NOTES

BANKRUPTCY: CREDITOR ALLOWED TO SET OFF DEBT AFTER DISCHARGE IN BANKRUPTCY

FROM the perspective of an insolvent debtor, the substance of the federal Bankruptcy Act[1] lies in the decree of discharge[2] which relieves him of liability for certain of his overburdening debts.[3] Although the usual effect of such a discharge is to defeat any subsequent action on the discharged debt,[4] the Kentucky Court of Appeals in *Kaufman's of Kentucky v. Wall*[5] has limited its effect by allowing a creditor to set off a discharged claim against tort judgment later obtained by the bankrupt against the creditor.[6]

The plaintiff in *Wall* sustained personal injuries while shopping in defendant's store. The defendant refused to settle this claim, and within two months the plaintiff accrued charges of 1157 dollars for purchases on her account at the store. Subsequently the plaintiff initiated the instant tort action and then filed and was discharged upon a voluntary petition in bankruptcy which included among

[1] Bankruptcy Act (Chandler Act) §§ 1-703, 52 Stat. 840 (1938), as amended, 11 U.S.C. §§ 1-1103 (1964).

[2] Bankruptcy Act § 17, 52 Stat. 851 (1938), as amended, 11 U.S.C. § 32 (1964).

[3] See generally 1 COLLIER, BANKRUPTCY ¶ 17.27 (14th ed. 1962) [hereinafter cited as COLLIER]; 8 REMINGTON, BANKRUPTCY §§ 3220, 3225-35, 3237, 3239, 3307 (6th ed. 1955) [hereinafter cited as REMINGTON]; Hartman, *The Dischargeability of Debts in Bankruptcy,* 15 VAND. L. REV. 13 (1961); Rifkind, *Discharge of Debts in Bankruptcy and Some Problems Related Thereto,* 7 N.Y.L.F. 354 (1961).

[4] See note 14 *infra* and accompanying text.

[5] 383 S.W.2d 907 (Ky. Ct. App. 1964).

[6] With certain qualifications the right of a creditor to set off mutual debts and credits between the estate of the bankrupt and himself in the bankruptcy proceeding is specifically provided in the act. Bankruptcy Act § 68, 52 Stat. 878 (1938), as amended, 11 U.S.C. § 108 (1964). See generally 4 COLLIER ¶ 68.01-.22. Although the *Wall* opinion makes no attempt to rationalize the set-off under § 68, the court cited without comment New York Credit Men's Adjustment Bureau v. Bruno-New York, Inc., 120 F. Supp. 495 (S.D.N.Y. 1954). The latter case concerned a set-off within the bankruptcy proceedings against the trustee, and adopted the better view that there is requisite "mutuality" for set-off under § 68 although one claim is in tort and the other in contract.

If specific provision for set-off were not made under § 68, it could be argued that set-off, by permitting a greater pro rata recovery, would be an improper preference of creditors as prohibited by § 60 of the Act. Bankruptcy Act § 60, 52 Stat. 869 (1938), as amended, 11 U.S.C. § 96 (1964). While the creditor by using a set-off in the instant case increases his pro rata recovery on the debt, this in no way affects the amounts which other creditors have already received out of the bankruptcy estate. Thus, such set-off does not reflect a similar character of preference.

her scheduled liabilities the debt for goods purchased.[7] A 2000 dollar judgment was awarded in the tort suit against the storeowner, and the trial court rejected the defendant's contention that the unpaid balance of the discharged debt should be set off against the tort judgment . Although recognizing that the discharge would bar a direct action by the defendant to recover on the debt, the court of appeals reversed on the ground that a set-off was necessary to prevent the bankrupt from obtaining a greater recovery than she would have had without the benefit of a bankruptcy proceeding.[8]

[7] The opinion states that when the plaintiff filed the petition in bankruptcy, "she listed her cause of action against appellant [the store] as an asset of her estate and the indebtedness she owed appellant as a liability. She was permitted to, and did, prosecute this cause of action in her own name following her discharge in bankruptcy . . . ." 383 S.W.2d at 908. Since the plaintiff was allowed to prosecute personally this tort action after the bankruptcy proceeding, it could not have been included among the assets of her estate in bankruptcy. The dictates of § 70 (a) of the Bankruptcy Act require a trustee to pursue any cause of action forming a part of the bankrupt estate. The amount of any judgment obtained is to be a part of the estate, available for meeting debts of the bankrupt. Bankruptcy Act § 70 (a), 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110 (a) (1958). If such a judgment had been obtained in the instant case, the defendant could have set off the mutual debts within the bankruptcy proceeding under § 68. See note 6 *supra.*

The reason for exclusion of the claim from the bankrupt's estate is not articulated in the *Wall* opinion, but can perhaps be inferred from the Bankruptcy Act. Section 70 (a) provides that title to property of the bankrupt vests by operation of law in the trustee. However, in respect to rights of action § 70 (a) (5) provides that the trustee shall have title according to the following standard: "... property, including rights of action, which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* that rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process...." The plaintiff's brief on appeal refers to the listing of the claim but notes that it was excluded from the estate because of its nature as a personal injury action. Brief for Appellee, p. 2. Exclusion of the claim reflects a determination, not apparent in the *Wall* opinion, that it would not under Kentucky law be subject to garnishment or other judicial process. Tort claims, particularly those for personal injury, have been generally held to be outside the purview of the attachment and garnishment statutes of the various states, and therefore not subject to such process except upon final judgment or settlement. 6 AM. JUR. 2d *Attachment and Garnishment* §§ 133-36 (1963); Annot. 93 A.L.R. 1088 (1934). While Kentucky does not expressly exempt such claims in its statute, KY. REV. STAT. ch. 425, §§ 425.190, .215-520; 427.010-.030 (1960), it is probable that it would follow the general rule, as have other states, without specific provision. Thus, exclusion of the claim from the bankruptcy estate appears correct. Regardless of the legal propriety, this cause of action was excluded and is, in effect, similar to one which might arise subsequent to a discharge in bankruptcy.

[8] 383 S.W.2d at 909. The court adopted this reasoning from a case involving set-off by a decedent's estate against a bankrupt distributee. Leach v. Armstrong, 236 Mo. App. 382, 156 S.W.2d 959 (1941).

The original purpose of bankruptcy laws was to salvage a portion of the debtor's estate for ratable distribution to his creditors.[9] Today, the debtor's financial rehabilitation has attained a position of comparable importance, and discharge is considered a matter of right in the absence of proven objections.[10] Underlying this policy is the thesis that the public interest is served by reinstating an insolvent person to a position of incentive and a productive role in society even after financial disaster.

Although the bankruptcy court determines the right to a discharge, the non-bankruptcy forum in which the creditor later seeks to collect the debt determines whether under the provisions of the Bankruptcy Act[11] and applicable state law[12] the effect of the discharge is to prevent recovery.[13] When recovery is denied, the rule

[9] See 1 COLLIER ¶ 14.01, at 1257-58; 7 REMINGTON § 2993, at 42.

[10] See, *e.g.*, Shelby v. Texas Improvement Loan Co., 280 F.2d 349, 355 (5th Cir. 1960); Dixon v. Lowe, 177 F.2d 807, 808 (10th Cir. 1949); 1 COLLIER ¶ 14.02, at 1259; 7 REMINGTON §§ 2992-94, at 41-45. A clear right to a discharge was first provided by the federal bankruptcy law in the Bankruptcy Act of 1841, 5 Stat. 440 (1846).

In § 14(c) the Bankruptcy Act specifies certain grounds for objection to the granting of a discharge. 52 Stat. 850 (1938), as amended, 11 U.S.C. § 32(c) (1964). See generally 1 COLLIER ¶¶ 14.07-.61; 7 REMINGTON §§ 3028-3173. The courts, however, have construed these provisions in favor of the bankrupt by requiring the grounds asserted to be clearly within the language of the statute. See, *e.g.*, Gross v. Fidelity & Deposit Co., 302 F.2d 338, 340 (8th Cir. 1962); "[S]tatutory provisions regulating discharges are remedial in nature; they should be construed liberally with the purpose of carrying into effect the legislative intent, and the statutory grounds for opposing a discharge should not be extended by construction." *Ibid.* Jones v. Gertz, 121 F.2d 782 (10th Cir. 1941).

Section 15 provides that a discharge obtained through fraud may be revoked upon application of a party in interest within one year. Bankruptcy Act § 15, 52 Stat. 851 (1938), as amended, 11 U.S.C. § 33 (1964); see generally 1 COLLIER ¶¶ 15.01-.16; 7 REMINGTON §§ 3382-92.

[11] Unless the debt is non-dischargeable under § 17(a) it is released by the discharge if it is provable in bankruptcy by § 63. Bankruptcy Act § 63, 52 Stat. 873 (1938), as amended, 11 U.S.C. § 103 (1964).

[12] Unless the Bankruptcy Act otherwise provides, the decisions have established that the validity of a claim is to be determined in accordance with principles of local law. Fidelity Union Casualty Co. v. Hanson, 44 S.W.2d 985, 987 (Tex. Comm'n of App.), *cert. denied*, 287 U.S. 599 (1932); see, *e.g.*, Humphrey v. Tatman, 198 U.S. 91 (1905).

[13] See Barbachano v. Allen, 192 F.2d 836 (9th Cir. 1951); *In re* Lowe, 36 F. Supp. 772 (W.D. Ky. 1941); 1 COLLIER ¶¶ 14.62 & 17.28; see generally Smedley, *Determination of the Effect of a Discharge in Bankruptcy*, 15 VAND. L. REV. 49 (1961). The following quotations are helpful in understanding the effect of a discharge on a debt: "[T]he discharge is not designed to prevent creditors from attempting to collect. If it is applicable to the case it can prevent the collection but not the attempt. If the creditor feels that the debt is not discharged the proper procedure is for him to file suit in the state court." COWANS, BANKRUPTCY § 184, at 102 (1963).

"Such defence is one that the state or any other court is bound to consider, and if error is committed in failing to accord to the discharge its due weight, the way is open to the Supreme Court of the United States." *In re* Biscoe, 45 F. Supp. 422, 423 (D. Mass. 1942).

in most jurisdictions is that discharge of a debt in bankruptcy is a valid defense to any legal proceeding to enforce payment[14]—an effect parallel to that of the statutes of limitations and frauds.[15] Section 17 (a) excludes certain debts from discharge,[16] including taxes, wages due employees, fiduciary debts, debts not duly scheduled and liabilities for certain specified acts such as obtaining property by false representations. These debts will not be affected by the bankruptcy proceedings even though no objection is raised by the claimant at the time.[17]

The effect of the *Wall* decision was to allow a set-off without reference to those limitations in the Bankruptcy Act which provide for defeating a discharge or its effects. In the absence of precedent permitting a set-off by a creditor directly against the discharged bankrupt *after* the bankruptcy proceeding, the court was constrained to rely upon cases involving analogous situations. Reliance was placed on two cases which followed the settled rule allowing set-off of discharged debts owed by distributees of a decedent's estate.[18] While these cases and *Wall* involve mutual obligations, there is a distinction between permitting a set-off against a bankrupt distributee who seeks to enforce a gratuity and allowing set-off against a bankrupt as in *Wall,* who claims under a judgment at law.[19] The presence of other distributees whose interests must be protected is a circumstance which supports the allowance of a set-off and is not found in the instant case, where set-off is sought after the bankruptcy

[14] See 1 COLLIER ¶ 17.27; 8 REMINGTON § 3226. See, *e.g.,* Helms v. Holmes, 129 F.2d 263, 266 (4th Cir. 1942), 28 VA. L. REV. 1129; Flowers v. Gray, 170 Kan. 266, 269, 225 P.2d 94, 97 (1950); Crandall v. Durham, 348 Mo. 240, 242, 152 S.W.2d 1044, 1045 (1941) (past obligations sufficient consideration for new promise to pay discharged debt); First-Citizens Bank & Trust Co. v. Parker, 232 N.C. 512, 514-15, 61 S.E.2d 441, 443 (1950). However, a minority of cases hold that the discharge not only bars the remedy but also extinguishes the debt. See, *e.g.,* Colton v. Depew, 59 N.J. Eq. 126, 128, 44 Atl. 662, 663 (Ch. 1899); Nossek v. A. H. Todd & Son, 160 Misc. 528, 530, 290 N.Y. Supp. 253, 255 (Sup. Ct. 1936); Hobough v. Murphy, 114 Pa. 358, 359, 7 Atl. 139 (1886).

[15] See COWANS, *op. cit. supra* note 13, § 184.

[16] Bankruptcy Act § 17 (a), 52 Stat. 851 (1938), as amended, 11 U.S.C. § 35 (a) (1964).

[17] See Friend v. Talcott, 228 U.S. 27, 39-41 (1913), where the creditor did, however, oppose composition with other creditors; Beneficial Fin. Co. v. Meyers, 33 Misc. 2d 69, 70, 223 N.Y.S.2d 923, 924 (Jefferson County Ct. 1962).

[18] *In re* Morgan's Estate, 226 Iowa 68, 283 N.W. 267 (1939) (legatee), 5 U. PITT. L. REV. 214; Leach v. Armstrong, 236 Mo. App. 382, 156 S.W.2d 959 (1941) (heir), 90 U. PA. L. REV. 742 (1942). *Accord,* Johnson v. Jones, 54 Ga. App. 456, 188 S.E. 279 (1936) (legatee became bankrupt after testator's death).

[19] See 5 U. PITT. L. REV. 214, 216 (1939). However, while a distributee of a decedent's estate receives his share gratuitously, be nonetheless takes it by legal right.

distribution. The debt incurred by the distributee is in the nature of a prepayment of his bequest or inheritance, so that he is unjustly enriched if he benefits by the amount of the uncollectible debt and still gets his full share of the estate. Without set-off of the debt, assets of the estate available for distributees would be reduced accordingly.[20] Having already shared pro rata in the assets at bankruptcy, the other creditors in *Wall* are not in the position of the distributees of a decedent's estate; rather, they are unaffected by the set-off. Moreover, the court's reliance upon the distributee cases is questionable because Kentucky does not recognize a similar right to set off debts of the distributee which have been barred by the statute of limitations.[21] A right to set off such unenforceable debts has been frequently relied upon by other courts as a basis for parallel treatment of the bar of a bankruptcy discharge.[22]

The court also analogized the instant case to decisions which have subjected assignees of a bankrupt's claim to a set-off of a debt owed by the bankrupt prior to discharge where the mutual obligations arose out of the same transaction.[23] The policy articulated in those cases is that a debtor should not be permitted to frustrate a creditor's set-off in bankruptcy merely by assigning his claim to a third party.[24] Arguably, since the assignee took the claim subject to

[20] One court viewed the issue not as a question of the enforcement of an obligation, but of "equality of purchase by inheritance among the heirs." Leach v. Armstrong, 236 Mo. App. 382, 388, 156 S.W.2d 959, 962 (1941). This situation demonstrates some of the same justifications for set-off found in the treatment of intestacy advancements and testacy ademption. See generally LEACH, THE LAW OF WILLS 9-15, 148-51 (2d ed. 1960).

[21] Luscher v. Security Trust Co., 178 Ky. 593, 199 S.W. 613 (1918).

[22] *E.g.*, Wood v. Knotts, 196 Iowa 544, 194 N.W. 953, 956 (1923) (cited by *In re* Morgan's Estate, 226 Iowa 68, 283 N.W. 267 (1939), *supra* note 18); *In re* Lindmeyer's Estate, 182 Minn. 607, 235 N.W. 377 (1931); *In re* Leitman's Estate, 149 Mo. 112, 121, 50 S.W. 307, 310 (1899) (cited by Leach v. Armstrong, 236 Mo. App. 382, 156 S.W.2d 959 (1941), *supra* note 18); 5 U. PITT. L. REV. 214, 215 (1939). *Contra, e.g.*, Kimball v. Scribner, 174 App. Div. 845, 161 N.Y. Supp. 511 (1916); *In re* Light's Estate, 136 Pa. 211, 20 Atl. 536 (1890). Since policy factors favor set-off against distributees to a greater extent than against other debtors and since the evidentiary policy considerations underlying the statute of limitations would seem to weigh less in this context than the purposes of bankruptcy adjudication, a fortiori it is patently inconsistent to uphold the bar of the statute to benefit the distributee but refuse to honor bankruptcy discharge to the detriment of the bankrupt in *Wall*. It would also follow that a set-off should clearly be denied in a jurisdiction which views the discharge as an extinguishment of the debt itself.

[23] Gill v. Richmond Co-op. Ass'n, 309 Mass. 73, 82, 34 N.E.2d 509, 515 (1941); *accord*, Turner v. Dickey, 3 F. Supp. 360, 361 (W.D. Tenn. 1932).

[24] If the law were otherwise, the creditor would be limited to a ratable share of the value received by the bankrupt from the assignment, which might be nothing, and

any infirmities and was not a party to the bankruptcy proceeding, he is in no position to merit its protection.[25] Thus, standing alone, these cases would not seem to provide adequate support for the result in *Wall.*

Considering the purposes of the bankruptcy laws, the rationale adopted in *Wall* subverts to a considerable extent the effect a discharge is manifestly intended to have under the act.[26] Although discharge is not granted for the negative purpose of preventing a creditor's recovery on rightful claims, this is a necessary incident of any meaningful protection for the bankrupt.[27]

In *Wall,* set-off after discharge was allowed against a tort claim which had arisen before bankruptcy and had not been included among the final list of assets in the bankruptcy estate.[28] The bankrupt was allowed to prosecute the claim after her discharge. Because the cause of action was not a factor in the bankruptcy proceedings, its accrual prior to filing could have no effect on the disposition of the estate. Thus, since the time of accrual is not pivotal, a court

later be required to pay the entire claim which he could have set off in the bankruptcy proceeding.

[25] Cases have frequently asserted that the right to plead a discharge is personal to the bankrupt; however, such authorities usually rely upon § 16 of the Bankruptcy Act, 52 Stat. 550 (1938), as amended, 11 U.S.C. § 34 (1964), which provides that liability of a co-debtor, guarantor, or surety is not altered by a discharge. *E.g.,* Flowers v. Gray, 170 Kan. 266, 269, 225 P.2d 94, 97 (1950) (surety) (dictum); England Motor Co. v. Greenville Commercial Body Co., 163 Miss. 22, 27, 138 So. 591, 592 (1932) (garnishee of creditor of bankrupt); Alabama Great So. Ry. v. Crawley, 118 Miss. 272, 278-79, 79 So. 94-95 (1918) (garnishee); Fidelity Union Cas. Co. v. Hanson, 44 S.W.2d 985, 988 (Tex. Comm'n App.), *cert. denied,* 287 U.S. 599 (1932) (insurer); State *ex Rel.* Bumgarner v. Sims, 139 W. Va. 92, 119, 79 S.E.2d 277, 293 (1953) (secondarily liable party). Still, a successor in interest has been allowed to set up the defense of discharge. Fleitas v. Richardson, 147 U.S. 550, 556 (1893) (mortgagee taking after discharge raising discharge against wife of bankrupt, who was mortgagee prior to discharge).

[26] Commenting on the allowance of a set-off in Gill v. Richmond Co-op. Ass'n, 309 Mass. 73, 34 N.E.2d 509 (1941), Collier noted that "this case seems to be in error, for the use of the debt as a set-off is merely another means of enforcing payment. Moreover, it would seem that the requisite mutuality of obligation has been destroyed." 1 COLLIER ¶ 17.27, at 1695 n.7. For a case denying a right of set-off, see Robinson v. Smith, 130 S.W.2d 381, 383 (Tex. Civ. App. 1937).

The right of banks to set off deposits against claims of the bankrupt clearly applies only to the balance existing when the petition is filed and not to subsequent deposits. 4 COLLIER ¶ 68.16[3].

[27] However, the bankrupt may at his election waive the bar of a discharge and renew the discharged obligation by making a new promise to honor the debt, with no additional consideration other than the moral obligation to pay the unextinguished debt. See, *e.g.,* Crandall v. Durham, 348 Mo. 240, 242, 152 S.W.2d 1044, 1045 (1941); 1 COLLIER ¶¶ 17.33-.37; 7 REMINGTON §§ 3288-95, 3297-98.

[28] See note 7 *supra.*

applying the *Wall* rationale could reasonably go beyond its factual setting to allow set-off against a claim arising subsequent to bankruptcy.

To hold the bankrupt to the discharged obligation by way of set-off whenever he later carries on business transactions and seeks to collect subsequently matured claims of his own renders the discharge a somewhat meaningless determination. The bankrupt is thus encumbered by the necessity of carefully avoiding dealings with anyone to whom he owed a debt at the time of his prior financial failures. This rule invites future litigation; a creditor of the bankrupt will be encouraged to resist later claims so that he may reduce their amount by previously discharged debts—a result he could not be assured of accomplishing otherwise than by causing the bankrupt to go into court to enforce his own claims.[29]

The facts of the *Wall* case, however, indicate certain equitable considerations which, though unarticulated, may lend some support to the holding.[30] While the creditor's brief refers to the questionable nature and purpose of incurring the debt for purchases on credit,[31] the opinion reflects no reliance upon bad faith of the shopper. If, indeed, it could have been found that the debt was incurred by the bankrupt upon credit with no intention at the time to pay for the goods so purchased (as a sort of out-of-court exaction of retribution for the injury), the debt would have been properly non-dischargeable under section 17 (a) (2) as constituting the obtaining of property by false representation.[32] The assertions of the

[29] While the Bankruptcy Act does not *prevent* the *attempt* to collect a discharged debt in court, see note 13 *supra,* it is not meant to *encourage* litigation. One writer has suggested that the bankrupt should be protected from future creditor harassment by legislation to give the bankruptcy court clear jurisdiction for final determination of the effect of the discharge upon all debts. Rifkind, *supra* note 3, at 369.

[30] A set-off did not occur within the bankruptcy proceeding under § 68 because the personal injury claim did not pass to the trustee in bankruptcy under § 70 (a) for prosecution to judgment. See note 7 *supra;* Bankruptcy Act § 70 (a), 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110 (a) (1964). It is arguable that this nature of the claim alone should not defeat the creditor's right to set off before discharge and thus that it should be permitted when the judgment is later determined.

[31] "Within a period of some 30 to 60 days following the accident she incurred an indebtedness to the defendant in the amount of $1157.01, freely admitting that this was done because no effort was made to settle her claim." Brief for Appellant, p. 3.

The following question and response on deposition is particularly interesting: "128. Yes, as a matter of fact, it is right unusual for you to buy nine pairs of shoes in less than a month, isn't it? A. Well, I guess so." *Ibid.*

[32] The better rule would seem to be that a purchase of goods on credit by one who falsely represents a present intention to pay for them creates a liability for property obtained by false representations which is not discharged in bankruptcy. Several juris-

store and statements by the bankrupt in deposition regarding her purpose might well have led to this conclusion.[33] However, the opinion does not discuss this possibility, which would have allowed a set-off and yet remained within the letter of the bankruptcy law.

While the court could thus have denied protection if it found the debt to be one which should not be escaped by an unworthy debtor,[34] the rationale employed frustrates a major bankruptcy purpose by facilitating a method of defeating a discharge. A set-off should be allowed only within the bankruptcy proceedings and prior to discharge. Unless the debt is non-dischargeable, the courts should not negate the effect of a discharge by a method which cannot be persuasively distinguished from permitting affirmative enforcement by the creditor.[35] If there is a need of greater protection for creditors against undeserved procurement of debt discharge, it should be met by additional and appropriate safeguards enacted by Congress and not by skirting the existing law to create an avenue for the creditor to overcome protection of well-intentioned and opportunistic debtors alike.

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dictions—including Kentucky—have so held. *E.g.*, Crawford v. Davison-Paxon Co., 46 Ga. App. 161, 166 S.E. 872 (1932), 17 MINN. L. REV. 658 (1933); Louisville Dry Goods Co. v. Lanman, 135 Ky. 163, 169, 121 S.W. 1042, 1043-44 (1909); Boerner v. Cicero Smith Lumber Co., 292 S.W. 632, 635-36 (Tex. Civ. App. 1927); see Ames v. Moir, 138 U.S. 306 (1891), where a purchaser, knowing himself to be insolvent, took goods with the intention of disposing of them without paying the price. He was not released from liability by a discharge in bankruptcy, which would seem to be a rather clear suggestion by the Supreme Court of a potential rationale for *Wall.* See also Forsyth v. Vehmeyer, 177 U.S. 177 (1900); Wells v. Blitch, 182 Ga. 826, 831-32, 187 S.E. 86, 90 (1936); Morris Fin. & Loan, Inc. v. Dickerson, 57 So. 2d 786 (La. 1952); Wheeler & Motter Merc. Co. v. Green, 97 Okla. 96, 222 Pac. 965 (1924); Rowell v. Ricker, 79 Vt. 552, 66 Atl. 569 (1907); Zerega Distrib. Co. v. Gough, 52 Wash. 2d 443, 325 P.2d 894 (1958). See generally 1 COLLIER ¶ 17.16[3]. *But see* Davison-Paxon v. Caldwell, 115 F.2d 189 (5th Cir. 1940). (Sibley, J., dissenting), *cert. denied*, 313 U.S. 564 (1941). Of course, mere failure to pay is not sufficient to establish that the debt is of this nature. See Brooks v. Pitts, 24 Ga. App. 386, 100 S.E. 776 (1919); De Latour v. Lala, 15 La. App. 276, 131 So. 211 (1930). Although under the criminal law of the majority of jurisdictions, a misrepresentation of intention is insufficient for this offense, the requirements should not be so stringtent under the remedial bankruptcy law as under the penal law. In addition, the American Law Institute now adopts the minority view that it is sufficient for the criminal offense. MODEL PENAL CODE § 223.3 (Proposed Official Draft, 1962). See MODEL PENAL CODE 206.2, comment 7 (Tent. Draft. No. 2, 1954).

[33] See note 31, *supra.*

[34] The Act should be construed to "prevent the discharge in bankruptcy of a liability which would not exist but for the fraudulent conduct of the Bankrupt." Hartford Acc. & Indem. Co. v. Flanagan, 28 F. Supp. 415, 419 (S.D. Ohio 1939).

[35] Allowance of a set-off after discharge appears inconsistent with the policy of carrying out remedial legislative intent by construction in favor of the bankrupt, as discussed in note 10 *supra.*