# Book Reviews

DISCOVERY BEFORE TRIAL. By George Ragland, Jr. Chicago: Callaghan and Company. 1932. pp. x, 406.

IN a forward to this volume Professor Edson R. Sunderland, who can surely speak with authority, says: "It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial. Much of the delay in the preparation of a case, most of the lost effort in the course of the trial, and a large part of the uncertainty in the outcome, result from the want of information on the part of litigants and their counsel as to the real nature of the respective claims and the facts upon which they rest." [1]

Here we have in a workmanlike treatise a complete account of this procedural device, which can provide what the formal pleadings were supposed to but did not supply, namely, trustworthy information of the facts complained of by each side. The author, now a member of the Chicago bar, was formerly research associate in the Legal Research Institute of the University of Michigan Law School, and in the course of a two-year investigation visited many jurisdictions to observe the actual operation of this process. He thus is able to set out a thorough examination of the conflicting theories as to the scope and method of discovery, its practical use in various proceedings and against various parties and, finally, a complete summary of the statutory provisions on the subject in the several states, and in England, Ontario, and Quebec.

According to the ancient chancery rule, discovery was permitted only as to matter supporting the mover's own case. It was available merely for defense and not for attack. Under modern practice, still resisted in many places, it should be freely available to ascertain not only the facts of the mover's own case but also those supporting the case of his adversary. The bugaboo that this might stimulate perjury to meet the case thus disclosed is yielding, however, to recognition of the fact that justice will not suffer but may be expedited if each party knows fully beforehand his adversary's testimony. Again the ancient practice limited the method of discovery to the use of written interrogatories, a practice far inferior to the oral examination. Some curious results of attempts at reform have been occasioned by advance in one aspect and not in the other. Thus Massachusetts has undertaken to broaden the scope of discovery while retaining the interrogatory method, while New York has retained the narrow chancery limits as to the scope of the remedy but has introduced the new method of oral examination to the confusion of the practice.

Perhaps the most effective use of discovery occurs when it is supplemented by another modern procedural device—the summary judgment. If discovery is available to ascertain what the facts of the case are, and summary judgment is available for quick disposition of the case after the facts are known, speed and efficiency in litigation result without sacrifice of substantial justice in those cases where the facts indicate a real defense. This the author has well explained in a special chapter on this combination of methods. We are indeed

1. See Professor Sunderland's article in this issue of the *Yale Law Journal*, *Scope and Method of Discovery before Trial* (1933) 42 YALE L. J.

indebted to him for a most satisfactory type of law book, one which aims at a single objective, and reaches it with sureness and completeness.

The text seems to have been prepared before it was possible to include the amendment to the Connecticut statute and the new rules thereunder adopted by the Superior Court judges in 1931. These followed the recommendations of the Connecticut Judicial Council in its Second Report (1930), and have been analyzed elsewhere by Professor Sunderland.[2] Connecticut lawyers may, and perhaps should, be shocked to learn that even after these changes so extensive in form, we have but the restricted type of discovery, limited in scope and available only by the outworn method of written interrogatories.

Yale School of Law. CHARLES E. CLARK.

THE MODERN CORPORATION AND PRIVATE PROPERTY. By Adolph A. Berle, Jr. and Gardiner C. Means. Chicago: Commerce Clearing House, Inc. 1932. pp. xiii, 396. $4.50.

*Reviewed by Jerome Frank*†

THIS book will perhaps rank with Adam Smith's *Wealth of Nations* as the first detailed description in admirably clear terms of the existence of a new economic epoch. For what, in effect, the authors tell us is this: Without our knowing it, we have been passing through a revolution comparable to the so-called industrial revolution[1]—analogous to the feudal system—the corporate system of economic government. "Very much more than half of industry" in this country, the authors say, is controlled, directly and indirectly, by 200 corporations which are in turn controlled by "approximately 2,000 individuals out of a population of one hundred and twenty-five million."[2] Those few men do not rely for their control on ownership of or investment in a major portion of the shares of stock of those few corporations; many of them exercise control with little or no stock or other investment. The owners of the major portion of the shares in these enterprises are almost completely divorced from the power to influence their management. We thought that we had established corporate democracy, but it has vanished or is vanishing. As a consequence of this more or less unobserved shift of power, a tiny fraction of the population, we are told, may before long impose their wills on the corporate entities which dominate the lives of the rest of us who are investors, consumers (customers) and employees. The authors state that this new economic system is not yet complete but is already vastly powerful and that there are indications that it

2. Edson R. Sunderland, *Discovery Before Trial*, January 1933 Bulletin, New Haven County Bar Association, pp. 32-40.

†A review of this book by Nathan Isaacs appeared in 42 YALE L. J. 463. The reviews in this issue by Jerome Frank, Research Associate at the Yale Law School, and Norman L. Meyers of Washington, D. C., complete the series.

1. "A revolution which continued for 150 years and had been in preparation for at least another 150 years may well seem to need a new label," writes Heaton. It was "the outcome of developments which had been under way since at least 1600." See 8 ENCYCLOPEDIA OF SOCIAL SCIENCES 5. The word "revolution" as applied to such changes is more dramatic than accurate.

2. The authors discuss the concentration of industrial as distinguished from non-industrial (banking and agricultural) wealth.

will not be long (perhaps thirty or forty years) before the process will complete itself.

It may perhaps be said that the book contains minor errors of description; that, for instance, it overstates the precise extent of the amount of wealth which is now directly and indirectly controlled by 200 corporations. This criticism is probably unwarranted, for the authors are wisely cautious in their statements; more than that, the criticism is unimportant, if the essential truth of the exposition is correct.

When, several weeks ago, the reviewer ventured to express enthusiasm about the book, one critic replied that its basic notion was not new. But, to paraphrase Scripture, the same can be said of almost anything human. The Berle and Means book has, indeed, a rich background; but that is no sin of scholarship. *The great virtue of this volume is its sharp focus and its telling assemblage of detailed evidence.* (It is worth noting that Adam Smith had his forerunners—such as Hume, Mandeville and the physiocrats.)

What is more important is that the picture in this book of the drift of events may soon conceivably be of interest only to the antiquarian. For the present economic crisis may so drastically and rapidly reverse the trend, or retard it, or hasten the processes of change, that we may shortly find ourselves in a substantially different economic epoch. In 1902 Ghent predicted that in a comparatively short time there would be developed in this country "a benevolent feudalism"; his neo-feudal barons resemble the "dictators of industry" and business "princes" described by Berle and Means. Ghent's predictions were not (in substance as distinguished from form [3]) markedly unlike those tentatively made by Messrs. Berle and Means. But in the thirty-one years that have elapsed since Ghent wrote, a variety of circumstances prevented the rapid actualization

3. The critic referred to the following: Woodrow Wilson in an address in 1910 described the potentialities of the corporate form of business and the unsatisfactory position of the stockholder as compared with the seemingly illimitable power of those in control; he referred to the large modern corporation as an "economic state" or a "body economic" which might "dominate bodies politic", labelled those in control of these corporations "these kings and chiefs of industry" and the corporations as their "kingdoms", noted that "some corporations are in fact controlled from the outside, not from the inside", and commented, "I think you must admit . . . that the position of the minority stockholder is, in most of our states, extremely unsatisfactory. I do not wonder that he sometimes *doubts whether corporate stocks are property at all or not. He does not seem to enjoy any of the substantial rights of property in connection with them. He is merely contributing money for the conduct of a business which other men run as they please.* If he does not approve of what they do, there seems nothing for it but to sell the stock (though their acts may have depreciated its value immensely)." See Wilson, *The Lawyer and the Community* (1910) 35 A. B. A. REP. 419.

Veblen, in 1923, wrote that, "Business enterprise may be said to have reached its majority when the corporations came to take the first place and became the master institution of civilized life"; see ABSENTEE OWNERSHIP 86. Steffens, (II AUTOBIOGRAPHY, 868-9) in 1932 spoke of "an inevitable conflict between ownership and management" and said that "financial sovereignty, and therefore business, and therefore political sovereignty in the United States, may be passing from the banks to the management of industry—the management, not the ownership. Indeed it looks as if the fundamental issue may be between management and ownership."

of his prediction. And in the present period of uncertainty it would be a rash man who would venture to foretell what the future has in store.[4]

It is for that reason that this review began with the statement that, "This book will perhaps rank with Adam Smith's *Wealth of Nations*." Adam Smith was lucky enough to have guessed the general outline of the trends of his time. If no important changes take place in present trends, then the *Modern Corporation and Private Property* may occupy equal rank with Smith's book. But who can tell? The wise historian knows that history is full of the unexpected.

But if it be assumed that this new corporate epoch will develop and flourish,[5] then we will be confronted with a new set of rulers. And Berle and Means picture them as princes who (as matters now stand judicially) are sovereigns subject to no effective legal checks.

Some who read Berle's earlier articles in the law reviews with reference to the changing law of corporations, had a feeling that he was over-sanguine in his expectation that the courts would soon adopt his views and that, if they did, it would make much practical difference. Berle has in this book completely and satisfactorily answered the latter part of that criticism, for there he has pretty plainly indicated that, whatever new theories the courts may adopt or develop, the ordinary stockholder is in a rather hopeless condition. For reasons explained by the authors, the theoretical protection available to the stockholder through a minority stockholder's suit is seldom useful to him in any practical sense. While there is (or is in the making) a body of legal theory on the basis of which courts might, to some extent, curb these new masters, the authors assert that "the indefiniteness of its application, and the extreme expense and difficulty of its application, still leave the stockholder virtually helpless. In fact, if not in law, at the moment we are thrown back on the obvious conclusion that a stockholder's right lies in the expectation of fair dealing rather than in the ability to enforce a series of supposed legal claims." [6]

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4. In the Preface, Berle says, "Is this organization permanent? Will it intensify or will it break up? Mr. Brandeis struggled to turn the clock backward in 1915; Professor Frankfurter is inclined to believe even now that it cannot last. To us there is much to indicate that the process will go a great deal further than it has now gone."

But Brandeis is too able a thinker to adhere blindly and dogmatically today to 1915 attitudes; see his dissenting opinion in New State Ice Co. v. Liebmann, 285 U. S. 262, 280 (1932). The reviewer is unaware of the time and place when Frankfurter expressed the sentiments attributed to him. But Frankfurter is one of the soundest and most brilliant minds of our time, peculiarly gifted in his discernment of social trends, and the reviewer strongly inclines to believe that, if he ever entertained such an attitude, he no longer does so.

5. The recent crisis has already, in some respects, underscored the divorce of stock-ownership from corporate control. Those in control of many corporations have voluntarily or perforce denuded themselves of their investment in those enterprises, yet their control continues unabated.

Sales of "control," resulting from deflation, have also hastened the process of integration. See what has happened, for instance, to the control of many investment trusts which, in turn, often hold the keys to control of large industrials and public utilities.

6. If the corporateness described by Berle and Means continues to exist or grow, then certain aspects of the minority stockholder's suit, not discussed by the authors, will deserve elaborate attention. Some of those aspects may be briefly indicated as follows:

Considerable attention should also be given to the fact (but briefly adverted to by Berle and Means [7] because their study was primarily of the stockholder's position) that, more and more, the position of the bondholder and of the stockholder of large corporations are merging. It is true that the stockholder has no right to fixed income while the holder of an ordinary corporate bond seems to have a right to fixed income and to ultimate payment of a definite amount of principal. But the processes of reorganization can deprive the bondholder of those rights. If an ordinary corporate bond were realistically worded, it would perhaps advise the bondholder that the corporation was agreeing either (1) to pay him a stated sum of money with interest at stated periods, or (2) if the corporation finds itself financially embarrassed, then, at the option of those in control,[8] to give him new securities which might take the form of non-voting stock in a new corporation.[9] And in so far as a bondholder has an income bond [10]

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Lawyers representing large corporations are inclined to ascribe improper motives to all those who bring such suits; such a sweeping indictment is unjustified. It is, however, true that a considerable proportion of those suits are brought by so-called "strikers" who buy a few shares solely for the purpose of instituting such actions. If their suits succeed, the courts reward them handsomely by making generous allowances for fees and expenses. This raises the question of the social value of the minority stockholder's suit. On the one hand it may be argued that whatever the purpose of such strikers, there is something to be said in their behalf since, occasionally, they do valiant work on behalf of their fellow stockholders, and the generous allowances which they receive from the courts may perhaps be justified on the analogy of the damages allotted in *qui tam* actions; perhaps someone will some day write a treatise called *In Praise of Venner, et al.*

On the other hand, many of such stockholder's suits brought by strikers are disposed of by settlement without trial; such a result does nothing for the body of the stockholders. Not infrequently the striker obtains a settlement from an innocent management—on the same basis that a reputable and innocent man will often settle an unfounded blackmailing suit for breach of promise. It is arguable that, since the minority stockholder's action is seldom practically useful to the honest investor and is principally serviceable to the parasitic striker, it has little social value and should be abolished by statutes which would, as substitutes, develop or create governmental agencies to investigate corporate practices and protect the investor. Such a suggestion, however, raises the question whether such political agencies would be sufficiently efficient and active to constitute adequate substitutes for the minority stockholder's suit. Prophylactic devices, private and governmental, also deserve consideration.

7. Pp. 279-280.

8. Sometimes, in those circumstances, there is a shift of control.

9. Or even perhaps in the same company. *Cf.* Phipps v. Chicago, Rock Island & Pacific Ry Co., 284 Fed. 945 (C. C. A. 8th, 1922). Under the new Federal railroad reorganization statute, the point made in the text may become increasingly obvious.

10. The present economic crisis may conceivably lead to a period in which financing will be done through the use of income bonds or stock,—that is, in such a way as to prevent the injury to the investor which results from the fact that the individual investor is one of a group whose securities call for the payment of fixed charges which, when they cannot be met in a period of crisis, precipitate the waste and disorganization resulting from receivership.

the principal of which is payable at a long distant date, he is in substantially the same position as a non-voting stockholder.[11]

If as these authors intimate the consumers and the employees are or soon will be in much the same helpless condition as the stockholder, then, our destinies may in a few decades or sooner be in the hands of a small group of unregulated business potentates. But there is this defect in Berle and Means' book: it strongly implies that these potentates are an integrated group. Today a highly-conscious unified oligarchy of American business rulers popularly referred to as "Wall Street" does not—for better or for worse—exist outside the wishful imagination of certain radicals. *Psychologically*, and therefore pragmatically, there is today no considerable proletariat class in this country; [12]

11. When a large corporation becomes financially embarrassed and reorganization ensues, the old control may be changed. But the individual bondholders do not usually determine the successor control. Not infrequently that is determined by the banking houses which sold the bonds to the investing public; those houses often create the reorganization committee which determines to whom control shall pass. *Cf.* Frank, *Reflections on Some Realistic Aspects of Corporate Reorganization*, soon to be published in the VA. L. REV.

It remains to be seen what will be the effect on this situation if the courts adopt and develop the doctrine of Bergelt v. Roberts, 144 Misc. 832, 837, 258 N. Y. Supp. 905 (Sup. Ct. 1932), *aff'd*, 236 App. Div. 777 (1st. Dep't 1932), which, under certain circumstances, permits minority bondholders to procure, from the issuing banking house, a list of the names and addresses of persons holding bonds.

The new Federal railroad reorganization statute provides that such lists must be filed in court.

12. Whether widespread unemployment, if too long continued, will change this status is anybody's guess. Two recent books stress the fact that in America there is as yet no large self-conscious proleteriat class; see WILLIAMS, HUMAN ASPECTS OF UNEMPLOYMENT AND RELIEF (1933), and CALVERTON, THE LIBERATION OF AMERICAN LITERATURE (1932); the latter book is peculiarly interesting in this respect because the author is an avowed Marxian.

Marx's prediction of an unavoidable clash between self-conscious classes was based upon a survey of the European scene. But in Europe the division of society into sharp and defined classes had existed under feudalism, and consequently class groupings with class attitudes were a reality; the stratification in the form of a more or less conscious ruling group and a more or less conscious governed group was taken over in capitalist-industrialist Europe from the preceding feudal epoch. In this country there was no period in which anything like a developed feudal structure existed and therefore this stratification did not occur in anything like the same manner. In the United States the aristocracy, if any, has been based primarily upon wealth which according to Sapir, "means a *psychological . . . levelling* because of the feeling that wealth is an accidental or accorded quality of an individual as contrasted with blood." Entrance into or emergence from the aristocracy seems to many persons to be largely due to chance; and this and a variety of other causes has created a "psychological levelling" which is hostile to class consciousness.

Of course the American frontier helped to foster this psychological levelling. "For three centuries," it has been said, "the common American had an easier opportunity to become a free economic agent than did any of his contemporaries." The workaday backwoods equalitarian mood of the frontier, we are told, permeated all American thinking. It still vitally affects American attitudes,

most of the unemployed look upon themselves as capitalists momentarily without capital. And the American business bosses, in like manner, have not class-consciously worked together or exercised their full powers; nor are they even aware of their potential strength. There is more jealousy and less cooperation between these modern sovereigns than between national states; the business rulers have not even developed as much of an organization as the League of Nations. It may be that the intensity of our present economic miseries is, in part, the consequence of this lack of cohesion. (One recalls John Maynard Keynes' comment: "A Banker's Conspiracy! The idea is absurd. I only wish there were one!")

The American business potentate, believing as he does in the democratic dogma [13] experiences a strong psychological deterrent to looking upon himself as a ruler and to working out logically the implications of his economic position. That is perhaps one reason why Ghent's 1902 prophecies and the more tentative 1932 predictions of Berle and Means may not come true—at any rate for a period the duration of which is unpredictable.

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although the frontier disappeared several decades ago. That fact should give pause to those geographic determinists who glibly explain the American credo as solely or primarily a frontier product. Just as that body of attitudes persists when the frontier is non-existent, so the mere fact of a frontier, although doubtless an important causal factor, cannot alone account for its original existence. Other countries have had frontiers. Think of Russia today; its immense frontier is not producing anything remotely resembling American "individualism."

The peculiar American culture is a complicated composite; religious, scientific, industrial and economic factors have inter-acted with a variety of other factors. Ideas, good and bad, often become imbedded in a culture and have their effects long after the causes which produced those ideas have vanished. As Fouillée said, every idea is a potential force. Thus Jeffersonianism was originally a hodge-podge, an emotional and intellectual mince-pie, containing among other things, some French idealistic equalitarianism, some English political individualism, some indigenous agrarianism. Although most of its original ingredients have evaporated, it is still an active psychological levelling force in American life.

13. Bryce noted in 1894 that, "*In America there are two classes only, those who have succeeded and those who have failed* . . . In America men hold others at bottom to be exactly the same as themselves. If a man is enormously rich . . . he is an object of interest, perhaps of admiration, possibly even of reverence. But he is deemed to be still of the same flesh and blood as other men . . . In France and Switzerland there lingers a kind of feeling as if the old *noblesse* were not quite like other men. The Swiss peasant, with all his manly independence, has in many cantons a touch of reverence for the old families. . . . Nothing like this is possible in America."

In 1932 another foreign observer, Bonn (THE CRISIS OF CAPITALISM IN AMERICA) wrote, "*As most of the industrial leaders are sprung from the same ranks of life as the rest of the American people, they are animated by the same sentiments as their former neighbors.*" There is a "notion that everyone who is still a nobody has the opportunity of becoming a somebody." "Simple folk" feel that the successful capitalist "is one of themselves—bigger, more successful, more favored by fortune than they, but not a high-brow denizen of another intellectual sphere."

It is not impossible that current disorganization will soon push us in the direction of benevolent feudalism. But if the present situation is to be compared with the "feudal system," then it should be compared with the earlier stages of that system when baronial anarchy was regnant. Perhaps the business barons will become as clearly cognizant of their potentialities as were the feudal barons. Perhaps a dominant business prince, guided by a new Machiavelli, will subjugate the warring barons as the kings subjugated the feudal barons. Or luck or intelligence may pull us out of the current depression in some way that will prevent such cohesion.

Or we may, via the Reconstruction Finance Corporation or some similar political device, find our way into state capitalism. In that event, economic centralization may occur in strictly political form. And who knows whether it will then go further or recede?

Berle and Means suggest that the corporation under its new masters may challenge and perhaps dominate the political state to a far greater extent than has occurred heretofore. But the recuperative power of the political state is immense, and prediction in this respect is dangerous. In all likelihood, it will be urged that efforts should be made to restore what might be called the anarchy of old-fashioned competition.[14] Whether that would be desirable may be questionable.[15] Whether it is possible or probable is also a question; *the very belief that it is impossible—which this book encourages—if that belief becomes sufficiently widespread, may make it impossible.* A possibility more likely of at least temporary realization is that of a program which will allow and even foster the consolidation of private corporate control, at the same time subjecting it to strict political regulation.[16]

*If* centralization does not take political form, and *if* the power of the giant corporations persists, and *if* a tiny minority continue in control of those corporations, these further problems will arise:

1. Is it socially desirable to re-democratize that control? If so, how can that end be attained? The insiders successfully reelect themselves at corporate elections through the control of (1) the proxy machinery[17] or (2) a small amount of voting stock with the majority disfranchised because the majority holds non-voting stock or (3) voting trusts. The courts seem to furnish few weapons for a fight for re-enfranchisement. Can legislation do the trick?

2. If much of real government is exercised by the large corporations, and if democratization of this economic government is desirable, should it stop with stockholders? Should it be extended to (a) creditors, (b) employees,[18] (c) consumers?

3. If democratization does not develop, what will be the devolution of the narrowly-held ruling power? Will it become hereditary? Or will election to participation in the controlling group resemble election to an Academy or a

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14. *Cf.* Slichter, *The Organization and Control of Economic Activity*, in TUGWELL, THE TREND OF ECONOMICS (1930); STUART CHASE, THE NEW DEAL (1932).

15. See CHAMBERLAIN, FAREWELL TO REFORM (1932).

16. See Brandeis' dissenting opinion in New State Ice Co. v. Liebmann, 285 U. S. 262, 280 (1932).

17. So far as the reviewer knows, Berl and Means for the first time adequately discuss the use of proxy machinery for perpetuation of corporate control.

18. See the early writings of C. D. H. Cole.

college faculty?[19] Can and should the principle of the inheritance tax be applied to the transfer of such power?

4. And what self-limitations will these rulers impose on their power? How far will such restraints result from the necessity, which (as Hume pointed out) even a tyrant is under, of a minimum placating of the governed? Will they develop a feeling of wide social responsibility—either out of self-respect[20] or from other motives?[21] Since they will have little or no investment in the corporations which they control, their incentives will not derive from a desire for profits. They may conceivably develop ambitions (resembling those of such a benevolent despot as Joseph II) to do conscientiously what they conceive to be the best possible for all those whom they rule—the investors, the customers and the employees.

5. What will develop in the way of integrating their control with the control of credit?

6. What will be the relation of these business rulers to our political governments (local, state and national) in the United States?[22]

7. How far will their interests compel the development of internationalism or cosmopolitanism either through or as supplemental to, or in disregard of, political states?[23] Will these narrowly controlled giant corporations, through cosmopolitan cartels and other devices, spread their power over the globe and create a new world-order?

These and many other questions buzz in the mind of the reader of this important book.

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19. This problem will soon come to the fore in communist Russia and fascist Italy. In this connection note that Bertrand Russell, Lincoln Steffens, the Webbs, and now Messrs. Berle and Means suggest resemblances between the Bolshevik commissars and American business rulers. Thus Bertrand Russell in the preface to THE PROSPECTS OF INDUSTRIAL CIVILIZATION (1923) speaks of "the extreme similarity between the Bolshevik Commissar and the American trust magnate."

20. *Cf.* STUART CHASE, *op. cit. supra* note 16, at 169-171.

21. See Paul Douglas, *The Reality of Non-Commercial Incentives in Economic Life*, in TUGWELL, TREND OF ECONOMICS (1924) and Berle and Means, pp. 122, 350.

Our business potentates have perhaps been less happy than is ordinarily supposed. Dewey commented that "even those who seem to be in control, and to carry the expression of their individual abilities to a high pitch, are submerged. They may be captains of finance and industry, but until there is some consensus of opinion as to the meaning of finance and industry in civilization as a whole, they cannot be captains of their own souls—their beliefs and aims. They exercise leadership surreptitiously and, as it were, absent-mindedly. . . . *If there is in general any degree of contentment on the part of those who form our pecuniary oligarchy, the evidence is sadly lacking.* As for many, they are impelled hither and yon by forces beyond their control"; INDIVIDUALISM, OLD AND NEW (1930) 53-54.

22. *Cf.* LINCOLN STEFFENS, AUTOBIOGRAPHY (1931), especially Vol. II.

23. *Cf.* BERTRAND RUSSELL, PROSPECTS OF INDUSTRIAL CIVILIZATION (1923); LASKI, STUDIES IN LAW AND POLITICS (1932) 237 *et seq.*

*Reviewed by Norman L. Meyers*

IF Technocracy did nothing else in its short life, it dramatized the persistent recurrence and vitality of the social and economic analyses of Thorstein Veblen. Twelve years ago Veblen pointed out the dominant factor of a developing technology in modern life;[1] and even the somewhat hasty exploitation of that analysis applied to the current depression seemingly does not prevent its constant recurrence in sounder economic discussion. And it is not mere coincidence that at this time in *The Modern Corporation and Private Property* his theory of *Absentee Ownership and Business Enterprise in Modern Times* (1923) is elaborated by a statistical but scholarly, and nevertheless practical, study of the two hundred largest non-banking corporations in the United States.

In the short time since the book has been published, it has already received generous and deserving, if at times uncritical, praise for what it does. It demonstrates in detail, and as a matter of cold fact, Veblen's theories concerning the separation and degradation of the investors' stake in an enterprise, historically dubbed "ownership", from the "control" of the business enterprise; and presents a lucid analysis of the legal devices whereby "control" has been shifted to minority groups or to the "management". The first half of the title of this book amply deals with the first half of the title of Veblen's; the book proves concretely what has been obvious for a decade to the hitherto submerged economists familiar with Veblen. In a recent dissenting opinion[2] Mr. Justice Stone has begun the process of creating a majority recognition of the legal significance of this part of the book. However, regarding "Private Property" in the large scale "Business Enterprise" there are many generalizations in the book which challenge attention, in the light either of Veblen's analysis or of the experience of the past few years.

Based on cautious statistics, the authors present sundry bold generalizations. "Within (the corporate system) there exists a centripetal attraction which draws wealth together into aggregations of constantly increasing size, at the same time throwing control into the hands of fewer and fewer men. The trend is apparent; and no limit is as yet in sight". Comments are hazarded concerning the time it will take until all property is controlled by giant corporations; and until there shall be super-giant corporations the size of the combined two hundred under observation. Although the Artificial Person has taken the place of the Captain of Industry, the prediction is strongly reminiscent of the sanguine but comparatively inept Marxian prophecy of the concentrate of wealth into a few hands before *Der Tag*.

However, this analysis of Big Business is made as of January 1, 1930. While apparently the choice of that date was fortuitous, it is rapidly becoming apparent that the selection of that date was a happichance, since the fall of

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1. VEBLEN, THE ENGINEERS AND THE PRICE SYSTEM (1921).

2. "Extension of corporate activities, distribution of corporate personnel, stockholders and directors through many states, and the diffusion of corporate ownership, separated from corporate management, make the integrity of the conduct of large business corporations increasingly a matter of national rather than local concern [citing this book] to which the federal courts should be quick to respond when their jurisdiction is rightly invoked." Rogers v. Guaranty Trust Co., Oct. term, 1932, decision handed down on Jan. 23, 1933 (involving protest over allotment of securities to management and employees of American Tobacco Co.)

1929 seemingly marks the end of another business epoch. The rapid growth of the two hundred corporations along with others in the Coolidge boom was produced by stock jobbing on a colossal scale; merger, new security issue, and reinvestment of questionable earnings produced gigantic balance sheets, portending stability, diversification, economy, strength and other stock market desiderata. But a cursory scanning of the list of the two hundred giant corporations shows that at least eighteen of them are already actually in receivership; how many more belong there only the gods and the R. F. C. can tell.

The explanation of the weakness of these giant corporations—and others not so gigantic—must include consideration of the nature of business enterprise. Veblen's dichotomy of business and industry,[3] of the pecuniary institution and the industrial appliance should not have been overlooked when predictions of the future were made. After the zoom of the recent stock jobbing to enlarge the pecuniary institution, we are now made sadly aware of the resulting problems of industrial management, of the mastering of irrepressible new technological advances, of the domestication of the exuberant and troublesome machine. Events since January 1, 1930 indicate the existence of centrifugal as well as centripetal forces affecting the aggregations of wealth.

The two hundred corporations include five moving picture companies: these companies are recognizing that chain theatres are not chain stores and must be managed with the hauteur demanded by palaces of corresponding elegance, and overhead; and that the production of pictures is not adapted to the conveyor-belt process. As a result there are indications that these giant corporations may jettison large theatre holdings on the one hand, and farm out production to independent units on the other. Finance may very well return the business to Showmen. The list includes forty-four public utility companies. Recent regulatory commission success in the struggle to stop the "milking" of operating companies through intercorporate fees strikes at the jugular of the present utility holding companies. And the recent depression experience of easily-financed operating companies carrying the holding companies may do away with the justification for existence of many of this group. On the other hand there are some forty-two railroads in the list; and under the consolidation proposals of the I. C. C. and of the recent Coolidge Committee,[4] the number may decrease and the size of the giant railroad corporations increase in accordance with the predicted trend. There are some twenty petroleum companies, and technological conditions favor further consolidation; in fact since January 1, 1930 three of the listed companies have become one. On the other hand, impending pipe line regulation may compel some realignment in that industry. The last decade saw undue emphasis on the balance sheet and corporate bigness; the next may see a searching for an optimum size for a corporation, dictated by technological considerations and the limits of managerial ability. The corporate dinosaur may yet give way to the whippet.

The authors define "control" as the power to elect the majority of a board of directors. But what actual control does a board of directors exercise in a modern corporation? It would be a matter of super-human intelligence and ability for the small number of men who served as interlocking directorates of these two hundred corporations to control them according to the traditional

3. VEBLEN, THEORY OF BUSINESS ENTERPRISE (1904).

4. *Cf.* MOULTON AND ASSOCIATES, THE AMERICAN TRANSPORTATION PROBLEM (prepared for the National Transportation Committee) (1933).

theory of the functions of directorship. At best they now juggle with balance sheets and financial reports; technological problems, labor policy, and industrial detail are given but summary concern. The recent revelations in the more pathological cases—the Krueger and Toll kingdom, the Insull empire, the Bank of United State bailiwick,[5] and the less notorious principalities such as the Gillette merger—give ample evidence of the lack of full control, even knowledge, by directors; not as a matter of legal theory perhaps, but certainly as an actuality. The same and other cases of common report likewise absolve "management" from full control, and even knowledge. A literal acceptance of the authors' concept of control would compel the conclusion that The Modern Corporation was anarchic, even before 1929.

Banking institutions have been excluded from this study for good and obvious reasons. But a casual reading of Veblen or an eye on the passing scene, even that of 1929, would have gained recognition for the part the larger use of credit plays in The Modern Corporation. A tardy revival in interest in the Pujo Committee findings and in Brandeis' *Other People's Money* indicates that the authors were not alone lulled by the glow of the era of Banking Statesmanship. However it would seem that the rigor of the logic of their thesis would compel a further isolation of "control" by tracing the dictates of the credit institutions on to the boards of directors. Even a "minority" on a board of directors may "control". Senator Norris' recent attack indicated the intricacy of the mesh of directors of banking institutions and the directorates of these large corporations. The demand for consideration of the part the banks play in the "control" of corporations, along with the "minority control" and the "management", is not unwarranted.

For that matter, the influence of even the impotent organizations of labor can not be ignored in considering the "control" of The Modern Corporation. Above all, an analysis of "control" must recognize the concomitant power of organized society with that of the boards of directors. The "control" of commissions over rates, security issue, financial and labor policy, etc. of the utilities and railroads in the list of two hundred corporations is patent. The emergent national policy over raw material industry will greatly affect a large number on the list. Legislation recently adopted or proposed will seriously affect the size and character of the chains and other business included on the list. The State has not yet surrendered supremacy to the Corporation.

The problem of control in the Modern Corporation is not dissimilar from the problem of sovereignty in the Modern State. There is no unity; a pluralistic analysis seems the most promising. The separation of possession from ownership in large scale industry, by altering the psychological or spiritual rewards to the craftsman challenges the traditional basis of private property;[6] ownership has become absentee; the "leisure" of investors has accentuated social problems.[7] The concentration of wealth deeply affects the workaday of the common man,[8] technological advances attack the price system and threaten to raise the Engineer to a position of power equal to that of the financial status

5. Inasmuch as the Senate Committee has not yet investigated other large banks it would be unfair to do more than drop this footnote concerning the activities in mergers, etc. of the President of the National City Bank.

6. *Cf.* VEBLEN, INSTINCT OF WORKMANSHIP AND THE STATE OF THE INDUSTRIAL ARTS (1914).

7. *Cf.* VEBLEN, THEORY OF THE LEISURE CLASS (1899).

8. *Cf.* VEBLEN, THE VESTED INTERESTS AND THE COMMON MAN (1919).

of the directors of credit or the politico-social status of the State.[9] Science has become a matter of major business concern.[10] In the words of the authors of this book, slightly amended, "The institution here envisaged calls for analysis not in terms of business enterprise [alone] but in terms of social organization." Absenteeism plays a large part in the demolition of "Private Property" but it is not the sole governing factor over the size and function of The Modern Corporation.

CASES AND MATERIALS ON THE ADMINISTRATION OF DEBTORS' ESTATES. By Wesley A. Sturges. St. Paul: West Publishing Co. 1933. pp. xiv, 1141. $6.50.

IN this volume the author states as his purpose: (1) to present a general outline of the typical methods of liquidation, namely, compositions, assignments for the benefit of creditors, receiverships and bankruptcy; (2) to present each method as a separate technique; (3) to suggest the combination of two or more of these methods; (4) to consider the use of receiverships to supplement or to displace compositions and assignments and the supremacy of bankruptcy over other methods of liquidation.

The Reviewer is in entire sympathy with the idea of dealing with the administration of insolvent debtors' estates, as a whole. The division of law school curricula into courses is not entirely scientific, and most law schools are attempting by experiments of one sort or another, to make a more satisfactory division of the law. To this end subjects that in the past have been treated separately are sometimes united by groupings made either according to associations of basic fact or function, or according to associations of legal ideas. Sometimes it is possible to combine both kinds of association. Where it is not, the reviewer believes it is better to adhere to the latter method. For in the study of business or economics fact or function might properly predominate; but three years is a short time in which to crowd a study of law in its technical aspect, and this reviewer at least looks with jealousy at any attempt to include at the expense of technical legal study, matter which though appropriate in itself, is in its nature economic rather than legal.

In the administration of debtors' estates by the various methods dealt with in this case book, there are, however, not only associations of function, but basic legal conceptions which form connecting links. The chief of these are preferences and fraudulent conveyances. It is a common desire of insolvent debtors to prefer some creditors to others; it is by no means uncommon for them also to attempt by some device either to retain part or all their property so that it cannot be reached by their creditors, or to make a gift of it to relatives or friends. The debtor may seek to accomplish these objects either by dealings with an individual creditor or friend, or by composition or assignment. Although preferences were not unlawful at Common law, so far as fraudulent conveyances are concerned, the Statute of Elizabeth and the modern law developed from it, furnish some remedy to individual creditors. Statutes regulating voluntary general assignments, Receiverships and Bankruptcy have furnished more complete protection against fraudulent conveyances, and the

9. *Cf.* VEBLEN, THE ENGINEERS AND THE PRICE SYSTEM (1921).

10. *Cf.* VEBLEN, THE PLACE OF SCIENCE IN MODERN CIVILIZATION (1919).

only effectual protection against preferences. It would seem perhaps the most logical as well as satisfactory beginning to the whole subject with which this case book deals to print some decisions illustrating the common law in regard to preferences and fraudulent conveyances. Every teacher, however, has his own ways of developing his subject, and arranges his materials accordingly, and it would be absurd to suggest that there is only one good way. The cases that are contained in the book are well selected and well edited. If a criticism is to be made of them, it would be that in the earnest desire to include the latest decisions historical development is not much considered. It must always be true that judgment concerning future growth will best be cultivated by a study of past growth. There are frequent pertinent notes in the book and not infrequent suggestive inquiries. Occasionally merely the facts of a case are given and the student is asked to supply the proper decision.

In comparison with the matter devoted to other topics, the space allotted to Acts of Bankruptcy seems somewhat small. Especially it seems that fraudulent conveyances both as Acts of Bankruptcy and as affording ground for recovery of property, might have received fuller treatment. The Uniform Fraudulent Conveyance Act which has been enacted in a number of states would certainly seem of sufficient pertinence and interest to justify the inclusion of some material illustrating its effect.

The editor includes besides cases and statutes statistical summaries, reports of investigations and of public hearings, recommendations of bar associations, and other matter. For reasons stated above, this reviewer does not think it the most profitable use that can be made of a student's time to discuss in class whether bankruptcy procedure is too expensive in the larger cities or whether trustees' compensation is sufficient, or similar matters. But a teacher who does not wish to spend time discussing this material with his students is at liberty to omit it. And as the author explains, this functional material may be extremely useful to the student outside the class room not only for its informative value with respect to the topics referred to, but also to provoke interest in current problems of administration of the law in this general field.

Harvard Law School. SAMUEL WILLISTON.

STATISTICAL ANALYSIS OF AMERICAN DIVORCE. By Alfred Cahen. New York: Columbia University Press. 1932. pp. 149. $2.25.

AMERICAN FAMILY LAWS. By Chester G. Vernier. Volume II. Stanford University: Stanford University Press. 1932. pp. xxvii, 523. $5.

THOUGH the increasing importance of divorce has made it the most dramatic phenomenon in the field of domestic relations, a formulation of its problems will vary as it is presented by the lawyer, the sociologist, the legislator or the cleric. So, to some, the unhealthy survival of the vestiges of canon law is the most important cause for the abuses and scandals of our present law. A more popular study may treat the sexological factors of family life in a pseudo-scientific manner.

Nothing quite so startling is attempted in either of the books under review. Doctor Cahen is the sociologist; Professor Vernier, the legal scholar.

Doctor Cahen has compressed a tremendous amount of labor within less than 150 pages. By means of charts, graphs and maps he has made clear and focused attention upon the many problems relating to divorce, its underlying

causes and the gradual breakdown of the home which we are witnessing. His method of research is interestingly set forth, and his diagnosis of prevailing conditions and trends are well worth the attention not only of the social worker, but of the legislator, the lawyer, and the jurist as well.

While it is true, as the author points out, that the study of this question is not wholly to be found in divorce statistics, and that the human element involved in many divorce cases is so difficult of ascertainment, yet unless the facts as presented by Dr. Cahen are dramatized for the benefit of those interested in the problem, but little progress can be made in attempting to solve its many manifestations.

Professor Vernier's exhaustive treatise is the first important comparative survey of the divorce and separation laws of the 48 states, Alaska, the District of Columbia and Hawaii since Stimson's *American Statute Law* was published in 1886.

It is virtually an annotated digest, containing the arguments, pro and con, on the many debatable questions arising in this field, buttressed by a resumé of all of the state statutes, adjudicated cases, law journal articles and annotations in lists of published cases.

It also contains a brief summary of the common law on many of the questions involved. The comment and criticism of the author with respect to the vagaries of the different state legislatures and the puncturing of many ideas held by the public is interestingly set forth.

These two books are valuable as well as interesting additions to the steadily increasing literature on family laws.

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