penses and to create reserves.[24] Revenues not required "for business purposes" must be returned from time to time to members on a pro rata basis according to the amount of business done with each.[25] An interesting problem, not yet considered by the courts, is whether "business purposes" includes expansion. If expansion is considered to be a business purpose, some regulation of this matter might be desirable to prevent a majority from forcing a minority to contribute to an expansion not desired by all.

Public Utilities—Holding Company Act of 1935—Power of District Court to Approve Corporate Simplification Plan in Non-adversary Proceeding—[Federal].—A holding company registered under the Public Utility Holding Company Act[1] submitted to the Securities and Exchange Commission a voluntary plan for corporate simplification. The plan provided that it was not to become effective until approved by a federal court.[2] After notice to persons affected and a hearing at which no objections were raised, the commission entered an order approving the plan.[3] Thereafter, at the request of the company, the commission applied to a federal district court "to enforce and carry out . . . . the plan," alleging among other things that officers and directors of the company feared that if they carried out the plan without having obtained court approval, creditors and security holders of the company might bring suit to subject them to liability.[4] *Held*, inter alia, that Section 11(e) of the act empowers the district court to take jurisdiction of the subject matter. *In re Community Power and Light Co.*[5]

[24] Ala. Code Ann. (Michie, Supp. 1936) § 687(36); Ga. Laws (1937), No. 503, § 14; N.D. Laws (1937) c. 115, § 25; N.M. Stat. Ann. (Courtright, Supp. 1938) § 32–1340; Pa. Stat. Ann. (Purdon, 1938) tit. 14, § 276; Tenn. Code Ann. (Michie, 1938) § 3291(64); Mont. Code (Supp. 1939) § 6396.20. Many municipal utilities are subject to similar legislation. Ill. Rev. Stat. (1939) c. 111⅔, § 107; Conn. Rev. Stat. (1930) § 532; Iowa Code (1939) § 6151.1; Minn. Stat. (Mason, 1927) § 1312.

[25] Ala. Code Ann. (Michie, Supp. 1936) § 687(36); Ga. Laws (1937) No. 503, § 14, N.D. Laws (1937) c. 115, § 25; N.M. Stat. Ann. (Courtright, Supp. 1938) § 32–1340; Pa. Stat. Ann. (Purdon, 1938) tit. 14, § 276; Tenn. Code Ann. (Michie, 1938) § 3291(64); Mont. Code (Supp. 1939) § 6396.20.

[1] 49 Stat. 803 (1935), 15 U.S.C.A. § 79 (Supp. 1939).

[2] In the Matter of Community Power and Light Co., Hold. Co. Act Rel. No. 1803, p. 3; No. 1804, p. 7 (1939).

[3] In the Matter of Community Power and Light Co., Hold. Co. Act Rel. No. 1803, p. 20 (1939). For discussion of the plan used in the instant case see Feldman, Voluntary Reorganization under the Holding Company Act, A3 Corp. Reorg. 227 (1940); Recapitalization under Section 11(e) of the Public Utility Holding Company Act, 49 Yale L.J. 1297 (1940).

[4] SEC's Application to the Court, count 14. The alleged fear of the officers and directors of the company that they might incur liability if they attempted to carry out the plan before court approval appears to be inconsistent with that provision in the plan according to which it was not to become effective until such approval had been obtained. Indeed, this allegation may have been inserted in the petition in order to bring the application within that provision of § 11(e) which provides that applications are to be made in accordance with § 18(f). One of the provisions of § 18(f) is that an action may be brought when any person is about to violate the act or any order thereunder.

[5] 33 F. Supp. 901 (N.Y. 1940). The court also held that §§ 11(b) and 11(e) of the Public Utility Holding Company Act are constitutional; and that the plan submitted to the court was fair and equitable and effectuated the provisions of § 11(b).

The instant case raises for the first time the problem of whether the Securities and Exchange Commission may, in a non-adversary proceeding, obtain judicial approval of voluntary plans of corporate simplification under the Holding Company Act. The court's interpretation of the statute so as to allow the SEC to seek blanket approval of a plan in a district court is open to serious question.

Under Section 11(e) the commission may approve plans submitted to it by a registered holding company and

> the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms . . . . of such plan.[6]

Subsection (f) of Section 18 authorizes the commission to enforce the provisions of the act by seeking an injunction in the proper federal district court against any person who "is engaged or about to engage in any acts . . . . which constitute or will constitute a violation of the provisions of this title, or . . . . any . . . . order thereunder."[7] In addition, Section 11(e) provides:

> If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of Section 11, the court as a court of equity may, ... for the purpose of carrying out the terms . . . . of such plan, take exclusive jurisdiction . . . . of the company . . . . and the assets thereof . . . . and shall have jurisdiction to appoint a trustee.[8]

It may be admitted that Section 11(e) contemplates a procedure distinct from, and in addition to, the kind of court action provided for in Sections 24[9] and 18(f).[10] While Sections 18(f) and 24 provide for actions by or against particular persons, Section 11(e) appears to confer upon the court a more general supervisory power over the entire plan.[11] The application may be made to the court "to enforce and carry out . . . . the plan," and, to that end, the court may appoint a trustee and exercise equitable powers. The statute does not seem to require that the proceeding be "adversary" in the sense

[6] 49 Stat. 822 (1935), 15 U.S.C.A. § 79k(e) (Supp. 1939).

[7] 49 Stat. 832 (1935), 15 U.S.C.A. § 79r(f) (Supp. 1939).

[8] 49 Stat. 822 (1935), 15 U.S.C.A. § 79k(e) (Supp. 1939).

[9] 49 Stat. 834 (1935), 15 U.S.C.A. § 79x(a) (Supp. 1939). This section provides: "Any person . . . . aggrieved by an order issued by the Commission . . . . may obtain a review of such order in the circuit court of appeals of the United States . . . . by filing in such court, within sixty days after the entry of such order, a written petition. . . . . [Then] such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order . . . . shall be considered by the court unless such objection shall have been urged before the Commission. . . . . The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

[10] It might be argued, however, that § 11(e) contemplates a procedure exactly like that provided for in § 18(f); that the only reason for inserting § 11(e) was to set out fully all provisions relating to voluntary plans, so that if the constitutionality of the provisions for voluntary plans were not upheld, the rest of the act would not be affected. See Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938), in which the registration provisions of the act were stated to be separable from § 11.

[11] It should be noted, however, that § 24 also provides for action somewhat broader than mere action by a particular person, in that it provides for the circuit court to modify and set aside orders. But cf. Wright v. SEC, 112 F.(2d) 89 (C.C.A. 2d 1940) (where statute gives district court exclusive jurisdiction of violations, powers granted circuit court for review may not be construed as being inconsistent therewith).

that an action must be brought against particular persons.[12] The question remains, however, as to *when* a proceeding under Section 11(e) may be brought.

One interpretation of these provisions is that district courts have no power to pass upon the fairness of plans at the request of the commission merely because it appears that some stockholders or security holders are not in favor of the plan.[13] The application to the district court to "enforce and carry out . . . . the plan" is to be made in accordance with the provisions of Section 18(f), which deals exclusively with remedying violations or threatened violations of regulations made under the act. It may be urged that violations or threatened violations as used in Section 18(f) does not mean mere refusal to aid in consummating a plan, but rather means refusal to aid in the execution of a plan which has already been accepted. Moreover, the sanctions provided in Section 11(e) are the appointment of a trustee and the exercise of equitable powers by the court—sanctions which, it may be argued, presuppose a necessity for remedying difficulties encountered in enforcing a plan.[14] And while the section does contain the language that "the court[15] shall approve such plan as fair and equitable," that language read in its context might be taken to mean that the power to approve the plan is to be exercised only in connection with the court's aid in carrying out the plan. That is, that the provision for approving the plan is inserted in Section 11(e) for the purpose of avoiding the otherwise possible situation in which a district court would be asked to aid in carrying out a plan which had never been approved by a court.

This interpretation of the statute is further supported by the fact that detailed provisions for judicial review of commission orders are made in Section 24,[16] which places the power of review in the circuit courts of appeal. It may be contended that that power is exclusive,[17] since for the district courts to pass upon plans results in circumventing not only the detailed safeguards for the administrative process set up in Section 24, but also those safeguards which are implicit in review by the circuit courts. Section 24 provides that "findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive," and it sets up a sixty-day time limit for review. No cor-

[12] See S. Rep. 621, 74th Cong., 1st Sess. (1935), at 8. "This [§ 11(e)] makes it possible for companies to submit their own readjustment plans for the . . . . approval of the Commission at any time . . . . and to have those plans carried out if necessary in the federal courts of equity." See also pp. 13, 32–33.

[13] The plan had been accepted by a majority of the stockholders at a stockholders' meeting. There is no allegation in the application to the district court of any specific acts on the part of any stockholders. The only allegation touching on "violation" is the officers' fear of suit. See note 4 supra.

[14] The absence in § 11(e) of a provision giving the district court power to modify commission orders (contrasted with the presence of such a provision in § 24) is, perhaps, an indication that the district court is to enforce rather than review.

[15] Meaning, through the reference to § 18(f), the "proper district court of the United States." It might be urged that this reference to § 18(f) is merely a venue provision for § 11(e). But if Congress had so intended, it could have stated in § 11(e) that actions under that section be brought in the federal district courts.

[16] Note 9 supra.

[17] Section 24 expressly states that the circuit court is to have exclusive jurisdiction, but the provision is qualified by the phrase, "Upon the filing of such transcript"—meaning "transcript of the record upon which the order complained of was entered."

responding safeguards for the administrative process are contained in Section 11(e). While the "substantial evidence" rule might be applied by a district court under Section 11(e), there is no statutory provision rendering the application of that rule mandatory.[18] And while, if the application to the district court under Section 11(e) is made before the expiration of the sixty-day period, there is no circumvention of the sixty-day provision, there would be a circumvention where application is made after the expiration of the sixty-day period. In the latter case, of course, it might be argued that the commission had waived the benefits of the provision. Review by a circuit court rather than by a district court provides further protection to the administrative process in that one less time-consuming appeal is possible; and also in that the three-judge circuit court is supposedly better qualified to pass upon the questions than is the single-judge district court.[19]

The statute may be construed, however, as allowing the district court to pass upon the plans at the request of the commission upon a mere allegation that some stockholders are not going to act in accordance with the plan. The threatened violation which by reference to Section 18(f) is made a ground for exercise of jurisdiction may be interpreted as including mere threatened refusal to accept the plan.[20] The provisions for the appointment of a trustee and for the exercise of equitable powers do not, it may be urged, presuppose any actual difficulty in enforcing a plan; the emphasis should be placed upon the power of the court to "approve the plan as fair and equitable,"[21] with the exercise of the equitable powers being available for use in the discretion of the

[18] It might be argued, however, that the district court would in any event be required to apply the "substantial evidence" rule, and that it would be required to apply that rule as to the evidence before the commission, without permitting the introduction of new evidence before the court. Cf. Shields v. Utah Idaho R. Co., 305 U.S. 177 (1938).

[19] It may be urged, however, that in those instances where district court judges are not so pressed for time, they will be able to give more careful consideration to the matter than would a circuit court.

[20] In the instant case, the plan was not to become effective until court approval. It is difficult to conceive of a "violation" of such an order. However, it may be contended that the SEC "order" approving the plan is distinct from the plan and became effective upon publication. 49 Stat. 833 (1935), 15 U.S.C.A. § 79t(c) (Supp. 1939). Thus any present or threatened future action to prevent the SEC from applying to the court or to enjoin the company's officers and directors from going forward with the plan would, in a sense, be a violation of the order. Although no objection was made at the hearing before the SEC on the plan, it is possible that the company or the SEC felt that refusal by a minority of the stockholders to approve the plan when submitted to a stockholders' meeting was a threatened violation; or it is possible that either the company or the SEC had notice of the intention of dissenting stockholders to bring an action in the Delaware chancery court to enjoin the company from further prosecuting the plan. See note 22 infra.

[21] The power of approval does not, it may be said, confer upon the district court authority to alter or modify the plan. Section 11(e) provides that the commission may modify the plan submitted by the company; but there is no provision that the commission's plan may be modified by the district court. Judicial power to modify or alter a commission order is conferred by § 24. This interpretation is supported by the analogous procedure under the Railroad Reorganization Act where the plan submitted by the ICC to the court may be approved or rejected by the latter. If the plan is rejected, it must be returned to the ICC for modification. 49 Stat. 918 (1935), 11 U.S.C.A. § 205(f) (1939).

court.[22] Moreover, it may be said that the provisions of Section 24 for review by the circuit courts are not exclusive;[23] that Section 24 is not primarily intended to provide a means for judicial approval of a plan, but is rather intended to provide redress for aggrieved parties for all sorts of commission orders, of which the order approving a plan is but one.[24] Since the language of the statute is in no sense conclusive the importance of the policy considerations attendant upon acceptance of either interpretation renders clarifying legislation desirable.[25]

The procedure followed in the instant case does undoubtedly facilitate the accomplishment of the purposes of the act. Through this procedure the amount of administrative detail is reduced in that there is no possibility of the company's having carried on voluminous correspondence with stockholders,[26] or the SEC's having approved the filing and registration of papers, only to find that the plan does not merit court approval; and also in that the early obtaining of judicial approval eliminates the need for defending the numerous security-holder suits which might otherwise be brought. This argument is of no force, of course, unless the decree of the district court is binding upon security holders in respect to the issues litigated.[27] There are two grounds upon which it may be argued that the decree is binding. It may be said that the proceeding is one "in rem," and that the court's jurisdiction over the "company" gives it jurisdiction over the "res" so as to bind all who are interested therein. Thus the proceeding is analogous to that under the Railroad Reorganization Act.[28] It should be noted, how-

[22] The discretionary exercise of these powers is perhaps illustrated by the instant case. After the application to the court in the instant case, a stockholder brought suit in a Delaware chancery court to enjoin the company from enforcing the plan. The court's appointment of a trustee may perhaps be explained by this fact.

[23] See note 17 supra.

[24] See Warner, An Approach to the Extent of Judicial Supervision over Administrative Agencies, 28 Georgetown L. J. 1042 (1940); 48 Yale L. J. 1257 (1939); 38 Mich. L. Rev. 682 (1940).

[25] Attempting to secure a revision of the legislation might, of course, be thought to be politically inexpedient, because it would serve as an opportunity for emasculating the entire section.

[26] Considerable paper work was involved, of course, in obtaining stockholder approval of the plan prior to the application to the court in the instant case: notice of hearing before the commission; notice and summaries of the plan issued by the corporation and the commission; and solicitation of proxies by the company in accordance with § 11(g). (49 Stat. 823 (1935), 15 U.S.C.A. § 79k(g) (Supp. 1939)). It does not appear that § 11 actually requires the stockholder approval used in the plan in the instant case. Although § 26 of the Delaware Corporation Law (Del. Rev. Code (1935) § 2058) requires assent by a majority of each class of stockholders to an amendment of the certificate of incorporation, it may be argued that that law is inapplicable to a proceeding under a federal statute. It was argued in the instant case that, under the doctrine of Keller v. Wilson & Co., 190 Atl. 115 (Del. 1936), stockholder approval could not operate to eliminate the accumulated preferred dividends, but the court held that the state statute was not applicable. It may be supposed, however, that the stockholder approval in the instant case was an added inducement to the court's approving the plan.

[27] In the commission's view, upon approval of the plan by the security holders and the court, dissenters would be bound to accept the securities provided by the plan and would have no further remedy. Hold. Co. Act Rel. No. 1804, p. 7 (1939).

[28] 49 Stat. 911 (1935), 11 U.S.C.A. § 205 (1939).

ever, that even if it be said that the proceeding is one which could be made in rem by Congress, the statute does not, as does the Railroad Reorganization Act, specifically provide that security holders are to be bound.[29] In the second place, it may be argued that Section 18(f), in accordance with which the proceeding under Section 11(e) is brought, provides for a class suit, wherein one or more of the security holders represents at least all those holding the same class of securities so as to bind them by the decree. However, the proceeding in the instant case was not set up as a class suit; in fact there were no security holders before the court.[30]

The advantage to be gained by obtaining a binding decree in the district court depends to some extent, of course, upon the effect to be given to Section 24, providing for application for review to a circuit court within sixty days by "parties aggrieved." If Section 24 is construed as cutting off all possibility of objection to a plan after sixty days from the effective date of the plan, then there is little advantage to be gained by obtaining a binding decree in the district court. If, however, the running of the sixty-day period does not prevent a person's raising the issue of the fairness of the plan at any time an action to enjoin a violation is brought against him, there is a great advantage in obtaining a binding decree at an early stage.

Another advantage of the procedure followed in the instant case is that it enables the commission to choose, within limits, the court in which the proceedings shall be brought.[31] Furthermore, the interpretation given Section 11(e) in the instant case,

[29] The Railroad Reorganization Act provides that, when a plan is submitted to the court by the ICC and is confirmed by the court, the decree is binding, subject to the right of review, upon the debtor, its stockholders, and creditors. 49 Stat. 920 (1935), 11 U.S.C.A. § 205(f) (1939). It might be argued that, whether security holders are "bound" or not, they cannot appeal, since they were not parties to the record.

In any event, it would appear reasonable to predicate the right of objecting stockholders or creditors to obtain review from the district court upon timely entry of objections in that court, as was done in proceedings under § 77B of the Bankruptcy Act. (48 Stat. 912 (1934), 11 U.S.C.A. § 207 (1937)). In re Milwaukee & Sawyer Bldg. Corp., 79 F. (2d) 478 (C.C.A. 7th 1935). If, however, the present proceeding is considered ex parte, the proper remedy might be to apply to the court to have its order set aside, and, if the application is denied, to have the order of denial reviewed on appeal. See In re Snyder, 4 F.(2d) 627 (C.C.A. 9th 1925).

[30] One consideration indicating that the decree is not fully binding on security holders is that § 24 provides for a sixty-day period during which "parties aggrieved" may apply to the circuit court for review. It may be argued that a proceeding in the district court, before the expiration of the sixty-day period, does not cut off that possibility of review. The importance of this consideration depends to some extent upon whether the security holders may appeal to the circuit court from the decree of the district court. If they can appeal, the effect to be given § 24 makes little difference, except that the circuit court might feel constrained to give greater weight to a district court decree, on appeal, than to an SEC determination, on review. But it may be that, because they are not parties to the record, security holders cannot appeal from a district court decree. Substantially the same question, still undecided, arises under the Railroad Reorganization Act. By the terms of that Act, the ICC must submit the plan to the district court before the plan becomes effective. Whether the determination by the district courts cuts off the review of ICC orders by a three-judge court at the instance of a party aggrieved, as provided for in the Judicial Code (38 Stat. 220 (1913), 28 U.S.C.A. § 47 (1927)), has not been decided. See 10 Remington, Bankruptcy § 4326 (1939).

[31] Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939) (action involving company may be brought in state in which company is doing business as well as in state of incorporation), noted in 7 Univ. Chi. L. Rev. 397 (1940).

that there are no standards for determining when proceedings shall be brought under the act, leaves the commission free either to bring or not to bring proceedings, as the circumstances of the particular case seem to dictate. Moreover, allowing officers and directors to secure a judicial umbrella for their actions early in the proceedings will probably result in having more voluntary plans filed. In the instant case, the strategy of inserting in the plan the provision making its operation contingent upon judicial approval perhaps made the arguments in favor of obtaining district court approval even more persuasive to officers and directors. This provision gave them assurance that in the administration of the plan there would be no pressure on them to take any action except under court approval.[32]

On the other hand, it would seem that the procedure followed in the instant case is undesirable in that it tends to cause the commission to shift the responsibility for the fairness of plans to the district courts, thereby reducing the independence of the commission. Furthermore, it may be questioned whether it is desirable to permit the streamlining of the administrative process to be carried so far as to require judicial action in a situation which has so few of the attributes of an adversary proceeding as does the proceeding in the present case. While the instant case may perhaps not be said to run afoul of the constitutional "case or controversy" provision,[33] it may nevertheless be urged that the protection afforded persons by judicial action should not be dissipated in a proceeding in which the contentions of those persons are not litigated.[34]

[32] It should be noted that there is no actual requirement under the act that either officers or directors comply with the plan until it has been approved by a court. Even wilful violation of commission rules or orders made under § 11 may be made without incurring liability. The dependence upon the courts for the enforceability of SEC orders under the Holding Company Act is a typical administrative procedure found in other acts: Securities Act of 1933, 48 Stat. 86 (1933), 15 U.S.C.A. § 77(t)(b) (Supp. 1939); Securities Exchange Act of 1934, 48 Stat. 900 (1934), 15 U.S.C.A. § 78(u)(c) (Supp. 1939); National Labor Relations Act, 49 Stat. 454 (1935), 29 U.S.C.A. § 160 (e) (Supp. 1939).

[33] U.S. Const., art. 3, § 2. It may be argued that in the instant case the company's security holders are "possible adversaries" in the same sense that the United States is a possible adversary in a petition for naturalization (see Tutun v. United States, 270 U.S. 568, 577 (1926)), or that creditors or stockholders are possible objectors in a corporate reorganization. In each instance, the status of the "adversary party" in relation to the "res" (citizenship, the debtor, or the recapitalized company) is finally determined by the judgment of the court.

[34] Objections to the plan may not be fully realized by security holders until it has been in effect for some time. It is true that § 24 limits the time in which actions may be brought for review to sixty days. It does not appear, however, whether the running of the sixty-day period is to cut off all possibility of a security holder's raising the issue as to the fairness of the plan. It may be argued that he could raise it in a district court in an action brought by the SEC to remedy a violation. If the decree in the instant case is binding on all, it cuts off that possibility.

Moreover, it does not appear when the sixty-day period in the instant case started to run. If it started to run at the time the commission approved the plan, then the instant case, in that it was brought more than sixty days after SEC approval, does not cut off the sixty-day period. If, however, the period did not begin to run until after the decree of the court making the plan effective, the decree of the court, if considered res judicata by the circuit court as to the fairness of the plan, does operate to cut off the sixty-day period. On the other hand, it may be argued that, in the instant case, there was adequate protection to persons affected by the plan in that notice was given to them (1) in the hearings on the plan before the commission, (2) by the company's solicitation of stockholder approval of the plan after it had been approved by the commission, and (3) in the proceedings before the court.