NOTES

The REVIEW regrets to announce the resignation of Mr. Odell Kominers.

THE "FAIR" PLAN IN CORPORATE REORGANIZATION: I.—As a condition of the confirmation of a plan of reorganization,[1] Section 77B of the Bankruptcy Act[2] requires that the judge be satisfied that "it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible."[3] This parallels the judicial requirement of fairness imposed upon reorganization plans perfected through equity procedure,[4] in order to protect reorganized corporations otherwise rendered vulnerable by the historic *Boyd* case[5] to attacks by interest holders. It can scarcely be supposed that the courts will do otherwise than turn to the body of precedents thus formulated and

[1] The plan of reorganization is the scheme for new capitalization and contains the conditions on which old creditors and equity holders may join in it—usually by exchange of securities with or without the requirement of investing new capital.

[2] 48 STAT. 912, 11 U. S. C. A. § 207 (1934).

[3] Subdiv. (f) (1). The tenor of § 77 of the Bankruptcy Act, 47 STAT. 1474, 11 U. S. C. A. 205(g)(1) (1933), is similar: "The judge shall confirm the plan if satisfied that . . . [it] is equitable and does not discriminate unfairly in favor of any class of creditors or stockholders."

[4] The method of imposition at its present point of development in the federal courts is incorporation into the foreclosure decree of the requirement that any one purchasing at the sale pursuant to a reorganization plan shall submit the plan to the court which shall hold hearings at which stockholders and creditors may appear and register objections; and that no sale to any one purchasing pursuant to a reorganization plan shall be confirmed, "if this court shall determine that the provisions of such plan . . . are inequitable or that said plan . . . does not contain an equitable and timely offer of participation in the reorganization thereby proposed to all persons entitled thereto." See Guaranty Trust Co. v. Chicago, M. & St. P. Ry. Co., 15 F.(2d) 434, 438 (N. D. Ill. 1926). For the history of the development of this technique see Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade* (1927) 27 COLUMBIA LAW REV. 901, 907. For the methods of obtaining judicial scrutiny in the state courts see Note (1934) 34 COLUMBIA LAW REV. 706, 710.

[5] Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482 (1913). At the time of the reorganization of the Northern Pacific Rail*road,* Boyd was litigating his title to a judgment previously procured against a small road which had since been taken into the Northern Pacific system. The reorganization plan admitted stockholders into the new corporation, but excluded unsecured creditors. Claiming to be a creditor of the old Northern Pacific due to stock juggling in the acquisition of his judgment debtor, Boyd brought an action against the new corporation twenty years after completion of the reorganization. The Supreme Court upheld his claim, condemning the reorganization as a fraudulent conveyance, although the participation of the stockholders was conditioned upon payment of an assessment. In answer to the argument that this would necessitate the impossible—the payment of unsecured creditors in cash—Lamar, J., said it is only necessary that a "fair offer" be made, and if that is refused, the creditor "is left to protect himself as any other creditor of a judgment debtor, and, having refused to come into a just reorganization could not thereafter be heard in a court of equity to attack it." This ability to attack defects in the plan long after it has been effected necessitated some procedure to give finality to reorganization at the time of its accomplishment.

convert them to employment in the administration of the statutory prescription.[6]

The determination of fairness places on business judgment in the rearrangement of financial structure[7] a judicial[8] limitation which sanctions contravention of strict contract right.[9] Since our economic system has adherence to the agreement as its criterion of "fair" treatment of contracting parties, in reorganization "fairness" has not its normal meaning, and its content requires independent determination. The cases which have sought to give content to this concept, sired by the *Boyd* case, have inherited the three major problems which inhere in that opinion:[10] (1) what creditor and stockholder classes or parts thereof may be excluded from participation? (2) what priorities or equalities must be observed among all classes or parts of classes participating? (3) how may such priorities or equalities be effected?

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[6] Friendly, *Some Comments on the Corporate Reorganizations Act* (1934) 48 HARV. L. REV. 39, 74. But *cf.* Gerdes, *A Fair and Equitable Plan of Corporate Reorganization Under Section 77B of the Bankruptcy Act* (1934) 12 N. Y. U. L. Q. 1, 22. This generalization ignores the effect of subdiv.(b) of § 77 and subdiv.(b) of § 77B, making compulsory the inclusion in all plans of certain provisions, some of which operate to produce differences from the equity rules. See p. 400 *infra*.

[7] Express disclaimers by courts of desire or power to interfere with the business judgments exercised in the course of reorganizations are no longer made. See U. S. & Mexican Trust Co. v. U. S. & Mexican Trust Co. as Trustee, 250 Fed. 377, 381 (C. C. A. 8th, 1918); Clinton Trust Co. v. 142-144 Joralemon St. Corp., 237 App. Div. 789, 793, 263 N. Y. Supp. 359, 363 (2d Dept. 1933); *cf.* Swaine, *supra* note 4 at 913. Yet the court probably still only checks on the equity of proposed plans and approval will not be reserved for the best possible plan. See Swaine, *supra* at 911. Compare People v. S. W. Straus & Co., N. Y. L. J., Sept. 30, 1933 at 1097, where the court itself suggested changes in the submitted plan.

[8] The Transportation Act of 1920 [41 STAT. 494 (1920), 49 U. S. C. A. § 20a (1926)] has made the requirement of fairness in railroad reorganization also an administrative limitation by making a finding by the Interstate Commerce Commission that such issuance "is compatible with the public interest" prerequisite to the issuance of new securities. In passing upon the economic advisability of the financial structure of the proposed reorganization, the Commission has been forced by this custodianship of the public interest to consider fairness insofar as unfair treatment of security holders will, through causing the higher interest charges attendant upon consequent increased risk, reflect on earnings and rates. See Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673, 691-692 (1928); *cf.* Stone, J., dissenting in United States v. Chicago, M. & St. P. & P. R. Co., 282 U. S. 311, 337 (1931).

[9] The courts have been keenly aware that reorganization "always involves changes in the existing legal rights of some (often all) of those who have such rights in connection with the property involved." See Kansas City Terminal Ry. Co. v. Central Union Trust Co., 28 F.(2d) 177, 186 (C. C. A. 8th, 1928), *cert. denied*, 278 U. S. 655 (1929); Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674, 683 (1899). Indeed, both amendments to the Bankruptcy Act provide that plans of reorganization, "shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise." See § 77(b); § 77B(b).

[10] See *supra* note 5.

Exclusion from the Plan.—The right of bondholders to foreclose upon their security and acquire it for their benefit at the ensuing sale is conceded.[11] But the *Boyd* case decided that when unsecured creditors were excluded, bondholders do not have an added right to take the old stockholders into the reorganized corporation, even on payment of an assessment,[12] and even though the property was less in value than the amount of the mortgage.[13] This decision probably established the principle,[14] adopted by the bankruptcy amendments,[15] that no class of creditors and stockholders can be excluded without the exclusion of all junior classes.

Initially, application of this principle requires ascertainment of the ranking of old interests. Essentially this is dependent upon the individual security contracts, but preference among the normally outstanding interests will be in the following order: claimants superior in equity to the mortgage liens, successive mortgagees, unsecured creditors including debenture holders,[16] preferred[17] and common stock-

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[11] New York Trust Co. v. Continental and Commercial Trust & Savings Bank, 26 F.(2d) 872 (C. C. A. 8th, 1928) *cert. denied,* 278 U. S. 644 (1928); Sebree v. Cassville & W. R. Co., 212 S. W. 11 (Mo. 1919); Male v. Atchison, T. & S. F. Ry. Co., 230 N. Y. 158, 129 N. E. 458 (1920); Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674, 683, 684 (1899); Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445, 454 (1926). This right is, of course, curtailed by the bankruptcy amendments which permit the corporation or any three creditors to institute reorganization proceedings. § 77(a); § 77B(b). It has been held, however, under § 77B, that where the plan inadequately protected the rights of the mortgagees and was unlikely of accomplishment, foreclosure would not be stayed. *In re* Murel Holding Corp. (C. C. A. 2d, Mar. 11, 1935), C. C. H. BANKRUPTCY LAW SERVICE 1173.

[12] Railroad "assessments" consist in the payment of cash for an amount of new securities plus the right to receive new stock for the old. They would be better termed "compulsory investments."

[13] "The invalidity of the sale flowed from the character of the reorganization agreement, regardless of the value of the property, for in cases like this the question must be decided according to fixed principle, not leaving the rights of creditors to depend upon the balancing of evidence as to whether, on the day of the sale the property was insufficient to pay prior encumbrances." However, in the next paragraph of the decision the court tempered the decisiveness of this pronouncement by a discussion of value to demonstrate an equity in the stockholders. Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 507 (1913). But the doubt on this point left by the Boyd case and its successor, Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166 (1916), was dispelled in Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445 (1926) where the court affirmed the "fixed principle." But *cf.* New York Trust Co. v. Continental & Commercial Trust & Savings Bank, 26 F.(2d) 872, 876 (C. C. A. 8th, 1928), *cert. denied,* 278 U. S. 644 (1928), *infra* note 38.

[14] For the controversy waged on this subject compare Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization* (1933) 19 VA. L. REV. 541, 551; Gerdes, *supra* note 6, at 16, with Swaine, *Reorganization—The Next Step: A Reply to Mr. James N. Rosenberg* (1922) 22 COLUMBIA LAW REV. 121, 123; Swaine, *supra* note 4, at 907.

[15] See Friendly, *supra* note 6, at 79; Gerdes, *supra* note 6, at 23.

[16] Moore v. Splitdorf Electrical Co., 114 N. J. Eq. 358, 168 Atl. 741 (1933).

[17] See Eagleson v. Pacific Timber Co., 270 Fed. 1008, 1010 (D. Del. 1920).

holders.[18] Creditors secured by a mortgage on or pledge of but part of the property of the old corporation depend for their rank on the decision of the reorganizers as to inclusion of the property.[19] If rejected, they claim only as unsecured creditors;[20] if included, their secured position must be recognized.[21] Yet if the lien of these latter creditors is subordinate to a prior general lien, though they rank ahead of general creditors, it is likely that they cannot demand participation merely because of the inclusion of similar junior lienors on other assets

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[18] See Western Union Telegraph Co. v. U. S. & Mexican Trust Co., 221 Fed. 545, 549 (C. C. A. 8th, 1915); Eastern States Public Service Corp. v. Atlantic Public Utilities, Inc., 156 Atl. 214, 215 (Del. Ch. 1931). "This plan as indeed any other that might aspire to endurance, necessarily requires that the existing securities must, in proportion as their values are decreased by remoteness of their equities from the assets of the system, suffer a serious curtailment.

[19] Discretion to exclude any divisions of the road is almost exclusively with the reorganization managers. "The relation of a particular railroad to the system as a whole . . . enters into the problem. A court cannot well review such matters but must leave them largely to the business judgment of those in charge." See Guaranty Trust Co. v. Missouri Pacific Ry. Co., 238 Fed. 812, 818 (E. D. Mo. 1916); DEWING, FINANCIAL POLICY OF CORPORATIONS (3d ed. 1934) 1204.

[20] However, even on exclusion of the property, it is not sufficient to make them the same offer as the general creditors for the full amount of their debt. Proper procedure requires the ascertainment of the value of the property, either by agreement or foreclosure, and then treatment as unsecured creditors for the balance, if any. Guaranty Trust Co. v. Missouri Pacific Ry. Co., 238 Fed. 812, 819 (E. D. Mo. 1916). Sections 77(g)(6) and 77B(c)(6) adopt the procedure of § 57h for appraisal of the security and provide that the balance be treated as an unsecured claim.

[21] Guaranty Trust Co. v. Missouri Pacific Ry. Co., 238 Fed. 812, 819 (E. D. Mo. (1916). In railroad reorganizations the only considerable property not subject to the general mortgage liens would be corporate securities and rolling stock. The former, pledged either with the trustee of a collateral trust bond issue or as security for floating debt holders might be those of the reorganizing corporation itself, of affiliates, or of stranger corporations. If the obligations of a co-reorganizing affiliate, the exercise of the power of the bankruptcy court to enjoin sale would invoke the same principles for treatment of their holders as in the case of the corporation's own securities. See *infra* p. 395. If those of a stranger corporation they probably constitute an independent class of secured claims which must receive provision in accordance with the value of their security plus treatment as unsecured creditors for any balance. *Cf.* Guaranty Trust Co. v. Missouri Pacific Ry. Co., *supra.*

Judicial consideration of the treatment of equipment trust certificate holders is not available, probably because their contractual position as owners, not mere lienors, of the cars has been respected. Generally they are lessors to the railroad with a power of removal of the cars which, in light of the obligation to maintain the operation of the road, has forced reorganizers to continue their position undisturbed. See DEWING, *op. cit. supra* note 19 (2d ed. 1926) at 213 *et seq.* However, analytically, as owners, they are mere rent claimants, and would rank only as such (see *infra* p. 396) should the new corporation be in a position to dispense with their cars. It is, nevertheless, not improbable that under § 77 they may now come to be considered in the same position as the holders of the chattel mortgage type of equipment obligations, with the cars subject to the court's power. But see Rodgers and Groom, *Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act* (1933) 33 COLUMBIA LAW REV. 571, 601. In such case they, too, should be treated as a separate class of secured creditors entitled to absolute inclusion if their security be taken into the reorganization.

also subject to the general lien.[22] Floating debt holders with pledges of securities of the reorganizing company itself, which are not sold[23] upon default because of agreement or an injunction issued under the bankruptcy amendments,[24] probably must be accorded the rank of holders of that class of security.[25] For though a pledgee is not an owner, his power to confer ownership upon third persons, and, with the necessary formalities, to acquire it himself,[26] persuades against a distinction for this purpose.

A second concern, the composition of the class of unsecured creditors, raises the problem of discrimination against contingent claims.[27] The bankruptcy amendments effectively dispose of the question by granting the status of creditors[28] to the holders of any claim including

[22] The value of one portion of the property of a corporation over and above the claim of the general mortgage may be sufficient to leave an interest in subordinate mortgagees, but that of another portion may be insufficient even to satisfy that part of the general mortgage which might be allocated to it.

[23] Clearly where there is a sale the holder will rank only as an unsecured creditor for the unrealized balance of his debt.

[24] *In re* Chicago, Rock Island & Pacific Ry. Co., 72 F.(2d) 443 (C. C. A. 7th, 1934), discussed in (1935) 35 COLUMBIA LAW REV. 109. The ground was that the sale of the securities which included those of co-reorganizing affiliates and which had a face amount of approximately triple the debt would hinder the preparation of an acceptable plan of reorganization. Whether the power will be limited to pledges of the debtors' securities is uncertain, but the ground of the decision does seem as applicable to § 77B as to § 77. And indeed, though the court refused to indicate it, its policy might well ground the same result in equity receiverships under equity's elastic powers to interfere with contracts to preserve and make effective its device of receivership. *Cf.* Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. 456 (C. C. A. 2d, 1918). For a general discussion, see Hatch, *A Form of Depression Finance—Corporations Pledging Their Own Bonds* (1934) 47 HARV. L. REV. 1093, 1113 *et seq.*

[25] This has been the rule in judicial liquidation and bankruptcy. See Hatch, *supra* note 24, at 1104-05. In the Chicago, Milwaukee & St. Paul reorganization where the face of the collateral was about 160% of the debt the government received an offer of participation better than that extended to holders of the bonds pledged. See Jameson v. Guaranty Trust Co., 20 F.(2d) 808, 814 (C. C. A. 7th, 1927), *cert. denied*, 275 U. S. 569 (1927).

[26] Normally pledge instruments provide that upon default the collateral may be sold at either public or private sale without notice, at which the pledgee may become the purchaser. See Sample Copy of Obligation Used by the Reconstruction Finance Corporation; Obligation-pledge agreement of a New York Trust Company, HANNA, CASES AND MATERIALS ON SECURITY (1932) 109, 111. Inasmuch as the amounts involved are generally very large, the likelihood of a market at an adequate price is very slight. At the time of the reorganization of the Chicago, Milwaukee and St. Paul, the railroad was indebted to the United States for $54,000,000, and had pledged securities of face value of $91,000,000. See Jameson v. Guaranty Trust Co., 20 F.(2d) 807, 809 (C. C. A. 7th, 1927). And the Rock Island system, now being reorganized, has borrowed from the Reconstruction Finance Corporation and several banks approximately $18,000,000 and had pledged $54,000,000 worth of bonds.

[27] On the subject generally see Douglas and Frank, *Landlord's Claims in Reorganization* (1933) 42 YALE L. J. 1003.

[28] "The term 'creditors' shall include . . . all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act." § 77B(b). The corresponding provision in § 77(b) is almost

future rent claimants. Where reorganization is under the auspices of equity, the limitations on provability of claims in receivership would be expected to operate to the prejudice of contingent debts. However, without any discussion,[29] the courts have allowed the claims of litigating tort claimants,[30] promisees of executory contracts,[31] and insurance policy holders.[32] In *Howard v. Maxwell Motor Co., Inc.*[33] the issue was directly presented, and the court held that, though the claim of the holder of the lease guaranty there involved was not normally provable because

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identical, but does not include the limitation of future rent claims to three years rent as does § 77B. Despite the liberality of this language it is probable that a claim must possess the ability to be liquidated within a reasonable time.

[29] Support for the view that the cases cited *infra* notes 30-32 are conclusive of the position of contingent creditors is found in the language of Brandeis, J., in Pierce v. United States, 255 U. S. 398, 403 (1921): ". . . as a matter of substantive law, the right to follow the distributed assets (see Railway v. Howard, 7 Wall. 392, 409; Northern Pacific Ry. v. Boyd, 228 U. S. 482; Kansas City Ry. v. Guardian Trust Co., 240 U. S. 166) applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims. A corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim or the obligee of an executory contract, . . . or the holder of a claim in tort." Although the case was one of liquidation rather than reorganization, the citation of the Boyd case along with two of the three other fair plan cases decided by the Supreme Court down to that time, may well destroy any inference from the failure of the court to discuss contingency in these cases. See also Oehring v. Fox Typewriter Co., 272 Fed. 833, 835 (C. C. A. 6th, 1921).

[30] Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482 (1913); Pittsmont Copper Co. v. O'Rourke, 49 Mont. 281, 141 Pac. 849 (1914); Mountain States Power Co. v. A. L. Jordan Lumber Co., 293 Fed. 502 (C. C. A. 9th, 1923), *cert. denied,* 264 U. S. 582 (1924).

[31] In a Missouri, Kansas & Texas reorganization, the receiver disaffirmed a contract with the plaintiff terminal company to pay a share of the bond interest and other expenses of the plaintiff. Although no express provision was made for plaintiff or other executory contract and contingent claimants, the offer to unsecured creditors was held to extend to them. The court rejected plaintiff's argument for specific performance based on the ground that its claim could not be included in the offer because of the difficulty of estimating damage, upon the theory that unless plaintiff could bring itself within the term "creditor," which would not include a claimant for specific performance, it had no standing to invoke the Boyd case despite the offer to stockholders. Nor would unfairness of the offer to the plaintiff oblige the defendant to carry out the contract of the old company. Kansas City Terminal Ry. Co. v. Central Union Trust Co., 28 F.(2d) 177 (C. C. A. 8th, 1928), *cert. denied,* 278 U. S. 655 (1929).

[32] *Cf.* Matter of National Surety Co., 239 App. Div. 490, 268 N. Y. Supp. 88 (1st Dept. 1933); Note (1934) 43 YALE L. J. 1146.

[33] 269 Fed. 292 (S. D. N. Y. 1920), *aff'd,* 275 Fed. 53 (C. C. A. 2d, 1921). The plaintiff was lessor of one of the subsidiaries of the old corporation, the lease being guaranteed by another such subsidiary. The corporation and its subsidiaries went into receivership, but by paying rent past the last day for filing claims, default was avoided, thereby preventing the plaintiff from filing his claim, a device generally effective in receivership (see Douglas and Frank, *supra* note 27, at 1006). Subsequently the lessee, which had not been included in the reorganization, went bankrupt. After reorganization, the new company disaffirmed the guaranty, and the plaintiff commenced suit upon it. In permitting recovery the court distinguished receivership cases where similar claims had been denied, by stressing the stockholder participation, and pointing out that the new company by its own act set in motion the default which matured the contingent claim into an absolute liability, and should not be allowed to profit by that act.

contingent, where stockholders had participated in the reorganization the contingent claimant is protected. If this decision is an application of the rule of the *Boyd* case[34] the distinction between contingent and absolute claims is, for purposes of inclusion, obliterated;[35] but if recovery was conditioned on the stressed contrivance by the reorganizers of the default which render the claim absolute, the position of the contingent creditor is not yet clear.[36]

A third problem raised by the limitation on exclusion of junior claimants is what constitutes inclusion in a plan to enable complaint by intermediate classes. Although the Supreme Court has scoffed at the analysis of a reorganization as a foreclosure plus an independent negotiation with stockholders,[37] yet on this very ground, the court in *N. Y. Trust Co. v. Continental & Commercial Trust & Savings Bank*[38] held that settlement with tort claimants asserting priority over the foreclosing first mortgage, by a payment including securities of the new corporation, grounded no objection by excluded second mortgage bondholders. The court in declaring the transaction a "purchase" and not a reorganization, merely assumed its conclusion, and failed to distinguish the *Boyd* case where it might be said that the stockholders' consent to the receivership was also "brought" with an offer of participation. A

[34] It has been argued that this decision is the recognition of the fraudulent conveyance theory underlying the Boyd case, and is an application of the doctrine that a fraudulent conveyance is invalid as against contingent creditors. Douglas and Frank, *supra* note 27, at 1024. Such an analysis, however, is unnecessary. The case may be well explained as an extension of the holding of the Boyd case, apart from any underlying theory, to contingent creditors.

[35] It may, however, be found that once included, contingent claims will rank between provable claims and stockholders. This is supported by the bankruptcy procedure which permits holders of unprovable claims to recover from the bankrupt any excess over the amount of provable claims which may have been returned. See 6 REMINGTON, BANKRUPTCY (3d ed. 1923) § 2871; *cf.* Johnson v. Norris, 190 Fed. 459 (C. C. A. 5th, 1911).

[36] This emphasis by the court leaves doubts as to whether the decision would be the same, despite stockholder participation, if the contingency were not within the control of the corporation and not resolved within the period for filing claims. A ready example would be the situation where the lessee was independent of the guarantor rorganizing corporation.

[37] ". . . Human nature is something whose action can never be ignored in the courts, and parties who have acquired full and absolute title to property are not as a rule donating any interest therein to strangers." Louisville Trust Co. v. Louisville, N. A. & C. Ry., 174 U. S. 674, 688 (1899).

[38] 26 F.(2d) 872 (C. C. A. 8th, 1928), *cert. denied,* 278 U. S. 644 (1929). A group of unsecured creditors consisting of tort claimants, sought a priority to the first and second mortgages under the provisions of the corporate franchise or, in the alternative, to establish the invalidity of the bond issues, in which latter argument they were joined by preferred stockholders. The court based its decision upon the ground that there was no reorganization involved, but an exercise of the unquestioned right to foreclosure plus a purchase of peace and good will, rather than a capricious selection of one class over another, and used as a buttressing argument the fact that there was no equity left in the property for the second mortgage. It would seem, however, that the latter ground is erroneous in view of the Boyd case. See *supra* note 13.

true distinction[39] between the cases seems to lie in that in the *New York Trust Co.* case the purchased claim was one which could insure to the benefit of the claimants alone, and indeed would only further subordinate the omitted class to a station below all the participating classes and thus take them outside the principle of the *Boyd* case.[40]

It has been stated that stockholders are not "included" when they receive no interest in return for their old shares, but only the opportunity to purchase new securities on an independent consideration.[41] However, on principle it would seem that this must be restricted to cases where the right to subscribe to the new securities is open to the general public.[42] The accident of an identity could then be disregarded as it has been when foreclosing bondholders are also owners of stock; in such cases when the plan does not purport to recognize the stock interest as such, objections by excluded intermediate creditors are overruled.[43] Although the sanction of these devices in effect can defeat the

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[39] The case has been explained by restricting the principle of the Boyd case to situations where a fraudulent conveyance is effected, *i.e.* where stockholders are included. Frank, *supra* note 14, at 551-3. But the court expressly disclaimed any intent to pass upon this point. See N. Y. Trust Co. v. Continental & Commercial Trust & Savings Bank, 26 F.(2d) 872, 875 (C. C. A. 8th, 1928). The distinction that in the New York Trust Co. case a colorable claim was involved, whereas in the Boyd case merely the consent of the stockholders to the receivership was involved, presupposes a principle subject to abuse by collusive claims.

[40] It seems unlikely that the allegation that the first mortgage bondholders feared, was that of the invalidity of their mortgage: they were not sufficiently persuaded to buy out the preferred stockholders. Thus the decision appears based on the creditors' claim of priority. This analysis, moreover, would prohibit the purchase of a lower class to the exclusion of an intermediate class merely because the former asserted the invalidity of the purchaser's interest or even of all interests above his own, since the purchased interest would alone be displaced by the negotiation, and its elimination would in no way affect the relative priorities of the remaining classes. Thus the benefit of this exception would be restricted to the situation only where a normally lower class asserts a claim which would place it above its superiors. Under no circumstances then could stockholders utilize it.

[41] "In that line of cases [referring to the Boyd case] there is a reorganization in which the old stockholders obtain an interest in the new company by virtue of and in consideration of their old stock, and therefore receive from that stock a benefit to which they are not rightfully entitled until after the payment of all debts due by the old company, and it is only this benefit, so received in consideration for the old stock, which the rule of the Boyd case subjects to the old debts. In the present case there was no such benefit. Every new stockholder paid cash in full for his new stock and received nothing in exchange for his old." See Oehring v. Fox Typewriter Co., 272 Fed. 833, 835 (C. C. A. 6th, 1921). But *cf.* Kingston v. American Car & Foundry Co., 55 F.(2d) 132 (C. C. A. 8th, 1932), *cert. denied,* 285 U. S. 560 (1932).

[42] In that situation the stockholders would receive no offer *qua* stockholders. Otherwise, the decision would fail to recognize the conclusiveness of the presumption of an equity which the Boyd case finds in the mere participation of stockholders, and would open up the question of the value of the options given, whereas the necessity for considering that question was subsequently laid to rest by the Supreme Court. See *supra* note 13.

[43] Sebree v. Cassville & W. R. Co., 212 S. W. 11 (Mo. 1919); Male v. Atchison, T. & S. F. Ry. Co., 230 N. Y. 158, 129 N. E. 458 (1920). Nor was the application of this rule in the latter case affected by the fact that the bonds were acquired by

"fixed principle," their rarity demonstrates them to be mere sports, and, although perhaps calling for the closest scrutiny,[44] their recognition, fair in principle, presents no threat to the rule.

Fourthly, assuming no classes have been skipped, there remains the problem of the treatment of the unprovided for lowest classes. Under equity reorganization, since the foreclosing class acquires the property free of all subordinate claims,[45] participation may be demanded only by those which are superior to the lowest included class,[46] but the latter would seem unable to compel its inclusion.[47] Where the statutory

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the sole stockholder after the foreclosure with obvious intent to preserve the ownership it had through its stock interest, freed of intermediate claims. Of course, if it be established that the class as stockholders procured the default as by diverting funds to enable foreclosure as bondholders, and thus to wipe out unsecured claims, the plan would probably be unfair to the excluded classes. *Cf.* Farmers' Loan & Trust Co. v. N. Y. & N. Ry. Co., 150 N. Y. 410, 44 N. E. 1043 (1896); Chase National Bank v. 10 East 40th Street Corp., 238 App. Div. 370, 264 N. Y. Supp. 882 (1st Dept. 1933).

Approval in one capacity does not estop objection in another. Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166 (1916).

[44] The attitude suggested is that adopted by some courts before the Boyd decision with reference to surveillance over plans taking in stockholders. ". . . where, in ordinary course, foreclosure is instituted and carried out for the honest purpose only of enforcing, against the property the mortgage obligation, the mere fact that shareholders of the old company may, under a purchasing arrangement, become interested in the security of the new, will not make the foreclosure *per se* fraudulent. Such fact may be indicative of fraud, but is not a fraud *per se*." See Wenger v. Chicago & E. R. Co., 114 Fed. 34, 38 (C. C. A. 7th, 1902).

[45] *Supra* p. 393.

[46] *Supra* p. 393.

[47] In American S. S. Co. v. Wickwire Spencer Steel Co., 42 F.(2d) 886 (W. D. N. Y. 1930), *aff'd,* 49 F.(2d) 766 (C. C. A. 2d, 1931), the reorganization plan included first and second mortgagees, and unsecured creditors, but excluded stockholders. To the latter's protestations against their exclusion, the court said (at 895): "Upon default the bondholders have clearly the right of sale of the properties mortgaged . . . , and, as said in Guaranty Trust Co. v. Mo. Pac. R. Co. to 'leave the holders of junior securities, unsecured creditors, and stockholders to protect themselves as best they can.'"

The only theory upon which the lowest class might ground an argument would be that the amount of the purchase price is not conclusive as to the value of the property, but rather that it should be determined by an independent appraisal, and, if an equity remain for them, they be given participation. See Frank, *supra* note 14, at 553 *et seq.* Since generally the purchase price is the upset price, and since that is usually set with the object of facilitating the reorganization, and not with the object of ascertaining the "actual" or "real" value of the property [See Weiner, *Conflicting Functions of the Upset Price in a Corporate Reorganization* (1927) 27 COLUMBIA LAW REV. 132, 146.], this theory is based upon an actuality, and is one which appeals as eminently just. Where no upset price is fixed, its desirability is still more apparent. However, in the few cases that have arisen the guarantor of defaulted bonds has been held liable for the deficiency calculated as the difference between the foreclosure decree and the upset price, the latter being held conclusive. *In re* Howell, 215 Fed. 1 (C. C. A. 2d, 1914), *cert. denied*, 235 U. S. 702 (1914); Equitable Trust Co. v. Western Pac. Ry. Co., 244 Fed. 485 (S. D. N. Y. 1917), *aff'd* (with unimportant modifications) *sub. nom.*, Equitable Trust Co. v. Denver & R. G. R. Co., 250 Fed. 237 (C. C. A. 2d, 1918), *cert. denied*, 246 U. S. 672 (1918). *Contra:* Central Trust Co. v. J. & M. Ry. Co., 58 Fed. 500 (N. D. Ohio 1892). See Weiner, *supra* at 147. Since the guarantor's liability exists only to the extent of the liability of the mortgagor, these cases seem adequate authority against this

procedure is used, apparently any class, including stockholders, for which, following the order of priority, an equity remains over the amount of prior liens, is entitled to participate.[48] This demands the determination of the existence of that interest which is accomplished in the statute not only by conditioning elimination of stock interests on insolvency,[49] but also by allowing the presence of an equity in excluded classes to be tested by the procedure for valuation of the claims of unbound dissenters,[50] for which elaborate provision is made.[51] Since, unlike the upset price in equity procedure,[52] this valuation will be directed primarily at the determination of the interest of subordinate classes, there seems a likelihood of an estimate which will more closely approximate its "true" value[53]—it has been decided that the issue of

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contention. Moreover, the power of the foreclosing mortgagee to exclude any one he pleases, except for the Boyd case, weighs heavily against this theory. Nevertheless, in several cases this contention has been advanced and the courts rather than brush it aside with the short answer, have gone on to long excursions into the problem of valuation and concluded that actually no equity existed for the complainant class. *Cf.* American S. S. Co. v. Wickwire Spencer Steel Co., *supra* at 888, 895; Temmer v. Denver Tramway Co., 18 F.(2d) 226 (C. C. A. 8th, 1927). It may well be that in a persuasive case, the fetters of a law of mortgage foreclosure applicable to a suburban lot, may be shaken free where the subject matter is a great corporation.

[48] The requirement in §§ 77(h) and 77B(c) that if the corporation be not insolvent the plan must be submitted to the vote of the stockholders, will enable the latter, since it is inconceivable that the requisite majority will assent to a plan which offered them no participation, to insist, as an alternative to participation, on payment to the extent of their equity under subdivision (b). Likewise the required submission of the plan to the votes of all creditor classes gives each the same club to force its inclusion if an interest remains to it. See *infra* notes 49, 50.

[49] Section 77B(b)(4) "A plan of reorganization within the meaning of this section . . . shall provide in respect to each class of stockholders, of which less than a majority shall accept such plan (unless the judge shall determine . . . that the debtor is insolvent . . .), adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan. . . ." Section 77(g)(5), (e) contains similar language.

[50] Section 77B(b)(5) provides: "A plan of reorganization within the meaning of this section . . . shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan, provide *(sic)* adequate protection for the realization by them of the value of their interests, claims, or liens. . . ." Section 77(g)(6) contains similar language.

[51] Provision is made in the alternative for sale at an upset price, appraisal, or methods which will do equity, and in the case of creditors by sale subject to their interests. Sections 77B(b)(4), (5).

[52] See Weiner, *loc. cit. supra* note 47.

[53] This involves the problem of ascribing to a piece of property the value, in terms of money, which the property will bring at a sale where no market exists. The answers to the problem in the equity reorganization cases have thus far been mainly negative: it is not determined by a utility rate base [see Temmer v. Denver Tramway Co., 18 F.(2d) 226, 228-229 (C. C. A. 8th, 1927); N. Y. Trust Co. v. Continental & Commercial Trust & Savings Bank, 26 F.(2d) 872, 874 (C. C. A. 8th, 1928) *cert. denied,* 278 U. S. 644 (1928)]; nor estimates to base the capitalization of new securities [P. R. Walsh Tie & Timber Co. v. Missouri Pacific Ry. Co., 280 Fed. 38 (C. C. A. 8th, 1922), *cert. denied,* 260 U. S. 743 (1922)]. It is undoubtedly an independent type of valuation, which will develop its own rules of determination. See Bonbright, *The Problem of Judicial Valuation* (1927) 27

solvency shall be determined "liberally" in favor of the debtor.[54] Yet absent such interest, the participation of junior classes, as in equity reorganization, must depend on the "charity"[55] of their superiors. However, the undesirable rule established by *American S. S. Co. v. Wickwire Spencer Steel Co.*[56] that stockholders are without standing even to be heard concerning the fairness of the plan[57] has been avoided in the bankruptcy procedure by express provision.[58]

Entirely independent of the *Boyd* case, a requirement of equal treatment of all members of included classes[59] prevents the exclusion of any minority of a class of stockholders,[60] general creditors,[61] or bondholders.[62] And further guaranty of such equality lies in the right of any

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COLUMBIA LAW REV. 493, 518. Professor Bonbright has hazarded the surmise to the writer that the type of valuation will be that advanced for computation of the base for capital stock taxes in Ray Consolidated Copper Co. v. United States, 268 U. S. 373 (1925), but that it will probably be more liberally estimated in fact.

[54] *In re* Hopkins Lake Drive Realty Corp. (D. Md. Dec. 6, 1934) C. C. H. BANKRUPTCY SERVICE 1325.

[55] *Cf.* note 37, *supra.*

[56] American S. S. Co. v. Wickwire Spencer Steel Co., 42 F.(2d) 886 (W. D. N. Y. 1930), *aff'd,* 49 F.(2d) 766 (C. C. A. 2d, 1931).

[57] Insofar as a court is concerned with setting up an economically feasible plan, an interest most apparent where a utility [*cf.* Eastern States Public Service Corp. v. Atlantic Public Utilities, Inc., 156 Atl. 214 (Del. Ch. 1931)], banking, or railroad reorganization is involved [see Trustees Corp., Ltd. v. Kansas City, Mexico & Orient R. Co., 18 F.(2d) 765, 770 (C. C. A. 8th, 1927); compare the early view of Merchants' Loan & Trust Co. v. Chicago Rys. Co., 158 Fed. 923, 929 (C. C. A. 7th, 1907)], to deny birth to the suggestions of any interested class which might propose a better plan than that before the court seems questionable. In American S. S. Co. v. Wickwire Spencer Steel Co., 42 F.(2d) 886 (W. D. N. Y. 1930), *aff'd,* 49 F.(2d) 766 (C. C. A. 2d, 1931) the miscarried plan offered by the stockholders would have greatly lessened the fixed charges of the new company and enhanced its credit by creating equity interests for the new classes rather than bonded indebtedness. See Note (1930) 30 COLUMBIA LAW REV. 1013, 1018. And see the proposed substitute plan of Commissioner Eastman in the St. Paul reorganization, 131 I. C. C. 673, 708 (1928).

[58] §§ 77(c); 77B(c).

[59] See Eagleson v. Pacific Timber Co., 270 Fed. 1008, 1010 (D. Del. 1920); Gerdes, *supra* note 6, at 8.

[60] Southern Pacific Co. v. Bogert, 250 U. S. 483 (1919); Eagleson v. Pacific Timber Co., 270 Fed. 1008 (D. Del. 1920); Cutting v. B. & O. R. Co., 35 Misc. 616, 72 N. Y. Supp. 27 (Sup. Ct. 1901); *cf.* Leland v. Ford, 245 Mich. 599, 223 N. W. 218 (1929).

[61] *Cf.* Wheeler v. Acme Harvesting Machine Co., 175 Ill. App. 69 (1912).

[62] ". . . We never have observed or heard of a case where the minority were turned away without having been given by the majority a fair opportunity to share equally with them the benefits of the purchase—where, for example, 95 per cent. of the bondholders of a vast railroad or industrial enterprise have combined and then shut the door upon the scattered 5 per cent." See Investment Registry, Ltd. v. Chicago & M. E. R. Co., 212 Fed. 594, 610 (C. C. A. 7th, 1913). But a reasonable time limit for acceptance of the plan may be properly imposed as a condition precedent to participation. Bound v. South Carolina R. Co., 78 Fed. 49 (C. C. A. 4th, 1897). And since the litigation of fairness always consumes more than the time set, the court in its decree generally stipulates an extension to permit the litigants to join. Jameson v. Guaranty Trust Co. of N. Y., 20 F.(2d) 808, 815 (C. C. A. 7th, 1927), *cert. denied,* 275 U. S. 569 (1927); Kansas City Terminal Ry. Co. v. Central Union Trust Co., 28 F.(2d) 177 (C. C. A. 8th, 1928). See TRACY, CORPORATE FORECLOSURE (1929) § 292.

negligently or purposely excluded interest holder to invoke the "fixed principle" if lower interests receive offers, even though the rest of the class is provided for.[63]

Order of Priorities in the Reorganized Corporation.—Reorganization principles have bowed to the norm of contract adherence to the extent of recognizing that the normal order of priorities[64] in the new corporation is preservation of the order of the old.[65] But even this obeisance is scarcely complete: operation of factors of expediency sanction sizeable departures. The dominant considerations are the necessities of consummating some workable plan and of preserving essential good will for the new corporation.

Recognition of the universal need of new capital for a workable reorganization[66] has culminated in approbation of attractions to such capital. Consequently it is held fair to give providers of new cash securities of higher rank, greater interest, or earlier maturity,[67] even though they be the old stockholders.[68] Suspension of the interest on

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[63] Howard v. Maxwell Motor Co., Inc., 269 Fed. 292 (S. D. N. Y. 1920), *aff'd*, 275 Fed. 53 (C. C. A. 2d, 1921); Mountain States Power Co. v. A. L. Jordon Lumber Co., 293 Fed. 502 (C. C. A. 9th, 1923), *cert. denied*, 264 U. S. 582 (1924); Pittsmont Copper Co. v. O'Rourke, 49 Mont. 281, 141 Pac. 849 (1914); see Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 504 (1913).

This ability to invoke the Boyd rule should not be confused with the announced rule of the equal freedom from exclusion of all creditors in a class without regard to the participation of other classes. See *supra* notes 59-62.

[64] "Priority" of an old corporate claim may be either in a right to precedence of principal in order of liquidation or of income during the life of the enterprise. The norm would require according each of the interests in the old corporation which was "prior" in either or both of the stated senses a recognition of its superior importance to its junior in any one or more of the several permissible ways. The methods of such recognition of superiority in the new structure, often termed the accordance of "priority," have been extended beyond the stated tests for "priority" in the old.

[65] Express mention of this principle is rarely found, yet recognition of and adherence to it, is clear. *Cf.* Hancock v. Toledo, P. & W. R. Co., 9 Fed. 738 (N. D. Ill. 1882); Western Union Telegraph Co. v. U. S. & Mexican Trust Co., 221 Fed. 545, 549 (C. C. A. 8th, 1915); Phipps v. Chicago, R. I. & P. Ry. Co., 284 Fed. 945, 949 (C. C. A. 8th, 1922), *cert. granted*, 261 U. S. 611 (1923), *dismissed by stipulation*, 262 U. S. 762 (1923).

[66] See Guaranty Trust Co. v. Missouri Pacific Ry. Co., 238 Fed. 812, 818 (E. D. Mo. 1916); Jameson v. Guaranty Trust Co., 20 F.(2d) 808, 811 (C. C. A. 7th, 1927); Kansas City Terminal Ry. Co. v. Central Union Trust Co., 28 F.(2d) 177, 184 (C. C. A. 8th, 1928); DEWING, *op. cit. supra* note 19, at 1158.

[67] Guaranty Trust Co. v. Missouri Pacific Ry. Co., 238 Fed. 812 (E. D. Mo. 1916); Jameson v. Guaranty Trust Co., 20 F.(2d) 808 (C. C. A. 7th, 1927), *cert. denied*, 275 U. S. 569 (1927).

[68] In view of the fact that reorganization plans continually provide for giving such stockholders securities superior to prior liens, without even offering those displaced lien holders the right to save their priority by themselves providing the required capital, the justification by necessity seems unproved. See Eastman, dissenting, in Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673, 710 (1928). However, it is generally conceded that the stockholder class is the most likely source of contribution. Cravath, in STETSON AND OTHERS, SOME LEGAL PHASES IN CORPORATE FINANCING, REORGANIZATION AND REGULATION (1917)

bonds given old bondholders, and the creation of a fund from earnings to be devoted to improvements before payment of such interest—both devices benefitting stockholders—have been approved.[69] In addition there have been ratified disturbances of order among and equality within classes accomplished by buying out a class[70] or part thereof for cash, even at different rates,[71] or by accordance of special treatment to small claimants.[72] Indeed under this broad banner of the need of a workable plan, room has even been found to sanction disturbances based on mere "business judgment": the discretion of the reorganizers with respect to the treatment of liens on different parts of the property permits the according of different ranks to lienors of the same previous relative standing, with at least a *prima facie* claim to equal treatment.[73]

Approval of superior treatment of tort claimants[74] rests largely on

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153-154; DEWING, *op. cit. supra* note 19, at 1177. Accepting as a premise the right of any class to redeem by buying the new securities for cash, a scholarly complex system has been worked out whereby each class in turn receives such an offer. See Buscheck, *A Formula for the Reorganization of Public Service Corporations* (1932) 32 COLUMBIA LAW REV. 964. The scheme appears legalistically and logically flawless, but its complexity appears to make it unmanageable.

[69] Jameson v. Guaranty Trust Co., 20 F.(2d) 808 (C. C. A. 7th, 1927), *cert. denied,* 275 U. S. 569 (1927). The court glibly dismissed the bondholders' complaint at the five year non-cumulative feature of their bonds as not a contribution in the same sense as the money paid by stockholders. And to the argument that it was a sacrifice by bondholders directly given stockholders, the court said such arrangement would aid stockholders, but only if they first get the road in shape to pay bonds in full. This apparently disregards any claim to interest. To the objection to the reservation of earnings for improvements, which would belong to the stockholders, the court replied that the bondholders' security would be increased. But increased security is hardly fair exchange for possession and ownership of the diverted earnings. Yet the case makes no factual showing of necessity; it is satisfied with stating that necessity requires sacrifices and that the stockholders have commensurate burdens.

[70] New York Trust Co. v. Continental Commercial Trust & Savings Bank, 26 F.(2d) 872 (C. C. A 8th, 1928), *cert. denied,* 278 U. S. 644 (1928) ; see *supra* note 38. That the purchase price included new securities makes the case an *a fortiori* holding on the power to buy.

[71] "There is no objection that the court can perceive to a reorganization committee, or anyone else, purchasing claims against an insolvent railroad company, for any price it sees fit to give, and paying some percentage to one creditor, and a larger or less percentage to another." North American Co. v. St. Louis & S. F. R. Co., 28 F.(2d) 174, 175 (E. D. Mo. 1926). But see Investment Registry, Ltd. v. Chicago, & M. E. R. Co., 212 Fed. 594, 610 (C. C. A. 7th, 1913), where purchases for the purpose of chilling the bidding were held bad and a dictum announced such payment was also bad as favoring some of bondholders over others; confirmation of the sale was denied.

[72] Milner v. Gibson, 249 Ky. 594, 61 S. W.(2d) 273 (1933) (bank depositors of less than $25 paid outright; depositors of over $25 to get 10%, and the remainder to be paid over a period of time) ; Nagel v. Ghingher, 171 Atl. 65 (Md. 1934) (depositors of less than $10 paid in full) ; *cf.* Keech v. Stowe-Fuller, 205 Fed. 887 (C. C. A. 6th, 1913) (100% payment to claims of less than $100; 50% payment to those above $100).

[73] See *supra* note 19.

[74] See New York Trust Co. v. Continental & Commercial Trust & Savings Bank, 26 F.(2d) 872, 876 (C. C. A. 8th, 1928) ; *In re* Brooklyn-Manhattan Transit Corp., unreported (S. D. N. Y. 1935). A preference in favor of injured persons was established by § 77(s), but no parallel is encountered in § 77B.

the value of their good will and fear of their animosity. An even more justified invocation of this purpose has advanced insurance policy holders, analytically mere contingent creditors, over all other interests,[75] because, as the customers of the enterprise, its future fate was completely in their hands. Yet the extension of such preferences to other situations fitting the pattern is speculative; possibilities include employee security holders, utility consumer security holders, factor's consignors, building and loan association investors, and other customer classes generally. The coincidence of an emotional solicitude for these classes with the necessity of preserving their good will might well promote such an extension.

In addition, the regular equity priorities remain in chancery reorganizations,[76] and the bankruptcy amendments specify their own statutory priorities.[77]

(To be concluded)

THE WRIT OF HABEAS CORPUS IN THE FEDERAL COURTS.*—The original general grant to the federal courts of power to issue writs of

[75] In the rehabilitation of the National Surety Co., the company's creditors included guaranteed bondholders, and insurance policy holders, the latter affording the only profit made. The plan set up three new corporations: the first, which assumed the insurance business and liability for future losses, acquired all the valuable and liquid assets of the old corporation, and its stock was placed in the Commissioner's hands in trust for old creditors; the second company took over the mortgage business, previously unprofitable; and to the third was transferred all the frozen assets and it assumed all the debts, including matured claims, remaining from the allocation to the first company. The plan was upheld. Matter of National Surety Co., 239 App. Div. 490, 268 N. Y. Supp. 88 (1st Dept. 1933), *aff'd*, 264 N. Y. 473, 191 N. E. 521 (1934), discussed in Note (1934) 43 YALE L. J. 1146.

[76] CLARK, RECEIVERS (2d ed. 1929) §§ 667 *et seq.*

[77] § 77B(k) excludes § 64, thus eliminating all the regular bankruptcy priorities including that of wage earners, but by subdivision (b) retains the equity preferences, including the six months' rule. The three exceptions to the acceptance of equity doctrine are: (1) The bankruptcy rule as to the amount a secured creditor may prove for is adopted, *i.e.* the difference between the value of the security and the amount of the claim. (2) Claims include those on executory contracts, including leases, regardless of whether provable under § 63, but landlords' claims shall not exceed three years rent plus rent accrued. (3) A creditor who would have been held to have been preferred had there been an adjudication in bankruptcy, may prove only for the amount which would have been provable in bankruptcy. See Weiner, *Corporate Reorganization: Section 77B of the Bankruptcy Act* (1934) 34 COLUMBIA LAW REV. 1173, 1185.

* The present discussion will be concerned largely with problems centering about the use of the writ for release of persons held by virtue of judicial authority. Review of detention under orders of administrative bodies (*e.g.*, immigration authorities) or courts of limited and special jurisdiction (*e.g.*, courts martial) will be considered only in its incidental relation to the main problem. For a general survey of the scope of the federal writ, see Williams, *Federal Habeas Corpus* (1924) 9 ST. LOUIS L. REV. 250; Dobie, *Habeas Corpus in the Federal Courts* (1927) 13 VA. L. REV. 433; 7 LONGSDORF, CYCLOPEDIA OF FEDERAL PROCEDURE (1930) c. 80.