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BANKRUPTCY — PREFERRED STOCKHOLDERS AS CREDITORS FOR ACCRUED DIVIDENDS UNDER SECTION 77B OF THE BANKRUPTCY ACT—Preferred stockholders were "beguiled" into purchasing their stock, and paid, as part of the subscription price, for accrued dividends at the rate of 6 per cent per annum from June 1, 1933, to the date of their respective subscriptions, upon the "virtual promise of refund" on December 1, 1933, the next dividend date. No dividend was declared or paid. Such stockholders seek to file a petition for the reorganization of the corporation under Section 77B of the Bankruptcy Act as "creditors" within the meaning of the word as employed in that section. *Held*, they are "creditors" within the meaning of the language of the act and may file such a petition. *In re Lehrenkrauss Corporation*, (D. C. N. Y. 1935) 10 F. Supp. 14.

Generally speaking, preferred stockholders are not considered creditors of a corporation [1] except in the broad sense that their equity is carried on the right hand side of the balance sheet.[2] This is true even though their dividends are "guaran-

[1] 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5290 (1932), contains what is probably the most exhaustive marshalling of the decisions upon this point.

[2] Hamlin v. Toledo, St. L. & K. C. Ry., (C. C. A. 6th, 1897) 78 F. 664 at 671; Heller v. National Marine Bank, 89 Md. 602, 43 A. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212 (1899).

teed."[3] Their investment is looked upon as a contribution to the capital and not as being in the nature of a loan.[4] The instant case, however, decides that they are "creditors" within the meaning and intention of the language of Section 77B of the Bankruptcy Act[5] and as such may file a petition for the reorganization of the corporation under the terms thereof. This is in conflict with a recent decision of the Circuit Court of Appeals for the Seventh District in which it was determined that such a stockholder was not a "creditor" within the intendment of the Act.[6] The court in the present case finds it unnecessary to determine whether the stockholders are contract or tort creditors;[7] it would seem however that their claim must rest upon a tort basis. By an invocation of the doctrine of *respondeat superior* the corporation may be held responsible for the fraud and misrepresentation of its representatives where, were a contract analysis attempted, it would be very difficult to find the necessary authority as agents to make such a contract.

F. K. B.

[3] Hazel Atlas Glass Co. v. Van Dyk & Reeves, Inc., (C. C. A. 2d, 1925), 8 F. (2d) 716, wherein a great number of decisions to the same effect are cited.

[4] In re Fechheimer Fishel Co., (C. C. A. 2d, 1914) 212 F. 357.

[5] 11 U. S. C., § 207. The term "creditor" is defined, 11 U. S. C., § 207 (b) (10): "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title."

[6] In re Piccadilly Realty Co., (C. C. A. 7th 1935) 78 F. (2d) 257. In this case, however, it appeared that the assets would be well in excess of all claims if the stockholders' claims for accrued preferred dividends were excluded.

[7] "Certainly the money they paid was dishonestly exacted of them, and, if their claim is not good in contract, it should be in tort." 10 F. Supp. 14 at 15.