laws cannot be reconciled, the later will repeal the earlier to the extent of allowing school savings plans.[22] In any event, whether the acts be deemed consistent or incompatible, the decision in the instant case appears to be clearly wrong.

Bankruptcy—Reorganization—Jurisdiction and Discretion under Section 77B and Chapter X To Proceed by Summary Process in Collection of Pledged Assets—[Federal].—The debtor assigned and pledged certain accounts receivable to the complaining creditor. In some instances the same accounts were assigned to two or more creditors. Proceedings were then instituted under Section 77B of the Bankruptcy Act. By order of the district court, in a *summary proceeding*,[1] the trustee was directed to notify all debtors whose debts were assigned to pay their indebtedness to the trustee, who was to deduct one and one-half percent for "collection charges" and keep the sums collected in separate accounts to await final disposition. The creditor-pledgee of the accounts receivable objected to the jurisdiction of the trial court to proceed summarily. The Circuit Court of Appeals held that under Section 77B the debtor's uncontested property interest in the accounts receivable was sufficient to give the reorganization court summary jurisdiction. *In re Moulding-Brownell Corp.—National Builders Bank of Chicago v. Schwartz.*[2]

The decision is a recognition of the broadened summary jurisdiction conferred by Section 77B of the Bankruptcy Act.[3] Since in ordinary bankruptcy proceedings, possession by the court is the basis of the court's power over the debtor's property,[4] the assertion of an adverse claim to possession may necessitate a plenary suit[5] to collect the assets of the debtor's estate. In reorganization proceedings, however, the reorganization court is vested by Section 77B (a) with complete and paramount control of the

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tained the identical clause as to school savings. One section of this prior act had been held unconstitutional in Wedesweiler v. Brundage, 297 Ill. 228, 130 N.E. 520 (1921), but this section has been omitted from the amended statute.

[22] Ayres v. City of Chicago, 239 Ill. 237, 247, 87 N.E. 1073, 1076 (1909); City of Decatur v. German, 310 Ill. 591, 142 N.E. 252 (1924); People v. Gould, 345 Ill. 288, 312, 178 N.E. 133, 143 (1931).

[1] "A summary proceeding is one begun by petition and notice of motion or by order to show cause. The court may make its determination upon proof by affidavit or upon testimony at a hearing; upon short notice or *ex parte*. The determination and trial of issues by formal pleadings has no place in a summary proceeding." 2 Gerdes, Corporate Reorganizations § 849 (1936).

[2] 101 F. (2d) 664 (C.C.A. 7th 1939).

[3] 48 Stat. 912 (1934), 11 U.S.C.A. § 207 (1938). The amendment and incorporation of § 77B into Chapter X of the Bankruptcy Act probably does not diminish the summary jurisdiction of the reorganization court for if anything the provisions of Chapter X would seem to extend the court's power.

[4] Wabash Ry. v. Adelbert College, 208 U.S. 38, 53 (1908); Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 433 (1924); Mueller v. Nugent, 184 U.S. 1 (1901); May v. Henderson, 268 U.S. 111 (1925); Harrison v. Chamberlin, 271 U.S. 191 (1926).

[5] "If a proceeding is treated as a suit in equity, with formal pleadings and amendments, and full opportunity for the presentation and cross-examination of witnesses is given at the trial, the proceeding is plenary rather than summary, even though begun by petition and notice of motion or by order to show cause." 2 Gerdes, *op. cit. supra* note 1, at § 849.

"debtor's property wherever located,"[6] and the new test as to the necessity of a plenary suit is whether there is more than a colorable adverse claim to title.[7]

The increased statutory jurisdiction is explained by the difference between the objectives of bankruptcy and reorganization. In bankruptcy the aim is immediate liquidation and distribution, and retention of possession and liquidation by security holders will not defeat this purpose. The theory of a reorganization, however, is that the creditors will ultimately recover a greater proportion of their claims through the rehabilitation and continued operation of the debtor's business. Fair treatment of all the creditors requires that the continuation of the business be not unduly hampered by dissipation of the debtor's property to particular creditors,[8] or by the separate administration of the estate in numerous forums. The effectuation of a successful plan under Section 77B is accomplished by centralizing the reorganization proceedings in a single forum,[9] and vesting the 77B court with control over property in the hands of creditors which is not enjoyed by an ordinary bankruptcy court.[10]

It is true that the right of immediate liquidation sometimes is the essence of the creditor's bargain in taking collateral for his loan.[11] In spite of Section 2 (15) of the Bankruptcy Act,[12] the limited power of the bankruptcy courts to deal with secured creditors has prevented the issuance of summary stay orders in bankruptcy—except in cases where the debtor had possession at the time of bankruptcy or the lien was voidable. In contrast are the reorganization cases in which stays have been ordered even prior to the formulation of a plan.[13] Since the pursuit by each secured creditor of his remedy may jeopardize the success of the entire plan, the plan may include provi-

[6] 48 Stat. 912 (1934), 11 U.S.C.A. § 207 (a) (1938).

[7] See Gerdes, Jurisdiction of the Court in Proceedings under § 77B, 4 Brooklyn L. Rev. 237 (1935).

[8] It is vital to the success of a reorganization that all the debtor's property and all its creditors secured and unsecured be included, particularly as modern corporate financial structures often involve secured obligations. § 77B (b), 48 Stat. 914 (1934), 11 U.S.C.A. § 207 (b) (1938), provides that "the term 'claim' includes debts, securities . . . . liens, or other interests of whatever character." By § 77 (c) (6), 48 Stat. 916 (1934), 11 U.S.C.A. § 207 (c) (6) (1938), the judge "shall determine a reasonable time within which the claims and interests of creditors . . . . may be filed or evidenced, and after which no such claim or interest may be shown." Creditors are thus obliged to come in, or else be excluded from the benefits of the reorganization.

[9] See *In re* Greyling Realty Corp.—Troutman v. Compton, 74 F. (2d) 734 (C.C.A. 2d 1935).

[10] See Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 72 F. (2d) 443 (C.C.A. 7th 1934).

[11] See note, 48 Harv. L. Rev. 1430 (1935).

[12] 52 Stat. 842 (1938), 11 U.S.C.A. § 11 (15) (Supp. 1938). By this section Bankruptcy Courts are invested with such authority in equity as enables them to exercise original jurisdiction in bankruptcy proceedings, including the power "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."

[13] Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648 (1935); *In re* Prudence-Bonds Corp., 77 F. (2d) 328 (C.C.A. 2d 1935). See also *In re* Prudence Bonds Corp.—Radin v. Chemical Bank & Trust Co., 75 F. (2d) 262 (C.C.A. 2d 1935).

sions modifying or altering the rights of creditors, secured or unsecured,[14] and upon confirmation, the provisions of the plan and the order of confirmation are binding upon all creditors whether or not they have accepted.[15] It is arguable that the broad control of the 77B court after consummation of the plan[16] must in some measure depend on the existence of extensive summary power prior to confirmation. Accordingly in a few cases, including the instant one, even the issuance of turnover orders, seemingly more drastic than stays, have been sustained.[17]

Since any property interest in the debtor vests the reorganization court with jurisdiction,[18] it would seem that it is no longer a question of the court's *power* to

[14] § 77B (b) (1), 48 Stat. 913 (1934), 11 U.S.C.A. § 207 (b) (1) (1938). See also § 77B (b) (9), 48 Stat. 914 (1934), 11 U.S.C.A. § 207 (b) (9) (1938) by which a plan of reorganization "shall provide adequate means for the execution of the plan, which may include . . . . the satisfaction or modification of liens." Compare § 67 d, 30 Stat. 564 (1898), 11 U.S.C.A. § 107 (d) (1934) which in substance provided that bona fide liens shall not be affected by anything contained in the Bankruptcy Act (as it stood prior to the adoption of § 77B).

[15] § 77B (g) (3), 48 Stat. 920 (1934), 11 U.S.C.A. § 207 (g)(3) (1938).

[16] "Upon final confirmation of the plan, the debtor . . . . shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge. . . . ." § 77B (h), 48 Stat. 920 (1934), 11 U.S.C.A. § 207 (h) (1938).

[17] *In re* Monsen—Mellin v. Monsen, 74 F. (2d) 411 (C.C.A. 7th 1934); *In re* Greyling Realty Corp.—Troutman v. Compton, 74 F. (2d) 734 (C.C.A. 2d 1935); *In re* Moulding-Brownell Corp.—Nat'l Builders Bank of Chicago v. Schwartz, 101 F. (2d) 664 (C.C.A. 7th 1939). "The court of reorganization can bring within its jurisdiction property covered by mortgage or pledge, when a plan covering it has been adopted and confirmed. And *prior thereto*, property held by a pledgee, in which the debtor has an equity, is *likewise* within the court's jurisdiction. . . . . For the purpose of reorganization, the court should take complete charge of property in order that it may from the beginning, and through all the intermediate steps of reorganization, so administer the property as to achieve the desired rehabilitation." *In re* Prudence-Bonds Corp., 77 F. (2d) 328, 330 (C.C.A. 2d 1935) (italics supplied). *Cf. In re* Frances E. Willard Nat'l Temperance Hospital—Campe v. Bills, 82 F. (2d) 804, (C.C.A. 7th 1936) where it was held that a turnover order was improper either in a summary or plenary proceeding prior to confirmation of the plan since the trustee-mortgagee, on default, held the property for the bondholders. It would seem however that the confirmation of the plan would result in "payment" of the bondholders and the trustee could then be forced out of possession, because there is no longer any property objection to the court's jurisdiction. § 227 of Chapter X, 52 Stat. 899 (1938), 11 U.S.C.A. § 627 (Supp. 1938) reads: "The court may direct the debtor, its trustee, any mortgagees, indenture trustees . . . . to execute and deliver . . . . such instruments as may be necessary to effect a retention or transfer of property dealt with by a plan that has been confirmed. . . . ."

[18] *In re* Greyling Realty Corp.—Troutman v. Compton, 74 F. (2d) 734 (C.C.A. 2d 1935), *cert. denied* 294 U.S. 725 (1935). But see Arnold and James, Cases on Trials, Judgments, and Appeals 452 (1936), where the authors in commenting on the Greyling case say: "The formula is that summary process cannot be used to determine a substantial adverse claim to property which is not in the possession of the bankruptcy court. Therefore in affirming the summary order to turn over the proceeds, the Circuit Court of Appeals held in effect that state court receivers did not have any substantial adverse claim because they did not hold the property in their possession in their own right but only for the benefit of others." It is submitted that this emphasis on "possession" is a misconception of the difference between a reorganization and ordinary bankruptcy.

"Formerly the court, while having jurisdiction of whatever equity a bankrupt might own in pledged property did not have jurisdiction over the property itself. Thus property was in

enjoin the sale or order the surrender of collateral in the hands of creditors, but a matter of *discretion* only.[19] In some of the cases in which summary jurisdiction was denied the debtor's property interest had been defeated or was at least disputed. The taking of the debtor's bank deposit under claim of set-off,[20] the forfeiture of the debtor's equity of redemption to mortgaged property,[21] the foreclosure and possession by a committee of bondholders under final decree,[22] have resulted in such defeasance. Under such circumstances plenary proceedings may be required. So also where the creditor claimed funds which had never been the property of the bankrupt,[23] where the debtor was vendee under a conditional sale,[24] and where the debtor was only the trustee under a deposit agreement.[25] But even where the debtor cannot be said to have property, it would seem that a summary stay order might be issued in an emergency affecting the success of the plan although nothing further may be adjudicated. In general an abuse of discretion rather than an erroneous assumption of jurisdiction explains the cases reversing summary orders in reorganization proceedings. Thus it was error to proceed summarily where the injunction was not sought in good faith,[26] or where there was small likelihood of a reorganization plan being accepted,[27] or where the benefits of the stay order could not contribute to the execution of the reorganization.[28]

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the possession of the pledgee, and the bankrupt having neither real nor constructive possession thereof, the bankruptcy court had no jurisdiction over it. . . . . But the present grant of jurisdiction under § 77B, contains no limitation which excludes property subject to a lien or mortgage." *In re* Prudence-Bonds Corp., 77 F. (2d) 328, 330 (C.C.A. 2d 1935).

[19] See Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648, 677 (1935); *In re* Monsen—Mellin v. Monsen, 74 F. (2d) 411, 413 (C.C.A. 7th 1934).

[20] *In re* Chicago & Northwestern Ry. Co.—Megan v. Continental Illinois Nat'l Bank & Trust Co., 86 F. (2d) 508 (C.C.A. 7th 1936).

[21] *In re* Prudence Bonds Corp., 79 F. (2d) 212 (C.C.A. 2d 1935); *In re* Prudence Co.—Marine Midland Trust Co. of New York v. Callaghan, 82 F. (2d) 755 (C.C.A. 2d 1936). But see *In re* Mortgage Securities Corp.—Union Trust Co. of Maryland v. Compton, 75 F. (2d) 261 (C.C.A. 2d 1935). In commenting on this case Judge Hand observes in *In re* Prudence-Bonds Corp., 79 F. (2d) 205, 209 (C.C.A. 2d 1935): "We went even further in the case of In re Mortgages Securities Corporation . . . . and directed the trust company there to turn over collateral which secured bonds issued by the debtor, even though the latter had conveyed away its equity of redemption prior to the institution of the reorganization proceedings."

[22] Morrison v. Rockhill Improvement Co., 91 F. (2d) 639 (C.C.A. 10th 1937); Continental Bank & Trust Co. of New York v. Nineteenth & Walnut Streets Corp., 79 F. (2d) 284 (C.C.A. 3d 1935).

[23] United States v. Tacoma Oriental S.S. Co., 86 F. (2d) 363 (C.C.A. 9th 1936).

[24] *In re* Lake's Laundry, Inc., 79 F. (2d) 326 (C.C.A. 2d 1935). But note Judge Hand's strong dissent. Were the transaction in the form of a mortgage the court would have had summary jurisdiction. The failure to find the technical existence of "title" in the conditional vendee tempts creditors to avoid the court's jurisdiction by arranging the transaction in the form of a conditional sale.

[25] *In re* Commonwealth Bond Corp.—Evans v. Mann, 77 F. (2d) 308 (C.C.A. 2d 1935).

[26] First Nat'l Bank of Wellston v. Conway Road Estates Co., 94 F. (2d) 736 (C.C.A. 8th 1938).

[27] *In re* Murel Holding Corp.—Metropolitan Life Ins. Co., 75 F. (2d) 941 (C.C.A. 2d 1935).

[28] *In re* Commonwealth Bond Corp.—Evans v. Mann, 77 F. (2d) 308 (C.C.A. 2d 1935); Foust v. Munson S.S. Lines, 299 U.S. 77 (1936).

The court in proceeding summarily must balance the injury to the particular creditor against the benefits to all the creditors in the plan, if the sale, or, at in the instant case, individual collection of the accounts, were enjoined. Several factors should guide the court's discretion. The nature of the security, whether long- or short-term, should weigh in the scales. It is pointed out that injury to the creditor will be greater where the court enjoins the sale of short-term collateral, the essence of which is usually quick resale, than where the security is land, which may not have any present market value.[29] There would seem, however, to be no merit in the contention that possession in the court is necessarily inimical to the preservation of the creditor's security of either kind.

The sale of the debtor's own obligations may have a more disastrous effect upon the plan than if the collateral sold consists of obligations due it,[30] but the sale of both has been summarily enjoined by reorganization courts.[31] In the instant case, where the debtor had made successive assignments of the same accounts, the hazards imposed upon the debtors in paying disputed and possibly voidable claims was a persuasive element in issuing the surrender order. The fact that the appellant was a single dissenter in the class of creditors affected by the pledging of the accounts was probably also operative. The matter of the trustee's fee, however, may have given the court pause, but, if not obviously excessive, the burden ought to be on the complainant to show abuse of discretion.

Since the reorganization court may exercise nation-wide jurisdiction over the debtor's property, a summary proceeding may entail unreasonable inconvenience upon a distant creditor asserting an adverse right. The complexity of the issues, the feasibility of a jury trial, and the advantages of trying the matter in the accessible local forum, may make a separate plenary suit desirable. The court in its discretion may order such a separate plenary suit.

Whether in addition to having summary jurisdiction to issue a stay or surrender order, the reorganization court has summary jurisdiction to determine the merits of contested claims and to decide whether the creditor's taking of security was a voidable preference has not been settled. Although the decisions in which stays were ordered indicate that nothing further was decided,[32] no provision in Section 77B or Chapter X seems to limit the court's summary process to temporary orders. Indeed, the broad powers to effectuate a fair and workable reorganization, even at the cost of modifying rights generally, would indicate that the question of final adjudication in a summary proceeding is also addressed to the court's discretion.

[29] See Howland, The Enforcement of Secured Creditors' Claims under § 77 and § 77B, 46 Yale L.J. 1109 (1937), and Rapkin, Power of Courts to Restrain Sale of Pledged Collateral, 21 Marquette L. Rev. 194 (1937).

[30] *In re* Moulding-Brownell Corp.—National Builders Bank of Chicago v. Schwartz, 101 F. (2d) 664, 666 (C.C.A. 7th 1939).

[31] Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648 (1935); *In re* Moulding-Brownell Corp.—Nat'l Builders Bank of Chicago v. Schwartz, 101 F. (2d) 664 (C.C.A. 7th 1939). Although the Rock Island case involved § 77 providing for railroad reorganization, it would seem that a court proceeding under § 77B or Chapter X should have no less jurisdiction where the situation warrants.

[32] In the Matter of Moulding-Brownell Corp.—Nat'l Builders Bank of Chicago v. Schwartz, 101 F. (2d) 664, 666 (C.C.A. 7th 1939); Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R. I. & Pac. Ry. Co., 294 U.S. 648, 681 (1935).

In view of the increased jurisdiction conferred by Section 77B and Chapter X continued emphasis upon a distinction between summary and plenary proceedings which was developed by cases decided prior to the enactment of Section 77B and Chapter X appears unwarranted. While Section 2(15)[33] was in terms broad enough to extend the summary power of bankruptcy courts, the tendency to construe that section narrowly so as not to alter the necessity of plenary suits, if paralleled in the construction of the stronger provisions of Section 77B and Chapter X undermines the evident difference in purpose between a reorganization and bankruptcy. The apprehension of summary process as a Star-chamber method of adjudication is groundless, since full opportunity to be heard is provided.[34] The difference, in fact, between a summary and plenary proceeding is so insignificant as to indicate that the latter is a dilatory tactic which should be discouraged like any other hindrance to the consummation of a feasible reorganization.

Bankruptcy—Reorganization—Lease Provisions of Section 77—Treatment of Long Term Leases—[Federal].—The debtor in reorganization under Section 77 of the Bankruptcy Act was the lessee of a 999 year lease of certain street railway property. The terms of the lease provided for an annual rental of over one million dollars, part of which was to be placed in a sinking fund for the retirement of the lessor's bonds. In addition, the lessor was given the right to repossess the property on default without prejudice to his right of action for rent or breach of the lease, but the lease contained no covenant for liquidated damages. The Court of Appeals, affirming the decision of the district court, decided that the lessor was a creditor only to the extent of the rent accruing from the date of the rejection of the lease to the latest date for the filing of claims in the proceedings. On *certiorari* to the Supreme Court, *held*, reversed. The lessor should be allowed damages to the extent of the difference between the present value of rent reserved less the present value of the remainder of the term, the amount to be determined by "evidence which satisfies the mind." *Connecticut Railway & Lighting Co. v. Palmer.*[1]

Prior to 1934, claims for future rent in bankruptcy[2] were not provable in the absence of skillfully worded covenants which provided for liquidated damages measured by the difference between the present fair value of the rent reserved by the lease and the present fair value of the premises for the duration of the term.[3] In an equity

[33] See note 14 *supra.*

[34] "Even in summary proceedings, a reasonable opportunity must be afforded for a proper hearing, for otherwise constitutional rights would be violated." 2 Gerdes, *op. cit. supra* note 1, at § 849. Although the court in the instant case sustained the summary order, it deplored the failure to take evidence before its issuance. Perhaps opposition to summary jurisdiction would be mollified by affording opportunity to present testimony in addition to argument of counsel.

[1] 59 S. Ct. 316 (1939). Two other cases involving the same point have recently been decided. See Palmer v. Palmer, 59 S. Ct. 647 (1939), reversing Old Colony R. Co. v. New York, N.H. & H. R. Co., 98 F. (2d) 670 (C.C.A. 2d 1938), and *In re* Chicago & North Western Ry. Co., Claim of Consolidated Office Buildings Co., Opinion of Special Master (D.C. Ill. 1938).

[2] 30 Stat. 562 (1898).

[3] Litigants were never certain as to whether a given covenant would be construed so as to allow recovery. Manhattan Properties v. Irving Trust Co., 291 U.S. 320 (1933); Irving Trust v. Perry, Inc., 293 U.S. 307 (1934); *In re* Roth and Appel, 181 Fed. 667 (C.C.A. 2d 1910).