

1952

## BANKRUPTCY-POWERS OF THE TRUSTEE-LIENS BY LEGAL OR EQUITABLE PROCEEDINGS UNDER SECTION 70c

Edward D. Goldstein S.Ed.  
*University of Michigan Law School*

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### Recommended Citation

Edward D. Goldstein S.Ed., *BANKRUPTCY-POWERS OF THE TRUSTEE-LIENS BY LEGAL OR EQUITABLE PROCEEDINGS UNDER SECTION 70c*, 50 MICH. L. REV. 925 (1952).

Available at: <https://repository.law.umich.edu/mlr/vol50/iss6/7>

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## RECENT DECISIONS

**BANKRUPTCY—POWERS OF THE TRUSTEE—LIENS BY LEGAL OR EQUITABLE PROCEEDINGS UNDER SECTION 70c**—Husband and wife filed a petition in bankruptcy. They petitioned the United States District Court for the Southern District of California to set aside their residence from the bankruptcy estate as exempt property. They had not filed their declaration of homestead until after the petition in bankruptcy. The district court set aside the property as exempt. On appeal, *held*, affirmed. Under California law homestead exemptions can be perfected after a petition in bankruptcy. The trustee's claim that section 70c<sup>1</sup> of the Bankruptcy Act gave him a lien that prevailed over a homestead claim subsequently recorded was denied on the ground that the section refers only to a lien obtained by "legal or equitable proceedings." California requires that judgments be recorded before a lien can arise on California land, and therefore there could be no lien on the property "by legal or equitable proceedings," since the act of recording is not itself part of a legal or equitable proceeding. *Sampsell v. Straub*, (9th Cir. 1951) 189 F. (2d) 379.

A state statute requiring judgments to be recorded before a lien can arise on land within the state has usually not operated to deny the trustee in bankruptcy a lien unless the property of the bankrupt was not within his control.<sup>2</sup> The old version of section 47a(2)<sup>3</sup> and 70c<sup>4</sup> as to property not within the bankrupt's control gave the trustee the rights of a judgment creditor. It logically followed that if a judgment by state law did not give rise to a lien, the trustee would not acquire a lien by merely holding a judgment by virtue of the Bankruptcy Act. However, where the property was within the bankrupt's control, the trustee was given a lien despite any state requirement regarding recording.<sup>5</sup> In the principal

<sup>1</sup> 52 Stat. L. 881, §70c (1938), 11 U.S.C. (1946) §110.

<sup>2</sup> In *Southern Dairies v. Banks*, (4th Cir. 1937) 92 F. (2d) 282, the court held that, as to property in the hands of a third party, §47a only gave rights of a judgment creditor to the trustee, and this did not include a lien, which only accrued on North Carolina land by a recording of a judgment. Indicating the helplessness of the trustee, the court said at 287, "Nothing was added to the rights of the trustee with respect to this property by the filing of a certified copy of the adjudication in the register of deeds office."

<sup>3</sup> 36 Stat. L. 840 (1910).

<sup>4</sup> 52 Stat. L. 881, §70c (1938), 11 U.S.C. (1946) §110.

<sup>5</sup> In *Ashbaugh v. Becker* (In re Cobb), (D.C. Mich. 1936) 14 F. Supp. 465 at 467, the court in discussing 47a(2) said: "It will be noted that if the trustee in bankruptcy were entitled only to the rights of a judgment creditor holding an execution, but not shown to have filed said notice as prescribed by said statute, he would not be entitled to the rights of a lien creditor under section 47a. . . . As, however, the trustee in bankruptcy herein is now shown to be vested with the rights of a creditor holding an execution lien, such trustee must, for the purposes of the present case, be deemed to have complied with all of the requirements prescribed by the Michigan statute just quoted as necessary to the acquisition of such a lien, including the filing of notice so prescribed. . . ." The court in the principal case at 382 (footnote 5) seeks to distinguish this case by saying that the rights of a creditor arose on levy of execution, but this is not correct, for the Michigan statute required a notice to be filed before a lien would arise.

case the property was clearly within the bankrupt's control, and in any event section 70c<sup>6</sup> has been amended<sup>7</sup> to remove the distinction between property within the bankrupt's control and property in the hands of a third person, thereby giving the trustee a lien on all the property of the bankrupt. The court's holding that a "lien by legal or equitable proceedings" does not embrace a case where a state statute requires recording of the judgment before a lien will arise seems to be unsound. The phrase "by legal or equitable proceedings" appears merely to refer to the usual way liens are obtained and seems not to have been inserted to limit the powers of the trustee under section 70c. When the petition in bankruptcy is filed, section 70c<sup>8</sup> gives the trustee a lien whether the state statute requires recording of a judgment or not.<sup>9</sup> If the interpretation of the court in the principal case is followed, the powers of the trustee under section 70c will be seriously impaired,<sup>10</sup> and will resemble the limited powers he exercised under 47a(2)<sup>11</sup> and 70c before its amendment<sup>12</sup> as to property not within the bankrupt's control.<sup>13</sup> The trustee by the "strong arm provision" is first and last given a lien, and the words following do not qualify this lien. If a creditor must record, then the trustee must be deemed to have recorded.<sup>14</sup>

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<sup>6</sup> 52 Stat. L. 881, §70c (1938), 11 U.S.C. (1946) §110.

<sup>7</sup> P.L. No. 461, 81st Cong., 2d sess., §2 (March 18, 1950); 11 U.S.C. (Supp. IV, 1951) §110; see H.Rep. No. 1293 on S. 88, 81st Cong., 1st sess. (1949). This amendment was passed to widen the trustee's powers and seems to be a compensation for the restrictions imposed by the amendment to §60a amended at the same time. The court in the principal case did not mention this change in §70c and seems to have relied on the original §70c.

<sup>8</sup> 52 Stat. L. 881, §70c (1938), 11 U.S.C. (1946) §110; as amended 11 U.S.C.A. (1951) §110.

<sup>9</sup> COLLIER, BANKRUPTCY MANUAL, ¶70.30, p. 957 (1948), "Thus if under the state law a creditor asserting a lien by virtue of legal proceedings must file certain notices thereof, the trustee will be deemed to have complied with such requirements." *Ashbaugh v. Becker* (In re Cobb), *supra* note 5.

<sup>10</sup> States could require many things to be done by methods that do not involve legal or equitable proceedings before giving a creditor a lien, and there is no indication that the trustee can do anything to perfect a lien of a hypothetical creditor. See note 2 *supra*.

<sup>11</sup> 36 Stat. L. 840 (1910).

<sup>12</sup> 52 Stat. L. 881, §70c (1938), 11 U.S.C. (1946) §110.

<sup>13</sup> See note 2 *supra*.

<sup>14</sup> In *In re Wright Industries*, (D.C. Ohio 1950) 93 F. Supp. 58 at 62, the court said: "Hence the trustee's powers in every case governed by this portion of Sec. 70, sub. c, are those which the State law would allow to a supposed creditor of the bankrupt, who had at the date of bankruptcy completed the process for the perfection of a lien upon property in the bankrupt's or the Court's possession." See note 9 *supra*.