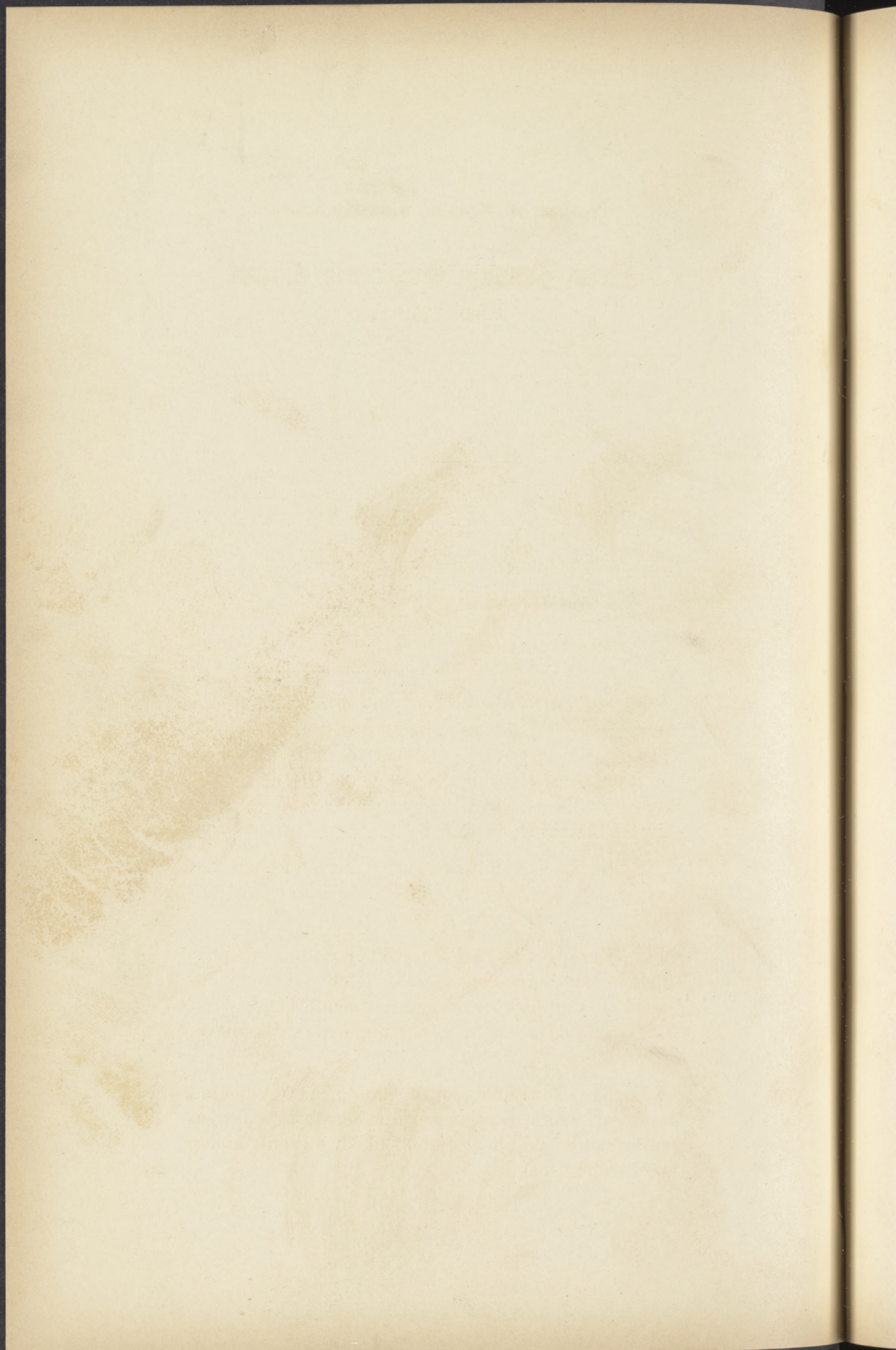


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Notice of Appeal and Grounds.

New Jersey Supreme Court

ESSEX COUNTY.

PAUL BENCSKO,
Plaintiff,

vs.

CAESAR A. CANNARA,
Defendant.

10

Action at Law.
Notice of Appeal
and Grounds.

To John W. Palmer, Esq., Attorney for Plaintiff,
Harry L. Huelsenbeck, Sheriff of Essex
County, or to whom it may concern:

20

PLEASE TAKE NOTICE that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the order entered in this cause on May 26, 1930, on the following grounds, to wit:

1. Because the Supreme Court denied the prayer of the defendant filed herein on April 15, 1930;

30

2. Because the Supreme Court should have reopened and cancelled of record the judgment entered in the above entitled cause on February 9, 1925, and entered said judgment *nunc pro tunc* as of January 27, 1925;

3. The Supreme Court should have vacated and set aside the execution heretofore issued under said judgment, and the levy made under said execution;

40

Notice of Appeal and Grounds.

4. The Supreme Court should have perpetually restrained and enjoined the sale of any property of the said Caesar A. Cannara levied upon under said execution;

10 5. The Supreme Court should have perpetually stayed any further proceedings under said judgment.

Respectfully yours,

STEIN, MCGLYNN & HANNOCH,
Attorneys of Defendant.

**Abstract of Record in the Supreme Court
Prior to Petition for Relief
Involved Herein.**

20

On December 3, 1923, summons and complaint were filed in the Supreme Court by the plaintiff against the defendant, Cannara and New Jersey Auto Company, a corporation, the complaint alleging the existence of a cause of action in favor of the plaintiff and against both defendants, arising out of alleged negligence in the operation of an automobile.

30 On December 6, 1923, answers on behalf of both defendants were filed, denying the acts of negligence charged against them and alleging contributory negligence on the part of the plaintiff.

On December 10, 1923, replies were filed by the plaintiff to each of said answers, denying each and every allegation contained in said answers.

40 On February 9, 1925, a postea was filed reciting that the cause had been tried before Judge Nelson Y. Dungan with a jury, at the Essex Circuit, on

*Abstract of Record in the Supreme Court Prior to
Petition for Relief Involved Herein.*

January 26th, and 27th, 1925, and that the jury had returned their verdict as follows: For the plaintiff, Paul Benesko and against the defendant, Caesar A. Cannara, in the sum of \$10,000.00.

On February 9, 1925, judgment was entered on said verdict in favor of the plaintiff and against the defendant Cannara for the sum of \$10,000.00, besides costs to be taxed. 10

On October 10, 1929, the plaintiff caused execution to be issued on said judgment, directed to the Essex County Sheriff and levy was made by said Sheriff under said execution upon all right, title and interest of the defendant, Cannara in and to lands and premises commonly known as 55-57-59 Beach street, Nutley, N. J. Said lands and premises were thereupon advertised for sale, and the sale having been stayed by this Court pending the rule to show cause involved herein was adjourned from week to week. 20

On February 1, 1930, a petition was filed in the Supreme Court on behalf of said Cannara praying for some, but not all of the relief asked for under the petition involved herein. A rule to show cause entered upon the first petition was discharged by Chief Justice Gummere on March 31, 1930. 30

On April 15, 1930, the petition involved herein was filed in the Supreme Court on behalf of Cannara, and on that date the rule to show cause involved herein with a stay, was entered by Chief Justice Gummere.

**Petition to Stay Execution and for
Other Relief.**

(Filed April 15, 1930.)

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

10

PAUL BENCSKO,
Plaintiff,

vs.

CAESAR A. CANNARA,
Defendant.

Action at Law.
Petition.

20

*To the Honorable, the New Jersey Supreme
Court:*

The petition of Caesar A. Cannara respectfully shows and alleges that:

30

1. The within proceedings were instituted on November 20, 1923, by the plaintiff against the defendant to recover damages alleged to have been sustained by the plaintiff by reason of the defendant's negligence in operating an automobile.

2. On January 27, 1925, a verdict was entered in said cause in the Essex Circuit, in favor of the plaintiff against the defendant for \$10,000.00 damages. A judgment was entered on said verdict on February 9, 1925, for \$10,000.00 damages and \$62.48 costs.

40

Petition to Stay Execution and for Other Relief.

3. On January 30, 1925, your petitioner was adjudicated a bankrupt by the United States District Court for the District of New Jersey, pursuant to the acts of Congress relating to bankruptcy, hereafter referred to as the "Bankruptcy Act". The following proceedings and steps, among others, were taken in the matter of the administration of said bankruptcy estate, all in accordance with the statute in such case made and provided, that is to say: 10

(a) Your petitioner, on January 30, 1925, filed a schedule of his assets and liabilities. The indebtedness and liability owing to the plaintiff as aforesaid, was included in said schedules in the following words:

Paul Benesko,	20
Roseland, N. J.	\$10,000.00
Represented by John W. Palmer,	
Kinney Building,	
Newark, N. J.	

Judgment obtained in New Jersey Supreme Court in proceedings instituted by Paul Benesko against Caesar A. Cannara.

(b) Said plaintiff received due notice of said bankruptcy proceedings and participated therein, and did on March 5, 1925, duly file a proof of claim of his said indebtedness in said proceedings in the following form: 30

Petition to Stay Execution and for Other Relief.

IN THE
DISTRICT COURT OF THE UNITED
STATES.

10

IN THE MATTER

of

CAESAR A. CANNARA, Bankrupt.

In Bankruptcy.

20

30

At Newark, in district of New Jersey on the fifth day of March, A. D. 1925, came PAUL BENSCKO, of Roseland, in the County of Essex in said district of New Jersey, and made oath and says that Caesar A. Cannara is the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of Ten Thousand sixty-two Dollars and forty-eight cents (\$10,062.48) that the consideration of said debt is as follows: A verdict for \$10,000.00 damages and \$62.48 costs, recovered by the said Paul Benscko against the said Caesar A. Cannara, in the Essex Circuit of the New Jersey Supreme Court on January 27th, 1925, that no part of said debt has been paid (except that no note has been given therefor (except that there are no set-offs or counterclaims to the same; except that no judgment has ever been recovered thereon; except the judgment above mentioned) and that deponent has not, nor has any person by his order, or to his knowledge or be-

40

Petition to Stay Execution and for Other Relief.

lief, for his use, had or received any manner of security for said debt whatever.

PAUL BENSCKO,
Creditor.

Subscribed and sworn to before me } 10
this 5th day of March A. D. 19 }

WILHELMINA HAGNEY,
Notary Public.
Commission Expires April 9, 1925.

(SEAL)

Said claim was duly filed and allowed as a provable claim by said Court in the sum of \$10,- 20
062.48.

(c) Your petitioner applied to said Court for a discharge in bankruptcy, and having complied with all the terms and provisions of said Act, a discharge was duly granted to him on September 8, 1925, in the following form (a certified copy of said discharge is on file in this cause and is attached to the petition hereafter more particularly referred to):

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40

Petition to Stay Execution and for Other Relief.

IN THE
DISTRICT COURT OF THE UNITED
STATES.

FOR THE DIVISION DISTRICT OF N. J.

10

IN THE MATTER
of
CAESAR A. CANNARA, Bankrupt.

No.
In Bankruptcy.

20

WHEREAS, Caesar A. Cannara, of Newark, in said District, has been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf,

30

It is, therefore, ordered by the Court that said Caesar A. Cannara be discharged from all debts and claims which are made provable by said Acts against his estate, and which existed on the 30th day of January, A. D. 1925, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable William N. Runyon, Judge of said District Court, and the seal thereof, this 8th day of September, 1925.

GEORGE T. CRANMER,
Clerk.

per S. R. BRETTELL,
Deputy.

40 (Seal of the Court.)

Petition to Stay Execution and for Other Relief.

4. The debt and claim of the plaintiff against the petitioner was a provable claim under said Bankruptcy Act and was filed as such provable claim in said proceedings, in order that plaintiff might participate in the administration of said estate and receive whatever dividend might be declared therein. The said claim was duly filed and allowed as a provable claim by said Bankruptcy Court. The plaintiff's debt and claim was not such a debt as was exempt by law from the operation of a discharge in bankruptcy. By reason of the foregoing, the defendant became discharged from all further liability and obligation therein. 10

5. Subsequent to the aforesaid adjudication and discharge in bankruptcy, to wit: during the year 1926, your petitioner acquired an interest in property commonly known as 55-57-59 Beech Street, Nutley, N. J. 20

6. On October 10, 1929, plaintiff caused an execution to be issued out of this Court on said judgment, directed to Harry L. Huelsenbeck, Sheriff of Essex County and said Sheriff, pursuant to the terms and direction of said writ, caused a levy to be made on petitioner's interest in said lands and premises and did thereupon advertise said property for sale. Said sale is to be held on April 15, 1930, at two o'clock in the afternoon at the Sheriff's salesrooms, Hall of Records, Newark, N. J. 30

7. By reason of the statute in such case made and provided and the matters and things herein set forth, defendant has been duly discharged and released of all his personal liability under the aforesaid judgment and therefore alleges that plaintiff was without power or right to cause 40

Petition to Stay Execution and for Other Relief.

such execution to be issued and said levy to be made on said property so acquired by him subsequent to his said adjudication and discharge in bankruptcy and that this said Court should vacate said execution and levy and perpetually enjoin said Sheriff's sale, and perpetually stay any further enforcement of said judgment.

8. It is urged by the plaintiff that his claim is not discharged or in any way affected by said discharge in bankruptcy because it was not a provable claim as designated and defined by said Bankruptcy Act.

Petitioner alleges that said claim was a provable claim and alleges further that the plaintiff, having filed his claim in said bankruptcy proceedings as hereinabove set forth and having caused such claim to be accepted and allowed as a provable claim, is now estopped from urging, and should not now be permitted to urge, that said claim was not a provable claim at the time of said adjudication. Your petitioner further alleges that inasmuch as said claim was, on the application of plaintiff, allowed and adjudged to be a provable claim under said Act, by a Court having full and complete jurisdiction in the cause, in which cause both the plaintiff and the defendant were parties, the question of whether or not said debt was a provable debt is *res adjudicata* upon the parties hereto and upon this Court, and that the plaintiff cannot further litigate herein the question as to whether or not said claim was a provable one.

9. It is conceded by the plaintiff that had a judgment been entered upon the plaintiff's aforesaid verdict prior to January 30, 1925, defendant would now be entitled to the relief herein prayed

Petition to Stay Execution and for Other Relief.

for, but petitioner argues that due to the fact that the judgment was not entered in said verdict until February 9, 1925 (after the adjudication in bankruptcy of the defendant) plaintiff's indebtedness was not a provable one as defined by said Bankruptcy Act and was therefore not discharged by the aforesaid order and decree of discharge herein referred to. 10

10. Petitioner alleges that due and proper practice on the part of the plaintiff required a prompt entry of judgment on the said verdict and that by reason of the other matters and things herein set forth, justice to all parties herein requires that the judgment of the plaintiff against the defendant be now entered *nunc pro tunc* as of January 27, 1925, the date of the verdict. 20

11. Your petitioner heretofore filed a petition herein, asking for some of the relief herein prayed for but not setting forth all the facts herein stated. A rule to show cause entered on said petition was discharged on March 31, 1930, as an examination of the record will disclose. Your petitioner is advised that no appeal or other review lies from the refusal of this Court to grant the prayer of said petition. 30

WHEREFORE, your petitioner prays:

1. That an order may be entered vacating and setting aside the execution and levy heretofore issued and made on the judgment herein referred to;

2. That an order may be entered perpetually restraining the sale of said property by Harry L. Huelsenbeck, Sheriff of Essex County, as herein more particularly set forth; 40

Petition to Stay Execution and for Other Relief.

3. That an order may be entered, perpetually staying any further enforcement of said judgment;

4. That an order may be entered cancelling said judgment of record;

10 5. That an order may be entered, entering said judgment *nunc pro tunc* as of January 27, 1925;

Or in the alternative

6. That petitioner may be permitted to re-argue the application heretofore made herein and that there be considered, at the time of said re-argument, all the things and matters herein set forth;

20 7. That petitioner may have such other and further relief as the nature of the case may require.

And petitioner will ever pray, etc.

CAESAR A. CANNARA,
Petitioner.

STEIN, MCGLYNN & HANNOCH,
Attorneys of Petitioner.

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

CAESAR A. CANNARA, being duly sworn on his oath, according to law, deposes and says:

I am the petitioner named in and who executed the foregoing petition.

The facts therein contained are true.

CAESAR A. CANNARA.

40 Subscribed and sworn to before me }
this 12th day of April, 1930. }

N. B. GROBERT,
A Master in Chancery of N. J.

Rule to Show Cause.

(Filed April 15, 1930.)

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

PAUL BENCSKO,
Plaintiff,

vs.

CAESAR A. CANNARA,
Defendant.

10

Action at Law.
Rule to Show
Cause With
Stay.

Upon reading and filing the duly verified petition of Caesar A. Cannara, the defendant in the above cause, 20

It is on this 15th day of April, 1930, on motion of Stein, McGlynn & Hannoeh, attorneys for said petitioner, ORDERED that the plaintiff, Paul Bencsko, and Harry L. Huelsenbeck, Sheriff of Essex County, show cause before this Court at the State House, Trenton, New Jersey, on Tuesday, May 6, 1930, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be entered. 30

1. Reopening and cancelling of record the judgment entered in the above-entitled cause on February 9, 1925;

2. Vacating and setting aside the execution heretofore issued under said judgment, and the levy made under said execution;

3. Perpetually restraining and enjoining the sale of any property of the said Caesar A. Cannara levied upon under said execution; 40

Rule to Show Cause.

4. Perpetually staying any further proceedings under said judgment;

5. Granting to petitioner such further relief in the premises as justice may require.

10 And it is further ORDERED that in the meantime, and until the further order of the Court in the premises, the said plaintiff, Paul Bencsko, his attorney, agents and servants, and the said Harry L. Huelsenbeck, Sheriff of Essex County, be and they are hereby jointly and severally restrained and enjoined from proceeding with any sale under the execution heretofore issued out of this court under said judgment;

20 It is further ordered that a copy of this rule and of the petition upon which it is based, be served upon the plaintiff or his attorneys herein and upon the said Harry L. Huelsenbeck, Sheriff as aforesaid within three days from the date hereof.

Leave is hereby given to the respective parties hereof upon two days' notice to the other to take such testimony in support of or in opposition to the prayer of the said petition as they may be advised is proper, such proofs to be taken before a Supreme Court Examiner.

30 Let this rule be entered in the minutes.

WM. S. GUMMERE,
C. J.

Answering Affidavit of Plaintiff.

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

<p style="text-align: center;">PAUL BENCSKO, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CAESAR A. CANNARA, Defendant.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: center;">Action at Law. On Rule to Show Cause. Affidavit.</p>
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STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.: 20

JOHN W. PALMER, of full age, being duly sworn according to law upon his oath deposes and says:

I am the attorney for the plaintiff herein, and have been said attorney from the inception of the suit of the plaintiff against the defendant which was instituted on November 20, 1923, by a summons and complaint issuing out of this court, and which involved personal injuries sustained by the plaintiff as a result of the defendant's negligence, and at the trial of which on January 27, 1925, in the Essex Circuit of this court, a verdict was rendered in favor of the plaintiff and against the defendant for \$10,000.00 damages. Judgment was not entered on said verdict until February 9, 1925. On January 30, 1925, the defendant was adjudicated a bankrupt on his own application, and I state the fact to be that at the time of that adjudication there was no judgment in existence against him on any claim of the plaintiff. 30
40

Answering Affidavit of Plaintiff.

On March 5, 1925, the plaintiff filed a proof of claim with the Referee in Bankruptcy, to whom the defendant's application in bankruptcy had been referred, but expressly stated therein that the consideration of any claim he had against this defendant was based on a "verdict" for \$10,000.00, and which contained the phrase "except that no judgment has ever been recovered thereon."

Under date of September 8, 1925, a discharge in bankruptcy was granted to the defendant, but which discharge specifically provided that it covered only those debts and claims "which are made provable by said acts against his estate," and which discharge related only to such debts and claims as existed "on the 30th day of January A. D. 1925," and which furthermore provided that said discharge did not purport to apply to "such debts as are by law excepted from the operation of a discharge in bankruptcy." The debt and claim of the plaintiff against the petitioner was not a provable claim under the bankruptcy act, nor did the plaintiff ever receive any dividends therein. The plaintiff's claim at the time of the defendant's adjudication in bankruptcy consisted solely of a claim arising out of tort action, on which a verdict had been rendered by a jury, but which claim did not become a debt or a provable claim under the bankruptcy act until the same had been reduced to judgment on February 9, 1925, and therefore was not included in the defendant's discharge, but was expressly excluded therefrom by the plain terms of said discharge.

I deny that the claim of the plaintiff was allowed and adjudicated to be a provable claim under said act by reason of any acts of the plaintiff herein, but state the fact to be that any such

Answering Affidavit of Plaintiff.

action as was taken on plaintiff's claim was induced by the defendant's misrepresentation in his adjudication on January 30, 1925, to the effect that the plaintiff's claim was predicated on a "judgment obtained in New Jersey Supreme Court," and state the fact to be that there was no judgment in existence at that time, and that the defendant well knew such to be the case, or could readily have ascertained the same, and deny that the question of whether or not plaintiff's claim against the defendant as stated on January 30, 1925, is *res adjudicata* upon the parties hereto and upon this Court, and state the fact to be that if said claim was not a provable debt under the bankruptcy act as of January 30, 1925, that the plaintiff is privileged and entitled to any and all rights accruing to him under the judgment obtained in this court under date of February 9, 1925; and I further state the fact to be that the question of whether or not said claim was a provable debt was argued before the Chief Justice of this court on the return of the rule to show cause previously granted to the defendant herein, and that after hearing full argument on this identical point on March 29, 1930, the Chief Justice discharged the defendant's rule to show cause and held that said claim was not a provable debt and did not become one until February 9, 1925, and that it was therefore not embraced within the terms and scope of the defendant's discharge in bankruptcy, and that an order discharging said rule to show cause was signed by the Chief Justice on March 31, 1930, and has been filed herein.

I deny that due and proper practice on the part of the plaintiff herein required that he should within three days of the rendering of the aforesaid verdict enter a judgment on the same, and

Answering Affidavit of Plaintiff.

state the fact to be that judgment was entered on February 9, 1925, on a verdict rendered on January 27, 1925, and that there was no unreasonable delay in the entering of said judgment by the plaintiff, and state the fact to be that by the rules of court and in accordance with regular practice the plaintiff was allowed approximately seventy days from January 27th, namely, any-time before expiration of ten days in the April term, in which to enter the same if for any reason he had seen fit to permit such a period of time to elapse. I furthermore state the fact to be that it was the defendant's privilege to have presented a postea to the Trial Court and to have entered judgment on said verdict at any time after that verdict was rendered, and at any time before the defendant petitioned himself into bankruptcy, but state that the defendant did not pursue these steps.

This affidavit is made by me in my capacity as attorney for the plaintiff, for the reason that he is not familiar with the matters and things herein stated and set out, and has necessarily left the handling of the foregoing matters to me, and that I am the one who is familiar with them.

JOHN W. PALMER.

Sworn to and subscribed before me, }
 this 28th day of April, A. D. 1930. }

SAMUEL K. SOBEL,
 A Master in Chancery of N. J.

Service is hereby acknowledged of a copy of the within affidavit, this 28th day of April, A. D. 1930.

STEIN, MCGLYNN & HANNOCH,
 Attorneys of Defendant.

Stipulation of Facts in Lieu of Testimony.

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

<p style="text-align: center;">PAUL BENCSKO, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CAESAR A. CANNARA, Defendant.</p>	}	<p>10</p> <p>Action at Law. Stipulation of Facts.</p>
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It is hereby stipulated and agreed by and between counsel for the respective parties hereto that upon the hearing of the order to show cause heretofore entered herein on April 15, 1930, the following facts are admitted to be true. 20

1. The within proceedings were instituted on November 20, 1923, by the plaintiff against the defendant to recover damages alleged to have been sustained by the plaintiff by reason of the defendant's negligence in operating an automobile.

2. On January 27, 1925, a verdict was rendered in said cause in the Essex Circuit of the New Jersey Supreme Court in favor of the plaintiff and against the defendant for \$10,000.00 damages. A judgment was entered on said verdict on February 9, 1925, for \$10,000.00 damages and \$62.48 costs. 30

3. On January 30, 1925, the defendant was adjudicated a bankrupt by the United States District Court, for the District of New Jersey, pursuant to the acts of Congress relating to bankruptcy. The following proceedings and steps among others 40

Stipulation of Facts in Lieu of Testimony.

were taken in the administration of said bankruptcy estate, that is to say:

(a) The defendant, on January 30, 1925, filed a schedule of his assets and liabilities. The indebtedness and liability owing to the plaintiff was included in said schedule in the following words:

10 Paul Bencsko,
 Roseland, N. J. \$10,000.00
 Represented by John W.
 Palmer, Kinney Building,
 Newark, N. J.
 Judgment obtained in New
 Jersey Supreme Court in
 Proceedings instituted
 Paul Bencsko *v.* Caesar
 A. Cannara

20 (b) The following additional unsecured claims were scheduled in the aforesaid bankruptcy schedules:

Tuorto Cut Stone Co., 70 Franklin St.,
 Silver Lake, N. J., judgment obtained
 in the District Court of Newark, about.. \$400.00
 Alphonse Russomano, 138 Ridge St., New-
 ark, N. J. Judgment obtained in the
 District Court of the City of Newark,
 30 about 300.00
 N. J. Auto Co., 190 Central Ave., Newark,
 N. J., book account, about..... 700.00
 Spring Sash & Door Co., 363 Washington
 Ave., Newark, N. J., goods sold and
 del., about 250.00
 Forest Hill National Bank, Newark, N. J.,
 money loaned 1,000.00
 First National Bank of Belleville..... 500.00

40 (c) Said plaintiff received notice of said bankruptcy proceedings, participated therein, and did on March 5, 1925, file his proof of claim of his said indebtedness in said proceedings in the following form:

Stipulation of Facts in Lieu of Testimony.

IN THE
DISTRICT COURT OF THE UNITED
STATES.

<p>IN THE MATTER of CAESAR A. CANNARA, Bankrupt.</p>	}	<p>In Bankruptcy.</p>
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At Newark, in District of New Jersey on the fifth day of March, A. D. 1925, came PAUL BENCSKO, of Roseland, in the County of Essex in said district of New Jersey, and made oath and says that Caesar A. Cannara is the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of Ten Thousand sixty-two dollars and forty-eight cents (\$10,062.48) that the consideration of said debt is as follows: A verdict for \$10,000.00 damages and \$62.48 costs, recovered by the said Paul Bencsko against the said Caesar A. Cannara, in the Essex Circuit of the New Jersey Supreme Court on January 27, 1925, that no part of said debt has been paid (except that no note has been given therefor; except that there are no set-offs or counterclaims to the same; except that no judgment has ever been recovered thereon, except the judgment above mentioned); and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received

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40

Stipulation of Facts in Lieu of Testimony.

any manner of security for said debt whatever.

PAUL BENCSKO,
Creditor.

10 Subscribed and sworn to before me }
 this 5th day of March, A. D. 19 . }

 WILHEMINA HAGNEY,
(Seal) Notary Public,
 Commission expires April 9, 1925.

Said claim was filed and allowed as a provable claim by said Bankruptcy Court in the sum of \$10,062.48.

20 Attached to said proof of claim was an abstract of the judgment recovered in the New Jersey Supreme Court, signed by the Clerk of said Court, and indicating that judgment had been entered on Feb. 9, 1925, for \$10,000. and \$62.48 costs.

(d) The defendant applied to said Court for a discharge in bankruptcy and a discharge was granted to him on September 8, 1925, in the following form:

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Stipulation of Facts in Lieu of Testimony.

4. During the year 1926, said defendant acquired an interest in property commonly known as 55-57-59 Beach street, Nutley, N. J.

10 5. On October 10, 1929, plaintiff caused an execution to be issued out of this court on said judgment directed to Harry L. Huelsenbeck, Sheriff for Essex County, and said Sheriff, pursuant to the terms and directions of said writ, caused a levy to be made on defendant's interest in said lands and premises and did thereupon advertise said property for sale. Pursuant to the stay granted in the order to show cause entered herein on April 15, 1930, the said sale is being adjourned from week to week.

20 6. On February 1, 1930, defendant filed a petition in this cause praying for some of the relief now being asked under the pending petition, but not setting forth all of the facts set forth in the pending petition. A copy of said petition is included in the state of the case. A rule to show cause entered on said petition was discharged on March 31, 1930, by the Chief Justice. A copy of said rule is included in the state of the case.

JOHN W. PALMER,
Attorney of Plaintiff.

30

STEIN, MCGLYNN & HANNOCH,
Attorneys of Defendant.

40

On Rule to Show Cause.

NEW JERSEY SUPREME COURT.

No. 460, May Term, 1930.

<p style="text-align: center;">PAUL BENCSKO, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CAESAR A. CANNARA, Defendant.</p>	}	10
	}	On Rule to Show Cause.

Argued May 7th, 1930. Decided May 19th, 1930.

Before Justices Black and Case.

20

For the Rule

MESSRS. STEIN, MCGLYNN and HANNOCH.

Contra Mr. JOHN W. PALMER.

Per Curiam:

The problem for solution in this case, is whether the defendant Caesar A. Cannara was discharged from liability of a debt, in a bankruptcy proceeding by the United States District Court, District of New Jersey, on September 8th, 1925. The situation grew out of the following facts, as set forth in the defendant's petition addressed to this Court, viz.: A suit was commenced on November 23rd, 1923, to recover damages for personal injuries caused by the negligence of the defendant, in operating an automobile. On January 27th, 1925, a verdict was entered against the defendant and in favor of the plaintiff, in the Essex Circuit Court for \$10,000.00. A judgment

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On Rule to Show Cause.

was entered on the verdict on February 9th, 1925, for \$10,000.00. On January 30th, 1925, the defendant and petitioner was adjudged a bankrupt by the United States District Court. On January 30th, 1925, the petitioner filed a schedule of his assets and liabilities, which included a judgment in the New Jersey Supreme Court. On March 5th, 1925, a proof of claim was filed and on September 8th, 1925, the petitioner was discharged from all debts and claims, etc. On April 15th, 1930, the Chief Justice granted the rule to show cause, why the judgment should not be cancelled, setting aside the execution issued thereon, enjoining the sale of the property levied under the execution. The case is brought before the Court on a stipulation of facts, in lieu of testimony. The crux of the case is whether a "verdict" and "judgment" are synonymous terms within the meaning of Section 63 of the Bankruptcy Act of 1898. It will be observed, that the verdict was rendered on January 27th, 1925; the judgment was not entered until February 9th, 1925; but, on January 30th, 1925, the petitioner was adjudged a bankrupt. The statute provides for debts which may be proved, viz.: of "a fixed liability", as "evidence by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, etc."

After hearing the argument of the respective counsel and reading and considering the helpful and exhaustive briefs, we are led to the conclusion, that the petitioner, the defendant was not discharged from the debt in question, on the ground, that it was not made provable under the statute. The result is, the rule to show cause heretofore allowed by the Chief Justice on April 15th, 1930, is discharged with costs. An order may be entered to that effect.

Order Discharging Rule to Show Cause.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">PAUL BENCSKO, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CAESAR A. CANNARA, Defendant.</p>	}	<p style="text-align: center;">Action at Law. 10</p> <p style="text-align: center;">Order Discharging Rule to Show Cause.</p>
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Argument on the Rule to Show Cause heretofore allowed in this case coming on to be heard before the Court in the presence of Stein, McGlynn & Hannoeh, attorneys for and of counsel with defendant, and John W. Palmer, attorney for and of counsel with plaintiff, and the Court having inspected the record brought up on said rule and heard the arguments of counsel thereon, and having considered such record and arguments, and being of the opinion that said Rule to Show Cause should be discharged, with costs, 20

IT IS ORDERED that the Rule to Show Cause heretofore allowed herein by the Chief Justice of this court on April 15th, 1930, be and the same is hereby discharged, with costs. 30

On motion of

JOHN W. PALMER,
Attorney for and of Counsel
with Plaintiff.

Rule entered this 26th day of May, A. D. 1930.

A true copy

FRED L. BLOODGOOD,
Clerk.

40

First Petition Filed in the Supreme Court.

(Filed February 1, 1930.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

 PAUL BENCSKO,
 Plaintiff,

vs.

 CAESAR A. CANNARA,
 Defendant.

 Action at Law.
 Petition.

20 *To the Honorable William S. Gummere, Chief
 Justice of the New Jersey Supreme Court:*

The petition of the undersigned respectfully shows and alleges:

1. That on November 20, 1923, the above-entitled cause of action was instituted herein.

2. That on January 27, 1925, a verdict was rendered by a jury in favor of the plaintiff and against your petitioner, the defendant herein. A
 30 judgment was entered on February 9, 1925, in the amount of \$10,000 and costs, \$62.48.

3. That on October 10, 1929, an execution was issued and a levy was made by the Sheriff of Essex County on lands and premises of this petitioner commonly known and designated as No. 55-57-59 Beech street, Nutley, Essex County, New Jersey.

4. That the said property was acquired by this
 40 petitioner March 30, 1926, and on October 4, 1926.

First Petition Filed in the Supreme Court.

5. That the said Sheriff of Essex County has advertised the said property for sale for March 4, 1930, at 2 P. M.

6. That on January 30, 1925, your petitioner filed a voluntary petition in bankruptcy in the United States District Court for the District of New Jersey. On the same day he was duly adjudged a bankrupt and the matter was referred to the late Charles M. Mason as Referee in Bankruptcy. In the course of the said bankruptcy proceedings your petitioner filed a schedule of his assets and liabilities and in the said schedule he listed the plaintiff herein as a creditor in the following manner, to wit: 10

“Paul Bencsko, Roseland, N. J., represented by John W. Palmer, Kinney Bldg., Newark, N. J..... 10,000.00 20

Judgment obtained in N. J. Supreme Court in proceedings instituted Paul Bencsko v. Caesar A. Cannara.”

7. That the said Paul Bencsko, the plaintiff herein, received notice of said bankruptcy proceedings and participated therein.

8. That your petitioner made an application for a discharge to the said United States District Court for the District of New Jersey, and, in accordance with the National Bankruptcy Act of 1898 and as amended, on September 8, 1925, he received a discharge in bankruptcy. That annexed hereto and made a part hereof and marked Exhibit “A” is a certified copy of said discharge in bankruptcy. 30

Your petitioner prays:

1st: For an order to set aside the said execution and levy; 40

First Petition Filed in the Supreme Court.

2nd: For an order enjoining the said Sheriff's sale;

3rd: For a perpetual stay of the enforcement of said judgment;

10 4th: For a cancellation of the said judgment, and for such other and further relief as may be just and proper.

CAESAR A. CANNARA,
Petitioner.

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

20 CAESAR A. CANNARA, being duly sworn on his oath according to law, deposes and says: That he is the petitioner named in and who executed the foregoing petition; that the statements of facts therein contained are true, except those matters therein alleged to be upon information and belief, and as to those matters, he believes them to be true.

CAESAR A. CANNARA.

30 Subscribed and sworn to before me }
this 28th day of February, 1930. }

KATHERINE MAC GEORGE,
Notary Public of N. J.

First Rule to Show Cause.

(Filed February 1, 1930.)

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

 PAUL BENCSKO,
 Plaintiff,
vs.
 CAESAR A. CANNARA,
 Defendant.

 Action at Law.
 Rule to Show
 Cause.

20

Upon reading and filing the duly verified petition of Caesar A. Cannara; it is on this 1st day of February, 1930, on motion of Furst & Furst, attorneys for said petitioner.

30

ORDERED: That the plaintiff, Paul Bencsko, and Harry L. Huelsenbeck, the Sheriff of Essex County, show cause before this Honorable Court, at the Hall of Records, High Street and 13th Avenue, Newark, N. J., on the 8th day of March, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made (1st) to set aside the execution issued herein and the levy made thereunder; (2nd) to enjoin the said Sheriff of Essex County from conducting a sale of the defendant's assets; (3rd) for a perpetual stay of the enforcement of the judgment recovered herein; (4th) for a cancellation of the judgment recovered herein; and (5th) for such other and further relief as may be just and proper; and it is further

40

First Rule to Show Cause.

ORDERED: That in the meantime the said plaintiff, Paul Bencsko, his attorneys, agents and servants; and Harry L. Huelsenbeck, the Sheriff of Essex County, be and they are hereby jointly and severally restrained and enjoined from conducting a sale of the property of the defendant herein, until the further order of this Court. 10

WM. S. GUMMERE,
Chief Justice of Supreme Court.

20

30

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Rule Discharging First Rule to Show Cause.

(Filed March 31, 1930.)

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

10	<p style="text-align: center;">PAUL BENCSKO, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CAESAR A. CANNARA, Defendant.</p>	<p>Action at Law. On Rule to Show Cause.</p> <p>Order Discharg- ing Rule to Show Cause.</p>
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20 Upon reading the verified petition of the defendant in the above-entitled cause, and the affidavits thereto annexed, and on hearing John W. Palmer, attorney for the plaintiff, and George Furst, of Furst & Furst, attorneys for the defendant on Saturday, the 29th day of March, A. D. 1930.

30 It is, on this 31st day of March, 1930, on motion of John W. Palmer, attorney of plaintiff, ORDERED that the rule to show cause entered herein on the 1st day of March, 1930, be and the same is hereby discharged; and

IT IS FURTHER ORDERED, that the plaintiff herein be allowed the taxed costs of this motion.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
Chief Justice of New Jersey
Supreme Court.

On motion of

40 JOHN W. PALMER,
Attorney of Plaintiff.

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

New Jersey Court of Errors and Appeals

PAUL BENSCKO,
Plaintiff-Appellee,
vs.

CAESAR A. CANNARA,
Defendant-Appellant.

*Action
 at Law.
 On Appeal
 from
 New Jersey
 Supreme
 Court.*

BRIEF OF PLAINTIFF-APPELLEE.

The points involved herein have already been passed upon by the Chief Justice, and a previous Rule to Show Cause granted by him to the defendant on March 1, 1930, was discharged after argument and hearing before him on March 29, 1930. At that time the defendant was represented by Messrs. Furst & Furst, of Newark, and since then the defendant has retained his present counsel who, on the 15th of April, 1930, petitioned the Chief Justice to grant a re-hearing, which he refused to do, but stated that in view of the public interest which had apparently been created by the situation involved herein he would give the defendant a Rule to Show Cause returnable before the Supreme Court *en banc*, which rule came on for argument at the May, 1930, term and was, after hearing discharged, and it is from that ruling by the Supreme Court that the defendant now appeals.

In his petition of April 12, 1930, the defendant alleges that the previous petition dated February 28, 1930, asked for similar relief to that for which he was asking on April 12th, but alleged that the previous petition did not set forth all the facts contained in the latter petition, but a reading of

the two will show that every substantial point involved was contained in his previous petition, and certainly every fact alleged in the later petition was argued before and considered by the Chief Justice on March 29, 1930, when the former rule was discharged, so that it can be considered as a fact that this same question has already twice been decided by our own courts.

Statement of Facts.

On August 26, 1922, this defendant, while operating an automobile on the wrong side of one of the main highways in the town of Roseland, in the county of Essex, ran down the plaintiff, who was then on a bicycle on his right hand side of the road, and injured him so severely that five operations were necessary, and although this accident occurred more than seven years ago, the plaintiff still has to undergo from time to time treatment at a hospital. Suit was started in the Supreme Court on November 20, 1923. The case was tried on January 26th and 27th, 1925, and a verdict rendered for the plaintiff for \$10,000. Within *seventy-two hours* thereafter the defendant filed a voluntary petition in bankruptcy, namely, on January 30, 1925, and was adjudicated a bankrupt *as of that date*, as appears by a certificate contained in the State of the Case, and which certificate expressly provided that it operated only as a discharge from all debts and claims "*which are made provable by said acts against his estate, and which existed on the 30th day of January, A. D. 1925, on which date the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.*" Judgment was entered on the foregoing verdict of January 27th on February 9, 1925, that is, ten

days after the defendant had petitioned himself into bankruptcy, and likewise ten days after he had been adjudicated a bankrupt. It is to be remembered that there was no judgment in existence at the time he petitioned himself into bankruptcy, and this has twice been determined to be a fact by our courts and was the very basis of the former rulings holding that that bankruptcy discharge did not in any way affect this plaintiff's judgment—a judgment which was never even in existence at the time this defendant voluntarily went into bankruptcy.

It will therefore be seen that the trial in the Supreme Court was the trial of a tort action for personal injuries, and that it had not been reduced to judgment at the time the defendant petitioned himself into bankruptcy, and that there was nothing more in existence on January 30, 1925, than the plaintiff's claim against the defendant arising out of this tort, on which there was a verdict, but which had never been reduced to judgment.

Just such a situation as the one here presented has frequently arisen in the past, namely, where a defendant petitions himself into bankruptcy in a tort action without waiting for a judgment to be entered against him and when the only thing which is outstanding is a verdict, and eight times in this country the question has been squarely presented to eight different courts, and it has in every instance been held that the bankrupt's discharge which he subsequently obtained in no way affected the *judgment* which was later on entered on the verdict which was in existence when the bankrupt petitioned himself into bankruptcy—in other words, his discharge in bankruptcy did not operate, could not operate, and was never intended to operate against a judg-

ment which was acquired after his petition in bankruptcy had been filed, for it should be borne in mind that when the discharge is granted it always relates back to the time of the filing of the petition, just as the discharge in this case dates back to such provable debts and claims as existed against this defendant on January 30, 1925, although the discharge itself was not granted until September 8, 1925.

The Bankruptcy Act.

Section 63a of the above act, to be found in U. S. C. A., Section 103a, sets out those debts and obligations which that act has power to discharge, and from a reading of that section it will be seen that the act has no operation whatsoever on the Benseko judgment, for that section reads:

“Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against the plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account or upon a contract express or implied; (5) founded upon provable debts reduced to judgments after the filing of the petition and before

the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments."

In explanation of the fifth class of cases referred to in the above section, I would say that this does not at all enlarge the class of debts which are to be allowed to share in the dividends, because it expressly provides that it relates to claims founded upon *provable debts* and the mere obtaining of a judgment on which would in no wise better the creditors position nor make them any more entitled to share in the dividends. There are some people, however, who have provable debts against a person who files a petition in bankruptcy who for their own convenience or satisfaction prefer to reduce those debts to actual judgments. Sub-division 5 of the above section simply provides that they can follow that course if they so desire, but it is stipulated that they shall receive no costs or interest which would accrue on that judgment after filing of the petition and up to the time of the entry of such judgment. In other words, the act itself specifies what are provable debts, and if a debt is provable in the first instance against the bankrupt the creditor in no way betters his position by insisting on reducing his claim to a judgment, and if he insists on doing so Sub-division 5 warns him that the costs which he incurs in following that course will not be chargeable against the estate of the bankrupt, nor shall any interest run on that judgment. See Remington on Bankruptcy, 3d Edition, Section 3523.

For the convenience of the court I quote below from the 3d edition of Remington on Bankruptcy, giving the section numbers and dealing with those

debts which are dischargeable and those claims which are not:

Section 757—"Debt"—By debt is meant any debt, demand or claim *provable in bankruptcy*.

Section 759—"Provable" Debt: A provable debt means an obligation susceptible of being presented in such form as to come within some one or more of the classes of debts designated in Section 63 (a) as "provable" debts, whether actually so presented or not.

Section 760—Whether "Provable" or not depends on Status at Date of Filing Bankruptcy Petition—The question whether or not a debt is provable turns upon its status *at the time of the filing of the petition*. *Williams & Co. v. U. S. Fidelity Co.*, 28 A. B. R. 802, 11 Ga. App. 635, 75 S. E. 1067.

Section 766—Claims "Ex Delicto" for money Not Provable unless in Judgment—Claims ex delicto, even though for money, cannot be proved as such. Thus, an unliquidated claim for damages for personal injury is not a provable claim, and is not susceptible of being made into a provable claim—Thus, it does not include damages for injuries to the person, not yet reduced to judgment. But if claim is reduced to judgment *before the filing of the Bankruptcy Petition, it may be proved as a judgment*, though not if reduced to

judgment *until after the filing of the petition*, even though before adjudication.

The two recognized authorities on bankruptcy in this country appear to be Remington and Collier. In Section 3529 of Remington, 3d Edition, it is stated:

“But a mere liability not yet reduced to judgment arising from having committed a personal injury, is not provable, nor can it be presented in form *ex contractu*, and consequently it is not dischargeable, *even though a verdict has been rendered thereon before the bankruptcy.*”

Section 766 of the same work says:

“Thus, an unliquidated claim for damages for personal injuries is not a provable claim, and is not susceptible of being made into a provable claim. But if reduced to *judgment* before the filing of the bankruptcy petition it may be proved *as a judgment.*”

The same author, in Section 826 of his work, says:

“*Judgments* for personal injuries and other similar torts not capable of being presented in form *ex contractu* are provable, although the unliquidated *claims* for the torts themselves would not be provable; but are not provable where not rendered before the filing of the bankruptcy petition, *even though verdict has been rendered.*”

Collier on Bankruptcy, p. 1387, says:

“All judgments *actually entered at the date of bankruptcy* are provable debts. A judgment is primarily absolutely owing when rendered and entered. The rendering of a verdict is not, it seems, a judgment entitling such verdict to proof. For instance, a verdict against a bankrupt for damages for personal injuries, where no judgment had been entered thereon prior to the bankruptcy

proceedings, is not a fixed liability evidenced by a judgment within this clause, and is not a provable debt."

The Law as to a Mere Verdict.

"Verdict" and "judgment" are certainly not synonymous in this State, and there can be no justification for the claim advanced here and elsewhere by this defendant that inasmuch as a verdict had been rendered against him it had the same legal effect as a judgment, and immediately brought into being a fixed liability, or created a provable debt. Both "verdict" and "judgment" have been defined by our courts, and it is most clear that there is a sharp distinction between the two.

Speaking of a verdict, the Court of Errors and Appeals said:

"A verdict is the definitive answer given by the jury to the court concerning the matters of fact committed to the jury for their deliberation and determination."

State v. Williams, 89 N. J. L. 234; 98 Atl. 416.

As to a "judgment," in *Stewart v. Stewart*, 93 N. J. Eq. 1, 114 Atl. 851, the Chancellor said:

"Conviction means the confession of the accused in open court or the verdict returned by the jury, which ascertains and publishes the fact of guilt. The judgment or sentence denotes the action of the court in which the plea is made or verdict rendered, declaring the consequences to the convict of the fact ascertained," citing

State v. Hanson, 66 N. J. L. 607; 50 Atl. 468, decided by the Court of Errors and Appeals, in which it is stated:

"The distinction between 'conviction' and 'judgment' has been very generally observed."

See also *Morgan v. Bowman*, 103 N. J. L. 542, 137 Atl. 655.

The full force of the difference between a judgment and a verdict becomes apparent from a reading of the definitions and history of each under their respective headings in 15 R. C. L. 569 and 27 R. C. L. 833. From such reading it is clear that it is *the judgment*, and not a mere verdict, which creates and constitutes the debt. It is spoken of as a debt, or an indebtedness, or a debt of record; it is held to be an obligation of the highest nature known to the law; it is recognized as personal property, and gives the holder thereof such a vested right of property that the legislature cannot by a retroactive law either destroy or diminish its value. I would like to direct the court's attention, however, to the fact that in these present proceedings the defendant is urging that this judgment of the plaintiff, regularly and duly entered, should be re-opened and canceled; execution already issued and levy made should be vacated and set aside; the plaintiff perpetually restrained and enjoined from selling any of this defendant's property—in other words to completely destroy the debt and security therefore which the law has already given to this plaintiff and to which the plaintiff has long since proven to the satisfaction of the law he was entitled.

Coming to a consideration of the cases, we find the following:

In re Ostrom, et al., 185 Federal Reporter 988, from the district court for the District of Minnesota, 6th Division; decided March 10, 1911:

This suit arose over a personal injury case, just as in the Benskeo case. John Peck brought suit against Ostrom & Swanson to recover dam-

ages for personal injuries. The table of dates in the matter is as follows:

- June 20, 1908, verdict for Peck for \$2,000.
- Dec. 19, 1908. order for judgment in favor of the defendants notwithstanding the verdict.
- Apr. 30, 1909, this order reversed by the Supreme Court and the verdict reinstated.
- May 8, 1909, leave given to defendants to move for new trial.
- June 20, 1909, petition in bankruptcy filed against the defendants.
- Aug. 13, 1909, motion of defendants for new trial denied.
- Oct. 15, 1909, judgment entered in favor of Peck for \$2,219.
- Nov. 3, 1909, defendants adjudicated bankrupts.

The Federal court points out that if this claim can be allowed at all, it must be under sub-division 1 of section 63 of the bankrupt act, which is as follows:

“A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not.” Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, 9. 3347).

The court further states that it is admitted that the claim for personal injuries as it existed before the verdict was not provable or allowable, and then takes up the contention of the bankrupt that when the *verdict* was rendered the liability became fixed, and that it then became provable

and allowable, citing copiously from *Black v. McClelland*, Fed. Cas. No. 1, 462, to which I will presently refer, and which clearly shows that a *verdict* is not a debt provable in bankruptcy.

It was claimed by the bankrupt that under some Minnesota state court decisions the rendering of a verdict removed any uncertainty there might have been about the claim, and that a verdict under these decisions becomes property and passes to a personal representative the same as though it had been reduced to a judgment. As to *this*, the Federal court points out that even if it can be said that a verdict created a fixed liability, yet it is not a fixed liability evidenced by a judgment or instrument in writing, conditions which must, by the present act, be complied with *even before a fixed liability can become a provable debt*. In this case it was held that the bankruptcy had no effect whatever on the plaintiff's judgment, which was acquired after the filing of the petition, even though a verdict had been in existence at that time for a period of exactly one year. The fact that there was a *verdict* was immaterial; it was the lack of a *judgment* which controlled.

The case of *Black v. McClelland*, reported in 3 Fed. Cases, being case No. 1462, was decided by the Circuit Court for the Western District of Pennsylvania on appeal from the District Court for the Western District of Pennsylvania, and was decided September 4, 1875. This is a case directly in point, and it affirms the ruling of the judge of the Federal District Court for the Western District of Pennsylvania, who had previously held that the same state of facts as are involved in the Benseko case were not dischargeable under the bankruptcy act, and because *Black v. McClelland*, appears to be a leading case, I would like to

direct the attention of the court first to the syllabus of the case and then to the reasoning:

1. A mere verdict in an action for a personal tort is not a provable debt.

2. A judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy, upon a verdict rendered before that time, is not a provable debt.

3. A party who holds a judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy need not apply to the district court for leave to issue an execution.

In this case Black had obtained a verdict against McClelland on January 12, 1875, for \$3,850 in the state courts of Pennsylvania; and on March 20, 1875, McClelland filed his petition in bankruptcy and was adjudicated a bankrupt as of that date. On May 6, 1875, Black had judgment entered on his verdict.

Subsequently Black applied to the Federal court for the Western District of Pennsylvania for leave of issue process from the State court for the collection of his debt, claiming that as the verdict was for damages in tort and no judgment being entered upon that verdict at the time of the adjudication in bankruptcy it was not a debt provable in bankruptcy at the time of the adjudication, and consequently the proceeding in bankruptcy was not a discharge of the debt. The judge of the United States District Court agreed in this contention and signed the order applied for, whereupon McClelland appealed to the Circuit Court for the Western District of Pennsylvania, and its opinion was delivered by McKennan, Circuit Judge. It was there held

that *the time of adjudication is fixed as the date with reference to which the provable character of the bankrupt's liabilities are to be determined*; those which are not at the time of adjudication within the category of provable debts as the act enumerates and describes them are not chargeable upon the estate, and are not discharged by the certificate.

Judge McKennan points out that the sole question to be determined is whether the amount of Black's verdict is a provable debt against McClelland's estate, and states that this particular point for a long time caused considerable trouble to the courts of England, there being opinions first one way and then the other, until finally in *Ex parte Charles*, 16 Ves. 256, it was directly presented for decision and Lord Eldon ordered a commission in bankruptcy to be superseded, which was issued upon a creditor's petition whose debt consisted of a verdict for damages in an action for breach of promise of marriage, which verdict was rendered before the act of bankruptcy, and upon which judgment was entered thereafter but before the allowance of the commission. At the same time he directed a case to be stated for the opinion of the judges of the King's Bench, who after full argument and deliberate consideration of the question, with all the cases bearing upon it, unanimously certified their opinion that the debt was not sufficient in law to support the commission. *Ex parte Charles*, 14 East 197. Since then the law has been settled accordingly in England.

The Court then points out:

"Now, a claim which has not obtained the condition of a fixed liability cannot be characterized as a debt due and payable, either

presently or at a future day, and such is the immature character of a mere verdict before judgment. It is subject to the control and discretion of the Court, and may be superseded altogether by arresting judgment upon it, or by the allowance of a new trial. No action could be maintained upon it; it does not bear interest, and no determinate character is impressed upon it until the Court has pronounced its judgment that the plaintiff do recover from the defendant the amount of it. The judgment establishes the indebtedness and impresses the obligation of payment, and so may be said to create the debt. Not until it has passed is there a debt due and payable. The respondent's debt was not, therefore, in the category of debts provable against the bankrupt's estate at the time of the adjudication, so it was not necessary for him to apply to the bankruptcy court for leave to take judgment on the verdict, or to issue execution thereon."

I would ask the court to observe the similarity of the above language and reasoning with that used by Parker, *J.*, in *Morgan v. Bowman*, *supra*, where he was speaking of the effect of a bare verdict.

This same matter has also been before the State courts of Massachusetts in a case in which Gray, *C. J.*, wrote the opinion, and where the facts are identical to those in the Benseko case, and he also held that if at the time of the petition in bankruptcy there was nothing more in existence than a mere verdict, on which verdict a judgment was entered *after* the filing of the petition, that the bankrupt's discharge in no way operated on that judgment, and that as to that judgment there never was a discharge. I refer to:

Zimmer v. Schleeauf, 115 Mass. 52, where the plaintiff had a verdict against the defendant for slander and malicious prosecution. After *verdict* and before *judgment* the defendant filed a petition in the United States District Court for the District of Massachusetts for proceedings in bankruptcy upon his estate, and was subsequently adjudicated a bankrupt under the laws of the United States. The plaintiff moved for judgment in the State court, and at the same time the defendant moved for a continuance to await the proceedings in the bankrupt court. For the defendant it was frankly admitted that the claim was not a "debt" until judgment, but it was contended that it was a "liability" within the meaning of the fourth clause of Section 19 of the Bankrupt Act. The opinion of the court was written by Gray, *C. J.*, who held:

"The bankrupt act of 1867, c 176, Sec. 19, declares that no debts other than those therein specified shall be proved against the bankrupt's estate. The plaintiff's claim does not come within either of the specified classes. It is conceded that it was not 'a debt existing at the time of the adjudication of bankrupt,' because a claim for damages in an action of tort does not become a debt by verdict before judgment. It was not a demand for or on account of goods taken or withheld, nor a liability upon any contract. The only 'contingent debts and contingent liabilities' allowed to be proved are those 'contracted by the bankrupt.' The plaintiff's cause of action did not arise out of any contract, or any injury to property, but out of a personal tort. It was therefore not provable under the bankrupt act, and the provision of Section 21 for a stay of proceedings has no application. Exceptions overruled."

In re Boston & Fairhaven Iron Works, Bankrupts, 23 Fed. Rep. 880, decided by the Circuit

Court for the District of Massachusetts, April 30, 1885, it was also held:

“A claim for damages for a tort is not a claim provable in bankruptcy, unless liquidated or reduced to judgment prior to the date of proceedings in bankruptcy.”

Citing *In re Schuchardt*, 15 N. B. R. 161;
Black v. McClelland, 12 N. B. R. 481;
In re Hennocksburgh, 7 N. B. R. 37.

When this matter came on before Gummere, C. J., on March 29, 1930, every argument which could be advanced on behalf of the defendant, which certainly covered all the facts stated and set out in his later petition to the Supreme Court *in banc*, was advanced at that time. Unfortunately no stenographer was present and a record is therefore not available of what the Chief Justice said, but his ruling was in accordance with the rulings in the six preceding cases, namely, that at the time this defendant filed his petition in bankruptcy there was no debt in existence which he owed to this plaintiff, and consequently if there was no debt in existence there was no debt which could be discharged as of January 30, 1925. He also held that a mere verdict created neither a debt nor a fixed liability which was absolutely owing at the time of the filing of the petition, and that under the plain terms of the bankruptcy act neither a debt nor a fixed liability came into being until judgment was entered on February 9th, 1925, which was ten days after Mr. Cannara's petition in bankruptcy.

When the matter came on before Black and Case, J. J., 8 N. J. Misc. Rep. 431, 150 Atl. 232, it was held the crux of the case was whether a “verdict” and “judgment” are synonymous terms within the meaning of Section 63 of the Bankruptcy Act of 1898 (11 U. S. C. A. Sect.

103). The court pointed out that the judgment was not entered until February 9, 1925, and that on January 30, 1925, Mr. Cannara was adjudged a bankrupt on his own petition, and that the Bankruptcy Act only purports to discharge debts which may be proved, meaning by that "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not." It is further stated:

"We are led to the conclusion that the petitioner, the defendant, was not discharged from the debt in question, on the ground that it was not made provable under the statute. The result is, the rule to show cause heretofore allowed by the Chief Justice on April 15, 1930, is discharged with costs."

There is no element of waiver or estoppel in this case.

I would direct the attention of the court to the fact that when Mr. Cannara filed his petition in bankruptcy on January 30, 1925, he presented to the court a schedule of his assets and liabilities, in which he listed the plaintiff as a *judgment* creditor for \$10,000, stating "Judgment obtained in New Jersey Supreme Court in proceedings instituted Paul Benseko v. Caesar A. Cannara," and I think it should be remembered that Mr. Cannara was the moving party in these bankruptcy proceedings, and the burden was on him, if he desired a discharge, to bring himself within the provisions of the bankruptcy act. He did not do this, however, because he refused to wait until any provable debt or fixed liability was in existence, but immediately petitioned himself into bankruptcy, and terms himself and terms the plaintiff what neither one of them really were—

i. e. judgment debtor and judgment creditor. Of course, the fact that Mr. Cannara on January 30, 1925, claimed that this plaintiff was a judgment creditor of his in no way makes the plaintiff a judgment creditor if, as a matter of fact, as is undisputed, no judgment was in existence at that time, or until ten days thereafter, but for some reason the defendant takes the view-point that because he misrepresented the facts in the bankruptcy court and the plaintiff's claim was thereafter erroneously allowed by the referee in bankruptcy that the plaintiff should be estopped from denying that he was a judgment creditor, although the record is most clear that the plaintiff was no such thing, and in fact the defendant's various petitions admit that the plaintiff was no judgment creditor at the time the adjudication in bankruptcy was had.

Sometime early in March of 1925, the plaintiff received a notice that the defendant had filed a petition in bankruptcy and listing the plaintiff as a judgment creditor, and stating that if the plaintiff desired to present his claim he was to do so in the regular way, and as his attorney the writer filled out the proof of claim referred to in paragraph (b) of the petition herein dated April 12, 1930, but I would direct the court's attention to the fact that it is clearly stated in that proof of claim that it is based on a *verdict for \$10,000*, and contains the phrase "except that no judgment has ever been recovered thereon."

I would take this occasion to state to the court that I did not know, when this proof of claim was filed, whether the plaintiff was or was not a judgment creditor of the defendant. The defendant had sworn that the plaintiff *was*, and if the defendant had followed the necessary steps the plaintiff very well could have been a judgment

creditor as of January 30, 1925, because it was open to this defendant at any time before he filed his petition in bankruptcy to have prepared a *Postea* and had it signed by the trial court and had the judgment entered before January 30th if he had so desired, and inasmuch as he listed himself as a judgment debtor of the plaintiff I was under the impression that the defendant had done what he had to do before he could discharge this debt or before he had a right to list the plaintiff as a judgment creditor. The fact of the matter, however, is that if at the time the petition in bankruptcy was filed this plaintiff was not a judgment creditor of the defendant the latter's terming the plaintiff a judgment creditor did not *make* the plaintiff one, nor did that misrepresentation, whereby it was later allowed by the Referee, make the claim a fixed liability; nor did the plaintiff's filing of a proof of claim under the misapprehension that this verdict had been reduced to a judgment, as the defendant swore had been done, change the legal situation one iota, because if this was never a fixed liability at the time the petition in bankruptcy was filed it could not become a fixed liability as the result of anything which the defendant or the plaintiff or the Referee might thereafter have done.

In the defendant's petition to the Supreme Court *in banc* he advanced a claim which is certainly novel, because in paragraph 10 thereof he alleges that due and proper practice *on the part of the plaintiff* required that there be a prompt entry of the judgment on the verdict which was secured on January 27th; in other words, the plaintiff is now being blamed because the defendant feels for some reason that there was a duty on this plaintiff sometime between January 27th, when the verdict was rendered, and January

30th, when the defendant saw fit to petition himself into bankruptcy, to immediately have judgment entered on this verdict. Just what justification there is for asserting this I do not know. Supreme Court rules of 1913, Rule 117, would indicate that a Postea must be filed within ten days after the first day of the term next after the trial, under penalty that the failure so to do shall at the option of the opposite party be considered a waiver of the verdict or finding. That rule would certainly indicate that the plaintiff in this case (which was tried at the December term) had any time before the tenth of April to enter his Postea, if it was the plaintiff who happened to enter it, and neither the practice Act nor rules of court contain any provision whatsoever to the effect that a person must immediately enter a judgment on a verdict.

Supreme Court rules of 1913, Rule 116, provides:

“In actions in the Supreme Court, the Postea may be filed immediately after relieta given or verdict obtained, and judgment shall be entered forthwith.”

This rule indicates that it was always open to the defendant at any time after the verdict was rendered to prepare a Postea, present it to the trial judge for his signature, file it with the clerk of the Supreme Court and have judgment entered forthwith, but the defendant saw fit not to do this and so great was his haste to defeat any claim of the plaintiff that he petitioned himself into bankruptcy within three days of the rendering of the verdict and without waiting until the plaintiff had entered judgment, which was entered on February 9th, and which was certainly within a most reasonable time after the rendering of the verdict. If the defendant, for reasons

of his own, preferred to petition himself into bankruptcy before this judgment was entered by the plaintiff, it was always open to the defendant, under Rule 116, to prepare the Postea himself and file it, whereupon judgment would be entered forthwith.

Either party can present the Postea and file it, and as the Chief Justice pointed out during the argument on March 29, 1930, a verdict is by no means a judgment, and he stated that no appeals will lie from a verdict, and that wherever an appeal was desired it was incumbent on the person desiring to appeal to see that there was a *judgment* on which to predicate it, and it very frequently happens, and is a well known course of practice in the profession, that where an unsuccessful litigant wishes to appeal, and the prevailing party has not entered a judgment, that the one desiring to prosecute the appeal will present to the trial court the necessary papers and file them and have the verdict reduced to a judgment so that the appeal will lie. See *Gottfried v. Gottfried*, 8 A. R. 208, 148 Atl. 719. If Mr. Cannara was not willing to wait until in the due course of affairs the plaintiff had time to prepare the Postea and present it to the trial court and send it to the clerk of the Supreme Court (all of which was done within a very short time), and Mr. Cannara wished to go into bankruptcy hurriedly and before the plaintiff took these steps, it was always open to Mr. Cannara to have reduced this verdict to judgment himself. Mr. Mason apparently thought that Cannara had done this and I was of the impression that Mr. Cannara had done it, because in his bankruptcy petition of January 30th he swore that he owed this plaintiff \$10,000 on a *judgment* obtained in the Supreme Court.

I therefore feel that there is no element of waiver or estoppel whatsoever under the above state of facts, and claim that if there was no fixed liability or a judgment in existence on January 30th that there was no provable debt which could be allowed, and that if Mr. Mason did allow the plaintiff's claim he allowed it under a misapprehension based on the defendant's own misrepresentation, and furthermore that any such allowance is a nullity if as a matter of fact there was no provable debt in existence on January 30th.

However, there is no element of waiver or estoppel in matters of this kind. This is clearly shown on those claims which are capable of being considered as founded on contract as well as in tort. The defendant will petition himself in bankruptcy and the creditor will come in and prove his claim *ex contractu*; it will be allowed, and he will receive a dividend. Later the bankrupt receives a discharge and this creditor sues in the State courts on that claim *ex delicto* and obtains a judgment for the full amount. Credit is given on that *ex delicto* judgment for the amount of money which was received by way of a dividend in the bankruptcy proceedings, and the bankrupt is liable for the difference, and although he will claim that his discharge in bankruptcy discharged his liability and that the plaintiff by participating in the bankruptcy proceedings and proving the claim and actually receiving a dividend waived all of his rights to subsequently allege that the debt was not dischargeable, he has been uniformly met with the declaration that such a course does not constitute a bar or a waiver, and that if the claim was not dischargeable in the first instance it never became dischargeable by the plaintiff's filing a proof of

claim, participating in the proceedings, receiving dividends, and the claim subsequently being allowed by the Referee.

In this connection I would refer the court to Section 3543 of Remington on Bankruptcy:

“Proving the claim in bankruptcy as a debt for sharing in the dividends is not a waiver of the creditor’s right to argue that the debt is not dischargeable;” and cases therein cited. See also Section 771 of the same work:

“We are quite clear that the petitioners may proceed with their suit in the State Court for tort notwithstanding that they first proved their claims in bankruptcy on contract.”

In re Menzin, 38 A. B. R. 435, 238 Fed. 773, (C. C. A. N. Y.).

Waiver or estoppel is no element in this case. I have previously referred the court to every reported case that I have been able to find in this country dealing with the only point which is involved in the case now under review, and in every one of those cases the defendant had received a discharge in bankruptcy. Like the defendant in this case, those defendants produced a discharge in bankruptcy and claimed that the plaintiff was therefore estopped to deny that the debt was discharged, but a reading of those decisions shows very clearly that because a man has obtained a discharge in bankruptcy it by no means follows that that paper grants him immunity from any and all claims, because the fact of the matter is that it does not, and the very certificate on which he relies to secure this immunity is careful to state that it operated as a discharge from those debts and claims only “which are made provable by said acts against his estate, and which existed on the 30th day of

January, A. D. 1925, on which date the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." The very basis of all of the foregoing opinions was that there was no provable debt in existence which could be discharged. Mr. Cannara's contention is that he not only was discharged, but that no court has a right to determine whether or not that discharge operated on the plaintiff's judgment, and that regardless of the circumstances under which he misrepresented his status, and regardless of the fact that throughout all of these proceedings he has been compelled to admit that there was no judgment in existence when he went into bankruptcy, that one is "estopped" from passing on the question as to whether or not he can obtain a discharge in bankruptcy on January 30th, 1925, and have that discharge apply to judgments which are not even in existence at the time, and this in the face of Section 63a of the Bankruptcy Act, which expressly states that those debts only are discharged which are "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him."

Conclusion.

In view of the seven decisions heretofore referred to, where this identical situation came before the courts, and which were always decided against the contention of the defendant herein; in view of there being no element of waiver or estoppel present in this case, as indicated by the foregoing citations; because it was always open to the defendant either to have waited until the plaintiff entered judgment, or for the defendant to have entered it himself if he pre-

ferred not to wait; and because this defendant is not discharged of this judgment due to his own omissions and misrepresentations, it is respectfully submitted that the rule be discharged.

To re-open and cancel the plaintiff's judgment of record, or to enter a judgment *nunc pro tunc* as of January 27, 1925, in order to relieve this defendant would be, I do most respectfully submit, a grave injustice to this plaintiff, who by no stretch of the imagination has at any time or in any way induced this defendant to follow the course which he did, but who deliberately followed it with but one idea in mind, which was to deprive the plaintiff of any rights which had accrued to him by reason of his Supreme Court action in 1925. All of this was requested of the Chief Justice on March 29, 1930, and again on March 31st, 1930, when Mr. Furst appeared with the writer before the Chief Justice at the time the order discharging the previous rule to show cause was signed, at which time the Chief Justice stated that while it might be a thing much to be desired by this defendant he could see no reason, nor could any be advanced, to prompt him to cancel of record a judgment which was duly and regularly obtained and entered, and substitute in its place an entirely different one for the sole convenience of Mr. Cannara, in whose power it always lay from the very beginning to have had a judgment entered before he went into bankruptcy.

As to that prayer of the defendant that an order be made entering this plaintiff's judgment, which was regularly obtained on February 9, 1925, *nunc pro tunc* as of January 27, 1925, so that it should be embraced within the scope of the discharge in bankruptcy which the defendant has received, I would refer the court to an

opinion by the Chief Justice in the case of *Davis White Markets, Inc. v. Lefas, et al.*, 96 Eq. 605, 126 Atl. 430, decided by the Court of Errors and Appeals, in which it was said:

“But no court has power to make an order *nunc pro tunc*, the purpose of which is to give effect to its mandate as of a time anterior to that when it was in reality made.”

The point involved in that case was whether or not it was within the power of the Court of Chancery to make a *nunc pro tunc* order the effect of which, if valid, was to destroy the then existing status of the parties. It was unanimously decided that the Court of Chancery had no such power, and the opinion itself expressly states that there is *no* court which has such power.

It is all very clear as to what happened in the present case. What Mr. Cannara had in mind when he went into bankruptcy is most apparent. A citizen of this State had obtained a verdict against him for \$10,000.00, and Mr. Cannara was determined that the man he injured would never be paid by him. He thereupon went into another tribunal, misrepresented the facts in the case and stated that a judgment had been entered against him for \$10,000.00, whereas this was not the fact and he knew it. Listing his assets at that time as an interest in a sixteen-dollar radio set, he is found within a few years thereafter to either be holding or to have held from the time he received his discharge real estate it is safe to say any one would be glad to buy for two hundred thousand dollars, and against which this plaintiff has issued execution. Mr. Cannara sought a statutory remedy, and one which is in derogation of the common law, and it was incumbent upon him to bring himself within its terms if he desired the only protection

which that statute could give. He not only failed to take those steps, but so great was his haste that he misrepresented his status and is now the holder of a paper which may be perfectly good so far as it concerns judgments which were entered against him prior to January 30th, 1925, but which certainly can have no application whatsoever to a judgment which not only was not entered before that time, but which was not even in existence. His claim differs in absolutely no respect from that of the defendants in the cases heretofore cited, and the eight times that this matter has come before various courts it has eight times been decided in favor of the contention of the plaintiff herein. Neither at the argument before the Chief Justice, nor at the argument before the Supreme Court *in banc* did the defendant make a single reference to any of those cases, but adopted the policy of completely ignoring them, although they are the entire law as reported in this country on this identical point.

In his brief before the Supreme Court the defendant referred to the case of *Linn & Decker v. Hamilton & Wood*, 34 N. J. L. 305, as an authority for raising the questions which it raised before the Supreme Court on the matter of procedure. No question is being raised over the procedure which the defendant is adopting, but I would direct the attention of the court to a very significant phrase in that opinion. That case dealt with property of a bankrupt taken under process issued on a judgment *upon which the discharge operated*, and Justice Depue said that the remedy would be in the court out of which the execution issued, and he went on to state that if the goods of a certified bankrupt, acquired after his bankruptcy, are seized under a

fi. fa. issued upon a judgment in respect of a debt due before the bankruptcy, that the court would, on motion, set aside the execution. The significant phrase is "issued upon a judgment in respect of a debt due before the bankruptcy." This indicates most clearly that before any such relief will be granted by a court it must be shown that the goods were seized under a *fi. fa.* which was issued on a judgment in respect of a debt due before the bankruptcy, and these three things Mr. Cannara cannot show, because admittedly they did not exist when he went into bankruptcy.

In his brief before the Supreme Court the defendant, referring to the Bankruptcy Act, stated that its object was "to relieve debtors who have complied with its provisions from further liability with respect to what the act defined as 'provable debts.'" That definition is undoubtedly correct, but it has no application to this defendant, for the reason that at the time he went into bankruptcy he was not a "debtor" nor had he "complied with its provisions."

The defendant also made the following admission in his brief before the Supreme Court, referring then to what was and what was not a provable debt under that act:

"It must be conceded that the adjudications passing upon the foregoing section of the Act establish that the ordinary *unliquidated* tort claim does not come within any of the classes of provable claims and the allowance of such claims is not permitted," and cites *Clarke v. Rogers*, 228 U. S. 534; In re *New York Tunnell Co.* (C. C. A. N. Y.), 159 Fed. 668.

This admission covers the only point involved in this whole case, because if, as they say, the ordinary unliquidated tort claim does not come

within any of the classes of provable claims covered by the act, they embody in that statement the admission that Benseko's claim was not a provable one, because as that claim stood at the time Mr. Cannara voluntarily went into bankruptcy it was "the ordinary unliquidated tort claim." I say this because of what has been the holdings of the courts of this and of other states on the status of a verdict. In *State v. Williams, supra*, the Court of Errors and Appeals held it to be only a definitive answer given by the jury to the court concerning matters of fact committed to the jury; it has been defined as a thing of "immature character," subject to the control and discretion of the court; judgment may be arrested upon it; a new trial might be granted which would completely nullify it; no action can be maintained upon a mere verdict; it never bears interest; and no appeal can lie from it. This being the indeterminate character of a verdict, it is still "the ordinary unliquidated tort claim," and it cannot be discharged in bankruptcy, and no bankruptcy court has ever purported to discharge one, nor can the defendant cite a single case where it has ever been done. Only judgments are discharged by that court, and times without number this defendant has admitted, and indeed it cannot be controverted, that there was no judgment in existence when he sought and obtained his discharge.

For the foregoing reasons it is respectfully submitted that the order of the Supreme Court heretofore made be affirmed.

Respectfully,

JOHN W. PALMER,
Attorney for and of Counsel with Plaintiff.

New Jersey Court of Errors and Appeals

PAUL BENCSKO,
Plaintiff-Appellee,

vs.

CAESAR A. CANNARA,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

(Italics are our own unless otherwise indicated.)

BRIEF FOR DEFENDANT-APPELLANT.

Nature of Proceedings.

This matter was before the Supreme Court upon the return of a rule to show cause, allowed by Gummere, C. J., why all further proceedings under a judgment recovered in the Supreme Court in the above cause including proceedings under a then, and still pending writ of execution, should not be permanently stayed, because of the fact that the defendant had been duly discharged in bankruptcy, and that, therefore, no further personal liability existed against him on the judgment.

State of Facts.

1. On November 23, 1923, Bencsko instituted proceedings in the Supreme Court against Cannara, and the New Jersey Auto Co., to recover damages alleged to have been sustained by him by reason of the negligence of the defendants in operating an automobile (Case, p. 2, l. 20).

2. On *January 27, 1925*, a verdict was rendered in favor of Bencsko, and against Cannara for \$10,000.00. A judgment was entered on said verdict on *February 9, 1925*, for \$10,000.00 damages and \$62.48 costs (Case, p. 3, l. 10).

10. On *January 30, 1925*, three days after the entry of the verdict, and nine days prior to the entry of the judgment, Cannara was adjudicated a bankrupt by the United States District Court for the District of New Jersey, pursuant to the Acts of Congress relating to bankruptcy (Case, p. 19, l. 36).

4. Thereafter, the following proceedings were, among others, taken in connection with the administration of said bankruptcy estate:

(a) Cannara, on January 30, 1925, filed a schedule of his assets and liabilities. The Bencsko liability was stated in said schedules as follows (Case, p. 20, l. 10):

PAUL BENCSKO	
Roseland, N. J.	\$10,000.00
Represented by John W.	
Palmer, Kinney Building,	
Newark, N. J.	

Judgment obtained in New
Jersey Supreme Court in
proceedings instituted
Paul Bencsko vs. Caesar
A. Cannara.

(b) *Bencsko* received notice of the bankruptcy proceedings, participated therein, and on March 5, 1925, filed a *proof of claim* of the indebtedness owing to him by reason of said suit. His proof of claim is in the following form (Case, p. 21, l. 10).

IN THE DISTRICT COURT OF THE
UNITED STATES.

IN THE MATTER <i>of</i> CAESAR A. CANNARA, Bankrupt.	}	In Bankruptcy.
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At Newark, in district of New Jersey, on the fifth day of March, A. D. 1925, came PAUL BENCSKO, of Roseland, in the County of Essex in said district of New Jersey, and made oath and says that Caesar A. Cannara is the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of Ten Thousand sixty-two Dollars and forty-eight cents (\$10,062.48) that the consideration of said debt is as follows: A verdict for \$10,000.00 damages and \$62.48 costs, recovered by the said Paul Bencko against the said Caesar A. Cannara, in the Essex Circuit of the New Jersey Supreme Court on January 27th, 1925, that no part of said debt has been paid (except that no note has been given therefor, except that there are no set-offs or counterclaims to the same, except that no judgment has ever been recovered thereon, except the judgment above mentioned); and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

PAUL BENCSKO,
Creditor.

Subscribed and sworn to before me }
 this 5th day of March, A. D. 1925. }

WILHELMINA HAGNEY,
Notary Public.

Commission Expires April 9, 1925.
(Seal)

5. Subsequent to the adjudication and discharge in bankruptcy and during the year 1926, Cannara acquired an interest in property known as 55-57-59 Beach Street, Nutley, N. J. (Case, p. 24, l. 5).

6. On October 10, 1929, Benesko caused an execution to be issued out of this court on said judgment directed to Harry L. Huelsenbeck, Sheriff for Essex County, and said Sheriff, pursuant to the terms and directions of said writ, caused a levy to be made on defendant's interest in said lands and premises, and did thereupon advertise said property for sale (Case, p. 24, l. 10).

7. ^{CANNARA}~~Benesko~~ thereupon filed a petition in this cause, asking for *some* of the relief asked for under the second petition, but not setting forth all of the facts set forth in the second petition. A rule to show cause was entered on the first petition, and was discharged on March 31, 1930 (Case, p. 24, l. 20).

8. Thereafter, and on April 15, 1930, Cannara filed the second petition, setting forth the facts in greater detail. The petition prayed for either a reargument on the old petition, or a new rule. The Chief Justice allowed a new rule, with a stay, returnable before the Supreme Court *en banc* (Case, p. 25, l. 10).

The rule in general required Benesko and the Essex County Sheriff to show cause why:

(a) The judgment entered on February 9, 1925, should not be reopened, and said judgment entered *nunc pro tunc* as of January 27, 1925; or why

(b) Benesko should not be perpetually restrained and enjoined from taking any further proceedings under the said judgment, including a perpetual stay of all proceedings under the pending writ of execution.

The above rule was discharged by an order entered May 26, 1930, and *it is from this order that the present appeal is taken.*

As a result of the foregoing facts, the following issues arise:

Bencsko alleges that inasmuch as his verdict was based on a tort claim, it was not a provable claim under the Bankruptcy Act until a *judgment* had been entered therein; that inasmuch as the *judgment* was not entered until after the adjudication in bankruptcy, the Bankruptcy Court was in error when it admitted his claim as a provable claim; and therefore, not being a provable claim, the judgment was not discharged by Cannara's discharge in bankruptcy.

Cannara answers by alleging that the claim was a provable one; that even if it were not a provable one, the Bankruptcy Court adjudged it to be provable, and such decree is *res adjudicata* and cannot be collaterally attacked; and furthermore, the whole difficulty having arisen because the judgment was not entered promptly by the plaintiff, therefore, in order that justice be done, the judgment should now be entered *nunc pro tunc* the date of the verdict.

Discussion of Procedure Adopted.

The method of raising the questions involved herein has received the sanction of our courts in several cases.

In *Linn & Decker v. Hamilton & Wood*, 34 N. J. L. 305, Justice Depue had before him an application to set aside an execution. It appeared that the plaintiffs had recovered a judgment against the defendants as joint debtors, and that the defendant Wood had subsequently been discharged as a bankrupt by bankruptcy proceedings instituted in the United States District Court for the

Eastern District of New York. Several years after the entry of the discharge in bankruptcy, an execution was issued out of this Court against Wood, and a levy made on property acquired by him *after* his discharge. (In this respect, the Court will note the facts are identical with the case at bar.) Among the questions raised, was one relating to the procedure adopted by Wood, which procedure is the same as the procedure followed herein. The Court stated (pp. 306-307):

“The remedy by *audita querela* having fallen into disuse, the same practice has been adopted of giving relief on summary application, where the person or property of a bankrupt is taken under process issued on a judgment upon which the discharge operated; and the remedy is in the court out of which the execution issued. If the goods of a certified bankrupt, acquired after his bankruptcy, are seized under a *fi. fa.* issued upon a judgment in respect of a debt due before the bankruptcy, the Court, on motion, will set aside the execution.”

The Court, after discussing the other points involved, granted an order staying the execution.

The same procedure was approved by Mr. Justice Van Syckel in *Williams v. Humphreys*, 50 N. J. L. 500, and by Mr. Justice Dixon in *Barnes Manufacturing Co. v. Norden*, 67 N. J. L. 493.

Defendant's Further Liability on the Judgment Has Been Discharged in Bankruptcy.

The questions involved herein being to a great degree questions involving a construction of the Acts of Congress relating to Bankruptcy (hereinafter referred to as the Bankruptcy Act), it becomes necessary to briefly refer to provisions of that act.

At the outset, it should be borne in mind that the object of the Bankruptcy Act is to relieve debtors who have complied with its provisions from further personal liability with respect to what are defined in the Act as "provable debts".

In *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, the objects of the Bankruptcy Act are well defined in the following words:

"A further object (of the Bankruptcy Act) is to relieve the honest debtor from legal proceedings for his debts, and to enable him to have a fresh start in business life * * *."

Having ascertained the intent and object of the Act, let us proceed to discuss its provisions, insofar as they are applicable to the matters before us.

The Bankruptcy Act will be found, thoroughly annotated, in the United States Code Annotated (Title No. 11). (The sections referred to hereafter relate to sections of the Act.)

Jurisdiction to administer the Act is granted to the United States District Courts, within their respective jurisdictions (Section 2 of the Act of 1898). These Courts are vested with jurisdiction among other things, to

2. *Allow claims, disallow claims*, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.

* * * * *

13. Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases.

* * * * *

15. Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

A person filing a voluntary petition in bankruptcy, as was done in the present case, is required to annex to his petition for adjudication, a list of his assets and liabilities. The United States Supreme Court rules, promulgated under the provisions of the Act of 1898 (Section 30) requires that these schedules be in certain form and certain data is required to be therein set forth. Cannara filed such schedules. The Bencsko claim was scheduled in the following words:

PAUL BENCSKO	
Roseland, N. J.	\$10,000.00
Represented by John W.	
Palmer, Kinney Building,	
Newark, N. J.	

Judgment obtained in New Jersey Supreme Court in proceedings instituted by Paul Bencsko against Caesar A. Cannara.

After a bankrupt has surrendered his property, submitted himself to an examination on the part of the Court and his creditors, and complied with whatever court orders may be entered with respect to him, he is in a position to apply for a discharge. A hearing is allowed upon his application, after notice to all parties in interest, and if he has complied with the provisions of the Act, he is granted a discharge. Such a discharge was granted to Cannara in the form heretofore set forth herein.

Sec. 17 of the Act of 1898 provides that "a discharge in bankruptcy shall release a bankrupt from all his *provable* debts, except certain miscellaneous classes of claims."

It is conceded that the Bencsko claim does not come within any of the excepted classes.

It will thus be apparent that if the Bencsko liability was a "provable" debt, Cannara is dis-

charged from further liability thereon, and Bencsko is without authority to proceed further under his judgment and that the present application for a permanent stay must be granted.

Bencsko argues, however, that his debt was not a "provable" debt. *And this argument is made by him notwithstanding that he filed a claim in the bankruptcy proceedings, and notwithstanding that the Bankruptcy Court at his motion allowed his debt as a provable debt; Bencsko claiming that the Bankruptcy Court was in error when it did so, and that he may therefore still proceed under his judgment.*

"Provable" debts are defined in Section 63 of the Bankruptcy Act of 1898 in the following words:

"Debts which may be proved:

(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) *a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at the date or with a rebate of interest upon such as were not then payable and did not bear interest;*

(2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

(3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

(4) founded upon an open account, or upon a contract express or implied; and

(5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

It must be conceded that the adjudications passing upon the foregoing section of the Act establish that the ordinary *unliquidated* tort claim does not come within any of the classes of provable claims and the allowance of such claims is not permitted. *Clark v. Rogers*, 228 U. S. 534; *In re New York Tunnel Co.* (C. C. A. N. Y.), 159 Fed. 688.

In the present case, however, the *verdict* was entered *before* the petition for *adjudication* had been filed, but the Clerk of the Court did not enter the *judgment on the verdict* until *after* the petition for adjudication was filed. As a result of this, Benesko makes the argument that his claim was not "a fixed liability as evidenced by judgment * * * absolutely owing at the time of the filing of the petition" and hence that his claim was not provable.

This is the crux of the entire argument before this Court, because if the claim was provable, then it has become discharged, and Cannara is no longer liable thereunder.

We argue on behalf of Cannara:

(1) That proper practice required that the judgment in question should have been entered by the Supreme Court *nunc pro tunc* as of the date of the verdict. Such action on the part of the

Court would have disposed of the matter immediately. But if that Court was correct in declining to enter such judgment *nunc pro tunc*, then the argument is made:

(2) That the question of whether or not the debt was a "provable" one, was a question solely and exclusively for the Bankruptcy Court, and that the action of such Court in determining such claim to be a provable claim, *even if erroneous*, is binding and conclusive upon the State Court, and upon the parties to the present litigation, and *cannot be collaterally attacked*;

(3) That such claim was a provable claim, and the allowance thereof as a provable claim by the Bankruptcy Court was entirely proper.

The Judgment Entered in the Supreme Court on February 9, 1925, Should Have Been Reopened, and Said Judgment Entered *Nunc Pro Tunc* as of January 27, 1925, the Date of the Verdict.

From the facts which have herein been stated, it will be apparent to the Court that if the judgment had been entered on the day of the verdict, the claim would have been

"a fixed liability as evidenced by a judgment * * * absolutely owing at the time of the filing of the petition * * *"

and would therefore undoubtedly have been a provable claim. The Supreme Court therefore, by entering the judgment *nunc pro tunc* could have fixed and established the rights of the parties *as they themselves intended their rights should be fixed and determined when they both participated in the bankruptcy proceeding.*

**The Power of a Court to Enter a Judgment
Nunc Pro Tunc Cannot be Disputed.**

Ruling Case Law in Vol. 15, page 622, states:

“Courts of law and of equity have from the earliest times, possessed and exercised the power of making entry of judgments and decrees *nunc pro tunc* in proper cases when such entries are necessary to prevent injustice to suitors. Such power is inherent, and may be exercised in criminal, as well as civil cases and being in many instances necessary for the attainment of justice, when properly exercise it is favored by the courts.”

In *McNamara v. New York, etc. R. R.*, 56 N. J. L. 56, Justice Depue had before him an application for the entry of a judgment *nunc pro tunc*. In that case, the plaintiff had recovered a verdict for damages resulting from the defendant's negligence. The defendant obtained a rule to show cause why the verdict should not be set aside. In the regular course of proceeding, a judgment would have been entered in the February Term, 1893. The matter, however, was not argued until the June Term of that year, and the rule was discharged at the November Term. While the matter was pending, the defendant was adjudged to be an insolvent corporation by decree of the United States District Court. The plaintiff thereupon moved for the entry of the judgment *nunc pro tunc* as of the date of the verdict, *in order that he might participate in the insolvency proceedings*. The Court granted the application. The Court stated:

“* * * In *Hess v. Cole*, 3 Zab. 116, 125, this Court held that when a delay in giving judgment, caused by the Court, affects the rights of the parties, the Court, when necessary to effect justice, will order the judgment

to be entered *nunc pro tunc*, as of the term when the matter was submitted to them. From the earliest times, it has been the practice to allow judgments to be entered *nunc pro tunc* whenever the interest of justice so requires, and the delay in entering judgment has been due to the action of the Court, saving the rights of third parties which have intervened. * * * The defendant's property is in the hands of the receiver and under the control of the Federal Court. We think that if the plaintiff will derive any benefit in the administration of the affairs of the company by having his judgment *nunc pro tunc*, he is entitled to that advantage."

It should be noted that in the case last cited, the Court granted the relief prayed for because of the delay of *the Court* in deciding the case. In other words, the delay was not the result of the action of the plaintiff. The delay in entering judgment in the case *sub judice* being due to the *plaintiff's* failure to enter his judgment promptly, and not due to any act of the defendant, and the *plaintiff now seeking to avail himself of benefits which may accrue to him as a result of his own delay*, we submit that this application should present itself with even greater favor than that presented in the McNamara case cited above.

Section 173 of the Practice Act (3 C. S. 4106) provides:

"In any action which has been finally determined, until the clerk shall enter the record of the judgment, the verdict or rule for judgment entered in the minutes shall be held and taken in the court in which the same is obtained to be the record of the judgment in such action and shall be received in evidence in said court as such judgment, as fully as if the record had been made up and signed."

The foregoing statute indicates the intention of the Legislature that the verdict should have the effect of a judgment until the judgment roll is actually signed.

In *Nitti v. Public Service R. R. Co.*, 104 N. J. L. 67, the Court of Errors and Appeals had before it a case in which the entry of a judgment *nunc pro tunc* was necessary in order to carry out the intention of the parties. In that case, the plaintiff, while an infant, had, through his next friend, recovered a verdict against the defendant. The next friend refused to accept the moneys and they were deposited with the clerk of the court. *No judgment was entered on the verdict.*

Subsequently, when the plaintiff became of age, he instituted new proceedings. The defendant thereupon pleaded that the cause was *res adjudicata*. The question before the Court was whether or not the *verdict* in the prior action was equivalent to a judgment so that the plea of *res adjudicata* could be invoked. While the matter was pending, the defendant applied to the Court in which the verdict had been entered and procured the entry of a judgment *nunc pro tunc* as of the verdict.

Upon an appeal to the Court of Errors and Appeals, two matters were argued: first, whether or not it was proper to enter the judgment *nunc pro tunc*; and second, whether the verdict should be given the effect of a judgment.

Justice Parker, speaking for the Court, stated (at p. 69):

“We proceed then, to the question whether there was a judgment cognizable by the trial court; and in examining this, we disregard the arguments pro and con touching the so-called ‘judgment *nunc pro tunc*’, for the reason that *we find there was an adequate judgment irrespective of that feature.*”

It is to be noted that both actions were in the same court; and this brings into play section 173 of the Practice act of 1903 (3 Comp. Stat., p. 4106), which provides that 'in any action which has been finally determined, until the clerk shall enter the record of the judgment, the verdict or rule for judgment entered in the minutes shall be held and taken in the court in which the same is obtained to be the record of the judgment in such action and shall be received in evidence in said court as such judgment, as fully as if the record had been made up and signed'. Consequently, when the Hudson Circuit Court found on its own minutes the entry of a trial and verdict based on the earlier record, it was not only authorized but required, to give it the force and effect of a judgment."

The Chancellor concurred in the conclusion of the Court that the judgment should be affirmed, but based his opinion on the fact that it was entirely proper for the Court to enter the judgment *nunc pro tunc*, and having done so, the matter was *res adjudicata* between the parties.

The Chancellor, in his opinion discussed at length the propriety of entering judgment *nunc pro tunc* where justice requires. He quoted Volume 23 Cyc. p. 840, under the title of "Judgments," as follows:

"For instance (at p. 840), it (referring to Cyc.) says 'there is an inherent common law power in Courts to cause the entry of judgments *nunc pro tunc* in proper cases and in furtherance of justice. This power belongs to all courts of record, and may be exercised by an appellate court, but does not appertain to the clerk of a court. It can be exercised, however, only in cases where the cause was ripe for judgment—that is, where the case was in such a condition at the date to which the judgment is to relate back that a final judgment could then have been entered im-

mediately.' At p. 841: 'If judgment upon a verdict is delayed by a motion for a new trial or other proceeding, or if a case tried by the Court is held under advisement or delayed by exceptions, and meanwhile one of the parties dies, the court will not allow the action to abate, but will enter judgment *nunc pro tunc* as of the time when the party was still alive.' At p. 842: 'Whenever delay in entering a judgment is caused by the action of the court, as in holding the case under advisement, judgment *nunc pro tunc* will be allowed as of the time when the party would otherwise have been entitled to it, if justice requires it.' And at p. 844: 'The right to enter judgment *nunc pro tunc* is not defeated by a delay of several terms, or even several years, which is explained or justified, where justice to the parties requires it, and no intervening rights are affected.' "

The Chancellor also quotes 34 *Corpus Juris* p. 71 under the title of "Judgments" and states that the same rules are therein stated, as are stated in Cyc. After citing other cases, he concludes that the circumstances of the case required that the judgment be entered *nunc pro tunc*, and that the action of the lower court in so entering such a judgment, was entirely proper.

In *St. Vincent's Church v. Borough of Madison*, 86 N. J. L. 567, an application for a writ of certiorari was made to set aside a local assessment. The thirty-day statutory limitation expired on December 25th, 1912. The *allocatur* was signed on December 21st, 1912, but the writ was not actually tested until December 28th, 1912. The Court stated that the application would be regarded as having been made within time. The Court went further, however, and stated that even if it were not made in time, the writ could be issued *nunc pro tunc* as of the date of the *allocatur*.

We thus have the expressions of our Courts upon the propriety of entering judgments *nunc pro tunc*. From these cases, the rule can be laid down that such judgments should be entered where by so doing, either justice is done, or injustice is prevented from being done.

We respectfully submit, that as soon as the verdict was recovered in the present case, the plaintiff was in a position to have his judgment entered upon the verdict. Had the suit been pending in the Circuit Court, judgment would have been entered forthwith. The fact that the suit was pending in this Court required the filing of a postea before the judgment was entered. This necessitated a delay of several days, during which the petition for adjudication was filed. *Had the plaintiff found it necessary to have his judgment entered as of the date of the verdict in order to predicate rights which he might desire to have established in the bankruptcy proceedings of Cannara, this Court, under the McNamara case (supra) would clearly have made such entry. Conversely, therefore, the entry of such judgment nunc pro tunc being asked in order that the defendant may have the benefit of the same statute, and thus be in a position to enjoy the rights granted to him by the statute, similar relief should have been granted.*

We therefore respectfully submit that the judgment entered on February 9th, 1925, should have been reopened and said judgment should have been entered *nunc pro tunc* as of January 27th, 1925.

Assuming, however, that this Court should conclude that the Court below was correct in not entering the judgment *nunc pro tunc* and should decide that the rights of the parties must be adjudicated upon the record as it now stands, then we submit:

The Allowance of Bencsko's Claim as a Provable Claim by the Bankruptcy Court is *Res Adjudicata* Upon This Court on the Question of Whether or Not the Claim Was Provable, and Such Conclusion Cannot be Collaterally Attacked Herein.

Although the foregoing point was dealt with in brief and argument in the Court below, it was not considered by the Court below in its opinion. It was the foregoing point which led the Chief Justice to grant the second rule to show cause after discharging the first rule. Let us assume for a moment that the Bankruptcy Court committed gross error in allowing the filing of the Bencsko claim as a provable claim. Nevertheless, we argue, such error cannot be availed of in this proceeding.

The Bankruptcy Act, quoted above, grants to Bankruptcy Courts jurisdiction to:

“allow claims, disallow claims, reconsider allowed or disallowed claims and allow or disallow them against bankrupt estates.”

Both Bencsko and Cannara were parties to the Bankruptcy proceeding. Cannara had filed the petition in bankruptcy, and had scheduled Bencsko as a creditor holding a provable debt. Bencsko admitted that his claim as a provable debt, filed his claim in the proceedings, *and procured its allowance by the Bankruptcy Court as a provable debt* (Case, p. 28, l. 23). The Bankruptcy Court thus had jurisdiction of the controversy and jurisdiction over the parties.

Our Courts have frequently discussed the effect upon them of orders and decrees entered in bankruptcy proceedings and have always held that such orders and decrees are *res adjudicata*

and binding upon them, *even though manifestly erroneous.*

In *Den. ex dem. Van Kleek v. O'Hanlon* (21 N. J. L. 582) the Court went into the question of the power of the Orphans' Court to decree a sale of land which had escheated to the State. The Court was unanimous on the proposition, and counsel were relieved from arguing thereon "that orders of the Orphans' Court on matters within their jurisdiction were conclusive and binding, and could not be impeached collaterally for any irregularity or illegality apparent on the face of them".

In *Mount, admix. v. Manhattan Co.*, 41 N. J. Eq. 211, Vice Chancellor Van Fleet had before him an application for surplus moneys arising out of a foreclosure proceeding. It appeared that the complainant's intestate had, during his lifetime, filed a voluntary petition in bankruptcy. The defendants set up the defense that the right, if any, to the surplus moneys, was vested in the Trustee in Bankruptcy, and not in the administratrix. The administratrix moved to strike the answer on the ground that the plea did not establish that the bankruptcy proceedings had been validly prosecuted. The Court denied the motion, holding that the adjudication in bankruptcy being a declaration of a court of general and exclusive jurisdiction, could not be attacked collaterally by the State Court. The Court says:

"But even if the plea was subject to each of the imperfections (as to the form of bankruptcy proceeding) which the counsel of the complainant ascribes to it, I still think it would be the duty of the court to hold it to be sufficient. They are not faults of which the complainant can take advantage in this action, and it may be that she could never, in any proceeding, be heard to impeach the validity of the adjudication of bankruptcy of her intestate. *He produced it; it was pro-*

nounced at his request, and upon his representation, under oath, as to what the facts were. For this reason, neither he nor his privies should, according to the general rule, be allowed to impeach it, even by a direct proceeding.

“United States District Courts are courts of general jurisdiction, and in bankruptcy matters, especially in pronouncing decrees of bankruptcy and in passing the property of a bankrupt to his assignee, they possess not only a general, but an exclusive jurisdiction. Their judgments are conclusive as to the facts adjudged and must, within the territory where they have power to hear and decide judicially, be accepted as speaking verities which cannot be disputed, except before themselves, or on appeal before the appropriate appellate tribunal, or in a direct proceeding before some other court of competent jurisdiction.

“The rule defining the effect which must be given to the acts of courts of general jurisdiction is stated as follows by Chief Justice Beasley: ‘The decision of a domestic court of general jurisdiction, acting within the scope of its powers, has inherent in it such conclusive force that it cannot be challenged collaterally, and such decision definitely binds all the parties embraced in it unless on objection made to such court itself, or in a direct course of appellate procedure. * * * Such judicial act may be voidable, but it is not void. *If even admittedly erroneous, such error cannot be set up against the decree in a collateral proceeding formed on the decree.* * * * The Supreme Court of the United States has held that this doctrine should be applied, in all its full force, to decrees of bankruptcy pronounced by the district courts. Mr. Justice Clifford, in *Michaels v. Post* (21 Wall. 398), speaking for the court, said: ‘The decree of the district court in such a case is conclusive of the fact decreed unless when it is called in question in the court where it is entered, or by some direct proceeding in some other court of competent jurisdiction.’”

In *Nix & Co. v. Andrews*, 88 N. J. L. 721, a somewhat similar situation was before this Court, which adopted as its own the opinion of the Supreme Court. In that case plaintiff instituted suit and the defense was set forth that the plaintiff had participated in bankruptcy proceedings, wherein the defendant had been discharged. The plaintiff, in order to show that he had not participated in the proceedings and that his claim was not a provable one, offered an order entered in the bankruptcy proceedings to the effect that his claim had been expunged by the Bankruptcy Court. The Court held that the order of the Bankruptcy Court could not be collaterally attacked, and that, therefore, the plaintiff was not barred by the bankruptcy proceedings. The Court said (p. 722):

“The question whether or not the plaintiff is in a legal sense a participant in the distribution of the estate of the bankrupt is, in our opinion, foreclosed by the order of the bankruptcy court made on February 13th, 1913, by which the claim of the plaintiff is expunged from the list of claims and excluded from participating in the distribution of the estate of the bankrupt under such bankruptcy proceedings. This order while it stands is conclusive of the matters covered by it.
* * * *If it was improvidently entered it must be directly attacked in the court that was imposed upon. It cannot, upon this or upon any similar ground, be collaterally assailed.*”

It should be noted that the Court in this case refused to hear a collateral attack upon an order *expunging* a claim. Conversely, it should not permit a collateral attack upon an order *allowing* the claim to be filed.

A rule similar to that of the *Nix* case was adopted by the Court of Appeals of Kentucky in

Thompson v. Sunrise Coal Co., 204 S. W. 89. In that case, the purchaser of assets of the bankrupt estate agreed to pay, as part of the purchase price, sixty per cent of the costs of the bankruptcy proceedings. These costs having been fixed by the Bankruptcy Court, the purchaser gave a note for the amount agreed upon. Subsequently, when suit was brought in the State Court on the note, a defense was urged that the costs assessed by the Bankruptcy Court were higher than they should have been assessed. The State Court held that the defendant

“could not in this action have reviewed and corrected, *even if erroneous*, the taxation of costs in the bankruptcy proceeding, * * * because to do this would be a denial of the validity of the judgment of that court in a matter clearly within its jurisdiction.”

The same rule was also adopted by the Appellate Division, New York Supreme Court, in *Coen v. James*, 33 Am. Bkcty. Reports 249. In that case, the plaintiff had deposited a sum of money with the Bankruptcy Court for the purpose of carrying out a composition which had been effected between the bankrupt and his creditors. Plaintiff then filed a petition with the Referee in Bankruptcy asking that her deposit be returned to her, because certain conditions upon which the deposit had been made, had been violated. The Referee decided adversely to the petitioner. Suit was thereupon brought in the State Court against the Trustee in Bankruptcy, seeking the recovery of the deposit and a plea of *res adjudicata* was filed by the Trustee. The Court, after reciting the facts, stated that the money had been deposited in a statutory proceeding pending before the Referee in Bankruptcy, and concluded:

“It would be extraordinary interference for another tribunal to direct a Trustee in

Bankruptcy as to his duties. At the time of her deposit the plaintiff came into and made herself party to the bankruptcy proceeding. It follows that plaintiff's right to get back this check having been submitted to, and passed upon adversely by the Referee in Bankruptcy in a matter within his jurisdiction, is not open to review in this court."

To the same general effect are the cases of:

Spencer Commercial Club Corp. v. Bartmess, 43 A. B. R. 569;
Clendening v. Red River Valley Bank,
 11 A. R. B. 245.

It is conceded that the Bankruptcy Court admitted the Bencsko claim as a provable claim (Case, p. 22, l. 15). Such determination is, therefore, under the cases cited, binding and conclusive upon this Court, and this Court must conclude that Bencsko's claim was a provable claim, and being a provable claim, was discharged, and that Bencsko is therefore without power to proceed further on the judgment.

Our foregoing argument has proceeded on the premise that the order of the Bankruptcy Court allowing the claim as a provable claim is binding upon this Court, even though the bankruptcy ruling was manifestly erroneous. We submit, however, that

The Bankruptcy Court Was Justified in Allowing the Claim as a Provable Claim.

We have heretofore quoted Section 173 of the Practice Act, reading as follows:

"In any action which has been finally determined, until the clerk shall enter the record of the judgment, the verdict or rule for

judgment entered in the minutes shall be held and taken in the court in which the same is obtained to be the record of the judgment in such action and shall be received in evidence in said court as such judgment, as fully as if the record had been made up and signed."

The Court will note that although the verdict was recovered on January 27th, 1925, the clerk did not enter the judgment until February 9th, 1925. The petition in bankruptcy was filed on January 30th and therefore, because the clerk had not yet on January 30th entered the record of the judgment, the verdict which had been recovered on January 27th must, under the statute, be held and taken to be the record and have the effect of the judgment.

In other words, *at the time of the adjudication in bankruptcy, the verdict under the statute cited had the effect of a judgment.* When, therefore, Cannara admitted that he was liable on the claim, and Bencsko filed a proof of claim before the Bankruptcy Court, alleging his right to participate in the bankruptcy proceedings, the Bankruptcy Court was justified in allowing the claim as a provable claim.

Furthermore, the Bankruptcy Court could well have taken the position that the entry of a judgment *nunc pro tunc* was purely a formal matter, which could be obtained upon application to this Court upon consent of the parties, both of whom regarded the claim as a provable one, and it, therefore, was justified in accepting the verdict as a judgment in the proceedings pending before it.

For all of the foregoing reasons, and in order that justice be done to this defendant and that he may be given the benefit of the Bankruptcy Act, we respectfully submit that the order of the

Supreme Court denying the petition was erroneous, and that this Court should reverse said order, and remand the proceedings to the Supreme Court with direction that it either:

(a) Reopen the judgment of February 9th, 1925, and enter such judgment *nunc pro tunc* as of January 27th, 1925; or

(b) Perpetually restrain any further proceedings on behalf of Bencsko against Cannara upon said judgment, including a perpetual restraint against proceeding further under the pending writ of execution.

We respectfully point out to the Court that if the opinion of the Supreme Court is sustained, a vast uncertainty must of necessity arise in connection with examination of titles. Persons examining the title to the Cannara property, for example (as was actually done), will find open of record the judgment in question. An examination of the bankruptcy proceedings will then disclose that Bencsko filed a proof of claim in the bankruptcy proceedings and that the Bankruptcy Court, having full jurisdiction over the matter, allowed the claim as a provable claim. Such examination will also disclose that Cannara was thereafter discharged of his future obligation under the judgment and no further proceedings under a judgment may be taken. If, at some time in the future (six years in the present case), Bencsko could argue in another court that the Bankruptcy Court was in error when it allowed the claim, and that therefore the judgment is still valid and enforceable, persons who have acquired title relying upon the adjudication of the Bankruptcy Court, are seriously affected and prejudiced. There would never be any certainty as to the effect of the bankruptcy records and it is for

that reason that we most strenuously argue that the bankruptcy order was *res adjudicata* and that the relief asked for above should be granted.

Respectfully submitted,

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