THE ABSTENTION DOCTRINE IN BANKRUPTCY

INTRODUCTION—CLASSICAL ABSTENTION

The abstention doctrine represents one attempt by the federal courts to deal with the pressures and conflicts of parallel federal and state court systems. In the landmark case of Railroad Commission v. Pullman Co., the Supreme Court acknowledged the doctrine as part of the body of federal jurisprudence and established the conceptual framework within which the doctrine has developed. The Court unanimously reversed the decree of a three-judge district court granting an injunction against enforcement of an order of the Railroad Commission of Texas, and remanded the case with directions to retain the bill pending a determination of proceedings to be brought in the state courts. Thus, a federal court confronted with a case in which its jurisdiction was properly laid, and which also contained sensitive federal concerns, was directed not to exercise its jurisdiction—the outstanding characteristic of abstention.

In the Pullman opinion, Mr. Justice Frankfurter articulated three basic concerns which have been regarded as the "classical" theoretical construct for discussion and development of a doctrine which requires a federal court to abstain from an action which it would otherwise normally take. The first and perhaps the most consistently applied rationale is the settled policy of federal courts to avoid an unnecessary decision of a constitutional question. Thus, in a case in which a constitutional issue is raised, but where state law is unsettled or unclear, a federal court, by use of its power to abstain, can stay further proceedings in the case before it until the state law questions are resolved.

1 312 U.S. 496 (1941).
3 The Commission had issued an order prohibiting the operation of any sleeping car on any line of railroad in Texas unless a Pullman conductor was in charge. Ordinarily, one Pullman conductor, a white employee, supervised the Pullman porters, Negro employees, who were each in turn responsible for one Pullman car. Previously, when a train carried only a single Pullman car, only the Pullman porter was necessary. The Commission's order prompted action by the Pullman Company and several Texas railroads in the federal district court to enjoin enforcement. In addition to the Pullman porters' charge of discrimination in violation of the fourteenth amendment, the complaints alleged violation of the equal protection, due process and commerce clauses of the Constitution. The complaints also charged that the order was in excess of the Commission's authority under the Texas statute.

4 See Rescue Army v. Municipal Court, 331 U.S. 549, 568-75 (1947), and cases cited therein for a discussion of this principle, its application to various situations and the general considerations of policy and administration that support it.
ABSTENTION IN BANKRUPTCY

in an appropriate state forum.\(^5\) The state determination may render the constitutional decision moot.\(^6\)

It is imperative to notice that cases presenting facts justifying application of the first abstention rationale (avoiding an unnecessary constitutional decision), if they contain the requisite amount in controversy, satisfy by definition the requirements for "federal question" jurisdiction.\(^7\) It is reasonable to suppose that the nearly invariable ordering of abstention on such a finding\(^8\) is a function of the coincidence of the concerns which prompted development of constitutional abstention and the purposes for which federal question jurisdiction was conferred. Abstention where determination of a constitutional question necessarily depends upon unclear state law is avowedly to avoid an incorrect forecast of state law and therefore an irrelevant or premature resolution of the constitutional issue.\(^9\) Such a concern complements the desire to prevent a multiplicity of interpretations of the Constitution by various state courts with a resulting lack of certainty and uniformity in the federal law.\(^10\) Absent some compelling reason to retain jurisdiction, a finding of facts raising the possibility of constitutional abstention narrowly circumscribes the discretion permitted the district court.\(^11\)

\(^5\) The technique of staying the federal proceedings has frequently been employed in such Constitutional abstention situations. An excellent general discussion of the dispositive alternatives used by federal courts when abstaining may be found in Note, Judicial Abstention from the Exercise of Federal Jurisdiction, 59 Colum. L. Rev. 749, 771-76 (1959).

\(^6\) An excellent example of the operation of this approach is found in Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944). The plaintiff, Spector, was engaged in the interstate trucking business exclusively and maintained two leased terminals in Connecticut for that purpose. It sued in federal district court for injunctive relief from a corporation tax imposed by the state of Connecticut, alleging inter alia violation of both the commerce and due process clauses of the United States Constitution. The district court concluded that the tax was not applicable to the plaintiff, 47 F. Supp. 671 (D. Conn. 1942). On appeal, the Second Circuit determined that it was necessary to reach the federal constitutional questions and sustained the tax, 139 F.2d 809 (2d Cir. 1943). The Supreme Court held that construction of the tax by the courts of Connecticut must precede the determination of the constitutional issue in view of the fact that the statute was unconstrued and susceptible to a number of legitimate interpretations which might affect or moot the constitutional decision. 728 U.S.C. § 1331 (1964):

\(^7\) 28 U.S.C. § 1331 (1964):

(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.


\(^11\) It is nonetheless quite clear that the district court may not mechanically yield to a state court determination, even in the constitutional abstention area. See NAACP v. Bennett, 360 U.S. 471 (1958) (per curiam):

When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication before a United States District Court, a finding that the validity of the statute is a question of state law is not a finding that the validity can be determined under a state judicial system. The rule that a Federal question is not determinable by state courts is not that the Federal question is not determinable in the state courts, but rather that the Federal question is not capable of determination by means of state procedures and state standards.
The second ground which prompted abstention was the desire to avoid undue conflict with state administration and regulation.12 Cognizant of the disruptive effect a federal injunction directed against state officials might have on orderly state administration, the courts have made effective use of abstention.13 However, these concerns of "comity" which dictate abstention, unlike the concerns in constitutional abstention situations, are not clearly identical with the reasons which prompted the conferral of jurisdiction on the federal district court. Frequently, cases involving comity abstention are entitled to a federal forum because of diversity jurisdiction,14 which was conferred in

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12 Various commentators have attributed this concern in part to the expansive rule pronounced by the Supreme Court in Ex parte Young, 209 U.S. 123 (1908), which made possible the broad use of federal injunctive power against state officials acting in their official capacities. Note, Abstention: An Exercise in Federalism, 108 U. Pa. L. Rev. 226, 226-27 (1959); Note, Judicial Abstention from the Exercise of Federal Jurisdiction, 59 Colum. L. Rev. 749, 749-52 (1959).

13 An example of this approach is Hawks v. Hamill, 288 U.S. 52 (1933). In Hawks, an injunction was sought by the owners of a toll bridge in Oklahoma to prevent state officials from obstructing the collection of tolls in accordance with a directive by the state highway commissioner that the bridge had become a part of the "free" highway system. The district court granted a motion to dismiss the suit, 288 F.2d 628 (W.D. Okla. 1931), and the court of appeals reversed, 58 F.2d 41 (10th Cir. 1932). The Supreme Court unanimously reversed and held dismissal proper. In an opinion for the Court, Mr. Justice Cardozo explained the reason for dismissal in the following terms:

Only a case of manifest oppression will justify a federal court in laying such a check [injunction] upon administrative officers acting colore officii in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium.

288 U.S. at 61 (emphasis added). Other early examples are Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935), and Pennsylvania v. Williams, 294 U.S. 176 (1935), discussed at notes 92-93 infra and accompanying text.

Dismissal is most appropriate where the rationale for abstention is non-interference with state administration, as in Hawks, but it may be used in other situations. See, e.g., Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929).

response to the fear that local courts and juries might be prejudiced against out-of-state parties or claims. Thus, federal jurisdiction based on diversity insulates against local or state interests which may or may not be the very interests that comity abstention protects.

Where state comity concerns arise in a diversity case, the decision whether to abstain can meaningfully be made only by the district court as a proper exercise of its equitable powers and in light of all the circumstances of the case before it. The potential prejudice to the state interests may be enormous or minimal, ranging, for example, from a challenge to an important state-wide regulatory scheme to a protest over the price offered in condemnation of a small parcel of property sought for a relatively insignificant township use. Similarly, although today there is seldom hostility against the citizens of one state in the courts of a sister state, the problem has not ceased to exist, and the concerns which prompted diversity jurisdiction are of frequent importance in such areas as civil rights.

Finally, despite the clear power of a federal court to determine questions of state law necessary to the decision of a case before it, abstention has been thought appropriate on the authority of the third articulated Pullman concern—where the applicable state law was uncertain, highly complex or without a clear construction by an authoritative tribunal. Thus the wise exercise of discretion might allow a court, despite the absence of a constitutional claim or issue, to defer the determination of state law to the state court. This approach was apparently indicated by the Court, even prior to Pullman, in Thompson v. Magnolia Petroleum Co. The Supreme Court in


(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.


17 See Comment, Stare Decisis and the Lower Courts: Two Recent Cases, 59 COLUM. L. REV. 504, 512 (1959), and cases cited.


19 309 U.S. 478 (1940). In Thompson, a railroad was undergoing reorganization within §77 of the Bankruptcy Act, 11 U.S.C. § 205 (1964), when oil, the title to which was in dispute, was discovered under its right of way. The trustee petitioned the reorganization court for an adjudication of title. The district court found it had jurisdiction of the question, granted an injunction against further assertion of rights
Thompson found that the district court had jurisdiction, based on the bankruptcy laws, of a title controversy which presented no constitutional or state comity problems, but further found that the complex questions of state law should nevertheless be determined in the state courts, and instructed the district court to order the trustee to proceed in state court for adjudication of title.

Notwithstanding Thompson, it is not clear whether abstention based only on the third rationale is presently permissible. In 1943, the Supreme Court elaborated upon its Thompson and Pullman decisions in Meredith v. Winter Haven, a case based on diversity jurisdiction. The Court held that difficulty in finding state law did not automatically preclude a federal decision, but that the federal courts might exercise properly laid jurisdiction unless some "defined principle" or consideration of "recognized public policy" suggested otherwise. The Court then engaged in a discourse on the policy considerations that would indicate when abstention is appropriate:

[A] federal court, adhering to the salutary principle of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented.

Abstention, in a case where an unnecessary constitutional decision could be avoided, was thus endorsed, as was abstention which would prevent interference with state administration. Nonetheless, the Court, while indicating an awareness of Thompson, made no effort to distinguish it from the case before it; it concluded that the court of appeals could not reverse the discretionary decision of the district court not to abstain where the record showed only unclear state law, the third Pullman ground.

in the property by other parties and reserved the question of actual title, 309 U.S. at 480-81. The court of appeals dissolved the injunction and determined by its own construction of the state's property law that the reorganization court was without jurisdiction in the controversy. 106 F.2d 217 (8th Cir. 1939).

20 See notes 50-51 infra and accompanying text.
21 320 U.S. 228 (1943).
22 320 U.S. at 234.
23 City officials were going to call in bonds in a manner which the plaintiffs thought illegal. Suit was brought by the plaintiffs in federal court (based on diversity jurisdiction) for injunction against this call. The Florida law regarding the bonds was unclear, but the district court granted the defendant's motion to dismiss. The court of appeals ordered abstention. 134 F.2d 202 (5th Cir. 1943).
24 320 U.S. at 236 (citing Pullman).
25 Id. at 235-36.
26 Id. at 236. The case is cited following the quotation reproduced in the text accompanying note 23 supra (abstention to avoid an unnecessary constitutional decision). It is introduced, however, by a cf. signal, and close analysis of Thompson reveals that no problem or claim of constitutional right was involved. See note 19 supra and accompanying text.
The Court only belatedly resolved this apparent conflict and no small amount of confusion has resulted. The probable interpretation is that the Court considered the fact that the Thompson case was a proceeding under the Bankruptcy Act a sufficient distinction. At the time of the Thompson decision, the Court had already indicated that abstention was proper in the discretion of a bankruptcy court where no constitutional or state comity problems existed; shortly after Thompson it again upheld a decision by a bankruptcy court to abstain solely because of unclear state law.

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26 Id. at 234 (emphasis added).
27 Propper v. Clark, 337 U.S. 472, 489-90 (1949). Discussing abstention, the Court stated:

This suggested procedure has been followed . . . where the only issue in the case was one of state law, although federal jurisdiction was based on the Bankruptcy Act [citing Thompson]. We have refused in a diversity of citizenship case to allow the difficulty of an issue of state law to deter us from exercising our jurisdiction when federal determination was subject to equitable discretion and the state issue was the only one in the case [citing Meredith].

28 An example of this followed shortly after the Court's apparent about-face in Meredith. The federal court for the district of New Jersey, faced with the long and complex reorganization of the New Jersey Central Railroad, In re Central R. Co., 152 F.2d 408, 411 (3d Cir. 1945), aff'd in part and rev'd in part sub nom., Gardner v. New Jersey, 329 U.S. 565 (1947), was petitioned by the state of New Jersey and its attorney general to stay proceedings before a master and to grant permission for suit to be brought in the state courts to determine a number of highly complicated questions of state law, including the railroads' challenges of the constitutionality of state legislation. The motion was denied, In re Central R. Co., 163 F.2d 44, 45 (1947), and the Third Circuit on appeal felt compelled to order abstention to allow the state court proceedings. In re Central R. Co., 163 F.2d 44 (3d Cir. 1947), cert. denied, 332 U.S. 810 (1947).

The Third Circuit opinion attempted to deal with the Thompson-Meredith dilemma by distinguishing Thompson as a case where the court "request[ed] state scrutiny of the facts at bar" in view of a "lack of relevant . . . law." 163 F.2d at 48. This was hardly the situation. See discussion of Thompson at notes 19-20 supra and accompanying text. The Thompson court summarizes its opinion by stating that there is a problem of finding which law is applicable and by citing the opposite results reached by two different courts to show the possibility of that determination being made either way and the consequent need for submitting the question to the state court. 309 U.S. 478, 484 (1940). Meredith is cited with approval by the Third Circuit as a statement of general position. 163 F.2d at 48. The opinion then engages in a recitation of the complexities of the case and finally concludes unconvincingly: "We have not here . . . a question of which of two courts might better decide an issue. We have rather a question which only one court can effectively decide." Id. at 53. Cf. cases discussed at note 98 infra.

29 Foust v. Munson S.S. Lines, 299 U.S. 77 (1936), discussed at notes 100-19 infra and accompanying text.
30 Mangus v. Miller, 317 U.S. 178 (1942). The opinion gives some indication that the fact of bankruptcy jurisdiction was to be considered in the abstention decision: Indeed, before dismissing the proceedings because of difficulties in ascertaining the rights of the debtor under state law and in administering them in bankruptcy, it would be an appropriate exercise of the court's jurisdiction to take
The synthesis thus seems to be that abstention based solely on unclear state law questions presented to a federal court is improper, but, in proceedings under the Bankruptcy Act, both substantive and procedural concerns are sufficiently unique that abstention is allowable even on this ground in the sound discretion of the district court sitting in bankruptcy or reorganization.\textsuperscript{31}

Supreme Court decisions following \textit{Meredith} continued, until 1959, to be more or less consistently based on one or both of the two rationales approved by the Court—constitutional abstention\textsuperscript{32} and comity abstention.\textsuperscript{33} "Classical" state-law abstention has continued to be held improper where it was the \textit{sole} basis for refusal to exercise jurisdiction.\textsuperscript{34}

In 1959, the Supreme Court reexamined the abstention doctrine. In two highly controversial decisions, \textit{County of Allegheny v. Frank Mashuda Co.,}\textsuperscript{35} and \textit{Louisiana Power & Light Co. v. Thibodaux,}\textsuperscript{36} the Court departed from the settled scope of doctrinal application.\textsuperscript{37} The cases are factually quite difficult to reconcile and prompted a wealth of comment.\textsuperscript{38} The thrust of the change, however, seems to suitably measure to remove those difficulties by affording the interested parties opportunity to assert their rights in the state courts . . . .

\textit{Id.} at 185 (emphasis added). This case arose under the §75 provisions of the Bankruptcy Act for agricultural compositions and extensions. Act of July 1, 1898, ch. 541, §75, 30 Stat. 544, added by, ch. 204, §1, 47 Stat. 1470 (1933). The right of farmers to file petitions under §75(a)-(r) expired on March 1, 1949. Technically, §75(s), 11 U.S.C. §203(s) (1964), is still in force, but it operates only on a case filed under §75(a)-(r). Section 75 is now therefore of largely historical interest.

\textsuperscript{31} Judge Friendly recognized this analysis in First Nat’l Bank v. Reed, 306 F.2d 481 (2d Cir. 1962), another bankruptcy case in which unclear state law moved the court to order abstention with the following statement:

Moreover, the issue does not here arise in a diversity action, see Meredith . . . where “abstention” . . . [took] the extreme form of dismissal . . . . Here Federal jurisdiction rests on bankruptcy, and the Bankruptcy Act contains several provisions looking toward state court determination of issues arising in the administration of bankrupt estates.

\textit{Id.} at 488 (emphasis added).


\textsuperscript{34} See, e.g., Sutton v. Leib, 342 U.S. 402 (1952); Propper v. Clark, 337 U.S. 472 (1949).

\textsuperscript{35} 360 U.S. 185 (1959).

\textsuperscript{36} 360 U.S. 25 (1959).

\textsuperscript{37} Three other abstention decisions handed down at the same time appear to fall within the older limits: Harrison v. NAACP, 360 U.S. 167 (1959) (state court construction of state statute should precede constitutional determination); Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959) (same); Martin v. Creasy, 360 U.S. 219 (1959) (deference to state administrative appeal system).

be an expansion of the application of the doctrine. Some authorities also foresaw a relaxation of the Meredith rule that state-law abstention is inappropriate where it is the sole ground. Most important, however, is the affirmation of district court discretion to weigh the problems of state comity and diversity jurisdiction.

Since there has been no major change in classical abstention since Thibodaux and Mashuda, a federal district court (at least in situations where there exist no interests of comity or possibility of avoiding an unnecessary constitutional decision by a prior state determination of unclear law) now confidently may use its discretion in determining whether or not to abstain. And, although the allowable limits of discretion are not fixed, at least the district court must not refuse to consider the jurisdictional bases of the case before it in making that decision. Moreover, at least in case of a dispute in which jurisdiction rests on the Bankruptcy Act, the district court may yield its jurisdiction in a greater number of circumstances than when jurisdiction rests on diversity or a federal question.

The Bankruptcy Context

Essential to an understanding of the application of abstention to bankruptcy cases is a consideration of the distinctive provisions of

39 The prior notion that abstention was only an equitable device was negatived by its application to situations at law. Abstention, by stay of the federal action, was upheld in the eminent domain proceedings of Thibodaux where state law was unsettled, but not in similar proceedings in Mashuda where the law appeared clear. The conclusion that this application beyond equity was proper in some cases is strengthened by the Court's decision a year later in Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960), where constitutional abstention was ordered in a common law action against an insurance company.

Similar decisions tending to expand the application of the doctrine beyond the scope of application indicated by the Court in Mashuda and Thibodaux include P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951) (stay of trademark infringement action where crowded federal docket and prior state action), and Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949) (stay of shareholder action pending state suit consolidating nine similar actions). Such an expansion has been given some support and is discussed in Kurland, Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F.R.D. 481, 490-92 (1960).

40 C. Wright, FEDERAL COURTS, § 52, at 175 (1963); Note, Abstention: An Exercise in Federalism, 108 U. PA. L. REV. 226, 247-48 (1959). However, McNeese v. Board of Educ., 373 U.S. 668 (1963), claims to reaffirm the Court's Meredith approach, despite Thibodaux, although the Court said "no underlying issue of state law [was] controlling in this litigation." Id. at 674.


42 Compare the narrow grant of discretion in constitutional abstention cases, discussed at note 11 supra and accompanying text, with the district court's broader discretion in comity situations, discussed at text accompanying note 16 supra.

43 This is the effect of the Bennett and Harrison decisions, discussed at note 11 supra.
bankruptcy jurisdiction and procedure which bear directly on the bankruptcy court's decision to abstain. The Constitution of the United States gives Congress the power "to establish . . . uniform Laws on the Subject of Bankruptcies throughout the United States." \(^{44}\)

Pursuant to this grant, Congress has exercised continuous authority over bankruptcies since the passage of the Bankruptcy Act of 1898,\(^{45}\) the statute which forms the nucleus of modern American bankruptcy law. This federal power is exclusive, and was characterized thusly by the Supreme Court in *International Shoe Co. v. Pinkus*:

> The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount . . . . The national purpose to establish uniformity necessarily excludes state regulation.\(^{46}\)

Despite its supremacy, however, the Bankruptcy Act does not encompass all questions relating to bankruptcy,\(^{47}\) and state regulation of potentially conflicting areas has been sanctioned.\(^{48}\)

As a necessary part of the exercise of this power, the Bankruptcy Act invests the federal district courts in the various states (and certain other federal courts)\(^{49}\) with original jurisdiction in bankruptcy proceedings, as well as in certain other related controversies.\(^{50}\) The juris-

\(^{44}\) U.S. Const. art. I, § 8 (emphasis added).

\(^{45}\) 30 Stat. 544 (1898), as amended, 11 U.S.C. §§ 1-1103 (1964). There were three earlier attempts by Congress to establish a federal bankruptcy act (1800, 1841, and 1867), but in each instance the statute was repealed in a relatively short time. H. REMINGTON, BANKRUPTCY §§ 7-9 (5th ed. 1950). During the periods without federal bankruptcy legislation, the states properly exercised sole authority over debtors and their relief. Sturgis v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

\(^{46}\) 278 U.S. 261, 265 (1929).

\(^{47}\) Thus a state insolvency statute may remain in effect in so far as it is not superseded by the federal bankruptcy legislation. *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929); Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902).

\(^{48}\) Stellwagen v. Clum, 245 U.S. 605 (1918). Moreover, Congress constitutionally may provide within the Bankruptcy Act itself for state exemption statutes to be continued in effect regarding the estate of a bankrupt, thus allowing priorities of payment and such institutions as dower, despite the variance from state to state. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 189-90 (1902). As a result, there is not infrequent difficulty in determining whether state legislation, as sought to be enforced, conflicts with federal bankruptcy administration. Indeed, the limitations of the federal bankruptcy power have never been precisely defined. See, e.g., Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 669-71 (1935) (upholding the reorganization sections as a valid exercise of the federal bankruptcy power against objections that the clauses providing for protection and rehabilitation of the debtor exceeded the constitutional grant).

\(^{49}\) "[C]ourts of bankruptcy" shall include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable." Bankruptcy Act of 1898, § 1(10), 11 U.S.C. § 1(10) (1964).

\(^{50}\) § 11. Creation of Courts of Bankruptcy and Their Jurisdiction. (a) The courts of the United States herebefore defined as courts of bankruptcy are created courts of bankruptcy and are invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and
diction of the bankruptcy court is explicitly made exclusive by the Judicial Code, but remains, nevertheless, a limited jurisdiction, outside of which a state tribunal properly may hear actions related to a bankruptcy proceeding.\footnote{51}{28 U.S.C. § 1334 (1964). This exclusivity is the case, as well, with the special bankruptcy courts and reorganization courts, discussed at note 60 infra and accompanying text. See Meyer v. Fleming, 327 U.S. 161, 164 (1946) ("the exclusive jurisdiction granted the reorganization court by § 77(a) is that which bankruptcy courts have customarily possessed").}

during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt . . . (2) Allow claims, disallow claims, . . . (3) Appoint . . . receivers or the marshals . . . authorize such receiver, . . . to prosecute or defend any pending suit. . . . or to commence and prosecute any suit or proceeding . . . before any judicial, legislative, or administrative tribunal in any jurisdiction . . . (4) Arraign, try, and punish persons for violations . . . (5) Authorize the business of bankrupts to be conducted . . . (6) Bring in and substitute additional persons or parties . . . (7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided. . . . (8) Close estates . . . (9) Confirm or reject arrangements or plans proposed under this title. . . . (10) Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings; (11) Determine all claims of bankrupts to their exemptions; (12) Discharge or refuse to discharge bankrupts . . . (13) Enforce obedience by persons to all lawful orders, . . . (14) Extradite bankrupts . . . (15) 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 title: \textit{Provided, however,} That an injunction to restrain a court may be issued by the judge only; . . . (17) Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do; and, upon complaint of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice; (18) Tax costs, and render judgments . . . (19) Transfer cases to other courts of bankruptcy; (20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: \textit{Provided, however,} That the jurisdiction of the ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property . . . .

\footnote{52}{In Callaway v. Benton, 336 U.S. 132 (1949), a railroad undergoing reorganization under § 77, 11 U.S.C. § 205 (1964), had leased and operated for many years a smaller and still solvent railroad as a part of its line. The reorganization trustee gave the leased railroad a choice of a complete sale to the reorganizing railroad or accepting a recision of the lease and a return of property. Shareholders of the solvent railroad approved a sale of assets but with a large minority dissent. The minority shareholders sued under a Georgia state law requiring all shareholders to approve a...}
The jurisdictional grant reflects the distinct purpose of bankruptcy jurisdiction—to achieve insofar as is possible a fair distribution of assets to creditors and to provide appropriate relief for the debtor. In order to prevent the many possible ways in which individual state suits could be used to give certain creditors an advantage in satisfaction of their claims, or to disadvantage debtors, there is a need to have a single judicial or administrative body in charge of all of the debtor's assets and all of the proceedings against him. It is, of course, true that substantially all the claims against a debtor will ordinarily have arisen under state law.

Bankruptcy administration and jurisdiction thus may be conceived as a federal administrative superstructure imposed on a body of pre-existing state law relationships which are adjusted, but not determined, by the federal statute. This federal superstructure essentially serves a clearinghouse function, assembling claims and assets, either for an equitable distribution or a viable reorganization. Such a scheme can operate only if the court has control of all assets and authority to administer all claims. Consequently, federal bankruptcy jurisdiction premises no minimum jurisdictional amount in controversy. In such a system there well may arise claims which, without prejudice to the debtor or other creditors, could be more economically, expeditiously or authoritatively settled in a state court proceeding. The grant of exclusive jurisdiction to the bankruptcy or reorganization court does not prohibit allowing state court action. In fact, the Bankruptcy Act itself contemplates state court resolution of certain disputes.

An evaluation of how the district court should decide to yield its jurisdiction depends upon an examination of the jurisdictional provisions of the Bankruptcy Act.

Ascertaining the line which delimits the jurisdiction of a Bankruptcy Act court is complicated by the fact that a number of major sale of assets and got a state court injunction against the sale. The trustee got a district court injunction against continuation of the state court proceedings, which the court of appeals reversed. 165 F.2d 877 (5th Cir. 1948). The state court's jurisdiction was upheld since the Bankruptcy Act does not bear on the percentage of shareholders of a corporation (not before the reorganization court) who must approve a transaction. Determination of this question was a matter exclusively determinable in state court, despite its effect on the estate. Accord, Engebretson v. West, 111 F.2d 528 (8th Cir.), cert. denied, 311 U.S. 663 (1940).

53 See notes 84-88 infra and accompanying text.

54 See, e.g., In re Kravitz, 278 F.2d 820 (3d Cir. 1960).

55 See notes 48 supra, 72 infra. This is also the thrust of the jurisdictional sections discussed at notes 65-75 infra and accompanying text. See generally, Hill, The Erie Doctrine in Bankruptcy, 66 HARV. L. REV. 1013, 1020, 1031-36 (1963).

56 See notes 71-74 infra and accompanying text.

57 The term "Bankruptcy Act court" will be used hereafter to refer to any court established under the Bankruptcy Act, whether sitting in bankruptcy or reorganization. The term "bankruptcy court" refers to a federal district court sitting only as a court of bankruptcy.
provisions have been added to the Bankruptcy Act since its enactment.58 Chapter X, the most detailed and important of these sections, outlines a procedure for the reorganization rather than the liquidation of an insolvent corporate debtor.59 The chapter also includes a special grant of jurisdiction to the court administering the reorganization proceedings.60

There are two elements of federal jurisdiction based on the Bankruptcy Act that may directly affect the decision of a bankruptcy

58 The greatest number of changes were made by the Chandler Act of 1938, 52 Stat. 840-940 (1938), which made alterations throughout the text and added to the Bankruptcy Act chapters X, XI, XII, and XIII, 11 U.S.C. §§ 501-1086 (1964), which provide respectively for corporate reorganizations, corporate arrangements, non-corporate real property arrangements, and wage-earners' plans. Each of these chapters also includes a section defining the jurisdiction of the court when proceeding under that chapter. See 11 U.S.C. §§ 511-21, 711-16, 811-16, 1011-16 (1964).


60 Sec. 111. Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located.

Sec. 112. Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding before adjudication.

Sec. 113. Prior to the approval of a petition, the judge may upon cause shown grant a temporary stay, until the petition is approved or dismissed, of a prior pending bankruptcy, mortgage foreclosure or equity receivership, proceeding and of any act or other proceeding to enforce a lien against a debtor's property, and may upon cause shown enjoin or stay until the petition is approved or dismissed the commencement or continuation of a suit against a debtor.

Sec. 114. Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

Sec. 115. Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

Sec. 116. Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—

(1) permit the rejection of executory contracts of the debtor, ..... 
(2) authorize a receiver, trustee, or debtor in possession, ..... to issue certificates of indebtedness ..... 
(3) authorize ..... to lease or sell any property of the debtor, ..... 
(4) in addition to the relief provided by section 11 of this Act, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor.

Sec. 117. The judge may, at any state of a proceeding under this chapter, refer the proceeding to a referee in bankruptcy to hear and determine any and all matters not reserved to the judge by the provisions of this chapter, or to a referee as special master to hear and report generally or upon specified matters.

or reorganization court to abstain. The first is the establishment in bankruptcy litigation of two distinct forms of procedure—summary and plenary proceedings. A summary proceeding is generally characterized by the informality of its procedure in comparison with its plenary counterpart. In a summary proceeding there is only a petition, not a formal pleading; parties are brought in by an order to show cause, rather than by regular service of process; the time of notice is fixed at the discretion of the court, instead of by statute or court rule; and hearing may be on affidavit, rather than by examination of witnesses in open court.

A plenary proceeding, on the other hand, will involve procedure not substantially different from the usual court proceeding, since ordinarily the regular requirements of the court before which it is brought will be followed. Plenary procedure thus involves the issuance of a summons or process, formal pleading, depositions of witnesses and, not infrequently, a jury trial.

The establishment of summary proceedings in bankruptcy was one of the ways in which Congress hoped to effectuate the goals of a rapid and economical distribution of assets. Thus, it is generally contemplated that proceedings in a straight bankruptcy court will be of a summary fashion. The Bankruptcy Act details three specific exceptions to this principle, and in each instance the jurisdiction of the straight bankruptcy court is also concurrent with the appropriate state courts. Proceedings are plenary, rather than summary, when the controversy is an action by a trustee or receiver under section 60 to recover or avoid a preference to a creditor by a debtor, an action under section 67 to secure a recovery of fraudulent transfers, or an action which involves questions of title under section 70.

It similarly is contemplated that a reorganization court will proceed in a largely summary fashion. Under chapter X, however, there is a substantially larger grant of plenary jurisdiction to the

61 See Mussman & Riesenfeld, Jurisdiction in Bankruptcy, 13 LAW & CONTEMP. PROB. 88, 97 (1948), for a general discussion of this jurisdictional dichotomy.
62 Central Republic Bank & Trust Co. v. Caldwell, 58 F.2d 721, 731-32 (8th Cir. 1932).
63 Only in certain special cases, however, is a jury available within the bankruptcy proceedings, and then by special provision in the Bankruptcy Act. For a person against whom an involuntary petition in bankruptcy has been filed, there is a right to a jury determination of the question of insolvency and of the commission of an act of bankruptcy. See § 19, 11 U.S.C. § 42 (1964).
64 See notes 85-88 infra and accompanying text.
66 11 U.S.C. § 96b (1964). The full text of this section and those referred to in the following two notes is reproduced at note 50 supra.
69 The purpose of the chapter X reorganization procedure—like that of its predecessor, section 77B—was to secure for equity receiverships the benefits and remedies of straight bankruptcy, including the less costly and more expeditious summary proceedings. See Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 218-20 (1935);
Section 23 of the Bankruptcy Act contemplates that "all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees," will be prosecuted in the forum "where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted" as opposed to a determination within the bankruptcy court itself. Section 102, however, specifically suspends the operation of section 23 in chapter X reorganization. The reorganization court thus may find itself in the position of hearing many controversies that for its bankruptcy counterpart would be determined in an alternate forum.

The second distinctive element of federal bankruptcy jurisdiction which merits particular consideration by a Bankruptcy Act court considering abstention is an outgrowth of the powers of a bankruptcy or reorganization court to stay proceedings in other fora. Not infrequently, claims, foreclosure proceedings and other legal actions are pending against a debtor at the time a petition in bankruptcy or reorganization is filed. Such suits frequently are being prosecuted in state court, which makes relevant section 2283 of the 1948 Judicial Code:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.


70 Williams v. Austrian, 331 U.S. 642 (1947).
72 11 U.S.C. § 46b (1964). This was largely meant to allow proceedings in state courts. Reporting on the bill, the Chairman of the House Judiciary Committee explained:

The jurisdiction of State courts to try controversies between the trustees of bankrupt estates and parties claiming adverse interest is not in any way interfered with. Under the last bankruptcy law the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was great inconvenience and much expense to a majority of the people interested in such litigation as principals, witnesses, and attorneys. Such will not be the effect under this bill. It is proper that such should be the case, speaking generally in behalf of the administration of justice.
31 CONG. REC. 1785 (1898).

73 Sec. 102. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this Chapter [X]: Provided, however, That section 23, . . . shall not apply in such proceedings . . .

74 There is interestingly no corresponding expansion of jurisdiction for chapter XI arrangements, see § 302, 11 U.S.C. § 702 (1964); chapter XII real property arrangements, see § 402, 11 U.S.C. § 802 (1964); or Chapter XIII wage earner plans, see § 602, 11 U.S.C. § 1002 (1964).
The Bankruptcy Act contains several such authorizations.\textsuperscript{76} The issuance of an injunction, effective until dismissal of the petition or adjudication of the debtor as a bankrupt, is mandatory upon the court when a bankruptcy petition is filed, but, upon adjudication, becomes discretionary.\textsuperscript{77}

Similarly, the reorganization court inherits this power by virtue of section 102,\textsuperscript{78} where not inconsistent with the similar specific grant within chapter X itself.\textsuperscript{79} This injunctive power is discretionary until a petition is approved, at which time that approval itself becomes a stay of prior bankruptcy or equity receivership proceedings to foreclose a mortgage or to enforce any other lien against the debtor’s property.\textsuperscript{80}

Moreover, both the bankruptcy and reorganization courts inherit the power of other federal courts to issue injunctions where necessary in protection of their jurisdiction.\textsuperscript{81} This power is particularly important in the bankruptcy context as a means of conserving the estate of the debtor or bankrupt against suits to enforce liens or foreclose mortgages against property of the debtor.\textsuperscript{82} The power, of course, is not without limit, and neither court may enjoin litigation beyond its jurisdiction, even though the outcome of the controversy may be of concern to the proceedings.\textsuperscript{83}

Finally, in addition to the unique nature of bankruptcy jurisdiction, a federal district court sitting as a court of bankruptcy or reorganization must consider the essentially distinct objectives of the proceedings before it. It is established beyond question that the two-fold purpose of a bankruptcy proceeding is to control the distribution

\textsuperscript{76} These present exceptions in the Bankruptcy Act were actually enacted before the present Judicial Code, in accordance with a long-standing exception in older codes which allowed injunction of state proceedings by federal bankruptcy courts. \textit{See} \textit{C. Wright, Federal Courts} \S 47 (1963).

\textsuperscript{77} This provision, \S 2a(15), 11 U.S.C. \S 11a(15) (1964), is reproduced at note 50 \textit{supra}. Section 11a provides, moreover, that:

A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of filing of a petition by or against him, \textit{shall be} stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action \textit{may be} further stayed until the question of his discharge is determined by the court. . . . .

11 U.S.C. \S 29a (1964) (emphasis added).

\textsuperscript{78} \textit{See} note 73 \textit{supra}.

\textsuperscript{79} \textit{See} Bankruptcy Act \S\S 113, 116(4), 11 U.S.C. \S\S 513, 516(4) (1964), reproduced at note 60 \textit{supra}.

\textsuperscript{80} Sec. 148. Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor’s property.


\textsuperscript{81} \textit{See} note 75 \textit{supra} and accompanying text.

\textsuperscript{82} \textit{See} discussion at notes 122-24 \textit{infra} and accompanying text.

\textsuperscript{83} Callaway v. Benton, 336 U.S. 132 (1948), discussed at note 52 \textit{supra} and accompanying text.
of the assets of an insolvent debtor to insure an equitable distribution among creditors and to provide relief and a fresh start for an honest debtor.\textsuperscript{84} To achieve this objective it always has been a statutory and judicial imperative that the proceedings progress in a rapid fashion\textsuperscript{85} and as economically as possible.\textsuperscript{86} Similarly, although reorganization proceedings envisage a rehabilitation rather than liquidation of the debtor,\textsuperscript{87} alacrity and economy in accomplishing this are, as in straight bankruptcy, essentials of sound administration by the court.\textsuperscript{88} It is apparent from the statutory provisions\textsuperscript{89} that, although the primary purpose of chapter X is one of reorganization, and although chapter X proceedings can be brought only against a corporation having some hope of reorganization to begin with, if it later develops that this hope was unfounded and that the only way to “reorganize” the debtor is in effect to liquidate its assets, the liquidation may be done with the framework of a “plan of reorganization.”\textsuperscript{90} Thus, a proceeding

\textsuperscript{84} This has been the consistent concern of the Supreme Court under the current Bankruptcy Act, Simonson v. Granquist, 369 U.S. 38 (1962); Straton v. New, 283 U.S. 318 (1931); Williams v. United States, Fidelity Co., 236 U.S. 549 (1915), and even before under earlier acts. Wiswall v. Campbell, 93 U.S. 347 (1867).

\textsuperscript{85} Katchen v. Landy, 382 U.S. 323, 328-29 (1966); see 1 H. Remington, Bankruptcy § 27 (1950). Thus the court should not attempt any greater adjudication of rights than necessary for proper administration of the estate. See Goldenberg v. Westover, 150 F.2d 388 (9th Cir. 1946); In re Railroad Supply Co., 78 F.2d 530 (7th Cir. 1935).

\textsuperscript{86} Katchen v. Landy, 382 U.S. 323, 328 (1966) and congressional materials cited; see 1 H. Remington, Bankruptcy § 28 (1950).

\textsuperscript{87} This is the contemplation of the Bankruptcy Act §§ 169-79, 11 U.S.C. §§ 569-80 (1964), covering the development and approval of a plan of reorganization. See note 59 supra.

\textsuperscript{88} See Hearings on H.R. 8046 Before the House Committee on the Judiciary, 75th Cong., 1st Sess. 5 (1937) (statement of Congressman Chandler) (emphasis added): While corporate reorganization, as now proposed under the bill, to a great extent, rewrites the present act thereon (§ 77B), nevertheless all valuable features have been retained, together with many changes proven necessary by experience. There will be noted . . . the attempt, as far as possible, to remove the abuses of the present act, to speed up procedure, and to economize.

This was the initial impetus for § 77B as well, see note 69 supra.

\textsuperscript{89} Section 216(10) provides:
A plan of reorganization under this Chapter [X] (10) shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein . . . .


\textsuperscript{90} See Central States Elec. Corp. v. Austrian, 183 F.2d 879 (4th Cir.), cert. denied, 340 U.S. 917 (1950); In re Puerto Rican American Tobacco Co., 112 F.2d 655 (2d Cir. 1940). In any event, the trustee must submit a plan of reorganization within the deadline set by the court to avoid the possibility of dismissal or transfer
which is essentially a liquidation may be based on the jurisdictional provisions of a reorganization under chapter X.

**Bankruptcy Abstention: A Better Approach**

Absent some indication to the contrary, it could be assumed that application of the abstention doctrine was incumbent upon bankruptcy and reorganization courts as lower federal courts. Indeed, the Supreme Court had mandated application of the doctrine in the proceedings of federal district courts, sitting as courts of bankruptcy or reorganization, even before the doctrine was articulated in *Pullman*. Six years before *Pullman*, the Supreme Court, in *Pennsylvania v. Williams*, ordered district court deference to state proceedings without denouncing such action abstention. This result was reached despite a properly filed petition for federal appointment of a receiver to secure the assets of an insolvent building and loan association, in view of a comprehensive state statutory scheme for liquidation of such institutions. The reasoning of the Court tracks that which it used in allowing comity abstention where the probability of interfering with a state's domestic policy and administration through over-zealous use of federal injunctive power was sufficient to outweigh the concerns protected by federal diversity jurisdiction.

While it is clear that federal district courts sitting in bankruptcy or reorganization have had frequent recourse to the abstention device, even in situations which clearly do not present facts justifying consti-
tutional or comity abstention, an analysis of bankruptcy abstention is made more difficult due to the failure of most decisions to deal with or perceive as relevant the fact that their jurisdiction rests on bankruptcy rather than diversity or a federal question. Much of the discussion is highly doctrinal and phrased in terms of the Pullman-articulated concerns.

In the absence of any of the concerns that prompted development of the classical doctrine, abstention in the bankruptcy context must be justified—and indeed achieved—as a function of the special concerns, procedures and jurisdiction of bankruptcy administration already detailed.

Authority for this exercise of the bankruptcy court's equitable discretion may be found in the case of Foust v. Munson S.S. Lines.

Similarly, the commentators have drawn this conclusion, largely on the authority of Thompson. See 1 H. Reimington, Bankruptcy § 79; 1 W. Collier, Bankruptcy ¶ 2.07; 6 id. ¶ 3.08. Moreover, there is reason to suspect that the use of this approach may be considerably more common than the number of appeals would indicate. Ordinarily, the only effect of abstention will be that the proceeding is conducted in a different forum and may possibly involve some procedural variance. The burden in time and expense of an appeal to the circuit court, even if successful, may often be greater than the hardship which compliance with the decision would entail, and parties, therefore, may be reluctant to appeal decisions which they view as incorrect.

Thompson, despite the Meredith problem, see notes 21-30 supra, is frequently relied upon where the abstention is on bankruptcy grounds and no federal problem is presented. See, e.g., Gramill Weaving Corp. v. Raindeer Fabrics, Inc., 185 F.2d 537 (2d Cir. 1950); Redmond v. United Funds Management, 144 F.2d 155 (8th Cir.), cert. denied, 323 U.S. 776 (1944). Other readings of the cases have included: Finn v. 415 Fifth Ave. Co., 153 F.2d 501 (2d Cir.), cert. denied, 328 U.S. 838 (1946); Redmond v. United Funds Management, 144 F.2d 155 (8th Cir.), cert. denied, 323 U.S. 776 (1944); In re Fine Arts Corp., 136 F.2d 28 (6th Cir. 1943); Mack v. Pacific S.S. Lines Ltd., 94 F.2d 95 (9th Cir.), cert. denied, 304 U.S. 882 (1937); In re Adolf Gobel Inc., 89 F.2d 171 (2d Cir. 1937).

These include: the need for speed and economy of administration, see notes 85-88 supra and accompanying text; the distinctive summary-plenary procedural dichotomy, see notes 61-63 supra and accompanying text; the expansive authority to stay state proceedings, see notes 75-83 supra and accompanying text; the related but not identical objective of bankruptcy proceedings compared with reorganization proceedings, see notes 58, 87 supra and accompanying text; and the particular view the Bankruptcy Act takes of state law proceedings, see notes 54-56 supra and accompanying text.
In *Foust* the master appointed by the bankruptcy court was ordered by the Supreme Court to abstain from proceeding further and to permit the prosecution of the action in another federal court. Clearly, this case did not present any classical ground for abstention since no state court proceeding received deference. Most important, the case contained the seeds of an analysis applicable to a bankruptcy court's decision to permit proceedings in state as well as in other federal courts.

The plaintiff in *Foust*, the administrator of the estate of a former employee of the defendant steamship company, was pursuing a claim for the employee's death against the steamship company under section 33 of the Merchant Marine Act. Pursuant to the filing of a petition for reorganization, a stay of all suits, including the plaintiff's against the company, was entered. The plaintiff petitioned for removal of the stay in order to continue to press the claim in district court where it would be determined by a jury, instead of by the master in bankruptcy. The district court denied leave and the circuit court of appeals affirmed.

Because the plaintiff had shown that insurance carried by the company would probably cover the claim and thus not diminish the debtor's estate, against which the trustee had argued only the possibility that the district court jury might return a larger verdict than the master in bankruptcy, the Supreme Court unanimously reversed the continuation of the stay as an abuse of discretion. The Court found that "[t]he Circuit Court of Appeals rightly held petitioner's claim provable and dischargeable [in the reorganization proceeding] and the district judge empowered to stay proceedings in the suit." But the Court indicated that the district court should abstain in any event:

There is nothing in the record to warrant a finding that liquidation of petitioner's claim by trial of his pending action at law would hinder, burden, delay or be at all inconsistent with the pending corporate reorganization proceeding . . . .

Injunction against that method of establishing the debtor's liability, if any there is, ought not to stand.

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102 Section 77B of the Bankruptcy Act, as added by the Act of June 7, 1934, ch. 424, § 1, 48 Stat. 912, under which the petition was filed, was the original general reorganization provision; it was amended in 1938 and incorporated as chapter X of the Bankruptcy Act. 11 U.S.C. §§ 501-676 (1964).
103 299 U.S. at 79.
104 *In re Munson S.S. Line*, 80 F.2d 859 (2d Cir. 1936).
105 *Foust v. Munson S.S. Lines*, 82 F.2d 289 (2d Cir. 1936) (per curiam).
106 Justice Stone did not take part in the decision.
107 As in other matters within the bankruptcy court's discretion, the standard on review is reversal only for abuse of discretion. The reversal in *Foust* was on this ground. See also *Marian Corp. v. Bray*, 235 F.2d 318 (4th Cir. 1956) (per curiam).
108 299 U.S. at 81.
109 299 U.S. at 87-88 (emphasis added).
ABSTENTION IN BANKRUPTCY

Bankruptcy abstention is thus conceived of by the Foust Court as properly within the equitable discretion ordinarily exercised by a district court without reference to the classical grounds for abstention. While such discretion has been exercised in subsequent bankruptcy and reorganization cases which presented facts not justifying classical abstention, the cases have not always struck the careful balance required by equitable bankruptcy administration.

In deciding that it is preferable to permit the resolution of a particular controversy by another tribunal, the district court faces a complex matrix of variables. Because any discretionary decision should be grounded in the facts before the court, there can be no quick answer to the question when abstention is appropriate. Nevertheless, the relevant considerations and a sound approach to the problem may be indicated. At the threshold, of course, the court must determine whether it has jurisdiction over the controversy. Given jurisdiction, the court then should consider the available alternatives: it may either decide to exercise its jurisdiction, resolving the controversy in summary or plenary fashion (whichever is appropriate), or it may abstain, either permitting an alternative proceeding to continue or directing the trustee to take steps such as the prosecution or defense of the action in another proceeding. In this procedural context, two factors will be of significant importance to the bankruptcy or reorganization court's decision to abstain, since the court's choice at this

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110 The variety of situations in which bankruptcy abstention has been employed is illustrated by these cases: Submeyer v. Pfohlman, 329 F.2d 915 (9th Cir. 1964) (wife's community property rights); In re Terrace Lawn Memorial Gardens, 256 F.2d 398 (9th Cir. 1958) (usurious interest charge, shareholder identification and recognition of stock transactions); Gramil Weaving Corp. v. Raindeer Fabrics, Inc., 185 F.2d 537 (2d Cir. 1950) (title dispute); Finn v. 415 Fifth Ave. Co., 133 F.2d 501 (2d Cir.), cert. denied, 328 U.S. 838 (1946) (rent determination under state control statute); Redmond v. United Funds Management, 144 F.2d 155 (8th Cir.), cert. denied, 323 U.S. 776 (1944) (determination of indenture trustee's duties); Layton v. Thayne, 144 F.2d 94 (10th Cir.), cert. denied, 323 U.S. 786 (1944) (setting redemption preferences); In re New York N.H. & H.R.R., 109 F.2d 136 (2d Cir. 1940) (secondary liability of lessees of assignees).

111 See cases cited note 98 supra.

112 Clearly no court reasonably may engage in consideration of whether or not to exercise a jurisdiction it does not have. Cf. Submeyer v. Pfohlman, 329 F.2d 915 (9th Cir. 1964) (state proceeding allowed to continue, overruling referee's stay where referee failed to properly find on jurisdiction).

113 See notes 61-74 supra and accompanying text. This may itself be a matter of dispute. See Katchen v. Landy, 382 U.S. 323, 323-37 (1966).

114 This follows from the bankruptcy and reorganization court's ability to stay the state court proceedings. See notes 75-83 supra and accompanying text. The court, however, may refuse to stay (or lift a temporary stay of) the state action and elect not to proceed in the matter. This is one of the quickest and most effective means for a federal court to abstain, since it eliminates any delay or uncertainty such as may follow where the parties to the federal action have yet to file suit in state court. For a general discussion of this approach, see Note, Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits, 60 Colum. L. Rev. 684 (1960).

115 This authority is derived from the jurisdictional grant of the Bankruptcy Act, §§2(3) and (17), reproduced at note 50 supra, and §§ 11(b), (c) and (e), 11 U.S.C. §§ 29(b), (c), (e) (1964).
The juncture will usually affect the time and expense of administration of the proceeding: (1) the possible pendency of a prior proceeding; and (2) whether proceedings within the bankruptcy or reorganization process would be plenary or summary.

Where the proceeding would be summary in the bankruptcy or reorganization court, but plenary in an alternate forum, and where there is no action pending in which the question or controversy could be resolved, no basis for bankruptcy abstention is present. Abstaining will yield a longer and more costly resolution of the question. Such a result conflicts with the congressional goals for bankruptcy proceedings—rapid and economical administration.

On the other hand, presented with the same summary-plenary procedural dichotomy in a controversy in which a prior proceeding had been stayed, that litigation already may have progressed to such a point that even summary proceedings in district court would be both more time-consuming and costly than allowing the plenary suit to continue to a final determination. Abstention is therefore consistent with the rationale and concerns of the Bankruptcy Act.

The situation is different where the conflict must be resolved by plenary suit regardless of the forum. Where no pending proceeding has been stayed, considerations of economy and efficiency of administration will be essentially the same regardless of whether a plenary suit is instituted before the bankruptcy or state (or alternative federal) court.

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110 See Ernst v. Oberferst, 166 F.2d 519, 523 (2d Cir. 1948), discussed at note 134 infra and accompanying text.
111 But cf. In re New York, N.H. & H.R.R., 109 F.2d 136 (2d Cir. 1940). The opinion, upholding the discretionary abstention of the reorganization court, discusses the time considerations of a determination in state court, as opposed to one within the reorganization proceedings, and suggests a proper abstention ground would be presented where the “reorganization docket may be so crowded that . . . a quicker decision could be reached in Massachusetts.” Id. at 137.
112 See Gramil Weaving Corp. v. Raindeer Fabrics, Inc., 185 F.2d 537 (2d Cir. 1950); Layton v. Thayne, 144 F.2d 94 (10th Cir.), cert. denied, 323 U.S. 786 (1944). In Gramil the plaintiff asked for an appraisal in the bankruptcy proceeding of its secured claim (pursuant to which an attachment proceeding was begun in Massachusetts state court) and an unsecured claim for the amount in excess of the attached property. The debtor argued, in opposition to the attachment, that the claim was unsecured. In response to a petition by other creditors for stay of the Massachusetts action, the court, possibly considering the time and delay of settling the questions within the bankruptcy proceeding, ordered abstention applying the following test: Although the bankruptcy court has jurisdiction, it may, in the exercise of a proper discretion, decline to exercise it if the best interests of the estate and of all interested parties would be better served by permitting an issue to be litigated in a state court.
113 185 F.2d at 540 (emphasis added).
114 This statement assumes for simplicity of analysis that there would be no variations in docket to obviate the difference. In actuality this may not be the case, and the court should weigh this factor as well when reaching its decision. See In re New York, N.H. & H.R.R., 109 F.2d 136 (2d Cir. 1940).
115 See Texas v. Donoghue, 302 U.S. 284 (1937), where the state claimed prior title, under a forfeiture statute, to oil illegally produced by the debtor in contravention of a valid state regulatory scheme. Texas sought permission for a state court title suit which the Court ordered, although the opinion of Mr. Justice Butler offers
However, where a prior state proceeding has been enjoined, a plenary determination of the issue within the bankruptcy or reorganization proceedings would not seem warranted if the prior proceeding had already made substantial progress toward a resolution; insistence upon the duplication of an entire or substantial part of the litigation in a plenary bankruptcy or reorganization proceeding would seem to be in disregard of the congressional concern for the shortest possible administration of the debtor’s estate.\footnote{121}

In addition to these procedural factors, the bankruptcy or reorganization court considering abstention should also focus on the nature of the controversy presenting the question. Whether the proceeding is one in bankruptcy, contemplating an equitable liquidation of the debtor’s assets, or one in reorganization, contemplating a reorganization of the corporate capital structure, the importance to the court of being able to protect a debtor’s property is self-evident.\footnote{122} It follows that a court should consider actions or claims which pose a threat of diminishing the debtor’s estate differently than unsecured or in personam claims when abstention is proposed. Thus, abstention is generally inappropriate in a proceeding to foreclose a mortgage or to enforce a lien against the debtor’s property.\footnote{123} Conversely, where a controversy poses no threat to the estate which the court is administering, abstention to allow resolution of the question in another forum often will expedite the administration of the entire estate.\footnote{124}

One subset of in personam almost no insight into the grounds upon which abstention was ordered. It appears however that the equipoise of procedural posture may have been considered by the Court. The dissent by Mr. Justice Cardozo argues that the reorganization court should have made the title determination in order to save time and expense, but he bases that argument on the ground that the reorganization court would not be required to recognize the Texas result, a conclusion specifically negatived in the majority opinion.

\footnote{121} In re Terrace Lawn Memorial Gardens, 256 F.2d 398 (9th Cir. 1958). Abstention was ordered with the following discussion of the grounds:

> Prior pendency of state litigation is a strong factor in the exercise of the discretion of the federal judge. These actions had been pending for a number of months and were on the eve of trial when the petition for reorganization was filed.

\textit{Id.} at 402.

\footnote{122} This need to protect the property in the custody of the court may be the reason for the long-standing exception in the Judicial Code allowing bankruptcy courts the generally prohibited power to enjoin state court proceedings. \textit{See} note 76 \textit{supra}. This certainly appears to be the contemplation of §148, reproduced at note 80 \textit{supra}, which makes such stays in reorganization automatic against actions to enforce liens or foreclose mortgages, which are the most threatening to a debtor’s estate.

\footnote{123} \textit{See} In re Fine Arts Corp., 136 F.2d 28 (6th Cir. 1943) (allowance of a sale by the city of property which constituted almost all of the debtor’s assets, with a state court determination of the right of the trustee to bid at such a sale, would frustrate reorganization). There is one important exception to this general approach. Where the proceeding is one in bankruptcy and the threatened property is over-encumbered, assumption of the proceeding by the court may be improper. \textit{See} notes 127-29 \textit{infra} and accompanying text.

\footnote{124} In re New York, N.H. & H.R.R., 109 F.2d 136 (2d Cir. 1940); \textit{see} Redmond v. United Funds Management Corp., 144 F.2d 155 (8th Cir.), \textit{cert. denied}, 323 U.S. 776 (1944). In In re \textit{New York, N.H. & H.R.R.}, an in personam action against a
claims seems to merit special comment in this regard. It is the clear holding of Foust that in circumstances where the pending proceeding does not threaten to diminish the estate and would, in addition, secure the advantage of a jury trial desired by the plaintiff, abstention is appropriate.

In addition to considerations of procedure and the nature of the controversy, the court should remain cognizant whether the proceedings which it is administering are in straight bankruptcy or reorganization. While it is clear that both proceedings are to be conducted economically and efficiently, they progress toward somewhat antithetical goals: liquidation of the bankrupt's estate or rehabilitation of the reorganizing debtor.

In this respect, the rather well-settled principle of bankruptcy administration, that a trustee should abandon an asset which is less valuable than its encumbrances, in the abstention context would suggest allowing foreclosure of such property rather than staying such an action. A reorganization court may hardly be so cavalier, and must look closely at each asset before disposing of it, in view of the possibility that it may be needed to properly reorganize and continue the debtor's business. Abstaining in such a reorganization context is not desirable; retention of jurisdiction may be inferred as the congressional intention. Similarly, where the reorganization court's jurisdiction is grounded on section 102 of chapter X, which excepts the reorganization court from the bankruptcy court's section 23 jurisdictional limit, the decision to abstain will of course be made with

bank, alleging a secondary liability for breach of covenants in a lease which it had accepted as security, was allowed in view of the fact it would not affect the debtor's estate. Similarly, in Redmond, the indenture trustee for bonds of the debtor was allowed to prosecute a state action to determine its state law duties in that capacity.

See notes 100-09 supra and accompanying text.

See note 59 supra and accompanying text.

See 1 Modern Bankruptcy Manual §§ 938-40 (1966); Note, Abandonment of Assets by a Trustee in Bankruptcy, 53 Colum. L. Rev. 415 (1953). This rule is based in the concern for economy of administration. Since the excess of encumbrances over the asset's value will usually be claimed against the bankrupt's estate in any event, assumption of the liquidation of a secured asset usually only will raise the total amount of priority claims and the total value of the estate's assets by an equal amount—producing no advantage, but necessitating additional administration with delay and increase in cost probably resulting.

See Gramil Weaving Corp. v. Raindeer Fabrics, Inc., 185 F.2d 537 (2d Cir. 1950) (attached asset's value less than secured claim); Layton v. Thayne, 144 F.2d 94 (10th Cir.), cert. denied, 323 U.S. 786 (1944) (liquidity preferences following foreclosure disputed between first and second mortgages). This result follows, since the property would not increase the amount available to be distributed to creditors by as much as the encumbrances would increase the claims against the distributable funds.

See In re Fine Arts Corp., 136 F.2d 28 (6th Cir. 1943), discussed at note 123 supra.

See notes 59, 84, 87 supra.

This expansion of jurisdiction is detailed at notes 71-74 supra and accompanying text. See also Williams v. Austrian, 331 U.S. 642 (1947).
reference to the need for judicial control of assets required for successful business rehabilitation.\textsuperscript{132} On the other hand, where a chapter X plan contemplates liquidation,\textsuperscript{133} the court should view the choice of forum or procedure as a court sitting in straight bankruptcy.

Other subtle differences between reorganization and bankruptcy on the facts of a given case may be sufficiently important to affect a court's decision to abstain. Thus, in \textit{Ernst v. Oberferst},\textsuperscript{134} for example, the court found that a claim for rent due under the state statute should be determined in the bankruptcy proceeding in view of the time and expense a state proceeding would involve. However, the court suggested that resort to a state determination might be both convenient and desirable were it faced with this question in a reorganization proceeding where the amount fixed would bind the reorganized corporation, and continue to be paid over a substantial period of time.\textsuperscript{135}

\textbf{Conclusion}

It is apparent that the cases which extrapolate the discretionary \textit{Foust} approach offer an analysis for deciding when to abstain in bankruptcy or reorganization which is superior to the doctrinal \textit{Pullman} approach and the cases properly relying on it. \textit{Foust} indicates that the district court should balance, in the exercise of its equitable bankruptcy jurisdiction, the numerous factors which are peculiar to bankruptcy and reorganization. Reliance on the authority of \textit{Thompson}, so far as it is based on the classical abstention ground of uncertain state law, lies under the shadow of \textit{Meredith}'s holding that this ground alone is not a sufficient basis for abstention. And, insofar as \textit{Thompson} may be viewed as relying on the special character of bankruptcy, its authority is tenuous since the Supreme Court did not take the opportunity to explicitly distinguish it on this ground.

Even more compelling a reason for a federal court sitting in bankruptcy or reorganization to utilize the discretionary approach is that it is sufficiently flexible to subsume doctrinal, jurisdictional and substantive factors into a consistent and unified approach to abstention in proceedings under the Bankruptcy Act. Using \textit{Foust}, the court may consider any of the special bankruptcy and reorganization concerns which ought properly to influence abstention, even though no

\textsuperscript{132}See note 73 supra. The statute itself contemplates this approach by providing that section 23, which was enacted to allow, in bankruptcy administration, the prosecution of certain plenary claims in state courts, is inapplicable only in chapter X reorganizations. This carefully limited expansion of jurisdiction evidences congressional recognition of circumstances extant in chapter X reorganizations which may require more extensively centralized control by the court.

\textsuperscript{133}See notes 89-90 supra and accompanying text.

\textsuperscript{134}166 F.2d 519 (2d Cir. 1948).

\textsuperscript{135}Id. at 523.
Thompson problem of unclear state law appears. Further, it may well be that the relevant state law is unconstrued, highly complex or of a distinctively local nature. Such a condition of state law affects both the time and expense of the court's deliberations. To a court considering abstention from the Foust-derived perspective, the problem of state law may still be viewed as a factor to be considered in the exercise of discretion (and one which might, when balanced with other factors, actually be decisive) while under Meredith it would not have been of sufficient importance to be an independent ground for the same action.