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The End of the Trustee in Bankruptcy as the Ideal General Creditor: Lewis v. Manufacturers National Bank of Detroit

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CONCLUSIONS

The practical question presented by these cases is that to prevent unnecessary litigation the thoughtful attorney must concern himself with the appropriate method for expression of the shareholders' agreement which he is drafting. If a court followed the line of reasoning as in the Montana decision, then an agreement "without the realm of corporate structure" would seem to be called for, but when the contract is not one which is likely to be held as opposed to "public policy," then a by-law provision might be appropriate to bind the greatest amount of shareholders. In any event, it is a question which must be given due consideration before the agreement is submitted to the shareholders.

The proposed Wyoming Business Corporation Act eliminates this problem when the agreement concerns the transferability and sale of shares. Section 32 reads as follows:

> The articles of incorporation or the by-laws of a corporation, or an agreement among all the shareholders of a corporation may impose restrictions on the sale or other disposition of its shares, and on the transfer thereof, which do not unreasonably restrain or prohibit transferability if each such restriction is copied at length or in summary form on the face, or so copied on the back and referred to on the face, of each certificate representing shares to the transfer of which restriction applies.

The importance of this provision is readily appreciated by making a brief survey of the cases involving the enforceability of an invalid by-law as a contract. Most of the cases cited involving this proposition involve by-laws restricting or regulating the right of shareholders to sell or transfer their stock.[11]

FLOYD R. KING

THE END OF THE TRUSTEE IN BANKRUPTCY AS THE IDEAL GENERAL CREDITOR: LEWIS v. MANUFACTURERS NATIONAL BANK OF DETROIT

The second sentence of Section 70, sub. c of the Bankruptcy Act, popularly called the "strong-arm clause," reads as follows:

> The trustee, as to all property, whether or not coming into 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.[1]

The rights therein conferred upon the trustee are not derivative from the rights of actual creditors; these rights are hypothetical.[2] The trustee's

11. Annot., ___ Invalid Bylaw as Contract, 159 A.L.R. 291.

1. 11 U.S.C. § 110(c) (1952 ed.)
2. Ibid. ". . . whether or not such a creditor actually exists."

rights under the strong-arm clause may be superior to those of actual lien creditors in that he is presumed to be without notice,[3] to have complied with all requirements for the perfection of his lien,[4] and to have a lien for an unlimited amount.[5] His rights may be superior to the rights of the bankrupt himself in that they relate to "all property, whether or not coming into possession of the court, upon which a creditor of the bankrupt could have obtained a lien. . . ."[6] Except for the limitation that the trustee's lien commences only "at the date of bankruptcy,"[7] the trustee under the strong-arm clause is truly the "ideal" lien creditor.[8]

The troublesome problem is that "[a]lthough Section 70(c) is clear enough in fixing the time as to which the trustee's lien is deemed to attach, it leaves to unguided inference when the trustee is deemed to have extended the credit whereby he became the hypothetical creditor of the strong-arm clause."[9] This problem came to a head in *Constance v. Harvey*,[10] wherein the rule was laid down that the trustee, as the ideal lien creditor, was also a general creditor at any time most advantageous to the trustee prior to the date of bankruptcy.[11] If, therefore, the applicable state law should permit any possible general creditor to avoid the particular security interest by

3. E.g., Hoffman v. Cream-O-Products, 180 F.2d 649 (2d Cir. 1950), cert. denied, 340 U.S. 815.
4. E.g., Sampsell v. Straub, 194 F.2d 228 (9th Cir. 1951), cert. denied, 343 U.S. 927.
5. The "ideal" amount of any lien would be infinity, or at least an amount sufficient to invalidate all unperfected liens that can be avoided by the trustee in bankruptcy. This implication in the word "ideal" should be sufficient authority to sustain this proposition. Some decisions, e.g., Miller v. Sulmyer, 263 F.2d 513 (9th Cir. 1959), cert. denied, 361 U.S. 838, have relied upon Moore v. Bay, 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133, 76 A.L.R. 1198 as authority here. This appears unwarranted in view of the fact that the holding of that case was based upon the existence of *actual* creditors, a requirement not necessary under the express provisions of the strong-arm clause. Supra note 2.
6. Supra note 1.
7. Ibid. Section 1(13) of the Bankruptcy Act, 11 U.S.C. § 1(13), defines the "date of bankruptcy" as the date when the petition is filed.
8. The classic statement on the rights of the trustee under the strong-arm clause was made by Judge Holmes, that the trustee under this clause "stands here as the ideal creditor, irreproachable and without notice, armed cap-a-pie with every right and power which is conferred by the law of the state upon its most favored creditor who has acquired a lien by legal or equitable proceedings." In re Waynesboro Motor Co., 60 F.2d 668, 669 (S.D. Miss. 1932).
   The trustee may not be the "ideal" lien creditor under all circumstances. There are cases holding that where § 70(c) of the Bankruptcy Act comes into conflict with § 3672 of the Internal Revenue Code, § 3672 controls and that the trustee is, for certain tax purposes, not to be considered as a judgment creditor. The whole question is thoroughly explored in the majority and dissenting opinions in In re Fidelity Tube Corp., 278 F.2d 776 (3d Cir. 1960); the case is discussed in Note, 35 Ind. L.J. 351 (1960).
9. 4 Moore, Collier on Bankruptcy, 14th ed., ¶ 70.51, p. 1429, hereafter cited as Collier.
10. 215 F.2d 571 (2d Cir. 1954), cert. denied, 348 U.S. 913.
11. The case involved a chattel mortgage held not to have been filed within a reasonable time. The New York Court of Appeals had previously held in Karst v. Gane, 136 N.Y. 316, 32 N.E. 1073 (1893) that, should a chattel mortgage not be filed within a reasonable time, the New York Lien Law, § 230 permitted any creditor who had extended credit during the interval between the execution and filing of the mortgage to avoid this mortgage by subsequently, even after the mortgage had been recorded, obtaining a lien on his unsecured claim. In the *Constance* case, supra note 10, there were no actual intervening general creditors. Even so, the Court of Appeals for the Second Circuit permitted the trustee to prevail over the belatedly perfected chattel mortgage by ruling that the trustee, as the "ideal" lien creditor under the strong-arm clause, was also, in effect, a prior ideal general creditor who could assume the rights of this non-existent intervening general creditor and therefore avoid the mortgage in bankruptcy.

subsequently obtaining a lien on his unsecured claim, the trustee could avoid security interest in bankruptcy.[12] The geographical limitation on the application of *Constance* is apparent; only where the law of the particular state protects some possible class of general creditors against subsequently perfected security interests could the *Constance* rule have any effect.[13] The rule, subject to this geographical limitation, would have application against any type of security interest.[14] It had purportedly been extended to deny an increase in homestead exemption to the *bankrupt* where the increase had previously been held by the state court to be void as to creditors who were such prior to the effective date of the increase.[15]

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12. Theoretically the trustee could assume the rights of several different hypothetical general creditors of the same bankrupt. For instance, where the bankrupt was involved in several secured transactions belatedly perfected and the intervals between execution and recording did not coincide in time so that one hypothetical general creditor could avoid them all, the trustee could still avoid them all by assuming the rights of several hypothetical general creditors, each one having extended credit at a different time.
The trustee as hypothetical general creditor is even more "ideal" than the trustee as lien creditor. He must be presumed to have extended credit without notice and his unsecured claim must be presumed to be of an infinite amount; in addition, the point in time when the credit is deemed to have been extended is not, of course, limited to the date of bankruptcy, but at any date most advantageous to the trustee.

13. The possible relationships under the various state recording laws between secured and unsecured creditors are set out in Collier, ¶ 70.51, p. 1430. The chattel mortgage laws and conditional sales laws of the several states can be found in Jones, Chattel Mortgages and Conditional Sales (Bowers ed. 1933).

14. E.g., chattel mortgages, Conti v. Volper, 229 F.2d 317 (2d Cir. 1956); conditional sales In re American Texticle Printers Co., 152 F.Supp. 901 (D.N.J. 1957); accounts receivable, Blackford v. Commercial Credit Corp., 263 F.2d 97 (5th Cir. 1959); equitable mortgages capable of filing, In re Plymouth Glass Co., 171 F.Supp. 650 (E.D. Mich. 1957); trust receipts, see Marsh, Constance v. Harvey—The "Strong-Arm Clause" Re-Evaluated, 43 Cal. L. Rev. 65 (1955); real estate transactions, see In re Plymouth Glass Co., supra.

15. Serious questions of policy arise when the Bankruptcy Act becomes an instrument used to limit or deny exemptions granted under state law, in spite of the strong policy reasons behind these exemptions. Section 6 of the Bankruptcy Act, 11 U.S.C. § 24, states that "[t]his Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the . . . State laws in force at the time of the filing of the petition. . . ." The Federal courts have, however, superimposed the strong-arm clause upon section 6 as a limitation thereto. The potentialities of this limiting force was first demonstrated in Sampsell v. Straub, 194 F.2d 228 (9th Cir. 1952), cert. denied, 343 U.S. 927. In this case the bankrupt did not record his homestead exemption as required by state law and therefore was not effective at the date of bankruptcy. The court held that the trustee's lien under the strong-arm clause was of the type that under the state law would prevail over the unperfected homestead and that the trustee could therefore avoid the exemption in bankruptcy. In the subsequent cases of England v. Sanderson, 236 F.2d 641 (9th Cir. 1956) and Towers v. Curry, 247 F.2d 738 (9th Cir. 1957) the same court held that where, under state law, the homestead exemption applied only to subsequent creditors, and where there were creditors prior to the effective date of an increase in the amount of the exemption, the trustees, under the Constance rule of the strong-arm clause, could step into the shoes of these actual prior creditors and avoid the increase in bankruptcy. The court became confused as to the rationale of Constance (the court apparently corrected itself in the subsequent case of Miller v. Sulmeyer, 263 F.2d 513 (9th Cir. 1959) cert. denied, 361 U.S. 838), but the lethal effect upon state exemptions of the "ideal" general creditor theory in made evident. As a general creditor at the ideal time, the trustee can assume the rights of a general creditor prior to any increase in exemption (or in an extreme case even prior to the original exemption, statutes of limitation and other factors permitting) and thereby avoid the increase (or possibly the entire exemption) in bankruptcy. The whole idea of the Bankruptcy Act being used to deny state exemptions to the bankrupt has been the subject of severest criticisms. Exhaustive discussions of this whole problem can be found in Comment, 68 Yale L.J. 1459 (1959) and Kennedy, Limitation of Exemptions in Bankruptcy, 45 Iowa L. Rev. 445 (1960). Constitutional problems

It had been held to be unavailable for use "as a basis for determining relative priorities between two lien holders as against whom the trustee claims no right."[16]

Constance has been criticized both judicially[17] and extra-judicially;[18] it was both followed[19] and rejected[20] by the lower Federal courts; it had

of retroactive exemption changes are discussed in Comment, 1 Stanford L. Rev. 350 (1949).

16. Brookhaven Bank and Trust Co. v. Gwin, 253 F.2d 17, 23 (5th Cir. 1958).
17. In re Gondola Associates, 132 F.Supp. 205 (E.D.N.Y. 1955); In re Di Pierro, 159 F.Supp. 497 (D. Me. 1958); In re Billings, 170 F.Supp. 253 (W.D. Mo. 1959); Blackford v. Commercial Credit Corp., 263 F.2d 97 (5th Cir. 1959); Bissell v. Doty Discount Corp., 183 F.Supp. 783 (W.D. Mich. 1960); In re Alikasvich, 275 F.2d 454 (6th Cir. 1960), cert. granted, 363 U.S. 837; Lewis v. Manufacturers National Bank of Detroit, 81 S.Ct. 347 (1961).
18. Seligson, Bankruptcy, 30 N.Y.U. L. Rev. 558 (1955); Comment, 30 N.Y.U. L. Rev. 1113 (1955); Marsh, Constance v. Harvey—The "Strong-Arm Clause" Re-Evaluated, 43 Cal. L. Rev. 65 (1955); Seligson, Creditors' Rights, 32 N.Y.U. L. Rev. 708 (1957); Weintraub, Levin and Bedlock, The Strong-Arm Claues Strikes the Belated Chattel Mortgage, 25 Ford. L. Rev. 261 (1956); Collier, ¶ 70.51, pp. 1432-1433; Comment, 57 Mich. L. Rev. 1227 (1959); Maclachlan, Two Wrongs Make a Right, 37 Tex. L. Rev. 676 (1959). But see, Klenberg and Masterson, Constance v. Harvey—A Defense, 62 Comm'l L.J. 124 (1957); Note, 45 Va. L. Rev. 573 (1959).
19. It is difficult to determine the extent to which the Federal courts have been willing to follow Constance, though certainly judicial approval of the case has not been overwhelming. A number of cases have either purported to follow Constance or at least to express approval of it, but it can be stated that outside the Second Circuit there is no case where a correct interpretation of the Constance rule has been used as the *sole* basis for invalidating a belatedly perfected security interest in bankruptcy. There are several reasons why this case, which has caused so much controversy has had such little practical effect. Some of these reasons are as follows: (1) As discussed above, supra note 13 and text relating thereto, Constance can be applied only in those jurisdictions wherein the state law protects some class of general creditors against belatedly perfected security interests. This geographical limitation permits the courts to "distinguish" Constance on the facts (state law here becomes a question of fact so far as the strong-arm clause is concerned) without ever accepting or rejecting the rule, where the applicable state law affords no protection to general creditors against perfected security interests. Examples of this approach to the problem are In re American Textile Printers Co., 152 F.Supp. 901 (D.N.J. 1957), and In re Freedman, 168 F.Supp. 25 (E.D.Mich. 1958), affirmed, Hertzberg v. Associates Discount Corp., 272 F.2d 6 (6th Cir. 1959) where "the court assumes but does not decide, that the decision in Constance v. Harvey constitutes good law. . . ." (2) Under the Constance rule, dual rights are conferred upon the trustee, those of lien creditor at the date of bankruptcy, and those of general creditor prior to bankruptcy. The case has been cited for each of these propositions; where it has been cited only as authority for the trustee's rights as lien creditor it is at least questionable whether the court adopts the rule insofar as it confers upon the trustee the rights of a prior general creditor. In any event, in this context, the Constance rule has no practical effect. E.g., In re Plymouth Glass Co., 171 F.Supp. 650 (E.D. Mich. 1957), wherein the court cites Constance for the proposition that the trustee as lien creditor can invalidate an unperfected mortgage in bankruptcy under the strong-arm clause. (3) Through sheer misinterpretation, some courts have purported to follow Constance without actually having done so. This result may result at least in part from the lack of clarity in the Constance opinion, the court's reasoning there being that since an existing general creditor could have avoided the mortgage, and since the trustee was the "ideal" lien creditor, the trustee could therefore avoid the mortage in bankruptcy. How the trustee reaches the position of prior general creditor from position of lien creditor is not spelled out, and has been the result of misinterpretation. E.g., England v. Sanderson, 236 F.2d 641 (9th Cir. 1956) and Towers v. Curry, 247 F.2d 738 (9th Cir. 1957) wherein the Ninth Circuit Court of Appeals rely upon the existence of actual creditors to permit the trustee to avoid an increase in state homestead exemption in bankruptcy under the strong-arm clause, although the trustee's rights thereunder are clearly hypothetical and not dependent upon the existence of actual intervening. This same confusion as to the proper rationale existed even before Constance, e.g., in Zamore v. Goldblatt, 194 F.2d 933 (2d Cir. 1952) the court relied upon the existence of an actual intervening general creditor to invalidate a belatedly perfected chattel mortgage under the strong-arm clause.

even been judicially anticipated.[21] The various criticisms of *Constance* were: that it was a misconstruction of the plain language of the strong-arm clause, which limits the trustee's rights thereunder as of the date of bankruptcy;[22] that it misinterpreted the history and purpose of the strong-arm clause;[23] that it rendered 70e (1) a nullity;[24] that it interfered with the legitimate authority of the several states to set the conditions upon which secured transactions will be protected;[25] that it permitted the states to legislate the rights of creditors in bankruptcy;[26] that it made secured credit costlier and harder to get;[27] that it rendered belatedly perfected security interests forever voidable in the event of subsequent bankruptcy;[28] that it was inequitable in that its result was unjust enrichment to unsecured creditors at the expense of secured creditors;[29] and that it distorted the policy of the Act in that it tipped "the balance between the two conflicting policies of the Bankruptcy Act—to promote equality of distribution among creditors and to preserve security interests fairly

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(4) When Constance cannot be distinguished on the fact (applicable state law) and its application will invalidate a security interest otherwise valid in bankruptcy, the lower Federal courts have not hesitated to reject the rule, infra note 20. Only in the Second Circuit has Constance been followed on a square holding, and even there the case was severely criticized in the District Court before being followed. In re Gondola Associates, 132 F.Supp. 205 (E.D.N.Y. 1955). The court stated that "[t]he result here reached seems incongruous: a state statute enacted to protect creditors who are such at a given date is held to operate in favor of a trustee in bankruptcy who really stands in empty shoes, for he occupies a space which does not exist, since there is no creditor who might enforce the right which he asserts. I find it difficult to reconcile the present decision with the equitable purposes of the Bankruptcy Act, but agree with the referee that the opinion of the Constance case seems to compel such a result. . . ." On appeal, the case was affirmed, Conti v. Volper, 229 F.2d 317 (2d Cir. 1956), wherein the court recited the strong-arm clause, cited Constance v. Harvey, and dismissed argument with the statement that "it is difficult to see how such plain language could be disregarded." (5) Other provisions of the Bankruptcy Act may produce the same result as Constance; in these situations, where the result would be the same if Constance were not applied, the case itself cannot be said to have resulted in loss to the secured creditor. E.g., in Miller v. Sulmeyer, 263 F.2d 513 (9th Cir. 1959), cert. denied, 361 U.S. 838, a purchase money mortgage not filed for seventy-nine days was held invalid in bankruptcy. The court relied upon the fact that there was an actual interim creditor who could have avoided the mortgage and therefore the trustee could avoid the mortgage under section 70e (1) of the Bankruptcy Act, 11 U.S.C. § 110 (e) (1), and also relied upon the strong-arm clause giving the trustee the same rights as hypothetical interim general creditor to produce the same result.

20. In re Billings, 170 F.Supp. 253 (W.D. Mo. 1959); In re Alikasovich, 275 F.2d 454 (6th Cir. 1960); Bissell v. Doty Discount Corp., 183 F.Supp. 783 (W.D. Mich. 1960).

21. Zamore v. Goldblatt, 194 F.2d 933 (2d Cir. 1952), cert. denied, 343 U.S. 979; McKay v. Trusco Finance Co., 198 F.2d 431 (5th Cir. 1952); In re Krantz Candy Co., 214 F.2d 588 (7th Cir. 1954).

22. Weintraub, Levin and Bedlock, The Strong-Arm Clause Strikes the Belated Chattel Mortgage, 25 Ford. L. Rev. 261, 265, 273 (1956); MacLachlan, Two Wrongs Make a Right, 37 Tex. L. Rev. 676, 678 (1959); Seligson, Bankruptcy, 30 N.Y.U. L. Rev. 558, 561 (1955); Comment, 30 N.Y.U. L. Rev. 1113, 1114.

23. Collier, ¶ 70.51, p. 1432; Weintraub, Levin and Bedlock, op. cit. supra note 22, at 273-274; Comment, 30 N.Y.U. L. Rev. 1113, 1115 (1955).

24. Collier, ¶ 70.51, p. 1432; Weintraub, Levin and Bedlock, op. cit. supra note 22, at 273-274; Marsh, Constance v. Harvey—The "Strong-Arm Clause" Re-Evaluated, 43 Cal. L. Rev. 65, 73-74 (1955); Seligson Bankruptcy, 30 N.Y.U. L. Rev. 558, 561.

25. See Comment, 57 Mich. L. Rev. 1227 (1959).

26. MacLachlan, op. cit. supra note 22, at 680.

27. MacLachlan, op. cit. supra note 22, at 679.

28. Collier, ¶ 70.51, p. 1433; Marsh, op. cit. supra note 24, at 67-70; Seligson, Bankruptcy, 30 N.Y.U. L. Rev. 558, 561; Comment, 30 N.Y.U. L. Rev. 1113, 1115.

29. Weintraub, Levin and Bedlock, op. cit. supra note 22, at 273; Marsh, op. cit. supra note 24, at 71; Seligson, Creditors' Rights, 32 N.Y.U. L. Rev. 708, 723.

acquired—too far in favor of the first."[30] These criticisms, except for the first two,[31] remain unanswered. Unquestionably, *Constance* did go a long way in vitiating the necessity and effectiveness of 70e (1);[32] no doubt it likewise unnecessarily involved the Federal and State governments in each other's affairs.[33] The other criticisms, excepting those of construction and interpretation, it is here submitted, are not so telling as they first appear. Where the line should be drawn in balancing the conflicting interests of secured and unsecured creditors is a matter of policy from which equities or inequities do not flow. If, as Professor MacLachlan states, *Constance* makes secured credit costlier and harder to get,[34] it cannot follow that in subsequent bankruptcy *Constance* produces an inequitable result to secured creditors. The very fact that the cost of secured credit has risen shows that the increased risk to the security has already been discounted. Businessmen adjust their transactions to meet whatever known risks are involved. Can it be said to be inequitable that the risk occasionally matures?[35]

Although judicial acceptance of *Constance* was not overwhelming, the recent case of *In re Alikasovich*[36] represents the first and only decision by a Court of Appeals to reject *Constance* on a square holding. The case went upon *certiorari*[37] to the Supreme Court as *Lewis v. Manufacturers National Bank of Detroit*,[38] wherein the Court affirmed unanimously the *Alikasovich* decision. After tracing the history of the strong-arm clause, the Court states it holding as follows:

> We think that one consistent theory underlies the several versions of Sec. 70, sub. c which we have set forth, *viz.*, that the rights of creditors—whether they are existing or hypothetical—to which the trustee succeds are to be ascertained as of "the date of

30. Marsh, op. cit. supra note 24, at 71.
31. These defenses are made in Note, 45 Va. L. Rev. 573 (1959).
32. Basically, section 70e(1) of the Bankruptcy Act, 11 U.S.C. § 110(e)(1), gives to the trustee the rights of actual general creditors. Constance gives to the trustee the rights of any general creditor, whether or not such creditor actually exists. Since Constance gives the trustee these rights it is immaterial whether section 70e(1) has application or not.
33. Since application of Constance depends upon state law, supra note 13 and text relating thereto, the states can protect secured creditors by enacting laws that exclude Constance from application in bankruptcy. Conversely, Constance may (state law permitting) invalidate security interests in bankruptcy that are valid under state law.
34. Supra note 27.
35. Examined more closely, it appears that Constance produces no inequitable results to secured creditors generally; however, the rule may produce inequitable results for some secured creditors. If no inequities result only when known risks are discounted, it follows that where the risk is not known at the time of the transaction, inequities may result when the risk that later matures was not know in advance and therefore not discounted. It may be said therefore that Constance is inequitable to secured creditors who were such before the Constance decision. There can be no inequity to secured creditors who became such only after Constance since it is presumed the added risk was here discounted. Possible windfalls to secured creditors who became such after Constance as a result of the Constance decision are discussed infra note 47.
36. 275 F.2d 545 (6th Cir. 1950), cert. granted, 363 U.S. 837. The case has been cited both as In re Alikasovich and as Lewis v. Manufacturers National Bank of Detroit.
37. Certiorari was granted, 363 U.S. 837, 80 S.Ct. 1613, 4 L.Ed.2d 1723, because of the clear conflict with Constance v. Harvey.
38. .... U.S. ...., 81 S.Ct. 347, ... L.Ed.2d .... (1961).

bankruptcy,"[39] not at an anterior point of time. That is to say, the trustee acquires the status of a creditor as of the time when the petition of bankruptcy is filed. We read the statutory words "the rights . . . of a creditor [existing or hypothetical] then holding a lien" to refer to that date.[40]

This construction seems to us to fit the scheme of the Act.[41]

The Court squarely rejects the *Constance* interpretation of the strong-arm clause because "[t]hat construction [*Constance v. Harvey*][42] would enrich unsecured creditors at the expense of secured creditors, creating a windfall merely by the happenstance of bankruptcy."[43] The Court then explains why it feels *Constance* to be inequitable to secured creditors:

> Congress in striking a balance between secured and unsecured creditors has provided for specific periods of repose beyond which transactions of the bankrupt prior to bankruptcy may no longer be upset—except and unless existing creditors can set them aside. Yet if we construe Sec. 70, sub. c as petitioner does, there would be no period of repose. Security tranactions entered into in good-faith years before bankruptcy could be upset if the trustee were ingenious enough to conjure up a hypothetical situation in which a hypothetical creditor might have had such a right. The rule pressed upon us would deprive a mortgagee of his rights in states like Michigan, if the mortgage had been executed months or even years previously and there had been a delay of a day or two in recording without any creditor having been injured during the period when the mortgage was unrecorded.[44]

The Court will not, therefore, adopt the *Constance* construction because "[t]hat is too great a wrench for us to give the bankruptcy system, absent a plain indication from Congress which is lacking here."[45]

The rule of the *Lewis* case is clear: the trustee obtains no rights prior to the date of bankruptcy under the strong-arm clause. The Court reasons that Congress meant to strike a balance between the interests of secured and unsecured creditors by providing "for specific periods of respose beyond which [secured] transactions of the bankrupt prior to bankruptcy may no longer be upset," that *Constance* strikes a different balance which produces inequitable results to secured creditors, and that this inequitable construction will not be adopted "absent a plain indication from Congress which is lacking here."

CONCLUSION

The *Lewis* case will be universally acclaimed as the cure to all the ills engendered by *Constance v. Harvey*. The decision is unquestionably correct, for by it the Supreme Court restores once again the harmony

39. Note 5 of Lewis opinion supra note 38, 81 S.Ct. at 349.
40. Note 6 of Lewis opinion supra note 38, 81 S.Ct. at 349.
41. Note 7 of Lewis opinion supra note 38, 81 S.Ct. at 350.
42. "The construction of § 70, sub. c which petitioner urges would give the trustee power to set aside transactions which no creditor could vond and which injured no creditor." Supra note 38 at 81 S.Ct. 350.
43. Supra note 38, 81 S.Ct. at 350.
44. Supra note 38, 81 S.St. at 350.
45. Supra note 38, 81 S.Ct. at 351.

between the strong-arm clause and the other provisions of the Bankruptcy Act, restores a proper balance between the conflicting interests of secured and unsecured creditors, and reduces the unwarranted interference by the Federal and State governments in each other's affairs. Its main beneficial aspect, aside from policy considerations discussed by the Court, is that it eliminates the worst of the bad effects the Bankruptcy Act could have upon increases in state homestead exemptions.[46] As previously suggested[47] however, no great equitable benefits flow from the *Lewis* decision, though certainly no great inequities are produced. Its practical result will be to ease the strain on secured transactions and to create a somewhat greater risk in unsecured transactions. Perhaps the most valid criticism of *Constance v. Harvey* is that it injected unnecessary uncertainty into the law. The great virtue of the *Lewis* case is that it removes this uncertainty. Secured transactions can now be entered into without the former nagging concern over whether or not, at some undetermined time in the future, the security will be disallowed in bankruptcy. All concerned can now breathe more easily.

CHARLES PHILLIPS

STANDING TO OBJECT TO AN UNLAWFUL SEARCH AND SEIZURE

A subject of constituional and criminal law which has received much serious consideration during the past 50 years is unlawful search and seizure. Since the advent of the automobile with the resultant transient society which characterizes life in the United States today, search and seizure has acquired a complexity not exceeded by any other aspect of criminal law.

The U.S. Constiution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."[1] The right to object to unreasonable search and seizure is considered a personal right and can only

46. Supra note 15. Although the overruling of Constance removes the most lethal of the trustee's weapons for invalidation of state exemptions in bankruptcy, it by no means assures that all exemptions will now be honored therein. Where filing is not completed, though required for perfection of the exemption, the trustee can still invalidate the exemption in bankruptcy through his status as lien creditor under the strong-arm clause. Sampsell v. Straub, 194 F.2d 228 (9th Cir. 1951), cert. denied, 340 U.S. 815. Further. where there are actual general creditors, however small, prior to the exemption or to an increase therein, the trustee can avoid *in toto* the exemption or increase under section 70e(1) and the doctrine of Moore v. Bay, 284 U.S. 4, 52 S.Ct. 3, 76 L.Sd. 133, e.g., England v. Sanderson, 236 F.2d 641 (9th Cir. 1956) in view of the later case of Miller v. Sulmeyer, 263 F.2d 513 (9th Cir. 1959).
47. Supra note 35. As there suggested, Constance could produce inequitable results with respect to security interests entered into before Constance. The same reasoning would lead to the conclusion that a windfall to secured creditors who became such after Constance has resulted from the Lewis case, in that the Constance produced risk was discounted in those transactions, a risk that no longer exists.

1. U.S. Const., Amend. IV. Cf., identical langlage in Wyo. Const., Art. I, § 4. This note is concerned with federal courts and those states whose rules of evidence provide for a motion to suppress or return of evidence seized as the result of an illegal search and seizure.