

Louisiana Law Review

Volume 2 | Number 3
March 1940

Reorganization Plans Under Chapter X

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Repository Citation

Vernon X. Miller, *Reorganization Plans Under Chapter X*, 2 La. L. Rev. (1940)
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LOUISIANA LAW REVIEW

PUBLISHED QUARTERLY, IN NOVEMBER, JANUARY, MARCH AND MAY
LOUISIANA STATE UNIVERSITY LAW SCHOOL
UNIVERSITY, LOUISIANA

Subscription per year \$4.00 (Foreign \$4.50)

Single copy \$1.00

VOL. II

MARCH, 1940

No. 3

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Comments

REORGANIZATION PLANS UNDER CHAPTER X

Six years ago Congress added Section 77B on corporate reorganizations to the Bankruptcy Act.¹ In 1938 the section was repealed and a new statute, Chapter X of the Chandler Act, was adopted.² Chapter X is a better statute. Several provisions of the old section have been changed³ and some new provisions have

1. Act of June 7, 1934, c. 424, 48 Stat. 912.

2. Act of June 22, 1938, c. 575, 52 Stat. 840, 883, §§ 101-276; 11 U.S.C.A. §§ 501-676 (1939).

3. Among the more important changes are the following: Under Chapter X the court must appoint an independent trustee, except in small cases, to manage the debtor's properties until a plan can be effected. § 156. Under the old statute the court might permit the debtor to remain in possession and

been added,⁴ but the new chapter is substantially the old section. By these statutes Congress has brought the consent receivership into the bankruptcy courts. And it has provided that the bankruptcy courts shall confirm fair plans of reorganization after they have been approved by special majorities of creditors and stockholders.

Lawyers knew about consent receiverships long before 1933 and 1934.⁵ The court would appoint a receiver at the request of a creditor in an action against a corporate debtor. The creditor had alleged that the defendant was insolvent.⁶ The corporation did not deny the allegation. The creditor and the debtor joined in the request for the appointment of the receiver. The court appointed the receiver and issued a blanket injunction against creditors. Temporarily at least there could be neither seizures on execution nor foreclosure sales, and immediate liquidation was avoided, although maturing obligations could not be met,

control. § 77B(c)(1). Under the new statute no petition can be filed by or against a debtor if another reorganization petition is pending. § 126. Petitions cannot be filed in the state of incorporation unless that is also where the debtor has its principal place of business or principal assets. § 128. Cf. *Hamilton Gas Co. v. Watters*, 75 F. (2d) 176 (C.C.A. 4th, 1935). The trustee is primarily responsible for the submission of a reorganization plan to the court. § 169. On a creditor's involuntary petition it is sufficient that the creditor show possession of the debtor's property by a receiver appointed in foreclosure proceedings. § 131. This was made necessary by the decision in *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 56 S.Ct. 412, 80 L.Ed. 591 (1936), where the court held that "equity receiver" in the statute did not include foreclosure receivers.

4. Some of the changes indicated in footnote 3, *supra*, are in effect new provisions. But see particularly Section 172 of the new chapter. The judge shall in some cases, and may in others, submit to the Securities and Exchange Commission for examination and advisory report any plan or plans which the court thinks worthy of consideration. A new chapter has been added to the Bankruptcy Act, Chapter XI, in which it is provided that the bankruptcy courts may confirm arrangements and compositions between individual or corporate debtors with their unsecured creditors. Some declaratory statements as to the meaning of "good faith" in connection with the approving of petitions appear in Section 146.

5. See particularly Billig, *Corporate Reorganization: Equity v. Bankruptcy* (1933) 17 *Minn. L. Rev.* 237; Foster, *Conflicting Ideals for Reorganization* (1935) 44 *Yale L.J.* 923. The district courts of Louisiana and the civil district courts in the Parish of Orleans are empowered to appoint receivers to take over the properties of corporations "At the instance of a creditor when the board of directors of the corporation shall have declared by resolution that the corporation is unable to meet its obligations as they mature, and that a receiver is necessary to preserve and administer its assets for the benefit of all concerned." Acts 1898, No. 159, § 1(8) [*Dart's Gen. Stat.* (1939) § 1209].

6. An equity court should not appoint a receiver for a corporation's properties in a consent proceeding if the corporation is not insolvent. The claims of protesting creditors must be paid just as if no receiver had been appointed. *First Nat. Bank v. Flershem*, 290 U.S. 504, 54 S.Ct. 298, 78 L.Ed. 465 (1934). Compare the Louisiana statute cited in footnote 5, *supra*.

the corporation could be operated as a going concern while creditors and the board of directors arranged for debt payments and management control. If the corporation was insolvent in the bankruptcy sense, the appointment of the receiver was an act of bankruptcy.⁷ Of course the corporation might be adjudged a bankrupt and then liquidation could not be avoided.

The consent receivership was not always effective as a liquidation-saving scheme if the corporation's assets were located in several states.⁸ It would then be necessary to institute an independent proceeding in each jurisdiction. Furthermore the several courts might not cooperate⁹ and at any time any one of them might permit judgment creditors to reach the assets located within its territorial jurisdiction.¹⁰ Any one of the courts might proceed with foreclosures in spite of what the courts were doing in the other states.¹¹

This scheme for avoiding liquidation was seized upon in 1933 and 1934 as a good device which could be made into a better one. In those years legislatures were forced to consider the plight of debtors.¹² Congress added several provisions to the Bankruptcy

7. Section 3(a)(5) of the old Bankruptcy Act. See 44 Stat. 662, 663 (1926). The section was amended by the Chandler Act. The appointment of any receiver in a consent proceeding is an act of bankruptcy. Congress has tried to force all formal attempts at reorganization into the bankruptcy courts. 52 Stat. 844 (1938), 11 U.S.C.A. § 21(a)(5) (1939).

8. See note (1935) 19 Marq. L. Rev. 190.

9. Judge Bourquin of the Montana Federal District Court thought that collateral suits filed in consent proceedings for the appointment of ancillary receivers were collusive suits. In one case he not only refused to appoint an ancillary receiver but he found the lawyers in the case guilty of contempt because they had petitioned him to appoint the receiver. *May Hosiery Mills v. F. & W. Grand 5-10-25 Cent Store*, 59 F. (2d) 218 (D.C. Mont. 1932). The judgment for contempt was reversed. *May Hosiery Mills v. United States District Court*, 64 F. (2d) 450 (C.C.A. 9th, 1933). Cf. *Harkin v. Brundage*, 276 U.S. 36, 48 S.Ct. 36, 72 L.Ed. 457 (1928).

10. *Mieyr v. Federal Surety Co.*, 97 Mont. 508, 34 P. (2d) 982 (1934), affirmed *Clark v. Williard*, 294 U.S. 211, 55 S.Ct. 356, 79 L.Ed. 865 (1935). Cf. *Standard Oil Co. v. Sugar Products Co.*, 160 La. 763, 107 So. 566 (1926).

11. *Equitable Trust Co. v. Washington-Idaho W., L. & P. Co.*, 300 Fed. 601 (E.D. Wash. 1924).

12. The mortgage moratorium statutes are typical. The general scheme of these was upheld in *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1933). The object of the legislatures in these cases was to permit courts to postpone foreclosure sales and to preserve equities of redemption. In 1934 Congress passed the *Frazier-Lemke Act*. 48 Stat. 1289 (1934). Congress tried to require of farmers' secured creditors that they share with the debtor any decrease in appraised values of the mortgaged properties and that they permit the debtor to remain in possession and to buy back the properties at their appraised values. The Supreme Court held that the statute was unconstitutional. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 547, 79 L.Ed. 1593 (1935). The Act was amended to allow some farmer-mortgagors three year moratoria and in that form the

Act which like Section 77B were liquidation-saving schemes.¹³ Under the new section on corporate reorganizations debtor corporations or their creditors could petition the bankruptcy courts to protect the assets of the debtors against threatened foreclosures, seizures on execution and pending bankruptcies.¹⁴ This in substance is what Chapter X provides.¹⁵ There can be no jurisdictional disputes growing out of ancillary receiverships. The court which has approved the petition has jurisdiction of the debtor and its property wherever located.¹⁶ It is the only court that can determine matters affecting the debtor's property in summary proceedings.¹⁷

The appointment of a receiver in a consent proceeding and the approval of a petition under Chapter X are temporary stop-gaps. Bankruptcy courts can save the properties from liquidation for a limited time. In that respect they can do a better job than the old courts could. But bankruptcy courts protect the assets of insolvent corporations, just as the courts in the consent receivership cases tried to do, only because it is probable in each case that creditors and stockholders can effect by compromise a new

Act was upheld by the Supreme Court. 49 Stat. 943-945 (1935), 11 U.S.C.A. § 203(s) (1939); *Wright v. Vinton Branch*, 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736 (1937).

13. Section 74 on compositions and extensions for individuals, 47 Stat. 1467 (1933); § 75 on agricultural compositions and extensions, 47 Stat. 1470 (1933); § 77 on railroad reorganizations, 47 Stat. 1474 (1933); §§ 78, 79, 80 to provide for municipal debt readjustments, 48 Stat. 798 (1934). The section on municipal debt readjustments was held unconstitutional in *Ashton v. Cameron County*, 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309 (1936). Sections 75 and 77 with amendments are still a part of the Bankruptcy Act. 11 U.S.C.A. §§ 203, 205. The Chandler Act has new chapters on "arrangements," "real property arrangements," and "wage earners' plans." Chapters XI, XII, and XIII of the statute, 52 Stat. 905, 916, 930, 11 U.S.C.A. §§ 701-799, §§ 801-926, §§ 1001-1086 (1939). To meet the decision in the Ashton case Congress in 1937 adopted another statute providing for local taxing agencies. 50 Stat. 654 (1937), 11 U.S.C.A. §§ 401-404 (1939).

14. Section 77B(a). The petitions filed by creditors were like involuntary petitions in bankruptcy. The creditors had to allege that the debtor had committed an act of bankruptcy or that an equity receivership or bankruptcy was pending.

15. Sections 126-133.

16. Section 77B(a) of the old statute; § 111 of the Chandler Act; *Continental Illinois Nat. Bank & Tr. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110 (1935), in which the court decided a case under Section 77 and settled the same question about proceedings under Section 77B. Cf. *In re Greyling Realty Corporation*, 74 F. (2d) 734 (C.C.A. 2d, 1935).

17. Distinctions between plenary suits and summary proceedings are important in reorganization cases. Which are the cases that must be disposed of in plenary suits and which may be disposed of in summary proceedings? See *United States v. Tacoma Oriental S.S. Co.*, 86 F. (2d) 363 (C.C.A. 9th, 1936), discussed in (1937) 21 Marq. L. Rev. 87, and *Texas Co. v. Hauptmann*, 91 F. (2d) 449 (C.C.A. 9th, 1937).

plan for the management of the properties.¹⁸ The particular business will be kept alive. New debt burdens will be carried and management will be shared by several groups. Capital contributions may be made by the old stockholders, and liquidation will be permanently avoided. If no such plan can be produced the court will withdraw its protection, and the proceeding under Chapter X will be dismissed.¹⁹ Seizures on execution may follow. Decrees of foreclosure may be entered or the debtor may be adjudged a bankrupt. The court in its discretion may direct that the properties be liquidated, as in bankruptcy.

The draftsmen of Section 77B tried to devise a simple test for the confirmation of reorganization plans. They provided that a proposed plan should be submitted for approval to each of the debtor's several classes of creditors and stockholders.²⁰ A plan should not be confirmed unless it had the approval not only of two-thirds in amount of each class of creditors affected but also of the stockholders affected by the plan and having a majority of each class of stock.²¹ Provision was made for confirmation in some instances even when approval of the special majorities in all the classes could not be obtained.²² But a plan which had been so approved was not to be confirmed unless it was also "fair," "equitable" and "feasible."²³ All these provisions are in Chapter X.²⁴

Under the old consent receiverships reorganizations were sometimes effected over the protests of minority groups.²⁵ It is

18. No petition should be approved if it has not been filed in good faith. § 146. If a corporation is hopelessly insolvent no petition should be approved and if one has been approved the proceeding should be dismissed. *Tennessee Pub. Co. v. American Nat. Bank*, 299 U.S. 18, 57 S.Ct. 85, 81 L.Ed. 13 (1936); *First Nat. Bank v. Conway Road Estates Co.*, 94 F. (2d) 736 (C.C.A. 8th, 1938). If most of the debtor's properties are beyond the reach of the court's process or the process of any ancillary court of bankruptcy, the petition should not be approved. *Manati Sugar Co. v. Mock*, 75 F. (2d) 284 (C.C.A. 2d, 1935).

19. Sections 236-238.

20. Section 77B(b). Congress did not try to fix a standard for the courts in the matter of the membership in and the number of the classes of creditors to be dealt with in the several cases. That is left to the discretion of the court. Cf. § 77B(c)(6) and § 197. See *J. P. Morgan & Co. v. Missouri Pac. R. Co.*, 85 F. (2d) 351 (C.C.A. 8th, 1936); *In re Palisades-on-the-Desplaines*, 89 F. (2d) 214 (C.C.A. 7th, 1937).

21. Section 77B(e)(1).

22. Sections 77B(b)(4)(5), 77B(e)(1).

23. Section 77B(f)(1).

24. Sections 175, 179, 216, 221.

25. The leading case is *Northern Pacific Ry. Co. v. Boyd*, 228 U.S. 482, 33 S.Ct. 386, 57 L.Ed. 931 (1913). Another important case is *Kansas City Terminal Ry. Co. v. Central Union Tr. Co.*, 271 U.S. 445, 46 S.Ct. 549, 70 L.Ed. 1028 (1926). A case that might have been the most important of them all had the district judge not entered his decree without a record to support it was

not to be supposed that all creditors would agree to accept any "plan" affording them something different from that for which they had bargained. Nor was it to be expected that all stockholders would agree as to what they should give up in order to get consent of all the creditors. But liquidations in some cases were virtually impossible. Going concern values had to be preserved. No single purchaser could buy the properties at the appraised values, so a compromise was worked out which resulted in the formation of a new corporation. In order to keep the record straight, and to build a case against dissenters, the properties were sold to the new company at a judicial sale.²⁶ Perhaps a decree of foreclosure had been entered on the petition of a bondholder's committee. Any cash consideration might be used to pay off dissenters. As a part of the plan bonds of the new corporation would be issued to the old bondholders. Interest rates would be lower. Maturity dates would be postponed. Principal might even be reduced. Voting stock in various amounts would be issued to the old bondholders, to the junior secured creditors, the unsecured creditors and the stockholders. The old bondholder's stock in the new corporation might be preferred as to dividends and liquidation. The stock might be distributed to junior secured creditors dollar for dollar, stock for indebtedness. Unsecured creditors might have an option to pay a small assessment for some new stock, or to accept a cash settlement, or to take notes without interest from the new corporation. Old stockholders would be required to pay assessments in order to preserve their interests in the new corporation. All creditors would have to be provided for.²⁷ Such a plan might be considered fair and feasible so that all persons would be compelled to take what they were offered.²⁸ They would have no recourse against the new corporation.

National Surety Co. v. Coriell, 289 U.S. 426, 53 S.Ct. 678, 77 L.Ed. 1300 (1933). For a description of a successful plan affecting widespread railroad properties and which was confirmed over opposition, see Jameson v. Guaranty Trust Co. of New York, 20 F. (2d) 808 (C.C.A. 7th, 1927).

26. See Weiner, *Conflicting Functions of the Upset Price in a Corporate Reorganization* (1927) 27 Col. L. Rev. 132.

27. The reorganization in the Boyd case was successful. But nothing had been offered to one unsecured creditor. That creditor was permitted to enforce his claim in full against the railway because old stockholders' equities had been carried over into the new corporation.

28. McReynolds, J., in *Kansas City Terminal Ry. Co. v. Central Union Tr. Co.*, 271 U.S. 445, 455, 46 S.Ct. 549, 70 L.Ed. 1028 (1926): "Unsecured creditors of insolvent debtors are entitled to the benefits of the values which remain after lienholders are satisfied, whether this is present or prospective, for dividends or only for purposes of control. But reasonable adjustments should be encouraged . . . the interests of all parties, including the public, are best served by cooperation between bondholders and stockholders. If creditors decline a fair offer . . . they are left to protect themselves."

The draftsmen of Section 77B were familiar with those cases when they prepared the new statute. Did they mean to suggest that after 1934 plans might be classified as fair and feasible which had not been recognized as such under the old consent receiverships? The leading cases involved railroads and Congress had provided in another section for supervision of railroad reorganizations by the courts.²⁹ Did the draftsmen intend that courts should take into consideration in determining the fairness or feasibility of any plan that the prescribed majorities of creditors and stockholders had accepted it? Would the courts permit Congress to establish new standards of fair treatment for creditors who had bargained for payment in full?

Obviously no plan can be fair if creditors are given nothing as compensation for reductions in principal, rates of interest, changes in security or postponement of maturity. Stockholders must relinquish something and no court would seriously consider any plan which did not so provide. However it has been decided in several cases arising under Section 77B that the stockholders do give enough to the senior secured creditors if they propose to share with them stock interests in the new corporation and to give them management control and the greater share of the profits.³⁰ In such case the required percentages have voted for the plan; bondholders are getting as much as they would get through foreclosure; appraisals are impracticable. It may well be that future prospects for successful operation of the properties are bright and it would be unfair to the stockholders to freeze them out.³¹

29. See *Brandels, J., in First Nat. Bank v. Flershem*, 290 U.S. 504, 515, 54 S.Ct. 298, 78 L.Ed. 465 (1935). See also § 77 of the Bankruptcy Act. 11 U.S.C.A. § 205 (1939). In the *Flershem* case it proved impracticable to effect through one judicial sale a reorganization of the corporate structure of a large industrial concern with several manufacturing plants located in different states.

30. In *re Georgian Hotel Corporation*, 82 F. (2d) 917 (C.C.A. 7th, 1936); In *re 333 Michigan Ave. Bldg. Corporation*, 84 F. (2d) 936 (C.C.A. 7th, 1936); In *re New Rochelle Coal & Lumber Co.*, 77 F. (2d) 881 (C.C.A. 2d, 1935).

31. During the first few years under Section 77B these were popular ideas. Courts were willing to confirm plans although the records contained no definite appraisals of the properties. The Court of Appeals in the Seventh Circuit was particularly willing to do it. With the cases referred to in note 30, *supra*, see also In *re Chain Inv. Co.*, 102 F. (2d) 323 (C.C.A. 7th, 1939). See what the lower court said in *Security-First Nat. Bank v. Rindge Land & Navigation Co.*, 85 F. (2d) 557, 565 (C.C.A. 9th, 1936), about the impracticability of appraising the properties. The Court of Appeals in the First Circuit recognized that Congress was trying to fix a new standard for fairness and feasibility. See *Downtown Investment Ass'n v. Boston Metropolitan Bldgs.*, 81 F. (2d) 314 (C.C.A. 1st, 1936).

Doubts concerning the meaning of "fair," "equitable" and "feasible" in Section 77B and Chapter X have been settled by the recent decision of the United States Supreme Court in *Case v. Los Angeles Lumber Products Co.*³² At least in one sense it is true that these questions have been answered. The words "fair," "equitable" and "feasible" are words of art. They mean in bankruptcy what the Court said they meant in *Northern Pacific Railway v. Boyd*³³ and other cases of the consent receivership days. The properties must be appraised.³⁴ If the appraised values are insufficient to cover the debts outstanding no plan that gives anything to the stockholders without a new cash contribution can be confirmed over the protest of a single creditor.³⁵ If the corporation is not insolvent in the bankruptcy sense, or if the properties are worth enough to cover the first mortgage indebtedness, no plan requiring bondholders to accept a reduction in interest or principal, or a postponement of maturity, can be confirmed over the protest of a single bondholder.³⁶ It is not enough that the old bondholders be given control of the properties and a preferred claim to dividends if stockholders or junior creditors be permitted to retain interests in the properties without assessment.

The record in the *Lumber Company* case shows that the debtor had assets of \$900,000 and that it owed the bondholders \$3,800,000 in principal and interest. The reorganization plan which the trial judge confirmed provided for the organization of a new corporation with an authorized capital issue of one million shares

32. 307 U.S. 619, 60 S.Ct. 1, 84 L.Ed. 22 (1939). In note 14, page 9, the Court expressly disavows the opinion of the court in *Downtown Investment Ass'n v. Boston Metropolitan Bldgs.*, 81 F. (2d) 314 (C.C.A. 1st, 1936), about the meaning of "fair" and "equitable" in the statute.

33. 228 U.S. 482, 33 S.Ct. 386, 57 L.Ed. 931 (1913).

34. The Court does not literally say that in the opinion. But it does take the appraised values as decisive. It cites *National Surety Co. v. Coriell*, 289 U.S. 426, 53 S.Ct. 678, 77 L.Ed. 1300 (1932), to the effect that the district judge must see that the parties have built an adequate record before he can pass on the fairness of a plan. Some of the courts of appeal have been insisting that the records show definite appraised values. *Jamieson v. Watters*, 91 F. (2d) 61 (C.C.A. 4th, 1937); *In re Philadelphia & Reading Coal Co.*, 105 F. (2d) 357 (C.C.A. 3d, 1939).

35. This has been the position of most of the circuit courts of appeal especially in the more recent cases. *In re Barclay Park Corporation*, 90 F. (2d) 595 (C.C.A. 2d, 1937); *In re Day & Meyer, Murray & Young*, 93 F. (2d) 657 (C.C.A. 2d, 1938); *Price v. Spokane Silver & Lead Co.*, 97 F. (2d) 237 (C.C.A. 8th, 1938); *Sophian v. Congress Realty Co.*, 98 F. (2d) 499 (C.C.A. 8th, 1938); *In re Philadelphia & Reading Coal Co.*, 105 F. (2d) 357 (C.C.A. 3d, 1939); *Tellier v. Franks Laundry Co.*, 101 F. (2d) 561 (C.C.A. 8th, 1939).

36. This is not the decision of the Court in the instant case. But it does seem to follow as a corollary of the rule of that case. It was the conclusion of the court in *Texas Hotel Securities Corp. v. Waco Development Co.*, 87 F. (2d) 395 (C.C.A. 5th, 1937).

of no par stock. Each share was to have a fixed value of one dollar and all shares were to have voting rights. About 650,000 shares of the authorized stock, preferred as to dividends and liquidation, were to be distributed among the old bondholders. The common stock, amounting to 188,625 shares, was to be distributed to the holders of preferred stock in the debtor corporation. Common stockholders would get nothing. These issues of stock would be supported by the appraised value of the assets which the new corporation would acquire from the old one. There could be no danger of subsequent creditors asserting constructive fraud and overvalued properties if the new corporation should in the future become insolvent.³⁷ The rest of the stock which was preferred was to be sold to the public. The plan was approved by the prescribed majorities.

The circuit court of appeals affirmed the decree of the district court, pointing out that the new arrangement gave advantages to the old bondholders.³⁸ They would be compensated for the change in interest which they would be forced to accept. They were to share in the management of the properties and to have a preferred claim to the profits from operation. The properties were to be maintained as a going concern. Had the debtor not been reorganized under Section 77B the bondholders could not have brought a foreclosure suit. Their bonds were income bonds and the corporation was not in default when it could not pay interest. Moreover the bondholders and preferred stockholders had participated previously in a reorganization of the properties through which these stockholders had made capital contributions to the enterprise. Nevertheless the United States Supreme Court concluded that the plan was not fair and reversed the judgment of the circuit court of appeals. The proceeding was not to be dismissed. A fair plan might be prepared and might be approved by the members of those groups having measurable equities in the debtor's assets.

The Court's decision in the *Lumber Company* case leaves untouched the powers of bankruptcy courts to approve petitions filed under Chapter X. Early in 1935 the Court recognized that Congress could confer upon courts of bankruptcy powers to pro-

37. Cf. *Brockett v. Winkle Terra Cotta Co.*, 81 F. (2d) 949 (C.C.A. 8th, 1936).

38. *In re Los Angeles Lumber Products Co.*, 100 F. (2d) 963 (C.C.A. 9th, 1939).

tect and preserve the assets of insolvent debtors in reorganization proceedings.³⁹ But the recent decision does indicate that there will not be many kinds of plans that can be enforced over the protests of a single creditor.⁴⁰ Approval of a plan by prescribed majorities in most cases will be meaningless. A debtor's properties will have to be appraised whether or not it is practicable to arrive at present valuations. Many proceedings under Chapter X will be mere foreclosures.⁴¹

There is one kind of plan which may be practicable. If cash contributions are made to the new corporation by the junior creditors and stockholders they may be permitted to retain stock interests in the business.⁴² The counting of votes may be important in these cases. Some effect may be given to the provisions in the statute by which the courts are authorized to confirm plans which have not been approved by the special majorities in particular classes.⁴³ Whether the prices to be paid to dissenters, the cash contributions to be made by the stockholders and junior

39. *Continental Illinois Nat. Bank & Tr. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110 (1935).

40. Cases like *Taylor v. Standard Gas & E. Co.*, 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669 (1939), and *In re Michigan-Ohio Building Corporation*, 97 F. (2d) 845 (C.C.A. 7th, 1933), have not been affected by the recent decision. The Court pointed out in the instant case that the debtor in the *Taylor* case was solvent. The particular plan was held to be unfair in that case because stock distributions were to be made to a general creditor over the protests of preferred stockholders although the general creditor's claim had been built up through its common stock control of the debtor. That the creditor as a common stockholder was to get nothing out of the reorganization and that the prescribed majorities had accepted the plan could not save it. In the other case the corporation was insolvent in the bankruptcy sense, but the senior creditor was the lessor who had consented to the plan. Without his consent the bondholders' security would have been worthless. Compositions with unsecured creditors are not within the province of the court in reorganization proceedings. See Chapter XI of the Chandler Act.

41. This is not a fanciful prediction. The court in the principal case said as much when it suggested that the lower court might confirm a plan for the bondholders alone, although the original petition had been filed by the debtor. See also *In re 620 Church St. Corp.*, 299 U.S. 24, 57 S.Ct. 88, 81 L.Ed. 16 (1936), and *In re Witherbee Court Corp.*, 88 F. (2d) 251 (C.C.A. 2d, 1936).

42. There have not been many plans like this presented for confirmation under Section 77B. See *In re New York Railway Corp.*, 82 F. (2d) 739 (C.C.A. 2d, 1936). When railroads are being reorganized plans like these may be "feasible." The properties can never be appraised in the simple sense. The stock will always have a speculative value. If the assessments are not too high old stockholders may be willing to pay them. Where other kinds of corporations are being reorganized it is not as likely that old stockholders will be willing to put more money into an enterprise that has already cost them much.

43. Section 216(7) of the Chandler Act. The dissenters are in effect to be paid the estimated values of their claims. Cf. *Horn v. Ross Island Sand & Gravel Co.*, 88 F. (2d) 64 (C.C.A. 9th, 1937).

creditors, together with the scheme proposed for management control and distribution of profits, all add up to a plan that is fair and feasible is the type of problem that bankruptcy courts will be required to struggle with in each case just as the equity courts had to do in the old consent receivership days. Congress can set no new standard.

VERNON X. MILLER*

RES JUDICATA—"MATTERS WHICH MIGHT HAVE BEEN PLEADED"†

LOUISIANA CIVIL CODE OF 1870:

ART. 2286. The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

III. THE PROBLEM IN LOUISIANA**

In Louisiana the doctrine of *res judicata* rests, as in France, on a single article¹ of the Civil Code, and it was early held that "The only test as to the effect of a decree is its finality as to the matters embraced in it, and its having the requisites of article 2265 [Article 2286, Code of 1870]."² One of those requisites is that "the demand must be founded on the same cause of action": Just what is meant by this requirement?

The French text of Article 2265 of the Code of 1825, and of

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† This is the second and concluding installment of the present comment, the first part of which appeared in the January 1940 issue, 2 *LOUISIANA LAW REVIEW* 347-365.

** Because of the great number of decisions on this subject in Louisiana jurisprudence, it is impossible to discuss or even to cite more than a portion of them. Representative cases have been selected for discussion in the text, and the footnote citations have been chosen principally from Louisiana Supreme Court opinions.

1. Art. 2286, La. Civil Code of 1870.

Art. 3556 (31), La. Civil Code of 1870, and Art. 539, La. Code of Practice of 1870, relate to what judgments have the effect of *res judicata*, but Art. 2286 is the only provision as to what that effect is.

Cf. also Arts. 156, 492, 536, La. Code of Practice of 1870.

2. Succession of Durnford, 1 La. Ann. 92, 93 (1846); Kellam v. Rippey, 3 La. Ann. 202, 203 (1848); State v. American Sugar Refining Co., 108 La. 603, 605, 32 So. 965 (1902); Hope v. Madison, 193 So. 666, 668 (La. 1940).