LEGISLATION

LEGISLATIVE BASES OF CORPORATE REORGANIZATION—Economic depression, with its characteristic lessened production and deflation of values, finds large corporations with excessive inventories and extensive contracts to purchase raw materials, both based on an inflated price level.[1] Forced to market its products at a price below the cost of production, the corporation is in a perilous condition. Although financial collapse is more prevalent in times of distress, it may of course also occur in a period of prosperity. Then, however, incompetence and inexperience are the leading causes of failure.[2] To these must be added the increase of fixed charges out of proportion to earning power brought about by unwarranted expansion or by unfortunate or costly investments which have seriously depreciated.[3] But whichever factor predominates, the result is evidenced by the omission of dividends, failure to reduce the floating debt, and, sooner or later, inability to meet the due installments on the secured indebtedness.[4]

If a small organization were involved, the next step ordinarily would be insolvency proceedings in a bankruptcy court, terminating in the winding-up of the business and the distribution of assets *pro rata*. But where the corporation is large, transacting business on an enormous scale, and frequently in a field where the public interest is involved, it often seems both expedient and desirable to continue the business as a going concern.[5] This can be done only by attracting new money to the enterprise, enabling it to safely emerge from the period of financial distress with the prospect of compensatory profits in the ensuing era of prosperity. But banks and members of the investing public are unwilling to put more money, unless secured by a prior lien, into an enterprise which has already demonstrated its inability to meet its obligations. To so alter the corporate structure as to allow the new money to dislodge the already existing liens and priorities and convert impending debts into long-term obligations or stock is the function of the reorganization.[6]

Sometimes a recapitalization can be effected voluntarily[7] by agreement between the various parties interested—usually the bondholders, the unsecured

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[1] DEWING, FINANCIAL POLICY OF CORPORATIONS (Rev. ed. 1926) 1136. It is recognized that these conditions are as pronounced today as in former depressions. See Stern, *Financial and Economic Review of 1930*, WORLD ALMANAC (1931) 139.

[2] GERSTENBERG, FINANCIAL ORGANIZATION AND MANAGEMENT (1924) 640.

[3] Prince, *The Rock Island* (1916) 19 MOODY'S MAG. 409.

[4] It has been estimated that $243,000,000 in rail securities will fall due in 1932 and that only two roads, with $24,000,000 between them, have funds on hand to meet this debt. TIME, January 4, 1932, p. 8.

[5] DEWING, *op. cit. supra* note 1, at 903-904. See Note (1931) 79 U. OF PA. L. REV. 788.

[6] Reorganization, as a term, possesses no legal fixity of meaning. In general, however, a corporate reorganization is "a conspicuous readjustment of the capital liabilities, ordinarily accompanied by a reduction in fixed charges, and by the addition of new capital," adopted to meet a financial crisis of some sort. DEWING, CORPORATE PROMOTIONS AND REORGANIZATIONS (1914) 7. Another definition is "the rearrangement of the financial structure of an incorporated enterprise, rendered necessary by insolvency or by the inability of the corporation to secure the necessary funds for its operations because of obstacles resulting from its financial structure." Cravath, *Reorganization of Corporations*, in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION (1916) 154.

[7] Reorganizations are commonly classified as voluntary or involuntary on the basis of whether or not judicial proceedings are employed. DEWING, *op. cit. supra* note 1, at 940-941. They might more properly be designated as negotiated or litigated. GERSTENBERG, *op. cit. supra* note 2, at 648. Other classifications are much more elaborate. Cook lists five cate-

creditors, and the stockholders.[8] This avoids the expense and aggravation of a receivership and its incidental litigation. The weak point of the scheme is that no one can be compelled to come into such an arrangement against his will.[9] A bondholder may insist upon payment of the bonds or else foreclosure of the mortgage.[10] A stockholder may demand that his interest be purchased from him at a fair appraisal value.[11] So too, a creditor, even though unsecured, retains his claim against the assets of the corporation whether or not they have passed to a new corporation as a result of the structural change.[12] He cannot be compelled to accept a change of creditors against his will.[13]

Since unanimity is seldom achieved in a project of this sort, it has become customary to resort to legal proceedings in order that the status of the parties be conclusively determined, either by foreclosure sale or decree of court. The bondholders unquestionably have the right to foreclose the lien upon default.[14] Since purchasers at a sale of such magnitude as the foreclosure of a large corporation involves are necessarily quite scarce, the normal procedure is for the bondholders, acting through their committee,[15] to buy in the property at a price which is either fixed or approved by the court.[16] This "upset price" may be paid with bonds which have been deposited with the committee.[17] Therefore, since an outsider must have at his command sufficient funds to meet the entire foreclosure bid, while the bondholders' committee need furnish actual cash only to the extent of paying non-assenting bondholders their proportionate share, it becomes apparent why reorganizations are usually effected by the bondholders.

It is entirely within the power of the secured creditors to exclude the other groups altogether from the reorganization.[18] But bondholders, who have displayed their caution by investing for security rather than for speculative profits, are reluctant to part with the additional funds necessary to pay off the dissenting bondholders and to provide sufficient working capital for the new organization. The stockholders, on the other hand, to avoid losing their entire investment,

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gories (1) Consent to scaling down of securities; (2) Reorganization by disposing of the assets without a judicial sale; (3) Reorganization by court decree without sale; (4) Reorganization on foreclosure or insolvency sale; (5) Reorganization in bankruptcy court. Cook, *Fraud and Ultra Vires in Reorganizations* (1924) 10 A. B. A. J. 780, 782.

[8] Of course the classification of interested parties depends upon the particular corporation being reorganized. There may be several different classes of lienholders, or there may be none. So, too, there may be preferred as well as common stock. But regardless of priorities within a class, the general rule is that lienholders are preferred over the other groups and the claims of the unsecured creditors are secondary to those of the lienholders but superior to the rights of the stockholders. DEWING, *op. cit. supra* note 6, at 9.

[9] 5 COOK, CORPORATIONS (8th ed. 1923) § 883.

[10] BALLANTINE, MANUAL OF CORPORATION LAW AND PRACTICE (1930) § 248; Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782 (1899).

[11] This right is granted by statutes which also provide that the sale of the corporate assets to the reorganized company must be approved by a specified number of stockholders —usually two-thirds, sometimes a simple majority. N. Y. CONS. LAWS (Cahill, 1930) c. 60, §§ 20-22; OHIO ANN. CODE (Throckmorton, 1930) § 8623.65; PA. STAT. (West, 1920) § 5694, Act of April 29, 1874, P. L. 73, § 23, as amended by Act of June 2, 1915, P. L. 724. But while the majority has the right to control, it occupies a fiduciary relation to the minority, and cannot exclude the minority from a fair participation in the transaction. Southern Pac. Co. v. Bogert, 250 U. S. 483, 39 Sup. Ct. 533 (1919).

[12] 7 FLETCHER, CORPORATIONS (1919) §§ 4984-4985.

[13] BALLANTINE, *op. cit. supra* note 10, at 761.

[14] 1 WILTSIE, MORTGAGE FORECLOSURE (4th ed. 1927) § 41.

[15] See Rodgers, *Rights and Duties of the Committee in Bondholders' Reorganizations* (1929) 42 HARV. L. REV. 899.

[16] See Weiner, *Conflicting Functions of the Upset Price in a Corporate Reorganization* (1927) 27 COL. L. REV. 132; Spring, *Upset Prices in Corporate Reorganization* (1919) 32 HARV. L. REV. 489.

[17] *Supra* note 15.

[18] *Supra* note 1, § 4935. See American S. S. Co. v. Wickwire Spencer Steel Co., 42 F. (2d) 886, 895 (W. D. N. Y. 1930).

are quite willing to raise the required capital in return for the chance to recoup losses out of the prospective profits of the new corporation. This is accomplished by levying an assessment on the old stock; which, of course, is equivalent to selling them the new stock at the assessment price, the difference between the assessment and the market price being the allowance conceded to the old stock. To permit the stockholders to enter into the reorganization also avoids much quarrelsome litigation concerning the fairness of the plan and the adequacy of the upset price.

But the stockholders cannot co-operate with the bondholders to effect a reorganization if the unsecured creditors are excluded therefrom.[19] The creditors must be offered terms as good as or better than the stockholders are granted.[20] This is because the stockholders as owners of the property are subordinated to the creditors whose priority cannot be ignored.[21] This is *a fortiori* true where the corporation possesses unmortgaged assets as well as those subjected to the lien.[22] It has been held, however, that this does not mean that in every reorganization the securities offered to the general creditors must be superior in rank or grade to those which the stockholders obtain, provided that the creditors are accorded their superior rights in other ways.[23] Even if they are offered terms which compare favorably with those accorded to stockholders, the problem is still far from solved. For creditors, "cold cash" possesses an allure which is quite absent in stock of a reorganized company, however glowing the prospectuses. Possibly the most difficult problem in a corporate reorganization is how to extinguish the claims of dissenting creditors with something other than cash.[24]

The most forceful solution is that embodied in the decision in the *Phipps* case,[25] in which the Court of Appeals of the Eighth Circuit held that an offer of the new securities will bar any recourse against the new corporation, and this even though no judicial sale has been or will be contemplated. In other words, under the doctrine of this case, a court may, by the force of its decree alone, restrain creditors from resorting to any other method of collecting their debts than that provided in the plan approved by the court. It is surely pertinent to inquire as to the source of this enormous power of a court of equity to compel a

[19] Louisville Trust Co. v. Louisville, *etc.* Ry., 174 U. S. 674, 19 Sup. Ct. 827 (1899). And one who is both a stockholder and creditor is not precluded from asserting his rights as creditor by participating as stockholder. Kansas City Southern Ry. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334 (1916).

[20] Northern Pac. Ry. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554 (1913).

[21] See Louisville Trust Co. v. Louisville, *etc.* Ry., *supra* note 19, at 685, 19 Sup. Ct. at 830.

[22] See Note (1923) 36 HARV. L. REV. 1007, 1008. In this connection it has been held that where all the bondholders assent to the plan they are not entitled to any deficiency judgment. Central Trust Co. v. Cincinnati, J. & M. Ry., 58 Fed. 500 (N. D. Ohio 1892).

[23] Kansas City Terminal Ry. v. Central Union Trust Co., 271 U. S. 445, 46 Sup. Ct. 549 (1926); Jameson v. Guaranty Trust Co., 20 F. (2d) 808 (C. C. A. 7th, 1927).

[24] Swaine, *Reorganization—The Next Step: A Reply to Mr. James N. Rosenberg* (1922) 22 COL. L. REV. 121.

[25] Phipps v. Chicago, Rock Island & Pac. Ry., 284 Fed. 945 (C. C. A. 8th, 1922). Although only the rights of unsecured creditors were involved in this case, there is no intimation in the opinion that lienholders are exempt from similar treatment. In fact, the inference is the other way. "The power of the court to deal in like manner with secured creditors has never been expressly adjudicated but the theory . . . of the *Phipps* case would seem to apply with at least equal force to secured creditors as it does to unsecured creditors. Indeed, in one respect, the position of the unsecured creditor is economically stronger than that of the mortgage bondholder. The latter has voluntarily become an investor in securities generally having a far future maturity. The unsecured creditor had no prior means of ascertaining in advance the number of others in his class. He has usually loaned money on short time or sold merchandise and expected cash payment. He never consented to become an investor." Rosenberg, *Phipps v. Rock Island & Pacific Ry. Co.* (1924) 24 COL. L. REV. 266, 271.

creditor, against his will, to invest his debt in the debtor corporation and thereby become one of the owners with all the liability incident thereto.

Curiously enough, although there must be statutory authority for a corporation to reorganize,[26] there is no *adequate* legislation controlling the subject.[27] The Pennsylvania statute [28] is typical. This provides that the purchaser of the property and franchise of a corporation at a judicial sale or by virtue of a power of sale [29] may organize as a corporation and succeed to the privileges of the old corporation. As to the manner in which claims shall be met; as to what coercive measures may be employed to bring recalcitrant minorities into line; as to the permissibility of dispensing with a sale in a reorganization by decree of court, the statute is silent. The Maine law [30] is more explicit only in that it provides that creditors must be paid ratably, and that the court may permit duly allowed claims at a proper valuation to be accepted in payment of the purchase price. Similarly, in Delaware, the property may be sold free of encumbrances at a judicial sale on such credits as the court may deem proper.[31] In some states, instead of a general statute, a special law is passed to cover each particular reorganization as it occurs.[32] Except as to the scope of its application, such a statute is similar to one of the general type. In other states, statutes are in force which permit the reorganization of corporations of a restricted designated class.[33] The Kentucky statute,[34] which applies only to railroads and bridge companies, is much more elaborate than most. It provides that if the holders of a majority of any class of securities issued, or any class of creditors submit a plan for reorganization, the court, on approval of the plan, may require any security holder or creditor to surrender for cancellation or discharge outstanding securities and claims and receive in lieu the new securities. The force of this, however, is considerably diminished by the next sentence of the act, which allows holders of claims or securities which arose or were issued before the act was passed to insist that their contract rights remain unimpaired. Although passed in 1896, it has never been judicially criticized.

The Ohio statute,[35] applicable to railroads, provides that when two-thirds in interest of each class of creditors and of stockholders agree upon a plan of reorganization they may purchase the assets of the old corporation and reorganize according to the plan, which must provide for "payment in money or bonds of the highest class issued" for debts incurred for repairs or running expenses. The rights of non-assenting creditors are defined in the vaguest of terms.[36] When counsel contended that under the act creditors had no rights other than those

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[26] 8 THOMPSON, LAW OF CORPORATIONS (3d ed. 1927) § 5966.

[27] Cook, *op. cit. supra* note 7, at 780.

[28] PA. LAWS (West, 1920) §§ 5805, 18569; Act of May 25, 1878, P. L. 145, § 1, as amended by Act of June 20, 1911, P. L. 1092.

[29] Of course where the instrument under which the lien was created expressly provides for a reorganization by the majority with the right to discharge the liens with securities, the problem is simple. Such provisions, however, are not extensively used because of their questionable negotiability. Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade* (1927) 27 COL. L. REV. 901, 927. But *cf.* Note (1927) 27 COL. L. REV. 579, 586-587.

[30] ME. REV. STAT. (Peabody, 1930) c. 56, § 87.

[31] DEL. REV. CODE (1915) § 1979.

[32] The Boston & Maine Railroad was reorganized under such an act. Mass. Spec. Acts 1915, c. 380 as extended by Spec. Acts 1917, c. 323. See Brown v. Boston and Maine R. R., 233 Mass. 502, 124 N. E. 322 (1919).

[33] KY. STAT. (Carroll, 1922) § 771a.

[34] *Ibid.*

[35] OHIO ANN. CODE (Throckmorton, 1930) §§ 9079, 9092.

[36] § 9095.

arising out of the reorganization plan, the court held unequivocally that any state law which abrogates the rights of non-assenting creditors is invalid.[37]

Since no state has gone further than Kentucky or Ohio, and since those statutes have been, in the one case, so guarded to avoid constitutional difficulties as to be of little value, and in the other, declared unconstitutional, it seems clear that the power of a court to compel creditors to accept payment in securities instead of cash is not derived from any state statute. This is all the more apparent in view of the constitutional limitation which forbids a state to pass laws impairing the obligations of contracts.[38] In the absence of federal legislation governing corporate reorganizations,[39] it is necessary to conclude that the power exercised by the court in the *Phipps* case is not one which has been conferred by statutory law.

If not derived from legislation, the power, to exist, must be an inherent one. That a court of equity has the power to so act, in the absence of statutory authority, has been questioned by both bench and bar. In *Harding v. American Sumatra Tobacco Co.*,[40] Judge Sibley declared:

> "This is a stretching of equity power beyond anything previously known. To deprive a creditor of his usual remedies and force him into membership into the corporation which he only credited seems to me of very dubious correctness, however convenient and cheap it may be to reorganizers, and however justly disappointing to recalcitrant creditors who may be trying to force the majority to buy them out to get rid of them." [41]

So, too, an attorney who has been very active in reorganization work has insisted that

> "the proposition . . . that Federal courts of equity today have, without legislation, inherent power to compel all creditors of an insolvent to accept in complete extinguishment of their rights against the property of the insolvent something other than cash or even than promises to pay cash in the future . . . is sound neither in legal theory nor in economic policy." [42]

Further help is derived from a study of the situation in England where practically all reorganizations are effected by court decrees. There the court derives its power, not from an inherent jurisdiction, but from the express terms of the Companies Act [43] which provides that if a majority in number representing three-fourths in value of each class affected by the reorganization agree on a plan which is approved by the court, it is binding upon all.[44] This has been held to

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[37] Mather v. Cincinnati Ry. Tunnel Co., 3 Ohio C. C. 284 (1888).

[38] U. S. CONST. Art. I, § 10, cl. 1.

[39] Under the Federal Transportation Act of 1920, 41 STAT. 456, §§ 402, 407, 439; 49 U. S. C. A. §§ 1 (18), 5 (2), 20a, the Interstate Commerce Commission has assumed, to a limited extent, supervision over the reorganization of interstate railroads. See Swaine, *op. cit. supra* note 29, at 931, n. 110.

[40] 14 F. (2d) 168 (N. D. Ga. 1926).

[41] At 169.

[42] Swaine, *loc. cit. supra* note 24.

[43] The Joint Stock Companies Arrangement Act, § 2; 32 & 33 VICT. c. 104 (1870); as amended by The Companies Act, § 24; 63 & 64 VICT. c. 48 (1900); and incorporated in the Companies (Consolidation) Act, § 120; 8 EDW. VII, c. 69 (1908).

[44] A similar result is reached in Canada by special statutes instead of general. See Fraser, *Reorganization of Companies in Canada* (1927) 27 COL. L. REV. 932. Court decrees in accordance with these statutes are enforceable against American citizens. Canada Southern Railway Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363 (1883). But *aliter* where the American court thinks the plan unfair, even though approved by an English court. Bank of China, *etc.* v. Morse, 168 N. Y. 458, 61 N. E. 774 (1901).

apply to secured as well as unsecured creditors.[45] In England, then, lienholders can be subordinated to junior charges, and the minority of any class is bound by the will of the majority.[46] But it is significant to note that no English court has ever exercised the power except under the statute. In America, the right of the court to so act, in the absence of enabling legislation, is evidenced only by the *Rock Island* cases.[47] Thus it would seem that those decisions are at best questionable. It is greatly to be regretted that the Supreme Court was not given the opportunity to review them.[48]

Even if the existence of the power is assumed, the wisdom of so acting is further disputed. Its exercise involves tremendous possibilities. Since no statute fixes the proportion of persons whose assent to the plan is required to give it validity, this would be left entirely to the discretion of the court, who might feel free to enforce upon an unwilling majority a plan fostered by the minority, as well as *vice versa;* or, further, a plan promulgated by the court itself and desired by none of the factions.[49] This is not a mere remote possibility. There is on record a case in which the plan finally adopted was one formulated by the court and not by any of the litigants.[50] In that case, there was apparently no expressed objection to the final adoption of the court's plan. But supposing a dissent, would it have been of any moment if the court possesses the power to fix the status of all parties concerned by force of its decree alone? The power of a court to pass upon the fairness of the plan [51] is something entirely different from the power to make contracts for the parties.[52] There is much to be said for the statement of Judge Learned Hand:

> "There is in my judgment no warrant either in principle or policy for asserting that, once a receiver is appointed, the court takes on the part of a benevolent despot." [53]

Whether the danger that reorganizations will in time be governed by the caprice of paternalistic courts is real or imagined, it would be sensible to avert it. This could best be accomplished by a federal statute. We have an excellent precedent and analogy in the Bankruptcy Act [54] which provides that a composition approved by a majority in number of creditors, representing a majority in

[45] *In re* Empire Mining Company, 44 Ch. D. 402 (1890).

[46] *In re* Alabama, New Orleans, Tex. & Pac. Junction Ry. [1891], 1 Ch. D. 213.

[47] Phipps v. Chicago, Rock Island & Pac. Ry., *supra* note 25; Chicago, Rock Island & Pac. Ry. v. Lincoln, *etc.*, 284 Fed. 955 (C. C. A. 8th, 1922) (differs from Phipps case in that Phipps had filed his claim with the reorganization committee while this creditor had not, apparently a factor of no importance in the opinion of the court); both growing out of American Steel Foundries v. Chicago Rock Island & Pac. Ry. (N. D. Ill. 1917) (not reported but fully discussed by Walker, *Reorganization by Decree* (1921) 6 CORNELL L. Q. 154, 162).

[48] *Certiorari* granted 261 U. S. 611, 43 Sup. Ct. 363 (1923); but dismissed per stipulation of counsel, 262 U. S. 762, 43 Sup. Ct. 701 (1923).

[49] These possibilities have been suggested by Swaine, *op. cit. supra* note 24, at 130; Cutcheon, *An Examination of Devices Employed to Obviate the Embarrassments to Reorganizations Created by the Boyd Case,* in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION 1926-1930 (1931) at 70.

[50] See Rosenberg, *The Aetna Explosives Case* (1920) 20 COL. L. REV. 733, 738.

[51] See Habirshaw Electric Cable Co. v. Habirshaw Electric Cable Co., Inc., 296 Fed. 875, 879 (C. C. A. 2d, 1924).

[52] "I do not think that courts sit to redraw or modify or make suggestions concerning such voluntary business arrangements as reorganization plans." Hough, J., in Conley v. International Pump Co., 237 Fed. 286, 287 (S. D. N. Y. 1915). *Accord:* Berwind, White Coal Mining Co. v. Borinquen Sugar Co., 7 Porto Rico Fed. 30 (1914). But *cf.* Note (1930) 30 COL. L. REV. 1013, 1020.

[53] Manhattan Rubber Mfg. Co. v. Lucey Mfg. Co., 5 F. (2d) 39, 43 (C. C. A. 2d, 1925).

[54] 30 STAT. 544 (1898); U. S. C. A. Title 11 (1926).

value of the claims allowed, shall, on confirmation by the court, be binding upon all creditors.[55] This alone, however, is incompetent to govern the situation because it deals with the rights of unsecured creditors only,[56] while a reorganization must adjust the rights and liens of secured creditors and stockholders as well. Furthermore, the Act does not compel the creditors to accept an *aliquot* interest in the assets of the bankrupt instead of payment in cash.[57]

Modified to include these provisions, and also to call for approval by two-thirds in number and value of each class concerned, rather than by a simple majority,[58] an adequate machinery to control corporate reorganizations would be set in force without doing violence to our traditions.[59] Such legislation would not be unconstitutional as impairing the obligations of contracts, since that constitutional prohibition [60] is directed against the states and not against Congress.[61] Furthermore, Congress is specifically empowered to establish a uniform system of bankruptcy laws [62] and to pass all laws necessary to carry such power into effect.[63] "Such a law, once enacted, would mark the end of one of the greatest and worst of legal anachronisms." [64] It would secure to American business the benefits which have existed under the English law since 1870.

The corporate reorganization plays a part in the world of modern industry of far more importance than one might at first suspect. In 1916, it was estimated that in the preceding twenty-year period, fifty per cent. of American corporations had undergone reorganization.[65] During the period of 1920-1923 "scores of industrial corporations became, in the equity sense, insolvent." [66] At that time voluntary reorganizations by creditors' committees were attempted on an extensive scale in order to avoid the publicity of receivership. However, due to the many suits instituted against these committees for personal liability, it has been doubted that readjustments will again be attempted to any great extent without the aid of judicial proceedings.[67] Since the current depression makes

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[55] § 12; 11 U. S. C. A. § 30.

[56] *In re* J. B. & J. M. Cornell Co., 201 Fed. 381 (S. D. N. Y. 1912).

[57] *In re* Northampton Portland Cement Co., 185 Fed. 542 (E. D. Pa. 1911); *In re* Prudential Outfitting Co., 250 Fed. 504 (S. D. N. Y. 1918).

[58] To require the approval of a preponderating majority is more likely to insure the fairness of the plan to all. Cutcheon has even suggested that the statute call for the assent of 90% of each distinct class of creditors and two-thirds of the stockholders. Cutcheon, *op. cit. supra* note 49, at 73.

[59] This scheme is approved by Swaine, *op. cit. supra* note 24; Cutcheon, *op. cit. supra* note 49. Although at first favored by Rosenberg, in *A New Scheme of Reorganization* (1917) 17 COL. L. REV. 523, he later wrote, "Let us leave the growth of our jurisprudence regarding this still developing subject of reorganization to our courts and the bar rather than to what would be at once the *terra incognita* and the straitjacket of an Act of Congress." Rosenberg, *op. cit. supra* note 25, at 272.

[60] U. S. CONST. Art. 1, § 10, cl. 1.

[61] Sinking-Fund Cases, 99 U. S. 700 (1878); Highland v. Russell Car & Snow Plow Co., 288 Pa. 230, 135 Atl. 759 (1927); see Canada Southern Ry. Co. v. Gebhard, *supra* note 44, at 539, 3 Sup. Ct. at 371 (1883). Although this is questioned in a *dictum* in Hepburn v. Griswold, 75 U. S. 603, 623 (1869), yet "It would in fact seem to be established that, because Congress is not expressly prohibited from passing any law impairing the obligation of contracts, it may, in the exercise of powers that are expressly given it, enact laws the indirect effect of which is to impair the obligation of contracts previously entered into." 2 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 1253.

[62] U. S. CONST. Art. 1, § 8, cl. 4.

[63] U. S. CONST. Art. 1, § 8, cl. 18.

[64] Cutcheon, *op. cit. supra* note 49, at 75.

[65] Judge Hough, as quoted by Cravath, *op. cit. supra* note 6, at 154.

[66] Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade* (1928) 28 COL. L. REV. 29.

[67] *Ibid.* 32.

imminent many corporate insolvencies,[68] the question of reorganization is again brought to a focus. The need for adequate legislation is again felt. Certainly it would be advantageous to enable corporations to make the structural changes necessary to accommodate their present needs and possibilities for future growth without the delay, uncertainty, expense, and confusion which now exist. It is neither unreasonable nor inequitable to disarm a recalcitrant minority, of the weapon by which it seeks to force the majority to grant it terms entirely disproportionate to the number and value of the claims represented. As was said by the Supreme Court of the United States, as long ago as 1883.

> "It seems eminently proper that where the legislative power exists some statutory provision should be made for binding the minority in a reasonable way by the will of the majority." [69]

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[68] See *supra* notes 1 and 4. The immediate situation is so serious that Congress has created, in accordance with President Hoover's suggestion, a Reconstruction Finance Corporation to lend $2,000,000,000 to hard-hit industries unable to get credit elsewhere. U. S. DAILY, Jan. 23, 1932, at 2647; TIME, Jan. 25, 1932, p. 11.

[69] Canada Southern Ry. v. Gebhard, *supra* note 44, at 535, 3 Sup. Ct. at 368.