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PROTECTIVE COMMITTEES IN RAILROAD REORGANIZATIONS *

I

RECENT criticisms by Mr. Lowenthal of railroad reorganization procedure, both before [1] and after [2] the enactment of Section 77 of the Bankruptcy Act,[3] raise anew not only the problem of private versus public control, but also the constitution, functions, and control of protective committees. As to the former it is clear that he favors a more highly concentrated control in the hands of the Interstate Commerce Commission. But as his proposal is general and not sufficiently specific to give a clear picture of that new control, it will be considered here only incidentally. There are, however, certain basic assumptions involved in his treatment of protective committees which it would be profitable to reëxamine.

One of these assumptions seems to be that a major defect of the old and present system is the absence of any real opportunity for independent judgment and approval of the reorganization plan by security-holders; [4] that their ratification is wholly fictitious,

* Since I have no interests, professional or otherwise, in any of the reorganizations discussed herein and since matters of record reveal only a small part of the picture, I have been dependent on private inquiry and observation for obtaining the vitally important factual material on which this article is based.

[1] LOWENTHAL, THE INVESTOR PAYS (1933).

[2] Lowenthal, *The Railroad Reorganization Act* (1933) 47 HARV. L. REV. 18.

[3] 47 STAT. 1474–82 (1933).

[4] See Lowenthal, *supra* note 2, at 43–46.

made so by the way in which committees are constituted and deposit agreements drawn; and that any real reform in reorganization procedure would seek to inject the principles of true democratic rule in this regard. In this connection it is assumed that an improved procedure would afford the small and independent bondholder full opportunity to be heard on all matters affecting his interest.[5] This would mean cutting the Gordian knot of the deposit agreement so as to permit the depositor to have greater freedom on his part than such agreements traditionally permit.[6]

Secondly, there is the implication or suggestion that adequate protection to the small investors cannot be afforded by the larger (usually the institutional) investors because, it is said, the latter are so closely tied to the banking and speculative equity groups.[7]

And, finally, it is suggested that protective committee racketeering is not only possible but probable under the new legislation. Primary reference here is to the item of committee expense which, though large in total amount, returns, it is said, no proportionate benefit;[8] and to the opportunities afforded and granted committee members and their associates to make a profit by trading in the deposited securities, dealing with the committee, or otherwise.[9] To prove these propositions Mr. Lowenthal uses material (mostly from deposit agreements) out of the current reorganizations under the new legislation.

Two propositions seem tolerably clear to me. In the first place the records and activities of the various committees to which Mr. Lowenthal makes reference not only fail short of sustaining the truth of the implications of his statements, but also go far in establishing that there is great utility and virtue in having independent, well organized, aggressive, powerful protective committees. Secondly, whether or not Mr. Lowenthal's *ad hoc* criticisms are justified, the potential or probable defects in the present system which he conjures up are by no means fantastic. But the solution of the difficulty lies not, as he implies, in emasculating the committees nor in concentrating more power in the individual bondholders, but rather in strengthening the position of com-

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[5] See *id.* at 49–51.
[6] See *id.* at 36–40, 43–46, 51–56.
[7] See *id.* at 48–49.
[8] See *id.* at 52–56.
[9] See *id.* at 38–39.

mittees, in assuring them full and complete powers, and in supplying control over them at the time of their constitution.

II

Speaking generally, there has long been a need for reform and regulation of the practices of protective committees. This need has not been peculiar to railroads — in fact, it has probably been less acute there than in other types of reorganizations. The need for increased regulation has not been due primarily to the incompetency or to the fraudulent proclivities of committee members. Rather, the need has arisen because so often the committees have been constituted by the inside groups, those affiliated with or drawn from the old management or the financial interests associated with it. Often the interests of these members have been clearly those of speculative equity groups, not motivated solely or dominantly by the urge to protect the interests of the securities which they represent. Through the use of security-holder lists, peculiarly or solely available to them, they have in fact employed the committee as a device to perpetuate their own control, to protect themselves from attack by the security-holders, and to enhance their own opportunities for further profit. Under these circumstances, the small security-holder stood little chance to gain the real protection which any legal system should afford him. In the first place, it took no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars — or even less. It was clear that his real protection was to be found in a vigilant organization composed of others like himself who, by pooling resources and concentrating attack, could gain the needed strength and power necessary for the task at hand. But the usual result was that this widely diffused and disorganized minority never mobilized, because of their inertia, lack of adequate leadership, or otherwise. Or, if an organization did result, it was too often effectuated by an incompetent and piratical group of the legal profession who as often as not did the security-holders even more disservice than would the old management or financial group. Though the demand was insistent there had never emerged in this country any permanent agencies rendering a continuous service to these widely

scattered minorities. We have had to date no private organization comparable to the Shareholders' Protection Association [10] in England, permanently organized for respectable and competent patrol duty in the field of finance. Hence the result of the conditions, vividly described by Berle and Means,[11] has been particularly acute in reorganization procedure, because it enhanced and even invited opportunities for exploitation of the economic interests of rather helpless security-holders.

The problem of protection of minority interests in reorganizations generally is too involved for adequate treatment here. Nor is it quite comparable to the problem in railroad reorganizations. The latter is somewhat unique, made so because of the existence of the Interstate Commerce Commission, with a vast background of experience in railroad regulation. Through this public agency Congress sought to give further needed protection to investors. And it is believed that what was done proceeded in the right direction and that that agency can further be employed to supply additional protection. But it is submitted that the additional steps taken should be in quite other directions than those which Mr. Lowenthal apparently has in mind.

III

Mr. Lowenthal's seeming insistence on security-holder ratification has much to be said for it *in* an idealistic system. Actually, it is too much to expect. Practically, it would not work. Realistically, it does not conform to the requirements of the case. To be sure, this illusion of ratification permeates the law of reorganiza-

[10] A report on the activities of this company, including some of the specific accomplishments it has made, is to be found in *The Stock Exchange, Protection for Shareholders* (1933) 117 ECON. 499: "Though the Association may be expected, in due course, to press for the amendment of the company laws, its more immediate tasks are the organization of collective action in shareholders' interests and the representation of its members, as a proxy-holder at company meetings, when occasion demands. As far as possible it keeps a watchful eye on all company affairs and makes investigation whenever suspicion is aroused or information as to abuses is received. Apart from these functions it deals with a mass of inquiries from its members regarding the companies in which they are interested." It is a company limited by guarantee, without share capital. Membership is open, for an annual subscription of 10s., to all shareholders and debenture holders of British companies.

[11] BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

tion. But it is bound to be as illusive in Mr. Lowenthal's search as it was fictitious in the reorganization lawyers' demonstration of its existence. Professor Roger S. Foster has well stated the problem as follows:

"Any attempt to introduce democracy into reorganization practice calls for analysis of just what a corporate reorganization does. The fundamental assumption is that the enterprise has failed to live up to minimum expectations. Default has given rise to theoretical legal remedies of various creditors. But these remedies may be uncertain in scope, realizable only after protracted litigation, and more calculated to harm others interested in the enterprise than to fulfil the defeated expectations of those to whom the remedies belong. Different bond issues may be secured by mortgages on segments of a railroad, each vital to the system and useless by itself. The necessity of pooling their securities is obvious, but unfortunately there is no mathematical basis for determining the settlement. Again, foreclosing bondholders may have to compromise with junior interests to avoid delay, or resort to them as the most likely source of new money. What terms shall they offer? These are the commonplace problems of reorganization. Forty thousand scattered bondholders cannot settle them at town meeting. Vicarious negotiation is inevitable.

"If this negotiation is to be effective and expeditious the negotiators must be able to speak with authority. Bondholders' representatives cannot defend in open debate the concessions they are about to make without convincing the stockholders that better terms should be offered them. The atmosphere of disappointed hope which hangs over the whole enterprise makes it peculiarly difficult to satisfy everyone. If practically all, or two-thirds, or even a bare majority have to ratify a plan when made, then the negotiators must so arrange it that they already have the ratifying votes in their pockets when they start to bargain. The alternative is a chaos of interminable talk." [12]

In other words, once the committee is constituted it should have, for purposes of effectiveness, powerful executive control. Realities of the case make it impossible continually to communicate and negotiate with the vast array of security-holders. A committee never would be able to function if it had only such amorphous support of its depositors as Mr. Lowenthal thinks is necessary. In this connection he criticizes current deposit agreements on the

[12] Book Review (1933) 43 YALE L. J. 352, 357.

ground that depositors are given no right to withdraw until the committee adopts a plan and that the failure to withdraw shall be considered as an execution of authority by the depositor to vote on his behalf and to accept the plan.[13] Assuming (contrary to fact and only for purposes of argument) that the only function of the committee is the preparation and adoption of a plan, it is impracticable to require more. The large number of depositors, their notorious inertia and failure to respond, and the difficulty of reaching them make it necessary to adopt a rather simple rule of thumb to determine whether they have or have not accepted the plan. The failure to withdraw [14] probably is one of the few satisfactory rules of thumb available.[15] The will-o'-the-wisp of ratifi-

[13] See Lowenthal, *supra* note 2, at 45–46. The criticism that there can be a withdrawal and recapture of the vote only on payment of money overlooks the fact that committee protection worth having costs somebody some money. This cost would be about the same in the end, whether the bondholders deposit or authorize a committee to act by proxy or power of attorney, as is suggested by Mr. Lowenthal at 40.

[14] A withdrawal provision which in substance is typical is contained in the Deposit Agreement for the Chicago and Eastern Illinois Railway General Mortgage Five Per Cent Gold Bonds Committee. It reads as follows: "Any Depositor's failure so to withdraw shall for all purposes be deemed to be and shall be (a) an approval by him of the Plan so approved by the Committee for adoption, and (b) an execution by such Depositor, as of the last day during which such withdrawal would have been allowed, of authority to the Committee on his behalf to accept such Plan pursuant to Section 77 of the Bankruptcy Act, as now or then amended, with the same force and effect as though such authority were executed by a duly and separately executed writing; and, having failed so to withdraw, he shall be obligated promptly to execute and deliver to the Committee any further writing which it may require to that end." Bondholders' Deposit Agreement dated as of June 1, 1933, art. VI, p. 21.

[15] In this connection the recent Deposit Agreement, dated Dec. 26, 1933, of the Prior Lien Mortgage Bonds, Series A & Series B, of the St. Louis-San Francisco Railway gives certain additional protection or leeway to depositors which may or may not prove to be practical. Theoretically, it has much to be said for it. Article Seven, paragraph (f), provides in substance that if the Interstate Commerce Commission or other governmental authority having jurisdiction shall recommend any plan, and such plan shall not be adopted or approved by the Committee, every depositor shall nevertheless be entitled to file with the Commission or other governmental authority written acceptance of such plan in respect of the deposited bonds owned by the depositor "and the Bonds in respect of which any such acceptance shall be filed may be included in determining whether or not such plan has been accepted or approved by holders of the percentage of Bonds required by law, as fully as if such Bonds were not subject" to the deposit agreement. This right does not, of course, enlarge the right to withdraw nor interfere with the right of the Committee later to consummate its own plan. But it does indicate willingness

cation should not be taken too seriously. Remedy for the fundamental problem lies in other directions, discussed hereafter.

Mr. Lowenthal's second major point flows from a distrust of placing in the hands of institutional or large investors such powerful executive control as the deposit agreements bestow and which I believe are necessary. He can demonstrate that abuses have occurred in the past. No argument is needed that they can recur in the future. Abuses can arise in any system. But as a matter of fact Mr. Lowenthal's account would lead to the belief that we have actually made less progress under the new legislation than has been the case. All of the large railroads which have filed petitions under Section 77 have independent investor committees representing the bondholders.[16] These committees have been

on the part of one committee to go as far as practicable in giving opportunity to all depositors to vote with or against the Committee when the Commission plan is produced. I understand that the deposit agreements for the Fort Scott bonds and for the consolidated bonds contain identical provisions in this respect.

[16] There follows a list of the principal roads now operating under § 77 and of the committees formed by institutional holders to protect the holdings of various bond issues and of the members of those committees and their affiliations. Note that although investment bankers are represented on some of these committees, in no case do they either dominate or have a controlling vote:

Protective Committee for Missouri Pacific Railroad First and Refunding Mortgage 5% Gold Bonds:

John W. Stedman, Chairman; Prudential Ins. Co. of America, Newark.
Philip A. Benson, Dime Savings Bank, Brooklyn, N. Y.
George W. Bovenizer, Kuhn, Loeb & Co., New York, N. Y.
Frederick W. Ecker, Metropolitan Life Ins. Co., New York, N. Y.
Robert A. Franks, The Carnegie Corp. of N. Y.
S. Parker Gilbert, J. P. Morgan & Co.
Frederick P. Hayward, John Hancock Mut. Life Ins. Co., Boston.
Harold Palagano, New York Life Ins. Co., New York, N. Y.
Sterling Pierson, Equitable Life Assur. Soc. of the United States, New York, N. Y.
John C. Traphagen, Bank of New York & Trust Co., New York, N. Y.
Frederick W. Walker, Northwestern Mut. Life Ins. Co., Milwaukee.

Protective Committee for Chicago, Rock Island and Pacific Railway First and Refunding Mortgage 4% Gold Bonds, and Secured 4½% Gold Bonds, Series A:

Dwight S. Beebe, Chairman; The Mut. Life Ins. Co. of New York, N. Y.
Merrel P. Callaway, Guaranty Trust Co. of New York, N. Y.
Harry C. Hagerty, Metropolitan Life Ins. Co., New York, N. Y.
DeWitt Millhauser, Speyer & Co., New York, N. Y.
John W. Stedman, Prudential Ins. Co. of America, Newark.
Harold Stone, Onondaga Co. Savings Bank; representing National Association of Mutual Savings Banks.
Frederick W. Walker, Northwestern Mut. Life Ins. Co., Milwaukee.

Protective Committee for Chicago, Rock Island and Pacific Railway General Mortgage 4% Gold Bonds:

Leon O. Fisher, Chairman; Equitable Life Assur. Soc. of the United States, New York, N. Y.
Robert Dechert, Pennsylvania Mut. Life Ins. Co., Philadelphia.
Stacy B. Lloyd, Philadelphia Saving Fund Soc., Philadelphia.
James Lee Loomis, Connecticut Mut. Life Ins. Co., Hartford.
Robert H. Stenhouse, Bowery Savings Bank, New York, N. Y.

Protective Committee for Burlington, Cedar Rapids and Northern Ry. Consolidated First Mortgage 5% Bonds (Chicago, R. I. & P. Ry.):

Alfred H. Meyers, Chairman; New York Life Ins. Co., New York, N. Y.
Milo W. Wilder, Jr., The Mutual Benefit Life Ins. Co., Newark.
Sterling Pierson, Equitable Life Assur. Soc., New York, N. Y.
Fred P. Hayward, John Hancock Mut. Life Ins. Co., Boston.
Howard Greene, Northwestern Mut. Life Ins. Co., Milwaukee.
Wm. J. Lum, Dime Savings Bank, Wallingford, Conn.
Edwin S. Hunt, Waterbury Savings Bank, Waterbury, Conn.

Protective Committee for St. Louis-San Francisco Ry. Prior Lien Mortgage Bonds, Series A and Series B:

John W. Stedman, Chairman; Prudential Ins. Co. of America, Newark.
Howard Bayne, Prudential Ins. Co. of America, Newark.
Dwight S. Beebe, Mutual Life Ins. Co. of New York, N. Y.
Walter H. Bennett, Emigrant Industrial Savings Bank, New York, N. Y.
Philip A. Benson, Dime Savings Bank, Brooklyn.
H. A. Fortington, Royal-Liverpool Group of Ins. Cos., New York, N. Y.
Frank M. Gordon, First Nat. Bank of Chicago, Chicago.
Fred P. Hayward, John Hancock Mut. Life Ins. Co., Boston.

Protective Committee for St. Louis-San Francisco Ry. Consolidated Mortgage Bonds:

Frederick H. Ecker, Chairman; Metropolitan Life Ins. Co., New York, N. Y.
Bertram Cutler, New York, N. Y.
Pierpont V. Davis, The City Company of New York, Inc., New York, N. Y.
Wm. L. DeBost, Union Dime Savings Bank, New York, N. Y.
Wm. A. Law, Penn Mut. Life Ins. Co., Philadelphia.

Protective Committee for The Kansas City, Fort Scott and Memphis Ry. Refunding Mortgage Gold Bonds (St. Louis-San Francisco Ry.):

James A. Brewster, Jr., Chairman; Aetna Life Ins. Co., Hartford.
Jacob A. Barbey, New England Mut. Life Ins. Co., Boston.
J. F. B. Mitchell, Wood, Low & Co., New York, N. Y.
Harold Palagano, New York Life Ins. Co., New York, N. Y.

Protective Committee for Chicago and Eastern Illinois Ry. General Mortgage 5% Gold Bonds:

Carrol M. Shanks, Chairman; Prudential Ins. Co. of America, Newark.
Harry C. Hagerty, Metropolitan Life Ins. Co., New York, N. Y.
Alfred H. Meyers, New York Life Ins. Co., New York, N. Y.
Robert L. Hoguet, Emigrant Industrial Savings Bank, New York, N. Y.
Charles R. Butts, Norwich Savings Soc., Norwich, Conn.

Protective Committee for Northern Ohio Ry. First Mortgage 5% Mortgage Gold Bonds:

formed not only entirely free from the domination of bankers, but in some instances in direct opposition to their wishes.[17] True, bankers have some representation on the committees. From the point of view of those interested in effectuating a sensible, workable plan of reorganization their presence is highly desirable in order that their technical skill and knowledge may be fully utilized. Like lawyers representing the committees, they can be of invaluable assistance, as has been recognized by the Commission.[18] What actually has happened here is that the control of these committees has shifted from bankers and speculative equity groups to investors who are grimly interested in protecting their investment portfolios.[19]

Any domination or control by these banking and other groups interested in the equity has not been apparent from the organization of the committees down to date. The committees have been appointed at meetings of security-holders. These meetings have been informal and called (after notice to such larger holders as could be ascertained) in some instances by insurance companies and in others by trustees of the bond issues.[20] Those attending

Milo W. Wilder, Jr., Chairman; Mutual Benefit Life Ins. Co., Newark.
Frederick W. Walker, Northwestern Mut. Life Ins. Co., Milwaukee.
Donald W. Campbell, State Mut. Assur. Co., Worcester, Mass.

In the case of the Monon, committees are in process of formation at the date of this writing. Since insurance companies hold over sixty per cent of the Refunding Bonds, the committee, for that issue at least and for the time being, will probably act only as an informal group.

[17] For an example which is a matter of record, see the statement by the Readjustment Managers of the Chicago, Rock Island & Pac. Ry., indicating opposition to the committees. N. Y. Herald-Tribune, July 8, 1933, at 15.

[18] Commissioner Eastman stated the proposition as follows: "Bankers and lawyers must be employed to assist in the preparation of the plan, but they ought not to dominate its preparation. They should be employed as expert advisers upon a strictly professional and nonspeculative basis." Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673, 714 (1928). This view of the matter was reiterated by Mr. Eastman in his memorandum as Chairman of the Legislative Committee of the Commission, addressed to Senator Hastings in connection with the pending enactment of § 77. See Memorandum of Jan. 31, 1933, at 9.

[19] See note 16, *supra*. The present depression and its various effects make this element of self-interest most conspicuous.

[20] The meeting leading to the formation of the Protective Committee for the holders of Missouri Pacific Railroad First and Refunding Mortgage 5% Gold Bonds was called by representatives of the Prudential Ins. Co. Those attending this meeting acted for some time as an informal group and on May 9, 1933, notified the court, the Commission, and the management of the road that they were so acting.

have been the responsible representatives of large investor institutions holding in some instances as high as from twenty to sixty per cent of the outstanding bonds.[21] These representatives, after consideration and deliberation, have chosen committee members. Thus we are seeing initiated a somewhat new era of reorganization procedure — the formation of committees whose interest is solely that of the protection of the bonds for which they act. That singleness of purpose does not rest upon any assertion of virtue. It has an even more solid basis. These institutions are heavily interested as investors in these issues. They represent in turn the investments of thousands upon thousands of small investors. They are under the pressing necessity of seeing that the best possible reorganization is accomplished within the shortest possible time and with the least expense, in order that their investment portfolio values may be safeguarded.

There is other evidence that these committees are not under the domination of the banking and other speculative equity groups.

The group which met and acted informally consisted of the representatives of the Prudential Ins. Co. of Am., the Metropolitan Life Ins. Co., the New York Life Ins. Co., the Equitable Life Assur. Soc. of the U. S., the Northwestern Mut. Life Ins. Co., the Mutual Life Ins. Co. of N. Y., the Mutual Benefit Life Ins. Co., the New England Mut. Life Ins. Co., the John Hancock Mut. Life Ins. Co., the Pennsylvania Mut. Life Ins. Co., and the Aetna Life Ins. Co. When it became apparent that a formal committee with depositors was advisable for the safeguarding of the interests of the First and Refunding bondholders, this informal group chose the formal committee, the names and affiliations of which are set out in note 16, *supra*. Likewise, the meeting leading to the formation of the Protective Committee for the Chicago, R. I. & Pac. Ry. First and Refunding Mortgage Gold Bonds, and Secured 4½% Gold Bonds was called at the instance of representatives of the Mutual Life Ins. Co. of N. Y., and the formal committee was selected by this group.

Although the Wisconsin Central Ry. went into receivership prior to the enactment of § 77 of the Bankruptcy Act, the method of formation of the committee representing its First General Mortgage Bonds and its Superior and Duluth Division Bonds may be cited as an indication of procedure where investor groups are in control. A preliminary meeting was called by bankers for the road. Later, a meeting was called by the United States Trust Co., trustee under both mortgages of some twenty-five or thirty representatives of the larger holders. This meeting selected the representatives of four large insurance companies and the representative of a large investor institution to act as a formal committee on behalf of the bonds.

[21] See note 20, *supra*. In addition, in the case of the Chicago, Indianapolis & Louisville Ry. (the Monon), which filed a petition under § 77 on Dec. 30, 1933, a meeting was called on Jan. 17, 1934, at the instance of representatives of the New York Life Ins. Co. At that meeting the holders of 58½% of the Refunding Bonds were represented

Mr. Lowenthal criticizes the new legislation in the inadequacy of its control over the post of reorganization managers.[22] As a matter of fact, with the exception of the somewhat special case of the St. Louis-San Francisco,[23] there is only one case where reorganization managers have been appointed; and in the case of the St. Louis-San Francisco the work of the managers has now been taken over by the separate committees.[24] This is indicative that the control of the situation is in the hands of independent investor committees and that reorganization managers will be appointed only as and when they are necessary to coördinate the work of the various committees and the Commission and to put the plan into effect. The one exception is the case of the Rock Island, where the committees are in direct opposition to the reorganization managers which were appointed by the banking groups formerly in charge of the affairs of the road. The committees in a joint statement had this to say:

"The chairman of the railway company, which is now in bankruptcy under the amended act, has announced the appointment of readjustment managers to prepare a plan of reorganization. Any such plan prepared under the auspices of the railway company and by its nominees will represent merely the debtor's view of the treatment to be accorded to its bondholders and other creditors. Nothing in the new procedure relieves bondholders from the need of studying their situation, formulating or adopting a plan and presenting their case before the Interstate

[22] See Lowenthal, *supra* note 2, at 36–37.

[23] The original Frisco plan was prepared and promulgated in 1932 as a means of escaping receivership for the road and was in effect a plan of voluntary adjustment. Precipitation of another large railroad receivership at the time seemed disastrous. Reorganization managers and the various committees were formed when the road was neither in receivership nor bankruptcy. The road has since gone into receivership and now has been taken from receivership into bankruptcy under the provisions of § 77. The voluntary adjustment plan was declared operative when the road went into receivership and the plan has been before the Commission since the transfer of the road from receivership to bankruptcy. Hence the make-up of the committees and their method of operations during that period were not truly indicative of operation under § 77. Recently, however, the plan was abandoned and the separate committees are now carrying on freed from the Readjustment Managers. See N. Y. Times, Dec. 28, 1933, at 36. The new deposit agreements for the Prior Lien Mortgage Bonds, Series A and Series B, for the Fort Scott bonds, and for the consolidated bonds, are dated Dec. 26, 1933. For the constitution of the committees, see note 16, *supra*.

[24] See note 23, *supra*.

Commerce Commission and the court. Nothing in the new procedure can assure an equitable readjustment between the debtor and its creditors unless the creditors are organized, represented and heard.

"Immediate coöperative action by the bondholders is therefore necessary and must be supported by a sufficient percentage of bonds to take action under the trust indentures and under the new law. Such coöperative action can be taken through the committees named below. The organization of these committees, which is being announced today, was undertaken some time ago by the institutions represented thereon and other holders of large amounts of the bonds with the belief that concerted action was absolutely essential for the protection of the interests of all bondholders." [25]

As a matter of fact, institutional investors have unique contributions to make not only in the preparation of a plan, but also in vigilant patrol of the property while it is being administered. Their facilities are unusual. Their engineering and investment staffs supply an equipment and skill difficult to duplicate without extraordinary expense. Any improved system of reorganization will enhance (or at least maintain) rather than weaken the position of these institutions in committee work. They are in a position truly to serve other investors better than any other agency which we have. There is ample evidence that they are doing so in current cases, as will clearly appear hereafter. Furthermore, as much as from twenty to sixty per cent of the outstanding bonds of various issues in the current reorganizations are held by these institutions. Any further movement in the direction of a more democratic rule must of necessity preserve a high and even dominant place for them in the control of the committees. In view of their substantial investments, their positions of prestige, their organization and technical equipment, and their real capacity to serve investors, the problem is not one of making it more difficult for them to act. Rather it is one of perpetuating and making more certain the continuance of that control by methods discussed hereafter.

A third salient point of Mr. Lowenthal imputes the element of racketeering to these committees. In the first place, it is implied that their early formation is not justified and that the elaborate paraphernalia which they have set up has little economic justifica-

[25] N. Y. Times Financial Section, July 11, 1933, at 27.

tion.[28] The sound view seems to me to be that the early formation of an independent, active, aggressive committee is not only desirable but necessary. What happens during the period between bankruptcy and consummation of a plan is of vital importance to all parties. The requirements of the case call for vigilant watching of the administration so that all possible steps are taken to preserve the property at its highest point of efficiency and to collect all assets of the estate. Elimination of committees at this early stage would deprive reorganization of one of its most valuable assets. Independent, well organized, vigilant committees are additional guarantee that the power of the former financial administration will be curbed or controlled. They also can act as an additional check on the operation during bankruptcy and supply further assurance that claims against officers and associates of the old company will be prosecuted. In this regard they will probably be the most effective agency to supply the initiative and drive.

A critical examination of the activities of the current committees belies the fact that their early formation was without justification. Here are just a few of the things which they have done to date. One committee, in conjunction with other committees, petitioned the court to appoint an impartial trustee or trustees, who owed no allegiance to the stockholders, to take joint charge of the property. Such appointments were made. It also moved the trustees of the mortgage to engage experts to test a formula which the company had prepared for allocating earnings to the several mortgage districts, in order to see that the issues represented by the committee were receiving equitable treatment. It also induced the trustees and the court (contrary to the desire and plans of the company) to order payment of interest on an entire issue of other bonds, part of which were pledged under the mortgage securing the bonds which the committee represents. That interest has now been distributed. One committee caused the company to petition the court to restrain certain creditors from selling securities of a face value of many millions which they held as collateral for loans of one-third the amount. The case was won in the lower court and is in process of appeal. One com-

[28] This more clearly appears in Lowenthal, *The Stock Exchange and Protective Committee Securities* (1933) 33 Col. L. Rev. 1293, 1299 *et seq.*

mittee is now investigating the status of extremely valuable collateral pledged under the mortgage and is studying the effect upon this collateral of the proposed unification program of the company.

In case of several of the roads the committees have had reports made by outside experts dealing exhaustively with the whole subject of operation, including such things as traffic, maintenance, branch lines, equipment, and leases. These reports cost from $8,000 to $12,000. On the basis of one report there have been substantial changes made in terminal arrangements which saves the road around $125,000 a year.

Another committee succeeded in blocking an ill-advised attempt to issue over $1,000,000 of receivers' certificates. As a result of its efforts the taxes of the road have been substantially reduced and further reductions seem probable. On the basis of a special report one committee obtained the removal of the operating head of the road and the appointment of a new one. Pursuant to the report, certain branch lines will be abandoned, the service on others will be changed, and conversion from steam to gas-electric will be effected. Two large departments or divisions have been consolidated into one. The committee has taken the lead in seeking alteration of certain leases. It has been active in examining various recommendations of the officials with respect to settlement of claims and, in some instances, has succeeded in getting more favorable terms.

Another committee has taken the lead in a court action and has obtained a decision that the lease of the road by another railroad is binding and is in effect, so that deficits accumulated by the lessee in the operation of the leased road must be borne by the lessee until lawful termination. This means protection to the lessor of possibly hundreds of thousands of dollars every year. In one case the committee assisted in procuring the appointment of a trustee so as to prevent a continuation of control by equity interests. Actual application was brought by the Reconstruction Finance Corporation and was actively supported by the committee.

The foregoing is but a small sample; the illustrations could be multiplied on end. Furthermore, many of the protective steps taken for the benefit of investors appear to be accomplishments of other parties. Yet in many of the instances the moving force back of these other parties has been the independent commit-

tee. The total activity which has transpired to date points clearly to the conclusion that these committees are actively promoting the interests of the investors whom they represent. This conduct completely negatives the notion that they are merely going through a formality as a justification for their existence and as a disguise for collateral and self-serving purposes. In view of this, those who contend that these committees serve no useful purpose at this stage have a burden of proof which hardly can be sustained.

Reference has been made above to the necessity of giving the committee powerful executive control, and not of expecting it to accomplish all that is needed if it is allowed to have only an amorphous support of its depositors. That power is made necessary not only by the requirements of negotiation in formulating a plan, but also by the task of supervision during the period of bankruptcy. Without adequate investors' support this cannot be done. Those experienced in the actual work of protection of investor interests can testify that only the group commanding large deposits carries real weight in shaping administrative policy.

In connection with protective committee racketeering, the matter of committee expense is discussed at length. This is a major point. In the matter of committee expenses Mr. Justice Stone has well stated:

> No one familiar with the financial and corporate history of this country could say, I think, that railroad credit and the marketability of railroad securities have not been profoundly affected, for long periods of time, if not continuously, by the numerous railroad reorganizations, in the course of which former security holders have found it impossible to save more than a remnant of their investment, and that only by the assumption of a heavy burden of expense, too often the result of wasteful and extravagant methods of reorganization.[27]

Against this history Mr. Lowenthal places the procedure under the present system, with the implication that these committees are carrying on in the same old way with the idea of running up extravagant fees and expenses.[28] Yet nowhere is it mentioned

[27] Dissenting, in United States v. Chicago, M. & St. P. Ry., 282 U. S. 311, 337 (1931).

[28] See Lowenthal, *supra* note 2, at 52 *et seq.* Section 77 (c) and (l) controls the allowance of fees to officers of corporations interested in the reorganization.

that the committee named and other committees formed under the Act are serving without compensation. It should be remembered that the control of these committees has shifted from speculative equity groups to the actual, substantial investors. There can be no better assurance than this that the expenses of the committees will be kept at a minimum consistent with aggressive watching of the property during bankruptcy and with a determined fight for proper provisions in the plan to safeguard the future of the property and the particular issue of bonds for which they act. The members of the committees are representatives of large depositors, who, on a *pro rata* basis, will pay the lion's share of any expenses which are incurred. This is an additional safeguard that expenses will be kept down. Moreover, large insurance company depositors generally bear far more than their *pro rata* portion of the expenses. The committee members are receiving their salaries from them and the committees have the inestimable benefit of the technical advice and the data of the investment and engineering staffs which they maintain. It is difficult to overstate the added facilities and relief from expense which this affords a committee and, consequently, the bondholders. Obviously there will be expenses for counsel, depositaries, and various other matters in connection with the vigorous safeguarding of interests of the bondholders. Only in relatively small part could these expenses be cut down or avoided by the failure to form or delay in forming these committees. All must agree that this supervision should be had. Hence there can be no reasonable criticism of the expense involved, provided it is kept as low as is consistent with adequate and efficient work. Prorated over a large group, the committee expense per bond is small. For a single bondholder to protect his interests is impracticable. The cost of counsel fees alone prohibits him from taking any active part. The only practicable way is to pool the resources of all the various investors and put them behind an active and competent committee with active and competent counsel. To meet the formal requirements of the stock exchange and to reassure investors who want to make sure that if they should decide to

This policy is sound, as it removes one incentive for such officers to subserve the interest of their corporation to the interests of others or to their own opportunity for profit.

withdraw they will not be unduly burdened with expense, it is customary to place in deposit agreements a limitation upon the expenses which may be charged, customarily one per cent. There must be repayment, of course, of any amounts which the committee may have advanced the bondholder on his bond. Likewise he must stand his *pro rata* share of the liabilities of the committee.[29] This provision is not subject to reasonable criticism. What is subject to reasonable criticism is the unwarranted or excessive expenses which may be incurred. As to this, the answer can be only that, granted investor committees the members of which receive no compensation, the ones paying the large *pro rata* share of that compensation are the institutions which the members represent. Obviously their interests will be as great as that of small bondholders in seeing that expenses are kept down.

Of similar nature is criticism of the customary working provisions of a deposit agreement, such as those which give members of the committee the right to become pecuniarily interested in any property or matters which may be dealt with under the agreement, to contract with the committee, or to form syndicates.[30] These powers are put in to enable the committee not only to work out a plan of reorganization, but to enable it to put through that plan when it has been adopted. That committee members are

[29] The provision for payment of charges on withdrawal in the Deposit Agreement for the Protective Committee for Chicago, R. I. & Pac. Ry. First and Refunding Mortgage Bonds, and Secured 4½% Bonds, provides that the one withdrawing shall pay "(i) any amount, with interest, which shall have been advanced in respect of such Certificate of Deposit by way of interest, and (ii) such sum as the Committee in its discretion shall fix as his fair proportion of the expenses, liabilities and other like items of the Committee accruing to the date of such surrender, limited as herein set forth." Deposit Agreement of July 21, 1933, Art. VII, at 35. The limitation as set forth on page 25 of the same Agreement provides that the charge for expenses shall not exceed one per cent unless approved by two independent arbitrators, the limitation, however, not applying to other kinds of liabilities or losses or to expenses, liabilities, and losses allowed by the Commission or the court and paid out of the assets of the debtor estate.

In the case of the bondholder committees which carried on after the abandonment on Dec. 27, 1933 by the Readjustment Managers of the Plan and Agreement of Readjustment of St. Louis-San Francisco Railway, the total charge which may be made against deposits is limited to one per cent of the principal amount of the bonds deposited. See Deposit Agreement for the Prior Lien Committee, dated Dec. 26, 1933, at 22.

[30] See Lowenthal, *supra* note 2, at 39.

fiduciaries[81] and must exercise their powers for the benefit of their *cestuis*, the depositing bondholders for whom they act, is, of course, some protection, but not adequate for the purposes at hand. Nevertheless, abstract criticisms of these powers without reference to such obligations and without regard to other practical controls over the exercise of such powers are not particularly germane to the problem. To put the plan into actual operation expeditiously and efficiently may involve the use of syndicates, purchases, sales, or any one of a dozen necessary business and legal steps. It is essential that the committee continually have the benefit of the advice and counsel of those who are skilled in the mechanisms of the market and the requirements of security distribution. So long as the latter remain servants of the investors and do not acquire the status of masters there should be no complaint. If a committee is to be trusted at all, it should have those powers. Otherwise it is too greatly restricted in the job it must do for the investors. Here, again, the criticism must be of the committee, its motives, competence, and honesty and of the way in which it was constituted, and not of the device and of the powers necessary to the success of the task.

This does not mean that abuses cannot arise under the present system — perhaps as flagrant as under the old. It depends upon the personnel. We might have evolved under the broad, flexible powers of equity a system far improved over this new legislation had we had federal judges of grander stature. And we may regress to evils as bad as those we have seen no matter how we refine the legislative, judicial, or administrative controls. The point here is that Mr. Lowenthal's criticism, insofar as it is *ad hoc*, is not persuasive. To the extent that it is a conjuration of potential or theoretical dangers it points to many possible weaknesses. That leads to a consideration of specific proposals to reduce to a minimum the risk that abuses will creep in.

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[81] Mawhinney v. Bliss, 117 App. Div. 255, 102 N. Y. Supp. 279 (1907); Carter v. First Nat. Bank, 128 Md. 581, 98 Atl. 77 (1916); Cox v. Stokes, 156 N. Y. 491, 51 N. E. 316 (1898); Parker v. New England Oil Corp., 13 F.(2d) 158 (D. Mass. 1926), rev'd on other grounds, 19 F.(2d) 903 (C. C. A. 1st, 1927).

IV

One alternative, sometimes envisaged, is to constitute the Commission a representative of all the various groups; empowering it to formulate the plan directly without the collaboration of independently organized groups. This hardly needs serious consideration. If the problem were relatively as uncomplicated as that of banks and insurance companies there might be much to be said for it.[82] For all practical purposes the reorganization of many banks and insurance companies consists of the liquidation of their assets and a winding up of their affairs. Where there is a true reorganization and a new going concern organized the questions of financial structure are relatively slight, since, generally speaking, there is only capital stock, and one class at that. In the cases of railroads, however, we have huge corporations with large and extremely complicated financial structures. Various of the component parts of these financial structures are secured by liens upon different portions of the road. This obviously gives rise to acute conflicts of interest between not only the stockholders and the creditors, but between the various classes of creditors. The interests of the various classes of creditors must be vigilantly safeguarded. It is too much to expect a court to do this, as it must act in an impartial and judicial capacity as between the various groups. Likewise it seems too much to expect it to be done by the Commission or some other governmental bureau. An added factor of embarrassment to either of the latter is the government's position as creditor of most of the roads in bankruptcy — with all the self-interest of any creditor in a position to be looked after. Also, that the Commission has approved more recent issues now involved in reorganization may give it a feeling akin to a banker who has sponsored an issue. Such agency, whether it will or no, likewise must be in a position similar to that of a court — looking after the interests of

[82] It is not clear that this is Mr. Lowenthal's notion. He maintains that receivership administration primarily calls for control by an administrative agency rather than by courts and he refers to the analogies of rate regulation and bank and insurance company insolvencies. See note 7, *supra*, at 33–35. But he does not indicate the extent to which he would agree that governmental supervision should supplant participation by the investors.

the public generally and deciding with impartiality between the interests of the various groups of stockholders and creditors. Otherwise it would be placed in a position of active and many-sided partisanship.[35] In addition, such a proposal would be wholly antithetical to the more popular notion that what is needed is a larger degree of democracy in reorganization.[34]

Furthermore, the taking of such an extreme step would deprive reorganization of one of its most valuable assets — independent, well organized, vigilant committees. When truly representative of the various economic interests involved, these serve a high purpose in protecting the interests of the investors during administration, as has been discussed above. Moreover, they can supply the elements of self-interest, shrewdness, initiative, and active partisanship necessary for the successful formulation and execution of a reorganization plan. The performance of these functions is wholly essential, and any thoroughgoing reform will make it more certain that powerful, independent, and competent committees are constituted to perform them. The Commission then would sit as a regulatory and semi-judicial body, passing upon the various plans presented to it. It would be the forum where the issues of many-sided partisanship would be aired and adjudicated. That might or might not result in the adoption of any of the plans submitted. If, as permitted by the present legislation,[36] the Commission saw fit to prepare its own plan, it would be enabled to do so in the light of the most enlightened self-interest and suggestions of those whose investments were at stake, as conditioned by its own conceptions of the requirements of the public interest. Whether, after adoption or approval of a plan by the Commission, it should be referred to a court for promulgation as at present or immediately put into effect by the Commission seems relatively unimportant. Though history teaches

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[33] As an indication of the active partisanship in which the Commission would become involved, one might recount some of the activities of the various protective committees. See pp. 577–78, *supra*.

[34] Certainly while we are in the present transition period, complete surrender of these powers to a governmental agency would have immediate detrimental effects upon railroad credit. If necessary for the public interest, such a step should be taken, even though the costs were to be great. But more effective regulation lies in other directions

[35] See § 77(d).

us that bankruptcy administration need not be reposed in the judicial branch, our tradition and experience will impell us to make certain that there be interposed a judicial review. If there is any inefficiency in our present system in that regard, it flows from that duality of control between Commission and court. But a large degree of duality of control, involving the vitally important principle of reciprocal checks, will for all practical purposes be preserved in any system.

The crux of any thoroughgoing control thus comes down to the selection and constitution of the agencies which are going to supply initiative, intelligence, and honesty in effecting financial rehabilitation under the aegis of Commission supervision and regulation.[88] As respects protective committees that means the

[88] Two other phases of reorganization become material in considering the additional type of control needed by the Commission. The first is the operation of properties during the bankruptcy or receivership period. Operation involves such mundane but essential problems as abandonment of branch lines; purchases of equipment, rails, ties, and supplies; changes in operation; and expenditures for maintenance. Management, to date, has been a distinct profession, carried on by men who have made a lifetime work of it. With no disrespect to the Commission and its able and efficient staff, it seems clear that it is not yet in a position to take on the management of roads. Its whole background and training has been on the side of regulation — a wholly different task requiring a wholly different technique. See Investigation of Chicago, Milwaukee & St. Paul Ry., 131 I. C. C. 615, 671 (1928). When Mr. Lowenthal speaks of concentrated control by the Commission he may or may not intend to convert it into a managing agency. If he does, it seems to be a sacrifice of efficiency wholly unnecessary to the end in view — protection of investors. There may be instances where operation rather than financial maladministration or other reverses have caused the bankruptcy. Nevertheless, it is a sensible and advisable thing to continue in charge of operations a competent operating man acquainted with the affairs of the road. Therefore, the fact that in current reorganizations under the new legislation one of the trustees is the head of the management of the company (see Lowenthal, *supra* note 2, at 30) seems desirable rather than otherwise. The cure for the continuance of the power of financial interests lies in other directions. In the case cited the R. F. C. early took the initiative in investigating the legality of the acquisition of certain property by the company. In view of the vigorous activity of the R. F. C. there seemed little which could be added and the committee in question remained inactive in that regard so as to avoid the duplication of expense and effort. What the future activity of the committee in this respect will be is, of course, only conjectural.

A second process in reorganization is the determination and adjudication of the rights and claims of various security-holders and creditors. Traditionally, this has been a judicial function. Conceivably, it might be turned over to the Commission. Certainly the trend in the last few decades has been more and more towards administrative adjudication of private rights. If the demand for such

selection of their members and the constitution of their charter grant — the deposit agreement. Professor Foster has suggested, as a substitute for the reformer's idle hope for genuine ratification of reorganization plans by security-holders, that the solution lies in representative democracy.

"Let machinery be provided for bondholder election of representatives by plurality or majority vote, or by cumulative voting, with open or closed primaries, with requirement that candidates disclose, or free themselves from, inconsistent interests; place limits upon campaign expenditures, et cetera. Then give the representatives thus chosen the power to bind their whole class by the bargain they will make. The reformer may object that the holders of any one large issue of bonds are too scattered, and the occasion for their cooperation too ephemeral, for them to cooperate intelligently whatever the safeguards. Inevitably those who sold them the bonds could count on at least a majority vote. To dislodge the bankers, the reformer will be forced to change his democratic slogan and call in Democracy at large. Those who can command investors' proxies must give way to the appointees of those who can win at the polls. There is no use disguising the fact that this would involve a tremendous shift of power. Whether the power is left in the bankers, transferred to public authority or somehow shared between them,[87] it should be openly conferred. Neither should be hamstrung

control were clearly needed, I, for one, would not hesitate to grant it. It is doubtful, however, if there would be any real gain made by forcing such functions on the Commission. Putting together according to the rules of law and equity the various pieces of the jig-saw puzzle which the average railroad presents is so conspicuously legalistic as to make a case for the transfer of this function to the Commission far from clear. There is but one salient and important danger to be avoided. The agency to enforce any claims of security-holders against the old management should not be biased and prejudiced in favor of the old management. See Lowenthal, *supra* note 2, at 78 *et seq.* This does not mean eliminating the old operating heads from the management during the bankruptcy. Rather it means constituting the management so that it is independent as well as capable. Among other things it means, as Mr. Lowenthal indicates (see note 2, *supra*, at 30), selection for the trustees of competent counsel who have not been identified with the old management. This process, involving the constitution and selection of the trustees and their counsel, does not seem, however, to be essentially one for an administrative agency. Whatever agency does it, it is bound to be a selection by men, and the quality of those men is going to be the controlling factor. The element of political availability is always going to be dominant in making any appointment, whether it be made by court or by Commission. And so it seems that the present system of duality of control as provided in § 77 may in this respect be the happiest one, because of the reciprocal checks which it affords.

[87] An alternative, more preferable for reasons discussed above, is to allow that control to be shared by the agency for public control and independent, aggressive

with a requirement of security holder ratification only obtainable by deception and coercion, by bribery and paying blackmail, all at the security holders' expense." [38]

The development of this technique along practical lines, so as to make it possible for this power to be shared between investor committees and public authority, seems to be the next logical step. In essence, it is in the direction of the procedure which has already been fashioned under the new legislation by investors on their own initiative. It envisages, however, the perfection of machinery to perpetuate that control and to minimize possibilities of its abuse. Specifically, it embraces the following procedure. (1) Machinery should be provided whereby the various private interests involved may select their own representatives to serve their cause. This would entail control over lists of security-holders which ought to be available to all interested parties. It would probably be preferable to allow these committees to be formed informally as at present, rather than to provide the elaborate, expensive, and time-consuming system necessary if the Commission conducted an election. But the membership of the committee should be passed upon by the Commission. Thus assurance could be had that those selected were dominantly interested as investors and that any other interests were in a minority position.[39]

(2) The selection of committee members would entail full disclosure of the various interests and affiliations of those being elected.[40] Those elected would be chosen in light of the various

committees. In fact, that is the type of control which we are experiencing under the current reorganizations.

[38] *Supra* note 12, at 357. This suggestion may have been intended as a *reductio ad absurdum*, illustrating what might happen if the governmental analogy were followed. Yet the substance of the idea is sound and the problem is one of making it workable.

[39] Mr. Lowenthal may have a comparable system in mind when he says, "The creation, the membership, the functions and the activities of committees, managers, and all other participants, direct and indirect, in reorganizations will have to be brought under Commission control." *Supra* note 2, at 56. In its context, it is not clear as to the extent to which the Commission would absorb and take on committee functions. One caveat to the proposition stated in the text should be given. This plan is designed for cases where the Commission has jurisdiction. Procedure for handling other types of cases, even in the railroad field, is not within the compass of this article.

[40] The necessity of such disclosure which the regulations of the Federal Trade

functions which they would serve and with their interests fully revealed. Thus power would be granted them openly and frankly.

(3) The committees so constituted would have a broad grant of powers so that they would have real authority necessary to serve investors effectively.

(4) To the Commission could be given power to adjudicate differences between depositors and committees as to certain matters, such as expenses. This power of control, however, would be of relatively small concern if the committees were properly constituted in the manner described.

These measures would be a desirable perfection of the new procedure which we have seen inaugurated under the recent legislation. They would entail leaving in the hands of the Commission the power to pass on the various conflicting plans of the many different self-interested groups involved in the normal railroad reorganization. The Commission would thus gain the invaluable assistance of aggressive, independent, and powerful groups from the beginning of bankruptcy to the end. At the same time the Commission would be protected against the assumption of the rôle of many-sided and active partisanship. Further, to assure the Commission proper power to supervise and coördinate the work of these independent committees, it should be given the power to appoint reorganization managers. Under this system those managers might be drawn from the various committees. In view of the protective features of this proposal it would not seem necessary to appoint reorganization managers who were wholly impartial and neutral, not affiliated with any group of security-holders, nor with any particular group of bankers,[41] since their rôle would be decidedly secondary in nature

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Commission require for registration under the Federal Securities Act sets a desirable precedent in this regard. Form D-1 parts I, II. The certificates in the current railroad reorganizations, the committees for which made calls for deposit before July 27, 1933, are, of course, exempt from the Securities Act. See § 3(a)(1).

[41] The necessity that reorganization managers not have any such affiliation has been urged by Commissioner Eastman. See Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673, 714 (1928). That suggestion, made at a time when the whole process of reorganization was largely on the basis of private initiative and usually in control of banking and speculative equity groups, was clearly sound.

and restricted in large part to the performance of the mechanics of consummation of the plan.

If we can fortify our present system by these changes,[42] we will have gone far to perpetuate and encourage the enlightened methods which the independent and aggressive committees organized to date have adopted. I believe that we can move with assurance toward that goal. The matter is essentially a simple one. Fundamentally it is a recognition that in our present system of social and economic organization we must seek our salvation not through the small security-holder, but through a powerful, aggressive, and honest organization of security-holders. This entails a tremendous shift in power from the old system. But that power openly and frankly conferred and subject to regulation in the public interest is our best safeguard against regression to ancient evils or against acquisition of new ones.

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[42] There are, of course, other desirable changes which should be made, some of which Mr. Lowenthal mentions. It is not within the compass of this article to discuss all of them. One not frequently mentioned is the necessity under § 77 of dealing with stockholders. See § 77(e). The impracticability or impossibility of determining insolvency [whenever the aggregate of its property at a fair value is not sufficient to pay its debts, § 1(15)] of a railroad under § 77 suggests that a more equitable procedure be devised. The complexity of the problem prevents adequate treatment here, but the adoption of some rule of thumb would seem preferable. One such rule might be that stockholders need not be offered participation if for a certain period of years prior to bankruptcy or reorganization the road had not, on the average, earned its fixed charges.