In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

UNITED STATES REALTY AND IMPROVEMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered February 2, 1940, (1) reversing an order of the United States District Court for the Southern District of New York allowing the Commission to intervene in proceedings under Chapter XI of the Bankruptcy Act, and (2) dismissing appeals taken by the Commission from two orders of the District Court, one of which denied the Commission's motion to dismiss the proceedings for lack of jurisdiction of the Debtor under Chapter XI, and the other of which referred the proceedings to a referee for further action.

OPINIONS BELOW

The District Court filed no written opinion. It expressed its views and announced its decision in open court (R. 336–339). The opinion of the Circuit Court of Appeals (R. 420) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 2, 1940 (R. 430). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a corporation which has securities outstanding in the hands of the public may institute a proceeding for an arrangement under Chapter XI of the Bankruptcy Act or whether it can reorganize under the Bankruptcy Act only pursuant to the provisions of Chapter X.

2. Whether a petition for an arrangement under Chapter XI should be dismissed when the facts disclose that no fair, equitable, and feasible plan may be consummated under Chapter XI.

3. Whether the Securities and Exchange Commisison, as an agency charged with the duty of administering the safeguards provided by Congress for public investors in reorganizations under Chapter X, was properly permitted to intervene in proceedings instituted under Chapter XI by a publicly-held corporation for the limited purpose of moving

to dismiss those proceedings on the ground that the Debtor could reorganize under the Bankruptcy Act only under Chapter X, and, if so, whether it was entitled to appeal from an adverse order.

STATUTE INVOLVED

Chapters X and XI of the Bankruptcy Act (11 U. S. C. Supp. IV, Secs. 501 *et seq.* and 701 *et seq.*) are involved in this proceeding substantially in their entirety. Because of their length they are not printed as parts of this petition, but copies thereof have been filed with the Clerk for the convenience of the Court.

STATEMENT

The Debtor, a New Jersey corporation having its principal place of business in New York City, owns and manages real estate investments (R. 6–7, 103). It owns all the capital stock of Trinity Buildings Corporation of New York (hereinafter called Trinity) (R. 7). The Debtor and Trinity have outstanding three classes of securities which are widely held by the public (R. 7, 111, 134).

The Debtor is guarantor of the principal, interest and sinking fund payments on publicly held first mortgage certificates issued by Trinity (R. 7). On June 1, 1939, the principal of the Trinity certificates, amounting to $3,710,500, became due (R. 7–8). Both Trinity and the Debtor defaulted in the payment of the principal of these certificates, as well as in the payment of an installment of interest amounting to $102,038, which became due at the same time (R. 171).

In addition to its liability on its guaranty of the Trinity certificates, the Debtor has liabilities totaling $5,551,416 (R. 375). Included in these liabilities are two series of publicly held debentures, aggregating $2,339,000, which will mature on January 1, 1944 (R. 375). Both series of debentures are secured by a pledge of admittedly valueless stock owned by the Debtor (R. 211–212, 227, 382). The Debtor has outstanding 900,000 shares of stock which are listed on the New York Stock Exchange (R. 111, 134).

The claimed value of the Debtor's assets is $7,076,515 (R. 375), of which $5,200,000 represents an investment in a building mortgaged to secure a $3,000,000 bank loan (R. 192–194, 375). The Debtor's current assets total less than $400,000 (R. 375). Each year since 1936, the Debtor has suffered a net loss, not including interest charges under the guaranty of the Trinity certificates (R. 59).

Prior to the maturity of the Trinity certificates, the Debtor and Trinity jointly proposed a Plan and Arrangement to the certificate holders for the purpose of modifying their respective obligations on the certificates, but which was to leave unaffected the other indebtedness and stock of the Debtor (R. 30, 40–41). The maturity of the certificates was to be extended, the interest reduced, and the sinking-fund payments modified. The Debtor's guaranty was to be modified to conform to these changes in principal and interest, and its present

guaranty of sinking-fund payments was to be eliminated entirely (R. 39).

The Plan and Arrangement was to be consummated by the institution of two proceedings: a proceeding instituted by the Debtor under Chapter XI of the Bankruptcy Act for an arrangement to modify its guaranty of the Trinity certificates, and a subsequent proceeding to be instituted by Trinity in the state courts under the Burchill Act (New York Real Property Law, Secs. 121–123) to conform Trinity's primary obligation to the modified guaranty (R. 33–34).[1] The Plan provided, however, that the modification of the Debtor's guaranty in the Chapter XI proceeding was to stand even though the state court should subsequently refuse to confirm the proposed modification of Trinity's obligation (R. 34).

On May 31, 1939, pursuant to this Plan, the present proceeding was commenced by the filing of a petition under Chapter XI, accompanied by a plan of arrangement embodying the proposed modification of the guaranty. On July 18, 1939, the Securities and Exchange Commission asked leave to intervene in the proceeding for the purpose of objecting by appropriate motions to the jurisdiction of the court and of appealing in the event

[1] Debtor's counsel stated that the Debtor desired prior approval of the arrangement by the United States District Court for the "pressure" it would put on the state court before which the Burchill Act proceedings would be brought (R. 277).

that its motions were denied (R. 133–138). The District Court entered an order on July 28, 1939, permitting the Commission to intervene (R. 142–143). The Commission then moved the court to vacate the order approving the Debtor's petition, to dismiss the proceeding, and to deny confirmation of the proposed arrangement on the grounds: (1) that the court did not have jurisdiction over the proceeding because Chapter XI does not apply to a debtor corporation which has securities outstanding in the hands of the public; and (2) that the proposed arrangement could not properly be confirmed under Chapter XI, because, among other reasons, the purpose of the proceeding was to modify the Debtor's obligation on its guaranty while leaving its stock issue and other obligations unaffected (R. 145–146). The Commission's motions were denied (R. 149–150) and the cause referred to a referee for further proceedings (R. 151).

The Commission thereupon appealed to the court below both from the order denying its motions and from the order referring the proceeding to a referee (R. 392–393). An appeal was also taken by the Debtor from the order of the District Court permitting the Commission to intervene (R. 394). The court below (Clark, J., dissenting) held: (1) that the proceedings were properly brought under Chapter XI and the District Court consequently had jurisdiction, and (2) that the District Court erred in allowing the Commission to intervene.

The court below consequently reversed the order of intervention and granted a motion by the Debtor to dismiss the Commission's appeal (R. 430).[2]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In failing to hold that the District Court lacked jurisdiction of the Debtor, as a corporation with publicly held securities, under Chapter XI.

(2) In holding that any corporation which could become a bankrupt may file a petition for an arrangement under Chapter XI.

(3) In failing to hold that the District Court properly permitted the Commission to intervene for the purpose of moving to dismiss the Debtor's petition under Chapter XI, and to appeal.

(4) In reversing the order granting the Commission leave to intervene.

(5) In dismissing the Commission's appeal from the orders denying its motion to dismiss the proceeding and referring the proceeding to a referee for further action.

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[2] The judgment of the court below dismisses the appeal (R. 430). The majority of the court, however, ruled upon the merits, concluding (Clark, J., dissenting) that any corporation which can be a bankrupt may file under Chapter XI (R. 422–423). Consequently, a mere reversal of the judgment dismissing the appeal and a remand of the case for consideration on the merits by the court below would grant the petitioner no relief. If the writ is granted, therefore, the merits must be considered, as well as the standing of the Commission to intervene and appeal.

REASONS FOR GRANTING THE WRIT

The decision below is one of first impression in the Circuit Courts of Appeals.[3] Although there is, therefore, no conflict of decisions, the questions raised are of such large importance in the administration of the corporate reorganization provisions of the Bankruptcy Act that review by this Court is, we believe, plainly warranted. The decision below, if allowed to stand, will render the Commission impotent in a large class of cases to perform the duty entrusted to it by Congress of protecting investors in corporate reorganization proceedings, and will to a large extent nullify the Congressional safeguards written into Chapter X of the Bankruptcy Act.

The principal issue in the case is the relationship between Chapters X and XI of the Act. Petitioner's position is that Congress intended Chapter X proceedings to be the exclusive method by which corporations with securities outstanding in the hands of the public can reorganize in bankruptcy and that

[3] There is, however, a conflict among the district courts on the question of whether a corporation which has securities outstanding in the hands of the public may file a petition under Chapter XI. The decision of the District Court for the District of Maryland in *In the Matter of Credit Service, Inc.*, No. 9340, decided January 18, 1940, is in accord with the decision below. A contrary ruling was made by the District Court for the Eastern District of Michigan in *In re Reo Motor Car Co.*, No. 24816, decided October 3, 1939. In the latter case the court, holding that the publicly held securities of the debtor made Chapter X proceedings appropriate, overruled a motion to dismiss a Chapter X proceeding which was based on the asserted availability of Chapter XI.

the District Court therefore had no jurisdiction over the proceedings instituted by the Debtor under Chapter XI. Petitioner also contends that, as the agency charged by Congress with the duty of administering the safeguards provided for investors in Chapter X, it was properly permitted to intervene in the present proceeding under Chapter XI for the purpose of moving to dismiss the petition on the ground that the Debtor could reorganize in bankruptcy only under Chapter X.

1. The court below, in holding that the petition was properly filed under Chapter XI, read the statute with literal exactness. Section 322 provides that a "debtor" may file a petition under Chapter XI, and Section 306 (3) provides that "debtor" means a person who could become a bankrupt under Section 4. Since the respondent could become a bankrupt under Section 4, the statute, construed literally and without regard to the purposes sought to be achieved by its enactment, permitted the procedure adopted.

Admittedly, in the usual case, the courts may not go behind the express language of a statute, for the presumption is strong that the words used in the statute express the intention of Congress in enacting it. But where, as here, it is perfectly plain from the structure of the statute as a whole, as well as from its legislative history, that Congress did not intend the result which would follow from literal application of the definition provisions, the presumption is overcome and the clear

purpose of Congress must be given effect. *Church of the Holy Trinity* v. *United States,* 143 U. S. 457; *American Security Co.* v. *District of Columbia,* 224 U. S. 491. See also *Kiefer & Kiefer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 391; *United States* v. *Ryan,* 284 U. S. 167; *United States* v. *Katz,* 271 U. S. 354; *United States* v. *Jin Fuey Moy,* 241 U. S. 394; *Lau Ow Bew* v. *United States,* 144 U. S. 47. As this Court said in *Helvering* v. *Morgan's, Inc.,* 293 U. S. 121, 126:

> * * * the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part. * * *

Chapters X and XI were enacted in 1938 as part of a general revision of the Bankruptcy Act. In this revision, specialized types of proceedings were segregated in separate chapters.[4] Chapter X pro-

[4] Chapters I–VII were retained for ordinary bankruptcy proceedings and several types of specialized proceedings were provided for in Chapters VIII–XIV. Chapter VIII contains provisions applicable to farm debtors and to railroads; Chapter IX contains provisions applicable to municipal corporations; Chapter X relates to corporate reorganizations; Chapter XI relates to arrangements of unsecured debts; Chapter XII relates to real property arrangements by persons other than corporations; Chapter XIII relates to wage earners' plans; and Chapter XIV relates to Maritime Commission liens.

vides a special procedure for the reorganization of corporations; Chapter XI provides for "arrangements" of the unsecured debts of any person who could become a bankrupt. The two chapters embody strikingly different schemes of reorganization. Chapter X, replacing former Section 77B, establishes comprehensive administrative machinery and protective provisions for the benefit of public investors, resting on the assumption that such investors, dissociated from control or active participation in the management, need impartial and expert administrative assistance in the ascertainment of facts, in the detection of fraud, and in the understanding of complex financial problems.[5] In contrast, Chapter XI, replacing the "composition" procedure formerly embodied in Sections 12 and 74, establishes a rudimentary system of creditor control, resting on the assumption that the problem of rehabilitating debtors filing petitions under Chapter XI can be substantially settled at a single creditors' meeting.

Thus, except where the liabilities are under $250,000, Chapter X requires the appointment of a disinterested trustee (Secs. 156–158). The trus-

[5] This basic assumption underlies all of the federal securities legislation administered by the Commission, of which Chapter X is an integral part. Securities Act of 1933, 48 Stat. 74, 15 U. S. C. Secs. 77a–77aa; Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. Sec. 78a; Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. Sec. 19; Trust Indenture Act of 1939, 53 Stat. 1149, 15 U. S. C. A. Secs. 77aaa–77bbbb.

tee is required to make a thorough examination and study of the debtor's financial problems and management (Sec. 167 (3) (5)). He prepares a report thereon, which is sent to security holders with a notice to submit to him proposals for a plan of reorganization (Sec. 167 (6)). The trustee then formulates a plan, or reports the reasons why a plan cannot be effected (Sec. 169). To preserve for the court freedom to consider the plan on its merits, unhampered by the appearance of an accomplished fact, Section 176 voids consents to a plan obtained prior to its initial approval by the judge.

Chapter X also provides for participation in the proceedings by the Securities and Exchange Commission. If the judge finds that a plan presented is worthy of consideration, he may refer the plan to the Commission for a report, and must do so where the liabilities of the debtor (as in the present case) exceed $3,000,000 (Sec. 172). When the plan is submitted to creditors after approval by the judge, it is accompanied by the report of the Commission and the opinion of the judge (Sec. 175). By this means investors are provided with an expert impartial analysis of the plan and of the debtor's financial condition, in the light of which the plan may be intelligently appraised. In addition, the Commission is authorized to participate generally in the proceedings as a party with the permission of the court, and with the duty to do so upon the request of the court (Sec. 205).

In contrast, Chapter XI provides a skeleton procedure for the modification of unsecured debts and contains no provision for the modification of secured debts or stock. The debtor files a petition which is accompanied by its proposed arrangement (Secs. 308 (1), 323, 357). Thereafter a meeting of the creditors is called (Sec. 334) at which creditors may elect a creditors' committee (Sec. 338). After acceptance by a majority in number and amount of the unsecured creditors, the proposal becomes effective upon a finding that it complies with the requirement of the statute (Secs. 362–367). In substance, that is all. There are no provisions for an independent study of the debtor's affairs, for making the information so obtained available to the security holders, or for assuring security holders adequate information before they vote upon a plan. There is no provision for the proposal of plans by anyone except the debtor, or for the participation in the proceedings of an independent trustee or an advisory agency.

The contrast between the procedures prescribed by these two chapters makes it plain that they were intended to be mutually exclusive. The problem, therefore, is to determine the precise sphere within which each chapter was intended by Congress to operate.

Under the decision of the court below, determination of the appropriate chapter depends solely on whether the debtor proposes to modify any of its obligations other than unsecured debts; if it seeks

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to modify only unsecured obligations, it may resort to Chapter XI, despite the fact that its unsecured obligations are widely held by the public and despite the fact that the proceeding necessarily discriminates against the holders of the unsecured obligations in favor of the debtor's other security holders. The decision thus imputes to Congress the irrational intention of providing safeguards for mortgage bondholders but not for unsecured debenture holders, or for unsecured debenture holders when secured debts are also to be affected but not when the secured debts are to be left untouched. In our view, the obvious intent of Congress was rather that all public security holders should have the protection afforded by Chapter X and that Chapter XI should be confined to corporations with only trade and commercial creditors.

Congress had a good reason for prescribing different procedures for corporations with a public investor interest and for corporations without such an investor interest. Trade and commercial creditors who are equipped to evaluate plans in terms of self-interest and business knowledge may safely be left to appraise the infirmities of a proposed arrangement. But public investors, such as the holders of the Trinity mortgage certificates, who are uninformed, unorganized, and widely scattered, are obviously not qualified to make a similar appraisal. Yet, under the decision below, the question of whether these certificate holders shall have the protection of the safeguards pro-

vided for them by Congress depends solely on the decision of the management whether to seek an arrangement of the unsecured debts of the company under Chapter XI or to seek reorganization of the company under Chapter X.

The legislative history of Chapters X and XI confirms the fact that the decision below does not properly reflect the intention of Congress. In 1932 the Solicitor General, in a report on bankruptcy administration transmitted to Congress by the President, recommended that a statutory scheme for the reorganization of corporations be adopted (Senate Document No. 65, 72d Cong., 1st Sess.). The Solicitor General explained that such a statute was necessary and desirable to save a failing business conducted "by a corporation having securities outstanding in the hands of the public representing various interests in its property" (*id.* p. 90). Pursuant to this recommendation, Congress in 1934 enacted Section 77B of the Bankruptcy Act (c. 424, 48 Stat. 912). Thereafter, a Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings filed with Congress the report of its counsel, showing that Section 77B had been improperly resorted to by small corporations. The report drew a distinction between small privately owned corporations with trade and commercial debts, on the one hand, and large corporations with securities held by the public, on the other hand; it recommended that the former be remitted to the

composition procedure in bankruptcy and that Section 77B or its equivalent be reserved for the latter (Senate Document No. 268, 74th Cong., 2d Sess., pp. 9–10). Relying in part on this report and in part on a study by the Securities and Exchange Commission of the degree of protection afforded to public investors in reorganizations,[6] Congress enacted Chapter X.

The hearings before the House and Senate Committees on the bill which as enacted included Chapter X,[7] and the reports of those committees on the bill,[8] show clearly that Congress intended to supply an impartial administrative machinery to assist the courts and public investors in the solution of the complex problems which arise in the reorganization of corporations having securities outstanding in the hands of the public. The same hearings and reports show that Chapter XI was designed to afford small enterprises, in which there is no public investor interest, a simple system of debt adjust-

[6] Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees, Part 1 (1937).

[7] Hearings before the House Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess., pp. 36–39, 45–47, 167, 199; Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess., pp. 9–15, 93–101.

[8] H. Rept. No. 1409 on H. R. 8046, 75th Cong., 1st Sess., pp. 37–51; S. Rept. No. 1916 on H. R. 8046, 75th Cong., 3d Sess., pp. 19–31.

ment under the traditional bankruptcy method of direct creditor control.

2. The District Court lacked jurisdiction over the Debtor under Chapter XI, not only because the Debtor had securities outstanding in the hands of the public but also because, as the record discloses, no "fair and equitable" plan can be consummated in the proceeding and no arrangement can be proposed in good faith. Section 366 (3) of the Act, which provides that an arrangement may not be confirmed unless it is "fair and equitable and feasible," makes applicable to Chapter XI proceedings the rules of law enunciated in *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482. See *Case* v. *Los Angeles Lumber Products Co., Ltd.,* Nos. 23 and 24, present Term, decided November 6, 1939. No plan for this Debtor under Chapter XI can be fair and equitable within the meaning of Section 366 (3) because under Chapter XI only unsecured obligations may be modified. Under this chapter, therefore, any modification of the Debtor's guaranty on the Trinity certificates must be accomplished without altering the Debtor's large debenture and stock issues. Yet the Trinity certificate holders have a claim against the Debtor which must be satisfied before the stockholders receive anything and which ranks on a par with that of the debenture holders, since the security behind the debentures is valueless. Under the doctrine of the *Boyd* and *Los Angeles Lumber Co.* cases, no plan for the debtor

would be fair and equitable which modified the debtor's obligation on the guaranty but left the debenture holders and stockholders unaffected—yet such a plan is the only one which can be consummated under Chapter XI.

Under these circumstances, and particularly in view of the inappropriateness of the remedy sought to be employed by the Debtor, no arrangement proposed can meet the requirement of "good faith" contained in Section 366 (5). In this connection, it is also material that the debtor proposes to effect what is actually one plan of reorganization by the piecemeal use of courts of two different jurisdictions. Neither the federal nor the state court will have jurisdiction over the plan as a whole, in contrast to the complete supervision which the federal court would have over both the Debtor and its subsidiary in a proceeding under Chapter X.[9]

The majority of the court below expressed the view that these matters should be left for decision until the plan came up for confirmation. But in our view, a disclosure that a plan cannot be consummated in the proceeding goes to the jurisdiction and requires dismissal. Cf. *Tennessee Publishing Co.* v. *American Nat. Bank,* 299 U. S. 18; *O'Connor* v. *Mills,* 90 F. (2d) 665 (C. C. A. 8th);

[9] Chapter X provides for the filing of a petition for a subsidiary corporation in the same court which has approved the petition of the parent corporation (Sec. 129). Chapter XI contains no such provision.

R. L. Witters Associates, Inc. v. *Ebsary Gypsum Co.,* 93 F. (2d) 746, 748–749 (C. C. A. 5th). Any other course must result in needlessly clogging court calendars with litigation predestined to be fruitless. Cf. *Tennessee Publishing Co.* v. *American Nat. Bank, supra.*

3. The holding of the court below that the District Court should not have permitted the Commission to intervene in the proceeding is, we believe, clearly erroneous and conflicts with the applicable decisions of this Court. The decision in effect establishes the principle that, in the absence of express statutory provision, a governmental agency may never intervene to protect the public from evasion or emasculation of the statute under which the agency functions, unless the agency has some property or pecuniary right affected by the litigation. This principle places such a drastic and far-reaching limitation upon the power, not only of the Securities and Exchange Commission but of all governmental agencies, to protect the public interest as plainly to call for review by this Court.

The court below, we submit, took a wrong approach to the problem. It pointed out first that Chapter X contains an express provision for Commission intervention while Chapter XI does not, and stated that this "raises a strong implication against intervention by the Commission" in Chapter XI proceedings (R. 423). It then addressed itself to the question of whether the interest of the

Commission in the litigation was so direct and immediate as to entitle it to intervene *as of right* and held that, since the Commission did not "stand to gain or lose directly by the decision of the court", it did not have such an interest (R. 424). There is no discussion in the opinion of whether the Commission's interest in the action is such as entitles it to intervene *with the permission of the court*. Since the District Court granted the Commission's motion to intervene, it is not necessary in this case to determine more than that the action of the District Court permitting intervention did not constitute an abuse of discretion, although we also believe that the Commission was entitled to intervene as of right (*infra,* p. 25).

The reliance of the court below upon the provision of Chapter X expressly providing for Commission intervention is, we believe, misplaced. The purpose of this provision is obviously to allow the Commission properly to perform the advisory functions with which it is charged in Chapter X proceedings. Since the Commission has no similar functions to perform in Chapter XI proceedings, a provision giving it a general right to participate in Chapter XI proceedings would be both inappropriate and superfluous.

The Commission did not intervene here in order to perform advisory functions, but to object against an improper exercise of the court's jurisdiction which, in the opinion of the Commission, nullifies the protection provided by Congress for investors.

Its standing to intervene, therefore, does not depend on the provisions of Chapter XI but upon the general principles governing intervention in the federal courts, as codified in Rule 24 of the Rules of Federal Procedure.

This Court has recognized that public officials and administrative commissions, federal and state, have a legitimate interest in resisting any endeavor to evade the provisions of the statutes in relation to which they have official duties. Cf. *Coleman* v. *Miller,* 307 U. S. 433, 442, 466; *Pennsylvania* v. *Williams,* 294 U. S. 176. The *Williams* case is strikingly similar to the present one. There a receivership proceeding was commenced in the federal court. The State of Pennsylvania filed a petition for leave to intervene and for an order directing the receiver to surrender the assets of the defendant association to the State Secretary of Banking for liquidation under the provisions of state law. The District Court denied the petition but this Court reversed, holding that the District Court, in the exercise of its discretion, should have discharged the receivers and directed the surrender of the property in their possession to the Secretary. The granting of this relief necessarily implies that the state had an interest sufficient to give it standing to intervene.

The majority opinion below attempts to distinguish the *Williams* case on the ground that the state "claimed a right to full possession and control

of the assets of the insolvents, not merely a right to advise or protect the public interest" (R. 423–424). The distinction, we submit, is unsound, for the interest of the state in the receivership proceeding was plainly not a property or possessory interest, but an interest in the enforcement of the state liquidation statutes for the protection of the public. That is precisely the type of interest which the Commission has in the present case. The fact that Congress sought to protect the investing public by making the Commission an advisory, rather than a liquidating, agency is immaterial; in each case the administrative body has the same interest in assuring that the public will receive the protection which the agency was designed to afford it.[10]

The decision of this Court in *The Exchange,* 7 Cranch 116, likewise supports the Commission's position. That case involved a libel filed by American citizens against a schooner which the libellants claimed to be their property. The schooner was in fact a French vessel of war in possession of French naval officers, although it was within the waters of the United States. After the libel was filed the United States District Attorney filed a "sugges-

[10] See also *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 25, a suit brought to enjoin an order of the Interstate Commerce Commission, in which the Court held that state utility commissions, who had intervened in the suit, were "aggrieved" parties and therefore had a statutory right of appeal "because they officially represent the interest of their states in obtaining adequate transportation service."

tion" setting forth the facts and praying that the schooner be released.[11] The District Court dismissed the libel, but on appeal the Circuit Court reversed. The District Attorney thereupon appealed to this Court, which reversed the judgment of the Circuit Court and affirmed the judgment of the District Court dismissing the bill. The Court, first expressing the opinion that an American citizen cannot assert, in an American court, title to a public armed vessel in the service of a foreign sovereign, added (p. 146): "If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

The course sanctioned by this Court in *The Exchange* was almost identical with the course pursued by the Commission here. There the United States appeared in the proceedings in order to move their dismissal on the ground that the court had no jurisdiction and that an improper exercise of jurisdiction would be contrary to the public interest; its contentions having been overruled in the Circuit Court, an appeal to this Court was allowed. As pointed out in *Percy Summer Club* v. *Astle,* 110 Fed. 486, 489 (C. C. D. N. H.), the *Exchange* case illustrates that the principle allowing intervention

[11] Although the opinion in *The Exchange* does not speak of intervention, the procedure followed was the same as intervention, if it was not intervention in fact. This Court so recognized in *Stanley* v. *Schwalby*, 147 U. S. 508, 513.

by public authorities where the public interest is concerned "is of the broadest character, and is applied without formalities." [12]

The assumption underlying the decision below that in the absence of statutory provision a governmental agency may not apply to the courts to protect the public interest, as distinguished from its own pecuniary interest, is also directly contrary to the principle enunciated in *In re Debs,* 158 U. S. 564. There the Court upheld the power of the United States to file a bill in equity to enjoin obstruction by the defendant of the interstate transportation of persons and property, as well as of the carriage of the mails; the decision was expressly rested upon the principle that a government entrusted "with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other" and that it is immaterial that the government "has no pecuniary interest in the matter"

[12] Other cases in which governmental intervention has been allowed cannot satisfactorily be distinguished on the ground that in those cases a claim of title, a pecuniary interest, or a trustee's interest was involved. Those factors are material as establishing the existence of a public interest; they do not limit the character of the public interest, which, when otherwise shown to exist, is sufficient to justify intervention. Cf. *Helvering* v. *Davis*, 301 U. S. 619; *United States* v. *Minnesota*, 270 U. S. 181, 194; *Norman* v. *Consolidated Edison Co. of New York*, 89 F. (2d) 619 (C. C. A. 2d); *Winola Lake & Land Co., Inc.* v. *Gorham*, 17 F. Supp. 75 (M. D. Pa.).

(p. 584). Certainly a nonpecuniary interest sufficient to support an independent suit for the protection of the public is sufficient to support intervention for that purpose. Cf. *New York* v. *New Jersey,* 256 U. S. 296, 307–308.

The authorities cited establish the Commission's standing to intervene under Rule 24, since that Rule simply amplifies and restates the theretofore existing practice. See Advisory Committee's Note to Rule 24. The Commission may intervene either under clause (a) (2) of the Rule, which provides for intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," or under clause (b) (2) which provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Here the Commission's interest in the litigation is not represented by any other party and that interest will be foreclosed by an adverse judgment which will effectively prevent the Commission from performing its functions in relation to the Debtor under Chapter X and will deprive the investors whom the Commission represents of the safeguards provided for them by Congress in Chapter X. Cf. *Percy Summer Club* v. *Astle,* 110 Fed. 486, 488 (C. C. D. N. H.); *United States* v. *C. M. Lane Lifeboat Co.,* 25 F. Supp. 410, 411 (E. D. N. Y.). And it is clear

that the Commission's claim raises a question of law in common with the main action, within the meaning of clause (b) (2), since the questions raised by the petition to intervene are addressed directly to the jurisdiction of the court to maintain the main action.

4. If the District Court properly exercised its discretion in permitting the Commission to intervene, it also properly gave the Commission a right to appeal from the orders denying its motions. An interest sufficient to warrant intervention is plainly sufficient to warrant appeal, after intervention, from a decision adverse to that interest. *Pennsylvania* v. *Williams, supra; The Exchange, supra; Texas* v. *Anderson, Clayton & Co.*, 92 F. (2d) 104 (C. C. A. 5th), certiorari denied, 302 U. S. 747. The general rules of intervention do not prohibit appeal and no considerations of policy make unreasonable the District Court's order allowing appeal.

The fact, adverted to by the court below, that Section 208 of the Act prohibits appeals by the Commission in Chapter X proceedings, does not, directly or by implication, limit the Commission's right to appeal in this case. The restriction imposed by Section 208 was designed to emphasize the advisory nature of the Commission's functions under Chapter X and the ultimate judicial character of the proceedings (see dissenting opinion of Clark, J., at R. 429). The restriction does not in

terms apply to the present case, since this is a Chapter XI rather than a Chapter X proceeding, and the policy reflected by the restriction is likewise inapplicable. The appeal was not taken by the Commission from the confirmation of a plan which it did not deem fair and equitable, but rather from an exercise of jurisdiction, based on a vital point of statutory construction, which the Commission believes to be in derogation both of the public interest and of the duties with which the Commission is charged under Chapter X in protecting that interest.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

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