

most equitable of custody decrees; care of the child was awarded to each parent, alternately, for equal periods of time, and provision was made for modification in the future. Yet the majority view, and the present case, permit a custodian to evade that type of decree by removing the child to another jurisdiction.

Since cases like the present one do represent the modern view, however, perhaps the only solution is to have the court awarding custody place strong economic pressure upon the custodian of the child to secure obedience to modifications of the original decree. It will do little good for the first court to threaten the custodian with punishment for contempt if the child is removed from the court's jurisdiction, since full faith and credit will not be given to modifications of the custody decree while parent and child are outside the state. *People ex rel. Wagner v. Torrence*, 27 P. (2d) 1038 (Colo. 1933). But the first state might require a bond conditioned upon full obedience to future orders of the court as a condition precedent to securing custody of the child. *Mattox v. Mattox*, 129 Okla. 301, 264 Pac. 898 (1928).

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Corporate Reorganization—Premature Receivership—"Upset Price" Doctrine—[Federal].—The current financial position of the National Radiator Corporation, judged by the ratio of liquid assets to current liabilities, was excellent; however, the corporation had sustained heavy operating losses in each year since its organization in 1927, and the officers and directors believed that some readjustment of the capital structure, consisting in the main of a large issue of debentures, was necessary to escape ultimate insolvency. A plan of reorganization involving an exchange of securities was proposed, and eventually accepted by ninety-five per cent of the debenture holders. Pursuant to the plan, interest payments on the debentures were defaulted. Thereupon certain dissenting debenture holders sued to collect the interest past due; to frustrate their action and effectuate the reorganization, a suit in the nature of a creditor's bill was brought by the bondholders' committee, the prior suit enjoined, and a receiver appointed. The court set an upset price about ten per cent in excess of the liquid assets of the corporation, relying entirely on figures compiled by the bondholders' committee, a nominee of which became the purchaser at the receiver's sale at a sum slightly above the upset price. At the hearing on confirmation of the sale, two groups of creditors objected, the first on the theory that the court lacked equity jurisdiction of the suit, and the second on the ground that the sale price was inadequate. *Held*, the first group was entitled to payment of its claims in full because the receivership and sale was fraudulent in law, since it had hindered and delayed the collection of these claims while the corporation was solvent; and the second group was entitled to that sum in cash which they would have received if the property had been sold at a proper price. *First National Bank v. Flershem*, 290 U.S. 504, 54 Sup. Ct. 298 (1934), rehearing denied Feb. 5, 1934.

Since the sanction given the friendly receivership in *Re Metropolitan Railway Receivership*, 208 U.S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403 (1908), the Supreme Court has shown a gradual though decided reversal of feeling toward this device to accomplish corporate readjustment. See *Harkin v. Brundage*, 276 U.S. 36, 48 Sup. Ct. 268, 72 L. Ed. 457 (1928), noted in 41 Harv. L. Rev. 804 (1928); *Riehle v. Margolies*, 279 U.S. 218, 49 Sup. Ct. 310, 73 L. Ed. 669 (1929), *Shapiro v. Wilgus*, 287 U.S. 348, 53 Sup. Ct. 142, 77 L. Ed. 355 (1932), noted in 81 Univ. Pa. L. Rev. 642 (1933); cf. *May Ho-*

*siry Mills v. F. W. Grand*, 59 F. (2d) 218 (D.C. Mont. 1932), noted in 27 Ill. L. Rev. 542 (1933); Brandeis, *Other People's Money* (1914). Adverse criticism has centered around incompetent receivers, exorbitant fees, and abuse of federal diversity jurisdiction. See Frankfurter, *Distribution of Judicial Powers Between United States and State Courts*, 13 Corn.L. Quar. 499, 529 (1928); Lowenthal, *The Investor Pays* (1933).

The principal case is the first square holding expressing this attitude of hostility. The court indicates that if the corporation had been insolvent (in the equity, not the bankruptcy sense, apparently), the receivership would have been proper. Cf. *Luhrig Collieries Co. v. Interstate Coal & Dock Co.*, 281 Fed. 265 (D.C. S.D. N.Y. 1922); *Kingsport Press v. Brief English Systems*, 54 F. (2d) 497 (C.C.A. 2d 1931); *Christian v. R. Hoe & Co.*, 63 F. (2d) 221 (C.C.A. 2d 1933). However sound such a dividing line may be in view of the logic of previous decisions, from a business viewpoint it seems lacking in merit. If default is inevitable, it would seem far better economically to effect a reorganization before the financial resources of the corporation have been exhausted. See Dewing, *Financial Policy of Corporations* (1926), bk. V, c. 5, 1016, c. 8. If receivership and reorganization is staved off until insolvency, continued operation of the corporation becomes far more difficult, and a purchaser for receiver's certificates must frequently be found. Moreover, great uncertainty will always exist as to when a corporation has reached the necessary hopeless stage that the court will label insolvency, and readjustments will be postponed even longer to avoid the heavy penalty of payment in full to dissenters meted out by the present case. As a result, it seems unfortunate that a broader rule of receivership jurisdiction, based perhaps on inevitable default, could not have been adopted. See Billig, *Corporate Reorganization: Equity vs. Bankruptcy*, 17 Minn. L. Rev. 237 (1933).

So long as the rule of the present case stands, however, industrial reorganization under the equity power of the federal courts will be somewhat hazardous, and it seems probable that some new method of reorganization will be developed, presumably by legislation. A possible model is Section 77 of the Bankruptcy Act, 47 Stat. 1474, 11 U.S.C.A. Supp. § 205 (1933), providing for railroad reorganizations. Cf. *Canada Southern Ry. v. Gebhard*, 109 U.S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020 (1883); see Swaine, *Corporate Reorganization under the Federal Bankruptcy Power*, 19 Va. L. Rev. 317 (1933); Swaine, *Federal Legislation for Corporate Reorganization: An Affirmative View*, 19 Am. Bar Assn. Jour. 698 (1933); but see Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 Va. L. Rev. 541, 698 (1933); Morford, *Federal Legislation for Corporate Reorganization: A Negative View*, 19 Am. Bar Assn. Jour. 702 (1933). It is somewhat doubtful, however, whether such a statute would eliminate many of the present evils of receivership. See Weiner, *Reorganization under Section 77: A Comment*, 33 Col. L. Rev. 834 (1933); Lowenthal, *The Railroad Reorganization Act*, 47 Harv. L. Rev. 18 (1933); cf. Douglas, *Protective Committees in Railroad Reorganizations*, 47 Harv. L. Rev. 565 (1934).

The holding as to the second group of creditors is understandable, since the lower court had fixed the upset price below the scrap or nominal value of the property. The language used by the court, however, and the directions given for the calculation of the sum to be paid these creditors, increase still further the hazards of reorganization by the usual judicial sale, even though the corporation is able to meet the test of insolvency. Previous decisions had shown considerable uncertainty as to the exact function of the upset price, and the factors which should enter into its determination. See *Blair*

*v. St. Louis Ry.*, 25 Fed. 232 (C.C.E.D. Mo. 1885) (upset price fixed at nominal figure); *Equitable Trust Co. v. Western Pacific Ry.*, 233 Fed. 335 (D.C.N.D. Cal. 1916) (earnings capitalized); *Fearon v. Bankers' Trust Co.*, 238 Fed. 83 (C.C.A. 3d 1916) (price reduced in order to secure a bidder); *Palmer v. Bankers' Trust Co.*, 12 F. (2d) 747 (C.C.A. 8th 1926) (weight given to market value of securities prior to reorganization); *Guaranty Trust Co. v. C.M. & St. P. Ry.*, 15 F. (2d) 434 (D.C.N.D. Ill. 1926) (valuation for rate-making purposes rejected as basis for upset price); *American Steamship Co. v. Wickwire Spencer Steel Co.*, 42 F. (2d) 886 (D.C.S.D. N.Y. 1930) (court refused to set any upset price on the theory the matter was within its discretion); Spring, Upset Prices in Corporate Reorganization, 32 Harv. L. Rev. 489 (1919); Swaine, Reorganization of Corporations: Certain Developments of the Last Decade, 27 Col. L. Rev. 901, 923-24 (1927); note, 26 Ill. L. Rev. 325 (1931).

The present case gives no exact basis for fixing an upset price, beyond saying that the second class of objecting creditors is entitled to the sum they would have received on a sale of the property at a "proper price," and that a price below scrap value, such as had been fixed by the lower court, was wholly inadequate. Several possible definitions of "proper price" remain, however; see Weiner, Conflicting Functions of the Upset Price in a Corporate Reorganization, 27 Col. L. Rev. 132, 139-140 (1927). Perhaps any of the previous bases for determining upset price which gave dissenters a reasonable amount, though somewhat lower than the actual value of the property, may still be used. Or, in view of the importance which the court attaches to the fact that an industrial, not a public utility, reorganization was involved, and the property could be divided into smaller units, increasing the chances of finding an outside bidder, it might be expected that the property could be sold at a figure approximating its true value; hence, perhaps, the upset price should be set as near the true value of the property as possible, to prevent a sacrifice at a forced judicial sale. See 54 Sup. Ct. 298, 306-307; note, 82 Univ. Pa. L. Rev. 539 (1934). But it may also be argued that outside buyers rarely appear, and that the majority committee is, as the court notes, a "willing purchaser" and almost invariably the successful bidder at the sale. The committee, however, can rarely, if ever, afford to bid the full value of the property; therefore, a court might only require that the committee bid the highest figure that will still permit the successful consummation and financing of the reorganization and the payment of dissenters in cash.

If the present case is construed to establish either of the last two rules for the fixing of an upset price, it would seem that the present method of reorganization by judicial sale to the majority will be no longer feasible in most cases. If a creditor can secure approximately the same amount in cash or securities of somewhat dubious marketability, he will normally choose the former; thereby the number of dissenters will be increased, and the problem of raising sufficient cash to pay off dissenters and finance the reorganization may often prove insurmountable.

Because of the restrictions the principal case places on the usual method of effecting corporate readjustments, it seems probable that the next step will be to force dissenters to accept a fair plan of reorganization and to give up their option of taking cash. Apparently a creditor has no inherent right to a judicial sale; he may be compelled to give up his claim, and accept cash equal to the fair value of the claim as appraised by the court. *Coriell v. M. White*, 54 F. (2d) 255 (C.C.A. 2d 1931), rev'd on other grounds, *National Surety Co. v. Coriell*, 289 U.S. 426, 53 Sup. Ct. 678, 77 L. Ed. 1300 (1933);

notes, 45 Harv. L. Rev. 697 (1932), 41 Yale L. Jour. 577 (1932). If a creditor may be compelled by a court to give up his right to a judicial sale in return for a cash appraisal value, it can be argued further that a court of equity has the inherent power to compel a creditor to accept securities under a fair reorganization plan in return for his claim. Cf. *Phipps v. C., R.I. & Pac. Ry. Co.*, 284 Fed. 945 (C.C. A. 8th 1922); see *Northern Pacific Ry. v. Boyd*, 228 U.S. 482, 508, 33 Sup. Ct. 554, 57 L. Ed. 931 (1913); Colin, Why Upset Price? An Argument for Reorganization by Decree, 28 Ill. L. Rev. 225 (1933); Rosenberg, Reorganization—The Next Step, 22 Col. L. Rev. 14 (1922); but cf. Swaine, Reorganization—The Next Step: A Reply to Mr. James N. Rosenberg, 22 Col. L. Rev. 121 (1922). In case of a bond issue secured by a mortgage to a trustee, such a result may be justified as an exercise of the jurisdiction of the court of equity over trusts. See *Straus v. Chicago Title & Trust Co.*, 273 Ill. App. 63 (1933), noted in 1 Univ. Chi. L. Rev. 623 (1934). If equity lacks inherent power to force dissenters to accept a plan, a statute may perhaps supply that deficiency. See *Detroit Trust Co. v. Stormfjeltz-Loveley Co.*, 257 Mich. 655, 242 N.W. 227 (1932); cf. *Canada Southern Ry. v. Gebhard*, 109 U.S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020 (1883). A dissenter should only be forced to accept an equitable plan, however, and such judicial or statutory action as has been suggested would focus attention clearly on the difficult problem of determining when a plan is fair to all classes of creditors and shareholders of a corporation. See *Northern Pacific Ry. Co. v. Boyd*, 228 U.S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931 (1913); *Kansas City Ry. Co. v. Central Union Co.*, 271 U.S. 445, 46 Sup. Ct. 549, 70 L. Ed. 1028 (1926); *Jameson v. Guaranty Trust Co.*, 20 F. (2d) 808 (C.C.A. 7th 1927); Payne, Fair and Equitable Plans of Corporate Reorganization, 20 Va. L. Rev. 37 (1933); Bonbright and Bergerman, Two Rival Theories of the Priority Rights of Security Holders in a Corporate Reorganization, 28 Col. L. Rev. 127 (1928); Buscheck, A Formula for the Judicial Reorganization of Public Service Corporations, 32 Col. L. Rev. 964 (1932); Rohrlch, Creditor Control of Corporations; Operating Receiverships; Corporate Reorganizations, 19 Corn. L. Quar. 35, 53 ff. (1933).

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Criminal Law—Repeal of Constitutional Provision—Effect on Pending Prosecutions—[Federal].—Defendant, indicted in June, 1933 for violation of the National Prohibition Act, was not brought to trial until after the ratification of the Twenty-First Amendment, and pleaded that amendment as a bar to conviction. *Held*, that all proceedings pending under the prohibition laws at the date of the passage of the Twenty-First Amendment, and of the repeal of the Eighteenth Amendment thereby, were terminated automatically, and defendant must be discharged. *United States v. Chambers*, 54 Sup. Ct. 434 (1934).

Defendant had been convicted before the repeal of the Eighteenth Amendment, and the conviction had been affirmed by the Circuit Court of Appeals; petition for *certiorari* was filed in the Supreme Court after the repeal. *Held*, the judgment below must be reversed and defendant discharged. *Massey v. United States*, 54 Sup. Ct. 532 (1934).

The repeal of the Eighteenth Amendment raises for the first time the question of the status of prosecutions begun under a federal statute but incomplete when the constitutional provision authorizing the statute was repealed. No other federal constitutional provision has been repealed, and no similar situation appears to have given rise