legislature as to desirable changes in the local statute of frauds with a view of bringing about greater uniformity in the cases and yet to conform to business and commercial practices.[25]

Corporations—Readjustment of Preferred Stockholders' Rights to Arrearages—[Wisconsin].—In an attempt to scale down arrearages on cumulative first preferred stock, the defendant corporation, among other amendments to the charter, authorized and directed the directors to declare a dividend of $20 on each share of first preferred stock, payable in non-interest bearing dividend warrants maturing in ten years and convertible into 1¼ shares of common stock. The warrants were to be offered in full discharge of all accumulated and unpaid dividends, which totaled $35 per share. By separate resolution, the board was directed to purchase the warrants at fifty per cent of face value ($10) from those desiring to sell to the corporation. The plaintiff shareholder sued to enjoin. *Held* (two judges dissenting), injunction denied. The court, however, gave the dissenting stockholder judgment for a cash dividend of $20 per share. *Johnson v. Bradley Knitting Co.*[1]

After periods of depressed earnings corporations whose capital structures contain cumulative preferred stock are often faced with accumulations of dividend arrearages which it apparently will require several years of normal earnings to discharge and which, meanwhile, prevent payment of dividends on common stock. Many corporations, in order to appease stockholders, or for other reasons such as raising new capital or improving the credit of the corporation, have attempted to meet this situation by plans of readjustment involving charter amendment. These plans may be grouped into two types: compulsory and voluntary. Under the former a charter amendment eliminating arrearages applies to all shares; under the latter stockholders are given at least an apparent option to retain their arrearages. Obviously the compulsory plan, if sanctioned by the courts, is the better from the point of view of the corporation, since all stockholders are forced to participate in the plan of readjustment.

The propriety of amendments providing for the compulsory adjustment of arrearages is largely a matter of construction of the statutes authorizing charter amendment.[2] Compulsory elimination of accrued cumulative dividend arrearages has received no favor in the courts.[3] It seems probable that a very specific statute, such as

[25] Costigan points out however that legislation cannot cover every conceivable point. Costigan, *op. cit. supra* note 15, at 35.

[1] 280 N.W. 688 (Wis. 1938).

[2] For a discussion of the background of the present practice of reserving to the state the power to alter or repeal the corporate charter, see 7 Fletcher, Cyclopedia Corporations 79 ff. (perm. ed. 1931). For a discussion of recent developments, see 46 Yale L.J. 985 (1937) and 4 Univ. Chi. L. Rev. 139 (1936).

The corporate charter may be amended either by the state or by stockholders in pursuance of an act of the legislature under the reserved power authorizing change in that manner. This note deals solely with the latter type of situation.

The constitutional problem of impairment of contract or impairment of vested rights would arise if an attempt was made to authorize by statute a change in the contract of stockholders who purchased stock before the operation of the statute.

[3] See Berle and Means, The Modern Corporation and Private Property 268 (1934); Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (1923); Keller v. Wilson & Co.,

the present New Jersey act,[4] would allow such a readjustment; on the basis of the strong authority of the line of holdings by the Delaware supreme court,[5] however, it is doubtful whether less specific statutes would be held to grant such power.[6] Courts seem to feel that accrued arrearages, although no actual dividend has been declared, are to be treated somewhat in the nature of a debt.[7] It would seem the better view to protect the preferred stockholder as far as possible, since the principal feature and primary inducement to buy is the alleged security of preferred stock.[8]

Under a *voluntary* plan of reorganization pursuant to charter amendment, presumably a dissenter has an option in the acceptance or rejection of a proposal to eliminate his arrearages. Thus the problem of construction of statute and validity of amendment does not arise. The rights of a dissenter to arrearages may be jeopardized, however, where so-called voluntary plans mean financial loss to a non-assenter. It is said in *Yoakam v. Providence Biltmore Hotel Co.*[9] that a so-called voluntary plan is in law compulsory "if to refrain therefrom would result in an obvious and substantial loss." This seems a fair rule, and insofar as this is the law, the interest of the preferred stockholder seems more secure than has been apparent heretofore. The result is in line with the policy of safeguarding arrearages illustrated in the Delaware line of cases.

What will the courts consider a compulsory plan? Are amendments which, standing alone, would be allowed although destructive of rights (*e.g.*, reduction of the dividend rate,[10] elimination of the sinking fund, or creation of prior preferred stock[11]),

190 Atl. 115 (Del. 1937); Consolidated Film Industries, Inc. v. Johnson, 197 Atl. 489 (Del. 1937); Lonsdale Securities Corp. v. Internat'l Mercantile Marine Co., 101 N.J. Eq. 554, 139 Atl. 50 (1927); Roberts v. Roberts-Wicks Co., 184 N.Y. 257, 77 N.E. 13 (1906); Havender v. Federal United Corporation, 13 Corp. Journal 222 (Del. Ch. 1938). See also Harr v. Pioneer Mechanical Corp., 65 F. (2d) 332 (C.C.A. 2d 1933). *Cf.* Windhurst v. Central Leather Co., 105 N.J. Eq. 621, 149 Atl. 36 (1930); Williams v. Nat'l Pump Corp., 46 Ohio App. 427, 188 N.E. 756 (1933); Romer v. Porcelain Products Inc., 1 Prentice-Hall Corporation Service, 20–266 (Del. Ch. 1938).

[4] N.J. Rev. Stat. 1937, § 14: 11–1. The New Jersey law permits the corporation by amendment to "provide for funding or satisfying rights in respect to dividends in arrears."

[5] See cases cited in note 3, *supra.*

[6] It has been argued that the New Jersey courts have indicated that elimination of arrearages will be more readily permitted if there is no corporate surplus. Compare Windhurst v. Central Leather Co., 105 N.J. Eq. 621, 149 Atl. 36 (1930) with Colgate v. United States Leather Co., 75 N.J. Eq. 229, 72 Atl. 126 (1909). See Berle and Means, *op. cit. supra* note 3 at 217.

[7] Courts speak of the right to arrearages as a "vested right." This is question-begging terminology since if power is granted to change that right it is not vested. See Keller v. Wilson & Co., 190 Atl. 584 (Del. 1936).

[8] For consideration of policy involved, see Curran, Minority Stockholders and the Amendment of Corporate Charters, 32 Mich. L. Rev. 743 (1934); 46 Yale L.J. 985 (1937); 4 Univ. Chi. L. Rev. 645 (1937); Securities Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees, part VII, sec. III (1938).

[9] 34 F. (2d) 533, 537 (D.C.R.I. 1929).

[10] Davis v. Louisville Gas and Electric Co., 16 Del. Ch. 157, 142 Atl. 654 (1928).

[11] General Investment Co. v. American Hide and Leather Co., 98 N.J. Eq. 326, 129 Atl. 244 (1925).

not permissible when coupled with a voluntary plan of eliminating arrearages, which stockholders must accept or suffer financial loss, since forcing cancellation of arrearages is a type of adjustment not permitted as part of a compulsory plan?[12] The *Yoakam* case intimated this, saying: "It is urged that the exchange . . . . is permissive, not compulsory. This interpretation, however, cannot be taken too seriously. . . . . In other words, if the holder of first preferred stock were to elect not to make the exchange, he would be left with a stock called first preferred but stripped of nearly every characteristic which gave it value."[13]

Voluntary plans fall into two categories: (1) Plans containing as a feature the issuance of prior preferred stock, and (2) Plans attempting elimination of arrearages without issuance of prior preferred stock.

In the former category there are three solutions. First, a corporation may not be permitted to carry through a voluntary plan which forces cancellation of arrearages through financial pressure applied by destructive (even though permissible) compulsory amendments. This may seem anomalous, but is an understandable position since the shareholders who chose to accept that voluntary plan probably agreed to the elimination of rights in contemplation of that voluntary plan, *i.e.*, they never would have agreed to the elimination of rights unless they knew that they could trade in their stock. (This would also indicate that stockholders considered everything part of a single plan.) *Johnson v. Lamprecht*[14] is a recent indication that this approach, in accord with the *Yoakam* dictum, will not be followed by the courts.

Second, although the corporation may completely carry through the plan, the courts may protect the dissenter's rights both on declaration of dividends and dissolution of the corporation. Arrearages will be protected if the dissenter is to be granted an injunction against dividends on the new preferred until an equal amount is paid on his arrearages, and if a dissenter is allowed to share equally with those who made the exchange, on dissolution. In *Wilcox v. Trenton Potteries Co.*[15] a voluntary plan for funding arrears of dividends on preferred stock was executed. The holders were offered non-cumulative shares for their stock, plus "funding certificates" for the dividend arrearages on that stock, the certificates to pay interest of four per cent per year out of the earnings of that year, the interest to be non-cumulative. The court said that this interest payment was in fact a dividend, and if the four per cent payment was a dividend it could not be made to the assenting class of preferred shareholders to the exclusion of the others. As a consequence, if the corporation made provision for the payment of such interest, it would be required to pay a like amount to non-assenting holders of preferred stock. This case, while contrary to the *Yoakam* dictum in allowing the plan to go through at all, is yet in accord with the policy of it in refusing to allow destruction of the rights of the dissenter, and if followed perhaps makes the protection offered in the *Yoakam* dictum unnecessary.

[12] See Williams v. Standard Oil Co. of Louisiana, 278 U.S. 235 (1929) and Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[13] 34 F. (2d) 533, 537 (D.C.R.I. 1929).

[14] 133 Ohio St. 567, 15 N.E. (2d) 127 (1938). The court here refused to enjoin the consummation of a plan offering prior preferred stock for old preferred plus arrearages. The court seemed to feel that although the Yoakam dictum was sound, this plan did not go so far as to be governed by the sanctions of that dictum. See the appellate court opinion 11 Ohio Opinions 323 (1937).

[15] 64 N.J. Ch. 173, 53 Atl. 474 (1902).

But, as the third possible solution, the courts have refused to protect the dissenter in either way indicated above in decisions more recent than the *Wilcox* case. The outstanding decision on the failure to protect on dissolution is *Matter of Duer*,[16] which, in contrast to the Delaware view, upheld the terms of a readjustment which gave assenters a prior preferred stock. The decision is anomalous in allowing by indirect method the elimination of the right to arrearages, a readjustment which may not be made directly. The *Duer* case is directly contrary to the *Yoakam* dictum, as well as to the language of the court in the *Wilcox* case, and indicates that this type of plan may not be treated as compulsory even if destructive of the dissenter's rights.[17] Defense of the position is that the dissenter has the powerful wedge of the right to the payment of accruals before the payment of dividends to the common stockholder, and in the normal case will suffer little or no prejudice.[18]

It has been suggested that, although the *Yoakam* dictum may not be followed, the protection of equity will aid the dissenter to some extent.[19] This may be some com-

[16] 270 N.Y. 343, 1 N.E. (2d) 457 (1936).

[17] See also Ainsworth v. Southwestern Drug Corp., 95 F. (2d) 172 (C.C.A. 5th 1938), in which the court refused to enjoin payment of dividends on prior preferred stock in preference to the old preferred.

[18] A distinction should be made between two types of cases of issuance of prior preferred stock. In the one case issuance is part of a plan which decreases the value of the old preferred stock by factors or amendments other than those resultant from the very issuance of prior preferred stock. These may take the form of a reduction of the sinking fund, elimination of the cumulative feature, and reduction of the dividend rate. This plan virtually forces the stockholder to take new preferred in exchange for his old stock plus arrearages. In the other type of case there is permissible issuance of prior preferred stock without the accompanying decrease in rights of the old preferred. This destroys the right of the stockholder to priority in dividends and on dissolution. It may be argued that this also forces exchange and giving up of arrearages since there is loss of preference without the added protection of additional capital obtained in the usually contemplated instance of issuance of preferred stock to be sold on the open market. The above-mentioned types of cases must be distinguished for two reasons: First, there is no lessening of rights which amounts to a stripping of nearly every characteristic which gave it value, forcing stockholders to part with arrearages, through the vote of those intending to exchange their stock for preferred stock. A class vote is usually required when incidents of preferred stock are changed. The fact that preferred stock was issued constitutes a change which was permissible in any event. Second, the stockholder retains the power of preventing payment of dividends on common stock until his accrued dividends are paid.

It may be argued, on the other hand, that the time element is important, since common stockholders (who usually control the management) may hold out to force an exchange. This argument must be discounted for these reasons: First, the discretion of the board of directors is very wide and it is very difficult to force payment of a dividend in any case; second, the acceptance of the plan by the others increases the dissenter's chance of getting his arrearages paid; and third, as a practical matter, since the whole purpose of these machinations is to pay dividends on common stock more quickly than otherwise possible, the dissenter is likely to be paid off as quickly as possible.

[19] See Securities Exchange Commission Report, *op. cit. supra* note 9, app. B, part III; Berle and Means, *op. cit. supra* note 9, at 150, 151, and 267; Shields v. Ohio, 95 U.S. 319, 326 (1877) ("The power of alteration and amendment is not without limit"); Johnson v. Lamprecht, 133 Ohio St. 567, 15 N.E. (2d) 127 (1938).

fort to the dissenter, but the scope of these equitable powers is much in doubt and they have seldom been used.[20]

In the other type of voluntary readjustment, involving no issuance of prior preferred stock, the stockholder retains his right to preference both in dividends and on dissolution. Rights of dissenters do not become subordinate to those of acceptors and are not jeopardized by the *exchange.*

Although in the instant case the plaintiff claimed that the plan was in fact "compulsory," not "voluntary," that argument is less persuasive in this type of situation than where prior preferred stock is involved. The trial court here found that the plan was voluntary and that thus the fact that a $20 dividend warrant was offered in full satisfaction of $35 accumulated arrearages was not a transaction in which the court need interfere. There is some judicial support for this point, and it would seem that the trial court was correct, since the dissenter retains all rights.

The supreme court modified the trial court's decision and, as the Delaware court did in the cases of attempted compulsory elimination of arrearages, protected the dissenter. The court gave the dissenting stockholder a judgment for $20 in cash. It is doubtful that the dissenter needs protection in this type of situation since he retains the right to full arrearages before dividends on common stock can lawfully be paid.

The theory upon which the court gave judgment for a cash dividend is difficult to perceive. It was probably based on the appellant's contention that the corporation cannot declare a dividend to those only of its first preferred shareholders who are willing to take less than the amount due them in full payment of their claim. This is predicated on the rule that a dividend may not be declared to a part of the preferred shareholders to the exclusion of the rest.

Other decisions are in conflict with the instant case. In *Hastings v. International Paper Co.*[21] the following resolution was adopted: "That for the purpose of adjusting and settling in full the deferred cumulative dividends upon the outstanding preferred stock of this company, a dividend of 33½ per cent upon such stock is hereby declared, payable 7½ per cent in cash, 14 per cent in preferred stock, of this company, and 12 per cent in common stock, and that such dividend shall be paid . . . . to the holders of undisputed preferred stock to be stamped with a notation thereon to the effect that the accumulated dividends have been settled and paid in full." Ninety-one per cent accepted. The plaintiff did not accept and sued to compel declaration of dividends since the resolution only made available enough cash to pay 7½ per cent of the accumulations. The court dismissed the complaint, saying, "The board merely declared a plan to adjust and settle deferred dividends upon the corporation's preferred stock, with such of the holders as were willing to accept such settlement, by paying 7½ per cent of such accumulated dividends in cash, 14 per cent thereof in preferred stock, and 12 per cent in the common stock of the corporation. The board of directors declared the 33½ per cent dividend *only in the manner stated.*" In *Wilcox v. Trenton Potteries,*[22] which was similar to the instant case, the court refused to enjoin an attempt

[20] Some jurisdictions have statutes requiring the purchase of dissenters' shares at an appraised value when certain rights are changed. The inadequacy of these statutes is discussed in the Securities Exchange Commission Report, *op. cit. supra* note 9, at 195 ff. and app. B, sec. III.

[21] 187 App. Div. 404, 175 N.Y. Supp. 815 (1919).

[22] 64 N.J. Ch. 173, 53 Atl. 474 (1902).

to fund arrears with interest-bearing certificates. In *Terry v. Eagle Lock Co.*[23] in denying a judgment for cash when a stock dividend was declared, the court said, "It is in effect asking the court to make a new dividend instead of enforcing the one made by the company. If the petitioner is entitled to receive anything it is stock." In none of the cases involving the exchange of prior preferred stock for arrearages was a cash judgment for accruals given to dissenters.

Perhaps the peculiar result in the instant case might have been prevented by greater care in the drafting of the amendment. Had the drafters in place of the words *"declare a dividend"* used some such phrase as *"offer and exchange"* the result might have been different. The identical words, "declare a dividend," however, were used in the *Hastings* case in which a contrary result was reached.

The decision puts a premium on dissenting in this situation, since the assenter receives a $20 dividend warrant, exchangeable for only $10 in cash, while the dissenter receives an immediate cash payment of $20. This appears inequitable from the point of view of the assenting stockholder, and it is likely to make a voluntary plan of eliminating arrearages difficult to carry through. Whether or not this case goes too far in protecting arrearages, in view of the fact that the dissenter retains his right of priority to dividends, is a question of policy.[24] It seems, however, that unless such an important feature of preferred stock as its accrued cumulative dividends is protected to some degree, the advantages of such shares will be highly illusory and investment in preferred stock will be discouraged.

Criminal Law—Abortion—Preservation of Health as a Justification—[England].—An eminent obstetric surgeon in what was evidently a test case defended his performance of an abortion on a feeble minded girl of fifteen whose pregnancy resulted from a rape, on the ground that the girl's health would have otherwise been seriously endangered. The defendant's contention was that danger to health was no less a justification for his conduct than danger to life. Although the English statute does not permit abortion even where necessary to save the woman's life, the jury was instructed that if the defendant acted in good faith "for the purpose only of preserving the life of the mother" he was entitled, and it was his duty, to perform the operation. Furthermore, if pregnancy was likely to make the mother a "physical or mental wreck" they might conclude that the operation was performed to save her life. *Held* for the defendant. The jury under these instructions and on the basis of medical evidence that unless the pregnancy was interrupted the girl would become a mental wreck acquitted the defendant. *Rex v. Bourne.*[1]

This case, which gives judicial recognition to the medical belief that the operation should be permissible where continued pregnancy would injure the mother's health,[2]

[23] 47 Conn. 141, 164 (1879). See also State of Maryland v. Baltimore and Ohio R.R., 6 Gill (Md.) 363 (1847); Bulger Block Coal Co. v. United States, 48 F. (2d) 675 (Ct. Cl. 1931); Helvering v. General Utilities and Operating Co., 74 F. (2d) 972 (C.C.A. 4th 1935).

[24] Allowing the corporation to persuade the stockholders to part with their rights is a problem of fair presentation of information to be dealt with by the Securities Exchange Commission in its control over solicitation of proxies.

[1] 186 L.T. 87 (1938).

[2] British Medical Association Committee on Medical Aspects of Abortion 24 (1936).