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CORPORATE REORGANIZATION SOME RECENT DEVELOPMENTS

By THOMAS CLIFFORD BILLIG*

ONE of the most important problems arising under any method of administering an insolvent estate concerns the legal position of the creditor who refuses to participate in either a composition or a corporate reorganization which has the approval of a large majority of the creditors. If the estate is being administered under a general assignment or some other extra-judicial method, the safety of the liquidator from possible future embarrassment requires the virtually unanimous consent of the creditors.[1] If bankruptcy is the method of administration used, the act of 1898 provides for a composition wherein the will of the majority in number and amount of the creditors whose claims have been allowed may be imposed upon the minority.[2] If a receivership in equity looking toward the reorganization of a corporate debtor is employed, the ghost of the *Boyd Case*[3] still haunts the interests fostering the new project.

In a previous article[4] I traced the attitude of the equity court toward this "problem of the dissenting minority creditor" from the *Boyd* decision in 1913[5] to *Cornell v. Morris White, Inc.*[6] which at that time (February, 1933) had been decided by the circuit court of appeals for the second circuit and later had been carried on certiorari to the Supreme Court of the United States. I sought to show the unsettled state of the law in this particular field, but, even so, I contended that equity gradually has extended the scope

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[1]This point is discussed in Senate Document No. 65, entitled Strengthening of Procedure in the Judicial System, by Thomas D. Thacher, former solicitor-general of the United States, at 70.

[2]Bankruptcy Act, sec. 12, 11 U. S. C. A., sec. 30, 1 Mason's U. S. Code tit. 11, sec. 30.

[3]Northern Pacific Railway v. Boyd, (1913) 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

[4]Billig, Corporate Reorganization. Equity vs. Bankruptcy, (1933) 17 MINNESOTA LAW REVIEW 237-269.

[5]Northern Pacific Railway v. Boyd, (1913) 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

[6](C.C.A. 2nd Cir. 1931) 54 F (2d) 255.

of the "consent receivership" to meet at least some of the needs growing out of the corporate reorganization situation.

This paper will discuss (1) the importance of the *Coriell* decision to the problem of the dissenting minority creditor, and (2) the 1933 amendments to the bankruptcy act as affecting the same problem.

1. National Surety Co. v. Coriell

This case was decided on May 22, 1933, by the Supreme Court of the United States.[7] The debtor corporation, Morris White, Inc., was one of the world's largest manufacturers of women's handbags and fancy leather goods. After many years of prosperity, Morris White, Inc., became involved financially during the recent depression. For six months prior to April 6, 1931, its bank creditors had been in control of the corporation. On the latter date these same bank creditors placed Morris White, Inc., in a consent receivership, the suit being brought by one Coriell, a citizen of New Jersey, in the federal court for the southern district of New York.

The bill contained the usual allegations of frozen assets far in excess of liabilities, of the dearth of cash with which to meet current obligations, of the danger that executions levied separately by creditors individually might destroy the business. "On the same day on which the bill was filed, the defendant answered, admitting the allegations and assenting to the appointment of a temporary receiver. The Irving Trust Company was appointed. The receiver employed as counsel the solicitor for the complainant."[8] Thus appeared a consent receivership so typical of the practice in the southern district of New York.

A creditors' committee at once started work on a reorganization plan which the district court on May 27, 1931, directed the receiver to accept. In brief, the plan provided that the assets should be purchased at a private sale by Mrs. Lily White, wife of Morris White (Morris White owned virtually all the stock in the old corporation). Mrs. White was then to transfer the assets, subject to existing liens, to a new corporation to be called the Morris White Handbag Corporation. Creditors of the old corporation having claims of $100 or less were to be paid in cash. Claims of preferred creditors, expenses of administration, and

[7]National Surety Co. v. Coriell, (1933) 289 U. S. 426, 53 Sup. Ct. 678.
[8](1933) 289 U. S. 426, 53 Sup. Ct. 678, 679.

expenses of the creditors' committee were to be assumed by the new corporation. All other creditors were to be paid, not in cash, but in unsecured notes of the new company to the extent of twenty per cent of their claims and in preferred stock of the new company to the extent of the remaining eighty per cent. Neither of the Whites nor anyone else was to advance any new money to the Morris White Handbag Corporation, but Morris White was to be paid a salary of $60,000 a year for three years by the new company. All the common stock in the new corporation was to be held by the Whites who were thus to control the directorate.

Although, as previously noted, the district court approved the reorganization plan, considerable opposition to it developed at the hearings on May 26th and 27th. A "substantial minority" of the creditors alleged that no inventory of the assets had been made either by the receiver or by the court; that the amount and character of the liabilities had never been determined;[9] and that certain of the bank creditors—who had been in control of Morris White, Inc., prior to the receivership—had received unlawful pref-

[9]The Supreme Court in the following statement from its opinion substantiated these allegations (53 Sup. Ct. 678, 679-680):

"The receiver had made no inventory and had not determined the amount of the liabilities. No one had made even an estimate of the value of the assets as of the date of the order to show cause, or, except as stated below, as of the date of the hearing. No figures were presented to indicate the course and results of the business while under the informal supervision and control of the banks, during the five months prior to the appointment of the temporary receiver; or during the seven weeks following his appointment. But that the bill had grossly overstated the assets was obvious. Instead of assets exceeding $4,000,000 as there alleged, it appeared that those available were worth, at most, a fourth of that amount. Items aggregating $2,277,714.89 consisted of obligations and securities of associated and subsidiary companies, which were probably worthless. The substantial assets consisted, according to the books, of the following items: Merchandise and supplies, which had cost $1,241,208.09; bills receivable aggregating $301,852.12, of which $251,409.42 were pledged to the banks; machinery entered as having cost, less depreciation, $74,265.01; and $5,614.60 cash. Based on an appraisal made by a sub-committee shortly after the appointment of the temporary receiver, the Creditors' Committee estimated the value of the merchandise as of that date to be $717,000, on the basis of a continuing business. Counsel for the receiver, estimating the value of the merchandise as of the date of the hearing, on the basis of a continuing business, stated that it was worth about $462,500; and that there was cash on hand in the amount of $54,000 and unpledged accounts receivable of $67,000. He stated that the committee estimated the value of the merchandise, if disposed of at forced sale, to be $357,000. Another statement was made to the effect that the committee estimated the total value of the assets at forced sale to be $182,000. Whether this figure included the assets pledged to the banks was left in doubt. The court was told that Morris White had an informal assurance that banks would give to the new company the necessary temporary accommodations required for working capital."

erences. The minority creditors also "protested against disposing of the assets otherwise than for cash after public sale and without competitive bids being sought."[10] The creditors' committee, on the other hand, contended that, as the handbag business was seasonal in character, any delay in disposing of the assets would prove disastrous.

After the district court had so decreed, the corporate assets were transferred to the Morris White Handbag Corporation which immediately began operation of the business. The transfer was made privately. Competitive bids neither were sought nor submitted. The National Surety Company and other dissenting creditors at once appealed the case to the circuit court of appeals which —five months later—"reversed the decree of the district court and remanded the cause for further proceedings in accordance with its opinion."[11]

There were at least two points in the opinion of the circuit court of appeals which would have had extremely important bearing on future corporate reorganization law had the Supreme Court affirmed the decision. In the first place, the circuit court of appeals said that a court of equity lacks "power to compel a creditor of any kind to accept stocks or promises to pay in the future in full extinguishment of his claim, without being afforded the alternative of receiving his proportionate share of the proceeds of the conventional sale of the property *in cash*."[12] In the second place, the Court held that, while ordinarily dissenting creditors are entitled to a public sale with competitive bidding, in this particular case their interests would be fully protected "by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale"[13] and then paying them *in cash* their proportionate shares after expenses of administration have been satisfied. If the payment to the dissenting creditors was not made in cash, then they were deemed entitled to collect through a sale of the property which had been transferred to the new corporation.

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[10]Ibid.

[11]Ibid.

[12](C.C.A. 2nd Cir. 1931) 54 F. (2d) 255, 260; (1933) 289 U. S. 426, 53 Sup. Ct. 678, 680. (Italics mine.)

[13](C.C.A. 2nd Cir. 1931) 54 F. (2d) 255, 260; (1933) 289 U. S. 426, 53 Sup. Ct. 678, 680.

It will be seen readily that here at last was a case which would give the Supreme Court of the United States an opportunity to rule on some of the unsettled questions arising out of its decision twenty years before in *Northern Pacific Railway v. Boyd.*[14] One of these questions may be stated thus: If a court is to stamp a reorganization plan as fair, must the plan offer the unsecured creditors of the old corporation a cash payment of the value of their claims as determined by the court, as an alternative to shares or securities in the new corporation? In my previous article attention was called to Mr. Justice Lamar's famous dictum in the *Boyd Case*[15] wherein he said that it is not always "necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock." Mention also was made in the former paper of subsequent cases in the inferior federal courts in which this issue was raised. Emphasis, too, was laid on the fact that it was impossible to state exactly the condition of the law on the point. In fact, the writer went no further than to venture the following prediction:

"The theory that it is always necessary to offer the unsecured creditor his share in cash as an alternative to stock or securities in the new corporation * * * may be on the way to the discard, although an affirmance by the Supreme Court in the *Coriell Case* will go a long way in the direction of perpetuating this theory."

However, before commenting here upon what the Supreme Court *did* do in the *Coriell Case,* let us notice the other point made by the circuit court of appeals—the right of the dissenting creditor to compel a public sale of the assets.

The circuit court of appeals, it will be recalled, said that in this specific case a public sale of the assets was not necessary. Perhaps this conclusion was reached because no mortgage bonds were outstanding against Morris White, Inc., with the consequent right of foreclosure in the bondholders. At all events, on this particular point the decision is in line with progressive legal thought which recognizes the cumbersome and expensive method of public sale for what it is—a relic of the past which often keeps the court from direct control over the reorganization plan.[16]

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[14](1913) 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

[15](1913) 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

[16]See, for example, Thacher, Strengthening of Procedure in the Judicial System, Sen. Doc. No. 65, at 90; Cutcheon, An Examination of De-

Such was the *Coriell Case* and its treatment in the inferior federal courts. And, needless to say, its disposition by the Supreme Court of the United States was awaited eagerly, especially at a time when each day brought news of more and more corporations plunging into receiverships. Would the Supreme Court declare that the district court had the power to order the distributive share of each creditor to be fixed by some other method than by a public sale? Would the Supreme Court hold that the district court could compel participation in the reorganization by the dissenters without the alternative of a share of the assets in cash?

The Supreme Court, however, in its decision in *National Surety Co. v. Coriell* never reached the point of answering the foregoing questions. After raising them, the Court, per Brandeis, J., concluded:[17]

"We have no occasion to pass on any of these contentions, for we are of opinion that the decree approving the plan should have been reversed in its entirety because the procedure pursued by the district court was improper."

Consequently, the decree of the circuit court of appeals was reversed; that of the district court entered February 2, 1932,[18] was vacated; and the case was remanded to the district court for further proceedings not inconsistent with the Supreme Court's opinion. The reasons given by Mr. Justice Brandeis for the Supreme Court's decision were two. In the first place, he said that the district court had entered a decree approving the reorganization plan without having recourse to adequate data.[19] As has been noted previously,[20] there had been no appraisal of the assets by a disinterested person, no adequate record of the operation of

vices Employed to Obviate the Embarrassments to Reorganizations Created by the Boyd Case, published in Some Legal Phases of Corporate Financing, Reorganization and Regulation, 73 et seq.; Swaine, Reorganization of Corporations; Certain Developments of the Last Decade, (1927) 27 Col. L. Rev. 901, 924; Rosenberg, Reorganization—The Next Step, (1922) 22 Col. L. Rev. 14, 26.

[17](1933) 289 U. S. 426, 53 Sup. Ct. 678, 681.

[18]Pursuant to the mandate of the Circuit Court of Appeals, the District Court entered on February 2, 1932, a decree which ordered that (subject to the orders to be made), "the reorganization plan approved by it June 15, 1931, be allowed to continue in operation and the Morris White Handbag Corporation be and is hereby permitted to continue in the conduct of the business heretofore transferred to it. . . . "

[19]"The district court had before it, in support of the plan, only informal, inadequate, and conflicting ex parte assertions unsupported by testimony." From the opinion of Mr. Justice Brandeis, (1933) 289 U. S. 426, 53 Sup. Ct. 678, 681.

[20]Note 9, supra.

the business during the five months period just prior to the receivership when it was controlled by its bank creditors, "no dependable schedule of liabilities of the corporation showing the number of creditors, the amount owed to each, and the collateral held."[21] In the second place, the Supreme Court felt that in this case particularly the district court should have made extraordinary efforts to reach "an informal, independent judgment,"[22] inasmuch as "the proceeding was not an adversary one; and jurisdiction rested wholly upon the consent of the defendant corporation."[23] The bank creditors, who favored the reorganization plan, were to a large extent protected by the pledge of assets; the merchandise creditors, who also favored it, were interested not only as creditors but as sellers of goods in the future to the new corporation. "On the other hand, the dissenting creditors, largely credit indemnity companies, were anxious to have determined the amounts of their risks and to obtain as promptly as possible dividends in cash."[24]

Such then was the *Coriell Case,* the first decision since 1926[25] in which the Supreme Court faced some of the unsolved problems inherited from *Northern Pacific Railway v. Boyd.* Unfortunately, however, for those interested in the corporate reorganization field, the facts in the *Coriell Case* were such that it could be disposed of without adding much to the jurisprudence of corporate reorganization.[26] All that the case did was to sound another warning[27] to

[21](1933) 289 U. S. 426, 53 Sup. Ct. 678, 682.
[22](1933) 289 U. S. 426, 53 Sup. Ct. 678.
[23](1933) 289 U. S. 426, 53 Sup. Ct. 678.
[24](1933) 289 U. S. 426, 53 Sup. Ct. 678.

[25]In 1926 the Supreme Court decided Kansas City Terminal Ry. Co. v. Central Union Trust Co., (1926) 271 U. S. 445, 46 Sup. Ct. 549, 70 L. Ed. 1028.

[26]Another factor may have influenced somewhat the decision of the Supreme Court. The Morris White Handbag Corporation had a short business life. It was adjudged bankrupt on April 29, 1932. On June 6, 1932, a sale of all its tangible assets for $53,850 was confirmed by the bankruptcy court. Neither the Morris White Handbag Corporation, nor its trustee in bankruptcy, nor the purchaser at the bankruptcy sale was a party to National Surety Co. v. Coriell.

[27]See, for example, the dictum of the late Chief Justice Taft in Harkin v. Brundage, (1928) 276 U. S. 36, 52, 55, 48 Sup. Ct. 268, 72 L. Ed. 457. Note the following significant sentence from the opinion of Mr. Justice Cardozo in Michigan v. Michigan Trust Co., Receiver, (1931) 286 U. S. 334, 345, 52 Sup. Ct. 512, 76 L. Ed. 1136: "This court has had occasion to point out the abuses from friendly receiverships forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay, Harkin v. Brundage, (1928) 276 U. S. 36, 52, 54, 48 Sup. Ct. 268, 72 L. Ed. 457; cf. Kingsport Press v. Brief

the inferior federal courts as to the need for careful scrutiny in the granting of consent receiverships and the approving of reorganization plans resulting therefrom.

II. The Recent Bankruptcy Amendments

It long has been the contention of certain writers on corporate reorganization that the real solution to the "problem of the dissenting minority creditor" lies not in the field of equity but in that of bankruptcy.[28] As has been suggested previously,[29] some of the lower federal courts, through the use of their general equity powers, have gone far in the direction of obviating the difficulties of the *Boyd Case.*[30] However, as has also been pointed out, the Supreme Court of the United States, up to the present time, has left unanswered some of the most perplexing questions resulting from that decision. Consequently, since the courts are in confusion, and since any state statute which attempted retroactively to force a composition or a reorganization plan upon an unwilling minority of creditors obviously would impair the obligation of their contracts,[31] the aforementioned writers have felt that the

English Systems, (C.C.A. 2nd Cir. 1931) 54 F. (2d) 497, 499, 500. Receiverships for conservation have at times a legitimate function, but they are to be watched with jealous eyes lest their function be perverted." Again in Shapiro v. Wilgus, (1932) 287 U. S. 348, 53 Sup. Ct. 142, 145, 77 L. Ed. 149, Mr. Justice Cardozo said: "We have given warning more than once, however, that the remedy [receivership] in such circumstances [consent] is not to be granted loosely, but is to be watched with jealous eyes."

[28]Cutcheon, An Examination of Devices Employed to Obviate the Embarrassments to Reorganizations Created by the Boyd Case, published in Some Legal Phases of Corporate Financing, Reorganization & Regulation 73; Swaine, Corporate Reorganization under the Federal Bankruptcy Power, (1933) 19 Va. L. Rev. 317; Swaine, Reorganization—The Next Step: Reply to Rosenberg, (1922) 22 Col. L. Rev. 523; Rosenberg, An Open Letter Containing Proposals for Amendment of the Bankruptcy Act, (1933) 19 Va. L. Rev. 333; Rosenberg, A New Scheme of Reorganization, (1917) 17 Col. L. Rev. 523. Cf. Rosenberg, Reorganization—The Next Step, (1922) 22 Col. L. Rev. 14; Garrison, The Power of Congress over Corporate Reorganizations, (1933) 19 Va. L. Rev. 343.

[29]See Billig, Corporate Reorganization: Equity vs. Bankruptcy, (1933) 17 Minnesota Law Review 237, 264, et seq.

[30]Northern Pacific Railway v. Boyd, (1913) 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

[31]Various statutory schemes have been devised to circumvent this result. See, for example, Delaware Gen. Corp. Law (1931) sec. 5 (9); Kentucky Stat. (Carroll. 1930) secs. 771a (Reorganization of Insolvent Railroads and Bridge Companies); New York Stock Corp. Law, 1930, secs. 95-99; West Virginia Off. Code. 1931. ch. 31. art. 1. sec. 6 (h); Minnesota, Laws 1933, ch. 300, sec. 54, discussed in Hoshour, The Minnesota Business Corporation Act, (1933) 18 Minnesota Law Review 1, 12. See also Gilfillan v. Union Canal Co., (1883) 109 U. S. 401, 406, 3 Sup. Ct. 304, 27 L. Ed. 977.

only feasible remedy lies in extending the composition provisions of the bankruptcy act. A section of the British companies act,[32] which provides that a reorganization plan acceptable to a three-fourths majority in value of the creditors in a given class shall be binding upon the other members of such class, has been the model of those who would find a statutory solution for the problem of the dissenting minority creditor.

In keeping with this approach, section 76 of the original Hastings Bill was drafted.[33] It provided a plan for bringing the reorganization of a "moneyed, business, or commercial corporation" under bankruptcy through a voluntary petition by the corporation itself rather than through a fictitious involuntary proceeding such as prevails in the typical "consent receivership" in equity. Section 76 was framed on the theory that the bankruptcy court should have direct control over any plan of reorganization which might be submitted to it, but that no such plan should be confirmed until it had been accepted in writing by creditors holding two-thirds in amount of the claims allowed in their particular class. After confirmation the plan was to be binding upon the corporation, its creditors and its stockholders.[34]

Although the provision of section 76, and those of its various statutory successors,[35] caused much discussion,[36] the question of the wisdom of its enactment again has become academic as far

[32]Note 4 to Garrison, Reorganization of Railroads under the Bankruptcy Act, (1933) 1 U. of Chicago L. Rev. 71 sums up the English statutory provisions as follows: "Since 1870 England has had a reorganization statute. In its original form it provided that a plan affecting a given class of creditors could be made binding upon the consent of a majority in number representing three-fourths in value of the creditors of such class. In 1900 the statute was enlarged by the adoption of a similar provision relating to stockholders. For the latest form of the statute see the Companies Act, 1929, 19-20 Geo. 5, ch. 23, secs. 153 to 155; and Sophian, The Companies Act, 1929. The Canadian Bankruptcy Act contains a reorganization section modelled on the English Companies Act (Act of July 7, 1919, 9-10 Geo. 5, ch. 36, sec. 13 as amended by act of June 28, 1922, 12-13 Geo. 5)." See Fraser, Reorganization of Companies in Canada, (1927) 27 Col. L. Rev. 932.

[33]See Billig, Corporate Reorganization: Equity vs. Bankruptcy, (1933) 17 MINNESOTA LAW REVIEW 237-39 for a discussion of section 76 of the Hastings Bill and its successors.

[34]See Thacher, Strengthening of Procedure in the Judicial System, Sen. Doc. No. 65, 90-92.

[35]Supra note 33.

[36]See, for example, the symposium, Corporate Reorganization—An Amendment to the Bankruptcy Act, (1933) 19 Va. L. Rev. 317-350; Payne, Fair and Equitable Plans of Corporate Reorganization, (1933) 20 Va. L. Rev. 37.

as "moneyed, business, or commercial corporations" are concerned. While certain amendments to the bankruptcy act were enacted in the closing days of the last Congress, section 76 never was passed.[37] Consequently the reorganization of private corporations remains a function of equity rather than of bankruptcy.

Let us notice for a moment the amendments to the Act of 1898 which *were* passed on March 3, 1933 and see if any of them throws any light on the specific phase of corporate reorganization law we are considering—the problem of the dissenting minority creditor. Section 74[38] is new and provides a statutory composition and extension plan for individual debtors. It has nothing to do with corporations and their reorganization. Neither does section 75,[39] another new one which is concerned with agricultural compositions and extensions. In fact, it is not until we reach section 77[40]—reorganization of railroads engaged in interstate commerce—that the problem of the minority creditor who will not "climb on the bandwagon" is once more encountered.

It is not the purpose here to describe in minute detail the provisions of section 77. As the footnote indicates,[41] that task has been performed already by competent authorities. Briefly, it may be said that section 77 provides a statutory substitute for the receivership in equity of a railroad engaged in interstate commerce. The railroad itself may file with the bankruptcy court in the district in which its principal executive or operating office is located a petition stating that it "is insolvent or unable to meet its debts as they mature and that it desires a plan of reorganization."[42]

[37]The House of Representatives passed the measure as a part of H. R. 14359, 72 Cong., 2d Sess. A similar bill, S. 5551, was introduced in the Senate but was not enacted.

[38]11 U. S. C. A., sec. 202, 1 Mason's U. S. Code, tit. 11, sec. 202.

[39]11 U. S. C. A., sec. 203, 1 Mason's U. S. Code, tit. 11, sec. 203.

[40]11 U. S. C. A., sec. 205, 1 Mason's U. S. Code, tit. 11, sec. 205.

[41]Garrison, Reorganization of Railroads under the Bankruptcy Act, (1933) 1 U. of Chicago L. Rev. 71; Rodgers and Groom, Reorganization of Railroad Corporations Under Section 77 of the Bankruptcy Act, (1933) 33 Col. L. Rev. 571; Weiner, Reorganization under Section 77: A Comment, (1933) 33 Col. L. Rev. 834; Hanna, Recent Amendments to the Bankruptcy Act, (1933) 1 Geo. Wash. L. Rev. 448; Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, (1933) 19 Va. L. Rev. 698, 707; Lowenthal, The Railroad Reorganization Act, (1933) 47 Harv. L. Rev. 18. See Jacobs, The Interstate Commerce Commission and Interstate Railroad Reorganizations, (1932) 45 Harv. L. Rev. 855.

[42]11 U. S. C. A., sec. 205, 1 Mason's U. S. Code, tit. 11, sec. 205. Creditors of the railroad having claims or interests aggregating not less than ten per cent of all the road's indebtedness, may, with the approval of the Interstate Commerce Commission, file an involuntary petition against

After approving the petition, the court may appoint a temporary trustee (who later, after a hearing, may become permanent) from a panel of standing trustees selected by the Interstate Commerce Commission. The trustee takes title to the debtor's property wherever located, thus eliminating the need for ancillary proceedings. After proper notice has been given, the Interstate Commerce Commission (with which a copy of the original petition must be filed) holds public hearings in the receivership. At these hearings reorganization plans may be submitted by the debtor railroad, by the trustee, or by creditors who represent at least ten per cent of the claims in any given class. The commission is required to recommend a plan of reorganization to the court—either one of those submitted or a plan which the commission itself has devised. If the creditors accept the plan recommended by the commission (the method of acceptance will be discussed in some detail presently), the plan is certified by the commission to the court, which, after a public hearing, may accept it or reject it. If the court accepts the plan, it simply orders the property transferred either to the debtor railroad or to some new corporation created under the reorganization scheme. Thus the need for a public sale of the debtor's assets under a mortgage foreclosure has been entirely eliminated.

This paper, of course, is concerned primarily with the question of acceptance of the plan by the creditors under section 77. The statute provides that if two-thirds in amount of any given class of creditors or stockholders accept the plan it shall thereupon become binding upon all the other members of such class. And this result follows even though the rights of the creditors and stockholders after the reorganization are wholly different from what they were before. Thus, an acceptance of the plan by two-thirds in amount of the members (creditors or stockholders) of a given class may impair the contract rights of *all* the members of the class. Neither is it necessary, in order to force the plan upon non-assenters, to offer them in cash their distributive shares of the proceeds of what under a proceeding in equity would be a sale to the new corporation.[43]

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the railroad "stating that such railroad corporation is insolvent or unable to meet its debts as they mature and that such creditors propose that it shall effect a reorganization."

[43]Compare the provisions of the Bank Conservation Act of March 9, 1933, 12 U. S. C. A., secs. 201-211, 1 Mason's U. S. Code, tit. 12, secs. 201-11, particularly sec. 207 entitled Reorganization; Consent of Depositors and Creditors. See the Bank Conservator Statute of West Virginia enacted

The sweeping character of this provision of section 77 is vividly described in the following language by Dean Lloyd K. Garrison of the University of Wisconsin Law School,[44] who, as special assistant to the attorney general, was co-author with former Solicitor General Thacher of the "Thacher Report" of December 5, 1931:[45]

"Complete flexibility is thus provided. Preferred stock or debentures, for example, may be substituted for mortgage bonds; unsecured claims may be made payable in stock; principal or interest or both may be scaled down; preferred stock may be changed into common; and so on, without limit, subject only to the requirement that the plan shall be equitable. Since securities with a lien prior to any previously issued may be provided for in the plan, adequate security can be given for the new money which is usually necessary to complete the reorganization and provide sufficient working capital. Hitherto, in the absence either of unanimous consent by the holders of mortgage securities, or of payment to the dissenters of the cash value of their claims against the property, there has been no way of giving the new money a prior lien; and this difficulty has prevented many forms of advantageous reorganizations. Under the new legislation, assuming always that the plan is fair, two-thirds in amount of any class of mortgage creditors may compel the entire class, without payment of cash to dissenters, to subordinate their liens to a new prior lien or even to abandon their liens altogether."

CONCLUSION

This paper was written primarily for the purpose of bringing down to date the former article, Corporate Reorganization: Equity vs. Bankruptcy, which was published last February before the *Coriell Case* was decided and prior to the enactment of the recent amendments to the Bankruptcy Act. No attempt has been made here to present any particular thesis. The writer still believes that the general jurisdiction of equity over corporations is broad enough to enable it, even without the aid of a statute, to find a solution for the problem of the dissenting minority creditor. As emphasized in the previous article, a step in the direction of solving this problem would be no more radical than several others which have been taken in molding the jurisprudence of corporate

April 12, 1933. Advance Copy, Acts of the Legislature of West Virginia, Extraordinary Session, 1933 at 66. See note, Reorganization of Banking Corporations, (1930) 28 Mich. L. Rev. 1052.

[44]Garrison, The Power of Congress over Corporate Reorganizations, (1933) 19 Va. L. Rev. 343.

[45]Supra note 1.

reorganization. Furthermore, at least since *In re Metropolitan Railway Receivership*,[46] the consent receivership with all its limitations—and they are many—has been the tool with which corporation lawyers have worked in preparing the way for the reorganization of a corporation in financial difficulty. The reports contain a host of federal decisions covering virtually every angle of the consent receivership process. Presumably these decisions now are only so much paper and ink as far as railroad reorganizations are concerned.[47] Before the close of the next session of Congress it is possible they may occupy a similar place as far as the reorganization of "moneyed, business, or commercial corporations" is concerned. It will then become necessary to build up a new body of case law interpreting the several provisions of these new corporate reorganization statutes—a task probably of considerable magnitude.[48]

However, the proof of the legal pudding is, in 1933, perhaps even more than ever in the proverbial eating. Section 77 of the bankruptcy act may have been hastily and imperfectly drawn,[49] and it may require considerable interpretation before it succeeds in setting up a smooth-running system for railroad reorganization. Nevertheless, if it furnishes us with what its proponents claim for it—an efficient and economical method of adjusting the affairs of a financially embarrassed railroad—then it will be worthy of taking a place along with the other great epoch-making statutes of Anglo-American law.

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[46](1908) 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403.

[47]Except, of course, with respect to certain matters where the statute either expressly or by implication has preserved the rules and principles evolved by the equity court.

[48]And, as is pointed out by Rodgers and Groom, Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act, (1933) 33 Col. L. Rev. 571, 616 "there will be a multitude of questions, the answers to which must be had by reference to bankruptcy legislation and decisions difficult of application to situations never therein contemplated."

[49]Rodgers and Groom, Reorganization of Railroad Corporations Under Section 77 of the Bankruptcy Act, (1933) 33 Col. L. Rev. 571, 616, particularly their footnote 88.