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OWNERSHIP AS A BASIS FOR SUMMARY JURISDICTION IN CHAPTER XI ARRANGEMENTS

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Noting the importance of determining whether a bankruptcy court has summary jurisdiction, the authors point out that, absent consent, the factors necessary to make this determination are uncertain. This paper examines the controversy as to whether possession of disputed property by the debtor is the only sufficient basis to give summary jurisdiction or whether ownership, apart from possession, will also suffice. The authors examine the commentators—Collier and Remington—as well as the case law and pending legislation on the issue. In conclusion, they recommend the adoption of a "substantial proprietary interest" test as a standard for summary jurisdiction.

I. INTRODUCTION

When an insolvent debtor commences a chapter XI arrangement,[1] there often exist conflicting claims to property in which the

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1. Bankruptcy Act, 11 U.S.C. §§ 701-99 (1970). Chapter XI contemplates the creation of an "arrangement" which is defined as any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms. It proceeds as an offer by the debtor in the form of a petition proposing such an "arrangement," and while it is not a proceeding for adjudication as a bankrupt (as in straight bankruptcy), it is still considered a bankruptcy proceeding. The object of the proceeding is the payment of the debtor's *unsecured* creditors in an orderly manner and the continuation, if possible, of his

debtor has some interest. The resolution of these conflicts must be decided in a plenary suit unless the bankruptcy court exercises its summary jurisdiction over the conflict. Summary jurisdiction is, for the most part, the only type of jurisdiction a bankruptcy court possesses. If summary jurisdiction is lacking or a plenary suit is necessary, the case has to proceed elsewhere, such as in federal district court or perhaps in a state forum.[2]

Whether the bankruptcy court may exercise summary jurisdiction over a particular conflict is thus a significant question since it determines whether a separate suit, with its attendant delay and expense, is necessary.[3] But there are other factors which may also cause a party to assert or deny the bankruptcy court's summary jurisdiction.[4]

For example, it has been suggested that bankruptcy judges are more prone to be collection-minded and will attempt to enlarge the bankrupt's estate.[5] This may occur, in part, as a function of the bankruptcy judge's role as an administrative advisor to the trustee. In that capacity, he may, prior to their formal presentation to him, hear statements and see evidence concerning issues which he must later decide.[6] Although the existence of any substantial prejudice in favor of the debtor has been vigorously disputed, and regardless of the actual existence or non-existence of bias, the perception of such bias in the eyes of some might induce a creditor to seek, in a plenary suit, adjudication of his claim to property also claimed by the bankrupt.[7]

Another factor involves the right to a jury trial. Some believe that the imposition of summary jurisdiction acts to deprive parties of their constitutional right to a jury trial under the seventh amend-

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business. It is thus a more economical proceeding than the straight bankruptcy which involves liquidation of assets. 8B C.J.S. *Bankruptcy* § 743 (1963).

The arrangement looks toward the creation of a feasible plan whereby the overburdened debtor may, through the creditor's cooperation, secure a scaling of debt or interest, or an extension of the due date. If none of these objects can be accomplished, the case is then one for liquidation through bankruptcy proceedings. *In re* Sterba, 74 F.2d 413 (7th Cir. 1935).

2. Treister, *Bankruptcy Jurisdiction: Is It Too Summary?* 39 S. CAL. L. REV. 78, 78-79 (1966). A bankruptcy court can exercise plenary jurisdiction in limited circumstances in actions under sections 60, 67, and 70 of the Act. 8 COLLIER ON BANKRUPTCY ¶ 3.01(2) (14th ed. 1976) [hereinafter cited as COLLIER].

3. The Supreme Court has recognized repeatedly that plenary processes are "slower and more expensive" than summary proceedings. Katchen v. Landy, 382 U.S. 323, 329 (1966); United States Fidelity & Guar. Co. v. Bray, 225 U.S. 205, 218 (1912); Wiswall v. Campbell, 93 U.S. 347, 350-51 (1876).

4. *See* D. COWANS, BANKRUPTCY LAW AND PRACTICE § 836 (1963).

5. J. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 205 at 226 (1956).

6. *Id.* at 196-97.

7. *See* Treister, *supra* note 2.

ment.[8] Although generally there is no constitutional right to a jury trial in bankruptcy proceedings because they are essentially equitable in nature,[9] and neither the Bankruptcy Act nor the Bankruptcy Rules expressly grant the right to jury trials on the issues of insolvency and acts of bankruptcy,[10] some may contend that the deprivation of any jury trial right is the most serious drawback to the summary jurisdiction of a bankruptcy court and that constitutional protections are of greater importance than more efficient bankruptcy administration.[11] Others, however, question the value of jury trials in civil litigation, believing that juries often "distort" or "fudge" the facts they are supposed to find and, in addition, often "determine, not the 'facts', but the respective legal rights . . . of the parties to the suit."[12] In any event, it is conceivable that the desire of a creditor to have his claim heard by a jury might lead him to challenge the bankruptcy court's summary jurisdiction of a controversy.

Procedural factors also affect the desirability of summary as opposed to plenary adjudication. The view exists that the invocation of summary jurisdiction means "summary disposition" of a claim without the protections and opportunity for full presentation of argument which exists in a plenary suit.[13] This view, however, has provoked persuasive criticism,[14] and is even less forceful in light of the rules of procedure governing bankruptcy proceedings.[15] Still,

8. Note, *Implied Consent to Summary Jurisdiction in Bankruptcy: The Forgotten Right to Jury Trial*, 114 U. PA. L. REV. 256 (1965).

9. Bankruptcy Act § 2(a), 11 U.S.C. § 11(a) (1970); *see* Pepper v. Litton, 308 U.S. 295, 304 (1939); Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934); 2 COLLIER ¶ 19.07.

10. Bankruptcy Act § 19(a), 11 U.S.C. § 42(a) (1970); *see* Bankruptcy Rules 115(b), (409)(c). *See also In re* Swope, 466 F.2d 936 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973) (no right to jury trial to determine dischargeability).

11. Note, *supra* note 8, at 265.

12. J. FRANK, COURTS ON TRIAL 111 (1949); *see* 5 MOORE'S FEDERAL PRACTICE ¶ 38.02 [1] (2d ed. 1948). *See generally* Palmer, *On Trial: The Jury Trial*, 20 F.R.D. 65, 71 (1957).

13. *See In re* Fox Metal Indus., Inc., 453 F.2d 1128, 1131 (10th Cir. 1972); Suhl v. Bumb, 348 F.2d 869, 871 (9th Cir.), *cert. denied*, 382 U.S. 938 (1965).

14. *See* Treister, *supra* note 2.

15. *See* 8 COLLIER ¶ 3.01[3]. Pursuant to enabling legislation enacted by Congress, 28 U.S.C. § 2075 (1970), the Supreme Court prescribed Rules of Bankruptcy Procedure governing straight bankruptcy cases and wage earners' proceedings under chapter XIII. 411 U.S. 989 (1973). The Rules of Bankruptcy became effective on October 1, 1973, and were followed by the similar rules effective July 1, 1974, governing practice and procedure in chapter XI cases. Butler, *Proceedings Under Chapter XI of the Federal Bankruptcy Act*, 11 GA. ST. B.J. 220 (1975). For discussion of these rules, see Treister, *New Rules for Cases Under Chapter XI of the Bankruptcy Act*, 49 CAL. ST. B.J. 382 (1974); Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827 (1973); Treister, *The New Bankruptcy Rules*, 48 CAL. ST. B.J. 522 (1973). Similar rules have recently been promulgated for chapter X proceedings. *See* Treister, *New Rules for Corporate Reorganizations Under Chapter X of the Bankruptcy Act*, 50 CAL. ST. B.J. 377 (1975).

this might induce a creditor to seek adjudication in a plenary suit.

Finally, it has been asserted that a frequent reason for objection to summary jurisdiction by creditors is a desire to use the threat of a costly and time-consuming plenary action to exact more favorable settlement terms from a debtor struggling to keep his financial being alive.[16]

Despite the many factors that may cause a party to assert or deny summary jurisdiction in a chapter XI proceeding, the criteria for determining the existence of that summary jurisdiction in a chapter XI proceeding are, at present, uncertain.[17] Although it is well settled that consent may be the basis for summary jurisdiction,[18] Remington[19] seems to indicate that mere *possession*—actual or constructive[20]—of the disputed property by the debtor[21] at the time of filing the chapter XI petition is the only sufficient basis to give the bankruptcy court summary jurisdiction, while Collier[22] unequivocally maintains that in addition to consent and possession, *ownership* of the property by the debtor confers summary jurisdiction. The case law is confused.[23]

It will be the purpose of this comment to examine this possession/ownership controversy as it exists both among the commentators and in the courts, and to offer suggestions leading to its ultimate resolution.[24] The last section of the comment will discuss the ramifications of pending legislation on this controversy.

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16. D. COWANS, *supra* note 4, § 836 (1963).

17. *See* Comment, *Summary Jurisdiction Under Chapter XI of the Bankruptcy Act: Collier v. Remington*, 59 GEO. L.J. 1395 (1971). Both the Georgetown comment and this comment entertain the same issues; the former was drawn upon for much of the information used in this comment's introduction. This comment, however, updates and elaborates upon the case discussion found in the prior comment and differs significantly in its analysis of policy and in its conclusions.

18. *Id.* at 1398 n.24.

19. 9 REMINGTON ON BANKRUPTCY § 3574 (6th ed. 1955) [hereinafter cited as REMINGTON].

20. Examples of constructive possession include: "[W]here the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only." Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 433 (1924) (footnotes omitted). *See also* Strasheim, *Fundamentals of Summary Jurisdiction in Straight Bankruptcy Over Controversies Between Trustees and Third Persons*, 51 NEB. L. REV. 505, 516 (1972).

21. In straight bankruptcy situations all non-exempt property of the debtor passes to the trustee upon adjudication of bankruptcy. 11 U.S.C. § 110(a) (1970). Thus, in most cases, possession by the trustee will exist where possession by the debtor exists.

22. 8 COLLIER ¶ 3.02.

23. *See* Part III, CASE LAW, *infra*.

24. The legislative history is inconclusive on the issue and has been discussed elsewhere. *See* Comment, *supra* note 17.

II. COMMENTATORS

A. *Collier*

Collier acknowledges the well settled case law that where a third party in "straight" bankruptcy under chapters I through VII has actual possession of the property involved and asserts a substantial adverse claim thereto, the bankruptcy court does not acquire summary jurisdiction over a controversy with respect to that property, even though ownership of the property is in the bankrupt.[25] Collier maintains, however, that by virtue of section 311[26] of chapter XI, which has no counterpart in chapters I through VII, a chapter XI court has enlarged summary jurisdiction resting on ownership of property, as distinguished from possession.[27] The existence of this ownership basis does not deny the validity of the separate possession basis, but is merely an alternate ground for summary jurisdiction.[28] Section 311 confers jurisdiction based on ownership and section 302[29] confers possession jurisdiction.

Collier's conclusion as to the ownership theory for summary jurisdiction does not appear to be based on existing case law. This is understandable given the confusion which exists in the courts.[30] Rather, it appears Collier has taken an affirmative stand based on statutory language rather than on any particular decisions, and then footnoted to selected cases for purposes of qualifying his major thesis. Conspicuously absent from Collier's treatment is any significant discussion of policy. In any event, it is noteworthy that Collier de-

25. 8 COLLIER ¶ 3.02 n.4 and accompanying text; *see* Strasheim, *supra* note 20, at 516.

26. 11 U.S.C. § 711 (1970): "Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

27. 8 COLLIER ¶ 3.02 n.2 and accompanying text. Collier also recognizes section 311 as enlarging the territorial jurisdiction of a chapter XI court. *Id.* at ¶ 3.03.

28. The ownership referred to by Collier must be of a beneficial nature. Thus, "bare legal title" or property held by the debtor as fiduciary would not be within Collier's concept of ownership. 8 COLLIER ¶ 3.02 n.2.

Collier also maintains that where a third party in possession claims ownership of the property, the bankruptcy court has jurisdiction in the first instance to determine if the adverse claim of ownership is substantial or merely colorable. If the claim is found to be substantial, the bankruptcy court is without jurisdiction to hear the merits. But if the claim is merely colorable, summary jurisdiction exists. This method of preliminary determination of the substantiality of an adverse claim of ownership is identical to the procedure utilized in determining the existence of summary jurisdiction based on possession. 8 COLLIER ¶ 3.02 n.13 and accompanying text.

29. Section 302 in relevant part makes the jurisdictional grounds of straight bankruptcy applicable in chapter XI proceedings.

30. See Part III, CASE LAW, *infra*.

votes an entire subsection to this issue and takes an expressly reasoned stand.

B. *Remington*

Remington's position is much less forcefully propounded than Collier's. The only direct commentary on the ownership/possession issue offered is as follows:

> It is well settled that jurisdiction of a bankruptcy court in ordinary bankruptcy proceedings does not extend to property which, although asserted by some of those in interest to belong to the bankrupt and his estate, is, at the time of institution of the proceedings, in possession of one claiming it adversely. This principle *seems* now to apply with full force to arrangement proceedings under chapter XI . . . .[31]

Remington makes no mention of section 311 in his discussion of the scope of summary jurisdiction. He does, however, indicate elsewhere[32] that section 311 serves to enlarge a chapter XI court's *territorial* jurisdiction. But the language used does not indicate this is the *only* enlargement which section 311 effects. Given Remington's separate treatment of section 311 and the use of non-exclusive language in his treatise, it seems likely that Remington never fully considered, let alone rejected, the theory that section 311 might enlarge a chapter XI court's *summary* jurisdiction.

As for the brief indication, quoted above, that possession and not ownership may confer summary jurisdiction, Remington relies[33] on two cases. The first, *Sada Yoshinuma v. Oberdorfer Insurance Agency,*[34] raised the question of whether a chapter XI court could require a state court receiver, appointed more than 4 months prior to the initiation of the chapter XI proceedings, to turn over to the bankruptcy court certain property in the receiver's possession. The bankrupt argued that under section 311 the bankruptcy court had such jurisdiction. But the court held that while normally that would

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31. 9 REMINGTON § 3574 (emphasis added). Although section 3573 has also been cited as a relevant section (*In re* Stockman Dev. Co., 447 F.2d 387, 390 (9th Cir. 1971) and Wikle v. Country Life Ins. Co., 423 F.2d 151, 153 (9th Cir. 1970)), its relevance apparently is based on its discussion of Lockhart v. Garden City Bank and Trust Co., 116 F.2d 658 (2d Cir. 1940), which does not seem particularly on point as it concerns property subject to a secured lien but not adversely held until after institution of the proceeding. *See* note 77 *infra*, and accompanying text.

32. 9 REMINGTON § 3572.

33. This "reliance" is also not forcefully asserted. In citing case authority the footnote is prefaced with the phrase: "Apparently to this effect . . . ." 9 REMINGTON § 3574 n.6.

34. 136 F.2d 460 (5th Cir.), *cert. denied*, 320 U.S. 785 (1943).

be true, under section 2a(21)[35] of the Bankruptcy Act, in this particular circumstance, the bankruptcy court could not issue the turnover order. Section 2a(21) provides for the continued control of assets by non-Bankruptcy Act receivers appointed more than 4 months before the filing of a bankruptcy petition. It should be noted, however, that section 2a(21) conflicts with section 311[36] and therefore under section 302[37] it arguably should not have been applied to chapter XI proceedings. This point was not discussed in the case. It has also been suggested that *Oberdorfer* is primarily a construction of section 2a(21) rather than section 311[38] since the court did not focus its attention on what could be done under section 311, but merely on what could not be done under section 2a(21). Thus, *Oberdorfer* is tenuous authority for denying that a debtor's ownership of controverted property is a sufficient ground for a chapter XI court's exercise of summary jurisdiction.

The second case on which Remington relies is *In re California Paving Co.*[39] In that case, the court held that the same jurisdictional criteria should apply in chapter XI proceedings as in ordinary bankruptcy.[40] The court based this holding on section 352 of the Act[41] which indicates that where not inconsistent with provisions of chapter XI, the rights, duties, and liabilities of creditors and of all other persons with respect to property of the debtor, shall be the same as in ordinary bankruptcy. But section 352 purports to deal with provisions concerning "rights, duties and liabilities of creditors" and not *jurisdictional* provisions of straight bankruptcy. Perhaps, in this regard, the court could more appropriately have relied on section 302.[42] Its failure to make this distinction, or even to cite section 302 as an alternative, detracts from the persuasiveness of this case as

35. 11 U.S.C. § 11(a)(21) (1970).

36. 11 U.S.C. § 711 (1970) subjects all property of the debtor, wherever located, to the exclusive jurisdiction of the court. It is inconsistent with this provision that the control of the bankrupt's assets should remain with a non-Bankruptcy Act receiver.

37. 11 U.S.C. § 702 (1970). This section states in relevant part: "The provisions of chapters 1 to 7 of this title shall, *insofar as they are not inconsistent with or in conflict with the provisions of this chapter*, apply in proceedings under this chapter." *Id.* (emphasis added).

38. Comment, *supra* note 17, at 1403 n.44.

39. 95 F. Supp. 909 (N.D. Cal. 1951), *aff'd sub nom.*, California Paving Co. v. Smith, 193 F.2d 647 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952).

40. In ordinary bankruptcy proceedings all property in the actual or constructive possession of the bankrupt when the petition is filed vests in the trustee and becomes subject to the exclusive jurisdiction of the bankruptcy court. *Id.* at 911, *citing* Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1939).

41. 11 U.S.C. § 752 (1970).

42. 11 U.S.C. § 702 (1970).

authority. But at least as significant in questioning the authority of *California Paving* is the fact that section 352, like section 302, contains a caveat that it is not applicable when in conflict with other specific provisions of chapter XI. It is suggested that section 311 is such a conflicting provision.[43] The *California Paving* case makes no mention of section 311. Finally, and most significantly, the Ninth Circuit has reversed its *California Paving* position in subsequent decisions.[44]

Further analyzing Remington's position, it should be recognized that the last Remington text was published in 1955, prior to the existence of a fully matured ownership/possession conflict among commentators or courts. However, in Remington's pocket part update there is no textual material affirming a view that possession and not ownership may confer summary jurisdiction. Indeed, there is merely a survey of recent cases on point with decisions apparently going both ways.

Based on the foregoing analysis, it is suggested that Remington is improperly viewed[45] as conflicting with Collier by advocating a "possession only" test.[46] It is further suggested that reliance on Remington's textual work for a statement of the applicable law must be limited by the cases which are cited.

III. CASE LAW

The plethora of cases involving summary jurisdiction generally in chapter XI proceedings are of such diverse factual patterns and involve so many alternate theories that reference to the bulk of them would not be helpful to a comprehensible analysis of the narrow question at hand. Nonetheless, there are a fair number of cases which perceive the conflict between ownership and possession as a basis for summary jurisdiction and sufficiently discuss the question to warrant consideration.[47]

Following the *California Paving* and *Oberdorfer* decisions, the Second Circuit had occasion to consider the ownership/possession

43. *See* Comment, *supra* note 17, at 1401.

44. *See In re* Stockman Dev. Co., 447 F.2d 387 (9th Cir. 1971); Pasadena Inv. Co. v. Weaver, 376 F.2d 175 (9th Cir. 1967); Lloyd v. Stewart & Nuss, Inc., 327 F.2d 642 (9th Cir. 1964). But the Ninth Circuit has also indicated subsequent to *California Paving* that its decision in that case, if not its reasoning, was correct. *See* Wikle v. Country Life Ins. Co., 423 F.2d 151 (9th Cir. 1970); Kapelus v. A Joint Venture, 377 F.2d 815 (9th Cir. 1967).

45. *See generally* Comment, *supra* note 17 for the view that Remington advocates a "possession only" test.

46. *See* discussion of *In re* Stockman Dev. Co., 447 F.2d 387 (9th Cir. 1971), *cert. denied*, 405 U.S. 923 (1972) in text accompanying notes 83-87 *infra*.

47. Several of these cases are also discussed in Comment, *supra* note 17.

question in *Slenderella Systems of Berkeley v. Pacific Telephone & Telegraph Co.*[48] The general fact pattern of that case is similar to many chapter XI arrangements.[49] The debtor was delinquent in paying his phone bill. He entered a chapter XI proceeding and the phone company attempted to coerce payment by threatening to change the debtor's well established business phone number. The debtor objected to this action by the phone company and sought to have the issue resolved by the bankruptcy court. The threshold question, however, was whether the bankruptcy court had summary jurisdiction to resolve the issue. The Second Circuit in *Slenderella* prefaced its discussion of the particular facts of the case with a statement which mirrors Collier's view:

> Although the debtor's undisputed title to property not in his possession would be enough under the language of Section 311 to authorize the court to act summarily, the court does not acquire summary jurisdiction if the property does not belong to the debtor and is not in his possession, or if the title to property not in his possession is disputed by a substantial adverse claim.[50]

Reliance for the above statement, however, was placed on two older cases, neither of which expressly deals with the ownership/possession conflict.[51]

The court held that the telephone numbers were not "property

48. 286 F.2d 488 (2d Cir. 1961).

49. *See* cases cited in *In re* Kassuba, 396 F. Supp. 324 (N.D. Ill. 1975).

50. 286 F.2d at 490.

51. The first case, *In re* Adolf Gobel, Inc., 80 F.2d 849 (2d Cir. 1936), arose under section 77B, the predecessor of chapter X. The case dealt with a bankruptcy court's jurisdiction to enjoin a state court action involving property of the debtor. The Second Circuit indicated that by virtue of language in section 77B identical to that of current section 311, the bankruptcy court had jurisdiction to enjoin

> not only actions interfering with the property of the debtor which was within the actual or constructive possession of the debtor on the date of the approval of the petition, but also actions interfering with property of the debtor not in such possession, the continued prosecution of which would prevent or impede reorganization.

Id. at 852.

It should be noted that the above language concerned a reorganization under the predecessor of chapter X and not a chapter XI arrangement. It seems that courts have generally construed a chapter X court's jurisdiction to be somewhat broader than that of a chapter XI court. *See* note 144 *infra*. More significant, however, is the *Gobel* court's recognition of jurisdictional limits defined by the purpose of the reorganization. It is precisely this type of policy consideration which is absent in the great majority of cases dealing with summary jurisdiction. Ultimately, the court found that the "property involved . . . was not only in no sense in the debtor's possession, but it was not the debtor's property." *Id.* at 852.

The second case, *In re* Journal-News Corp., 193 F.2d 492 (2d Cir. 1951), is a four sentence decision:

> An arrangement under Chapter XI affects only the unsecured creditors of the

of the debtor,"[52] nor were the numbers in the debtor's possession.[53] The debtor had contended that its contract rights to continued service amounted to property within the meaning of section 311. The court, somewhat opaquely, responded to this argument by reiterating that ownership-based jurisdiction is defeated by a substantial adverse claim to title. It seems the court viewed the phone company's denial of an enforceable contract right in the debtor to be equivalent to an adverse claim to the ownership of the debtor's contract rights. An alternative, and perhaps sounder analysis, would be that the contract rights of the debtor, regardless of how enforceable or valid they might be, are nonetheless the debtor's property, and the phone company was not asserting an adverse claim to ownership of those rights but was merely denying their effectiveness. Thus reasoned, the court could have sustained summary jurisdiction.[54]

The next case to address the ownership/possession question was *Lloyd v. Stewart & Nuss, Inc.*[55] There, the state's Department of

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> debtor. The bankruptcy court has exclusive jurisdiction of the debtor and his property. But the debtor has no property interest in the shares of its stock owned by its stockholders. Consequently the court had no jurisdiction to restrain disposal of their stock. (citations omitted).

The apparent significance of *Journal-News* to the *Slenderella* court was that it cited the *Gobel* case, thus extending the rationale of *Gobel* to a chapter XI case. It may also be argued, however, that *Gobel* was cited merely for the proposition that a corporation has no sufficient property interest in shares of its stock owned by its stockholders.

52. This holding was based on rules and regulations of the phone company which were part of the contract for service between the phone company and the debtor and which provided: "The subscriber has no proprietary right in the number." 286 F.2d 488, 490 (2d Cir. 1961). *But see In re* Fountainebleau Hotel Corp., 508 F.2d 1056 (5th Cir. 1975), discussed *infra* note 54.

53. The court considered the debtor's interest in the specific numbers to be a "license" not amounting to the requisite possession. 286 F.2d 488, 490 (2d Cir. 1961). *Contra, In re* Kassuba, 396 F. Supp. 324 (N.D. Ill. 1975) and cases cited therein.

54. Other courts have found summary jurisdiction to exist, although utilizing different logic, in similar cases. *In re* Fountainebleau Hotel Corp., 508 F.2d 1056 (5th Cir. 1975) involved a fact pattern substantially similar to that in *Slenderella*, although the case arose in a chapter X proceeding and did not discuss the possible ownership basis of summary jurisdiction. The court in rejecting the holding of *Slenderella*, reasoned that the rules and regulations of the phone company should not determine the existence of property rights for purposes of establishing federal jurisdiction; that in fact specific telephone numbers are property; and that the debtor's "right of use" established his possession of that property. Worthy of note is the Fifth Circuit's statement that "the purpose of summary jurisdiction is to give the bankruptcy court a quick means of preserving the wherewithal for maintaining the debtor's business. Protecting use of the telephone numbers by the debtor clearly falls within that responsibility." *Id.* at 1059. *See also* 101 Plating Corp. v. The Pacific Tel. & Tel. Co., Public Utilities Comm'n of Cal., Case No. 9313, Decision No. 83824 (Dec. 17, 1974) *cited in In re* Kassuba, 396 F. Supp. 324, 325 (N.D. Ill. 1975). *Kassuba* adopts the reasoning and holding of *Fountainebleau*.

55. 327 F.2d 642 (9th Cir. 1964).

Public Works contracted with a general contractor who sub-contracted with the debtor, already in a chapter XI arrangement, for certain construction work. The debtor, in turn, sub-contracted with a trucking company. When the trucking company failed to receive timely payment, it issued a "stop notice" to the Department of Public Works (which is a substitute for a mechanic's lien on public works). Under California law, the Department was then required to withhold from the general contractor and the debtor funds otherwise owed for work on the project. The Department of Public Works claimed no interest in the funds but was a mere stakeholder. The chapter XI court proposed to determine the trucking company's and the debtor's respective rights in the fund, whereupon the trucking company objected to this exercise of summary jurisdiction. The court first concluded that the scope of summary jurisdiction would be controlled by section 311.[56] Citing both *Slenderella* and Collier,[57] the court stated that such jurisdiction "includes property not in the possession of the debtor, where the debtor's title is not in dispute."[58] But the court went on to hold that the debtor had neither undisputed ownership nor possession of the property.[59] The court made no mention of its failure to apply section 311 in *In re California Paving Co.*[60]

In *Pasadena Investment Co. v. Weaver,*[61] a debtor in a chapter XI proceeding owned a parcel of land which was subject to an outstanding trust deed in favor of the Pasadena Investment Company. The debtor sought to have the deed and accompanying note voided for fraud in the bankruptcy court. The property was in the actual

56. Collier's view is that section 311 merely enlarges the basic jurisdictional provisions of sections 2a and 23 which are applicable to chapter XI proceedings through section 302. 8 COLLIER ¶¶ 3.01.1, 3.02.

57. 8 COLLIER ¶ 3.02.

58. 327 F.2d at 645.

59. The debtor raised the interesting argument that the property to which the stop notice was directed, and which was actually in question, was not actual funds but rather a chose in action of the debtor against the Department based on an obligation by the Department—which it did not dispute—to pay the general contractor and the debtor for work done. The debtor claimed that this chose in action was in the debtor's constructive possession. But the court held that even if the property in question was a chose in action, it was not in the constructive possession of the debtor since the debt was not held by the Department for the debtor, but rather for the general contractor; and the trucking company had an equal and adverse claim upon that debt. Presumably the court would have used the same equal and adverse claim rationale had the debtor asserted ownership of the chose in action rather than constructive possession of it. Essentially the Department held a fund of which neither the debtor, nor the trucking company had undisputed possession or ownership. It was the money in the fund which both parties were fighting over, not choses in action.

60. 95 F. Supp. 909 (N.D. Cal. 1951). This case is discussed in the text accompanying notes 39-44 *supra.*

61. 376 F.2d 175 (9th Cir. 1967).

possession of a lessee at the time the debtor originally came into ownership and continued in such possession throughout the proceedings. Pasadena Investment Company failed to object to the bankruptcy court's summary adjudication of its interest in the property under the trust deed and this implied consent[62] was held, on appeal, to constitute sufficient jurisdictional grounds. The Ninth Circuit, however, discussed the ownership theory as an alternative jurisdictional basis. Citing *Lloyd v. Stewart & Nuss, Inc.*,[63] the court stated that:

> Section 311 of the Act . . . confers exclusive summary jurisdiction to determine controversies concerning property owned by the debtor, *or* in the actual or constructive possession of the debtor or the bankruptcy court.[64]

Thus, it reasoned that since the debtor had undisputed ownership of the property, summary jurisdiction existed on that basis also, regardless of who had possession.[65] As in *Lloyd,* the *Pasadena* court failed to mention its contradictory analysis in *California Paving.*

The succeeding case on point was *Kapelus v. A Joint Venture,*[66] where a debtor in a chapter XI proceeding was a joint venturer who claimed a right in certain realty. Other conflicting claims to the property existed, and when the bankruptcy court attempted to resolve the controversy its jurisdiction was apparently[67] challenged. In considering the appeal, the Ninth Circuit made two relevant statements. The first was:

> [Summary jurisdiction] may *only* be invoked, however, when the property in question is in the possession of the bankrupt. It

62. *See* Comment, *supra* note 17, at 1398 n.24.

63. 327 F.2d 642, 645 (9th Cir. 1964).

64. 376 F.2d at 178 (original emphasis).

65. The court, in discussing the alternate ground for jurisdiction, went even further, holding that the reversionary interest in the land under lease was intangible property and that the debtor had constructive possession of that property as a function of her ownership as lessor. For the proposition that possession of intangible property follows ownership, see *In re* Rubin, 378 F.2d 104 (3d Cir. 1967). This reasoning fails to consider whether such constructive possession of the reversion would confer jurisdiction over any aspect of the property other than the reversion itself. In this regard, section 2a(15) of the Bankruptcy Act, 11 U.S.C. § 11a(15) (1970), provides in relevant part that jurisdiction exists in straight bankruptcy to "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act." Section 2a(15) would apply to a chapter XI proceeding by virtue of section 302 of the Act, 11 U.S.C. § 702 (1970). It might also be argued that the ownership required to confer jurisdiction need not be full ownership but merely a substantial ownership interest. See the test proposed in Part IV, section E, *A New Test, infra.*

66. 377 F.2d 815 (9th Cir. 1967).

67. The decision does not discuss any consent issue. Therefore it is assumed that timely objection was made at the trial level.

> is established that there is no summary jurisdiction where a third person is in possession of the property under a claim of right.[68]

This seemingly definitive pronouncement would be obviously too narrow since by its terms it precludes summary jurisdiction grounded on ownership or consent. It is suggested that the court was not ruling out ownership as an alternative jurisdictional base, as has been elsewhere suggested,[69] but was merely attempting to establish that a debtor's possession was one possible ground for summary adjudication and that possession by an adverse third party destroyed such possession-grounded jurisdiction. This interpretation is supported by the fact that as authority for its above statement the court cited *Suhl v. Bumb*,[70] a case involving only a determination of whether, on its facts, constructive possession existed. The ownership alternative to possession was not even discussed.

The second relevant statement of the *Kapelus* court was:

> While a tougher question is raised where, as here, one party, appellants, has legal title and the other, appellees, is in actual possession, it is now clear that a bankruptcy court has summary jurisdiction to adjudicate claims to all property that is in the bankrupt's physical possession, notwithstanding the fact that legal title rests in a third party.[71]

In *Kapelus* the appellants were third party claimants to the disputed realty; the appellee was the debtor. Therefore the "tougher question" referred to was not the possibility of ownership as a separate ground of jurisdiction (since title was not in the debtor), but whether, if the debtor had possession, outstanding title in another would destroy possession-grounded jurisdiction. The court, in its statement above, merely held that it did not. *Kapelus* makes no reference to any of the cases previously discussed concerning an ownership basis for summary jurisdiction.

Wikle v. Country Life Insurance Co.[72] involved the Nevada Henderson Land Company as the owner of a hospital upon which there was an outstanding trust deed securing an indebtedness in favor of Country Life Insurance Company. After encountering financial difficulty, Nevada Henderson surrendered possession of the property to a state court receiver, and filed a chapter XI petition

68. 377 F.2d at 816 (emphasis added).

69. *See* Comment, *supra* note 17, at 1402 n.41.

70. 348 F.2d 869 (9th Cir. 1965). *Suhl* has prompted criticism for its insinuation that summary proceedings offer something less than a full hearing with adequate opportunity for presentation of evidence and argument. *See* Treister, *supra* note 2.

71. 377 F.2d at 816.

72. 423 F.2d 151 (9th Cir. 1970).

which was subsequently converted to a straight bankruptcy proceeding. Thereafter Country Life realized upon their trust deed by sale of the property at which it was the purchaser. This resulted in the debtor's trustee seeking a quiet title adjudication in the bankruptcy court to determine the respective rights in the hospital property of Nevada Henderson and Country Life, but the referee ruled that he lacked summary jurisdiction. On appeal, the Ninth Circuit first held that the state court receiver, not the debtor, had possession of the property, whereupon the debtor advanced the argument that ownership was a separate and alternate jurisdictional ground in chapter XI proceedings. The court, however, found it unnecessary to decide the question since the debtor had converted its original chapter XI petition into one of straight bankruptcy. The court did recognize, however, the apparent rift between Collier and Remington[73] and went on to state, in dicta, that case authority favored Remington's position, citing only *Sada Yoshinuma v. Oberdorfer Insurance Agency,*[74] *Lockhart v. Garden City Bank and Trust Co.,*[75] and *In re California Paving Co.*[76]

Since *Oberdorfer* and *California Paving* were discussed in Part II *supra,* it is only necessary to explore *Lockhart.* In *Lockhart* a chattel mortgage on property in the mortgagor's possession was given to and filed by a creditor to secure an outstanding debt. The debtor-mortgagor subsequently filed a chapter XI petition whereupon the mortgagee, without leave of the bankruptcy court, took possession of the encumbered property. Having possession, the mortgagee neglected to refile his security interest within 1 year of the original filing as required by state law. The first issue addressed by the Second Circuit was whether the mortgagee could take possession without leave of the bankruptcy court. Citing, among others, section 311 of the Bankruptcy Act, the court held that leave of court is necessary for the rightful removal of property from the possession of the trustee or debtor-in-possession under a chapter XI proceeding. There is nothing in the language or the holding of *Lockhart* suggesting that ownership may *not* provide an alternate jurisdictional base in chapter XI proceedings.[77] Although it has been sug-

73. *See* Part II, COMMENTATORS, *supra,* for a discussion of Collier's and Remington's views.

74. 136 F.2d 460 (5th Cir.), *cert. denied,* 320 U.S. 785 (1943).

75. 116 F.2d 658 (2d Cir. 1940).

76. 95 F. Supp. 909 (N.D. Cal. 1951).

77. The Second Circuit did recognize the authority of the chapter XI court over the disputed property, but noted that it was in the actual possession of the debtor at the time the chapter XI petition was filed. Thus it is perhaps merely authority for the existence of a possession basis for jurisdiction and not for the proposition that jurisdictional grounds are

gested[78] that *Lockhart* supports a view that chapter XI jurisdiction is identical to that in both straight bankruptcy and chapter X proceedings, the language of the case which could conceivably be so construed[79] seems merely to indicate that possession is one ground of jurisdiction common to each proceeding. It was not necessary to comment on whether ownership without possession would also provide jurisdiction. Furthermore, the *Wikle* court's contention that the *Lockhart* case supports the purported Remington view that ownership by the bankrupt party without possession affords no grounds for summary jurisdiction for a chapter XI bankruptcy court is unsupported by an actual examination of the holding and reasoning of the *Lockhart* case.

The issue of ownership as opposed to possession as a basis for summary jurisdiction could have been decided in *Mithers v. Barasch,*[80] but was side-stepped. There, a divorce decree and property settlement order were rendered and appeals therefrom were pending at the time the husband entered a chapter XI proceeding. A receiver, acting for the debtor-husband, sought in the bankruptcy court a turnover order, an accounting, and injunctive relief concerning community property which was in the wife's possession by virtue of the divorce decree and property settlement order. The bankruptcy referee held he had no summary jurisdiction over the property. Although the wife was clearly in possession of the property, the receiver argued that the ownership rights of the husband were sufficient to confer jurisdiction.[81] The court noted the "seeming disagree-

identical in straight bankruptcy and chapter XI proceedings.

78. *See* Comment, *supra* note 17, at 1403 n.44.

79. This language is as follows:

> It is settled, both in ordinary bankruptcy . . . and in corporate reorganization proceedings under old section 77B, that property in the actual or constructive possession of the bankrupt when the petition is filed vests in the trustee and becomes subject to the exclusive jurisdiction of the bankruptcy court. Except where inconsistent with other provisions of Chapter XI, all provisions of Chapters I to VII . . . are applicable to an arrangement proceeding . . . and the court in which the petition for an arrangement is filed has "exclusive jurisdiction of debtor and his property, wherever located." The indicated conclusion is, therefore, that leave of the court is necessary to the rightful removal of property from the possession of the trustee or debtor-in-possession under an arrangement proceeding.

116 F.2d at 660 (citations omitted).

80. 439 F.2d 1393 (9th Cir. 1971).

81. The receiver appears to have asserted that ownership and not possession is the proper jurisdictional test in a chapter XI proceeding, thus placing before the court an unnecessarily extreme position. Existing authority, including Collier and certain of the cases thus far discussed in this comment, merely support the proposition that ownership is an alternative test to possession. 8 COLLIER ¶¶ 3.02 n.2, 3.03; Pasadena Investment Co. v. Weaver, 376 F.2d 175 (9th Cir. 1967); Lloyd v. Stewart & Nuss, Inc., 327 F.2d 642 (9th Cir. 1964); Systems of Berkeley v. Pacific Tel. & Tel. Co., 286 F.2d 488 (2d Cir. 1961). While the severity of the

ment" in case authority, citing *Wikle* as well as *Lloyd* and *Pasadena Investment*. However, the court escaped having to resolve the issue by finding that even if ownership were a basis of summary jurisdiction, the authority so holding qualifies its position by denying summary jurisdiction where the debtor's ownership is contested by a substantial adverse claim of ownership.[82] Since the court found the wife's claim to ownership under the divorce decree and settlement order was substantial and adverse, it concluded that the husband lacked clear title as well as possession. The court failed to comment as to whether clear title without possession on the part of the husband would have provided a basis for summary jurisdiction, if it had existed.

In *In re Stockman Development Co.*,[83] the debtor's principal assets were a hotel built upon a leasehold estate and personal property within the hotel. As a result of tax delinquency, the hotel property was seized and scheduled for sale by the tax collector. Thereafter, the debtor filed a chapter XI petition and the tax sale was temporarily enjoined. American Acceptance Corporation was the assignee of a conditional vendor of some of the hotel's personal property, and American filed a petition for reclamation with the chapter XI court. Subsequently, the chapter XI arrangement was converted into a straight bankruptcy proceeding. Thereafter, a second conditional vendor's assignee, Westinghouse Credit Corporation, filed a similar petition for reclamation with the bankruptcy court. At all times, Security Savings and Loan Association was a

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receiver's chosen proposition may have contributed to the court's refusal to reach the merits of the view, the court's method of escaping the question—finding substantial adverse claim to ownership—would still have been applicable even if ownership were asserted as only an alternate test.

82. The court cites Pasadena Inv. Co. v. Weaver, 376 F.2d 175, 178 (9th Cir. 1967), and Lloyd v. Stewart & Nuss, Inc., 327 F.2d 642, 645 (9th Cir. 1964), from which it quotes: "[The bankruptcy court] does not acquire summary jurisdiction over property not in the debtor's possession where the debtor's title to it is disputed by a substantial adverse claim." Collier is also cited as supportive authority. (The court's reference to Collier at 181-82 is an apparent miscitation. The proper citation apparently should be to the text preceding note 13, ¶ 3.02 at 162-63.) Note, however, that Collier goes further than the court by saying that the adverse claim to ownership must be made by a third party in possession of the property.

The *Barasch* court also cited Harrison v. Chamberlain, 271 U.S. 191 (1926), which dealt with the existence of constructive possession for a definition of "substantial adverse claim."

> [W]e are of opinion that [an adverse claim] is to be deemed of a substantial character when the claimant's contention "discloses a contested matter of right, involving some fair doubt and reasonable room for controversy" . . . in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense.

271 U.S. at 195.

83. 447 F.2d 387 (9th Cir. 1971), *cert. denied*, 405 U.S. 923 (1972).

secured creditor, holding a trust deed on both the leasehold and hotel building. Security purchased the debtor's interest in the personal property at a trustee's sale. Subsequently, the tax collector gave notice of its intent to sell the personalty within the hotel to recover the delinquent taxes. Security allowed the personalty to be sold, whereupon it bid in the outstanding tax liability. Adding to its ownership began when Security sought the debtor's interest in the personalty at the prior trustee's sale referred to above. Nevertheless, the bankruptcy referee later granted American's and Westinghouse's petitions for reclamation of the personalty which they had filed earlier. Security appealed this action by the referee, challenging, among other things, the referee's summary jurisdiction by claiming that "the summary jurisdiction of the Bankruptcy Court extends only to property in the possession[84] of the bankrupt at the time of filing of the petition in that court,"[85] and alleging the debtor was not in possession of the personalty.

The Ninth Circuit noted that Security's argument was the settled law in straight bankruptcy proceedings; but, prefacing its view that a chapter XI court has enlarged jurisdiction, the court pointed out that chapter XI has a different purpose from that of ordinary bankruptcy,[86] and that section 311, which has no counterpart in straight bankruptcy, controls chapter XI jurisdiction. The court was concerned not only with the ownership/possession issue, but with the question of whether the ownership sufficient to confer summary jurisdiction, may be encumbered ownership. Acknowledging that Collier views section 311 as expanding a chapter XI court's jurisdiction, the opinion interprets Remington as blowing "both hot and cold on the question of enlarged jurisdiction."[87]

The only elaboration offered of "hot and cold" is a quote in Remington from *Lockhart v. Garden City Bank and Trust Co.*[88] to

84. Presumably this argument was not intended to discount the grounds of consent nor those of constructive possession.

85. 447 F.2d at 389.

86. Chapters I to VII are the provisions under which an estate is administered for the purpose of liquidation and distribution. Chapter XI on the contrary seeks an "arrangement" for the settlement or extension of time for payment of unsecured debts with protection of the debtor while the arrangement is being carried out.

447 F.2d at 389. Note that this analysis of the respective proceedings' purposes, to determine the scope of jurisdiction, was similarly employed in *In re* Adolph Gobel, Inc., 80 F.2d 849 (2d Cir. 1936), discussed in note 51 *supra*.

87. 447 F.2d at 390. This interpretation by the Ninth Circuit lends credence to this comment's view, expressed previously in the text accompanying note 45 *supra*, that Remington should not be considered as advocating a strict possession test.

88. 116 F.2d 658 (2d Cir. 1940) discussed in the text accompanying notes 77-79 *supra*.

the effect that although chapter XI arrangements may not alter the rights of secured creditors, this is not inconsistent with the exclusive jurisdiction of a chapter XI court over encumbered property. Apparently the quote was offered to support Remington's "hot" or positive view on enlarged jurisdiction. No example or support of Remington's "cold" view is suggested. At any rate, the *Stockman* court concluded that the language of section 311 could not be more all-encompassing and that it "must necessarily include property owned but encumbered."[89] The court also pointed to section 314[90] of the Act — which gives the bankruptcy court authority to protect the debtor's assets by injunctions and stays of foreclosure proceedings[91] without resort to a possession test — "[a]s additional evidence that the chapter XI jurisdiction was not intended to be restricted to a theory of possession."[92]

Having commented on the enlarging effect of section 311, the *Stockman* court turned to a consideration of existing case law. Acknowledging that its own decisions in the Ninth Circuit were in "some disarray,"[93] the court examined the cases urged by Security as supportive of a strict possession test for chapter XI jurisdiction. It distinguished *Thompson v. Magnolia Petroleum Co.*[94] on the ground that it arose under section 77[95] of the Bankruptcy Act, a railroad reorganization proceeding, rather than chapter XI, and that it failed to discuss the effect of section 311. Although one might wonder why a railroad reorganization court would have any occasion to refer to section 311, a chapter XI provision, section 77(a), contains language identical to the relevant portion of section 311. In this regard, the fact that the *Thompson* court did not cite this language could be taken as indicative of their view that the language effected no change in jurisdiction, but it is more likely that the court was not considering its effect in their decision. In any event, it is suggested that *Thompson* can be more persuasively distinguished

89. 447 F.2d at 390.

90. 11 U.S.C. § 714 (1970).

91. Note that the Rules of Bankruptcy Procedure, enacted subsequent to the decision in *Stockman*, do the same. *See* Bankruptcy Rule 601 as to straight bankruptcy and Bankruptcy Rule 11-44(a) as to chapter XI proceedings.

92. 447 F.2d at 390.

93. *Id.*

94. 309 U.S. 478 (1940).

95. 11 U.S.C. § 205 (1970).

than it was by the Ninth Circuit.[96]

96. Indeed *Thompson* must at least be more closely scrutinized in view of the reliance other courts place upon it. *E.g.*, Bayview Estates Inc. v. Bayview Estates Mobile Homeowner's Ass'n, 508 F.2d 405 (6th Cir. 1974).

In *Thompson* valuable oil deposits, discovered under a railroad right of way, were at issue. The debtor railroad, undergoing a section 77 reorganization, claimed that it had fee simple ownership of the surface along the right of way and thus a right to possession of the underlying oil. The respondents claimed that although the railroad had possession of the surface, it was only by virtue of a mere right of way, not fee simple ownership, and that the fee to the surface and corresponding right to possession of the underlying oil was in the respondent's lessor who had leased the oil rights to the respondents. The debtor sought, among other things, a determination in the bankruptcy court of the parties' respective rights in the oil. The bankruptcy court found that the trustee was in actual possession of the oil under a claim of ownership and therefore the court had jurisdiction to determine the controversy.

On appeal, the United States Supreme Court held that no one had possession of the "fugitive oil" but that ownership of the surface would confer rights of possession and use of the underlying oil. 309 U.S. at 482. Therefore, the Court reasoned, the controversy over the oil could be resolved by determining who had title to the surface. The Court then found that since the debtor was in possession of the surface, the bankruptcy court had jurisdiction to adjudicate ownership of the surface.

As a preface to this reasoning, the Court made its often quoted statement:

> Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy.

309 U.S. at 481.

It is suggested that the purpose of the above statement was not to disallow ownership as an alternate ground of jurisdiction, but to point out that the possession of the oil was not a function of title to the oil. Perhaps the real meaning of the statement is that title need not exist in the debtor together with possession; that possession alone is sufficient to confer summary jurisdiction. This view may be supported in several ways.

First, the question of ownership as an alternate jurisdictional ground was not before the Court. Indeed, the question before the Court was only one of possession of the oil, and the above quotation speaks directly to that question. Had the *Thompson* court wished to pass upon the larger question of ownership as an alternate ground, it could have mentioned the language of section 77(a) corresponding to that of section 311. Even if the court were deciding the ownership issue, how much weight could be given to a decision which fails to consider the section 311 type language contained in section 77(a)?

Secondly, the citation following the quoted material was to Harris v. Avery Brundage Co., 305 U.S. 160, 162-63 & nn.4-6 (1938). The facts in *Harris* disclosed that ownership was not asserted as a separate ground of jurisdiction nor was it discussed by the court. The cited portion of the holding in *Harris* was merely to the effect that bankruptcy jurisdiction "extends to the determination of controversies relating to all property in the debtor's physical possession *or* in the hands of the debtor's agent at the time of the filing of a petition in bankruptcy." 305 U.S. at 163 (original emphasis). *Harris* was apparently cited only to support the existence of possession-based jurisdiction. There is no reference whatever in the cited portion of the *Harris* opinion which even mentions title or ownership.

Thirdly, many courts have properly cited *Thompson* for the singular proposition that title in the debtor is not necessary for summary jurisdiction to exist if the debtor has possession of the property. *In re* Fontainebleau Hotel Corp., 508 F.2d 1056 (5th Cir. 1975), citing the exact language of *Thompson* set out above, interpreted it thusly: "For the bankruptcy court to have summary jurisdiction, the debtor or his trustee must have possession, constructive or actual, of the property in question. He need not, however, have title to the property." *Id.* at 1058. *In re* Kassuba, 396 F. Supp. 324 (N.D. Ill. 1975), construed the identical language and stated: "It is clear that, as used in the Bankruptcy Act, "property of the debtor" includes

After dealing with *Thompson*, the *Stockman* court distinguished *Kapelus v. A Joint Venture*[97] and *Suhl v. Bumb*[98] on the grounds that they both relied upon *Thompson* and that neither discussed the "enlarging" effect of section 311.[99] Neither case addressed the question of ownership as an alternative jurisdictional ground. Thus, the language of each case involving the scope of jurisdiction[100] should properly be viewed as emphasizing the requirement of possession where neither consent nor ownership is asserted as a jurisdictional basis and not excluding the alternate ground of ownership.

The *Stockman* court then noted that:

> [M]ore recent opinions have held to the view that Section 311 confers exclusive summary jurisdiction, ". . . to determine controversies with respect to property owned by the debtor *or* in the actual or constructive possession of the debtor or the Bankruptcy Court."[101]

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property of which the debtor has possession, either actual or constructive. It is not limited to property title to which is in the debtor." *Id.* at 326. In Kapelus v. A Joint Venture, 377 F.2d 815 (9th Cir. 1967), the court, citing *Thompson*, stated: "[I]t is now clear that a bankruptcy court has summary jurisdiction to adjudicate claims to all property that is in the bankrupt's physical possession, notwithstanding the fact that legal title rests in a third party. *Id.* at 816. *See also In re* Madden, 388 F. Supp. 47, 50 (D. Idaho 1975), and cases cited therein.

Thus, reliance on *Thompson* for the proposition that ownership of disputed property by the debtor at the time of filing a chapter XI arrangement *may not* be a sufficient jurisdictional ground is tenuous at best.

97. 377 F.2d 815 (9th Cir. 1967), discussed in the text accompanying note 66 *supra.*

98. 348 F.2d 869 (9th Cir.), *cert. denied*, 382 U.S. 938 (1965).

99. The *Stockman* court further distinguished Kaplan v. Guttman, 217 F.2d 481 (9th Cir. 1954), and Evarts v. Eloy Gin Corp., 204 F.2d 712 (9th Cir. 1953), without explaining how they were urged as supporting a strict possession test, on the basis that in each an attempt was being made to invoke the bankruptcy court's jurisdiction to resolve conflicts between third parties not involving the debtor. It seems that since the debtor had sold all its interest in the personalty to Security, the controversy really was only between third parties and that, therefore, *Kaplan* and *Evarts* would be on point. The *Stockman* court did not adequately discuss this question.

100. *E.g.*, "[b]ut without actual or constructive possession of the property in the hands of the trustee, summary jurisdiction is not authorized . . . ." Suhl v. Bumb, 348 F.2d 869, 872 (9th Cir. 1965) (emphasis omitted).

101. 447 F.2d at 391 (emphasis in original) (citations omitted). The *Stockman* court reaffirmed that ownership jurisdiction is qualified. No summary jurisdiction exists if "title to it is disputed by a substantial adverse claim." *Id.* But as pointed out in the first paragraph of note 82 *supra*, Collier finds that the adverse claim to ownership must be made by one who is in possession of the disputed property before qualification applies. Note that under the facts in *Barasch*, which stated the same qualification as did *Stockman*, this difference was insignificant since the wife (the party making the adverse claim to ownership) was also in possession. But in *Stockman* the adverse claimants to ownership, Westinghouse, American, and Security, were not in possession. Where a debtor claims ownership of property and this claim is disputed by another also claiming ownership, but possession is in a third party, the qualification as stated by the *Stockman* court would bar ownership-based jurisdiction. 447

Ultimately, however, the *Stockman* court resolved the case before it not on grounds of an ownership jurisdictional basis, but by finding that both the debtor and the tax collector were in joint possession of the property at the time of the chapter XI filing.[102]

The next relevant case, *Ric-Wil Inc. v. First Pennsylvania Banking and Trust Co.*,[103] involved the ownership/possession question in an interesting procedural context. The debtor, a public utility and related entities which had suffered flood damage, was loaned

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F.2d at 391. But under Collier's statement of the qualification, jurisdiction would not be destroyed unless the party adversely claiming ownership was also in possession. No court stating the qualification has recognized this apparent conflict with Collier. *See also In re* Copeland, 391 F. Supp 134, 140 (D. Del. 1975).

It should be noted that the qualification is a parallel between jurisdiction based on ownership and jurisdiction based on possession. Constructive possession will not be recognized in the debtor where another party, in possession, holds with a substantial and adverse claim to the property. But it has been held that where a neutral third party is in possession and another third party asserts an adverse claim to the property, the debtor still may have constructive possession. The adverse claim of the non-possessing third party is not enough to destroy jurisdiction. *See* Ric-Wil, Inc. v. First Pa. Banking & Trust Co., 352 F. Supp. 782 (E.D. Pa. 1973), and cases cited therein. To destroy constructive possession-based jurisdiction, then, the adverse claimant must also have actual possession. Thus the analogy exists to ownership-based jurisdiction: actual possession would be required by the adverse claimant to ownership for the qualification to apply thus destroying jurisdiction. If a non-possessory third party makes an adverse claim to ownership, it should not be sufficient to destroy ownership-based jurisdiction.

Assuming that the purpose of recognizing ownership-based jurisdiction is to work a genuine expansion of bankruptcy court jurisdiction, it should be recognized that by restricting the application of the qualification, as Collier does, the number of cases in which the qualification will destroy jurisdiction is reduced. It could be argued, however, that the qualification, in any form, need not exist since there is no statutory justification for it. Analogy to the constructive possession qualification would be inappropriate since, unlike a constructive possession test, an ownership test is not, by definition, concerned with possession. It seems that adoption of a *Stockman* type qualification or Collier's qualification should have no application to situations where the challenged jurisdiction was based on ownership. Otherwise ownership theory will be bastardized by mixing in possession theory.

102. The tax collector's possession consisted of his having seized the property and scheduled it for tax sale. The debtor's possession consisted of its actual possession by permission of the tax collector. From the factual description offered in *Stockman* it seems that although the tax collector had possession, it gave possession up to the debtor. The fact that the tax collector had rights in the property or that the debtor held the property by grace of the tax collector seems only to cloud the essential fact that the debtor had actual possession. For discussion of the related problem of who has possession of a debtor's intangible property, the debtor or the federal government which has served a notice of tax levy on the debtor's intangible property, see Comment, *Possession of a Bankrupt Taxpayer's Intangible Property*, 16 WM. & MARY L. REV. 416 (1974).

The *Stockman* court also implied that consent to jurisdiction existed by stating: "The jurisdiction of the Bankruptcy Court was recognized by all." 447 F.2d at 393.

The court failed to take notice of the fact that Westinghouse filed its reclamation petition after the chapter XI proceeding was converted into a straight bankruptcy proceeding. The *Wikle* court used a similar factual circumstance to avoid having to decide the ownership/possession question.

103. 352 F. Supp. 782 (E.D. Pa. 1973).

state reconstruction funds which were placed in an escrow account pending distribution for repair costs. Thereafter, the debtor filed its chapter XI petition. The debtor's receiver ordered the escrow funds disbursed for continuing reconstruction, but apparently Ric-Wil Corporation, a supplier of reconstruction pipe to the debtor, was, for some unexplained reason, not scheduled to be fully paid from this fund. Ric-Wil sought an order in the bankruptcy court enjoining the disbursal of the escrow funds and a determination of whether it was entitled to a portion of them. The bankruptcy court denied the requested injunction and set a date for a hearing on the question of Ric-Wil's rights in the fund. Ric-Wil then sought an identical injunction of disbursal and determination of interest in the fund from the district court.[104] The debtor argued that the district court had no jurisdiction to hear this plenary action since the bankruptcy court had *exclusive* jurisdiction of the fund pursuant to section 311. Although the precise issue before the court was really the exclusivity of the bankruptcy court's jurisdiction, the district court's opinion also spoke to the existence of jurisdiction based on ownership. The court acknowledged section 311 as a relevant jurisdictional provision and quoted from Collier as to its interpretation:

> Section 311 gives the Court in which the [arrangement] petition is filed "exclusive jurisdiction of the debtor, and his property, wherever located." That jurisdiction over property rests on ownership of property, as distinguished from possession.[105]

After this recognition of the alternate jurisdictional ground of ownership, however, the court found that the debtor had constructive possession of the property[106] and that Ric-Wil had consented to the bankruptcy court's jurisdiction.[107] Therefore, the district court found that the bankruptcy court had jurisdiction, and that such jurisdiction was exclusive. It therefore denied Ric-Wil's request for an injunction and a determination of rights in the property.[108]

The following case dealing with the ownership/possession question was *Bayview Estates, Inc. v. Bayview Estates Mobile Home-*

104. Presumably Ric-Wil sought the separate injunction in the district court, rather than an appeal from the bankruptcy court's denial since no grounds other than abuse of discretion existed for appeal.

105. 352 F. Supp. at 786.

106. This constructive possession by the debtor may have been based on a finding that the bank, as escrow agent, had possession of the funds without asserting a claim to them. Note, however, that an adverse claim was made by Ric-Wil. Still, in this circumstance, the court found that constructive possession in the debtor existed. *Id.* at 787.

107. Consent was found by Ric-Wil in its filing of a claim in bankruptcy. *Id.* at 787-88.

108. The court did, however, hold that after the bankruptcy court's determination of rights in the property, that decision could be appealed to the district court. *Id.* at 788.

owners Association.[109] There, the corporate developer of a mobile home park was sued by the homeowners' association of the park for failure to provide certain services. The homeowners also withheld payment of rent from the developer, and paid it into an escrow fund. The developer subsequently filed a chapter XI proceeding wherein the bankruptcy court sought to determine the rights of the parties in the escrow fund. The association apparently objected to the bankruptcy court's summary jurisdiction over the property and this objection was sustained on appeal to the district court. On appeal to the Sixth Circuit, the court, after citing section 311, stated that:

> [T]he bankruptcy court's exercise of summary jurisdiction depends upon a finding that it has possession, either actual or constructive, of the property in question. "And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy." . . . In the instant case it is apparent that the bankruptcy court did not have actual possession of the disputed monies and that if its jurisdiction is to be upheld it must be upon a theory of constructive possession.[110]

Initially, it should be recognized that the foregoing statement could be interpreted such that ownership-based jurisdiction would not be prohibited in all cases. Rather, in cases where the adverse claim of a third party needed possession to bar the court's jurisdiction, *only* possession would be at issue. An ownership theory would be inapplicable on the facts in *Bayview.* Furthermore, the ownership ground was apparently not asserted by the debtor; it was certainly not discussed by the court which failed to cite any of the cases discussed in the text of this comment or even to indicate that a conflict appeared to exist on the question.

Even if one views the court's statement as precluding jurisdiction based on ownership, it must be recognized that the court placed principal reliance for such a view upon *Thompson v. Magnolia Petroleum Co.,*[111] which has been distinguished on this precise point by the Ninth Circuit,[112] and further distinguished elsewhere in this comment.[113] The court ultimately held that the debtor was not in constructive possession of the property, and therefore the bankruptcy court did not have summary jurisdiction over the fund.

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109. 508 F.2d 405 (6th Cir. 1974).
110. *Id.* at 407 (citations omitted).
111. 309 U.S. 478 (1940).
112. *In re* Stockman Dev. Co., 447 F.2d 387, 391 (9th Cir. 1971).
113. *See* note 96 *supra.*

In the recent case of *In re Copeland*,[114] Mr. Copeland personally guaranteed a loan made by Pension Benefit to Graphic Production Co. and the Citizen-News Co. Copeland agreed to post certain stock as collateral security for his guaranty. Pursuant to an escrow agreement, the Wilmington Trust Co. (WTC) was designated escrow agent to hold this stock. When the underlying loan was defaulted upon, Pension Benefit made demands for payment to the corporation. Payment was not forthcoming and Pension Benefit then demanded that Copeland and WTC surrender the escrowed stock.

Shortly thereafter Copeland filed a chapter XI petition. The escrow agent then delivered the collateral to Pension Benefit, whereupon the debtor petitioned the bankruptcy court to order Pension Benefit to turn the collateral over to the debtor.[115] Pension Benefit responded, in part, by denying the jurisdiction of the bankruptcy court.

The district court, in passing upon the jurisdictional question, directly confronted the ownership/possession issue[116] and engaged in a comprehensive survey of existing authority.[117] The court acknowledged that the Ninth Circuit tended toward a test that would expand jurisdiction for chapter XI cases;[118] that the Second Circuit in *Slenderella* adopted such a test and that the Third Circuit had interpreted language identical to that of section 311 in a manner consistent with the Collier view.[119] No reference was made to the

114. 391 F. Supp. 134 (D. Del. 1975).

115. The debtor alleged Pension Benefit's security interest in the stock was neither attached nor perfected and hence inferior to the debtor's rights in the property. *Id.* at 138.

116. The facts of the case called for this since the debtor was found to have ownership but not possession.

117. The court implies that Remington advocates a strict possession test. It is, however, the view of this Comment that Remington does not "advocate" this position but merely surveys the decisions of a few early cases. *See* note 31 *supra* and accompanying text.

118. *See In re* Stockman Dev. Co., 447 F.2d 387 (9th Cir. 1971). In fact, however, it appears that the *Stockman* court, although on its facts not required to so hold, was firmly convinced that section 311 enlarged jurisdiction. Section 314 is discussed as "additional evidence that the Chapter XI jurisdiction was not intended to be restricted to a theory of possession." *Id.* at 390.

119. *See* Slenderella Sys. v. Pacific Tel. & Tel. Co., 286 F.2d 488 (2d Cir. 1961). The *Copeland* court also cites *In re* Penn Central Transp. Co., 453 F.2d 520, 522 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972), a railroad reorganization under § 77 of the Act. The *Penn Central* court failed to specify the precise basis for its jurisdiction—ownership or possession. It did, however, characterize the debtor railroad's bank accounts as "property of the debtor" over which the bankruptcy court had jurisdiction. Somewhat confusingly the court indicated that the relevant property consisted of choses in action of the debtor against the bank. It would seem that in reality the relevant property was the money fund itself since rights to the debtor's "choses in action" concerned no one; the parties were disputing rights to money in the bank.

The *Copeland* court also quoted from the Third Circuit's opinion in *In re* Rubin, 378 F.2d 104, 109 (3d Cir. 1967), to substantiate that the Third Circuit viewed ownership as a suffi-

Sixth Circuit's ostensibly contradictory view in *Bayview Estates, Inc. v. Bayview Estates Mobile Homeowners Association.*[120]

The court also pointed out that rule 11-44(a) provides for automatic stays of actions pending or commencing against the debtor or his property after his filing of a chapter XI petition, without regard to who has possession. But more compelling is the court's citation of the Advisory Committee's Note to rule 11-44(a) which unequivocally indicates that the Committee had embraced the Collier view.[121]

Finally, the *Copeland* court expressly adopted the Collier view and found on the facts that the debtor had ownership of the collateral, and therefore summary jurisdiction existed.

A brief summary or overview of the foregoing cases reveals the following facts: Both the Second and Ninth Circuits have adopted an ownership-based jurisdictional test; there is some indication that the Sixth Circuit has not; a district court within the Third Circuit has also adopted an ownership test; the cases which support the existence of an ownership test generally offer more persuasive authority based on case law and statutory analysis, including consideration of the purposes of chapter XI proceedings; all cases cited for the proposition that ownership is not an alternate jurisdictional basis may be in some way distinguished.

IV. Analysis and Policy

In attempting to resolve the question of whether an ownership basis for summary jurisdiction should exist, it is desirable to go beyond the reported decisions which generally have failed to discuss adequately the policy factors and the development of criteria for summary jurisdiction.

A. *Historical Roots of the Possession Test*

An initial question, the answer to which may prove helpful in determining whether ownership should be accepted as an alternate

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cient jurisdictional base. But this reliance on *Rubin* was misplaced since there the court discussed ownership only after it found that in the case of intangibles, possession usually follows ownership. The *Rubin* court recognized only possession-based jurisdiction discussing ownership merely to identify possession.

120. *See* text accompanying notes 109-10 *supra.*

121. The Committee's Note states, in relevant part: "[Section] 311 gives the court exclusive jurisdiction of the debtor and its property wherever located and this jurisdictional grant includes granting stays and injunctions. See 8 COLLIER ¶ 3.02 (1963)." COLLIER, BANKRUPTCY ACT AND RULES 1156 (Pamphlet ed. 1975). *See also* text accompanying note 91 *supra* for a similar view expressed in *Stockman.*

jurisdictional basis, is "How did possession come to be the established test for *straight* bankruptcy jurisdiction?" It should be noted that none of the provisions of the Bankruptcy Act dealing with jurisdiction mention possession. Section 2 of the Act[122] confers summary jurisdiction over bankruptcy "proceedings" which are detailed in some of its subsections. These subsections indicate that "proceedings" are generally administrative matters, but subsection 7 also confers summary jurisdiction on the bankruptcy court to resolve controversies arising in a "proceeding." The Act, in section 23, describes the subject of plenary jurisdiction as "all controversies at law and equity, as distinguished from proceedings under this [Act]. . . ."[123] Thus, the statutory criteria for determining whether summary jurisdiction exists to resolve a dispute is the determination of whether the particular controversy is one "arising in a proceeding" or "at law and equity." But these are "terms of art which mean no more and no less than the courts have said they mean."[124] Courts have made the distinction turn on the concept of possession. It is submitted that in the development of the possession test, there was no evidence of a rationale or policy which would be thwarted by a limited expansion of the possession test.

The earliest case found which relates to the distinction between a controversy "arising in a proceeding" and one arising "at law or equity" is *In re Kerosene Oil Co.*[125] There, a creditor of the bankrupt sought in a state court to foreclose a mortgage it held on the debtor's property. The debtor's trustee[126] petitioned the bankruptcy court to enjoin the state court action and to determine the validity of the mortgage itself. The mortgagee, however, asserted that the bankruptcy court had no summary jurisdiction to do so. In deciding the question on appeal, the court made reference to the then existing bankruptcy statute.[127] The first section of that Act provided, in relevant part, that bankruptcy courts will have jurisdiction "in all matters and proceedings in bankruptcy . . . ." The second section of the Act qualified the first and required plenary proceedings in "all suits at law or in equity which may or shall be brought by the [trustee] in bankruptcy against any person claiming an adverse interest, or by such person against such [trustee],

122. 11 U.S.C. § 11 (1970).

123. *Id.* § 46.

124. *See* Strasheim, *supra* note 20, at 510.

125. 14 Fed. Cas. 380 (1869).

126. At that time the trustee was actually referred to as the debtor's "assignee in bankruptcy."

127. Act of March 2, 1867, ch. 176, 14 Stat. 517.

touching any property or rights of property of said bankrupt . . . ." Note the similarity of these sections to sections 2 and 23 of the present Act.[128] The court found that while the case was generally one in bankruptcy, and so apparently within the first section, it was more precisely a case brought by the trustee against one claiming an adverse interest in the bankrupt's property; and therefore within the qualification of the second section requiring plenary determination. There was no discussion of possession, although it appeared that the debtor had possession of the mortgaged property. The court did, however, indicate that if summary jurisdiction had been found, the summary proceedings would be in some way "informal" and that appeal from them might not lie.[129] Thus, it appears that the determination of jurisdiction was purely a matter of statutory construction, not involving a possession test, but colored by a view that summary proceedings would not afford full due process.

In *Knight v. Cheney,*[130] the trustee of the bankrupt claimed rights to certain goods which he asserted were fraudulently transferred to a third party prior to bankruptcy. The third party claimed valid title to the goods which were in its possession and contended that the bankruptcy court had no jurisdiction to hear the controversy. The bankruptcy court found that it did have jurisdiction, whereupon an appeal was taken. The court, on appeal, pointed out that the language of the first section of the Bankruptcy Act (the 1867 Act) apparently conferred summary jurisdiction, but that reference was necessary to the second section since the language fit the facts of the case more precisely and therefore called for plenary adjudication. The *Knight* court also viewed summary proceedings as affording something less than full due process.[131] The court could have justified its ultimate decision by interpreting the statute to require plenary suit, as did the *Kerosene* court. But the court went further and added that under the facts of the case the goods were all in the actual possession of the third party claimant and this factor as well required plenary adjudication.[132] It seems the court discussed possession only because the trustee also relied on section 25 of the 1867 Act. That section provided, in relevant part, for sale and retention of proceeds for later distribution by the trustee of disputed assets which were in the trustee's *actual possession or*

128. *See* text accompanying notes 122-23 *supra.*

129. The appellate provisions of the Act, contained in section 8, were apparently unclear as to the rights of appeal from summary proceedings.

130. 14 Fed. Cas. 760 (1871).

131. *Id.* at 762.

132. *Id.* at 763.

claimed by the trustee. The court repeatedly emphasized that neither the trustee nor the debtor had possession of the goods at the time bankruptcy was filed. The court reasoned that the phrase, "or claimed by the trustee" could not mean what it seemed to,[133] for if it did, a bankruptcy court could sell every piece of property owned by anyone in its district merely upon a claim by the trustee. Thus, as a result of the argument surrounding section 25 of the 1867 Act, possession became a factor in the determination of the necessity for plenary suit. Although the possession factor was not immediately relied on as the sole criteria, courts continued to discuss it in subsequent cases.

The earliest Supreme Court discussion concerning the determination of summary jurisdiction appeared in *Smith v. Mason.*[134] The debtor and a third party each asserted ownership of a fund held by a bank. The debtor sought determination of rights in the fund by the bankruptcy court, whereupon the third party objected to the bankruptcy court's jurisdiction to decide the matter. The jurisdiction issue was appealed to the Supreme Court which cited the first section of the 1867 Bankruptcy Act as well as the second section which qualified it. The Court found that the facts of the case fell within the language of the second section. Prior to an express holding on jurisdiction, however, the Court engaged in a discussion of possession, pointing out that the debtor did not have possession of the fund at the time he filed his bankruptcy petition, and that the third party had made an apparently valid claim to the fund. No explanation or citation was offered to indicate why possession was important to the Court. It is submitted that the possession discussion in *Mason* was prompted by the decision in *Knight.* In this respect, it is noteworthy that Justice Clifford, who wrote the *Mason* decision, had also authored the *Knight* opinion. The idea that summary proceedings did not offer full due process protections and procedures was common to both opinions. At any rate, immediately after its discussion of possession, the *Mason* Court held that no summary jurisdiction existed, but did so without clearly specifying whether it decided the case on the basis of the second section of the 1867 Act, or the absence of possession by the debtor, or both.

The case of *Marshall v. Knox,*[135] decided a year and a half later by the Supreme Court, offers some elaboration. A sheriff, upon re-

133. The court later held that this language referred to property in the actual possession of the debtor or the debtor's agent, but which was "claimed by the trustee." *Id.* at 763-64.

134. 81 U.S. (14 Wall.) 419 (1871).

135. 83 U.S. (16 Wall.) 551 (1872).

quest of a lessor, seized goods of the debtor to secure the debtor's payment of back rent. Subsequently, the debtor filed for bankruptcy and the bankruptcy court attempted to determine the rights to the goods while they were in the sheriff's possession. The lessor objected to the court's jurisdiction to make such a determination, claiming the sheriff held the property as agent for the lessor. In passing on the existence of summary jurisdiction under these facts, the Court first cited the second section of the 1867 bankruptcy statute. It then noted that at the time the debtor filed his bankruptcy petition, the sheriff had taken possession of the goods and was holding them for the lessor. Thereafter, the Court referred back to the second section of the Act and held that the facts before the Court fell within that section's description of controversies which require plenary adjudication. The *Knox* court also suggested that summary adjudication would not offer "due process of law." It would seem the existence of jurisdiction was a function of statutory construction rather than possession. It is true, however that in both *Mason* and *Knox* the court discussed possession, noted that the debtor did not have possession, and ultimately held that summary jurisdiction did not exist.

By this time, possession had become inextricably tied to a determination of summary jurisdiction. Although a new Bankruptcy Act was passed in 1898,[136] it continued the distinction of the old section 1 controversies arising in "proceedings in bankruptcy" and old section 2 controversies arising "at law or in equity" in the new sections 2 and 23 respectively. In 1905 the Supreme Court held that the 1898 Act was framed in recognition of the principles of the old cases discussed above, and that the Court's decisions concerning the distinction between proceedings in bankruptcy and plenary suits at law or equity were applicable to the new Act.[137] The Court went on to say: "It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the [trustee] by summary proceedings."[138]

Prior to that decision, but after the enactment of the 1898 Act, the Supreme Court had decided the case of *White v. Schloerb,*[139] which involved a debtor who had actual possession of certain property at the time he filed his petition in bankruptcy. A creditor had wrongfully taken possession of the property, and the trustee sought

136. Act July 1, 1898, ch. 541, 30 Stat. 544.

137. First Nat'l Bank v. Chicago Title & Trust Co., 198 U.S. 280 (1905).

138. *Id.* at 289.

139. 178 U.S. 542 (1900).

to have the bankruptcy court order its return. The creditor claimed the bankruptcy court lacked jurisdiction over the dispute. The Supreme Court, however, held that since the trustee, and thereby the bankruptcy court, was originally in possession of the property and since the only issue before the bankruptcy court was a right to possession of the property pending future determination of ownership rights, the bankruptcy court had summary jurisdiction to order the creditor to return the property to the bankrupt's estate. Although section 2 of the new Bankruptcy Act was briefly alluded to, the holding was not clearly based upon an interpretation of statutory language.

Authorities have implied that this case was the origin of the possession test for the existence of summary jurisdiction.[140] If so, it must be noted that only possession, and not ownership of the property was at issue in the bankruptcy court. Given the fact that the Supreme Court found possession was wrongfully taken from the bankruptcy court, it is understandable that the Court found that the bankruptcy court's initial possession was sufficient to confer jurisdiction upon that court to take back the property. Indeed any court must have the power to protect its own assets. This limited holding, based on the original possession of the bankruptcy court, was not intended by the *White* court to be a comprehensive construction of sections 2 and 23, the jurisdictional provisions of the 1898 Act. It hardly seems likely that the *White* court would have wanted its decision to shape the boundaries of summary jurisdiction in cases where more than possession was sought to be resolved. At the very least, *White* does not present any persuasive rationale for adhering to a strict possession based jurisdictional test to be used in the myriad of cases and factual circumstances which arise in bankruptcy.

If the possession test is really rooted in cases decided before *White,* even stronger grounds exist for not viewing possession as the only desirable jurisdictional test today. First, the possession test grew out of cases in which the courts clearly believed that summary determination would not offer full due process, including in some instances, the right of appeal. Given this view, it is only natural that these courts were reluctant to allow a summary determination of third party rights in property claimed by the bankrupt. The possession test afforded at least some restriction on the bankruptcy courts. Summary proceedings today do offer full due process protections and opportunity to be heard,[141] and appeals from summary determi-

140. *See* 2 COLLIER ¶ 23.04 n.14 and accompanying text.

141. *See* notes 13-15 *supra* and accompanying text.

nations are permissable.

Second, the possession test was born in a section of an old bankruptcy statute which no longer exists. If section 25 of the 1867 Act had not been argued in *Knight,* perhaps courts would have continued to rely on the actual language of the jurisdictional sections rather than a simplified possession test to determine if jurisdiction existed in a particular case.

This discussion should not be interpreted as suggesting that the possession test is entirely incorrect or even undesirable. It has been used for too long and more importantly, it has worked for too long to be completely uprooted. It is important, however, to recognize that the possession test is not so fundamentally rooted in any clear purpose of any bankruptcy act that it must be followed exclusively. Furthermore, it is suggested that any departure from a strict possession test would not be a departure from a well reasoned or purposefully developed doctrine which was intended to serve as the determinative criteria for establishing the scope of summary jurisdiction for all bankruptcy cases.

B. *Comparison of Chapters X and XI*

Apart from the historical analysis of the roots of the possession test, it is interesting to note that some courts have made use of language in section 111 of chapter X,[142] which is identical to that of section 311 of chapter XI,[143] to justify enlarged jurisdiction in chapter X proceedings.[144] In *First National Bank v. Lake,*[145] the court, citing section 111, held that a chapter X court's summary jurisdiction extended over the debtor's property which was in the possession of a creditor at the time of reorganization filing to serve as collateral

142. 11 U.S.C. § 511 (1970).

143. *Id.* § 711.

144. Language substantially identical to that of section 311 is also found in section 77(a) (railroad reorganizations), section 411 of chapter XII (real property arrangements by persons other than corporations), and section 611 of chapter XIII (wage earner's plans). There are relatively few cases which construe the language of these sections in such a way as to shed any light on the topic of this comment. It is believed that for the purpose of understanding how section 311 language might be construed, textual reference to the many cases arising in chapter X proceedings is sufficient.

The "enlarged" jurisdiction in chapter X proceedings has also been justified without citation to the language of section 111. *See, e.g., In re* Atlas Sewing Centers, Inc., 384 F.2d 66 (5th Cir. 1967); Pettit v. Olean Indus., Inc., 266 F.2d 833 (2d Cir. 1959); *In re* Cuyahoga Fin. Co., 136 F.2d 18 (6th Cir. 1943); *In re* Standard Gas & Elec. Co., 139 F.2d 149 (3d Cir. 1943), *cert. denied,* 321 U.S. 796 (1944); Warder v. Brady, 115 F.2d 89 (4th Cir. 1940). *But see* Duda v. Sterling Mfg. Co., 178 F.2d 428 (8th Cir. 1949); *In re* Mountain Forrest Fur Farms, 122 F.2d 232 (6th Cir. 1941); *In re* Prudence Bonds Corp., 75 F.2d 262 (2d Cir. 1935).

145. 199 F.2d 524, 527 (4th Cir.), *cert. denied,* 344 U.S. 914 (1952).

for the debtor's obligations. *In re Muntz TV*[146] cited both the *Lake* case and section 111 for the same proposition. Collier's statement of the "enlarged" jurisdiction of chapter X courts is also partly premised on the language of section 111.[147]

Perhaps of greater significance than the mere citation of section 111 is the fact that both Collier and the courts which have construed section 111 (and other provisions of chapter X) have concluded that summary jurisdiction is enlarged in chapter X proceedings based in part on the purposes of that chapter. They have indicated that since chapter X plans must include provisions affecting secured creditors,[148] it is necessary for the bankruptcy court to have jurisdiction over property owned by the debtor but which is in the possession of a creditor who asserts a lien upon it. Thus, it was stated in *Warder v. Brady:*[149]

> The formulation of a plan of reorganization contemplates a readjustment of secured as well as unsecured debts, and so the summary power of the court extends to all of the debtor's property that can be affected by a plan, whether or not the property is in his possession.[150]

In *Lake* where it was acknowledged that possession of the debtor's property by a creditor who asserted a lien thereon did not deprive the bankruptcy court of jurisdiction, it was stated that: "The purpose of Chapter X is to force secured creditors to come into the plan of reorganization worked out in the reorganization court . . . ."[151]

C. *Purpose of Chapter XI*

This type of "purpose" analysis seems equally appropriate in evaluating the desirability of enlarged jurisdiction in chapter XI proceedings. It is true that chapter XI does not require, or even permit secured creditors' rights to be affected by the plan of arrangement and thus can be distinguished from the chapter X cases, but chapter XI nonetheless has certain acknowledged purposes which would be furthered through an expansion of summary jurisdiction.

The Supreme Court has stated the purpose of chapter XI to be, "to provide a quick and economical means of facilitating simple

146. 229 F.2d 228, 231 (7th Cir. 1956).

147. *See* 6 COLLIER ¶ 3.03 as to the effect of section 111, and ¶ 3.05 as to the enlarged jurisdiction of chapter X courts.

148. Bankruptcy Act § 216 (1), 11 U.S.C. § 616(1) (1970).

149. 115 F.2d 89 (4th Cir. 1940).

150. *Id.* at 95.

151. 199 F.2d at 528.

compositions among general creditors . . . ."[152] Other courts have emphasized that "the purpose of Chapter XI is to provide a rapid, economical method for rearranging or scaling down . . . unsecured debts . . . ."[153] and that Congress intended, by its enactment of this chapter, to provide a means for the preservation of a going business which otherwise, because of overwhelming debt burden, would disappear from the economic scene.[154] Furthermore, it has been argued that "the primary advantage of a separate chapter for arrangements with the debtor's unsecured creditors is economy [and a] plan of arrangement permits the rescue of a financially troubled business on simpler terms."[155]

It is clear that chapter XI plans were not intended to provide for dealing with secured creditors. To the extent that an enlarged jurisdictional scope, based on ownership, would permit such an effect on secured creditors' rights in summary proceedings, it would be inconsistent with the purposes of chapter XI. However, many factual circumstances are conceivable in which ownership-based summary jurisdiction might exist over property not involving the claims of secured creditors.[156] An argument can be made for allowing a bankruptcy court to exercise its summary jurisdiction over the property held by a creditor as a pledge. The summary jurisdiction would extend only to answering the question of whether there is a valid "security interest." Such a determination would not impair the debt or the security of the alleged "secured creditor" since his status is subject to question.[157]

Apart from the secured/unsecured creditor distinction, another inescapably clear purpose of chapter XI, as gleaned from the preceding quotations, is to offer a quick and economical method of keeping an ongoing business in operation.[158] The advantages of maintaining a business in operation are manifest. The chances of maintaining the viability of an ongoing business in hopes of increas-

152. SEC v. American Trailer Rentals Co., 379 U.S. 594, 606 (1965).

153. *In re* Peoples Loan and Inv. Co., 410 F.2d 851, 856 (8th Cir. 1969).

154. Meyer v. C.I.R., 383 F.2d 883, 890 (8th Cir. 1967).

155. Drake, *The Judges' Bankruptcy Bill and the Commission's Bill: A Question of Access to the Judicial Process*, 26 MERCER L. REV. 1009, 1040 (1975).

156. *See, e.g., In re* Fontainebleau Hotel Corp., 508 F.2d 1056 (5th Cir. 1975); Bayview Estates Inc. v. Bayview Estates Mobile Homeowners Ass'n, 508 F.2d 405 (6th Cir. 1974); *In re* Barasch, 439 F.2d 1393 (9th Cir. 1971); Loyd v. Stewart & Nuss Inc., 327 F.2d 642 (9th Cir. 1964); Ric-Wil, Inc. v. First Pa. Banking & Trust Co., 352 F. Supp. 782 (E.D. Pa. 1973).

157. Note that a chapter XI court may summarily determine whether a secured creditor has been affected by an arrangement. Bankruptcy Act of 1898 § 308, 11 U.S.C. § 708 (1970).

158. A chapter XI proceeding can also be initiated by an individual. 11 U.S.C. §§ 22, 702 (1970). Many of the reasons which make it desirable to keep ongoing businesses in operation also apply to keeping solvent individuals solvent.

ing its financial strength are substantially increased when the time and expense required to complete an arrangement are decreased. Considerable time and expense would be saved if all of a debtor's controversy could be settled in the bankruptcy court's summary proceedings without the necessity of separate plenary actions. Therefore, a limited expansion in the scope of the bankruptcy court's summary jurisdiction would be in the furtherance of the previously stated goal of chapter XI, namely, an easy means of facilitating economic recovery.[159]

D. *Other Considerations*

A further reason for some departure from a strict possession test is the difficulty encountered in applying such a test to intangible property of the debtor.[160] In cases of intangibles, some courts have been forced to use the legal fiction of constructive possession which has begun to increasingly appear as a recognition that some property interest other than possession is justification for the courts' exercise of summary jurisdiction.[161] Thus, for example, in *In re Rubin*[162] the debtor in a chapter XI proceeding was in the baked goods business and employed driver-salesmen who kept appointed delivery routes and retail vendors. The bankruptcy court attempted to prohibit the driver-salesmen from individually servicing the retail vendors, believing the routes to be the property of the debtor. The court, on appeal, indicated that jurisdiction would be a function of constructive possession and that "[i]n the case of intangibles, such as these routes, constructive possession usually follows ownership."[163]

In *Walker Manufacturing Co. v. Bloomberg*,[164] where the disputed "property" was a secret industrial process, although the court recognized that "possession" was the accepted test of jurisdiction,

159. The Bankruptcy Act § 311, 11 U.S.C. § 711 (1970), permits the bankruptcy court to have exclusive jurisdiction over the debtor and his property, wherever located when dealing with chapter XI arrangements. Although similar logic could be extended to non-arrangement proceedings, there is no equivalent of § 311 in chapters I to VII of the Bankruptcy Act pertaining to straight bankruptcy proceedings. The question of an expanded ownership-based jurisdiction in such straight bankruptcy proceedings is not an open area of the law. First Nat'l Bank v. Chicago Title & Trust Co., 198 U.S. 280 (1905).

160. *See generally* 2 COLLIER ¶ 23.05[4] at 486-92.

161. *See In re* Schokbeton Indus., 449 F.2d 321 (5th Cir. 1971) (franchise or lease agreements); *In re* Rosenbaum Grain Corp., 13 F. Supp. 601 (N.D. Ill. 1935)(trading rights on an exchange).

162. 378 F.2d 104 (3d Cir. 1967).

163. *Id.* at 109, *citing* In re Marsters, 101 F.2d 365 (7th Cir. 1938), *cert. denied sub nom.* Herman v. Henley, 306 U.S. 663 (1939).

164. 298 F.2d 688 (1st Cir. 1962).

it confessed that this test was not well suited to cases involving intangibles. The court ultimately decided, "[i]n essence, the existence or non-existence of summary jurisdiction reduces itself to the question of whether the . . . 'process . . . was owned by and under the *exclusive* control of [the debtor] . . . .' "[165]

Indeed, it should be noticed that the accepted principle of constructive possession often has nothing whatever to do with real possession, but is merely a semantic link with the originally recognized jurisdictional basis of actual possession. It is submitted that the existence of a constructive possession doctrine itself is actually a manifestation of courts' convictions that a debtor may have a sufficient interest in property, entirely apart from possession, to justify adjudication of controversies over it in a bankruptcy court.

The unsacred nature of the possession test, along with the thesis that a more basic debtor interest is what presently underlies summary jurisdiction, is supported by the fact that wrongful possession by the debtor is not recognized as grounds for the existence of summary jurisdiction.[166]

E. *A New Test*

If summary jurisdiction is to be expanded,[167] there is need for a more precise definition of the intended scope of the enlargement than is offered by existing authority. Collier speaks of ownership as an alternative to "possession" as a determining factor,[168] while courts generally speak of title. Section 311, upon which the language of both "ownership" and "title" are based, refers to "property of the debtor." These general terms may be sufficient to contrast with "possession," but they do not sufficiently define to what extent jurisdiction will be expanded. Perhaps this can best be done by the courts on a case by case basis. Nonetheless, a brief attempt to begin that process is offered here.

The courts have sought a link between the bankrupt and the property in controversy when developing a criteria for the establishment of summary jurisdiction. This connection has been necessary

165. *Id.* at 693 (original emphasis).

166. Bradley v. St. Louis Terminal Warehouse Co., 189 F.2d 818 (8th Cir. 1951).

167. Any "enlargement" of existing jurisdiction might be merely a formalization of a process which is already well under way. One commentator has suggested, at least in regard to the issuance of injunctions against creditors, that the bankruptcy courts have and will find whatever jurisdiction is required to achieve a desirable result on the particular facts of the case. *See* Festersen, *Equitable Powers in Bankruptcy Rehabilitations: Protection of the Debtor and the Doomsday Principle*, 46 AM. BANKR. L.J. 311 (1972).

168. Collier does qualify his position by stating that the ownership must be of a beneficial nature, thus ruling out the bare legal title of a fiduciary. 8 COLLIER ¶ 3.02 n.2 at 157.

to insure that uninvolved third parties will not lose valuable property rights without due process. A plenary action would afford them the requisite due process. Possession was something the courts could identify as a connection between the property and the bankrupt. It is suggested that the gravamen of the plethora of cases ostensibly requiring possession is really a requirement for a "sufficient link." Thus, an expanded jurisdictional test should have at its foundation the concept of a "sufficient link," though it must be limited so as not to supersede the secured creditor limitation previously discussed.[169] Such a test should also conform to a reasonable construction of the "property of the debtor" language of section 311.

It is believed the above mentioned foundation requirements are met if the bankruptcy court is not called upon to impair the rights of a secured creditor,[170] and if a debtor has a substantial and bona fide, not merely colorable, proprietary interest in the property which is reasonably necessary to the sucsessful formulation, confirmation, and performance of a plan of arrangement and the subject of a controversy.[171] The debtor would not need to claim fee simple ownership or record title, but merely some valuable and substantial interest in the subject property. But the debtor's claim must be bona fide and not merely colorable.[172]

It should be noted that this proposed "substantial proprietary interest" test is not qualified, as is Collier's "ownership" test, by any rule that the "substantial proprietary interest" must be undisputed by an adverse claim. It appears the only purpose of such a qualification would be to insure that the debtor could not bring controversies into the bankruptcy court which did not actually involve the "property of the debtor." The existence of an "adverse claim" is what frequently creates the controversy and renders it beyond the bankruptcy courts' summary jurisdiction. The new test incorporates this same function by requiring that the debtor have both a bona fide and substantial interest in the controversial prop-

169. *See* Part IV, C *supra*.

170. Note that adjudications can be made which, practically speaking, affect secured creditors, but which neither impair their security nor reduce the debt owed to them. *See In re* Yale Express Sys., Inc., 370 F.2d 433 (2d Cir. 1966). Also, as pointed out in the text following note 156 *supra*, the mere adjudication of whether a creditor was really "secured" by passing upon the validity of his security interest need not be considered outside the scope of the limited chapter XI purposes. For a discussion of the proposition that chapter XI courts may deal with secured creditors and still be within the scope of jurisdiction intended by Congress, see Festersen, *supra* note 167, at 324.

171. For general support of such an enlarged test of jurisdiction, *see* Drake, *supra* note 155, at 1011-14.

172. *See generally* Harrison v. Chamberlin, 271 U.S. 191 (1926); Thompson v. Duchner, 214 F.2d 923 (9th Cir. 1954).

erty. Such a "substantial proprietary interest" test would be a plausible construction of the "property of the debtor" language of section 311, and it would be in furtherance of the previously stated purpose of chapter XI. Such a test would provide the requisite "sufficient link" between the debtor and the third party claimants. Moreover, it would be more specific than merely "ownership" or "property of the debtor" while not being rooted to the archaic concept of "title", which has been often criticized as a determiner of important legal consequences.[173]

Further elaboration and illustration of the operation of such a "substantial proprietary interest" test may be provided by examination of a few of the cases which have discussed the ownership/possession issue. In the "telephone number" cases, typified by *Slenderella Systems v. Pacific Telephone & Telegraph Co.*,[174] where the controversy was whether a telephone company could change the numbers of a debtor in a chapter XI proceeding, a threshold question was whether the phone numbers were property. Although the *Slenderella* court held they were not for purposes of section 311, other courts have disagreed.[175]

Assuming such telephone numbers are property, the debtor's interest in them would arise out of contract and a right to use them. A right of use is not title or ownership and so would not be within the jurisdictional expansion suggested by Collier or by some courts. A right of use could be a "substantial proprietary interest," however, depending on the particular equities of a given case, including the necessity of retaining the phone numbers for the successful completion of a chapter XI arrangement. A bankruptcy court could, therefore take jurisdiction over this controversy. The contractual right of the debtor to use a particular number constitutes property, although intangible.

The *Slenderella* view, which considers the debtor's property rights in the contract to be the disputed property, leads to a dilemma—while a bankruptcy court might exercise jurisdiction over the debtor's contract rights, as his property, it could not exercise jurisdiction over the phone company's contract rights, in which, technically, the debtor would have no interest.

A sounder approach when dealing with contract rights would be

173. *See* Comment, *supra* note 17, at 1407 and cases cited therein.

174. 286 F.2d 488 (2d Cir. 1961) discussed in text accompanying notes 48-54 *supra*.

175. *E.g.*, South Cent. Bell Tel. Co. v. Simon, 508 F.2d 1056 (5th Cir. 1975) (telephone numbers were in the possession of the debtor); Georgia Power Co. v. Security Inv. Properties, Inc., 406 F. Supp. 628, 635 (N.D. Ga. 1975) ("the right to continued electrical service is an intangible form of property in the possession of the debtor. . . .").

to consider the contract itself as the property subject to dispute, and then apply the "substantial proprietary interest" test to determine if the debtor had a bona fide interest in the contract. Again, the particular equities of the case would color the decision.

In *Loyd v. Stewart & Nuss, Inc.*,[176] where the debtor and a creditor made ownership claims to money being held in a fund by a neutral third party, it would appear that under a "substantial proprietary interest" test summary jurisdiction would have existed. There is a question as to whether the fund was property "reasonably necessary to the successful formulation, confirmation, and performance of a plan of arrangement." This is because the claim, indeed the fund, did not come into existence until over a year after the confirmation of the debtor's plan of arrangement. Whether the fund, and proper distribution of it, was a matter "reasonably necessary" to the plan or merely a controversy which happened to arise during a period when the debtor was working out his plan, would be an issue to be decided by the bankruptcy court in its discretion. The bankruptcy court, having a working knowledge of the debtor's affairs and its plan, would be in a good position to make such a decision.

The determination of jurisdiction over a specifically segregated fund leads to the more difficult problem of determining jurisdiction over non-segregated funds, i.e., general debts owed to the debtor or his accounts receivable. Traditionally, such controversies have been outside the bankruptcy court's jurisdiction.[177] Under a "substantial proprietary interest" test, jurisdiction could be found if the actual unsegregated money held by the debtor was deemed the "property in controversy," or if the contract which gave rise to the debt was deemed such property. The initial question is whether the debt or account is "property" within the meaning of "property of the debtor" language of section 311. Either construction suggested above would be arguably within this language. However, whether the bankruptcy court has jurisdiction should more properly turn upon a determination by the bankruptcy court, of whether proceeds of the debt or account are "reasonably necessary to the successful formulation, confirmation, and performance of a plan of arrangement." Such a decision would be within the court's sound discretion and based upon its working knowledge of the debtor's affairs.

It should be noted that under the ownership tests proposed by Collier and the courts,[178] there is a critical date on which ownership

176. 327 F.2d 642 (9th Cir. 1964) discussed in text accompanying notes 55-60 *supra*.

177. *See* Willyerd v. Buildex Co., 463 F.2d 996 (6th Cir. 1972) and cases cited therein.

178. *See* 8 COLLIER ¶ 3.02 n.2 at 157.

is determined: the date of filing the chapter XI petition. If the debtor does not have ownership at that time, no summary jurisdiction based on ownership would exist.[179] Commentators have questioned why such a crucial matter is determined in so many cases merely by the date the petition was filed.[180]

Property that is reasonably necessary to the debtor's plan should be within the jurisdiction of the bankruptcy court irrespective of when the chapter XI proceedings were filed. This should hold true whether it is the debtor's interest in the property or the property itself which comes into existence subsequent to the date of filing. This becomes ever more plausible when the property, or the debtor's interest comes into existence after filing but before a plan is formulated. The "reasonably necessary" rule seems to make more sense than the filing date cut-off, given the fact that one of the purposes of chapter XI is to allow the debtor to continue the operation of his business under court supervision.[181]

In *Kapelus v. A Joint Venture*,[182] the debtor ostensibly transferred a parcel of realty to two creditors but retained an option to repurchase for an amount far below the value of the property. The bankruptcy court in that case was of the opinion that the transfer-repurchase agreement was, in substance, a mortgage, and therefore was property of the debtor subject to the summary jurisdiction of the bankruptcy court.

Although in *Kapelus* the debtor was in possession of the property, it is interesting to speculate as to how other tests might apply if the debtor was not in possession. Under a "title" test, no jurisdiction would exist since the debtor did not have title. Collier's "ownership" test would not be applicable since the creditors did have a deed for the property and did have a valid claim against the debtor which could have been consideration for the transfer. Thus, there was at least an "adverse claim of ownership" by the creditors which

179. This "at the time of filing" rule is apparently a mirror image of the rule of the possession test which is based on the concept that at the time of filing all the debtor's interest in his property passes to the trustee and is therefore in *custodia legis* and that the court may always protect its own possession. Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1940); *In re* Eakin, 154 F.2d 717, 719 (2d Cir. 1946). But note that the substantial proprietary interest test is not based on any concept of possession and so the "at the time of filing" rule need not apply.

180. *See* Broude, *Jurisdiction and Venue Under the Bankruptcy Act of 1973*, 48 AM. BANKR. L.J. 231, 234 (1974).

181. *See* United States Metal Prods. Co. v. United States, 302 F. Supp. 1263 (E.D.N.Y. 1969). In support of the bankruptcy court's jurisdiction over property in which the debtor acquires an interest after filing, but which is reasonably related to the debtor's plan see Festersen, *supra* note 167, at 347.

182. 377 F.2d 815 (9th Cir. 1967).

would defeat summary jurisdiction.[183] Even if the creditors admitted that although their deed was for the entire parcel, their interest in the land was only for an amount equal to their claims against the debtor, this would result in the debtor having undisputed ownership of only a portion of the realty—perhaps an undetermined physical amount of acreage or even an undivided interest in the whole parcel. Neither Collier nor the courts which have discussed an "ownership" theory specifically address the question of how much ownership is sufficient to confer jurisdiction over the whole property. Under a "substantial proprietary interest" test, it would be a simple matter to determine, under the facts of *Kapelus* at least, that the debtor did have such an interest in the property.

Another illustrative case is *In re Copeland*,[184] where the debtor had pledged stock to secure his obligation as a guarantor on a note. That case suggests a potential problem of bankruptcy courts impairing the rights of secured creditors which is clearly beyond the intended scope of chapter XI. However, in *Copeland* the debtor did not seek to force a composition plan on a secured creditor, but rather sought to have the bankruptcy court determine whether the creditor had an attached and perfected security interest at all. In addition, the debtor sought an order from the bankruptcy court directing the escrow agent holding the stock to turn it over to the bankruptcy court. Such an order and determination seems to be within the intended scope of chapter XI.[185] Thus, where the bankruptcy court does not attempt to impair a creditor's security or reduce the debt as part of the plan of arrangement, the mere fact that the bankruptcy court proposes to enter orders dealing with secured creditors would not put such orders outside the real purposes of chapter XI or the "substantial proprietary interest" test.

Although it has been suggested elsewhere[186] that an expansion of the current jurisdictional standard would not be desirable since it would create uncertainty and hence promote litigation, it seems that there is no shortage of uncertainty today. Furthermore, an expansion of jurisdiction based upon "substantial proprietary interest" criteria would be sufficiently broad to eliminate much of the present litigation over the existence of constructive possession and

183. Collier's position is that for an adverse claim of ownership to defeat jurisdiction, it must be made by one in possession of the property. 8 COLLIER ¶ 3.02 (text preceding n.13 at 162-63). The courts have not picked up this point in their application of Collier's rule. For discussion of this subject see notes 82 and 101 *supra*.

184. 391 F. Supp. 134 (D. Del. 1975).

185. *See* text accompanying notes 157 and 170 *supra*.

186. Comment, *supra* note 17, at 1408.

"substantial adverse claims."[187] Such an expansion could also be worked within the existing Act.

V. PROPOSED LEGISLATION

On July 24, 1970, the Commission on the Bankruptcy Laws of the United States was created to study the nation's existing bankruptcy laws and to recommend improvements to effect a more just and efficient bankruptcy procedure.[188] On July 1, 1973, the Commission filed its report[189] which consists of two principal parts. Part I is an analysis and evaluation of the present system of bankruptcy administration and the Commission's textual recommendations for changes therein. Part II consists of actual proposed statutory changes comprising a new "Bankruptcy Act of 1973," along with official comments modeled in the form of such acts as the Uniform Commercial Code.

During the formulation of the Commission's proposals, the National Conference of Bankruptcy Judges created a committee to monitor the work of the Commission, and to make recommendations concerning the Commission's final product. The committee, while agreeing in many respects with provisions of the Commission's bill, differed in its recommendations on other important aspects of the proposed legislation. In view of the number of important differences, the Conference committee decided to draft its own bill.

Both the Commission and Conference bills were introduced into the 93rd Congress,[190] and reintroduced into the 94th Congress.[191] The Senate Judiciary Committee began hearings on both reintroduced bills on February 19, 1975.[192] The House Judiciary Committee began hearings on both bills on May 7, 1975.[193] Representatives of both the Commission and the Conference have been called to

187. *Id.* at 1408 n.70.

188. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. The term was extended on two occasions: Act of March 10, 1972, Pub. L. No. 92-251, 86 Stat. 63; Act of July 1, 1973, Pub. L. No. 93-56, 87 Stat. 140.

189. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Parts 1&2 (1973) [hereinafter cited as COMMISSION REPORT].

190. The Commission bill was introduced as H.R. 10792 and S. 2565, 93d Cong., 1st Sess. (1973). The Conference bill was introduced as H.R. 16643 and S. 4046, 93d Cong., 2d Sess. (1974).

191. The Commission bill was reintroduced as H.R. 31 and S. 235, 94th Cong., 1st Sess. (1975). The Conference bill was reintroduced as H.R. 32 and S. 236, 94th Cong., 1st Sess. (1975).

192. 1 CCH CONGRESSIONAL INDEX 94th Cong. at 2503.

193. 2 CCH CONGRESSIONAL INDEX 94th Cong. at 5051.

testify .[194] However, as of July 1976, neither bill had been reported out of committee.[195]

Although two bills are thus pending in the Congress, the jurisdictional sections of both are identical.[196] Thus, reference to the Commission bill, which, unlike the Conference bill, is supplemented with an extensive report[197] discussing the justification for its statutory recommendations, will be sufficient to explore the effect of pending legislation on the bankruptcy courts' jurisdiction.

It should be pointed out, however, that the Commission bill would consolidate chapters X, XI, and XII into one new chapter (chapter VII).[198] The Conference bill would consolidate only chapters XI and XII (into chapter VIII) maintaining a separate chapter

194. Drake, *supra* note 155, at 1010. *See Hearings on S. 235 and 236 Before the Subcom. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975).

195. No indication of further Congressional action was found as of July, 1976 in CCH CONGRESSIONAL INDEX.

196. Although the sections describing the scope of jurisdiction of bankruptcy courts are identical in both bills, the Commission bill calls for the establishment of a United States Bankruptcy Administration, a full-fledged agency intended to perform administrative tasks such as: (1) the receipt and handling of voluntary petitions; (2) the issuance of notices to creditors; (3) the allowance and disallowance of exemptions; (4) the allowance and disallowance of claims; (5) the granting of discharges when no objections are filed; (6) the approval of the rejection of executory contracts of debtors; (7) the determination of priority of distribution of proceeds; and (8) the ordering of the payment of dividends. COMMISSION REPORT, *supra* note 189, part 1 at 117-21. Although no clear statement of the scope of the agency's power is offered in the Commission's bill, as opposed to the Commission's report, it appears that the statement of bankruptcy court's jurisdiction in proposed section 2-201 sets the external boundaries beyond which the agency may not tread.

Still, it has been suggested that this agency/court dichotomy would create a jurisdictional split between the USBA and the bankruptcy courts, much as there presently exists between summary and plenary adjudication. Lee, *A Critical Comparison of the Commission Bill and the Judges' Bill for the Amendment of the Bankruptcy Act*, 49 AM. BANKR. L.J. 1, 13 (1975). But it has elsewhere been suggested that since the bankruptcy court will always have jurisdiction to hear the dispute, even if it be on appeal, no split really exists. Bull, *The Competing Proposals for a New Bankruptcy Act: Some Substantive Differences in Procedure*, 52 J. URBAN L. 929, 934-35 (1975). Although Bull has indicated that, with the exception of disputed involuntary petitions, all controversies reach bankruptcy court on appeal from the Administrator's determination, such is not really apparent from the Commission's bill and report. COMMISSION REPORT, *supra* note 189. Rather it would seem that at least controversies which manifestly involve actual disputes between parties, and thus on their face call for judicial and not administrative disposition, are intended to be heard originally by the bankruptcy court. *Id.*, part 2 at 30. Bull's position appears to be a function of a misreading of comment one to proposed section 2-201 which states merely that the filing of a voluntary petition does not itself create an issue for the court unless the validity of the petition is first challenged with the Administrator. *Id.* at 31-32.

197. COMMISSION REPORT, *supra* note 189.

198. *Id.*, part 1, at 23. For a discussion of the merits of such consolidation, *see* Drake, *supra* note 155, at 1037.

for reorganizations (chapter VII).[199] Nonetheless, the common jurisdictional section would apply to all bankruptcy proceedings including reorganizations, arrangements, and ordinary bankruptcies as well.[200]

Prior to discussing the jurisdictional section itself, it would be appropriate to summarize the considerations of the Commission which shaped its statutory proposal. In its report accompanying the proposed new act, the Commission specifically addressed the issue of bankruptcy jurisdiction.[201] The report first lists the situations where bankruptcy courts may currently exercise their summary jurisdiction. It then points out that other controversies must be resolved in a non-bankruptcy court although they involve an estate undergoing administration pursuant to the Bankruptcy Act and may seriously affect the rights of the debtor and creditors in the case.

The report goes on to discuss several objectionable results of the present division of jurisdiction. The first is delay caused not only by the slower pace of proceedings in nonbankruptcy courts but also by those courts' more crowded dockets. It is emphasized that delay is critical in bankruptcy cases, particularly in business debtor rehabilitation proceedings.

The division of jurisdiction is an extra expense entailed by the debtor in litigating outside the bankruptcy court. The report also recognizes that in some cases conducting litigation in a district bankruptcy court may be an extra expense to an adverse party.

A serious objection voiced by the report regarding the division of jurisdiction is the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding. It is pointed out that contesting the bankruptcy court's jurisdiction, even unsuccessfully, often gives an adversary the advantages of time and bargaining leverage against the trustee. It should also be noted that believing bankruptcy courts are collection-minded, regardless of its truth, may provide further impetus for some to contest jurisdiction.[202]

It is then suggested that a comprehensive grant of jurisdiction to the bankruptcy court would greatly diminish the basis for litigation of jurisdictional issues. The report cites, as a step in the direc-

199. In support of the Conference approach, *see* Weintraub and Crames, *Critique of Chapter VII and Related Sections of the Proposed Bankruptcy Act of 1973*, 48 AM. BANKR. L.J. 1 (1974).

200. COMMISSION REPORT, *supra* note 189, part 1, at 6.

201. *Id.* at 88.

202. *See* note 5 *supra* and accompanying text.

tion of enlarged, comprehensive jurisdiction, the 1970 amendments to the existing Bankruptcy Act,[203] which gave the bankruptcy courts broad and exclusive jurisdiction over the effect of a discharge on particular debts. The report also indicates that no constitutional objection to such a comprehensive jurisdictional grant should exist.[204]

Based on the foregoing considerations, section 2-201 of the proposed Commission bill is a genuinely comprehensive jurisdictional grant.[205] It is important to note that although section 2-201 specifies

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203. Act of Oct. 19, 1970, Pub. L. No. 91-467, 84 Stat. 990, *amending* §§ 2a(12), (14), (15), (17), (38), (58).

204. This conclusion is based not only on the broad language of the Bankruptcy Clause of the Constitution, but also on the fact that very broad jurisdictional grants were not objected to under the Bankruptcy Acts of 1841 and 1867, and that under the present Act virtually any dispute may be heard by the bankruptcy court if the parties consent to such jurisdiction.

205. The section states in full:

Section 2-201. Jurisdiction of the Bankruptcy Courts.

(a) Controversies Arising out of a Case. The jurisdiction of the bankruptcy courts shall extend to the determination of all controversies that arise out of a case commenced under this Act, including without limitation, the following:

(1) the issues arising on a contest of an involuntary petition;

(2) controversies involving property set apart to the debtor as exempt, including the enforceability of claims, whether or not secured, against such property;

(3) controversies arising out of agreements for the redemption of property by the debtor pursuant to this Act from liens securing dischargeable consumer debts;

(4) complaints objecting to the discharge of the debtor, seeking revocation of a discharge, requesting determination of the effect of a discharge, and seeking judgment on a debt excepted from discharge;

(5) controversies involving property of the estate of the debtor without regard to who has possession;

(6) objections to claims, whether secured or not, agains the estate;

(7) actions to avoid payments and transfers of property pursuant to provisions of this Act;

(8) actions to enforce rights of the debtor or creditors pursuant to provisions of this Act; and

(9) all other actions in which the trustee or other official under this Act is a party plaintiff or defendant.

(b) Additional Jurisdiction. The jurisdiction of the bankruptcy courts shall also extend to determination of the issues and dispositions of

(1) a complaint by a foreign trustee, administrator, or representative seeking relief pursuant to section 4-103(b)(3) or (4) in connection with the administration of a debtor's estate in another country;

(2) an application for approval of the appointment of a receiver, a disinterested trustee, a disinterested person selected to perform duties when a trustee is not appointed, additional committees of creditors, or a committee of equity security holders, and the appropriateness of the removal of any such appointee or change in memberships

several situations in which jurisdiction is expressly conferred, including "controversies involving the property of the estate of the debtor without regard to who has possession,"[206] subsection (a)(9) provides a "catch-all" which confers jurisdiction over "all other actions in which the trustee or other official under this Act is a party plaintiff or defendant."[207] The question of what constitutes property of the estate,[208] including when such property must be acquired, is of little practical consequence since jurisdiction will usually exist under subsection (a) in any event. As the official comments to section 2-201 point out,[209] "This section makes a comprehensive grant of jurisdiction to the bankruptcy courts over all varieties of litigable disputes arising out of a case commenced by the filing of a petition under this Act . . . ." Thus, with adoption of section 2-201, the ownership/possession issue would disappear.

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of an appointed committee, as provided for in cases under Chapter VII;

(3) an application for the issuance of certificates of indebtedness with priority over existing liens as provided for in cases under Chapter VII;

(4) any application or complaint filed for the purpose of enforcing the provisions regulating representation of creditors and equity security holders in a case under Chapter VII or VIII, including the recovery of excessive payments for services or the cancellation of obligations therefor;

(5) an application for authority to sell or lease substantially all of the property of the debtor in a case under Chapter VII;

(6) an application for the approval, confirmation, rejection or setting aside of the confirmation of a plan or a modification thereof under Chapter VII or VIII;

(7) an application for allowance of fees and other expenses of administration as provided in the Act;

(8) an application for dismissal of a case under Chapter VII; and

(9) an application for determination of any other issue of law or fact arising in the course of administration of a debtor's estate under this Act and submitted to the court by the administrator, trustee, or other party in interest.

(c) Abstention. Nothing in this section precludes the bankruptcy court from permitting an action, proceeding, or matter within its jurisdiction to be commenced or continued in another court having jurisdiction of the subject matter.

(d) Criminal Cases Excluded; Contempts. The jurisdiction of the bankruptcy courts shall not extend to the trial of persons charged with offenses against the laws of the United States. The bankruptcy courts shall nevertheless have jurisdiction to enforce obedience to their orders by fine or imprisonment or fine and imprisonment and to punish persons for contempts.

For discussion of the entire section see Broude, *supra* note 180.

206. H.R. 31 and S. 235, 94th Cong., 1st Sess. § 2-201(a)(5) (1975).

207. "The term 'official' includes a trustee, receiver, and the administrator." H.R. 31 and S. 235, 94th Cong., 1st Sess. § 1-102 (33) (1975).

208. Property of the estate of the debtor is defined in the Commission's bill. H.R. 31 and S.235, 94th Cong., 1st Sess. § 4-601 (1975).

209. COMMISSION REPORT, *supra* note 189, pt. 2, at 31-32.

VI. SUMMARY

This article has attempted to make the following points: (1) No real conflict between Collier and Remington exists upon the scope of chapter XI jurisdiction; (2) There are no well reasoned or well supported cases which oppose existence of an alternate "ownership" based jurisdictional standard; (3) There is no historical justification for opposing an alternate "ownership" based jurisdictional standard; (4) The purposes of the current chapter XI proceedings support an alternate "ownership" based jurisdictional standard; (5) An "ownership" standard, if widely adopted, needs more specific definition than exists in present case law and secondary authority; (6) A "substantial proprietary interest" test, as described in this comment, might be an acceptable alternate jurisdictional standard; (7) The proposed bankruptcy legislation and accompanying commentary support an enlargement of jurisdiction beyond a strict possession test; (8) The adoption of either of the two bills now in Congress would effect a comprehensive grant of bankruptcy court jurisdiction and eliminate the present ownership/possession issue.