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COMMENTS

CONSENT TO SUMMARY JURISDICTION

One of the most enigmatic features of bankruptcy jurisdiction is the operation of consent as a basis for the exercise of summary jurisdiction to grant affirmative relief to a trustee. For the bankruptcy practitioner, the operation of the consensual theory has often been a trying and costly experience.¹

I. NATURE OF SUMMARY JURISDICTION—IN GENERAL

It is sometimes said that "all of the jurisdiction of a bankruptcy court acting strictly in character is summary,"² when compared with the general legal and equitable, or, as it is commonly known, plenary jurisdiction of the district court.³ Thus, the court in *Central Republic Bank & Trust Co. v. Caldwell*⁴ suggested:

[Bankruptcy jurisdiction] . . . is based upon petition, and proceeds without formal pleadings; [plenary jurisdiction] . . . proceeds upon formal pleadings. In the former, the necessary parties are cited in by order to show cause; in the latter, formal summons brings in the parties other than the plaintiff. In the former, short time notice of hearing is fixed by the court; in the latter, time for pleading and hearing is fixed by statute or by rule of court. In the former, the hearing is quite generally upon affidavits; in the latter, examination of witnesses is the usual method. In the former, the hearing is sometimes ex parte; in the latter, a full hearing is had.⁵

It should also be noted that there is no jury trial in a summary proceeding.⁶

1. See Feibelman, What Is the Difference Between Summary and Plenary Jurisdiction in Bankruptcy?, 39 Fla. B.J. 155 (1965); Ferguson, The Consensual Basis of Subject-Matter Jurisdiction in Matters of Bankruptcy: Fact and Fiction, 14 Rutgers L. Rev. 491, 492 (1960). The consensual aspect of summary jurisdiction was little beset with conflict thirty years ago. See Glenn, Liquidation §§ 463-64 (1935). However, conflict and divergent opinion have been the order of the day in recent years. See MacLachlan, Bankruptcy § 196 (1956) [hereinafter cited as MacLachlan].

2. MacLachlan § 194, at 206. The district court's bankruptcy jurisdiction is statutory. In the Matter of Ross Sand & Gravel, Inc., 289 F.2d 311 (6th Cir. 1961) (per curiam). Consequently, "the courts of bankruptcy . . . are courts of limited jurisdiction and their power to act must be found expressly or impliedly in the provisions of the Bankruptcy Act . . ." O'Dell v. United States, 326 F.2d 451, 455 (10th Cir. 1964). (Citations omitted.) See generally 1 Collier, Bankruptcy ¶ 2.04 (14th ed. 1964) [hereinafter cited as Collier]; 1 Remington, Bankruptcy § 35 (5th ed. 1950) [hereinafter cited as Remington]. The Bankruptcy Act makes specific grants of summary jurisdiction to the bankruptcy court in several situations. E.g., Bankruptcy Act §§ 571, 67a(4), 52 Stat. 867, 876 (1938), 11 U.S.C. §§ 93(1), 107(a)(4) (1964).

3. The district court's bankruptcy jurisdiction must be distinguished from its general jurisdiction. See *Associated Electronic Supply Co. v. C.B.S. Electronic Sales Corp.*, 283 F.2d 683, 684 (8th Cir. 1961); *Hanna v. Britson Mfg. Co.*, 62 F.2d 139, 145 (8th Cir. 1932).

4. 58 F.2d 721 (8th Cir. 1932).

5. *Id.* at 731-32.

6. See Hunt, Summary Proceedings in Bankruptcy, 22 Ref. J. 109, 111 (1943). The right to a jury trial in this context has been viewed as crucial to the distinction between these two

However, despite the informality and the celerity of the proceedings in the bankruptcy court,⁷ the guaranties of due process must be met.⁸ For this reason, summary jurisdiction must be predicated upon the bankruptcy court's possession, actual or constructive, of the property in question,⁹ or a merely colorable claim proffered by the party having possession.¹⁰ If, however, a claim is truly adverse, the trustee must seek his remedy in a plenary suit,¹¹ unless there is consent by the adverse party to the disposition of his rights by summary proceedings.¹²

II. DEVELOPMENT OF THE CONSENSUAL THEORY

A. *In General*

It is in trying to accommodate the elements of due process with the prerogatives of the bankruptcy courts, which "are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act,"¹³ that bankruptcy law has sometimes fostered confusion and discouragement.

methods by at least one writer: "To the extent . . . that an adverse party may escape summary disposition of his claim or defense and establish a right to jury trial, the difference between a summary and plenary proceeding remains of considerable importance." Ferguson, *supra* note 1, at 493. (Emphasis omitted.)

7. See MacLachlan § 193, at 204.

8. See *In re Harry L. Sugarman, Inc.*, 3 F.2d 436 (2d Cir. 1924) (per curiam); *In re Frank*, 182 Fed. 794, 798 (8th Cir. 1910). "[T]here is no denial of due process of law in a summary proceeding and the parties have all of the traditional safeguards of a plenary suit, except the right of jury trial." Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref. J. 73, 74 (1962). (Footnote omitted.) See generally Hunt, *Summary Proceedings in Bankruptcy*, 22 Ref. J. 109 (1948).

9. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940); see 2 Collier ¶ 23.05 [1], at 468-69 & n.7. See generally 2 *id.* ¶ 23.05; Note, 40 Colum. L. Rev. 489 (1940).

10. *Harrison v. Chamberlin*, 271 U.S. 191, 194 (1926); *Cherno v. Engine Air Serv., Inc.*, 330 F.2d 191, 193 (2d Cir. 1964); *In the Matter of Plymouth Dyeing Co.*, 323 F.2d 134, 138-39 (3d Cir. 1963), petition for cert. dismissed, 375 U.S. 998 (1964).

11. *May v. Henderson*, 268 U.S. 111, 115 (1925); *Nicklaus v. Bank of Russellville*, 336 F.2d 144, 147 (8th Cir. 1964). See generally 5 Remington §§ 2134-35. It should be noted, however, that the bankruptcy court "has jurisdiction to inquire into the claim . . ." *May v. Henderson*, *supra* at 116. Where an adverse claim is alleged, "a preliminary inquiry is necessary and appropriate to ascertain whether the case is one for a summary proceeding or a plenary suit." *American Mannex Corp. v. Huffstutler*, 329 F.2d 449, 453 (5th Cir. 1964).

12. *Harris v. Avery Brundage Co.*, 305 U.S. 160, 164 (1938); *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 265 (1932); *Inter-State Nat'l Bank v. Luther*, 221 F.2d 382, 386 (10th Cir.), cert. granted, 350 U.S. 810 (1955), cert. dismissed per stipulation, 350 U.S. 944 (1956).

13. *Young v. Higbee Co.*, 324 U.S. 204, 214 (1945). This point is so well established as to be considered elementary. *Carrier Corp. v. J. E. Schecter Corp.*, 347 F.2d 153, 155 (2d Cir.), cert. denied, 382 U.S. 904 (1965). The various equitable maxims have often been applied in the courts of bankruptcy. E.g., *Central States Corp. v. Luther*, 215 F.2d 38, 46 (10th Cir. 1954), cert. denied, 348 U.S. 951 (1955) (he who seeks equity must do equity); *Litzke v. Gregory*, 1 F.2d 112, 115 (8th Cir. 1924) ("clean hands" doctrine). However, the applicability of equitable principles is limited to situations where such principles are not inconsistent with the Bankruptcy Act. *Young v. Higbee Co.*, *supra* at 214. See generally 1 Collier ¶ 2.09; 1 Remington § 22.

Reduced to simplest terms, an adverse claimant's consent to summary proceedings may be either express or implied.¹⁴ The former, evidenced by a stipulation executed by the adverse claimant,¹⁵ and a hybrid of the two, characterized by a voluntary turnover of the property to the bankruptcy court or its officers,¹⁶ have caused little difficulty to the practitioner or to the courts. On the other hand, consent implied from the voluntary assertion of a claim by an adverse claimant against specific property in the hands of the trustee¹⁷ or of a claim against the bankrupt estate¹⁸ has had a peculiarly erratic history.

Prior to the 1935 case of *Alexander v. Hillman*,¹⁹ the bankruptcy courts were definitely adverse to granting any relief to a trustee other than by way of expunging or diminishing a creditor's claim.²⁰ Since that decision, "an increasing body of case law which is slowly eroding judicial reluctance to expand the summary jurisdiction of referees"²¹ has developed. The persuasiveness of the consensual theory has encouraged this expansion.²²

B. *The Old View*

1. Proof of Claim

The pre-*Alexander* view as to the effect of filing a proof of claim was set out in *Fitch v. Richardson*.²³ The trustee there had answered the creditor's proof of claim with an allegation that the creditor held collateral for the debt. In fact, the alleged security exceeded the claim by 1,339 dollars, and the district court ordered the surplus returned to the trustee. The appellate court held that the

14. Another species of consent is that manifested by the adverse claimant's failure to enter "timely" objection to summary jurisdiction. Bankruptcy Act § 2a(7), 66 Stat. 420 (1952), 11 U.S.C. § 11(a)(7) (1964). This form was codified in order to reverse the holding of *Cline v. Kaplan*, 323 U.S. 97 (1944) (turnover proceeding by trustee), that an adverse claimant could object to the exercise of summary jurisdiction at any time before final order. See H.R. Rep. No. 2320, 82d Cong., 2d Sess. 4 (1952). A detailed discussion of the problem of the *Cline* decision is found in 2 *Collier* ¶ 23.08[4]. The "timely objection" clause of § 2a(7) has no application where the adverse claimant has voluntarily invoked the jurisdiction of the bankruptcy court by filing a proof of claim or reclamation petition. *Inter-State Nat'l Bank v. Luther*, 221 F.2d 382, 388 (10th Cir.), cert. granted, 350 U.S. 944 (1955), cert. dismissed per stipulation, 350 U.S. 944 (1956).

15. See 2 *Collier* ¶ 23.08[3].

16. See 2 *id.* ¶ 23.08[2], at 535.

17. This is more commonly known as a petition for reclamation. See generally 4 *id.* ¶ 70.39; 5A *Remington* §§ 2476-79.

18. Bankruptcy Act § 57, 52 Stat. 866 (1938), 11 U.S.C. § 93 (1964).

19. 296 U.S. 222 (1935).

20. See, e.g., *Spears v. Frenchton & B.R.R.*, 213 Fed. 784 (4th Cir. 1914); *In re Haly*, 158 Fed. 74 (64th Cir.), cert. denied, 209 U.S. 546 (1908); *Fitch v. Richardson*, 147 Fed. 197 (1st Cir. 1906).

21. Seidman, *Summary Jurisdiction of the Referee: Some Recent Developments*, 39 *Ref. J.* 100 (1965).

22. See *Nortex Trading Corp. v. Newfield*, 311 F.2d 163 (2d Cir. 1962); *In re Petroleum Conversion Corp.*, 99 F. Supp. 899 (D. Del. 1951), *aff'd per curiam*, 196 F.2d 728 (3d Cir. 1952), cert. denied, 344 U.S. 917 (1953); *In re Nathan*, 98 F. Supp. 686 (S.D. Cal. 1951).

23. 147 Fed. 197 (1st Cir. 1906).

bankruptcy court did not have jurisdiction to grant an affirmative decree against an adverse claimant who had merely filed a proof of claim, despite the fact that the claim and the counterclaim arose out of the same transaction.²⁴

Fitch merely illustrates the then prevailing opinion that jurisdiction of the bankruptcy courts "goes no further than to permit of an inquiry into and determination of, the net amount due the creditor."²⁵ When a counterclaim by the trustee was clearly in excess of the claim presented by the creditor, the bankruptcy court could either (1) stay the proceedings, pending a final adjudication of the counterclaim in a proper court,²⁶ or, (2) if the trustee waived his right to recover the excess, proceed upon the merits of the trustee's counterclaim to determine whether it diminished or expunged the creditor's allowed claims.²⁷

The philosophy that "the spirit and purpose of the act do not contemplate a general judgment in favor of the bankrupt estate against a third person"²⁸ was indicative of a growing fear that the bankruptcy courts were exceeding their jurisdictional powers and were usurping the powers of the state courts.²⁹ Courts adopting this philosophy convinced one another of the orthodoxy of their position by relying heavily, albeit unsoundly, on two Supreme Court cases—*Bardes v. Hawarden Bank*³⁰ and *Louisville Trust Co. v. Comingor*.³¹ Both cases involved summary suits in a court of bankruptcy against adverse claimants: *Bardes*, to set aside a fraudulent conveyance; and *Comingor*, to turn over fees paid to a general assignee before bankruptcy proceedings were commenced. In *Bardes*, the Court held that section 23³² was designed so that

independent suits brought by the trustee . . . to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts . . . "unless by consent of the proposed defendant," of which there is no pretence in this case.³³

24. *Id.* at 199. This decision apparently still represents the law in the First Circuit in regard to counterclaims. In an almost identical case in the Fourth Circuit, the same result was reached. *Morton G. Thalheimer, Inc. v. Florance*, 58 F.2d 23 (4th Cir. 1932).

25. *In re Continental Producing Co.*, 261 Fed. 627, 629 (S.D. Cal. 1919). *Accord*, *Metz v. Knobel*, 21 F.2d 317 (2d Cir. 1927); *In re Peacock*, 178 Fed. 851 (E.D.N.C. 1910); *In re Harper*, 175 Fed. 412 (N.D.N.Y. 1910).

26. *In re Continental Producing Co.*, 261 Fed. 627, 629 (S.D. Cal. 1919). This alternative has been expressly rejected by the Supreme Court. *Katchen v. Landy*, 86 Sup. Ct. 467, 477-78 (1966).

27. *In re Continental Producing Co.*, 261 Fed. 627, 629-30 (S.D. Cal. 1919).

28. *In re Patterson-MacDonald Shipbuilding Co.*, 284 Fed. 281, 283 (W.D. Wash. 1922), *aff'd* on other grounds, 293 Fed. 192 (9th Cir. 1923), *cert. denied*, 264 U.S. 582 (1924).

29. See *Eyster v. Gaff*, 91 U.S. 521 (1875); *In re Bacon*, 210 Fed. 129 (2d Cir. 1913). In *Eyster v. Gaff*, *supra*, the Supreme Court vividly expressed its opinion as to any expansion of the summary jurisdiction of the bankruptcy court: "This court has steadily set its face against this view." *Id.* at 525.

30. 178 U.S. 524 (1900).

31. 184 U.S. 18 (1902).

32. Bankruptcy Act § 23, ch. 541, 30 Stat. 552 (1898) (amended by 52 Stat. 854 (1938), 11 U.S.C. § 46 (1964)).

33. 178 U.S. at 538. An important distinction must be made as to the operation of § 23

Comingor, viewed as being squarely "within the ruling in *Bardes*"³⁴ pointed out that there was no consent since the defendant was peremptorily brought before the bankruptcy court on an order to show cause.³⁵ Therefore, relying upon *Bardes* and *Comingor*, and ignoring the essential distinction that by filing a proof of claim a creditor had voluntarily invoked the jurisdiction of the bankruptcy court, courts consistently found no consent, and hence no jurisdiction, to entertain a counterclaim for affirmative relief by a trustee.³⁶

2. Petition for Reclamation

A somewhat different posture was taken by the courts when the adverse claimant had availed himself of the jurisdiction of the court of bankruptcy by filing a petition for reclamation. Even prior to 1935, in *Operators' Piano Co. v. First Wis. Trust Co.*,³⁷ and similar cases,³⁸ it was generally held that, by filing a petition for reclamation, the adverse claimant consented to summary adjudica-

in regard to summary jurisdiction where the adverse claimant has affirmatively availed himself of the jurisdiction of the bankruptcy court to share in the bankrupt estate. Section 23 "applies only when the trustee brings suit . . ." *Columbia Foundry Co. v. Lechner*, 179 F.2d 630, 633 (4th Cir. 1950). See Seligson & King, *supra* note 8, at 79. It in no way limits the exercise of summary jurisdiction by the bankruptcy court, but rather relates to the plenary jurisdiction of the district court. See MacLachlan § 197, at 212-13. See generally 2 Collier ¶ 23.03. Therefore, the consent provision of § 23b applies where the adverse claimant is brought into a turnover proceeding at the instance of the trustee. The ultimate source of the summary jurisdiction of the bankruptcy court lies in the broad grant of power found in Bankruptcy Act § 2a(7), 66 Stat. 420 (1952), 11 U.S.C. § 11a(7) (1964). The claimant, by voluntarily entering the bankruptcy proceeding, exposes himself to the jurisdiction of the court to proceed upon counterclaims interposed by the trustee. *Wiswall v. Campbell*, 93 U.S. 347 (1876); *Floro Realty & Inv. Co. v. Steem Elec. Corp.*, 128 F.2d 338 (8th Cir. 1942).

Specific provision is made for setting off mutual debts in Bankruptcy Act § 68, 52 Stat. 878 (1938), 11 U.S.C. § 108 (1964). However, this section has no effect upon the jurisdiction of the bankruptcy court. Nonetheless, it does suggest, by its silence on the question of counterclaims (other than to negative the use of certain counterclaims held by debtors of the bankrupt), that summary jurisdiction is proper as to trustee's counterclaims where the adverse claimant has voluntarily entered the court. See *Inter-State Nat'l Bank v. Luther*, 221 F.2d 382 (10th Cir.), cert. granted, 350 U.S. 810 (1955), cert. dismissed per stipulation, 350 U.S. 944 (1956). For a complete discussion of § 68 as it relates to jurisdiction, see 4 Collier ¶ 68.20.

34. 184 U.S. at 24.

35. *Id.* at 26.

36. The typical pre-Alexander view was expounded by Professor Glenn when he stated that a creditor who filed a proof of claim had "the absolute right to withdraw it if he changes his mind. . . . [I]nasmuch as no counterclaim, as distinct from a defense, can be interposed to a claim when so offered, it follows that the right of withdrawal remains absolute." Glenn, *Liquidation* § 464 (1935). (Footnotes omitted.) See generally *id.* §§ 463-64.

37. 283 Fed. 904 (7th Cir. 1922).

38. *In re Barnett*, 12 F.2d 73, 81 (2d Cir.), cert. denied, 273 U.S. 699 (1923); *In re Pennsylvania Coffee Co.*, 8 F.2d 98 (W.D. Pa. 1925).

tion of all issues including affirmative counterclaims by the trustee.³⁹ The court in *Operators' Piano* reasoned that

a litigant cannot himself invoke the jurisdiction of the court and the particular form of proceeding (summary as well as plenary) and then object to the disposition of the issues which the respondent (the trustee) may raise either as a defense to his petition or as the basis of a counterclaim. The consent thus given cannot be subsequently withdrawn.⁴⁰

The carte blanche thus given bankruptcy courts with respect to trustee's counterclaims was soon restricted to those closely related to the claim of the adverse party.⁴¹

C. *The Turning Point—The Alexander Case*

Although the federal courts had cast a jaundiced eye upon any enlargement of the summary jurisdiction of the bankruptcy court during the first four decades of this century, the Supreme Court provided an opinion with which any court with liberal views in this area could modify the restrictive posture previously taken.

In 1935, *Alexander v. Hillman*,⁴² the case which was later to supply a wedge by which the courts opened the door to an expanded summary jurisdiction, was decided. This case involved an equity receivership to wind up the corporate business and distribute the assets of the corporation. The respondents, who had been corporate directors and officers, presented their claims. The receivers not only opposed these claims, but also filed four equitable counterclaims alleging fraudulent conversion of corporate assets and seeking affirmative relief. In affirming a money judgment in favor of the receivers, the Court held that, since the respondents had voluntarily submitted themselves to the jurisdiction of the receivership court (a court of equity), that court could properly grant relief on the receivers' counterclaims.⁴³ The Supreme Court found it quite reasonable that "the receivers . . . insist that, before taking aught, respondents may by the receivership court be required to make restitution."⁴⁴ Thus, while ostensibly reaffirming the equitable principle that "equity delights to do justice and not by halves,"⁴⁵ the Court was also acknowledging more subtle, but no less compelling,

39. Although it was not explicitly mentioned by the court, the claim of the trustee arose out of the same transaction as that sued upon by the reclaiming petitioner.

40. 283 Fed. at 906. However, the view was different where the claimant had entered the bankruptcy court by filing a proof of claim. See note 36 supra.

41. See *Daniel v. Guaranty Trust Co.*, 285 U.S. 154 (1932).

42. 296 U.S. 222 (1935), 22 Va. L. Rev. 963 (1936).

43. 296 U.S. at 238. The Court found little difficulty in disposing of the question of subject matter jurisdiction over the claims and counterclaims. *Id.* at 237-38.

44. *Id.* at 241-42.

45. *Clark*, Equity § 24, at 35 (1954). The Court stated that its decision was in conformity with this maxim. 296 U.S. at 242. For a complete discussion of this principle that equity, once having taken jurisdiction, will give complete relief, see 1 Pomeroy, *Equity Jurisprudence* §§ 231-42 (5th ed. 1941). There are, however, some limitations on its operation. *Id.* § 233.

reasons for sustaining the receivership court's action—convenience of the parties and speedy disposition of insolvent estates.⁴⁶

D. *Development Since Alexander*

By 1938, at least one court had applied *Alexander* to bankruptcy proceedings.⁴⁷ Gradually and inevitably, it has become well established not only that a claimant can impliedly consent to the exercise of summary jurisdiction by the bankruptcy court,⁴⁸ but also that an affirmative judgment can be entered by that court in favor of the trustee.⁴⁹ However, a question still remains as to the propriety of extending the consensual theory to all of the trustee's counterclaims.

1. Petition of Reclamation

Where the claimant was a reclaiming petitioner, there was no question, even prior to 1935, as to the court's power to accord the trustee affirmative relief.⁵⁰ *Daniel v. Guaranty Trust Co.*⁵¹ had, however, barred such relief on counterclaims by the trustee which were not immediately related to the claim presented.⁵² The Court reasoned that to view the filing of a petition for reclamation as consent to the summary adjudication of a trustee's counterclaim which was not closely related to the claim proffered "might lead to unfortunate complications and deprive owners of property of fair opportunity to recover."⁵³ The Court rejected the argument that public policy and the need for speed in disposition of bankruptcy cases justify the exercise of such jurisdiction.⁵⁴ However, having invoked the jurisdiction of the bankruptcy court, a creditor may not thereafter deny jurisdiction over related questions while the estate is still being administered.⁵⁵

46. See 296 U.S. at 242-43.

47. *Florence v. Kresge*, 93 F.2d 784 (4th Cir. 1938).

48. See cases cited note 22 supra.

49. *Ibid.* *Contra*, *Gill v. Phillips*, 337 F.2d 258 (5th Cir. 1964); *Fitch v. Richardson*, 147 Fed. 197 (1st Cir. 1906).

50. See text accompanying note 39 supra.

51. 285 U.S. 154 (1932).

52. *Id.* at 162. See generally 5A *Remington* § 2475.

53. 285 U.S. at 162. The necessity of "immediate relation" of the trustee's counterclaim has been strongly reiterated. See *James Talcott, Inc. v. Glavin*, 104 F.2d 851 (3d Cir.), petition for cert. denied, 308 U.S. 598 (1939); *In re C. A. Goldsmith Co.*, 122 F. Supp. 19 (D.N.J. 1954).

54. 285 U.S. at 162.

55. *Floro Realty & Inv. Co. v. Steem Elec. Corp.*, 128 F.2d 338, 341 (8th Cir. 1942). The bankruptcy court's jurisdiction to render an affirmative judgment in favor of a trustee on his counterclaim is limited to situations in which the adverse claimant is a private party. Where the United States Government is the reclaiming petitioner, the bankruptcy court lacks jurisdiction not only to grant relief in favor of the trustee, but also to set off or recoup against the Government's title to property. *In re Greenstreet, Inc.*, 209 F.2d 660, 667 (7th Cir. 1954). Where the Government has filed a proof of claim against the bankrupt estate, it is still unclear whether the trustee's related counterclaim may be used to expunge or diminish that claim. Compare *id.* at 663, with *In re Monongahela Rye Liquors, Inc.*, 141 F.2d 864 (3d Cir. 1944).

2. Proof of Claim

One major barrier to the expansion of summary jurisdiction was breached in *Florance v. Kresge*.⁵⁶ There, a creditor filed a proof of claim based upon a rental agreement, and the receivers (one of whom had been appointed as trustee) answered with a set off based upon the same agreement, requesting a judgment for any balance remaining after the creditor's claim was expunged. Relying on *Alexander*, the Fourth Circuit upheld the jurisdiction of the bankruptcy court to grant an affirmative judgment in favor of the trustee, stating that the bankruptcy court is "a court of equity even though exercising special statutory powers . . ."⁵⁷ The *Florance* court was the first to view the filing of a proof of claim by an adverse claimant as constituting the requisite consent to the exercise of summary jurisdiction by the court of bankruptcy.

Other courts did not readily recognize the possibilities of *Alexander* in a bankruptcy context.⁵⁸ In fact, the Fourth Circuit stood alone until 1942 when a district court in California indicated agreement in *In re Mercury Eng'r Co.*⁵⁹ The referee had suspended the proceedings below to allow the trustee to pursue his remedy in a plenary action. The district judge, although the case was not before him on proper pleadings, expressed the belief that, since the bankruptcy court is functionally identifiable with a court of equity, if the need arose, "the right to award a judgment for the surplus exists."⁶⁰

Although the Second Circuit,⁶¹ in 1945, had approved the *Alexander* reasoning in a railroad reorganization proceeding under Section 77 of the Bankruptcy Act,⁶² the definitive adoption of the *Alexander* doctrine in that circuit was

56. 93 F.2d 784 (4th Cir. 1938).

57. *Id.* at 786.

58. A subsequent district court case, decided in the same year as *Florance*, denied the bankruptcy court jurisdiction to grant affirmative relief on a trustee's counterclaim for an alleged voidable preference, and did not mention the *Florance* decision. *In re Florsheim*, 24 F. Supp. 991 (S.D. Cal. 1938), appeal dismissed per curiam per stipulation sub nom. *Bank of America Nat'l Trust & Sav. Ass'n v. Check*, 110 F.2d 660 (9th Cir. 1940).

59. 60 F. Supp. 786 (S. D. Cal. 1945), order affirmed after rehearing, 68 F. Supp. 376 (S.D. Cal. 1946).

60. *Id.* at 787. The court cited the *Alexander* and *Florance* decisions, stating in regard to the former that, "while the court there was dealing with receivers, the principle is the same in bankruptcy." *Id.* at 788. Thus, the view of the *Alexander* decision as to subject matter jurisdiction was adopted—i.e., the presentation of a claim by the creditor brings the entire res before the bankruptcy court, including counterclaims. See note 43 supra. The reasoning in *Mercury* was that jurisdiction to decide the validity of the claim encompassed not only invalidating objections, but also the determination of the validity of a counterclaim for any surplus owing to the bankrupt estate. See 60 F. Supp. at 788.

The court, while noting that the same district court had adhered to the pre-*Alexander* view in *In re Florsheim*, 24 F. Supp. 991 (S.D. Cal. 1938), appeal dismissed per curiam per stipulation sub nom. *Bank of America Nat'l Trust & Sav. Ass'n v. Check*, 110 F.2d 660 (9th Cir. 1940), adopted the post-*Alexander* view, pointing out that the Court of Appeals for the Ninth Circuit had not yet "spoken in the matter." 60 F. Supp. at 788 n.1.

61. *Chase Nat'l Bank v. Lyford*, 147 F.2d 273 (2d Cir. 1945).

62. Bankruptcy Act § 77, added by 47 Stat. 1474 (1933), as amended, 11 U.S.C. § 205 (1964).

delayed another eight years until *Conway v. Union Bank of Switzerland*.⁶³ There, Judge Learned Hand, strongly influenced by the operation of *res judicata* in a subsequent plenary proceeding,⁶⁴ opined that, if it were ever in doubt whether the filing of a proof of claim exposed the creditor to an affirmative judgment against him on a counterclaim by the trustee, the Supreme Court's decision in *Alexander* settled the question.⁶⁵

3. The Preference Cases

The so-called "implied consent" cases took on a new look with *In re Nathan*.⁶⁶ In that case, a Delaware corporation filed a proof of claim, and the trustee objected and counterclaimed for affirmative relief upon certain voidable preferences⁶⁷ which arose out of the same transaction as the claim. The referee

63. 204 F.2d 603 (2d Cir. 1953), petition for cert. dismissed per stipulation, 350 U.S. 978 (1956).

64. 204 F.2d at 607. A bankruptcy court's "judgments, decrees and orders possess all the attributes of finality and estoppel accorded to domestic judgments emanating from courts of general original jurisdiction." 5 Remington § 2309. (Footnote omitted.) In the case of counterclaims arising out of the same transaction as petitioner's claim, to force the trustee to resort to a plenary suit for affirmative relief would be inappropriate and wasteful since "the issues adjudicated as defenses to the claim would be *res judicata* in the plenary suit." *In re Solar Mfg. Corp.*, 200 F.2d 327, 331 (3d Cir. 1952), cert. denied, 345 U.S. 940 (1953). It is accurate to say that "*res judicata* . . . is not an absolute imperative of the law . . . [and] represents a policy which . . . must be weighed and balanced when in conflict with competing policies." Ferguson, *The Consensual Basis of Subject-Matter Jurisdiction in Matters of Bankruptcy: Fact and Fiction*, 14 Rutgers L. Rev. 491, 515 (1960). (Footnote omitted.) However, "on the whole *res judicata* is a triumphal rule . . ." 1B Moore, *Federal Practice* ¶ 0.405[1], at 629 (2d ed. 1965) [hereinafter cited as Moore]. (Footnote omitted.) *Res judicata* appears well established as a basis for the expansion of the summary jurisdiction of the bankruptcy court to trustee's counterclaims. See *Katchen v. Landy*, 36 Sup. Ct. 467, 475 (1966); *Conway v. Union Bank of Switzerland*, supra note 63; *Solar Mfg. Corp.*, 200 F.2d 327 (3d Cir. 1952), cert. denied, 345 U.S. 940 (1953); *In re Nathan*, 98 F. Supp. 686 (S.D. Cal. 1951); Moore, *Res Judicata and Collateral Estoppel in Bankruptcy*, 63 Yale L.J. 1, 32-38 (1958).

65. 204 F.2d at 607. Subsequent Second Circuit cases have been in accord with *Conway*. E.g., *Cherno v. Engine Air Serv., Inc.*, 330 F.2d 191 (2d Cir. 1964); *In the Matter of De Gregorio*, 219 F. Supp. 783 (S.D.N.Y. 1963); *In the Matter of Farrell Publishing Corp.*, 130 F. Supp. 449 (S.D.N.Y. 1955).

66. 98 F. Supp. 686 (S.D. Cal. 1951), 27 N.Y.U.L. Rev. 142 (1952). For an intimate discussion of this case and its ramifications, see Gendel, *Jurisdiction of a Referee in Bankruptcy To Render Affirmative Judgment on a Counterclaim in Favor of a Trustee*, 26 So. Cal. L. Rev. 167 (1953).

67. The surrender to the trustee of any voidable preference received by the adverse claimant is a condition precedent to the allowance of his claim. Bankruptcy Act § 57g, 52 Stat. 866 (1938), 11 U.S.C. § 93(g) (1964). A problem has plagued the courts as to whether the assertion of such a voidable preference in answer to a proof of claim constituted a counterclaim. See Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref. J. 73, 78 (1962). The Second Circuit, which had previously held, in *Kleid v. Ruthbell Coal Co.*, 131 F.2d 372 (2d Cir. 1942), that a 57g objection was not a counterclaim and could only be used defensively, has overruled itself and found an analogy between such an objection

permitted the claimant to withdraw its claim and was promptly reversed by the district court which declined, however, to rely upon the *Alexander* decision for two reasons: (1) the *Alexander* court had general equitable jurisdiction, whereas a bankruptcy court is "purely statutory" and exercises only limited jurisdiction based upon the consent of the parties;⁶⁸ and (2) the counterclaim in *Nathan* was a legal one to which the seventh amendment right to trial by jury attached, whereas the four counterclaims in *Alexander* were equitable.⁶⁹ The *Nathan* court preferred to base its decision on what it termed "the traditional common-law technique of reasoning by analogy from recognized legal principles."⁷⁰ Since, by filing a proof of claim, the creditor himself alleges that there are no set offs or counterclaims to his debt,⁷¹ he thereby impliedly consents to a determination of the merits of any set off or counterclaim interposed.⁷² The doctrine of *res judicata* would render any subsequent plenary suit by the trustee a mere formality.⁷³ The *Nathan* court therefore concluded that

the same considerations of reason and policy which support the holding that filing of a claim gives consent of the creditor to adjudication of an affirmative judgment on equitable counterclaims in a plenary suit . . . also support the holding that filing of a claim in bankruptcy gives the consent necessary to confer jurisdiction upon the bankruptcy court to adjudicate counterclaims for preferences, both legal and equitable, compulsory or permissive.⁷⁴

This reference to permissive counterclaims seemed to indicate that, at least where it is based upon a voidable preference, an unrelated counterclaim could be summarily adjudicated.⁷⁵ However, the counterclaim in *Nathan* arose out of the same transaction as the claim filed by the creditor. A subsequent decision in the Court of Appeals for the Ninth Circuit (the circuit in which *Nathan* was decided) eventually dispelled any conjecture as to jurisdiction over permissive counterclaims in that circuit. *Peters v. Lines*⁷⁶ concluded that the creditor's filing of a proof of claim operates as consent to the exercise of summary jurisdiction by the bankruptcy court over only those counterclaims which are compulsory in nature.⁷⁷ *Peters*, however, did not involve a voidable preference.

seeking affirmative relief and a counterclaim. *Nortex Trading Corp. v. Newfield*, 311 F.2d 163, 164 (2d Cir. 1962). However, the Supreme Court has muddled the waters by ignoring this issue. See *Katchen v. Landy*, 86 Sup. Ct. 467 (1966).

68. 98 F. Supp. at 690.

69. *Ibid.* This distinction has been denied efficacy in the bankruptcy court by the Supreme Court. See *Katchen v. Landy*, 86 Sup. Ct. 467 (1966).

70. 98 F. Supp. at 691.

71. *Ibid.*

72. *Id.* at 691-92.

73. *Ibid.*; see note 64 *supra*.

74. 98 F. Supp. at 692. (Citation omitted.)

75. The Supreme Court recently concurred with this conclusion in *Katchen v. Landy*, 86 Sup. Ct. 467 (1966).

76. 275 F.2d 919 (9th Cir. 1960), 60 Mich. L. Rev. 96 (1961). It should be pointed out that the *Nathan* decision, although decided within the Ninth Circuit, was not specifically mentioned in *Peters*, but it was alluded to. 275 F.2d at 924.

77. *Id.* at 924-25.

4. The *Katchen* Case and the Future of the Consensual Theory

Prior to the Supreme Court's decision in *Katchen v. Landy*,⁷⁸ the Tenth Circuit had stood alone in its liberal view of the extent to which the filing of a proof of claim conferred jurisdiction upon a bankruptcy court.⁷⁹ In *Inter-State Nat'l Bank v. Luther*,⁸⁰ the court upheld an affirmative judgment favoring the trustee on a counterclaim based upon a preference unrelated to the transaction out of which the claim arose. Dismissing the distinction between a compulsory and a permissive counterclaim, the court pointed out that the

distinction is of no consequence here for concededly the counterclaim is within the conferrable jurisdiction of the parties. And, being of the view that the [claimant] Bank impliedly consented to the jurisdiction of the court, the counterclaim was maintainable under Rule 13(b), F.R.C.P., whether compulsory or permissible.⁸¹

The Tenth Circuit apparently was satisfied that consent implied from the mere filing of a proof of claim was sufficient jurisdictional ground for the maintenance of even a permissive counterclaim—at least until *Katchen*.

Katchen involved four counterclaims for affirmative relief. Three sought recovery of voidable preferences, and the fourth demanded the purchase price of subscribed stock. All four counterclaims arose out of transactions unrelated to the transaction upon which the petitioner's claim was founded. As anticipated, the bankruptcy court rendered judgment in favor of the trustee on all four counterclaims. The circuit court⁸² reaffirmed its decision in *Inter-State*, but refused "to extend the summary jurisdiction of the court by implied consent to counterclaims which do not involve a preference, setoff, voidable lien, or a fraudulent transfer, and which are wholly unrelated to the creditor's claim."⁸³ The trustee abandoned his counterclaim for the stock subscription, and the creditor took the issue of the preferential counterclaims to the Supreme Court—and lost.⁸⁴

Unexpectedly, while affirming the Tenth Circuit, the Court avoided any explicit reference to consent,⁸⁵ the mainstay of courts since *Alexander*, and chose instead

78. 86 Sup. Ct. 467 (1966), affirming 336 F.2d 535 (10th Cir. 1964).

79. However, two other circuits had apparently left the question open. See *Nortex Trading Corp. v. Newfield*, 311 F.2d 163 (2d Cir. 1962); *Continental Cas. Co. v. White*, 269 F.2d 213 (4th Cir. 1959). The Nathan decision also expressed a liberal view on this question. See text accompanying note 75 supra.

80. 221 F.2d 332 (10th Cir.), cert. granted, 350 U.S. 810 (1955), cert. dismissed per stipulation, 350 U.S. 944 (1956), 69 Harv. L. Rev. 377 (1955), 31 N.Y.U.L. Rev. 391 (1956).

81. 221 F.2d at 390.

82. 336 F.2d 535 (10th Cir. 1964), 13 Kan. L. Rev. 427 (1965).

83. 336 F.2d at 537.

84. 86 Sup. Ct. 467 (1966).

85. The Court appears to have deliberately avoided employing the consensual theory. Rather than becoming bogged down in the haphazard development of the doctrine of implied consent, the Court restricted itself to the immediate issue of 57g objections and derived added support from that section's specific establishing of the surrender of a voidable preference as a condition precedent to the allowance of a claim.

to base its opinion on the bankruptcy court's duty to allow and disallow claims⁸⁰ where an objection has been interposed by the trustee.⁸⁷ Mr. Justice White, writing for the majority,⁸⁸ viewed the dispositive test of the bankruptcy court's proper exercise of summary jurisdiction as being whether "all of the substantial factual and legal bases [of the trustee's claim] . . . have . . . been disposed of in passing on objections to the claim."⁸⁹ Emphasizing the need for expeditious administration of bankrupt estates and congressional policy favoring this goal,⁹⁰ the Court concluded that "the objection under § 57(g) is, like other objections, part and parcel of the allowance process and is subject to summary adjudication by the bankruptcy court. This is the plain import of § 57 . . ."⁹¹ Thus, the bankruptcy court is bound to resolve an objection based upon section 57g in summary proceedings,⁹² and its determination would be *res judicata* in a subsequent plenary suit by the trustee to recover such preference.⁹³

Replying to the petitioner's contention that his seventh amendment right to a trial by jury would be abridged by the bankruptcy court's exercise of summary jurisdiction to order the surrender of a voidable preference which both exceeds and is unrelated to his claim, the Court stated that "there is no Seventh Amendment right to a jury trial for determination of objections to claims . . ."⁹⁴ The basis for this conclusion was the equitable nature of the bankruptcy court.⁹⁵ The Court stressed the congressional intent that a trustee's statutory objections be determined by summary proceedings,⁹⁶ and pointed out the "practical effect" of the bankruptcy court's necessary resolution of the preference issue.⁹⁷

The Court, unfortunately, confined its decision to objections based upon section 57g and refused to discuss objections founded upon any other claims held by the trustee against the claimant.⁹⁸ Nowhere in the opinion is the 57g defense denominated as a counterclaim.⁹⁹ Thus, the question of summary jurisdiction remains unresolved as to permissive counterclaims not involving a 57g objection. However, the Court's test of the propriety of summary jurisdiction¹⁰⁰

86. Bankruptcy Act § 2a(2), 52 Stat. 842, (1938), 11 U.S.C. § 11(a)(2) (1964).

87. See Bankruptcy Act § 57f, 52 Stat. 866 (1938), 11 U.S.C. § 93(f) (1964).

88. The decision was seven to two, with Justices Black and Douglas dissenting on the basis of the dissent in the circuit court. See 336 F.2d at 540 (separate opinion).

89. 86 Sup. Ct. at 474 n.9.

90. *Id.* at 472, 473.

91. *Id.* at 473.

92. *Ibid.*

93. *Id.* at 475; see note 64 *supra*.

94. 86 Sup. Ct. at 476.

95. *Ibid.*; see note 13 *supra*.

96. 86 Sup. Ct. at 478.

97. *Id.* at 475.

98. In this way, the Court avoided the problems raised by the consensual theory. See note 85 *supra*.

99. Section 57g objections have been viewed as counterclaims by courts in the past. See, e.g., *Nortex Trading Corp. v. Newfield*, 311 F.2d 163 (2d Cir. 1962); *In re Nathan*, 98 F. Supp. 686 (S.D. Cal. 1951).

100. See text accompanying note 89 *supra*.

and its reference to objections in the generic sense of the term¹⁰¹ provide a basis upon which to extend the *Katchen* reasoning to unrelated counterclaims founded upon other than 57g objections.¹⁰²

III. RESOLUTIONS AND RECOMMENDATIONS

Unfortunately, the solution to this jurisdictional puzzle is not to be found in the provisions of the Bankruptcy Act.¹⁰³ Even more lamentable is the fact that Congress cannot be relied upon for a disposition of the problem.¹⁰⁴ In the final analysis, it is to the courts that the difficult task of resolving this morass will fall. This will be accomplished only through a reasoned balancing of the arguments for and against the extension of summary jurisdiction.

A. *The Argument for Expansion*

1. Expeditious Administration

As one referee has aptly stated, "bankruptcy cases unlike General MacArthur's old soldier never fade away. They must be closed."¹⁰⁵ The importance of an expeditious disposition of bankrupt estates, a highly persuasive argument in support of extension,¹⁰⁶ has long been recognized by the courts¹⁰⁷ and was one of the purposes of the 1938 amendments to the Bankruptcy Act.¹⁰⁸ The necessity for speed in bankruptcy administration becomes more compelling in light of the ever-increasing number of bankruptcies.¹⁰⁹ Certainly, a narrow and restrictive

101. See 86 Sup. Ct. at 473, 476.

102. The Court did not exclude such an application of its reasoning, but avoided the problem. It appears reasonable to view objections as inclusive of counterclaims other than those based upon voidable preferences. If such be proper, the *Katchen* decision would support an expansion to those counterclaims.

103. The very wording of several jurisdictional provisions in the Bankruptcy Act has caused serious misconceptions as to this problem. See MacLachlan § 197.

104. Congress possesses the power to extend summary jurisdiction to all bankruptcy matters. *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 430 (1924). Congressional action in this area has rightly been urged. See Gendel, *supra* note 66, at 173; Nadler, *Summary Jurisdiction To Render Affirmative Judgment on Counterclaims, Setoffs and Reclamations*, 29 Ref. J. 39, 42 (1955). However, the present state of the law exemplifies the unwillingness of Congress to provide a solution, and it also appears unlikely that congressional action in this area will be forthcoming. Thus far, any expansion of the summary jurisdiction of the bankruptcy court has, of necessity, been effected through the courts. See Seidman, *Summary Jurisdiction of the Referee: Some Recent Developments*, 39 Ref. J. 100 (1965). It has been suggested that congressional action must be awaited. See Comment, 114 U. Pa. L. Rev. 256, 273 (1965); Note, 49 Va. L. Rev. 571, 590-91 (1963). Such a view is naive and unrealistic, as well as unnecessary.

105. Seidman, *supra* note 104, at 100.

106. See Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref. J. 73 (1962).

107. *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 346 (1874); see *Peters v. Lines*, 275 F.2d 919, 925 (9th Cir. 1960).

108. See H.R. Rep. No. 1409, 75th Cong., 1st Sess. 3 (1937).

109. In the post war year of 1948, there were 18,510 bankruptcy cases filed. 1949 U.S. Judicial Conf. Ann. Rep. 105. By 1964, this number had increased almost tenfold to 171,719. 1964 U.S. Judicial Conf. Ann. Rep. 185.

view of the extent to which summary jurisdiction may properly be exercised is not conducive to efficiency and economy in bankruptcy administration,¹¹⁰ which has been described as "only second in importance to securing equality of distribution."¹¹¹

2. Avoidance of Multiplicity of Suits

Integral to any expeditious administration of bankrupt estates is the avoidance of multiplicity of litigation, an end to which both the courts¹¹² and Congress¹¹³ have long aspired. The bankruptcy court's equitable jurisdiction, invoked by the creditor, militates in favor of disposing of all rights of the parties with finality,¹¹⁴ and eliminating the expense and delay occasioned by an otherwise requisite plenary suit. No less consonant with the spirit and purpose of the Bankruptcy Act is the judicially proclaimed doctrine of *res judicata*.¹¹⁵ Although the operation of this doctrine would support the assumption of jurisdiction over any counterclaim by the trustee,¹¹⁶ it is most persuasive where the counterclaim is based upon a 57g objection.¹¹⁷

Complementing and implementing this judicial scheme has been the enactment by Congress of the Federal Rules of Civil Procedure, which are made applicable to bankruptcy proceedings by General Order 37.¹¹⁸ Positive support for expansion of summary jurisdiction and the elimination of wasteful duplication in plenary actions is found in Congress' dictate that the Federal Rules are to "be construed to secure the just, speedy, and inexpensive determination of every action."¹¹⁹

110. For examples of the basic factors which promote delay and greater expense in plenary suits, see *Oglebay, Some Developments in Bankruptcy Law*, 22 *Ref. J.* 82, 86 (1948).

111. *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 346 (1874).

112. "[T]he general policy of the law [is] against unnecessary multiplicity of suits." *O'Donnell v. Archie's Motor Express*, 176 F. Supp. 36, 37 (E.D. Pa. 1959). Accord, *Chicago & No. W. Ry. v. Lindell*, 281 U.S. 14, 17 (1930); *United States v. Frank*, 207 F. Supp. 216, 219 (S.D.N.Y. 1962).

113. It has been stated repeatedly that the intent of Congress in enacting the Federal Rules of Civil Procedure was to avoid multiplicity of suits. See, e.g., *Blair v. Cleveland Twist Drill Co.*, 197 F.2d 842, 845 (7th Cir. 1952); *John R. Alley & Co. v. Federal Nat'l Bank*, 124 F.2d 995, 997 (10th Cir. 1942); *Value Line Fund, Inc. v. Marcus*, 161 F. Supp. 533, 536 (S.D.N.Y. 1958).

114. *Commercial Discount Co. v. Rutledge*, 297 F.2d 370, 373 (10th Cir. 1961); *In re Barnett*, 124 F.2d 1005, 1009 (2d Cir. 1942); *In re Gillespie Tire Co.*, 54 F. Supp. 336, 339-40 (W.D.S.C. 1942). See *Nadler, Bankruptcy § 588a*, at 456 (2d ed. 1965).

115. See note 64 *supra*.

116. See *Seligson & King*, 36 *Ref. J.* 73, 78 (1962). A good example of the use of the collateral estoppel argument where the counterclaim was not based upon a 57g objection is *Conway v. Union Bank of Switzerland*, 204 F.2d 603, 607 (2d Cir. 1953), petition for cert. dismissed per stipulation, 350 U.S. 978 (1956).

117. See *Katchen v. Landy*, 86 Sup. Ct. 467 (1966); *Moore, Res Judicata and Collateral Estoppel in Bankruptcy*, 68 *Yale L.J.* 1, 32-38 (1958).

118. General Order 37, 11 U.S.C. App. (1964). The Federal Rules of Civil Procedure are thus made applicable to bankruptcy proceedings "in so far as they are not inconsistent with the Act or with these general orders . . ." *Ibid*.

119. *Fed. R. Civ. P.* 1. See note 112 *supra*.

In implementing this policy, the treatment of counterclaims adopted in the Federal Rules and executed by the courts has been crucial. While little doubt remains that a counterclaim of a compulsory nature under rule 13(a)¹²⁰ is within the summary jurisdiction of the bankruptcy court,¹²¹ a dilemma has been created by rule 13(b), which requires separate jurisdictional grounds for permissive counterclaims.¹²² If the jurisdiction of the bankruptcy court in the latter case is viewed in a proper context, this additional requirement should be "of no consequence."¹²³ The consent of the adverse claimant, manifested by his voluntary entrance into the bankruptcy proceedings, could easily be construed to confer the jurisdictional basis for maintenance of a counterclaim of the permissive type and the granting of affirmative relief on it.¹²⁴ This argument is enhanced by rule 13(c), which provides that any counterclaim, compulsory or permissive, may be used to seek affirmative relief as well as merely to diminish or expunge the claim of the adverse party.¹²⁵

3. Protecting the Claimant

Were summary jurisdiction extended to include *all* counterclaims by trustees where the requisite consent by the adverse claimant is present, the adverse claimant would also be accorded the benefits of the court's equitable powers and of the Federal Rules. Thus, to preclude possible prejudice to the adverse claimant in any given situation,¹²⁶ the bankruptcy court could exercise its discretion, (1) as a court of equity, to remit the trustee to a plenary action,¹²⁷ or (2) to order a

120. A compulsory counterclaim is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ." Fed. R. Civ. P. 13(a). See generally 3 Moore §§ 13.12-13. The Federal Rules also provide for permissive counterclaims (i.e., those which do not arise out of the same transaction as that sued upon). Fed. R. Civ. P. 13(b). See generally 3 Moore § 13.18.

121. E.g., *Peters v. Lines*, 275 F.2d 919 (9th Cir. 1960); *In re Solar Mfg. Corp.*, 200 F.2d 327 (3d Cir. 1952), cert. denied, 345 U.S. 940 (1953); *Floro Realty & Inv. Co. v. Steem Elec. Corp.*, 128 F.2d 338 (8th Cir. 1942).

122. See 3 Moore § 13.19[1], at 53-55.

123. *Inter-State Nat'l Bank v. Luther*, 221 F.2d 382, 390 (10th Cir), cert. granted, 350 U.S. 810 (1955), cert. dismissed per stipulation, 350 U.S. 944 (1956).

124. The purpose of the requirement is, as Judge Moore has said, to prevent the enlargement of federal jurisdiction "by a rule designed to liberalize pleadings." 3 Moore § 13.19[1], at 55. There is no doubt that summary jurisdiction may be conferred by consent. See cases cited note 12 supra. "[T]he counterclaim is within the conferrable jurisdiction of the parties." *Inter-State Nat'l Bank v. Luther*, supra note 123, at 390. Although Katchen refused to extend *Inter-State* to unrelated counterclaims not involving a 57g objection, see text accompanying note 83 supra, nevertheless, the reasoning in *Inter-State* still appears to be valid as to such counterclaims. See 2 Collier § 23.08, at 555; Seligson & King, supra note 106, at 78.

125. Fed. R. Civ. P. 13(c). See generally 3 Moore § 13.24.

126. This is one of the criteria applied for the ordering of a separate trial under Fed. R. Civ. P. 42(b). Whether prejudice is present should depend on the circumstances of each case; e.g., a gross disproportion between a trustee's counterclaim and the claim filed.

127. See Moore, supra note 117, at 38 & n.186.

separate plenary trial of the counterclaim under rule 42(b).¹²⁸ The ensuing delay could be minimized by conditioning the court's order upon consent to a plenary action on the counterclaim in the district court under section 23b,¹²⁹ if necessary, and to an immediate and pre-emptory setting of a date for trial.¹³⁰

B. *The Argument Against Summary Jurisdiction*

1. The Seventh Amendment

It has been urged that "fundamental principles cannot be lightly set aside"¹³¹ merely to secure summary adjudication of trustee's counterclaims. Chief among these "fundamental principles" offered as reasons for restricting, or constricting, summary jurisdiction is the right to a trial by jury under the seventh amendment.¹³² Where the trustee's claim for affirmative relief is founded upon a 57g objection, there is no longer any doubt that the seventh amendment right does not attach to the adjudication of the objection.¹³³ In a case in which the counterclaim by the trustee is based upon an objection which does not involve a voidable preference, the right to a jury trial should also be defeated by the operation of the consensual theory.¹³⁴

128. Fed. R. Civ. P. 42(b). Under this rule, a separate trial "should not be ordered unless such a disposition is clearly necessary. . . . [And it is] in the discretion of the trial judge [referee]." 5 Moore ¶ 42.03, at 1211. (Footnote omitted.)

129. This is the use of § 23b in its most proper sense. See 2 Collier ¶ 23.14.

130. This method of creditor-consent and fixing a pre-emptory trial date has been suggested, but not as it is here proposed to be used. See Ferguson, *The Consensual Basis of Subject-Matter Jurisdiction in Matters of Bankruptcy: Fact and Fiction*, 14 Rutgers L. Rev. 491, 517 (1960); Comment, 114 U. Pa. L. Rev. 256, 272-73 (1965). If discretion dictates such action, this method would be wisely chosen, inasmuch as "the potential for delay is minimized by restricting the plenary proceeding to the federal court . . ." Ferguson, *supra* at 517.

131. Note, 49 Va. L. Rev. 571, 590 (1963).

132. See Ferguson, *supra* note 130, at 512-13; Note, 49 Va. L. Rev. 571, 584-85 (1963). But see Note, 65 Yale L.J. 694, 706 & n.55 (1956).

Absent his consent to summary proceedings, an adverse claimant has a right to plenary adjudication and to a jury trial as to a trustee's claim against him. See note 11 *supra* and accompanying text. Professor Ferguson viewed the problem from a false perspective insofar as he chose to deny absolutely the efficacy of the doctrine of *res judicata* and of the consensual theory, rather than to balance the operation of these concepts against the constitutional right to a jury trial.

133. *Katchen v. Landy*, 86 Sup. Ct. 467, 476-77 (1966).

134. Syllogistically, the argument defeating the right to a trial by jury through the consensual theory may be stated as follows:

(a) Summary proceedings do not carry with them the right to a jury trial. See notes 6 & 8 *supra* and accompanying text. (b) An adverse claimant, by filing a proof of claim or a reclamation petition, consents to summary proceedings in the bankruptcy court, even where he would otherwise have a right to a plenary procedure. See 2 Collier ¶ 23.08[1], at 533. (c) Therefore, an adverse claimant's consent operates, in effect, as a waiver of any right to a plenary suit and to a jury trial of issues raised by the trustee's counterclaims. The elements of this reasoning have strong support in decisional law. The right to a plenary

If, as a last resort, the opponents of any expansion of the summary jurisdiction of the bankruptcy court have turned to the over-exalted jury trial, they were no doubt encouraged by the decision of the Supreme Court in *Beacon Theatres, Inc. v. Westover*.¹³⁵ Although it is an inescapable conclusion from *Beacon* that the right to a jury trial in civil cases is to be preserved and that no impairment of it will be countenanced by the Court,¹³⁶ it must be noted that (1) the applicability of the seventh amendment to bankruptcy proceedings remains questionable;¹³⁷ (2) the summary proceedings to which a filing adverse claimant thereby consents do not encompass the right to a jury trial;¹³⁸ and (3) the Bankruptcy Act itself gives no new right of jury trial to the creditor, but only such rights as exist or are subsequently extended to him.¹³⁹ Any attempt to apply the *Beacon* decision to bankruptcy proceedings without taking cognizance of these points and of the consensual aspects of summary jurisdiction is foolhardy.¹⁴⁰

2. The Assault on the Referee

The referee in bankruptcy occupies a pivotal position in light of the provisions of the Bankruptcy Act mandating direct reference.¹⁴¹ It has even been suggested that the administrative and jurisdictional problems arising in the bankruptcy court could be solved by raising that court to the full status of the district court

suit is procedural and thus may be waived. *O'Dell v. United States*, 326 F.2d 451, 455 (10th Cir. 1964); *In re Read-York, Inc.*, 152 F.2d 313, 315 (7th Cir. 1945). There is also authority to support the view that the seventh amendment is inapplicable in bankruptcy proceedings. *Katchen v. Landy*, 86 Sup. Ct. 467, 476-77 (1966); *Barton v. Barbour*, 104 U.S. 126, 133-34 (1881); *In re Trans-Pacific Corp.*, 76 F. Supp. 623 (S.D. Cal. 1947), *aff'd per curiam sub nom. Trans-Pacific Corp. v. Goggin*, 166 F.2d 1021 (9th Cir.), *cert. denied*, 335 U.S. 815 (1948); *In re Christensen*, 101 Fed. 243 (N.D. Iowa 1900). However, even if the right to jury trial does attach, it can be waived. *Jesonis v. Oliver J. Olson & Co.*, 238 F.2d 307, 308 (9th Cir. 1956); *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir.), *cert. denied*, 388 U.S. 816 (1949).

In the final analysis, it may be stated that an adverse claimant, by his voluntary entry into the bankruptcy court, "has voluntarily sought a forum where the procedure of equity obtains. . . . By his election he must be held to have waived a jury." *In re Standard Tel. & Elec. Co.*, 157 Fed. 106, 113 (E.D. Wis. 1907), *aff'd sub nom. Knapp v. Milwaukee Trust Co.*, 162 Fed. 675 (7th Cir. 1908), *aff'd*, 216 U.S. 545 (1910).

135. 359 U.S. 500 (1959), 58 Mich. L. Rev. 474 (1960), 35 N.Y.U.L. Rev. 289 (1960).

136. See 359 U.S. at 510-11 & n.18. The Supreme Court reiterated this view in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962), 15 Ala. L. Rev. 562 (1963).

137. See note 134 *supra*.

138. *Ibid.*

139. See Bankruptcy Act § 19, 52 Stat. 852 (1938), 11 U.S.C. § 42 (1964). See generally 2 Collier ¶ 19.07.

140. The petitioner in *Katchen* sought to assert the *Beacon* and *Dairy Queen* decisions, but the Supreme Court rejected the contention that these decisions precluded the summary adjudication of a 57g objection. *Katchen v. Landy*, 86 Sup. Ct. 467, 477-78 (1966).

141. Bankruptcy Act § 22a, 73 Stat. 109 (1952), 11 U.S.C. § 45(a) (1964). Formerly, reference was within the discretion of the district judge. Bankruptcy Act § 22a, ch. 541, 30 Stat. 552 (1898).

so that the powers of the referee could be thereby expanded.¹⁴² While there is no reason to believe that these suggestions will become law, there is no longer any efficacy in the objection to the expansion of summary jurisdiction based upon the allegation that referees are "collection-minded." The Bankruptcy Act itself now provides for compensation of referees on a fixed-salary basis.¹⁴³ In addition to the fact that the bankruptcy courts are capable of being, and have been, well administered,¹⁴⁴ there is, for the unreasonably fearful creditor, the safeguard of review by the district courts.¹⁴⁵

IV. CONCLUSION

A trend is readily discernible in the courts to enlarge the summary jurisdiction of the courts of bankruptcy. Basically, it comes down to a balancing of the "absurdity of making A pay B when B owes A"¹⁴⁶ against specious constitutional and procedural arguments. The equitable nature of the court, the applicability of the Federal Rules, and the desirability of expeditious and economical disposition of bankrupt estates militate in favor of the extension of the consensual summary jurisdiction of the bankruptcy court to all claims proffered by the trustee in answer to an adverse claimant's voluntary¹⁴⁷ filing of a proof of claim or reclamation petition. The referees have persistently asked for increased summary jurisdiction and a clarification of the present jurisdictional powers of the bankruptcy court in this area.¹⁴⁸ Despite the obvious trend toward the needed expansion, however, there is still much vigorous dissent.¹⁴⁹

142. See Hanna & MacLachlan, *Cases on Creditors' Rights* 394-95 (5th ed. 1957); Rochelle & King, *A Proposal To Raise Bankruptcy Courts to District Court Level*, 13 Kan. L. Rev. 391 (1965).

143. Bankruptcy Act § 40, 60 Stat. 326 (1946), as amended, 11 U.S.C. § 68 (1964). See Hunt, *Summary Proceedings in Bankruptcy*, 22 Ref. J. 109, 113 (1948); Note, 65 Yale L.J. 694, 702 & n.38 (1956). Contra, Friebolin, *Summary Jurisdiction of Bankruptcy Courts*, 23 Ref. J. 43 (1949).

144. See Rochelle & King, *supra* note 142, at 396; Address by Mr. Justice Harlan, National Ass'n of Referees in Bankruptcy Annual Convention, Oct. 11, 1955, in 30 Ref. J. 3 (1956).

145. Bankruptcy Act §§ 2(10), 39c, 52 Stat. 842 (1938), 74 Stat. 528 (1960), 11 U.S.C. §§ 11(a)(10), 67(c) (1964).

146. *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913).

147. All provable claims must be filed within the statutory period. Bankruptcy Act § 57n, 66 Stat. 424 (1952), 11 U.S.C. § 93(n) (1964). Thus, it is seen that filing a proof of claim is necessary before a creditor may share in the bankrupt estate. Although it may be urged that this injects an element of compulsion and renders the filing involuntary, such a conclusion does not find support. See *In re Standard Tel. & Elec. Co.*, 157 Fed. 106, 113 (E.D. Wis. 1907), *aff'd sub nom. Knapp v. Milwaukee Trust Co.*, 162 Fed. 675 (7th Cir. 1908), *aff'd*, 216 U.S. 545 (1910); Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 Ref. J. 73, 75 (1962).

148. See, e.g., Coleman, *A Plea for "One Stop Service" in Bankruptcy*, 25 Ref. J. 31 (1951); Seidman, *supra* note 104. One referee was prompted to state that, "when writers and courts repeatedly say that this is a difficult problem, a vexation [sic] question, they are indulging in the prize understatement of the century." Friebolin, *supra* note 143.

149. See *Katchen v. Landy*, 336 F.2d 535, 540 (10th Cir. 1964) (separate opinion),

The uncertainty surrounding the problem of summary jurisdiction is, in large measure, a result of its staggering complexity.¹⁵⁰ Oversimplified distinctions¹⁵¹ and poor statutory draftsmanship¹⁵² have given rise to a monumental morass of conflicting decisional law. Nonetheless, the courts have achieved a reasonably satisfactory solution by sustaining summary jurisdiction to award affirmative relief to the trustee where the counterclaim is closely related to the claim and where the trustee seeks to recover a voidable preference, whether it be related or not. However, in furtherance of the efficient and speedy administration of bankrupt estates (*ergo*, to the advantage of both claimants and bankrupt), the summary jurisdiction of the bankruptcy court over *all* of trustee's counterclaims may, and should, be recognized with the exercise of discretion by the bankruptcy court to avoid inequities.

aff'd, 86 Sup. Ct. 467 (1966); Ferguson, *supra* note 130, at 517; Comment, 114 U. Pa. L. Rev. 256 (1965). Little has been said of the possibility of claimants' becoming excessively reticent in pursuing their claims if summary jurisdiction were expanded, but this is an important factor to be considered. See MacLachlan § 196, at 211-12. Nevertheless, it would appear to be desirable that irresponsible claim policies among creditors be discouraged, and, if this be one of the results of an expanded summary jurisdiction, it is a persuasive supporting argument. With the summary jurisdiction of the bankruptcy court expanding, many claimants will undoubtedly seek to preclude the exercise of such jurisdiction over the trustee's permissive counterclaims or unrelated objections by objecting to summary proceedings in their proof of claim—i.e., by reserving the right to a plenary adjudication of any counterclaims interposed by the trustee in his objection. This would appear to be a failing cause. The claim of a creditor who is faced with a 57g objection cannot, under any circumstances, be allowed without the summary adjudication of the voidable preference, whether it be related or unrelated. See *Katchen v. Landy*, 86 Sup. Ct. 467, 473 (1966). Where the counterclaim does not involve a 57g objection, the propriety and effect of such a reservation is at least in the realm of possibility. Several decisions have given effect to such a reservation. See *In re Eakin*, 154 F.2d 717 (2d Cir. 1946); *In the Matter of Industrial Associates, Inc.*, 155 F. Supp. 866, 871 (E.D. Pa. 1957); *In re G. L. Odell Constr. Co.*, 119 F. Supp. 573 (D. Colo. 1954). However, these decisions erringly relied either upon distinguishable authority, such as *Cline v. Kaplan*, 323 U.S. 97 (1944), *Pickens v. Roy*, 187 U.S. 177 (1902), and *Louisville Trust Co. v. Comingor*, 184 U.S. 18 (1902) (all of which decisions were based upon objections to the exercise of summary jurisdiction where the creditor was brought in under an order to show cause), or upon pre-Alexander cases, such as *In re Bacon*, 210 Fed. 129 (2d Cir. 1913). In addition to the erroneous basis for this past approval of such "reservation clauses," it is doubtful, in light of *Katchen* and *Alexander*, that such a reservation will be permitted since it runs counter to the paramountcy of the judicially and congressionally declared policy of expeditious administration. See *Katchen v. Landy*, 86 Sup. Ct. 467 (1966).

150. "When summary jurisdiction exists is a ridiculously complex problem . . ." Cowans, *Problems of Ethics for Referees in Bankruptcy*, 39 Ref. J. 69, 70 (1965).

151. An oversimplified distinction between summary proceedings and plenary suits is a substantial cause of much of the confusion in this area. See Editorial, *What's in a Name—The Unhappy Tag of "Summary Jurisdiction,"* 39 Ref. J. 67 (1965).

152. See MacLachlan § 197; Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy*, 20 Iowa L. Rev. 565 (1935).