

THE HYPOTHETICAL CREDITOR AND THE TRUSTEE IN BANKRUPTCY UNDER SECTION 70C— CONSTANCE V. HARVEY REJECTED

A troublesome problem of interpretation under Section 70c of the Bankruptcy Act¹ was dealt with by the Supreme Court of the United States in a case involving the validity of a chattel mortgage as against the claims of the trustee in bankruptcy of the mortgagor. On November 4, 1957, prior to bankruptcy, the bankrupt had borrowed money from the Manufacturers National Bank of Detroit, Michigan and as security for payment of this loan he executed a chattel mortgage on an automobile. The defendant recorded this mortgage on November 8, 1957. A voluntary petition in bankruptcy was filed on April 18, 1958 and the plaintiff was named trustee. Under the law of Michigan, where the transaction took place, a chattel mortgage is void as against creditors of the borrower, who become such in the period between execution and recordation, unless the mortgagee takes possession of the chattel or unless the mortgage is recorded "immediately,"² the reasonable diligence of the mortgagee in placing the mortgage on record being immaterial.³ Such an interim creditor may acquire a superior lien either before or after the mortgage is filed.⁴ There being no evidence of any actual extension of credit between the date of execution and the date of recordation, the referee, relying upon the "strong-arm" clause of Section 70c of the Bankruptcy Act,⁵ held that, since under Michigan law a creditor *could* have acquired a lien prior to the mortgage had he extended credit between execution and recordation, the trustee could claim the same rights even though there was no such actual, presently existing creditor. The District Court reversed the order of the referee and the Court of Appeals

¹ The Bankruptcy Act was originally enacted in 1898, 30 Stat. 550. What is now § 70c, 11 U.S.C. § 110(c) (1958), was originally inserted in 1910 as § 47(a)(2), 36 Stat. 840.

² Mich. Comp. Laws § 566.140 (1948), as amended by Pub. Acts 1957, No. 233, In Re Tobias, 150 F. Supp. 288, 291-92 (W.D. Mich. 1957) and cases cited therein.

By Pub. Acts 1959, No. 110 this statute was amended so as to provide a 10 day grace period from the date of execution within which a mortgagee could file and thereby properly perfect his security interest. But this amendment did not solve the basic problem involved. See *infra* note 30.

Under the law as of the date of the transaction in the instant case a 14 day grace period was allowed within which to record purchase money mortgages but the mortgage involved here was not such.

³ In Re Tobias, *supra* note 2 and cases cited therein.

⁴ O'Neil v. Brooks, 180 Mich. 540, 546, 147 N.W. 537, 539 (1914); Schuttler Co. v. Gunther, 222 Mich. 430, 437-38, 192 N.W. 661, 663-64 (1923).

⁵ Section 70c provides: "The trustee, as to all property, whether or not coming into the possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

STUDENT COMMENTS

for the Sixth Circuit affirmed.⁶ Certiorari was granted by the Supreme Court of the United States⁷ because of the conflict between that decision and the holding of the Court of Appeals for the Second Circuit in *Constance v. Harvey*.⁸ The Supreme Court, affirming the Court of Appeals, held that the rights of creditors, existing or hypothetical, to which the trustee succeeds under Section 70c are to be ascertained as of the time when the bankruptcy petition is filed and not at an anterior point of time. The trustee acquires the "status of a creditor" as of the time when the petition in bankruptcy is filed. The holding of *Constance v. Harvey*, which would allow the trustee to upset security transactions entered into years before the bankruptcy as long as he could posit a hypothetical situation in which a creditor might have had such a right, is not to be followed.⁹

That Section 70c, the so-called "strong-arm" clause of the Bankruptcy Act, gives the trustee the status of a hypothetical lien creditor is clear and agreed upon.¹⁰ But there are some critical interpretative difficulties as to what hypothesis the trustee may make to achieve this status. Does the trustee take the rights of a hypothetical creditor who, as of the date of the filing of the petition in bankruptcy, could have had a lien superior to that of the security interest sought to be avoided? If this is so, assume that the applicable law of the state provides that when a general creditor extends credit in the period between execution of a chattel mortgage or other security transaction and its recordation, he may obtain a lien, superior to that of the delaying mortgagee, at any time subsequent to the giving of credit, even after the perfection of the transaction. Should it make any difference when the extension of credit giving rise to the right to acquire the superior lien is deemed to have occurred as long as that lien *could* have been acquired on the date of the filing of the petition in bankruptcy? Or does the proper interpretation of Section 70c demand that the extension of credit and the acquisition of the lien be deemed to have occurred on the same day, viz., the date of the filing of the petition in bankruptcy, and that if any such creditor, whether or not one actually exists, could have acquired a superior lien on this date, under the state law, then the trustee may

Section 70c
"strong-arm
clause"

⁶ 275 F.2d 454, 456 (6th Cir. 1960), "The trouble with *Constance v. Harvey*, in our judgment, was in the retroactive extension of the rights of the trustee in bankruptcy to include those of a creditor which did not in fact exist as of a period almost one year prior to bankruptcy. The critical time for the accrual of the trustee's rights under Section 70, sub c is 'at the date of bankruptcy' not prior thereto. The trustee can only be 'vested as of such date' with the rights of a creditor 'then holding a lien whether or not such a creditor actually exists.' *This means a creditor at that time and not prior thereto.*" (Emphasis supplied.)

⁷ 363 U.S. 837 (1960).

⁸ 215 F.2d 571 (2d Cir. 1954), cert. denied, 348 U.S. 913 (1955).

⁹ *Lewis v. Manufacturers National Bank of Detroit*, 364 U.S. 603 (1961). Justice Harlan, concurring, stated "... I have long since come to the view that the second opinion in *Constance* . . . was ill considered." (Justice Harlan wrote the original opinion in *Constance* and the rehearing opinion was "per curiam.")

¹⁰ *Hoffman v. Cream-o Products*, 180 F.2d 649 (2d Cir. 1950), cert. denied, 340 U.S. 815 (1950).

have this lien? This preplexing interpretative difficulty should be kept closely in mind in the following discussion of case law and commentary preceding the principal case which, it is submitted, resolves the problem.¹¹

The extent of the trustee's "rights, remedies, and powers" as a lien creditor is determined by the substantive law of the jurisdiction governing the property in question but whether and under what conditions the trustee may attain such a status are federal questions covered by the Bankruptcy Act.¹² There seems to be general agreement that the trustee under Section 70c acquires his status as a lien creditor at the date of bankruptcy¹³ and not at any anterior point of time.¹⁴ It is clear, under the language of this Section, that the trustee's rights are not dependent upon the existence of any actual creditor,¹⁵ although some courts appear either to have used confusing language, or to have misinterpreted the Section, in this respect.¹⁶ Although

¹¹ For the purpose of this comment only § 70c is considered and not the possible effects on a particular transaction of other sections, e.g., § 60, 11 U.S.C. § 96 (1958); § 67a(1), 11 U.S.C. § 107(a)(1) (1958); § 67d, 11 U.S.C. § 107(d) (1958).

¹² Commercial Credit Co. v. Davidson, 112 F.2d 54, 55 (5th Cir. 1940), "We are controlled by federal law in determining what liens are preserved in bankruptcy; what character of title to the debtor's property is vested in the trustee in bankruptcy; and, as to such property, what rights, remedies, and powers are deemed vested in the trustee. We look to state law to ascertain what property the debtor owned immediately preceding the time of bankruptcy; what liens thereon, if any, then existed; the character thereof; and the order of priority among the respective creditors holding such liens." See also, In Re Consorto Construction Co., 212 F.2d 676 (3d Cir. 1954); McKay v. Trusco Finance Co. of Alabama, 198 F.2d 431 (5th Cir. 1952); Robbins v. Bostian, 135 F.2d 298 (8th Cir. 1943); In Re Wright Industries, Inc., 93 F. Supp. 58 (N.D. Ohio 1950). For a case which gives effect to a state statute which apparently could be construed to severely constrict the operation of the Bankruptcy Act, see, In Re Freedman, 168 F. Supp. 25 (E.D. Mich. 1958), aff'd sub nom. Hertzberg v. Associates Discount Corp., 272 F.2d 6 (6th Cir. 1959), cert. denied, 362 U.S. 950 (1960), MacLachlan, Two Wrongs Make a Right, 37 Tex. L. Rev. 676 (1959).

¹³ 11 U.S.C. § 1 (13) (1958) defines the date of bankruptcy as "the date when the petition was filed."

¹⁴ Bailey v. Baker Ice Machine Co., 239 U.S. 268 (1915) (decided under § 47(a)(2) of the 1910 Bankruptcy Act, 36 Stat. 840, which was transferred to § 70c in 1938 with no material change); In Re Consorto Const. Co., supra note 12, at 678-79; Lockhart v. Garden City Bank & Trust Co., 116 F.2d 658 (2d Cir. 1940). Even the controversial Constance case recognized that the lien status of the trustee in bankruptcy under § 70c could not be related back to some time prior to the filing of the petition in bankruptcy. That court distinguished between the chattel mortgage law which did not require that the creditor acquire a lien before recordation and the conditional sales law, which did require such. Supra note 8, at 575; In Re P.T.G. Grain Service, 185 F. Supp. 332, 336 (D. Minn. 1960).

The language of the present § 70c itself seems clearly to indicate that the trustee's lien vests as of the date of bankruptcy. See Collier, Bankruptcy Manual ¶ 70.31 (2d ed. 1960, Supp. 1960).

¹⁵ McKay v. Trusco Finance Co. of Alabama, supra note 12; Heath v. Helmick, 173 F.2d 157 (9th Cir. 1949); Robbins v. Bostian, supra note 12. There was authority holding that, under the language of the section [47(a)(2)] in 1910, the trustee could not attack a voidable chattel mortgage unless there was an actual creditor holding a fixed lien on the chattel at the time of the filing of the petition. Albert Pick & Co. v. Wilson, 19 F.2d 18, 19-20 (8th Cir. 1927) and cases cited therein.

¹⁶ See, e.g., In Re Billings, 170 F. Supp. 253, 258 (W.D. Mo. 1959), where the

Trustee's rights governed by applicable state law

Federal law determines whether trustee qualifies as a lien creditor or not.

there is some authority contra, the trustee, under Section 70c has the status of a creditor without notice and need not show lack of notice on the part of actual creditors, even if the applicable state statute provides that an attaching creditor must achieve his superior status without actual notice of an unrecorded security interest.¹⁷ The trustee is deemed to have taken any action which the particular state law requires the creditor to take before he may acquire a lien.¹⁸ Where, under state law, a reasonable time or period of grace is given within which proper recordation may be made, and the security interest is recorded within such time, even if subsequent to the filing of the petition in bankruptcy, it is deemed as effective as if recorded immediately.¹⁹ It can be seen that in some respects the hypothetical status of the trustee under Section 70c could be considered "ideal" but the difficulty comes in determining just how "ideal" his status really is.

In *Constance v. Harvey*²⁰ Constance sold a roadside diner to Reilly, \$20,000 of the purchase price being financed by a purchase money mortgage. Constance failed to file the mortgage within a reasonable time (over ten months after execution) as required by the applicable chattel mortgage law of New York.²¹ A petition in bankruptcy was filed on behalf of Reilly but the record did not show the date of such filing. The applicable New York law rendered chattel mortgages not recorded within a reasonable time void as to simple contract creditors who became such without notice, prior to actual recording, but did not require that such creditor acquire a lien before recordation in order to prevail.²² The trustee, relying on Section 70c, sought to have the lien petition of Constance dismissed. The record did not show that

court, referring to the trustee's status under § 70c stated, "If there had been any person capable of asserting any right to the mortgaged property on the day of the bankruptcy, even though no such person existed, then the trustee in bankruptcy would have acquired such rights. That, however, is not the situation in this case. There was no 'perfect' or 'ideal' hypothetical creditor on the day of the bankruptcy, because no rights had intervened between the time of the execution of the chattel mortgage and the date of its filing, and could not therefore, on the day of the bankruptcy, have asserted any right to the property," and *Zamore v. Goldblatt*, 194 F.2d 933, 934-35 (2d Cir. 1952), "It is argued by the appellants that the trustee could not attack the mortgage because he represented only one small creditor whose claim arose before the date of the filing but one creditor who could attack it was enough to avoid the mortgage under Section 70, sub. c"

¹⁷ *Hoffman v. Cream-o Products*, supra note 10, at 650 and cases cited therein. See also *Commercial Credit Co. v. Davidson*, supra note 12, at 56.

¹⁸ *Sampsell v. Straub*, 194 F.2d 228, 231 (9th Cir. 1951) (dictum), cert. denied, 343 U.S. 927 (1952).

¹⁹ *Collier, Bankruptcy Manual* ¶ 70.31 (2d ed. 1960) and cases cited therein.

²⁰ Supra note 8.

²¹ N.Y. Lien Law § 230, *Tooker v. Siegel-Copper Co.*, 194 N.Y. 442, 87 N.E. 773 (1909). In 1960 this section was amended so as to provide a 10 day grace period within which the chattel mortgage may be filed properly and its effectiveness against creditors will relate back to the day of execution if filed within that period. Laws 1960, ch. 1004, eff. Oct. 1, 1960.

²² N.Y. Lien Law § 230, *Karst v. Gane*, 136 N.Y. 316, 32 N.E. 1073 (1893); *Nucci v. McCollum*, 194 Misc. 1025, 88 N.Y.S.2d 619 (Sup. Ct. 1949) and cases cited therein.

any of Reilly's creditors became such before recordation of the mortgage by Constance. In its first opinion²³ the court remanded the case to the District Court to determine when the petition in bankruptcy was filed. The court held that if it was filed after the recordation of the chattel mortgage and if no creditor with a provable claim became such prior to the recordation,²⁴ the lien petition of Constance should be granted but if found otherwise, the trustee would prevail under Section 70c. However, on rehearing,²⁵ the court, *sua sponte*, without regard to the date when the petition in bankruptcy was filed, held that it was mistaken in its original opinion as to the application of Section 70c in view of the distinction under New York law making unrecorded chattel mortgages void as to *simple contract creditors* who became such without notice prior to actual recording²⁶ but making unrecorded conditional sales contracts void only as to creditors without notice who *acquired liens* on the goods prior to recording.²⁷ Therefore, the court held, since an *existing* creditor without notice of the chattel mortgage could have obtained a lien at the date of bankruptcy and the trustee has the position of an "ideal" hypothetical creditor, his position must prevail over that of Constance. The court based its change of position, it appears, not on any change of opinion on the meaning of Section 70c itself but on a closer look at the rights given a creditor under the chattel mortgage law of New York.²⁸

Thus, the court, while agreeing that the trustee's lien status vests as of the date of bankruptcy, after determining that a hypothesis could be made in which a creditor, under the state law, could have acquired a lien as of this date,²⁹ allowed the trustee to relate back the extension of credit by his hypothetical creditor to a time prior to the date of bankruptcy and prior to the recordation of the mortgage. The ingenuity of the trustee in "dreaming up" a situation in which, under state law, a creditor could have extended credit at some anterior point of time and as a result could have a superior lien as of the date of bankruptcy seemed to be the critical factor under this interpretation of the rights of the trustee under Section 70c. The immediate

²³ Supra note 8.

²⁴ If there were a creditor with a provable claim the trustee could take his rights under § 70c, 11 U.S.C. § 110(e) (1958).

²⁵ Supra note 8, at 575.

²⁶ Supra note 22.

²⁷ N.Y. Pers. Prop. Law § 65.

²⁸ In its original opinion, supra note 8, at 574, the court stated, "Section 70, sub c . . . clothes the Trustee with the status of a lien creditor as to any property of the bankrupt with respect to which a hypothetical creditor of the bankrupt 'could have obtained a lien by legal or equitable proceedings at the date of bankruptcy.'" The opinion on rehearing does not seem to involve any different interpretation of § 70c; the court looks only to the creditor's lien status.

²⁹ Perhaps the court placed too great a stress on the words "could have obtained a lien" which were inserted in § 70c by amendment in 1952 to remove the anomaly involved in conferring upon the trustee a lien upon the property of the bankrupt to which the trustee already had title. See H.R. Rep. No. 2320 on S. 2234, 82d Cong., 2d Sess. (1952).

practical effect of this holding was to put in jeopardy every existing chattel mortgage in New York which had not been recorded within a reasonable time after execution no matter how long before the date of bankruptcy it had in fact been recorded and regardless of whether any actual creditor could avoid it on that date.³⁰

The holding of the court and its effects have been subjected to extremely able and severe analysis and criticism.³¹ The case law following *Constance* shows the great hesitancy and confusion resulting therefrom and, in some instances, a refusal to follow its decision. In *Conti v. Volper*,³² the same court that decided *Constance*, in a brief *per curiam* opinion, held that although *Constance* may have reached an inequitable result, the language of Section 70c seemed to require it.³³ The Federal District Court in Missouri,³⁴ after stating that the construction of Section 70c in *Constance* was "clearly erroneous,"³⁵ proceeded to hold that since no rights had intervened between the time of the execution of the chattel mortgage and its filing there was no "perfect" or "ideal" hypothetical creditor on the day of bankruptcy and thus the trustee could not prevail over the prior chattel mortgagee.

³⁰ For the effects of this holding on other types of security transactions see, Marsh, *Constance v. Harvey—The "Strong-Arm Clause" Re-Evaluated*, 43 Calif. L. Rev. 65, 68-73 (1955); Brief for Respondent, pp. 26-30, *Lewis v. Manufacturers National Bank of Detroit*, supra note 9.

For the possible effects of this decision on security transactions under the Uniform Commercial Code see Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 Rutgers L. Rev. 518 (1960).

A statutory grace period within which a security holder may record and thereby preclude attack by any creditor (for example, see the present Michigan law, supra note 2) may, in some instances, lessen the harshness of the *Constance* result but still does not remove the basic inequity complained of because if the security holder doesn't record within the grace period the same problem will be presented. But UCC § 9-301 (1)(b) Comment 3, avoids the result reached in *Constance* by providing that an unperfected security interest is subordinate to the rights of lien creditors who acquire their liens without knowledge of the prior security interest and before it is perfected, and rejects the rule that an unperfected security interest is subordinate to all creditors. The Uniform Conditional Sales Act § 5, and the Uniform Trust Receipts Act § 8(2), contain similar provisions.

³¹ Collier, *Bankruptcy Manual* ¶ 70.31 (Supp. 1960); MacLachlan, *The Impact of Bankruptcy on Secured Transactions*, 60 Colum. L. Rev. 593, 604 (1960), "Such decisions pervert the Bankruptcy Act from a procedure for equitable distribution among creditors to a machine for destroying security without reference to the laws of contract, the laws of property, commercial convenience, or principles of elementary fair play."; Marsh, supra note 30; Seligson, *Annual Survey of American Law, Bankruptcy*, 30 N.Y.U.L. Rev. 558 (1955); Weintraub, Levin, Beldock, *The Strong-Arm Clause Strikes the Belated Chattel Mortgage*, 25 Fordham L. Rev. 261 (1956); Comment, 57 Mich. L. Rev. 1227 (1959).

³² 229 F.2d 317 (2d Cir. 1956).

³³ For a similar argument see Kleinberg, Masterson, *Constance v. Harvey—A Defense*, 62 Com. L.J. 124 (1957). See also Note, *Another Look at Constance v. Harvey*, 45 Va. L. Rev. 573 (1959).

³⁴ In *Re Billings*, supra note 16.

³⁵ Id. at 258.

Though the result reached may be desirable, the court, by apparently requiring that, before the trustee can prevail under Section 70c, rights of an actual creditor must attach in the period between execution and recordation, uses "clearly erroneous" reasoning.³⁶ In a case decided after the Sixth Circuit's opinion in the principal case, the Federal District Court in Minnesota refused to follow the *Constance* interpretation which, it stated, violated the basic concept of Section 70c—that all rights of the trustee accrue on the date of bankruptcy and not before—by creating a hypothetical creditor with rights assumed to have arisen before the date of bankruptcy.³⁷

The inequity of the result reached in *Constance* to the mortgagee seems clear. No creditor appears to have been injured since no creditor but one who extended credit before recordation could prevail over the mortgagee and there was no evidence that there was any such creditor. A subsequent creditor could not complain since he would have adequate notice of the security interest held by the mortgagee.³⁸

The original purpose of Section 70c was to protect against secret liens or transfers, as of the date of bankruptcy, for the benefit of the estate.³⁹ In *Constance*, however, if the mortgage was recorded before bankruptcy and if no actual creditor extended credit prior to recordation this purpose was not frustrated. Nor do the competing policies of the Act, equality of distribution among creditors and the protection of security interests, seem to dictate the result reached. The holding in *Constance* gives priority to the equality of distribution policy to the detriment of a security interest acquired before any creditor was harmed. Thus the mortgagee is being "punished" because of a failure to record within the required time, not because of any protection needed for creditors harmed by such delay. The security interest is not protected and the remaining creditors receive a windfall.⁴⁰

³⁶ Supra notes 15, 16.

³⁷ In *Re P.T.G. Grain Service*, supra note 14. In the course of its opinion the Court stated, "Indeed, in view of its [*Constance v. Harvey*] faulty logic, impractical reasoning, and unwise result, good sense dictates that we should not follow it." (335).

³⁸ Seligson, *Annual Survey of American Law, Creditor's Rights*, 32 N.Y.U.L. Rev. 709, 723 (1957). For a discussion of an instance where a creditor may have been prejudiced by the delay in recordation and the trustee may not be able to use either § 70c or § 70e see Collier, *Bankruptcy Manual* ¶ 70.31 (Supp. 1960).

³⁹ Marsh, supra note 30, at 65, 75.

⁴⁰ In addition to there being no policy consideration nor any frustration of the purpose of § 70c in this situation, the interpretation placed on § 70c by *Constance* seriously affects the vitality of § 70e of the Act which provides, "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor." It has been suggested that, since after *Constance* the trustee under § 70c can represent a hypothetical creditor who extended credit at the most advantageous time, and since such a creditor would have equal or greater rights than those of any actual creditor, § 70e would no longer be needed for the purpose of avoiding transfers by the bankrupt. Marsh, supra note 30, at 73-74. See H.R. Rep. No. 745 on H.R. 7242, 86th Cong., 1st Sess. (1959), which stated that *Constance* wrongly injected the substance of § 70e into § 70c.

The statute does not specify when the trustee is deemed to have extended credit to the bankrupt for purposes of his hypothetical lien and in *Constance* and the principal case this factor was critical, since under state law, in order to avoid the particular security device, credit must have been extended within a particular time.⁴¹ Professor Marsh suggests that the purpose of Section 70c and the policies of the Bankruptcy Act may be satisfied, and vitality returned to Section 70e, by construing Section 70c so that the trustee is considered "a creditor without notice who levied legal or equitable process at the time of bankruptcy and who also *extended credit at the time of bankruptcy.*"⁴²

The principal case, though lacking that clarity and preciseness needed in settling this problem, seems necessarily to reach the desired result. As aforementioned, even the *Constance* case held that the lien of the hypothetical creditor would have to be obtainable on the date of bankruptcy.⁴³ But the court in that case was concerned *only* with the trustee's status as a lien creditor on the date of bankruptcy.⁴⁴ That court showed no concern over the fact that the simple creditor status of the trustee was necessarily deemed to have arisen at a time prior to the date of bankruptcy. In order to reject *Constance* then, the Supreme Court could not merely say that lien status arises at the date of bankruptcy and therefore that the trustee's rights as a lien creditor must be measured as of that date. The Court had squarely to face the troublesome question as to when credit can be deemed to be extended under Section 70c since the law of Michigan required extension of credit within a particular time before a creditor could claim rights superior to those of the delaying mortgagee. The Court, in stating that the rights of creditors to which the trustee succeeds under Section 70c are to be ascertained as of the date of bankruptcy and not at any anterior point of time did not reach the heart of the matter. It would not be clear from this language whether the Court meant the rights of creditors becoming creditors on the date of bankruptcy or rights of creditors who became such at some prior time but who, under

⁴¹ Collier, Bankruptcy Manual ¶ 70.31 (Supp. 1960).

⁴² Marsh, *supra* note 30, at 74-75. Offering the same suggestion are, Weintraub, Levin, Beldock, *supra* note 31, at 273; Comment, 57 Mich. L. Rev. 1227, 1229, 1240 (1959); Collier, Bankruptcy Manual ¶ 70.31 (Supp. 1960).

Summary of Proceedings, National Bankruptcy Conference, 1956 Annual Meeting, Resolution No. 36: "RESOLVED, that it is the sense of the National Bankruptcy Conference that the trustee in bankruptcy gets his standing under Section 70c as of the date of the filing of the petition, with no privilege of relation back and without prejudice to such rights as the trustee might have under Section 70e or any other provision of the Bankruptcy Act."

A proposed amendment to § 70c, H.R. 7242, 86th Cong., 1st Sess. (1959), vetoed by the President on Sept. 21, 1960 because of certain other provisions therein which dealt with federal tax lien priorities, provided in pertinent part, "The trustee shall have as of the date of bankruptcy (without the benefit of any fiction of relation back prior to bankruptcy and without any added rights of a creditor extending credit at an earlier date) . . ." For legislative history see House Report 745, *supra* note 40. This amendment is discussed in Kennedy, *supra* note 30, at 527 n.41.

⁴³ *Supra* note 14.

⁴⁴ *Supra* note 28.

state law, could have obtained a lien had not bankruptcy intervened. Thus, looking at this language alone the same interpretative difficulties arising in the *Constance* decision are presented. Apparently realizing this, the Court immediately stated, "that is to say, the trustee acquires the status of a creditor as of the time when the petition of bankruptcy is filed."⁴⁵ The Court did not use the phrase "status as a lien creditor" for this was the phrase used in the original opinion in *Constance* and apparently not abandoned in the rehearing opinion⁴⁶ and would be subject to the same construction. These words then, in their context, and in the light of the *Constance* holding, must mean that the hypothetical creditor under Section 70c may be deemed to have extended credit only on the date of the filing of the petition in bankruptcy. The Court then states, "We read the words 'the rights . . . of a creditor [existing or hypothetical] then holding a lien' to refer to that date."⁴⁷ This appears to be an attempt to combine the two positions of the creditor which were separated in *Constance* and to relate both to the date of bankruptcy. Thus the creditor status and the lien status arise on the same day.⁴⁸ The trustee may no longer relate back creditor status to a time prior to the date of bankruptcy in order to avoid a security transaction properly recorded prior to such time.

A proposed amendment to Section 70c, which was vetoed by the President, inserted a clause designed to avoid the result reached in *Constance*. That clause provided that the trustee, under that Section, was "without the benefit of any fiction of relation back prior to bankruptcy and without any added rights of a creditor extending credit at an earlier date."⁴⁹ Thus, in practical effect, it would seem that since the trustee was not entitled to any added rights held by a creditor who had extended credit at some prior time, his rights would be measured by those of a creditor extending credit at the date of bankruptcy. In view of the decision in the principal case, however, this particular provision of the amendment would seem to be unnecessary.

⁴⁵ Supra note 9, at 607

⁴⁶ Supra note 28.

⁴⁷ Supra note 9, at 607.

⁴⁸ For cases following the holding of the Court of Appeals in the principal case, see, *In Re P.T.G. Grain Service*, supra note 14; *Bissell v. Doty Discount Corp.*, 183 F. Supp. 783 (W.D. Mich. 1960); *Schueler v. Weintrob*, 360 Mich. 621, 105 N.W.2d 42 (1960).

⁴⁹ Supra note 42.