III, Sheriff of Essex County, had advertised
 20 the property acquired by Anthony Norelli from one George Werner, to wit: #312 Park Avenue, Orange, New Jersey, for sale on Tuesday, May 22nd, next, at 3:00 o'clock P.M.

8. Petitioner further says that he acquired this property on May 25th, 1943 after he was discharged from bankruptcy. The funds with which he purchased this property belong to his son, Neil
 30 Norelli, who has been in the Military Service of the United States Government prior to the inception of the war.

9. Petitioner further says that if the Continental Purchasing Company, a corporation of New Jersey, by its attorney, and William H. Butler, III, Sheriff of Essex County, are permitted to continue with the same of this property, great harm and irreparable injury will be done to his
 40 son and to Petitioner.

Petition and Affidavit of Anthony Norelli.

10. Petitioner contends that he was discharged from bankruptcy on February 6th, 1943 and that the original debt owing to the National Furniture Company and the debt of the judgment creditor, Continental Purchasing Company, its assignee and transferee were discharged in the Bankruptcy proceedings. 10

Petitioner therefore prays that the defendants, Continental Purchasing Company, a corporation of the State of New Jersey and its attorney, and William H. Butler, III, Sheriff of Essex County be restrained and enjoined from continuing and proceeding with the sale of the aforesaid property and from taking any further proceedings and action on said execution and that petitioner have such further relief as may be just and equitable. 20

JOSEPH C. CASSINI,
Attorney for Petitioner.

ANTHONY NORELLI,
Petitioner.

State of New Jersey }
County of Essex } ss.:

ANTHONY NORELLI, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the petitioner in the foregoing petition named. I have read the same and am familiar with the contents thereof, and the matters and things therein contained are true. 30

ANTHONY NORELLI.

Sworn and subscribed to before
me this 17th day of May, 1945.

Joseph C. Cassini,
A Master in Chancery
of N. J. 40

Clerk's Copy of Judgment Record.

DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT OF THE
COUNTY OF ESSEX

IRVINGTON, N. J.

10 ON CONTRACT—STATEMENT FOR DOCKETING.
CLERK'S DOCKET #50,872.

CONTINENTAL PURCHASING Co., a corp. of N. J.,
Plaintiff,

VS.

FRANCES NORRELLI & ANTHONY NORRELLI,
Defendants.

20 REUBEN BROWN, Attorney for Plaintiff.

Judgment in the above entitled cause was entered in the District Court of the Second Judicial Court of the County of Essex, on the seventh day of January, A.D. 1937, for the sum of Two Hundred Fourteen Dollars and forty-five cents damages, and Fifteen Dollars and twenty costs of suit, in favor of the Plaintiff Continental Purchasing Co., a corp. of N. J., and against the defendants, Frances Norrelli & Anthony Norrelli,
30 No Execution was issued thereon.

I, J. Edward DeLancy, Clerk of said Court, do hereby certify that the foregoing statement is correct, and that said judgment stands open and unpaid of record in this Court.

In Witness Whereof, I have hereunto affixed my hand as the Clerk of said Court and the seal of said Court as provided by law, this seventeenth
40

Clerk's Copy of Judgment Record.

day of January, A.D. Nineteen hundred and forty-five.

J. EDWARD DELANCY, Clerk,
(SEAL) by M. PADOLAH,
2nd Asst. (Acting) Clerk.

State of New Jersey }
County of Essex } ss.: 10

I, RUSSELL C. GATES, Clerk of the Court of Common Pleas, 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 the Proceedings, and Judgment Record, docketed in the Essex County Court of Common Pleas on January 26, 1945 in Book DJ 38, Page 378, in the case of Continental Purchasing Co., Inc., a corporation of N. J., Plaintiff vs. Frances Norrelli & Anthony Norrelli, Defendants, as the same are taken from and compared with the original records, filed and entered in the Essex County Court of Common Pleas, and as the same now remains on the files of said Court. 20

(Seal) IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed the
official seal of said Court and
County at Newark, N. J. this
twenty-fifth day of August, A.D. 30
1945.

RUSSELL C. GATES,
Clerk.

Rule Absolute.

Filed July 30, 1945.

ESSEX COUNTY COURT OF
COMMON PLEAS

ACTION AT LAW.

10

CONTINENTAL PURCHASING Co., INC., a corporation
of the State of New Jersey, and WILLIAM H.
BUTLER, III, Sheriff,

Plaintiff,

vs.

ANTHONY NORELLI,

Defendant.

20

Defendant having, by notice of motion dated the 18th day of May, 1945, applied for a Rule to Show Cause why the Plaintiffs, Continental Purchasing Company, a corporation of New Jersey and the Sheriff, William H. Butler, III, should not be restrained and enjoined from proceeding further with an execution and sale of the property owned by the defendant, Anthony Norelli, and known as 312 Park Avenue, in the City of Orange, County of Essex and State of New Jersey.

30

The said rule was returnable on the 28th day of May, 1945, and on June 5th, leave to take depositions to be used on the argument was applied for and the taking of said depositions was referred to Honorable Augustus C. Studer, Jr., and it was further ordered that all costs abide the final event and the further order of this Court.

40

In the meantime, the above entitled matter was continued from time to time until the 23rd day of

Rule Absolute.

July, 1945, whereupon the Court having heard the argument of counsel and having determined the same. It is on this 30th day of July, 1945, ORDERED that the aforesaid rule be made absolute with costs to be taxed against the plaintiff, the Continental Purchasing Co., Inc., a corporation of the State of New Jersey, and in favor of the Defendant, Anthony Norelli. 10

On motion of Joseph C. Cassini, Attorney of the Defendant.

W. STANLEY NAUGHRIGHT,
Judge of the Essex County
Court of Common Pleas.

Transcript of Testimony.
(Hearing of June 15, 1945.) 20

ESSEX COUNTY COURT OF
COMMON PLEAS

CONTINENTAL PURCHASING COMPANY, INC.,
a corporation of New Jersey,
Plaintiff,

vs.

FRANCES NORELLI and ANTHONY NORELLI, 30
Defendants.

Transcript of testimony in the above entitled matter taken before AUGUSTUS C. STUDER, JR., Esq., a Supreme Court Commissioner of the State of New Jersey, at his office, Raymond-Commerce Building, Newark, New Jersey, on Friday, June 15, 1945 at two P.M. pursuant to order of refer-

Anthony Norelli—Direct.

ence of Honorable W. STANLEY NAUGHRIGHT, dated June 5, 1945.

APPEARANCES:

ALLAN L. TUMARKIN, for the Plaintiff.

JOSEPH C. CASSINI, for the Defendants.

10

EUGENE DONEGAN,
Certified Shorthand Reporter.

The Commissioner: This has been referred to me to take depositions of such witnesses as may be produced by either party with respect to the issue set forth in the petition of the defendant Anthony Norelli. Is Mr. Norelli here?

Mr. Cassini: Yes, he is.

20

ANTHONY NORELLI, one of the defendants, being duly sworn, testifies as follows:

Direct-examination by Mr. Cassini:

Q. Where do you live, Mr. Norelli? A. 312 Park Avenue, Orange, New Jersey.

Q. Are you the bankrupt in this matter, Mr. Norelli? A. Yes.

30 Q. Did you owe the National Furniture Company any money? A. I did.

Q. Where did they do business, do you know? A. On Springfield Avenue, Newark, New Jersey.

Q. You filed a petition in bankruptcy, did you not? A. I did.

Q. I show you a certified copy of a petition filed by you in bankruptcy dated November 24, 1942 and ask you if that is a true copy of the petition filed by you in this matter. A. Yes, sir.

40

Mr. Cassini: I want to make this state-

Anthony Norelli—Direct.

ment at the present time. There is a certificate attached here of the Clerk of the United States District Court showing that this is a certified copy of the petition on file in his office.

Q. Now, Mr. Norelli, I show you a schedule containing the names of creditors and ask you whether you find the name of the creditor to whom you were indebted on this claim. 10

Mr. Tumarkin: I object to that. The schedule speaks for itself.

The Commissioner: The objection is noted.

A. National Furniture Company.

Q. And the National Furniture Company, the address of that creditor is what? A. Springfield Avenue, Newark, New Jersey. 20

Q. And the word judgment is written there-after, is it not? A. Yes.

Q. What is the amount of the judgment? A. \$300.

Q. There was also an amended petition, order and schedule filed subsequently in this matter? A. Yes, I think it was on December 8.

Q. Will you examine the certified copy there and can you give us the name of the judgment creditor in whose behalf that petition, order and schedule was filed? A. Continental Purchasing Company. 30

Q. Is that the only creditor whose name appears in the amended petition, schedule and order? A. Yes, sir, that is the only one.

Q. And it specifies that Continental Purchasing Company is what? A. Continental Purchasing Company, a corporation, Newark, New Jersey.

Q. And what else does it specify? A. The judgment, \$229.65. 40

Anthony Norelli—Direct.

Q. Recovered against you? A. Yes.

Q. When you filed this petition or the original petition in bankruptcy did you know that the original indebtedness of the National Furniture Company had been assigned or transferred to the Continental Purchasing Company? A. No. I
10 didn't know until March 4 this year when I went up to Mr. Tumarkin's office. I never done any business with them people and I said I didn't owe any money. I said, "How come he has got a judgment?" He looked it up and he made a telephone call. He said that is the National Furniture Company, that they bought the account when they went bankrupt.

Q. You didn't file the original petition including the Continental Purchasing Company, is that right? A. No.
20

Q. You investigated the various district courts to find out what judgments were recovered against you? A. That's right.

Q. You went to the Irvington District Court and found a number of judgments? A. I did.

Q. You went back to the Irvington District Court on several occasions, is that right? A. That's right.

Q. On the last occasion that you went to the
30 Irvington District Court you went there for what purpose? A. To look up something else.

Q. When you went there to look for something else— A. I discovered that 1936-1937 was another judgment against me from the Continental Purchasing Company. Because I was in business up to 1935. I said I never done any business with these people. I was looking for something else and I happened to look in and saw the Continental Purchasing Company for a judgment, \$229 something.
40 So I came up to you again and you made another petition amended to that schedule there.

Anthony Norelli—Direct.

Q. It was after you went to the Irvington District Court and looked up something else that you discovered that? A. Yes.

Q. And I drew up another petition? A. That's right.

Q. An amended petition and schedule? A. Yes.

Q. Now, before drawing up the amended petition, order and schedule, were you present when a conversation was had with a certain other individual? A. Yes, you had a conversation over the phone with Herbert I. Levine of 17 William Street, Newark. 10

Q. Do you recall approximately what the conversation was?

Mr. Tumarkin: I object to this conversation.

The Commissioner: The objection is noted. 20

(Discussion off the record.)

Q. Did you ever hear a conversation that I had with someone on the phone? A. Yes, sir.

Q. Who was the party that I phoned, that I called, do you know? A. Because you told your daughter to call up Mr. Levine, look up Mr. Levine's address, and you looked it up in the 1942 Lawyers' Diary and got the name and address right in there and it was 17 William Street. She called up the number. She said, "Pop, I got Mr. Levine on the wire." He was on one phone. 30

Q. When you say "your daughter," my daughter happens to be my stenographer? A. Your stenographer, yes. And you said you wanted the name and address of the Continental Purchasing Company and he says, "Well, if there is any legal matter"—

Q. You didn't hear what conversation there 40

Anthony Norelli—Direct.

was on the other side, did you, or the conversation of Mr. Levine? A. No.

Q. You only heard what questions I asked? A. The questions that you asked.

Q. After I asked him that question do you know what question I asked him next? A. You said
10 you wanted to know the address of the Continental Purchasing Company and he told you, "Any legal matters, you have to see me."

Mr. Tumarkin: I move that the response be stricken as immaterial and irrelevant and hearsay. I reserve the right, without making further objections on the record, to move to strike all other matters which are immaterial, irrelevant or hearsay or objectionable on any other legal grounds.

20 The Commissioner: I think you ought to object as it comes along because otherwise you would simply object to everything in there; you would have a blanket objection to all the testimony to be given.

Q. Now, you spoke to me after that, didn't you?

A. Yes, sir.

Q. I told you what Mr. Levine had said.

Mr. Tumarkin: I object to that. It is
30 pure hearsay.

A. Yes.

(Discussion off the record.)

Q. I show you a discharge in bankruptcy. Is that the discharge in bankruptcy that you received from the Court? A. Yes, sir.

Mr. Cassini: I offer it in evidence.

The Commissioner: Are you going to
40 offer the petition, too?

Anthony Norelli—Cross.

Mr. Cassini: Yes, I offer the petition first.

(Petition in bankruptcy is received in evidence and marked Exhibit D-1; discharge from bankruptcy is received in evidence and marked Exhibit D-2.)

10

Q. Now, this claim or this judgment that was recovered against you by the Continental Purchasing Company was the same claim for which you were indebted to the National Furniture Company? A. That's right.

Q. Of Springfield Avenue, Newark, New Jersey, is that right? A. Yes, sir.

Q. Do you remember the date that you filed this petition in bankruptcy? A. I think it was November 24, 1941.

20

Q. I show you the petition—

The Commissioner: Is there any dispute about that fact?

Mr. Cassini: It is 1942.

The Witness: 1942. I was discharged in 1943 in February.

Mr. Cassini: That is all; cross examine.

Cross-examination by Mr. Tumarkin:

30

Q. Mr. Norelli, what is your occupation? A. Machinist.

Q. Can you read and write English? A. I suppose I can.

Q. What schooling have you had? A. Second year.

Q. Of what? A. High.

Q. You went through grade school? A. Yes, sir.

Q. Do you know how to use the City Directory? 40
A. Certainly I can use the City Directory.

Anthony Norelli—Cross.

Q. Do you know how to use a telephone book?

A. Yes, sir.

Q. Now, before you filed that petition in bankruptcy did you assemble all of the information necessary for your lawyer to prepare the petition and schedules? A. I certainly did.

10 Q. You gave him a list of all your assets? A. Yes, sir.

Q. You gave him a list of all your creditors?

A. All the creditors.

Q. In assembling the list of creditors what data or source did you go to? A. I had them when I was in business. I went all through the records of the people I done business with.

Q. What business were you in? A. I was in the liquor business, in a tavern.

20 Q. While you were in that business you kept records? A. Records, yes, sir. And I know I never done any business with—

Q. I didn't ask you anything yet. Did you keep a record of all the people to whom you owed money? A. Yes, sir.

Q. Did you keep a record of all your personal debts? A. All the personal debts, yes, sir.

Q. You knew in 1942 right after the petition was filed that you owed some money to National Furniture Company? A. I certainly did.

30 Q. Have they sued you? A. I don't remember because I was up in Connecticut for 1936, 1937, 1938, and 1939.

Q. But you maintained your residence where?

A. 340 Central Avenue.

Q. Is that where you lived? A. That is where I lived.

Q. Is that where your family lived? A. Yes, sir.

40 Q. You were away on business? A. I was working up there, I was out of business. In 1935 I

Anthony Norelli—Cross.

went to Connecticut and I worked up there for 1936, 1937, 1938, and 1939.

Q. But you used to come home week-ends? A. Maybe once a week, once or twice a month.

Q. During that period you were being sued by various creditors, were you not? A. I was sued up until 1935. That is why I missed that thing when I went to the— 10

Q. When you used to come home each time your wife would turn over to you any mail that you received in the interval, is that so? A. Yes, sir.

Q. I assume she called to your attention any suits that were served upon her in the dwelling house while you were away, is that correct? A. Yes.

Q. Do you recall distinctly being sued by National Furniture Company? A. I don't recall being sued by the National Furniture Company. 20

Q. What caused you to go up to the court and look the records up? A. To look up the judgment for Mr. Cassini. I went all through the courts.

Q. You had been sued by various creditors, I assume, and therefore you didn't know just which creditors had obtained judgments, is that right?

Mr. Cassini: I object to this line of examination. I don't see how it is pertinent.

The Commissioner: All your objections are noted, and you may note your exception. 30

A. Up until 1935, that is all I can answer that, because I was away from 1936, 1937, 1938, and 1939.

Q. You went to the various courts, as you said, to look up the judgments there because you were not sure which creditors had gotten judgments. That is correct, isn't it? A. I went up to the 40

Anthony Norelli—Cross.

court to make the list for Mr. Cassini because he was filing a petition in bankruptcy. And I only looked before 1935, up until the time I was in business, from then on. I happened to go up to the Irvington District Court for another matter.

10 Q. Just a moment. We will come to that. Now, the claim of the National Furniture Company was based on what? A. Furniture.

Q. When was it bought? A. I bought over \$5000 worth of furniture off them people, but I figured, according to the books, I think I owed \$300 balance. But in the meantime I must have made a couple of more payments, because I notice in the judgment there is \$229.

20 Q. So you knew there was a balance due National Furniture Company. That was for furniture you had purchased over some time, is that right? A. That's right, and it is in that schedule there.

Q. Did you actually see a judgment entered against you by National Furniture Company in the Irvington District Court? A. No, not in the Irvington District Court.

Q. What court? A. It was the Continental Purchasing Company in 1937.

30 Q. I thought you said that National Furniture Company had gotten a judgment against you.

Mr. Cassini: The petition sets out a judgment by the National Furniture Company.

Mr. Tumarkin: Will you stipulate that is not the fact, Mr. Cassini?

Mr. Cassini: I won't stipulate anything. The petition speaks for itself.

40 Q. Now, Mr. Norelli, is it or isn't it a fact that National Furniture never obtained a judgment

Anthony Norelli—Cross.

against you? A. I never found it in court; I didn't say I did.

Q. So when you put it in the schedules it was on the basis they had a claim against you and not a judgment, is that correct? A. I don't know whether they sued me or not.

Q. Would you mind answering my question? 10
The National Furniture Company claim then was founded on an open account against you and not on a judgment, according to your statement now, is that correct? A. Yes.

Q. When you speak about the judgment you are referring to the judgment obtained subsequently by the Continental Purchasing Company as assignee of the National Furniture Company; is that so? Is it or is it not so? A. I am saying I found that judgment in 1936 or 1937 that they 20
got in Irvington Court from the Continental Purchasing Company. And I didn't know that I owed them any money until I came up to your office.

Q. But in 1942 you filed a petition? A. I filed a petition.

Q. Asking the Court for leave to amend the schedules in which you asserted that Continental Purchasing had obtained a judgment against you. You knew that then, didn't you? A. Yes. It was in the amended petition there. 30

Q. Then your statement is that in 1942 you knew Continental had obtained a judgment against you, and isn't it a fact that before you put that in the papers, that is, before you signed the petition which is sworn to December 7, 1942, you had examined the records of the Irvington District Court and found the judgment on record? A. Of the Continental Purchasing Company as amended on the schedule. We had filed a schedule previous to that. 40

Anthony Norelli—Cross.

Q. That is correct. But before you put the facts in this petition which was signed by you you had investigated the court records and found this judgment on record? That is so? A. I found this on record afterwards, yes, sir.

10 Q. You mean after you had filed the original petition? A. After I filed the original petition.

Q. After you had filed the original petition, is that so? A. That's right.

Q. How did you find out about this judgment? A. I went over to make another investigation for Mr. Cassini up at the District Court from 1935 to 1942 for something else and I happened to run in this book in 1936 or 1937. So I happened to look and I saw it was another judgment against me. Then when I got to Mr. Cassini's office I told him about it.

20 Q. Did you look at the original papers that were on file in that court in relation to the Continental judgment? A. I only know that judgment; I didn't look at any papers.

Q. You found the docket entry? A. The docket entry, that is all I looked at.

Q. And you looked up these docket entries yourself? A. Yes.

30 Q. I understand you said that you looked up all of the docket entries of all of the judgments for the information of Mr. Cassini? A. Yes, up to 1935.

Q. And then subsequently from 1935 to 1942? A. This was for something else.

Q. I think you said that you also checked from 1935 to 1942 when you filed the petition in this case for other judgments? A. Yes. Not other judgments against me. This was a different case altogether. I looked up something for him.

40 Q. You found no other judgments after 1935 except the Continental judgment? A. That's right.

Anthony Norelli—Cross.

Q. Didn't it arouse your curiosity as to what that judgment was for? A. I called up Levine that is what Mr. Cassini was trying to tell you, he called up Levine to find out how the Continental Purchasing Company was involved. He said, "If it is any legal matter you have to take it up through me."

10

Q. Couldn't you have looked in the court's records and found the original papers on which the suit was entered?

Mr. Cassini: I object to the question.

Q. Did you ever see a paper like this? A. No, sir, because I was up in Connecticut. I was never served with no summons.

Q. If I were to tell you that the suit on which the judgment was founded by Continental Purchasing, which was entered January 7, 1937 against yourself and your wife, indicates that it is based upon merchandise sold and delivered by National Furniture Company of Newark, and the claim was assigned to the Continental Purchasing Company; if I were to tell you that what would you say?

20

Mr. Cassini: I object to that.

The Commissioner: The objection is noted.

30

A. I never saw one of those.

Mr. Cassini: That is only an assumption on the part of the attorney as to whether he saw that paper and what it included.

Mr. Tumarkin: We will prove it in good time. If you have no personal knowledge, Mr. Cassini, of the fact that the original judgment on file with the clerk shows that

40

Anthony Norelli—Cross.

I will subpoena the original records; otherwise we may stipulate or permit it to go into evidence at this time.

Mr. Cassini: I won't stipulate as to this. I won't permit it to go into evidence; I object to its going into evidence.

10 Mr. Tumarkin: We will subpoena the clerk's records.

Q. Now, I understand, then, Mr. Norelli, that although you checked the docket entries of the clerk of the Irvington District Court from 1935 down to 1942 and found this judgment which was entered against you in 1937, you did not go to the docket or the jacket of the court's records and examine it to determine whether or not the claim of National Furniture Company was the same
20 claim as that on which the judgment was based, is that correct? A. That's right.

Q. When you were present at Mr. Cassini's office on the day this alleged conversation was had with Mr. Levine you only heard Mr. Cassini's questions or statements on the telephone, did you not? A. That's right.

Q. You had no way of knowing what Mr. Levine, the party on the other side, was saying, had you? A. No.

30 Q. Now, the only way that you learned that subsequently was what Mr. Cassini told you, is that right? A. Yes.

Q. Now, when you found this judgment on record of Continental did you look in the telephone directory to determine the address of Continental Purchasing? A. It wasn't up to me; it was up to the lawyer.

Q. Did you or did you not? A. No.

40 Q. Did you look in the city directory for that year? A. No, sir.

Anthony Norelli—Cross.

Q. How did you know that Mr. Levine was the attorney for Continental? A. Because it was on the judgment in the docket; that is the only thing I found.

Q. Now, take a look at this paper I hand you now, which is a copy of a summons on contract in the case of Continental Purchasing Company against Frances and Anthony Norelli in the Irvington District Court. Look at the name of the attorney whose name appears on the bottom as the attorney for the plaintiff. A. Joseph L. Segal. 10

Q. Joseph L. Segal, and the address is 868 Broad Street, Newark, is that so? A. Yes.

Mr. Tumarkin: I ask that this be marked for identification.

(The document referred to is marked P-1 for Identification.) (Marked in evidence by Court on 7/23/45.) 20

Q. Now, then, after you went back to Mr. Cassini and told him you found this judgment of Continental he prepared the petition for leave to amend the schedules and you signed it, did you not? A. That's right.

Q. Are you familiar with the fact that an order was entered permitting you to amend the schedule you have here? A. I know that, yes. 30

Q. Did you or did anyone on your behalf serve a copy of this order on either Continental Purchasing Company, National Furniture Company, Herbert I. Levine or Joseph L. Segal? A. I don't know nothing about that.

Mr. Tumarkin: I ask that he answer the question. Would you mind repeating it?

Mr. Cassini: He has answered.

Mr. Tumarkin: It calls for a yes or no answer. 40

Anthony Norelli—Cross.

Q. Did you serve copies of this order on any of these persons?

Mr. Cassini: I object to the question because he has already answered it.

A. I told you that was up to my lawyer.

10 Q. Did you or did you not? A. I don't know nothing about it.

Q. Did you or did you not?

Mr. Cassini: He has answered already three times.

By the Commissioner:

Q. Did you or didn't you serve it? A. No, not me.

20 The Commissioner: Say yes or no; that is all.

By Mr. Tumarkin:

Q. You never had a conversation personally with Mr. Levine regarding the bankruptcy petition? A. I don't know the man, never had a conversation with him.

Q. Did you ever have any conversation with anybody representing the Continental Purchasing Company regarding the bankruptcy? A. No, sir.

30 Q. Did you ever have a conversation with Mr. Segal regarding the bankruptcy? A. I don't know Segal either.

Q. Did you or did you not? A. No, sir.

Q. When I say did you have I am referring to the period between the filing of your petition and the entry of the order of discharge and your answer would be the same, is that correct? A. Right.

40 Q. I show you page 390 of what purports to be the Newark directory for the year 1942 and ask you if you can find in the second column of

Anthony Norelli—Cross.

that page the Continental Purchasing Company listed.

Mr. Cassini: I object to the question because it is an improper question.

The Commissioner: I don't know what the purpose is but I can't rule on it. Therefore your objection is noted. 10

A. No, I never looked at that.

Q. Will you look at it now and see if you can find it? A. Yes.

Q. What does that read? A. Continental Purchasing Company, 1 Clinton Street.

Q. What else? A. Telephone Market 3-3363.

Mr. Cassini: I object to this.

The Commissioner: The objection is noted and the answer will be given. 20

Q. Is there any distinction between the printing for Continental and the rest of the page?

Mr. Cassini: I object to that question for the same reason.

The Commissioner: The objection is noted and the answer will be given.

Mr. Cassini: If he wants to make him his witness he has got to be bound by whatever Mr. Norelli says. 30

The Commissioner: Your objection is noted.

A. Heavy type.

Q. There is only one other name on the same page with heavy type? A. That's right.

Mr. Tumarkin: That is all for the present. I reserve the right to recall Mr. Norelli if necessary. 40

*Anthony Norelli—Redirect.**Redirect-examination by Mr. Cassini:*

Q. After Mr. Cassini got through speaking with Mr. Levine he told you the purported conversation, is that right? A. That's right.

10 Mr. Tumarkin: I object to the question and ask that the answer be stricken at this time.

The Commissioner: The question will be answered. Your objection has been noted.

Q. I directed you to make this investigation in the various courts, didn't I? A. That's right.

Q. And you were working under my supervision? A. That's right, yes, sir.

20 Q. You didn't make a record of all the judgments, did you? A. No.

Q. You made a record of a number of judgments where I asked you? A. Where you sent me, the court that you sent me.

Q. When you had made some mistakes in making up the list I sent you back? A. That's right.

Mr. Tumarkin: I object to this line of examination; it is not redirect.

30 The Commissioner: The objection is noted.

Q. I show you Exhibit D-1 which is the petition in bankruptcy and Schedule A-3, and show you the item National Furniture Company, Springfield Avenue, Newark, New Jersey. What is that after the words Newark, New Jersey? A. Judgment.

Q. Against Anthony Norelli, is that right? A. That's right.

40 Q. For what sum? A. \$300.

Mr. Cassini: That is all.

Mr. Tumarkin: That is all.

Frances Mahringer—Direct.

FRANCES MAHRINGER, being duly sworn, testifies as follows:

Direct-examination by Mr. Cassini:

Q. Where are you employed? A. Bankruptcy Court.

Q. Were you employed there in November 1942? A. I was. 10

Q. What are your duties in reference to bankruptcy matters? A. Well, sort of supervise the office.

Q. Do you mail notices of all the meetings to which creditors are invited for bankruptcy? A. I personally don't do it, no.

Q. You see that it is done? A. Yes.

Q. Do you know whether or not notices were all sent out in the matter of Anthony Norelli? 20

Mr. Tumarkin: What notices? What time, what year?

Q. To all the creditors enumerated in Schedule A-3 of the Bankruptcy Petition of Anthony Norelli.

Mr. Tumarkin: Notice of what? May we have that on the record?

Q. Notice of the first meeting of creditors. A. Well, they are sent to all the creditors listed in the schedules. 30

Q. And you supervise the mailing of copies of the notice of the meeting to the creditors named in this schedule, is that right? A. I don't quite get what you mean.

Q. I mean you supervise or you see to it that all of the creditors enumerated in the schedules in Anthony Norelli's bankruptcy were notified of the meeting? A. That's right. 40

Frances Mahringer—Cross.

10 Q. Now, do you know whether the same notices were sent out to the creditors in the amended petition and order? A. That I don't know. The affidavit of mailing was made out and I think it is prior to the entry of this order, because notice of the first meeting was sent out. Have you got the papers there?

Q. Yes. A. The first meeting notice was mailed on the first of December 1942 and this order is dated the 8th day of December 1942. So whether a notice was sent after that I don't know because there is no other affidavit.

Q. There is no other affidavit in there? A. No.

Mr. Cassini: That is all.

Cross-examination by Mr. Tumarkin:

20

Q. When was the first meeting of creditors? A. December 11, '42.

Q. Have you a record of the appearances of the first meeting? A. Yes.

Q. Who was present? A. The bankrupt, Joseph C. Cassini, attorney for the bankrupt, and Aaron Van Poznak for the creditor Builders' Construction Company, \$400. That is all.

30 Q. There were no other creditors or attorneys representing creditors? A. No.

Q. You had stated that the affidavit of mailing for the first meeting of creditors is dated December 1? A. Well, it is not dated; that is the date they were mailed, on the first.

Q. There is no proof of either service or mailing of the order amending schedules on Continental Purchasing Company or its attorney, is there? A. No.

40

Mr. Tumarkin: That is all.

Frances Mahringer—Redirect.

Frances Mahringer—Recross.

Redirect-examination by Mr. Cassini:

Q. Have you the complete folder here? A. Yes, this is it.

Q. Do you have proof that a notice was sent to Herbert I. Levine? A. I have no definite proof. This affidavit of mailing states it was mailed on December 1. When these amendments come in we attach them to the schedules, but I don't know whether there was a notice sent out specifically on that or not. 10

Q. Will you look through your folder and see if there is a letter returned to you from Herbert I. Levine? A. You mean this correspondence?

Q. Yes. A. No, not from Herbert Levine.

Mr. Cassini: That is all. 20

Recross-examination by Mr. Tumarkin:

Q. Is there an envelope returned from Nation Furniture Company? A. From National Furniture. This is here.

Q. Is that the way the National is listed in the schedules? A. That's right.

Q. In this envelope there is enclosed a printed notice of the first meeting of creditors? A. That's right. 30

Mr. Tumarkin: I offer the envelope with the printed notice in it in evidence at this time.

(Envelope and notice referred to are received in evidence and marked Exhibit P-2.)

By Mr. Cassini:

Q. I show you the original petition, certified 40

Frances Mahringer—Recross.

copy of the original petition. Will you examine that and show me whether that creditor is listed there as Nation or National? A. It is listed here as National, but this is our copy that we used when we mailed the notices out.

10 *By the Commissioner:*

Q. When you say this you are referring to a paper which you brought with you? A. That's right.

Mr. Cassini: This is a copy of the original petition on file.

The Commissioner: You refer to Exhibit P-1?

Mr. Cassini: Yes.

20 The Witness: Well, there is an affidavit from the clerk's office that it is, I assume it is.

By Mr. Cassini:

Q. You don't know whether or not the notice of a meeting of creditors was sent to Herbert I. Levine? A. I can't say definitely.

Q. There may have been? A. There may have been, there may not.

By Mr. Tumarkin:

30 Q. Just to clear up this Nation and National business. What you have been referring to as the duplicate original, that was originally filed and stamped by Benjamin F. Havens, Clerk of the United States District Court on November 24, 1942 and filed in the office of Referee A. T. Schenck, on November 25, 1942, is that correct? A. Right.

40 Q. The claim is there set up as "Nation Furniture Co., Springfield Avenue, Newark, N. J.,

Martha A. Kliesh—Direct.

judgment \$300," is that correct? A. Yes, that's right.

Q. What Mr. Cassini has been referring to where the name National appears instead of Nation is a certified copy of the original which is on file in Trenton? A. That's right.

Q. Now, as a matter of practice, to your knowledge, schedules are filed in triplicate, are they not? A. That's right. 10

Q. The original goes to the clerk? A. Yes.

Q. And duplicate originals signed by the bankrupt go to the Referee and a copy to the Trustee, is that correct? A. Duplicate originals come to the Referee and then we send one of those copies to the Trustee. There are only three filed.

Q. This copy that we have been referring to as supposed to be the duplicate original is prepared by the bankrupt or his attorney and filed with your office, is that correct? A. Yes. 20

MARTHA A. KLIESH, being duly sworn, testifies as follows:

Direct-examination by Mr. Tumarkin:

Q. You are connected with the Clerk's office of the United State's District Court at Trenton? A. That's correct. 30

Q. In what capacity? A. I am Deputy Clerk.

Q. Have you the original bankruptcy petition and schedules that were filed in the case of Anthony Norelli, bankrupt, on November 24, 1942? A. Yes, sir.

Mr. Tumarkin: I ask that the original schedule be marked at this time in evidence.

(The schedule is receive in evidence and marked Exhibit P-3.) 40

Martha A. Kliesh—Cross.

Q. Will you turn to Schedule A-3 and tell us how the claim of National or Nation Furniture Company appears in the original? A. It is written Nation and then there is a caret with the *al* written above the line, furniture company.

10 Q. From your knowledge and experience as deputy clerk what is your deduction from the fact that has been written in the original and the Referee's copy does not contain that correction?

Mr. Cassini: I object to any deduction she may make. The petition speaks for itself.

The Commissioner: The objection will be noted and the question answered.

20 A. Well, it looks as if whoever did prepare these schedules had found their error, put the caret and the *al* in the original but not in the copy which was sent to the Referee.

Mr. Tumarkin: Thank you.

Cross-examination by Mr. Cassini:

Q. A copy and the original are sent together to the Referee, is that right? A. No, the original is kept in the Clerk's office.

30 Q. But the four are filed together with the Clerk? A. Three.

Q. Three copies are filed with the clerk? A. That's right.

Q. And the original is filed with them? A. An original and two copies.

Q. An original and two copies are filed with the clerk simultaneously? A. That's right.

By Mr. Tumarkin:

40 Q. And the original goes to the Clerk's office

Martha A. Kliesh—Cross.

at Trenton and the two copies go to the Referee's office at Newark or whatever vicinage the case is referred to? A. That's correct.

Q. And the notices that go out through the Referee's office are based on the copies that are filed with the Referee's office? A. Yes, sir.

By Mr. Cassini:

10

Q. That is merely a matter of convenience for your office, isn't that right? A. There is not any matter of convenience to it. We don't have anything to do with the notices, that is the Referee's duty.

Q. Aren't you guided by the original petition that is filed in the Clerk's office as to the names of creditors that are mentioned in the schedule?

A. We don't have anything to do with the creditors; that is all taken care of by the Referee. The only thing that happens in our office is the filing of this original petition and the adjudication and the order of reference.

20

Q. And the original petition recites therein National Furniture Company? A. Yes.

Mr. Cassini: That is all.

(At this time the hearing is continued to July 6, 1945, at ten A.M.)

30

**Transcript of Testimony.
(Hearing of July 6, 1945.)**

CONTINENTAL PURCHASING COMPANY, INC.,
a corporation of New Jersey,
Plaintiff,

vs.

10

FRANCES NORELLI and ANTHONY NORELLI,
Defendants.

Transcript of testimony in the above entitled
matter taken before AUGUSTUS C. STUDER, JR.,
Esq., a Supreme Court Commissioner of the State
of New Jersey, at his office, Raymond-Commerce
Building, Newark, New Jersey, on Friday, July
6, 1945, at ten A.M. pursuant to order of reference
20 of Honorable W. STANLEY NAUGHRIGHT, dated
June 5, 1945.

APPEARANCES:

ALLAN L. TUMARKIN, for the Plaintiff.
JOSEPH C. CASSINI, for the Defendants.

EUGENE DONEGAN,
Certified Shorthand Reporter.

30 NORMA BROWN, called as a witness on be-
half of the plaintiff, being duly sworn, testifies
as follows:

Direct-examination by Mr. Tumarkin:

Q. Are you connected with the Continental Pur-
chasing Company, Inc.? A. I am.

Q. In what capacity? A. Manager and assist-
ant secretary.

40 Q. Are you familiar with the account of Fran-
ces and Anthony Norelli? A. I am.

Norma Brown—Direct.

Q. What are your duties generally as manager?

Mr. Cassini: I object to it as incompetent, irrelevant and immaterial.

The Commissioner: The objection will be noted and the question will be answered.

Mr. Tumarkin: I will withdraw it.

10

Q. How long have you been with Continental?

Mr. Cassini: I object to that for the same reason.

The Commissioner: The objection will be noted and the question answered.

Mr. Tumarkin: I will withdraw it.

Q. It was testified to in this proceeding, Miss Brown, that Mr. Norelli, that is, Anthony Norelli, filed a petition in bankruptcy on November 24, 1942. Did your company receive notice of those proceedings? A. No.

20

Mr. Cassini: I object to it as leading.

The Commissioner: The question will be answered and the objection noted.

A. We received no notice.

Q. When was the first time that your company received notice of the bankruptcy proceedings?

A. Some time in January, 1940.

Q. When? A. 1945, I am sorry.

30

Q. Do you know a lawyer named Herbert I. Levine? A. I do.

Q. Was he employed by Continental? A. He was.

Q. During what period? A. January 17, 1936 and he terminated on August 23, 1937.

Q. On what basis was he employed at that time?

Mr. Cassini: I object to the question.

40

Norma Brown—Direct.

The Commissioner: The objection will be noted and the question answered.

Mr. Cassini: I object for several reasons. One, that it is only a conclusion that she is drawing in this matter, and further I don't see the relevance of the question.

10 The Commissioner: The objection will be noted and the question answered.

A. He was employed on a retainer to handle all suits necessary—

Mr. Cassini: May I interpose an objection here, on the further ground that this question is irrelevant and incompetent and has no relation to the issue in question.

20 The Commissioner: All of your reasons are noted on the record. The objection is noted and the question will be answered.

(The preceding answer is read by the reporter.)

A. (Continuing) —on behalf of our company.

Q. Was he general counsel for the company?

Mr. Cassini: I object to the question for the same reason.

The Commissioner: The same ruling.

30 Q. Will you answer that? A. He was to commence suits on our behalf and to defend us against any suits against our company.

Mr. Cassini: May I interpose an objection at this time? The witness is reading from a letter and I object to the witness reading from any letters and getting the answers to the questions on the record.

40 The Commissioner: The objection is noted.

Norma Brown—Direct.

Mr. Cassini: I object to it on the further ground that this testimony is hearsay.

Q. Miss Brown, you say that Mr. Levine's contract of employment was terminated on August 23, 1937. Was he retained by your company at a later date? A. On November 1, 1940, we retained him to handle cases on a contingent arrangement of twenty per cent, just specific cases that were assigned to him. 10

Mr. Cassini: I object to this.

The Commissioner: Your objections are noted and on that basis they will be ruled on by the Court.

Mr. Tumarkin: You will notice that Mr. Cassini interrupts the witness and when I start a question he interrupts me. Now I wish he would guide himself by the usual rules in these matters and by the usual procedure and wait until the witness answers and wait until I finish my question. 20

The Commissioner: Everybody wants to be guided by the usual rules. You will just wait until the question is finished and then make your objection. I am sure that is what you want to do.

(The preceding question and answer are read by the reporter.) 30

Q. Was that arrangement terminated subsequently? A. It was terminated on December 10, 1940.

Q. During that interval unless a case was specifically assigned to him he would have no right to handle it, is that correct? A. That's correct.

Mr. Cassini: I object on the ground it is incompetent and irrelevant and that the witness is still reading from a letter pur- 40

Norma Brown—Direct.

porting to be some communication with someone, my objection being that what she is reading is hearsay.

The Commissioner: Your objection is noted.

10 Q. Was he re-employed again by your company at a later date? A. On June 8, 1943 we again retained him on a contingency fee basis on specific cases assigned to him.

Q. When was that terminated? A. I believe it was some time last year, it was 1944.

Q. Just what do you mean by contingency basis? A. It is just on specific cases. A case that we would assign to him, he would have a lien, he would represent us in that particular case only.

20 Q. Was he during the period since August 23, 1937 representing your company generally in all matters referring to your legal matters?

Mr. Cassini: I object as calling for a conclusion.

A. No, he wasn't.

Q. Had Mr. Levine a right to appear for you generally in any suit brought in your behalf or to defend your company during that same period, that is, since 1937? A. No.

30 Q. Did you have other counsel representing you since 1937? A. We did.

Q. During the period from January 17, 1936 to August 23, 1937 when you say he was on a retainer basis, was he retained generally to defend you in any matters or only specifically with respect to those matters that were assigned to him? A. He was to represent us in any and all cases that were assigned to him in our behalf.

40 Q. When you say a retainer do you mean on a salary basis? A. Yes.

Norma Brown—Direct.

Q. That is the distinction between his original retention and the subsequent retention that he was placed on on a contingency basis, is that correct?

A. That is correct.

Q. Now, did Mr. Levine ever inform your company of the bankruptcy proceedings instituted by Mr. Norelli?

10

Mr. Cassini: I object to that on the ground that it is completely and absolutely hearsay. She is telling us what Mr. Levine said.

The Commissioner: The objection will be noted and the question answered.

A. He did not.

Mr. Cassini: I object on the ground it is hearsay.

20

Q. What was the original claim of Continental Purchasing Company based on? A. On account assigned to us by the National Furniture.

Q. National Furniture what? A. National Furniture Company.

Q. Was there a suit instituted on that claim? A. There was.

Q. Where was that suit instituted? A. In the Second Judicial District Court of Essex County.

30

Q. Was there a judgment obtained thereon? A. There was.

Q. Are you familiar with the original suit? A. I am.

Q. Did the suit disclose on its face that the claim of Continental was based on the original assigned claim of National Furniture Company? A. It was.

Q. You mean it did disclose that fact? A. Yes.

Q. After the entry of judgment against Mr.

40

Norma Brown—Direct.

Norelli was he notified of the fact that the judgment was entered? A. He was.

Q. Was he notified as to the basis of the original claim? A. He was.

Q. Did you ever tell him personally or by correspondence that the claim was based on the original claim of National Furniture Company?
10 A. I did.

Mr. Cassini: I object to that.

The Commissioner: The objection will be noted.

Q. During what period was that? A. Prior to the time that we started our suit and after.

Mr. Cassini: May I ask that she specify when it was and to whom she spoke?

Mr. Tumarkin: For the record suit was
20 instituted on December 31, 1935.

Mr. Cassini: Are you testifying now?

The Commissioner: It is a matter of record, isn't it?

Mr. Tumarkin: It is a matter of record in the District Court. I examined the docket and that is the date the suit was filed. If you doubt my word you can verify it.

Mr. Cassini: I object to all this because
30 the attorney is now testifying. The records are not here. There is nothing here to show there was a suit started at that time.

The Commissioner: If you can't agree upon the date when the suit was instituted you can challenge Mr. Tumarkin's statement on the record.

Q. Who was the original attorney that instituted that action? A. Joseph L. Segal.

40 Q. That is S-e-g-a-l? A. Right.

Norma Brown—Direct.

Q. What was his address at the time suit was instituted? A. At the same address as our office.

Q. What was it? A. I believe it was 790 Broad Street at the time—no, 868 Broad Street, that's right.

Q. Newark? A. That's right.

Q. Mr. Levine was subsequently substituted for Mr. Segal, was he not? A. He was. 10

Q. Do you know the date? A. On September 5, 1936.

Q. On or about November 24, 1942, was Continental Purchasing Co., Inc., listed in the Newark Directory? A. Yes.

Q. Have you the 1942 Directory here? A. I have.

Q. Would you mind turning to the page where Continental's name appears and tell us what it says there? A. Continental Purchasing Co., Inc., Room 8, 1 Clinton, telephone Market 3-3363. 20

Q. You are reading from what page? A. Page 390.

Q. What directory is this? A. 1942 Newark directory.

Mr. Tumarkin: I offer this directory and the line on page 390 containing the name of Continental Purchasing Co., Inc., into evidence at this time. 30

The Commissioner: Before marking that could you agree on what the page says so you don't have to carry the directory around with the exhibits?

Mr. Cassini: I don't agree with that.

Mr. Tumarkin: What don't you agree with?

Mr. Cassini: There is no Room 8.

Mr. Tumarkin: For the record let it 40

Norma Brown—Direct.

show it doesn't say Room 8, there is an 8 in parentheses.

10 The Commissioner: I will read what the book shows into the record. Counsel agree that what would be Exhibit P-4 appears in the Newark Directory of 1942 published by the Price & Lee Company, Volume 104, page 390 and reads as follows: "Continental Purchasing Co., Inc. (8), 1 Clinton tel. Market 3-3363." That will be P-4 as of today.

Q. Now, have you examined the 1942 telephone directory? A. I have.

Q. Do you find Continental Purchasing Co., Inc., listed therein? A. I do.

20 Q. Will you tell us on what page? A. Page 209, third column.

Q. What do you find? A. Continental Purchasing Co., Inc., 760 Broad, Market 3-3363.

Mr. Tumarkin: Do you want to follow the same course with this directory?

Mr. Cassini: I have no objection.

30 The Commissioner: It is agreed instead of marking the telephone book four that the directory for Essex County dated May 1942 reads on page 209: "Continental Purchasing Co., Inc., 760 Broad, MART 3-3362." That will be P-5 as of today.

Q. Do you have two entrances to that building? A. We do.

Q. What is one entrance called? A. 760 Broad Street.

Q. What is the other one called? A. 1 Clinton Street.

40 Q. Do you have more than one telephone exchange? A. Yes, we do.

Norma Brown—Cross.

Q. What are the exchanges? A. Market 3-3362 and Market 3-3363.

Q. Is my assumption correct that if mail was sent to either 760 Broad Street, Newark, or 1 Clinton Street, Newark, that you would receive that mail? A. Yes.

Mr. Cassini: I object because of the fact it is an assumption on the part of the attorney. The record speaks for itself.

The Commissioner: The objection is noted.

Q. You are still at that same address? A. Yes.

Q. Do you receive mail addressed to either 1 Clinton Street or 760 Broad Street? A. We do.

Mr. Tumarkin: Cross-examine.

Cross-examination by Mr. Cassini:

Q. By whom are you employed? A. By whom am I employed?

Q. Yes. A. Continental Purchasing Co., Inc.

Q. Who are the officers of the Continental Purchasing Co.? A. Joseph Richter is president, Lillian F. Richter is vice president, I am the assistant secretary.

Q. Who is the secretary? A. Lillian Richter. 30

Mr. Tumarkin: You said she was vice president. Vice president and secretary?

The Witness: Yes.

Q. Who is the treasurer? A. I believe it is Mr. Richter.

Q. You don't know? A. I believe it is, sir.

Q. That is only your belief? A. Yes.

Mr. Tumarkin: I object to that.

Norma Brown—Cross.

Q. You were reading from a paper that you have there with reference to contracts made with different attorneys. Between whom was that paper or that contract? A. It wasn't between different attorneys, it was between us and Herbert I. Levine.

10 Q. When you say us, who do you mean? A. The corporation.

Q. Now, between whom was that contract signed, between what individuals? A. Mr. Joseph Richter and Herbert I. Levine.

Q. Individually or as a corporation? A. As a corporation.

Q. You mean that the original contract between Herbert Levine and the Continental Purchasing Company is signed by what officer of the corporation? A. The treasurer.

20 Q. Just the treasurer? A. That's right.

Q. Who is the treasurer? A. Joseph Richter.

Q. Does the president have his signature on that contract? A. No, sir.

Q. It wasn't signed by the president? A. It was not.

Q. And it wasn't signed by the secretary, was it? A. No.

Q. It was just signed by the two individuals, Joseph Richter as treasurer or Mr. Joseph Richter? A. Joseph Richter as treasurer.

30 Q. Who drew that contract, do you know?

Mr. Tumarkin: I object to it as immaterial.

Q. Who drew the contract? A. I could not answer it at the present time. This was in 1936. All I have here is that it is accepted by Herbert I. Levine and signed by Joseph Richter as treasurer.

40

Norma Brown—Cross.

Q. Do you know who drew that contract? A. I don't recall who drew it at the present time.

Q. Were you employed by the company at that time? A. I was.

Q. How many times was that contract terminated and then renewed again during the time that you were employed there? A. This particular contract was never renewed again. 10

Q. Well, that contract was terminated? A. That's right, correct.

Q. After it was terminated was it renewed again? A. It was not.

Q. What happened after that, wasn't he employed again? A. He was not employed by us, he was retained on a contingent—we gave him work on a contingent fee basis.

Q. What is the difference between employing him and retaining him? A. He was employed by us, he received a salary for the work that he did. On a contingent fee basis it is on specific cases which are assigned to him. 20

Q. Did he always work on those terms? A. No, sir. I answered your question before. I told you that from January 17, 1936 to August 23, 1937 he worked on a salary basis. After that date at various times we retained him on a contingent fee basis. 30

Q. In November, 1942, was he employed by you? A. November, 1942? No, sir.

Q. Was he retained by you? A. He was not.

Q. When did his contract terminate or his term of employment terminate? A. August 23, 1937.

Q. And he was re-employed on a retainer basis in 1940, was he not? A. No, he was not re-employed.

Q. When? A. He wasn't re-employed, he was not in our employ; we gave him cases. 40

Norma Brown—Cross.

Q. You gave him cases on a contingent basis after that, didn't you? A. We gave—

Q. Will you please answer my question?

(The last question is read by the reporter.)

10 A. We did.

Q. During 1941, 1942, and 1943? A. No, sir, not in 1942.

Q. Not in 1942? A. No, sir.

Q. You did in 1943? A. Yes.

Q. You just skipped 1942, is that it? A. Yes, sir.

Q. Can you tell me how it appears that the judgment of record says that Herbert I. Levine is attorney of record in this suit? A. Yes, I can tell you.

20 Q. Tell me. A. There was nothing that we could do, we could find no assets of Mr. Norelli. We have thousands of judgments where we do nothing at all at the time. If an attorney is substituted and we find assets we proceed, and that is the time the substitution is filed.

Q. You did file a substitution for Herbert Levine, a substitution in this case, did you not? A. When he was substituted in Mr. Segal's place, yes.

30 Q. It was in 1942? A. No, sir.

Q. When was it that he was substituted? A. September 5, 1936.

Q. He has been the substituted attorney ever since? A. He has not.

Q. What happened, did you substitute some other attorney after 1937? A. There is no object in substituting anyone—

Q. Will you please answer the question? Did you at any time after you substituted Herbert I.
40 Levine as attorney of record for Continental Pur-

Norma Brown—Cross.

chasing Company, substitute another attorney up to November, 1942? A. No.

Q. Did you substitute any other attorney after November 1, 1942? A. Yes, I did.

Q. Who in this particular case? A. Rubin Brown.

Q. When did you substitute? A. On January 10 13, 1945.

Q. That was after the discharge of the bankruptcy? A. I knew nothing about the bankruptcy. so I could not tell you.

Q. You knew that the bankruptcy was discharged? A. I knew nothing about the bankruptcy in January, 1945.

Q. You know now? A. Yes.

Q. You know when you substituted a new attorney? A. Yes.

Q. You know that, don't you? A. Yes.

Q. You know when you substituted the attorney it was after he had gone through bankruptcy? A. I don't know a thing about it.

Q. You know that? A. I know it now but I didn't know it in January, 1945.

Q. You know it now? A. I know it now.

Q. How do you recall in what capacities Mr. Levine was retained on these various occasions?

Mr. Tumarkin: I object to it as immaterial. 30

A. By agreements that we made with him.

Q. Did you make an agreement on each occasion that you re-employed him? A. We did.

Q. Have you got the agreements here? A. I have.

Q. Will you produce them? A. Yes, sir.

Q. I show you a letter, what you term to be an agreement dated November 1, 1940. Show me 40

Norma Brown—Cross.

where in that agreement or in that letter there are any signatures indicating an agreement between the two individuals that you mention. A. That is a carbon copy of the original agreement.

Q. There is nothing there to indicate that those papers were signed? A. I may find it amongst my papers here.

Mr. Tumarkin: I submit the paper speaks for itself.

Mr. Cassini: May I please object to counsel interrupting?

The Commissioner: He interposes his objection and the objection is noted and the question will be answered. What is the answer, Miss Brown?

(The last question is read by the reporter.)

A. That probably—

The Commissioner: Is there or is there not on that paper that is shown to you—

The Witness: No.

Q. I show you a memorandum of agreement on which there is a heavy inscription in ink over another date. I point it out to you and ask you whether that is so or not? A. No, it is not so. That happens to be the pen, anyone can see that it is the type of pen.

Q. The type of pen? A. That's right.

Q. Doesn't that cover another date underneath it? A. It does not, sir.

Q. Are you sure there is not another date underneath? A. I am positive.

Q. Is that contract signed by the Continental Purchasing Company? A. This is not signed by the Continental. We have the signature of Her-

Norma Brown—Redirect.

bert Levine. He gets a copy of the corporation's signature, sir; it is not necessary.

Q. But there is no signature on that paper indicating that there is a contract between the Continental Purchasing Company and Herbert I. Levine? A. There is Herbert I. Levine's name appears there.

10

Q. On the paper? A. Herbert I. Levine's name appears on this paper.

Q. I ask you if there is anyone signed this paper in behalf of the Continental Purchasing Company. Is there anyone who signed that agreement in behalf of Continental Purchasing Company? A. No.

Mr. Cassini: That is all. No further questions.

20

Redirect-examination by Mr. Tumarkin:

Q. You testified about the original agreement dated November 1, 1940, between your company and Mr. Levine. Was that agreement in fact executed? A. It was.

Q. The agreement of November 1, 1940, was that agreement in fact executed between the company and Mr. Levine? A. Yes, sir.

Mr. Cassini: I object unless the original agreement is produced.

30

Q. And the copy which you brought into this hearing appears to be an unexecuted copy but it is dated November 1, 1940 directed to Herbert I. Levine and signed by Continental Purchasing Co., Inc., and typed in Joseph Richter, president. On the left-hand side accepted and a blank line. Did you examine your file to try to find the original of this agreement?

40

Norma Brown—Redirect.

Mr. Cassini: I object because there has been no mention made of any agreement lost or any attempt made to produce the original agreement until the present moment.

10 The Commissioner: The objection will be noted.

A. No.

Q. Would you do so now and see if you can find it?

Mr. Cassini: I object to it now.

A. I don't seem to have it. I may have it in my file in the office, although sometimes we do destroy those agreements when they no longer represent us when the agreement is terminated.

20 Mr. Cassini: I object to this testimony. I move to strike out the testimony with reference to that agreement that it was not signed by any party.

The Commissioner: Your objection is noted.

Q. Now, was the agreement of November 1, 1940 in fact executed between your company and Herbert I. Levine? A. It was.

30 Q. Was the agreement of June 8, 1943 in fact executed between Herbert I. Levine and your company? A. Yes, it was.

Mr. Tumarkin: That is all.

Anthony Norelli—Recalled—Direct.

ANTHONY NORELLI, recalled as a witness on behalf of the defendants, testifies further as follows:

Direct-examination by Mr. Cassini:

Q. Were there any assets in this estate, in this bankruptcy estate? 10

Mr. Tumarkin: I object to it as immaterial.

A. None at all.

Q. None? A. None at all.

Q. Did you buy a piece of property? A. Yes.

Q. Do you know when you bought it? A. I think it was in May, 1943.

Q. From whom did you buy this piece of property? 20

Mr. Tumarkin: I object to it as immaterial.

A. For my boy.

Q. With whose money did you buy it?

Mr. Tumarkin: I object to it as immaterial and irrelevant.

A. My boy's money, for my boy that is in the Army.

Q. How did you get the money from him? 30

Mr. Tumarkin: I object to that as immaterial and irrelevant.

A. He had some money in the bank and he had been sending me money every month. He is still in the Army today. He is in the Army going on five years.

Anthony Norelli—Recalled—Cross.

Cross-examination by Mr. Tumarkin:

Q. Where is this property located? A. 312 Park Avenue, Orange.

Q. When was it purchased? A. I think it was in May, 1943.

10 Q. What was the purchase price?

Mr. Cassini: I object to this as immaterial, irrelevant and impertinent.

The Commissioner: The objection is noted and the answer will be given.

A. \$7500.

Q. You entered into a contract for the purchase before you bought it? A. What do you mean?

20 Q. You made an agreement with the owner to buy it originally? A. Yes.

Q. Was it you personally who made the agreement? A. Yes.

Q. You signed the papers? A. I signed the paper because the boy was in the Army. How could he sign it?

Q. Did your wife sign it, too? A. No, sir.

Q. How much cash were you required to pay under that contract? A. \$1500.

30 Q. Did you pay a deposit? A. I think it was \$200 deposit.

Q. And the balance of \$1300 was paid at the closing? A. At the closing of the deal, yes, sir.

Q. From whom did you buy the property? A. George H. Werner.

Q. Who got the deed for the property? A. I did.

Q. Did your wife get the deed, too? A. No, sir.

Q. It is in your own name? A. Yes.

40 Q. Is there anything in the deed or in the contract indicating your son's interest in this property, to your knowledge? A. No.

Norma Brown—Recalled—Direct.

Joseph C. Cassini—Direct.

Mr. Tumarkin: That is all.

Mr. Cassini: The Lawyer's Diary states specifically that Herbert I. Levine was located at 17 William Street, Newark, New Jersey.

The Commissioner: Can it be agreed between you that the legal diary and manual for 1942 in the list of members of the Bar at page 543 reads, "Herbert I. Levine, 17 William Street, Newark"? 10

Mr. Tumarkin: Mr. Studer, I would like to recall Miss Brown for a question.

NORMA BROWN, recalled as a witness on behalf of the plaintiff, testifies further as follows: 20

Direct-examination by Mr. Tumarkin:

Q. Miss Brown, have you examined the 1942 telephone directory for Essex County? A. Yes, I have.

Q. Did you look under the Newark listing for the name of Herbert I. Levine? A. I did.

Q. Did you find it? A. No, sir.

Mr. Tumarkin: I hand you the 1942 directory if you wish to check this. 30

Mr. Cassini: I called information to get it. That is his address. I will take the stand.

JOSEPH C. CASSINI, called as a witness, being duly sworn, testifies as follows:

The Witness: I phoned Herbert I. Levine in 1942 and asked him if he represented Continental Purchasing Company and 40

Joseph C. Cassini—Cross.

10 he informed me that he did. I got the telephone number of Herbert I. Levine from information, and I then spoke to Herbert I. Levine. He informed me that he represented the Continental Purchasing Company, if there was any matter I wanted to
20 take up with the Continental Purchasing Company to take it up with him and I did by including him as a creditor in the bankruptcy petition.

Cross-examination by Mr. Tumarkin:

Q. How did you know you were speaking to Mr. Levine? A. The party that answered the phone, the girl that answered the telephone, connected me with Herbert I. Levine. He told me
20 he was Herbert I. Levine when I asked him.

Q. Did you tell him there was a bankruptcy proceeding pending? A. I did not.

Mr. Tumarkin: That is all.

(It is stipulated and agreed by and between counsel for the respective parties that the signatures of the witnesses to their depositions be waived.)

30

40

Certificate.ESSEX COUNTY COURT OF
COMMON PLEAS

CONTINENTAL PURCHASING COMPANY, INC.,
a corporation of New Jersey,
Plaintiff, 10
vs.

FRANCES NORELLI and ANTHONY NORELLI,
Defendants.

I, Augustus C. Studer, Jr., a Supreme Court
Commissioner of the State of New Jersey, do
hereby certify that the foregoing depositions
were taken before me by Eugene Donegan, a Cer-
tified Shorthand Reporter of the State of New
Jersey, by me duly sworn faithfully, fairly and
impartially to take stenographically the testi- 20
mony given and to make a true and correct tran-
script thereof; and I believe they correctly state
the evidence given.

Supreme Court Commissioner
of New Jersey.

July 1945.

30

40

Exhibit P-1.SECOND JUDICIAL DISTRICT COURT OF
ESSEX COUNTY

ON CONTRACT—STATE OF DEMAND.

10

CONTINENTAL PURCHASING Co. a
corporation of N. J.,

Plaintiff,

vs.

ANTHONY NORELLI & FRANCES NORELLI,
Defendants.

FIRST COUNT.

20

Plaintiff, a corporation, says that:

1. It demands the sum of \$188.00 on a certain book account a true copy of which is annexed hereto, made part hereof and marked "Schedule A."

2. Said account was assigned to the plaintiff herein.

Judgment will be claimed on this count in the sum of \$188.00, together with interest and costs
30 of suit.

SECOND COUNT.

1. National Furniture Co. of Newark sold and delivered the merchandise set forth in the book account annexed hereto, for which the defendants agreed to pay a reasonable price.

2. The reasonable price for the merchandise so sold and delivered by National Furniture Co. of Newark to the defendants is \$460.00 and de-
40 fendants is entitled to credits in the sum of

Exhibit P-1.

\$272.00 leaving a balance of \$188.00. The said account was assigned to the plaintiff herein.

3. Plaintiff has demanded said sum of money from the defendants, but the defendants have failed, refused and neglected to pay same.

Judgment will be claimed on this count in the sum of \$188.00, together with interest and cost of suit. 10

THIRD COUNT.

1. On December 23, 1925 and subsequent thereafter, the defendants agreed to purchase the merchandise stated in the 1st Count hereof and agreed to pay thereof the sum of money set forth in the 2nd Count hereof.

2. Defendant defaulted in the agreement and there is now due the sum of \$188.00 all rights of the plaintiff's assignor in and to said agreement were assigned to plaintiff herein. 20

Judgment will be claimed in this count in the sum of \$188.00, together with interest and cost of suit.

FOURTH COUNT.

1. It sues defendants on a certain account due and owing by defendants. 30

2. Defendants confessed and admitted the amount due thereon to the plaintiff.

3. The said claim has been assigned to the plaintiff herein.

Wherefore, Judgment will be claimed in the sum of \$188.00 together with interest and costs of suit.

JOSEPH L. SEGAL,
Attorney for Plaintiff. 40

Exhibit P-1.

SCHEDULE

Anthony Norelli and Frances Norelli
 420 New England Terrace
 Orange, New Jersey

10

National Furniture Co
 of
 Newark

For Purchase of Furniture on Dec 23, 1925
 " 21, 1926
 Apr 3, 1928

Cost	\$460.00
Paid on account	\$272.00

20

Balance due and owing	\$188.00
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(Summons Annexed to Foregoing Exhibit)

Exhibit P-2.

(Photostat—Inserted opposite page.)

Exhibit P-3.

30

(This exhibit is the original petition and schedules in bankruptcy filed by Anthony Norelli, Bankrupt, on November 24, 1942 in the United States District Court for the District of New Jersey.)

Exhibit P-4.

(This exhibit was read into the record and is
 40 printed at page 44, *supra*, of this State of Case.)

If not delivered in 3 days return to
ALEXANDER T. SCHENCK
REFEREE IN BANKRUPTCY
FEDERAL BUILDING
FEDERAL SQUARE & FRANKLIN ST.
NEWARK, N. J.

Postpaid

*Exhibit P-2 - June 17/45
A.C. Stuchlik
S.C.C.*

590
NEWARK
DEC 1
6 PM
1942
N. J.

Do not use this
or wrapper again

Nation Furniture Co., C
73 Springfield Ave
Newark, N. J.

DEPARTMENT OF JUSTICE

OPTIONAL BUSINESS
BUY
Any person using this envelope should use
it to purchase or donate to the War Savings
Bonds and Stamps of Three Hundred Dollars
or more

RETURNED TO
UNCLAIMED FROM
NEWARK, N. J.

NEWARK
DEC 2
3 6 PM
1942

BUY
DEFENSE SAVINGS
BONDS AND STAMPS

EXHIBIT P-2.

Author: [illegible]
Editor: [illegible]
or [illegible]

U.S. GOVERNMENT PRINTING OFFICE
1967 O 312-100

U.S. GOVERNMENT PRINTING OFFICE
1967 O 312-100



[Large, faint, illegible text block, possibly a title page or abstract]

U.S. GOVERNMENT PRINTING OFFICE
1967 O 312-100

This report was prepared for the [illegible] and is
not to be distributed outside the [illegible] of [illegible]

Exhibit 78

(This exhibit was read into the record and is
printed at page 44, record of this State of Case.)

Exhibit 79

Exhibit 80

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Exhibit P-5.

(This exhibit was read into the record and is printed at page 44, *supra*, of this State of Case.)

Exhibit D-1.

10 (This exhibit consists of a certified copy of the petition and schedules in bankruptcy filed by Anthony Norelli, Bankrupt, on November 24th, 1942 in the United States District Court for the District of New Jersey. Annexed to said exhibit there appears the following petition and order:)

Order.

UNITED STATES DISTRICT COURT

In the matter of:

20 ANTHONY NORELLI, Bankrupt.

Application *haveing* been made heretofore for an order amending schedules previously filed herein on motion of Joseph C. Cassini, Attorney for Bankrupt. It is on this 8th day of December, 1942 order that Schedule A-3 herein be amended by adding thereto, in the proper column the following facts.

The Continental Purchasing Company,
30 a corporation of New Jersey
a Judgment Jan. 4, 1936
not disputed
Atty for Plt. Herbert I. Levine, 17 William St.
Newark, N. J.

vs.

Anthony Norelli, trading as \$229.65
Essex Rod & Gun Club
(s) A. T. SCHENCK,
Referee in *Bankrupt*

*Exhibit D-1.***Petition.**

UNITED STATES DISTRICT COURT

In the matter of:

ANTHONY NORELLI, Bankrupt.

1. Petitioner, Anthony Norelli, was duly adjudicated a bankrupt on the 27th day of November, 1942. 10

2. The first meeting of Creditors will be held on the 13th day of December, 1942.

3. That at the time of preparation of petitioner's schedule by inadvertence he omitted to state a judgment creditor's name to wit: The Continental Purchasing Company, a Corporation of New Jersey. 20

4. That the judgment creditors name is The Continental Purchasing Company, a Corp. of New Jersey and the Atty for Plt. is Herbert I. Levine, 17 William Street, Newark, N. J.

Wherefore Petitioner prays for an order amending said schedule in the particulars above specified.

(s) ANTHONY NORELLI,
Petitioner.

30

UNITED STATES OF AMERICA

State of New Jersey }
County of Essex } ss.:

ANTHONY NORELLI, being duly sworn, on his oath, says that he has read the foregoing petition and knows the contents thereof, and that all the facts and statements therein made are true so far as stated upon his own knowledge, and

40

Exhibit D-1.

those things stated upon information he believes to be true.

(s) ANTHONY NORELLI,
Petitioner.

Subscribed and sworn to before me
this 7th day of December, 1942.

10

(s) JOSEPH C. CASSINI,
A Master in Chancery of N. J.

Creditors Whose Claims are Unsecured.

Schedule A-3

The Continental Purchasing Company
a corp. of New Jersey

Judgment January 4, 1936

20 Atty. for Plt. Herbert I. Levine, 17 William
Street, Newark, New Jersey

vs.

Anthony Norelli, trading as \$229.65
Essex Rod & Gun Club

Total \$229.65

(s) ANTHONY NORELLI,
Petitioner.

30

Stamped:

“FILED

AT 10:30 O’CLOCK A.M.

DEC 8 1942

A. T. SCHENCK,

Referee in Bankruptcy”

Stamped:

“ORIGINAL FILED

DEC. 10, 1942

WILLIAM H. TALLYN, Clerk”

40

Exhibit D-2.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

 IN BANKRUPTCY—ORDER DISCHARGING BANKRUPT.

In the Matter
of
ANTHONY NORELLI,
Bankrupt.

10

At Newark, in said District, on the 6th day of February, 1943.

It appearing that Anthony Norelli of 340 Central Avenue, in the City of Orange, County of Essex, State of New Jersey, was duly adjudged a bankrupt on a petition filed by him on the 24th day of November, 1942; and

20

It further appearing that, after due notice by mail, no objections to the discharge of said bankrupt were filed within the time fixed by the Court;

It is ORDERED that the said Anthony Norelli be and he hereby is, discharged from all debts and claims which are made provable by said Act against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy.

30

A. T. SCHENCK,
Referee in Bankruptcy.

40

Opinion of New Jersey Supreme Court.

Filed January 15, 1946.

NEW JERSEY SUPREME COURT

No. 12, OCT. TERM, 1945.

10 CONTINENTAL PURCHASING COMPANY, INC., a
 corporation of New Jersey,
 Plaintiff-Appellant,
 vs.
 FRANCES NORELLI and ANTHONY NORELLI,
 Defendants-Appellees.

Argued Oct. 2, 1945; decided , 1946.

On appeal from Essex County Court of Common Pleas.

20 Before BROGAN, Chief Justice, and Justices
 PARKER and OLIPHANT.

For the plaintiff-appellant, ALLAN L. TUMARKIN.

For the defendants-appellees, JOSEPH C. CASSINI.

BROGAN, Chief Justice.

30 This is an appeal from an order the effect of
 which is a restraint of execution. The record
 comes before us on verified petition and rule to
 show cause why the Continental Purchasing Com-
 pany, a judgment creditor, should not be en-
 joined from having execution and sale of the
 property of Anthony Norelli. Depositions were
 taken and after argument the learned judge in the
 Pleas signed an order making the rule absolute.
 The holder of the judgment appeals. This state
 of fact appears from the depositions:

40 Frances and Anthony Norelli became indebted
 to the National Furniture Company for certain

Opinion of New Jersey Supreme Court.

merchandise which had been sold to them. The claim of the furniture company was assigned to the Continental Purchasing Co. and on Jan. 7, 1937, the assignee obtained a judgment in a District Court in Essex County. On Nov. 24, 1942, Norelli filed a petition in bankruptcy in this district and was adjudicated a bankrupt. Notice to the listed creditors was mailed by the Referee on Dec. 1, 1942. The first meeting of creditors was fixed by the Referee for Dec. 11, 1942. Norelli did not list in his schedule of liabilities the judgment owned by the Continental Purchasing Co. He did, however, list the National Furniture Co., the original creditor, but the notice mailed to it was returned "Not Found." A few days later, Norelli having made a further search for outstanding judgments against him in the several District Courts, came across the judgment under consideration. On Dec. 8, 1942, the bankrupt caused his petition and order and schedule to be amended to include this judgment. The judgment creditor had no notice or knowledge of the bankruptcy. The proof is that Norelli's bankruptcy proceeding did not come to its attention until January, 1945, almost two years after the date of the bankrupt's discharge. Norelli admitted that he did not serve a copy of the order amending the schedule of his creditors on Continental Purchasing Co. or National Furniture Co. or Mr. Levine or Mr. Segal, attorneys who had at intervals represented the judgment holder. The file from the Bankruptcy Court contained nothing to indicate that notice of the amendment of the bankrupt's schedule was mailed to Continental Purchasing Co. or to anyone for it. The amended schedule showed the bankrupt listed this debt by naming the creditor and the amount and date of

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Opinion of New Jersey Supreme Court.

the judgment. Instead of stating the creditor's address the name of Mr. Levine, its attorney in 1936, with his business address, was given. The testimony for the judgment creditor was that Mr. Levine, who from time to time handled litigation for it, did not bring the matter to its attention; that at the time of the bankruptcy he was not the company's attorney; that the suit in the District Court in the name of Continental showed that it was the assignee of the original creditor and that Norelli was informed of that fact both before and after judgment. It also appeared that Mr. Cassini, counsel for the bankrupt, telephoned to Mr. Levine, when the schedule was amended, to find out if he represented the Continental Purchasing Co. Mr. Levine answered in the affirmative and further said that if there was any matter "to take up with Continental Purchasing Co. to take it up with him." Mr. Cassini did not advise Mr. Levine of the pending bankruptcy proceeding of Norelli. Subsequent to the bankruptcy, the discharged bankrupt purchased some real estate in Essex County. On April 16, 1945, Continental Purchasing Co. issued an execution against this property to satisfy its judgment. On this state of the proof the learned judge of the Essex County Court of Common Pleas restrained execution. This, we think, was error.

The Bankruptcy Act (Title XI, Sec. 35, U.S.C. A.) provides that a discharge in bankruptcy releases a bankrupt from all provable debts except such as * * * (3rd) "have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy;".

Opinion of New Jersey Supreme Court.

It is conceded that notice had not been sent this creditor direct. And the proof is that it had no actual knowledge of the proceedings in bankruptcy. The schedule was amended to include this creditor and the name of Herbert Levine, an attorney, was listed as the person to whom notice should be sent.

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The important question in this case is whether the debt in question was "duly scheduled" as is required by the Federal statute, *supra*; if it was then it was released by the discharge in bankruptcy, otherwise not. The cases on the question—too many to cite—have passed upon a great variety of fact and circumstances as to what constitutes due scheduling. Many of those cases may be found in U.S.C.A., Title Bankruptcy, Sec. 35, notes 141 to 155, p. 191-199. From these cases the holdings of which are not all in accord, particularly those from the several states, we gather that there must be a substantial compliance with the provisions of the Act in these essentials: that the debt must be set out in time for proof and allowance; that the correct name of the creditor must be stated, if it is known, together with his correct address, if it is known, and if not known that fact should be stated.

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In the instant case the bankrupt debtor had knowledge that the original claim had been assigned to Continental. Norelli had been so informed by the creditor's office manager. In these circumstances, it has been held that the debtor must use due diligence to list the assignee's name and address in the schedule. *Lansing Liquidation Corp. v. Heinze*, 171 N. Y. Supp. 738; 184 App. Div. 129. Further: Norelli inspected the judgment in the court record. The fact of assignment appeared in the state of demand as well as

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Opinion of New Jersey Supreme Court.

the name of the creditor's attorney, Mr. Segal. It seems that Mr. Levine was substituted for Mr. Segal before judgment. Whether that was a matter of record is not clear but, assuming that it was, when counsel for the bankrupt telephoned Mr. Levine he did not inform him of the Norelli
 10 bankruptcy proceeding. And for the creditor the proof shows—and it was not controverted—that the creditor was not advised by Mr. Levine that any notice of the bankruptcy proceeding was served on him. The address of the creditor was not unknown. It was listed in the city directory as well as in that of the telephone company, yet its address was not stated in the bankrupt schedule but rather the address and name of its attorney. Under these circumstances, it has been
 20 held that the debt is not released. See *In re Quackenbush*, 122 App. Div. 456; 106 N. Y. S. 773; *Murphy v. Blumenreich*, 123 App. Div. 645; 108 N. Y. S. 175; *Hein v. Liberman*, 141 N. Y. S. 314.

A creditor who would avoid the effect of a discharge in bankruptcy on the ground that the debt was not duly scheduled has the burden of showing he had no notice or knowledge of the proceeding or that the debtor failed to state in the
 30 schedule the creditor's correct name and address, if known or readily discoverable. The debtor who fails in any of these requirements must, to excuse the failure, show that the creditor had notice or actual knowledge of the proceeding. Cf. *Hill v. Smith*, 260 U. S. 592, affirming *Smith v. Hill*, 252 Mass. 188. On this issue the creditor, in our view, proved it had neither notice nor actual knowledge.

Assuming that Mr. Levine was notified by
 40 mail—and there is no proof that he was—notice

Opinion of New Jersey Supreme Court.

to him does not charge the creditor with notice or knowledge of the bankruptcy because at that time the attorney was not acting for the creditor. *Vidal v. Jandorf*, 212 N. Y. S. 548. As a matter of fact, he was not the creditor's attorney on any matter at that time and there was no agency relationship between the creditor and him. We conclude that the debtor has not duly scheduled the debt and that as to it the discharge in bankruptcy is ineffectual. 10

If a creditor is to be deprived of his property due process requires that he have notice or actual knowledge that a proceeding to wipe out a debt in whole or in part is under way so he may be heard or have an opportunity to be heard. This the creditor in this case did not have.

The order is reversed with costs. 20

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Order of Reversal of Judgment and Remittitur.

Filed January 18, 1946.

NEW JERSEY SUPREME COURT

No. 12, OCT. TERM, 1945.

 ON APPEAL, &c.

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CONTINENTAL PURCHASING COMPANY, INC., a
 corporation of New Jersey,
 Plaintiff-Appellant,
 vs.

FRANCES NORELLI and ANTHONY NORELLI,
 Defendants-Appellees.

20 This cause having been duly argued at the
 October Term, 1945, of this Court by Allan L.
 Tumarkin, of counsel for the appellant, and Jo-
 seph C. Cassini, of counsel for the respondent,
 and the Court having inspected the record and
 judgment below, and considered the causes as-
 signed for error and the grounds of appeal there-
 in, it is thereupon, on this 18th day of January,
 A.D. 1946

30 ORDERED that the judgment of the said Essex
 County Court of Common Pleas be and it is here-
 by in all things reversed, set aside and for noth-
 ing holden, and that the record and proceedings
 be remitted to the said Essex County Court of
 Common Pleas to be proceeded with in accord-
 ance with this judgment and the practice of the
 said Court, with costs to be taxed in favor of
 appellant.

Entered January 18, A.D. 1946

40 On motion of
 ALLAN L. TUMARKIN,
 Attorney for Appellant.

Notice and Grounds of Appeal.
NEW JERSEY SUPREME COURT

CONTINENTAL PURCHASING Co., INC., a
 corporation of New Jersey,
 Plaintiff-Appellee,

vs.

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ANTHONY NORELLI,
 Defendant-Appellant.

To ALLAN L. TUMARKIN, Esq., Attorney of Continental Purchasing Co., Inc., a corporation of New Jersey, Plaintiff-Appellee.

TAKE NOTICE that Anthony Norelli, defendant-appellant appeals from the whole of the judgment entered in the above cause in the New Jersey Supreme Court reversing a judgment in the Essex County Court of Common Pleas to the Court of Errors and Appeals. 20

The defendant-appellant, Anthony Norelli, assigns the following as his grounds of appeal in the above entitled cause.

1. That the Supreme Court erred in reversing the judgment of the Essex County Court of Common Pleas. 30

Dated: March 6, 1946.

JOSEPH C. CASSINI,
 Attorney of Defendant-Appellant.

Service of the within Notice and Grounds of Appeal acknowledged this 6th day of March, 1946.

ALLAN L. TUMARKIN,
 Attorney for Plaintiff-Appellee. 40

Notice and Council of Agents
NEW JERSEY SUPREME COURT

THE NEW JERSEY SUPREME COURT
OFFICE OF THE CLERK
TREASURY OF NEW JERSEY

Philadelphia, Pa.

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Attorney General

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12 MAY T. 1946

New Jersey Court of Errors and Appeals

CONTINENTAL PURCHASING Co.,
INC., a corporation of New
Jersey,

Plaintiff-Appellee,

vs.

FRANCES NORELLI and ANTHONY
NORELLI,
Defendants-Appellants.

Action at Law
On Appeal
from
Supreme
Court.

BRIEF ON BEHALF OF THE DEFENDANTS-APPELLANTS.

HONORABLE JUSTICES AND JUDGES:

The defendants-appellants in this case, Frances and Anthony Norelli, are prosecuting this appeal from a judgment of the Supreme Court of New Jersey. The said judgment reversed an order made by the Court of Common Pleas of the County of Essex in favor of the present appellants.

Statement of the Case.

The pertinent facts involved in this litigation are that the appellant Anthony Norelli owed a small amount of money, the balance due on a large bill, to the National Furniture Co.; that this concern assigned the claim to the Continental Purchasing Co., the plaintiff-appellee, and that the appellee recovered a judgment against Mr. Norelli on the claim in the year 1937, at a time when he was living and working in the State of Connecticut.

We find next that in 1942 Mr. Norelli went into voluntary bankruptcy; that, having possessed no knowledge of the assignment of the claim in question to the Continental people and not having been informed by them of the assignment, he duly scheduled the National Furniture Co. as the creditor owning the claim; that subsequently, while having searched certain records, Mr. Norelli found the judgment against himself held by the appellee; that the record of this judgment disclosed the fact that the appellee's attorney was one Herbert I. Levine, Esq.

Mr. Norelli immediately took this newly-discovered information to the attorney who was handling the bankruptcy proceedings in his behalf; the said attorney then contacted Mr. Levine, the appellee's attorney of record, and was told by Mr. Levine that Mr. Levine handled legal matters for the Continental people; Mr. Norelli then amended his bankruptcy schedules and proceedings for the sole and express purpose of having scheduled the appellee as a judgment creditor; the street and number of the law offices of the said Herbert I. Levine, Esq., was inserted for the creditor's address.

In February of 1943, the appellant was duly granted his discharge in bankruptcy. More than two years later, in April of 1945, the appellee, on the basis of the aforesaid judgment, secured an execution from the Essex County Common Pleas Court and proceeded to advertise for sale certain property acquired by the said appellant after his discharge in bankruptcy.

The appellant then petitioned the Court of Common Pleas for a restraint against the appellee's proceeding, whereupon the appellee and the sheriff were ordered to show cause why the restraint should not be granted. On the return of

the rule, leave was granted to the parties to take depositions on the matter. The depositions were duly taken and the issues were then argued before the Court of Common Pleas.

“Whereupon the Court having heard the argument of counsel and having determined the same. It is on this 30th day of July, 1945, ORDERED that the aforesaid rule be made absolute with costs to be taxed against the plaintiff, the Continental Purchasing Co., Inc., a corporation of the State of New Jersey, and in favor of the Defendant, Anthony Norelli.” (See Rule Absolute, S. C., pp. 10 and 11.)

The Continental Purchasing Co. then appealed to the Supreme Court, and the Supreme Court reversed the Court of Common Pleas.

Grounds of Appeal.

The appellants' ground of appeal, under these circumstances, is that the Supreme Court erred in having reversed the judgment rendered by the Essex County Court of Common Pleas.

Since the appellants were the appellees in the proceedings before the Supreme Court, they are entitled to argue against any ground of appeal taken by the Continental Purchasing Co. before that tribunal. *Burhans v. City of Paterson*, 99 N. J. L. 490. The ground of appeal urged by the appellee in the Supreme Court was that “the said judgment, order and determination is contrary to the evidence submitted to said Court and the law applicable thereto.” (See S. C., p. 11, ll. 29-32.)

Brief of the Argument.

The fundamental error of the Supreme Court lay in its having weighed the evidence of the case and in then having found facts, on the basis of such evidence, discordant with the order and judgment of the lower court.

The Court of Common Pleas of the County of Essex made an order and judgment in favor of Anthony Norelli, the present appellant. In any appellate proceeding predicated on that judgment, the appellate tribunal must assume that the lower court weighed the evidence and found facts consistent with the judgment. That the lower court has not made any written or oral statement of its factual findings does not change the rule. There can be no judgment without findings of pertinent facts. The Common Pleas Court made a judgment in favor of the appellant; therefore, the Common Pleas Court found the pertinent facts in favor of the appellant.

Numerous decisions have been made in this jurisdiction to the effect that the appellate court will assume a finding of facts in accord with the judgment rendered by the lower tribunal. Thus, Justice CASE, now Chief Justice CASE, said in the case of *Stammelman v. Stammelman*, 111 N. J. L. 122,

“The trial judge rendered judgment without announcing his factual findings. We have assumed that he actually found such facts as were necessarily incident to the judgment, and we in turn have determined that such findings are justified by the evidence.”

The Supreme Court laid down the principle in a per curiam opinion in the case of *Ollemar v. Board of Education of Irvington*, 5 N. J. Misc. 109,

“Inasmuch as the judge’s conclusion is in favor of the respondent, plaintiff below, all findings necessary to support that judgment are necessarily findings in favor of him for whom judgment is rendered, if the evidence will support such finding. Practice Act of 1912, § 75, p. 255. See Laws 1912, p. 398. To the findings of the trial judge, expressed or implied, there is no exception in the record, and, inasmuch as our conclusion is that the judgment was justified on all the facts or blended law and facts, which it was permissible for the judge to determine under the evidence in favor of the plaintiff, the judgment should not be disturbed. *Webster v. Freeholders*, 86 N. J. Law, 256, 90 A. 1110.”

Justice PERSKIE spoke for the Supreme Court in *Miller v. Newark Hardware Co.*, 112 N. J. L. 300,

“There is no specific finding of fact by the trial judge on this conflicting testimony. Under such circumstances, this court is not called upon to weigh the sufficiency of the testimony. *MacBride v. Rogers*, 83 N. J. Law, 407, 85 A. 202. On conflicting evidence the appellate court will assume a finding of fact that will support the judgment below. *Steinmeyer v. Phenix Cheese Co.*, 91 N. J. Law, 351, 102 A. 150. In the present case it was clearly open to the trial judge to find that Bubenheimer had given permission to the defendant to remove the heating plant. In *Upton v. Slater*, 83 N. J. Law, 373, at page 374, 375, 85 A. 225, it was held: ‘It is true that there was other testimony from which a contrary conclusion might have been

reached. *But on appeal, where opposite conclusions might have been drawn from the testimony, that conclusion which is essential to support the judgment will be taken as found. Such a determination of a question of fact is final between the parties when there is legal evidence to support it. Backes v. Mosovich* (53 Vroom 82 N. J. Law) 441, 81 A. 497.' ”

Observed Justice HEHER in *Pollack v. New Jersey Bell Telephone Co.*, 116 N. J. L. 328,

“In the absence of anything to the contrary, a fact found by the district court is presumed to rest upon competent proof, and the appellate court will assume a finding of fact that will support the judgment. *Steinmeyer v. Phenix Cheese Co.*, 91 N. J. Law, 351, 102 A. 150; *Dordoni v. Hughes*, 83 N. J. Law, 355, 85 A. 353; *Home Coupon Exchange Co. v. Godfarb*, 78 N. J. Law, 146, 74 A. 143.”

The same Jurist wrote the opinion for the Supreme Court in the case of *Brody v. Goldman*, 117 N. J. L. 97:

“It is said, in relation to the first point, that plaintiff was a trespasser or licensee merely, and there was no evidence of willful or wanton injury. While there was no specific finding as to plaintiff's status, it is clear that the judgment below proceeded upon the theory, found to be factually well-grounded, that defendant was under the duty of reasonable care to plaintiff, and breached it. While the circumstances which gave rise to this meeting of the parties are not disclosed by the state of the case, it is to be presumed that the judgment is based upon a finding in favor of the plaintiff upon the cause of action pleaded in the complaint, i.e., breach of a duty resting upon defendant to use reasonable care in relation

to plaintiff. It is the settled rule that, in the absence of anything to the contrary, the appellate court will assume a finding of fact in favor of the successful party, even if such finding be not expressed in terms. *Pollack v. New Jersey Bell Telephone Co.*, 116 N. J. Law, 28, 181 A. 318."

"Moreover," continued Justice TRENCHARD in *Meyer Bros. Hay & Grain Co. v. National Malt-
ing Co.*, 124 N. J. L. 321, "in the absence of any-
thing to the contrary, a fact found by the Dis-
trict Court is presumed to rest upon competent
proof, and the appellate court will also assume
a finding of fact that will support the judgment.
Gare v. Gumina, 117 N. J. L. 30, 186 S. E. 518;
Plack v. New Jersey Bell Telephone Co., 116 N.
J. L. 28, 181 A. 318."

The principle was laid down by Justice COLIE
in his opinion in *Rogensof v. Perkoff & Forman,
Inc.*, 127 N. J. L. 28:

"Appellant argues that the court erred in fail-
ing to make any findings on the issues, but, obvi-
ously, it has overlooked the rule that the appel-
late court will assume a finding of fact that will
support the judgment appealed from. *Steinmeyer
v. Phenix Cheese Co.*, 91 N. J. L. 351, 102 A. 150."

Again, Justice HEHER remarked in the case of
Goldwyn v. Coast Cities Coaches, Inc., 129 N. J.
L. 501,

"In determining whether there has been error
in the judgment in matter of law under R. S. 1937,
2:27-358, N. J. S. A. 2:27-358, there is a presump-
tion of findings of fact in favor of the prevailing
party, even though not expressed in terms. *Smith
v. Cruse*, 101 N. J. L. 82, 128 A. 379; *Pollack v.
New Jersey Bell Telephone Co.*, 116 N. J. L. 28,
181 A. 318."

Only a few months ago, the Supreme Court ruled in an opinion written by the new Chief Justice in *Meier v. Nightingale*, 122 N. J. L. 400,

“Where the proofs permit, an appellate court will assume a finding of fact that will support a District Court judgment. *Meyer Bros., &c., Co. v. National Malting Co.*, 124 N. J. L. 321, 11 A. 2d 840.”

When the case which is now before the bar of this Honorable Court was in the Supreme Court on the appeal thereto from the Common Pleas Court, the Supreme Court violated this cardinal principle of appellate procedure by having made a finding of facts utterly inconsistent and discordant from the judgment rendered by the lower court. Thus, former Chief Justice BROGAN wrote as follows:

“This state of fact appears from the depositions:”

“that at the time of the bankruptcy he” (referring to Herbert I. Levine, Esq.) “was not the company’s attorney; that the suit in the District Court in the name of Continental showed that it was the assignee of the original creditor and that Norelli was informed of that fact both before and after judgment.” (See S. C., p. 68, ll. 10-15.)

On the basis of these two factual findings, the Supreme Court ruled as follows:

“In the instant case the bankrupt debtor had knowledge that the original claim had been assigned to Continental. Norelli had been so informed by the creditor’s office manager. In these circumstances, it has been held that the debtor must use due diligence to list the assignee’s name and address in the schedule. *Lansing Liquidation*

Corp. v. Heinze, 184 App. Div. 129, 171 N. Y. S. 738." (See S. C., p. 69, ll. 30-38.)

"Assuming that Mr. Levine was notified by mail—and there is no proof that he was—notice to him does not charge the creditor with notice or knowledge of the bankruptcy because at that time the attorney was not acting for the creditor. *Vidal v. Jandorf*, 126 Misc. 124, 212 N. Y. S. 548. As a matter of fact, he was not the creditor's attorney on any matter at that time and there was no agency relationship between the creditor and him. We conclude that the debtor has not duly scheduled the debt and that as to it the discharge in bankruptcy is ineffectual." *S.C. p. 70 l. 39 To p. 71 l. 13*

The first finding was that Mr. Levine was not the appellee's attorney at the time of the bankruptcy proceedings. Obviously, the trial court must have found to the contrary; had the trial court found that Mr. Levine was not the Continental's attorney, the trial court could not have given a judgment in the appellant's favor, for, under such circumstances, it would be palpable that the appellant had not correctly scheduled the claim.

The second finding made by the Supreme Court in the appellate proceeding was that Mr. Norelli knew of the assignment "both before and after the judgment." If Mr. Norelli, with knowledge of the assignment of the claim, had scheduled the assignor as the creditor, the man would have been guilty of a deliberate falsehood and fraud. He could not plead ignorance of proper procedure, because he was acting under the guidance of counsel, and, if he had made a full disclosure to his counsel, counsel would have told him that the assignee, not the assignor, must be scheduled. Had the Court of Common Pleas found that the appel-

lant knew of the assignment at the time of the bankruptcy, that Court would certainly never have rendered a judgment in favor of the appellant. That Court did not render judgment in the appellant's favor, and, therefore, we must assume, as the Supreme Court should have assumed, that the lower tribunal found that Mr. Norelli did not know of the assignment of the claim in question at the time of the institution of the bankruptcy proceedings.

We respectfully submit that the Supreme Court, in this instance, examined the evidence, not to determine whether there was evidence to support the judgment of the lower court, but rather to weigh the evidence and to make factual findings independent of the judgment of the Court of Common Pleas. In this respect the Supreme Court erred. If there was any credible evidence in the case to support the lower court's judgment (and we respectfully submit that there was an abundance of such evidence), it was the duty of the Supreme Court, in accord with numerous decisions to such effect, to affirm the judgment.

This Court affirmed the decision written by Chief Justice BROGAN in the case of *Zulinsky v. Greenblat*, 14 N. J. Misc. 345, affirmed in 117 N. J. L. 526:

“The rule is that if there is any evidence which, standing alone, or considered apart from opposing evidence, is, if believed by a jury, legally sufficient, or might reasonably tend to support the verdict, though such evidence may not be of an entirely certain and satisfactory nature, it will not be disturbed, for, upon the mere weight of evidence, the jury are the judges. Inferences of fact are to be deduced by the jury, and whenever there is evidence from which an existence of fact

sufficient to support a verdict might have been inferred, the verdict will not be disturbed. 3 Cyc. 348; *Klitch v. Betts*, *supra*, 89 N. J. Law, 348, at page 356, 98 A. 427."

The Supreme Court ruled in *Kantor v. Guarantee Building & Loan Ass'n*, 9 N. J. Misc. 397, affirmed in 109 N. J. L. 152,

"The case as to Hood is submitted to us on the theory that the preponderance of the evidence favors Hood and not Kantor. The verdict can be set aside only for error in law and not on the weight of the evidence. *Oppicci v. Erie Railroad Co.*, 93 N. J. Law, 394, 108 A. 759; *Breitbart v. Lurich*, 98 N. J. Law, 556, 120 A. 11."

In having affirmed this decision, this Court said,

"The Supreme Court held that a judgment can only be set aside by a court of review for legal error, and that the fact that it is contrary to the weight of the evidence affords no grounds for its reversal, and based its decision upon this rule. The soundness of the rule, of course, cannot be doubted."

The Court of Errors and Appeals said in the case of *Rickel v. Stockman*, 111 N. J. L. 294,

"Some of the testimony may show that even if the defendant's son may have gone on an errand for him he departed from the line of his duty and was on his way to the theatre. The weight of evidence is not for our consideration on an appeal, and the proof made the case one for the jury. *Mahan v. Walker*, 97 N. J. Law, 306, 117 A. 609."

Again, this Court, in having spoken through Justice PORTER, said in *Monahan v. Seaboard Surety Co.*, 126 N. J. L. 418,

“Third, is the amount of the verdict supported by the testimony? An examination of the proofs clearly shows that it was.

“Where a cause is tried by the court, without a jury, its findings, on questions of fact, are not reviewable by writ of error. All that can be reviewed is the sufficiency of the facts found to support the judgment.” *City of Elizabeth v. Hill*, 39 N. J. L. 555 at page 557.”

Justice BODINE spoke for this Court in *Dennis v. Thermoid Co.*, 128 N. J. L. 303, when he wrote,

“The weight and the reasonable inferences from the proofs are matters which rest in the sound discretion of the trial court and are not disturbed where the proofs support such findings.”

Very recently the Supreme Court laid down the rule in *Jensen v. Lincoln Realty Co.*, 45 A. 2d 490, in these words,

“It is settled law that, where there is legal evidence before the fact finding court which will support its conclusions, the Supreme Court does not reverse. *State Board of Medical Examiners v. Citarella*, 113 N. J. L. 210, 214, 174 A. 24.”

The case of *Clafin v. Wolff*, 88 N. J. L. 308, was a case in which the contention was advanced that a certain debt had not been discharged in bankruptcy proceedings because the address of the creditor had not been duly scheduled. Justice KALISCH was speaking for this Court when he observed,

“The mere fact that a creditor denies that he received notice or had knowledge of the bankruptcy proceedings in time to prove his claim, is not conclusive that the statutory notice was not given, or that he had no actual knowledge of the pendency of such bankruptcy proceedings, in face of a record of the district court that such notice was given.

“At most an issue of fact would be presented for the trial judge to determine, and his finding thereon would be conclusive on us.”

If the Supreme Court had not weighed the evidence in this case but had sought to ascertain merely whether there was sufficient evidence to support the judgment of the lower court, manifestly the Supreme Court would have affirmed that judgment: there was more than a sufficiency of evidence to support the finding that Mr. Norelli did not know of the assignment of the claim at the time of the bankruptcy proceedings (See S. C., p. 14, l. 6 to p. 15, l. 3; p. 18, l. 40, p. 24, l. 21); there was more than a sufficiency of evidence to support the finding that, at the time of the bankruptcy proceedings, Mr. Levine was the attorney for the appellee, so far as the claim in question was concerned (See S. C., p. 25, ll. 1-4).

That Levine was substituted as attorney of record is apparent from the face of the Amended Petition, Schedule and order marked Ex. D-I, pg. 62, l. 16 also pg. 64, line 16 under Schedule A-3. If Levine was not the attorney of record at the time the bankruptcy petition of Anthony Norelli was filed it certainly would not have been possible for the bankrupt to have included the names of Herbert I. Levine both in the order and schedule of the amended petition. Naomi Brown, the manager and assistant secretary testified very con-

veniently for the appellee that Herbert I. Levine the substituted attorney of record represented the appellee from January 17, 1936 to August 23, 1937, S. C. p. 37, l. 31. He was again employed on November 1, 1940-Dec. 10, 1940, S. C. p. 39, ll. 8-35. He was reemployed again on June 8, 1943 and said employment was terminated in 1944, S. C. p. 40, ll. 9-15.

Therefore, the legal conclusions were inescapable that the claim had been duly scheduled not once but twice and that the legal obligation on the claim had been abrogated by the bankruptcy discharge.

Section 35 of our Bankruptcy Act, 11 U. S. C. A. Supp., p. 93, provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as, *inter alia*, "(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

Here we have the guiding principle of the case. If the appellee's claim was duly scheduled, the discharge in bankruptcy discharges that claim, so far as Mr. Norelli is concerned.

There is no burden on the appellant to prove that the claim was duly scheduled. The introduction of the bankruptcy discharge in evidence casts on the appellee the duty of proving that the bankrupt did not list his creditors properly.

Said the Court of Civil Appeals of Texas in the decision in *Edrington v. Gee*, 30 S. W. 2d 360, "A debtor's discharge in bankruptcy, under the holding of the Supreme Court of the United States and also of the Supreme Court of this

state, is a prima facie defense in any suit against him based on a debt existing at the time of the filing of his petition, and casts upon the creditor attempting to defeat the effect thereof the burden of showing, if he can, that his debt was not duly scheduled. *Kreitlein v. Ferger*, 238 U. S. 21, 35 S. Ct. 685, 59 L. Ed. 1184; *State v. National Bank*, 116 Tex. pages 214, 216, *et seq.*”

The New Hampshire case of *Morency v. Landry*, 79 N. H. 305, 108 A. 855, is very clear on this point. “If it can be found that equitably the judgment belonged to J. A. Morency, and that he had the right to prosecute it in the bank’s name, the plaintiff can answer the discharge only upon the ground that the bankrupt failed to name Morency as the creditor under the judgment. In order to impose that duty upon the bankrupt, it must appear that he knew of the change in the equitable title. It is not the bankrupt’s duty to notify the assignee, until the assignee has performed his duty of notifying the bankrupt. ‘Upon an assignment being made it becomes the duty of the assignee to notify the debtor.’ *Thompson v. Emery*, 27 N. H. 269, 272; *Hellen v. Boston*, 194 Mass. 579, 80 N. E. 603.’ ”

“The cases ‘almost uniformly hold that where the bankrupt is sued on a debt existing at the time of the filing the petition, the introduction of the order makes out a prima facie defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge.’ *Kreitlein v. Ferger*, 238 U. S. 21, 26, 35 Sup. Ct. 685, 687 (59 L. Ed. 1184). The same rule was announced in this state as applicable in proceedings under similar provisions con-

tained in the national bankruptcy law of 1841. *Cutter v. Folsom*, 17 N. H. 139; *Wiggins v. Shapleigh*, 20 N. H. 444.' "

The duty of the bankrupt, in the disclosure of his assets and liabilities, is set forth in section 25 of the Act, 11 U. S. C. C. A. Sup., p. 122: it is his duty to "prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their residence, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated, or disputed; and a claim for such exemptions as he may be entitled to."

Judge BURLING wrote in the case of *Bucci v. La Rocca*, 21 N. J. Misc. 316, 33 A. 2d 878, " 'Due scheduling' means proper scheduling. Obviously, what is and what is not 'due scheduling' must depend largely upon the facts in each case. Remington on Bankruptcy, Volume 7, 5th Edition, page 832."

Certainly, under the facts of this particular claim, the bankrupt performed his statutory duty not merely once but twice. He thought that he owed the money to the National Furniture Co., and he duly scheduled that concern as his creditor. The scheduling of the assignor as the creditor, in an instance where the bankrupt does not know that the debt has been assigned, has been ruled to result in the discharge of the debt.

The Supreme Court of Arkansas said, in *Cleveland v. Summerfield*, 194 Ark. 727, 109 S. W. 2d 438, that the cases "hold in substance that, in order for the bankrupt to obtain a discharge of a debt, he must schedule the debt and the name of his creditor if he knows who his creditor is, but, if he does not know who his creditor is, in order to obtain the discharge he must list the original creditor, and that, having listed the original creditor, the burden falls upon the owner of the debt to show that at the time he listed the original creditor he had knowledge that the debt had been transferred or assigned to some third party. So the only test in all these cases seems to be whether the bankrupt knowingly failed to list an assignee or transferee of the debt."

In the case at bar, however, Mr. Norelli subsequently discovered this judgment in the appellee's favor. If the judgment represents any obligation which has already been listed, there is, indeed, a question as to the existence of any duty on the part of the bankrupt to list the claim again. He has already performed his statutory duty with regard to that claim. The law does not require him to perform it again.

Duty or no duty, the appellant, Anthony Norelli, acted with the utmost good faith and took his after-discovered information to his attorney.

The Springfield Court of Appeals of the State of Missouri ruled in the very recent case of *Davis v. Burke*, 188 S. W. 2d 765,

"Defendant testified that the note in question is the only one he ever signed payable to A. N. Ellis. He further states that he didn't know where the note was at the time the schedule in bankruptcy was filed or the post-office address of Mr. Ellis, and that he gave all the information

he had as nearly correct as possible, all of which testimony was undisputed. *There was nothing to indicate a lack of due diligence on the part of the bankrupt. It is therefore our conclusion that the Court did not err in admitting the proceedings in bankruptcy in evidence."*

Now, the question arises as to whether the bankrupt and his attorney erred in having listed the appellee's address as the law office of the appellee's attorney.

The bankrupt's attorney called Mr. Levine on the telephone. Naturally, Mr. Cassino, the attorney for the bankrupt, did not contact the appellee. For ethical reasons, an attorney does not contact the opposing attorney's client. Canon 9 of the Canons of Professional Ethics of the American Bar Association provides that "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." Even in matters of the slightest detail, the ethical attorney contacts the other attorney, and not the client.

When Mr. Cassini amended the bankruptcy pleadings in order to list the appellee as a judgment creditor, he was in possession of two facts: first, he knew that Herbert I. Levine, Esq., was the attorney of record in the case in which the appellee had recovered the judgment, and, second, the said Herbert I. Levine, Esq., had, on a query with regard to the judgment, told him that Mr. Levine should be seen concerning legal matters for the appellee.

The judgment record constituted notice to the world that Mr. Levine was the attorney at law who had charge over the collection of the claim on which the judgment was based. True, the ap-

pellee has very conveniently adduced evidence that Mr. Levine was its attorney in 1941 and in 1943 but that he was not its attorney in 1942, the year in which Mr. Cassini spoke to him on this matter. The relevancy of such testimony is, indeed, questionable: the fact of the attorney-and-client relationship between Mr. Levine and the appellant was a matter of record, and, so long as that record remained unchanged, any interested person had a right to rely on the facts stated therein.

Our highest court said, in the case of *Onken v. Onken*, 123 N. J. E. 156, 196 A. 688, “‘To avoid its conclusive operation, the complainant must show that the solicitor had no authority to appear for her. The presumption is in favor of his authority. It was anciently held that the party was concluded by an appearance, though entered without authority, and could not be relieved against it even in the court in which the judgment was entered. The modern rule is otherwise, but all the cases agree that the want of authority must be shown.’”

“‘The burden of showing want of authority is upon the party asserting it; in this case, the defendant.’”

Under these circumstances, it was the duty of Mr. Cassini to follow the instructions of the appellee's attorney of record. Let us suppose for the moment that, despite these instructions, Mr. Cassini had listed the office address of the Continental Purchasing Co.; then suppose that the referee had mailed the notice to that address, and, in the pressure of business and confusion of a modern office, the notice had never been given to Mr. Levine but had been lost. Would not the question be asked: Why did not Mr. Cassini respect

the instructions given to him by another attorney and list the appellee's address as the Law Offices of Mr. Levine, where the notice would have received due and prompt attention?

The attorney's notice of the pendency of the bankruptcy proceedings was tantamount to notice given to the appellee itself.

The Court of Appeals of Missouri said, in the case of *Atkinson v. Elmore*, 103 Mo. App. 403, 77 S. W. 492, "The law is that notice to the agent or actual knowledge of the agent of proceedings in bankruptcy is notice or knowledge of the principal. *In re Beerman* (D. C.) 112 Fed. 662."

Wrote the Supreme Court of New York, in *Baughn v. Irwin*, 49 N. Y. Misc. 611, 96 N. Y. S. 742, "Appeal from an order denying a motion to cancel and vacate a judgment by reason of the discharge in bankruptcy of the judgment debtor. The motion was denied because in the schedules the plaintiff's residence was stated as no. 31 Nassau Street, New York City, whereas she had never resided there, but did in fact reside elsewhere. Ordinarily this fact would be quite sufficient to warrant a denial of the motion to vacate, but the circumstances of this case are unusual. The defendant's attorney swears that he called at the office of plaintiff's attorneys, which was at No. 31 Nassau Street, and inquired plaintiff's address, saying that he wished to serve a notice upon her, and that one of the attorneys said that a notice sent to that building would reach her. This is not denied or attempted to be modified in any way by plaintiff's attorneys. We might, if there was anything to support it, readily believe that what the plaintiff's attorney said was that a notice addressed to that building, in care of her attorneys, would reach her; but no such statement was made, and we must therefore accept the statement of de-

fendant's attorney as it is made. Furthermore, the very day that the petition in bankruptcy was filed, plaintiff's attorneys were served with a stay order issued out of the United States District Court reciting the filing of the petition. The plaintiff's attorney, therefore, had actual notice of the commencement of the proceedings, and could have protected their client's interests, if necessary."

The Court held in *Katz v. Kowalsky*, 296 Mich. 164, 295, N. W. 600, "Ordinarily, where a client is represented by an attorney, knowledge acquired by the attorney while acting within the scope of his authority is by fiction of law the knowledge of the client. *Littauer v. Houck*, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572; *Security Trust Co. v. Tuller*, 243 Mich. 570, 220 N. W. 795; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *In re Locust Bldg. Co.*, 2 Cir., 299 F. 756."

It is not necessary that a creditor should have notice at the very beginning of the proceedings. Thus, the court ruled, in *Gurewitz v. Wise*, 122 Me. 444, 120 A. 536, "The object of the mailed notices provided for in the bankrupt act is to protect the rights of creditors. If they have actual knowledge of the proceedings in time to do this; equal protection is afforded them.

"Plaintiff's actual knowledge in the case at bar came to him in ample season to protect his rights. It is not necessary that he have knowledge at the very beginning of the proceedings, so that he may vote for trustee and take part in every succeeding step. *Davis v. Findley*, 201 Ala. 515, 78 South. 869."

The question has been raised as to whether the referee in bankruptcy mailed the notice to the appellee. Under Section 67 of the Bankruptcy Act, the referee "shall (1) give notice to creditors and other parties in interest, as provided in this title."

The appellee has failed to adduce any affirmative evidence to the effect that the referee did not mail the notice, and, therefore, we must be guided by the principles enunciated by our Court of Errors and Appeals in the case of *Claflin v. Wolff*, 88 N. J. L. 308, 96 A. 73. Said Justice KALISH in this case, "The referee in bankruptcy is a judicial officer charged by law with the duty to mail the notices to the creditors of the bankrupt, at the various stages of the bankruptcy proceedings. The bankrupt debtor is bound to furnish the list of his creditors, the amount due them, and their place of residence, etc., all of which were complied with in this case. The bankrupt debtor has nothing whatever to do with notifying his creditors of the bankruptcy proceedings; that duty, as has been said, the law casts upon the referee. It will therefore be presumed nothing appearing to the contrary that the officer properly performed the duty devolved upon him by law."

That the bankrupt will not be held responsible for any omission of the referee in this respect is clear from the decision of the case of *Sandy Hook Bank's Trustee v. Bear*, 250 Ky. 177, 61 S. W. 2d. 1045, where the court said, "The failure of Mr. Strother to get notice of this bankruptcy proceeding is due to the error of the referee in bankruptcy in certifying that the address of this judgment creditor was 'unknown.' The judgment was in favor of Strother as deputy banking commissioner. Bear had the right to go by the record. There is no evidence Bear had any notice that

anyone else had then any sort of ownership in this judgment. Bear is not responsible for the mistakes made by the referee in bankruptcy; therefore the court did not err in holding that this debt had been discharged by that proceeding.' "

In this case, we have a man who owed so many debts that a discharge in bankruptcy constituted the only means by which he could have any financial security for himself and his family. One claim against him was the balance due on a furniture bill. He scheduled the original owner of the claim; subsequently he discovered the judgment in favor of the assignee; he went to his attorney, and the bankruptcy pleadings were so amended as to schedule this judgment creditor with the address of the creditor's attorney of record.

The record discloses no evidence that the appellant knew of the assignment at that time. The testimony of Norma Brown (See S. C., p. 41, l. 40, p. 42, l. 20) to the effect that the appellant was told of the assignment probably refers to communications in 1945 after the commencement of the execution proceedings. Common sense would tell us that the man would have been extremely foolish to conceal the claim and that, if there had been a reason for the concealment, he would not have revealed the matter to his attorney a day or so after the institution of the bankruptcy proceedings.

This bankruptcy case was one in which the bankrupt possessed no assets whatsoever (See S. C., p. 53, ll. 9-14), and, therefore, if Mr. Levine did not represent the appellee's claim in the proceedings, the appellee did not sustain any financial loss as a result.

In the light of the rules of appellate procedure and in view of the facts of this case and the legal principles applicable thereto, we most respectfully submit that the judgment of the Supreme Court should be reversed and that the judgment of the Court of Common Pleas of the County of Essex should be affirmed.

Respectfully submitted,

JOSEPH C. CASSINI,
Attorney for and of Counsel
with Defendants-Appellants.

New Jersey Court of Errors and Appeals

CONTINENTAL PURCHASING Co.,
INC., a corporation of New
Jersey,

Plaintiff-Appellee,

vs.

FRANCES NORELLI and ANTHONY
NORELLI,
Defendants-Appellants.

Action at Law
On Appeal
from
Supreme
Court.

Brief on Behalf of Plaintiff-Respondent, Continental Purchasing Co., Inc.

(Italics ours except where otherwise noted.)

Nature of Case.

This is an appeal from the judgment of the New Jersey Supreme Court reversing an order previously made by the Essex Common Pleas. The order in the Common Pleas, in effect, permanently restrained respondents, Continental Purchasing Co., Inc., from proceeding with execution under a judgment obtained against appellants.

The Common Pleas had determined that the judgment in question had been discharged in bankruptcy. In reversing, the Supreme Court found that the judgment was excepted from the operation of the Bankruptcy Act, and hence not discharged. Appellant, Anthony Norelli, has appealed from the judgment of reversal.

Summary of the Facts.

On January 7th, 1937, plaintiff recovered a judgment in the Irvington District Court against the defendants, Frances and Anthony Norelli, for the sum of \$214.45, plus costs, which judgment was docketed in the Court of Common Pleas of Essex County on January 26th, 1945. The original suit was for the balance due on the purchase of certain furniture by defendants from National Furniture Co. The state of demand disclosed on its face that the claim of said National Furniture Co. had been assigned to Continental Purchasing Co., Inc., the respondent herein (Ex. P-1, pp. 58-60). Defendants were duly served in said suit and the judgment was not disputed by them (Ex. D-1, p. 62, l. 32). The suit was originally instituted through Joseph L. Segal, as attorney, and thereafter Herbert I. Levine was substituted.

On November 24th, 1942, appellant Anthony Norelli, filed a petition in bankruptcy in the United States District Court for the District of New Jersey, and was thereupon adjudicated a bankrupt. He admittedly did not schedule the said judgment of Continental Purchasing Co., Inc. Instead he listed the claim of the original creditor, National Furniture Co. The schedules listed this claim as a "judgment" although in fact it was an open account (S. C., p. 21, l. 14). The notice of the bankruptcy proceeding mailed by the Referee to National was, however, returned "Not Found" (Ex. P-2, p. 60).

Pursuant to a petition filed by the defendant-bankrupt, an order was made and entered by the Referee on *December 8th, 1942*, amending the schedules by adding thereto as a creditor, the

Continental Purchasing Co., Inc., respondent herein (Ex. D-1, pp. 62-63). The Referee fixed December 11th, 1942, as the date for the first meeting of creditors and notices thereof were mailed to the creditors "listed in the schedules" on *December 1st, 1942* (S. C., p. 30). There was no proof of either service or mailing of the order amending the schedules, or of the bankruptcy proceedings, on either the appellant or its attorney (S. C., p. 30).

The proofs showed that the defendant, Anthony Norelli, was a machinist by trade, that he could read and write English, and attended the public schools through the second year of high school (S. C., pp. 17-18); that he knew how to use the City Directory and the telephone book; that he personally gathered and obtained all the information necessary for his attorney to prepare the bankruptcy petition and schedules; that prior to his occupation as a machinist, he had been engaged in operating a tavern, where he kept records (S. C., pp. 17-18).

Before the schedules were prepared, Norelli personally went to the various courts and made a search of the records to ascertain what judgments had been entered against him (S. C., pp. 19-20).

The proofs showed that although Norelli claimed that his error in failing to list Continental in the *original* schedules arose through inadvertence, as he only looked "up to 1935" for judgments of record (S. C., p. 22, l. 32); the fact is that in his original schedules, he listed at least thirteen additional judgments, all entered *after* January 1, 1935 (see Appendix "A" annexed to this brief) (PP. 29-31).

The evidence showed that respondent did not learn of the bankruptcy proceedings until some time in January, 1945 (S. C., p. 37), or nearly two years after the discharge in bankruptcy was entered.

On November 24th, 1942, the date of the filing of the petition, Continental was listed in the Newark City Directory (S. C., pp. 43-44) and also the telephone directory (S. C., p. 44).

No claim was made by respondent that respondent, Continental, received *actual* notice or knowledge of the bankruptcy proceedings. His claim of discharge was based solely on the fact that the claim (or judgment) was duly scheduled (S. C., p. 26; S. C., p. 56).

POINT ONE.

The judgment in issue was not discharged in bankruptcy.

It will be noted from the foregoing that notice of the bankruptcy proceeding had already been mailed by the Referee on *December 1st, 1942*, to the creditors *listed* in the schedules, when the order amending the schedules adding Continental as a creditor was entered and filed on *December 8th, 1942*. In chronological order, we find the following:

- Nov. 24th, 1942—Petition in Bankruptcy filed.
- Dec. 1st, 1942—Notice of bankruptcy and first meeting of creditors mailed by Referee to creditors listed in original schedule.

Dec. 8th, 1942—Order amending schedules to include Continental Purchasing Co., Inc., as creditor, entered and filed.

Dec. 11th, 1942—First meeting of creditors held.

The order amending the schedules was presented to the Referee *ex parte*; *no notice of the application having been given to respondent or its attorney, nor was a copy of the order served thereafter on respondent or its attorney* (S. C., p. 30; S. C., pp. 25-26). It follows therefore, of course, that respondent had absolutely no knowledge or notice of the amendment of the schedules, and since *notices had already been mailed on December 1st*, Continental could not have received notice or knowledge of the bankruptcy proceedings.

The witness Mahringer (the Referee's clerk) testified as follows (S. C., p. 30):

“Q. Now, do you know whether the same notices were sent out to the creditors in the amended petition and order? A. That I don't know. The Affidavit of Mailing was made out and I think it is prior to the entry of this order, because notice of the first meeting was sent out. Have you got the papers there?

Q. Yes. A. The first meeting notice was mailed on the first of December, 1942 and this order is dated the 8th day of December, 1942. So whether a notice was sent after that I don't know because there is no other affidavit.

Q. There is no other affidavit in there?

A. No.

× × ×

Q. There is no proof of either service or mailing of the order amending schedules on Continental Purchasing Company or its attorney, is there? A. No.”

We respectfully emphasize here that appellant makes no claim that respondent had actual knowledge or notice of the bankruptcy proceedings; but based his application for a stay of the execution on the ground that the amendment of the schedules was a sufficient compliance with the Bankruptcy Act, and relieved him of any further obligation.

We have a situation therefore, where the *uncontradicted proofs* show (a) a failure to list the creditor in the original schedules; (b) an *ex parte* application to amend the schedule to include the omitted creditor, entered *after* notice of the bankruptcy proceedings had already been mailed; and (c) no claim of actual notice or knowledge of the bankruptcy proceeding.

We submit that under the circumstances, the debt was, in fact, not scheduled *in time for proof and allowance*, and hence not dischargeable.

Sec. 17 A (3) of the Bankruptcy Act (U. S. Code, Title 11, Chap. 3, Sec. 35) excepts from the application of a discharge all provable debts, which—"have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

The present act was amended to remedy a defect in the Bankruptcy Act of 1867, by which a debt was discharged, even though a creditor was omitted from the schedules and he had no notice or knowledge of the proceedings, provided, of course, the omission was neither willful nor fraudulent. As the Act stands today, it is immaterial whether the faulty scheduling was innocent,

fraudulent or careless; the *fact* and not the *intent* controls.

“The change most clearly indicated is that where the creditor has neither knowledge nor notice of the bankruptcy proceedings, his debt, if not duly scheduled, with his name if known to the bankrupt, is not to be discharged, whether the omission is fraudulent or otherwise. This would seem to be the application by Congress to bankruptcy proceedings of the familiar constitutional principle that the ‘due process of law’ intended to deprive one of property contemplates notice of some kind to the party whose property is to be taken that he may have his day in court and be heard before the court adjudicates against him.”

(Collier on Bankruptcy, 14th Ed., Vol. 1, p. 1626.)

If we apply the principle of due process of law, therefore, to the facts herein, we find that if respondent's judgment is discharged, it is in effect being deprived of its property without having had its day in court. Where does the fault lie? Was it the duty of the Referee to have mailed notice of the proceedings to this creditor, although the amendment was made some *seven* days after the notice had already gone out? Or, should the bankrupt have exercised that due diligence, required of him under the cases, by serving either notice of the application to amend in the first instance, or thereafter serving a copy of the order amending upon the creditor. We submit that due to the appellant's failure to do either, he should not be permitted to take advantage of the discharge provisions of the Bankruptcy Act.

It is elemental that the purpose of listing a creditor in the schedules is to give him notice of

the bankruptcy proceedings. Proper scheduling is essential in order that notice may be sent to the creditor. Since under the facts herein, as a result of the bankrupt's lack of due diligence, the creditor failed to receive notice, the bankrupt should suffer and not the innocent creditor.

On this issue, the Supreme Court (by former Chief Justice BROGAN) stated (S. C., p. 70):

"A creditor who would avoid the effect of a discharge in bankruptcy on the ground that the debt was not duly scheduled has the burden of showing he had no notice or knowledge of the proceeding or that the debtor failed to state in the schedule the creditor's correct name and address, if known or readily discoverable. The debtor who fails in any of these requirements must, to excuse the failure, show that the creditor had notice or actual knowledge of the proceeding. Cf. *Hill v. Smith*, 260 U. S. 592, affirming *Smith v. Hill*, 252 Mass. 188. On this issue the creditor, in our view, proved it had neither notice nor actual knowledge."

It might be well urged herein, that the bankrupt's original omission of this creditor from the schedule was intentional. The proofs disclose that when the bankrupt examined the records of the district court, he only "looked before 1935" (S. C., p. 20, l. 3). The judgment was entered in 1937. The bankrupt was duly served and did not dispute the judgment.

In his brief (at page 1), counsel states that the judgment was entered when Norelli was "living and working in the State of Connecticut." This is contrary to the fact. During this period, Norelli maintained his residence in this State and would come home periodically (S. C., pp. 18, 19).

Furthermore, in the order amending the schedule in bankruptcy, he admitted that the judgment was "not disputed" (S. C., p. 62, Ex. D-1, l. 32).

Could he with impunity and without suffering the natural consequences of his act, have failed to make a complete search of the records down to the date of the filing of the petition on *November 24th, 1942*, and be permitted to gain by his willful negligence? Obviously, if he found the record of the judgment after November 24th, 1942, he could have done so prior thereto. But by his own admission he didn't look for "all the judgments" (S. C., p. 28). There is no claim in the case of improper docketing or indexing of the judgment record, and it will be noted that this creditor is the only creditor whose name was added after the original filing of the schedules (Ex. D-1, p. 63).

Further, we have direct proof that appellant intentionally omitted Continental from the original schedules. We have annexed hereto as an appendix (since the exhibit was not fully printed in the State of Case) ^(pp. 29-31) a list of thirteen judgments entered against appellant, Anthony Norelli, after *January 1, 1935*. Judgments numbered 52 and 37 (listed in the appendix) were entered on *April 23, 1936* and *January 27, 1937* respectively. In view of this undisputed fact, what then becomes of the appellee's cloak of pretended innocence in failing to list the claim in the original schedule. Had he stated that his act was inadvertent, it might have been credible; but having taken the position that it was mistakenly omitted because he had only "looked before 1935," it is patent that this story was created for the occasion.

This is emphasized further by his direct statement that he found no other judgment "after

1935'—an absolute misstatement. We quote: (S. C., p. 22, ll. 40-41)

“Q. You found no other judgments after 1935 except the Continental judgment?

A. *That's right.*”

It is clear, therefore, that Norelli's act in failing to list the judgment in his original schedule was intentional, which should result in a denial of discharge as to this claim.

The foregoing conclusion is supported by the fact that Norelli's petition for leave to amend (Ex. D-1, p. 63) sworn to on *December 7th, 1942*, states that the first meeting of creditors “will be held on the 13th day of December, 1942” (actually it was to be held on December 11th), yet knowing that fact, apparently as a result of having received notice himself from the Referee's office, he failed to serve notice of the application to amend, and of course, failed to serve a copy of the order on respondent.

And then there is the highly interesting admission by the defendant that his counsel called Herbert I. Levine, plaintiff's attorney then of record, to obtain Continental's “address” (S. C., p. 16) despite the fact that Continental was listed in both the City and the telephone directories. His counsel states as follows (S. C., pp. 55-56):

“The Witness: I phoned Herbert I. Levine in 1942 and asked him if he represented Continental Purchasing Company and he informed me that he did. I got the telephone number of Herbert I. Levine from information, and then I spoke to Herbert I. Levine. He informed me that he represented the Continental Purchasing Company, *if there was any matter I wanted to take up*

with the Continental Purchasing Company to take it up with him and I did by including him as a creditor in the bankruptcy petition.

Q. How did you know you were speaking to Mr. Levine? A. The party that answered the phone, the girl that answered the telephone, connected me with Herbert I. Levine. He told me he was Herbert I. Levine when I asked him.

Q. Did you tell him there was a bankruptcy proceeding pending? A. I did not."

Firstly, it will be observed that no inquiry was made of Levine as to the basis for the judgment; Secondly, that although Levine stated he still represented Continental, defendant's counsel failed to advise him of the bankruptcy proceeding just instituted; and, Lastly, no attempt was thereafter made to serve Levine with a copy of the order amending the schedules.

The natural and obvious conclusion from the foregoing is that Norelli knew the basis for the claim when his attorney spoke to Levine, and that he intentionally failed to serve the order of amendment, hoping in that way, apparently, to avoid possible complications in obtaining his discharge in bankruptcy.

In *Bucci v. La Rocca* (21 N. J. Misc. 316; 33 Atl. Rep. 2d, 878), the debt was originally founded on a promissory note which was endorsed by one Joseph T. Bucci. The said endorser, prior to the filing of the petition in bankruptcy, paid the note to the holder, obtained an assignment, and filed same in the County Clerk's office. The schedules in bankruptcy listed the original holders of the note, and merely referred to the endorser. The latter's address was not stated. After the note was assigned, and more than three years

prior to the filing of the petition in bankruptcy, Bucci entered judgment on the note. The Court held that the debt was not discharged, as Bucci had no notice or actual knowledge of the proceedings in bankruptcy. The Court stated in part as follows (33 Atl. 2d, 880-81):

“The requirement of scheduling names and residences of the creditors is a most important one, and has been strictly interpreted. Collier on Bankruptcy, 14th Ed., Vol. 1, 1626.

Under this exception only duly scheduled debts are discharged. ‘Due Scheduling’ means proper scheduling. Obviously, what is and what is not ‘due scheduling’ must depend largely upon the facts in each case. Remington on Bankruptcy, Vol. 7th, 5th Ed., page 832.

* * * * *

In the recent case of *Salmon v. Sarno*, Supreme Court, 1942, 265 App. Div. 114, 37 N. Y. S. 2d 870, at page 872, it is stated:

‘Defendant admits that he did not list the creditor’s residence or his correct business address, and there is no proof that the residence was unknown. It is alleged and not denied that the lease upon which the claim sought to be discharged was based, showed plaintiff’s residence. The telephone directory gave his correct business address. *The purpose of the statute is to prevent a bankrupt from keeping his creditors in ignorance of his proceedings without penalty to himself.*’ See Gilbert’s *Collier on Bankruptcy*, Fourth Ed., para. 563, p. 376. A holding that a bankrupt is discharged although he has failed to list either the residence or the business address of a creditor would enable a bankrupt to evade the provisions of the Bankruptcy Act while purporting to comply therewith and obtain a

discharge without having duly scheduled his known creditors.

In *Parker v. Murphy*, 215 Mass. 72, 102 N. E. 85, 87, the Supreme Court of Massachusetts, holding that claims are not duly scheduled unless the names of the creditors showing their residence if known are on the list of creditors filed, said 'The requirement for duly scheduling the names and residences of creditors is a most important one. *It is in compliance with the generally recognized principle that one shall not be barred of his claim without the opportunity of having his day in court. It is for the benefit of the creditors and in the interest of fair dealing with them and is to be construed in harmony with this purpose. It is essential in order that notice in the bankruptcy proceeding may be sent him.*' It has been construed with some strictness. *Birkett v. Columbia Bank*, 195 U. S. 345, 25 S. Ct. 38, 49 L. Ed. 231; *Custard v. Wigder-son*, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740."

In *Birkett v. Columbia Bank*, *supra*, the bankrupts scheduled a debt represented by a promissory note in the name of the payee when they knew that it was held by a bank, which had no notice of the bankruptcy proceedings. The trial court found that the claim was not barred by the discharge. The judgment was successively confirmed by the Appellate Division of the New York Supreme Court and Court of Appeals. (174 N. Y. 112; 66 N. E. 652.) On Writ of Error to the United States Supreme Court, the judgment was again affirmed, the Court stating in its opinion, as follows (12 Am. B. R. 692-693):

"Section 7 of the Bankrupt Law of 1898 devolves a number of duties upon the bankrupt, all directed to the purpose of a full

and unreserved exposition of his affairs, property and creditors. Among his duties he is required to 'prepare, make oath to, and file in the court within ten days * * * a schedule of his property showing the amount and kind of property, the location thereof, its money value in detail, and the list of creditors, showing their residences, if known; if unknown, that fact to be stated the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemption as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee * * *'. To the neglect of this duty the law attaches a punitive consequence. Section 17 provides: 'A discharge in bankruptcy shall release a bankrupt of all of his provable debts, except such * * * have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy * * *'. But plaintiff in error urges that defendant in error did have actual knowledge of the proceedings in bankruptcy, and that Congress contemplated that there might be an intentional or inadvertent omission of the names of the creditors from the schedule of debts, and provided against it by other provisions of the law, especially by that which makes it the duty of the referee to give notice to creditors, and by that which imposes the duty on the bankrupt to appear at the meeting of creditors for examination. The finding of the trial court is that defendant 'had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupt therein.' This is made more definite as to time by the Court of Appeals. Defendant in error upon making an inquiry by letter

November 6, 1899, about Russell & Birket, was informed that they had gone through bankruptcy, and subsequently (November 17) the Northern District was given as the district of the proceedings. The discharge was September 12, 1899. Knowledge, therefore, it is contended, came to defendant in error in time to prove its claim (section 65), and to move to revoke the discharge of the bankrupt (section 15). It is hence argued that the defendant in error must be held to have had 'actual knowledge of the proceeding in bankruptcy', as those words of section 17 must be construed. We do not think so, nor is that construction supported by the other provisions of the law urged by plaintiff in error. Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail creditors of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participating in the administration of the affairs of the estate or to deprive him of dividends (section 65). *The provisions of the law relied upon by plaintiff in error are for the benefit of creditors not of the debtor.* That the law should give a creditor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. *The law would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceeding without penalty to him. It is easy to see what results such looseness would permit—what preference could be accomplished and covered by it."*

The parallel situation in the case at bar is obvious. If a bankrupt complies with the statute and properly lists his creditors in his original schedule, he would seem to be relieved of any further obligation. However, where, as in the case at bar, the bankrupt seems to have used the provisions of the Act only to deceive and keep this creditor in ignorance of the proceeding, he must suffer the penalty. In the *Birkett* case (*supra*), the creditor learned of the proceedings in time to have filed its claim, and to move to revoke the discharge of the bankrupt, and yet, the Court determined that the discharge was of no avail since the creditor did not learn of the proceedings in time to "give him an equal opportunity with other creditors"—not a knowledge that may come so late as to deprive him of participating in the administration of the affairs of the estate or to deprive him of dividends. Here, the evidence shows, the creditor did not learn of the bankruptcy until nearly two years after the discharge.

The right to appear at the first meeting of creditors, examine the bankrupt, and participate in the selection of a trustee is a most important right granted by the statute. If the bankrupt so manipulated his proceedings as to avoid a full and complete disclosure of his affairs, he should suffer, and not the creditor.

The case of *Hill v. Smith* (U. S. S. Ct. 1923; 2 Am. B. R. (New Series) 537; 260 U. S. 592, 43 S. Ct. 219, 67 L. Ed. 419) involved a suit on a judgment. The defendant pleaded a discharge in bankruptcy. Plaintiff introduced proof that the judgment was unsatisfied and rested. Defendants proved the discharge and rested. In rebuttal, plaintiff introduced the schedules in bank-

ruptcy, in which the plaintiff's name did not appear. Judgment was entered for the plaintiff on defendant's failure to go forward with the evidence. The judgment was affirmed by the U. S. Supreme Court and, in its opinion, by Mr. Justice HOLMES, stated as follows:

"By the very form of the law the debtor is discharged, subject to an exception, and one who would bring himself within the exception must offer evidence to do so. *Kreitlein v. Ferger*, 238 U. S. 21, 26, 34 Am. B. R. 862, 59 L. Ed. 1184, 1186. 35 Sup. Ct. 685; *McKelvey v. United States*, 260 U. S. 353, 67 L. Ed. 301, 43 Sup. Ct. 132. But there is an exception to the exception 'unless the creditor had notice,' etc., and, by the same principle, *if the debtor would get the benefit of that, he must offer evidence to show his right*. We agree with the court below that justice and the purpose of the section justify the technical rule that *if the debtor would avoid the effect of his omission of a creditor's name from his schedules, he must prove the facts upon which he relies.*"

We submit that the failure to schedule appellant's claim within time amounts, in effect, to an omission from the schedules; since by reason of the facts surrounding the amendment, appellant, in fact, acquired no notice or knowledge of the bankruptcy proceedings. In the state of the proof before the Court therefore, the burden was cast on Norelli to prove actual notice or knowledge of the bankruptcy proceedings. In this, he completely failed. The result is that the judgment was not barred by the discharge.

In *Feld Lumber Co. v. Bornstein* (118 N. J. L. 357, 192 Atl. Rep. 738), the bankrupt knowingly omitted the creditor because he considered that

the debt was not his, and in consequence, the debtor failed to receive notice of the bankruptcy proceedings. The Court held that the claim was not discharged. We quote in part from the opinion rendered by Mr. Justice (now Chief Justice)

CASE:

"We find nothing in the statute or in either of the mentioned cases to indicate that a bankrupt may, with knowledge fail to list a claim *and to send notice to a creditor* and then, by producing his discharge in bankruptcy, lay upon the creditor the burden of proving that the latter was not adversely affected. The better rule certainly where the debtor has knowingly refrained from listing a claim, is that the burden of proving that the creditor had *timely notice* or *actual knowledge* of the proceedings in bankruptcy is on the debtor, notwithstanding the latter's discharge in bankruptcy. *Parker v. Murphy*, 215 Mass. 72, 102 N. E. 85; *Barnes v. Silveus, et al.*, 114 Pa. Super, 214, 173 A. 837."

On this point the Supreme Court stated:

"If a creditor is to be deprived of his property due process requires that he have notice or actual knowledge that a proceeding to wipe out a debt in whole or in part is under way so he may be heard or have an opportunity to be heard. This the creditor in this case did not have." (S. C., 71.)

In his brief (at p. 12) counsel quotes from the case of *Clafin v. Wolff* (88 N. J. L. 308; 96 Atl. 73). The distinction between that case and the case at bar is two-fold. First, in the *Clafin* case there was uncontradicted proof of the mailing of the notice to the creditors. Second, there was no definite denial that the notice had not been re-

ceived. Here, there is absolutely no proof of the mailing of the notice, and a positive denial that the notice was received by the creditor (S. C., pp. 30, 41, 42).

In the *Clafin* case the Court said: (96 Atl. at P. 78.)

“It will, therefore, be presumed *nothing appearing to the contrary*, that the officer properly performed the duty devolved upon him by law.”

Here, the Referee's clerk testified that since the notices *had already been mailed* on December 1st, when the amendment to add Continental was made *no notice actually was mailed to Continental* and there is no proof of the mailing of either the notice, or the order amending, in her files. (S. C., 30.) Obviously, therefore, there can be no presumption of mailing in view of the positive testimony of this witness. And we respectfully repeat again there is no claim in this case of *actual notice or knowledge* of the bankruptcy proceedings.

POINT TWO.

The debt was not discharged by listing National Furniture Co., plaintiff's assignor, in schedule.

The evidence indicated that the state of demand in the district court, on which the judgment was entered on January 7th, 1937, disclosed on its face that respondent's claim was based upon the purchase of furniture from National Furniture Co. and that the claim was assigned to the plaintiff therein, Continental Purchasing Co., Inc., (Ex. P-1, pp. 58-60). It follows therefore, that defendant had notice of the assignment *prior to January 7th, 1937*, and when he prepared and filed his schedules in bankruptcy on November 24th, 1942, it was his duty to list the Continental Purchasing Co., Inc., and not its assignor, National Furniture Co.

Collier on Bankruptcy, 14th Ed., Vol 1,
p. 1639, *et seq.*;

Bucci v. La Rocca (21 N. J. Misc. 316;
33 Atl. Rep. 2d, 878);

Birkett v. Columbia Bank (195 U. S. 345,
12 Am. B. R. 691, 25 S. Ct. 38, 49
L. Ed. 231).

The proofs showed, however, that the envelope containing the notice of bankruptcy to National was returned "Not Found" (Ex. P-2, p. 60). No explanation was made by the bankrupt-defendant in this respect, and the natural inference is that he failed to exercise due diligence in ascertaining the correct address of National Furniture Co. The slight difference between "Nation" and "National" is fully explained by the evidence (S. C., pp. 32-33). The envelope was directed to "Na-

tion'' rather than "National" Furniture Co. by reason of defendant's failure to list same properly on the *copy* of the schedule which was filed with the Referee's office, and on which the notices are based (S. C., pp. 32-33).

In the *Matter of Henry D. Cleveland*, Bankrupt (U. S. Dist. Ct., So. D. N. Y.; 44 Am. B. R. (New Series), 785; 30 Fed. Suppl. 868), the bankrupt obtained a loan from a bank which later was consolidated with another, and judgment was entered against the bankrupt by the latter institution. The Court held that the judgment was not discharged in bankruptcy, as the bankrupt listed the original creditor instead of its successor. The Court stated as follows (44 Am. B. R. [New Series] at p. 787):

"The bankrupt claims that the debt was duly scheduled and was therefore discharged, and further that the claimant entitled to notice had timely notice and actual knowledge of the proceedings and so the debt was discharged regardless of whether it was duly scheduled.

There is nothing in the record of this proceeding to support either of the above contentions. The bankrupt, himself, had actual knowledge that the Central Trust Co. of Chicago, Ill. was not the plaintiff and subsequent judgment-creditor, but that the Central Republic Bank & Trust Co was the party plaintiff in the original proceeding. *The name of this plaintiff was properly endorsed on the summons and complaint of the action*, as well as on the subpoena in supplementary proceedings and the stipulation regarding these supplementary proceedings. Further, there is nothing to show that the judgment-creditor or the assignee had received timely notice, or had actual knowledge except the fact that the Referee

had mailed notices to the 'Central Trust Company of Chicago, Ill. in liquidation,' the erroneously listed judgment-creditor. There are no facts to show that the real judgment-creditor had received this notice, although the bankrupt tries to infer this receipt from the fact that notices were sent to a different company and never returned.

I am satisfied that the decision of the state court was correct in holding this debt was not discharged in bankruptcy."

In the *Matter of Nathan Osofsky, et al.* (U. S. D. C., So. D. N. Y.; 17 Am. B. R. [New Series] 561), the bankrupt gave a series of negotiable promissory notes in payment for goods purchased, and had received notice of protest on one note before bankruptcy, which showed that the note had been transferred by the payee. The Court held that it was his duty to make inquiry of the payee regarding the later notes and if he failed to do so and listed the notes under the name of the payee, instead of the actual holders, the debt will not be affected by the discharge. We quote (17 Am. B. R. [New Series]) at p. 564:

"We have here the statement of the payee that two or three months prior to bankruptcy the bankrupt was told that these notes had been transferred to the lumber company. If this is the fact, it is clear that the debt represented by the two notes is not dischargeable. *Columbia Bank v. Birkett* (N. Y. Ct. of App.), 9 Am. B. R. 481, 174 N. Y. 112, 66 N. E. 652, affirmed 195 U. S. 345, 12 Am. B. R. 691, 25 S. Ct. 38, 49 L. Ed. 231. The bankrupt however, denies knowledge of any transfer. Even if this were true as to these two notes of late maturities, he was certainly cognizant of the transfer of the note of the same series which

had fallen due prior to bankruptcy. And it would seem that this circumstance was sufficient to charge him with the duty of inquiry concerning the later notes. When he made up his schedules, he could readily have learned from the payee whether the notes had been passed on to others.

* * * * *

But this does not mean that the bankrupt may list the original creditor *when he knows or ought to know* that another is the present holder of his obligation, and in my opinion that is this case. I therefore hold that the debt represented by the judgment was not duly scheduled and is not dischargeable, and that the stay should be vacated."

The Supreme Court in disposing of this point stated (S. C., pp. 69-70):

"In the instant case the bankrupt debtor had knowledge that the original claim had been assigned to Continental. Norelli had been so informed by the creditor's office manager. In these circumstances, it has been held that the debtor must use diligence to list the assignee's name and address in the schedule. *Lansing Liquidation Corp. v. Heinze*, 171 N. Y. Supp. 738; 184 App. Div. 129. Further, Norelli inspected the judgment in the court record. The fact of assignment appeared in the state of demand as well as the name of the creditor's attorney, Mr. Segal. It seems that Mr. Levine was substituted for Mr. Segal before judgment. Whether that was a matter of record is not clear but, assuming that it was, when counsel for the bankrupt telephoned Mr. Levine he did not inform him of the Norelli bankruptcy proceeding. And for the creditor the proof shows—and it was not controverted—that the creditor was not advised by Mr. Levine that any notice of the bankruptcy proceeding was served on

him. The address of the creditor was not unknown. It was listed in the city directory as well as in that of the telephone company, yet its address was not stated in the bankrupt schedule but rather the address and name of its attorney. Under these circumstances, it has been held that the debt is not released. See *In re Quackenbush*, 122 App. Div. 456; 106 N. Y. S. 773; *Murphy v. Blumenreich*, 123 App. Div. 645; 108 N. Y. S. 175; *Hein v. Liberman*, 141 N. Y. S. 314."

In his brief (pp. 4-8) counsel for appellant argues that the Supreme Court erred in having "weighed the evidence of the case and in then having found facts, on the basis of such evidence, discordant with the order and judgment of the lower Court." Suffice it to say on this point that the basic facts on which the Supreme Court reversed the Common Pleas were undisputed. And if it was necessary to do so, the Supreme Court could have found that the order below was not supported by the evidence. The cases cited by counsel in his brief fully support this basic principle of appellate practice.

POINT THREE.

The judgment was not duly scheduled as the bankrupt-appellant failed to comply with the statute.

In order that a debt be duly scheduled, the bankrupt must comply with the provisions of Sec. 7 A (8) of the Bankruptcy Act requiring him to include in his schedules:

“A list of all his creditors, including all persons asserting contingent unliquidated, or disputed claims, showing their residence, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated, or disputed.”

The record shows that appellant failed to list respondent's office address, although available to him in both the City and telephone directories (S. C., p. 44). Instead he chose to list Herbert I. Levine, as attorney for plaintiff. The proofs showed that this attorney was substituted of record on September 5th, 1936, but that during the year 1942, he did not generally represent the plaintiff. He was on a retainer basis for a short period in 1936-1937, and thereafter only on a contingent basis; i.e., he was authorized to appear only in those matters in behalf of Continental Purchasing Co. which were especially referred to him (S. C., pp. 37-41). The uncontradicted testimony of the witness Brown is that Levine never forwarded a notice of the Norelli bankruptcy proceedings to Continental. This was not met in any way by appellant. The petition

in bankruptcy was filed in 1942. The judgment was obtained by Levine in 1937. Ordinary exercise of due diligence by appellant should have resulted in the listing of Continental in the schedules and not the attorney. The direct testimony by the witness Cassini as to the conversation merely emphasizes the mental attitude of appellant to keep knowledge of the proceedings from Continental, since he failed to state during the course of the alleged conversation that a bankruptcy proceeding was then pending (S. C., pp. 55-56).

It has been held that notice to the attorney binds the creditor only when such notice is acquired by the attorney's representation of the creditor *in the bankruptcy proceedings itself*.

Interstate Credit League v. Widdison,
50 Idaho 493, 26 A. B. R. (N. S.) 105,
297 Pac. 1106;

Vital v. Jandorf, 126 Misc. 124, 7 Am. B.
R. (N. S.) 122, 212 N. Y. Supp. 548;

Strickland v. Capital City Mills, 74 S. C.
16, 54 S. E. 220.

We quote from *Vital v. Jandorf* (*supra*), 7 Am.
B. R. (N. S.) at pp. 123-124:

"It is conceded that plaintiff's claim was not 'duly scheduled.' Whether it was a provable debt during the time the bankruptcy proceedings were pending is a debatable question. Assuming that it was a 'provable debt' there remains the important issue as to whether plaintiff had notice or actual knowledge of the bankruptcy proceedings. The only evidence offered as to notice or actual knowledge on the part of the plaintiff was the testimony heretofore referred to, to the effect that defendant's attorney advised the counsel for plaintiff

in charge of this action of the bankruptcy proceedings. The matter then presents this issue: Was notice to plaintiff's attorney notice to plaintiff as a creditor of the bankrupt? While as a general proposition a principal may be charged with notice given his agent, the rule that notice to an attorney for a creditor is notice to his client applies only where the knowledge of the attorney is acquired while acting for the client, and the information relates to a matter within the scope of his agency. 3 R. C. L. p. 337; Strickland v. Capital City Mills, 74 S. Car. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426.

* * * * *

In the case at bar, there is not a scintilla of evidence from which an inference can be drawn *that plaintiff's former attorney was authorized to represent him in the bankruptcy proceedings*. It cannot be said that his duty to his client in the litigation pending in this court charged him with a duty to inform plaintiff *of the bankruptcy proceedings*. *An attorney cannot represent a creditor in bankruptcy unless he is duly authorized to do so*. Rule 4, Supreme Court United States (Collier, 13th Ed. p. 1800, 18 S. Ct. Iv.) See 3 U. S. Comp. Statutes 1901, p. 3418. I conclude therefore that plaintiff had neither notice nor actual knowledge of the bankruptcy proceedings, and that his claim was not barred by the discharge of the defendant Ginsberg from bankruptcy. Under the circumstances, the finding of the jury will not be disturbed."

We respectfully submit therefore, that even if it should be held that the amendment of the schedules was sufficient, the failure to list Continental rather than the attorney Levine in the schedules must prove fatal to the appellant's claim that the debt was discharged.

In this regard the Supreme Court said (S. C., pp. 70-71):

“Assuming that Mr. Levine was notified by mail—and there is no proof that he was—notice to him does not charge the creditor with notice or knowledge of the bankruptcy because at that time the attorney was not acting for the creditor. *Vidal v. Jandorf*, 212 N. Y. S. 548. As a matter of fact, he was not the creditor’s attorney on any matter at that time and there was no agency relationship between the creditor and him. We conclude that the debtor has not duly scheduled the debt and that as to it the discharge in bankruptcy is ineffectual.”

In his brief (pages 19-22) counsel refers to the general rule applicable to the authority or agency of an attorney acting within the scope of his authority. In view of the *Vidal* case (*supra*) and the General Orders in Bankruptcy cited therein, this general rule does not apply to bankruptcy matters, since an attorney cannot appear for a creditor in the Bankruptcy Court except under authority of a special letter of attorney.

Conclusion.

By reason of the foregoing, Respondent respectfully submits that the judgment of the New Jersey Supreme Court should be affirmed, with costs in its favor.

Respectfully submitted,

ALLAN L. TUMARKIN,
Attorney for and of Counsel
with Plaintiff-Respondent.

To be argued orally by:
ALLAN T. TUMARKIN.

Appendix "A"

List of Judgments From Schedules in Bankruptcy

(Exh. D-1)

1. John E. Tromer, Inc. v. Anthony Norelli. Irvington District Court. Judgment entered *January 8, 1935*. Attorney for Plaintiff, Frank I. Kent, Newark, N. J. Amount, \$215.52, Costs, \$14.86.
Total \$230.48
14. Michael Bunomo, Frank Minelli and Vincent Scotton v. Anthony Norelli and Essex Rod and Gun Club. Orange District Court. Judgment entered *September 27, 1935*. Attorney for Plaintiff, Kennedy & O'Donoghue, Main Street, Orange, New Jersey.
Amount \$126.80
15. Michael Bunomo, Frank Minelli and Vincent Scotton v. Anthony Norelli and Essex Rod and Gun Club. Orange District Court. Judgment entered *September 27, 1935*. Attorney for Plaintiff, Kennedy & O'Donoghue, Main Street, Orange, New Jersey.
Amount \$124.20
24. Franklin Loan Co., Newark v. Anthony Norelli. Newark Second District Court. Judgment entered *April 24, 1936*. Attorney for Plaintiff, H. Kaplan, Newark, New Jersey. Amount \$49.02, Costs, \$7.49.
Total \$56.51

32. David S. Wasserman v. Anthony Norelli. Orange District Court. Judgment entered *March 20, 1935*. Attorney for Plaintiff, Mellinger & Rudenstein, Orange, N. J.
Amount for Possession.

33. Orange Sash Door & Glass Co. v. Anthony Norelli. Orange District Court. Judgment entered *June 15, 1935*. Attorney for Plaintiff, Mellinger & Rudenstein, Orange, New Jersey. Amount, \$128.94, Costs, \$10.05.

Total \$138.99

35. International Distillers, Inc. v. Anthony Norelli, and Essex Road and Gun Club. Orange District Court. Judgment entered *October 25, 1935*. Attorney for plaintiff, Seymour & Seymour, Orange, N. J. Amount \$71.02, Costs, \$7.15.

Total \$78.17

36. Joseph H. Reinfeld, Inc., a New Jersey Corp. v. Anthony Norelli and Essex Rod and Gun Club. Orange District Court. Judgment entered *July 3, 1935*. Attorney for Plaintiff, Hodes & Hodes, Newark, N. J. Amount \$149.60, Costs \$11.48.

Total \$161.08

37. Jerone J. Blumbert, trading as J. J. Distributing Co. v. Anthony Norelli and Essex Rod and Gun Club. Orange District Court. Judgment entered *January 27, 1937*. Attorney for Plaintiff, Mayer & Mayer, Newark, New Jersey. Amount \$58.11, Costs \$6.50.

Total \$64.61

38. Thomas Gray v. Anthony Norelli and Essex Rod and Gun Club. Orange Small Claims Court. Judgment entered *February 21, 1935*. Attorney for Plaintiff, Kennedy Donohue. Amount \$40.80, Costs \$2.00.

Total \$42.80

52. Norton Pilsener Brew Co. v. Anthony Norelli and Essex Rod and Gun Club. East Orange District Court. Judgment entered *April 23, 1936*. Attorney for Plaintiff, Michael A. Alenick, Newark, New Jersey. Amount \$139.50, Costs \$12.73.

Total \$152.23

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12 MAY T. 1946

New Jersey Court of Errors and Appeals

CONTINENTAL PURCHASING Co.,
INC., a corporation of New
Jersey,

Plaintiff-Appellee,

vs.

FRANCES NORELLI and ANTHONY
NORELLI,
Defendants-Appellants.

Action at Law

On Appeal
from
Supreme
Court.

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

Honorable Justices and Judges:

With the permission of the Court, we wish to make a brief reply to the contentions adduced by the appellee in its brief.

The appellee states, on page 24 of its brief, that the basic facts on which the Supreme Court reversed the Court of Common Pleas were "undisputed." An examination of the testimony presented in the State of the Case leaves no doubt that this contention is utterly absurd and nonsensical. There were two basic facts "found" by the Supreme Court on the appeal: the first was that Mr. Levine was not the appellee's attorney, and the second was that Mr. Norelli knew of the assignment of the claim. To say that these facts were "undisputed" is to disregard almost all of the testimony set forth in the State of the Case. The evidence presented by the appellants contradicted these findings, and it is to be remembered that the trial court, the Court of Common Pleas,

found facts consistent with a judgment in the appellant's favor.

Again, the appellee contends that the Supreme Court could have found that the order of the trial court was not supported by the evidence. A superabundance of evidence may be found in the State of the Case to support that order. There may have been some evidence in favor of the appellee, but the trial court, after having weighed all the evidence, entered judgment in favor of the present appellants. According to the numerous decisions discussed in the appellants' brief, the trial court alone had the right to weigh the evidence. Contrary to this cardinal principle of appellate procedure, the Supreme Court, on the appeal, weighed the evidence and proceeded to make factual findings inconsistent with those necessarily found by the trial court. The Supreme Court erred in this respect, and its judgment should be reversed on that ground.

It is to be noted that the appellee has not attempted to distinguish any of the cases cited on this point, nor has the appellee cited one decision permitting an appellate tribunal to weigh the evidence and make factual findings. The Supreme Court erroneously treated this case as a trial *de novo*.

So long as there was any legally admissible evidence whatsoever to support the judgment in the appellants' favor, regardless of the nature or the weight of that evidence, the Supreme Court should not have made the two factual findings in question. In the absence of such findings, the judgment could not have been reversed.

The appellee has labored mightily and at great length in its supposition that Mr. Norelli intentionally omitted to schedule the appellee's claim in the bankruptcy proceedings. In the appellee's entire argument on this point, we are unable to find the shred of a reason why the man should have done so. He was bankrupt; he had no assets whatsoever; he had so many judgments and claims against him that he could not keep track of all of them. Why should he try to conceal a furniture bill? He first scheduled the claim in the name of the original creditor; later, having learned of the assignment of the claim, he scheduled it again in the name of the assignee. In the absence of the slightest evidence of any reason for the man's having tried to conceal this furniture bill, it is certainly ridiculous to conclude that, assuming there was an error in the scheduling of the bill, the error was predicated on a fraudulent intention.

With respect to the appellee's claim that it received no notice of the proceedings from the referee, we might repeat that the duty to send out the notices rested upon the referee and not upon the bankrupt. It is to be remembered that the notice might have been mailed properly, even though there is no record to such effect. There is no evidence that the notice was not mailed; the evidence is merely to the effect that there is now no record of the mailing (S. C., p. 31, lines 10 to 15; p. 32, lines 23 to 27).

The appellee refers on page 6 to uncontradicted proofs of a failure to list the creditor in the original schedules. To Mr. Norelli's knowledge, at the time of the preparation of the original schedules, the creditor was the National Furni-

ture Co.: the appellee, as assignee, had never given him actual notice of the assignment. Mr. Norelli listed the National Furniture Co. as his creditor. According to decisions on point, he thereby completed and performed his duty under the law. His listing of the appellee, after he had learned of the assignment, was an act above and beyond his duty under the law. Assuming, for the moment, that a mistake was made as to the assignee's address, the bankrupt should not be prejudiced as a result.

The appellee has dissected Mr. Norelli's testimony in an attempt to discover flaws in it. If, at the time Mr. Norelli went into bankruptcy, he had had only one creditor, namely, the National Furniture Co. or its assignee, then some of the appellee's arguments would be tenable. However, the man was beset with creditors, many of whom had reduced their claims to judgments. Unable to cope with these financial circumstances, he lost his business and went to the State of Connecticut to gain a livelihood. While he was working in Connecticut, the appellee brought its suit and obtained judgment. Very likely, the man assumed, when he was making his first search of the records, that a judgment could not have been entered against him during the period of his stay in Connecticut. Such would naturally be the viewpoint of a person wholly unacquainted with legal process and procedure.

In the case of *Birkett v. Columbia Bank*, cited by the appellee on page 13 of its brief, the bankrupts knew that the promissory note had been assigned by the payee to the bank. The bankrupt, in the case of *Hill v. Smith* cited on page 16, had omitted the name of the creditor in the schedules.

Again, in *Feld Lumber Co. v. Bornstein* on page 17, the bankrupt knowingly omitted the name of the creditor. The bankrupt, in the *Matter of Henry D. Cleveland* cited on page 21, had, with actual knowledge of the true facts, listed the name of the creditor erroneously. In the *Matter of Nathan Osofsky* cited on page 22, the bankrupt had been told of the assignment of the claim against him.

We are unable to perceive any pertinency in these cases to the controversy now before the bar of this Court. All of the cited decisions were based on the fact that the bankrupt had *with knowledge* erred in the listing of a certain creditor. The Court of Common Pleas of the County of Essex County entered judgment in the appellants' favor, and we must, therefore, assume that that Court found that Mr. Norelli had not knowingly attempted to circumvent the Bankruptcy Act. Hence, the decisions cited by the appellee cannot have any application to the present case, because there is no parallel between the facts in those cases and the facts involved in the present matter. There, the bankrupt listed the wrong creditor and knew that he was doing so. Here, the bankrupt properly listed the original creditor; then, having discovered the assignment, he amended his schedule to list the assignee, with its address as the law offices of the lawyer who had secured a judgment for the assignee on the assigned claim. The appellee's attempt to compare the two situations and to apply the same legal principle thereto serves merely to becloud the issue.

The appellee, on page 20 of its brief, desires to have the Court draw the inference that the address of the National Furniture Co., was not listed correctly, merely because the referee's notice was returned "Not Found." The notice was returned thus, as a result of the fact that the concern is no longer in existence.

It is to be noted that the Supreme Court, after having weighed the evidence, found that the appellee's credit manager had notified Mr. Norelli of the assignment. At the time this notice is alleged to have been given, Mr. Norelli was not in New Jersey but in Connecticut. Hence, the Court of Common Pleas was right, when it gave little heed to this claim on the appellee's part.

So far as the debt which was owed to the assignee is concerned, Mr. Norelli discharged his duties under the Bankruptcy Act to the very best of his ability, not once, but twice. He did far more than the law required him to do. He listed the claim once, and then he listed it again. No court should predicate a fraudulent intention on the part of a man who acts in this manner. A finding of fraud is a *sine qua non* to any judgment in favor of the appellee. The most recent decision on this subject is apparently that of *Dill v. Hamilton*, 167 P. 2d 497 (Advance Sheet No. 3), decided by the District Court of Appeal of the State of California, on April 10th, 1946, where the court said:

"Other authorities are cited to the point that the bankrupt must use reasonable diligence to ascertain the correct address of the creditor, but, like those preceding, these authorities involve cases where either no address or an incorrect address was given. No one of these holds that the

'street and number' is required as a matter of law. *The rule of all these cases rests squarely on fraud. If the bankrupt purposely gives a false address, or refrains from giving any address when the true address is known to him the decisions hold that such act is done for the fraudulent purpose of preventing proper notification to the creditor.'*

There is no evidence whatsoever to the effect that Mr. Norelli was motivated by a purpose to conceal the balance of the bill he owed for furniture. All of the appellee's arguments, in the absence of any evidence, cannot operate to create a purpose which did not exist. Most of the evidence and the inferences arising therefrom establish that Mr. Norelli was acting in the utmost good faith and that he complied with the requirements of the Bankruptcy Act.

Therefore, we respectfully submit that the judgment of the Supreme Court should be reversed and that the judgment of the Court of Common Pleas of the County of Essex should be affirmed.

Respectfully submitted,

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with Defendants-Appellants.

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