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The Modern Corporation and Private Property, by Adolf A. Berle Jr. and Gardiner C. Means

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BOOK REVIEWS

The Modern Corporation and Private Property. By Adolf A. Berle, Jr. and Gardiner C. Means. New York: The Macmillan Company, 1932. Pp. xiii, 396. \$3.75.

There is a paper government for corporations and there is an actual government. The one is embodied in constitutional provisions, statutes, charters, by-laws, decisions; the other has its being in the conduct of men who control corporate activity. The one may arise from ethical ideals or from legal and economic philosophies; the other is made up of blunt, realistic facts. Theoretically the paper government and the actual government can and should coincide. As a practical matter they do not. With them as with all human institutions there is a divergence of the *intended* and the *realized*, the *ought* and the *is*. When the separation is relatively small and development is not too rapid the paper government and the actual grow together and act as salutary checks upon each other. When development of corporate activity is stimulated to a rapidity that leaves the paper government groping, the reciprocal checks of the two governments upon each other lose their balance and the resultant effect may be anything but salutary. A reexamination of premises becomes necessary. A survey must be made of the factual ground into which the paper government must drive its roots.

One should approach this book by Messrs. Berle and Means with these thoughts well in mind. Especially is it imperative for a lawyer whose mind is steeped in conventional corporation law literature to remember them; otherwise he may read the book word for word, yet miss its essential significance. Thus, Professor Wormser, author of so bold a title as *Frankenstein, Incorporated*, because of the shock he was given by a face to face encounter with the Frankenstein here revealed, cried "socialism!"¹ as though that shibboleth would exercise the monster, and despite the fact that the authors are at least conservative enough to contribute to the so-called "brain trust" of our capitalistic President. "Things are either legal or illegal," he says. "The profits of a corporation *properly* may be disbursed only in accordance with the terms and conditions set forth in the articles of incorporation or charter."² Right. But the argument misses the mark, is bad on demurrer. If too many things are illegal and too many profits are improperly disbursed, if legal remedies are for practical purposes unavailable or prohibitively costly, if factors begin to appear of which present law and other traditional social institutions take no account, then there are prob-

¹ Review by I. Maurice Wormser in (1933) 19 A. B. A. Journ. 113.

² *Ibid.* Italicization inserted.

lems. And those are the problems that called forth *The Modern Corporation and Private Property*.

In the opening third of the book Mr. Means unfolds for us a panoramic statistical picture of our two hundred largest corporations, most of them with gross assets well over a hundred million dollars. These two hundred companies control about forty-five to fifty-three per cent of the nation's non-banking corporate wealth. They control thirty-five to forty-five per cent of non-banking business wealth and fifteen to twenty-five per cent of the national wealth as a whole. Furthermore, they have been growing both in gross assets and income at a rate between two and three times as fast as other non-financial corporations. "It would take only forty years at the 1909-1929 rates or only thirty years at the 1924-1929 rates for all corporate activity and practically all industrial activity to be absorbed by two hundred giant companies." The stockholding of the Two Hundred are scattered widely and divided into comparatively small units. In only six per cent of them is the stock privately owned with no important holdings by the public. In only an additional five per cent is the stock sufficiently concentrated for majority control. The rest of them are obviously not controlled by the stockholding owners. They are governed by a minority or through some factual or legal device whereby decisions for the corporation are made independently of ownership. The shareholder somewhere in the evolution of the corporate system has lost an ancient incident of his property. He has lost "control." His property has become "passive"; that is, he holds merely a piece of paper representing an equity on which he hopes to get a return. In a word his Ptolemaic corporate universe has become Copernican. He is no longer the gravitational center. "Control" is.

The thesis introduced by Mr. Means is traced in its legal developments by Mr. Berle. He outlines the history of the separate jolts by which "control" has been broken loose from the shareholder. There was, for example, the shareholder's most powerful weapon, his vote. The first smash at his voting power was the proxy. Then the power of motion was legislated and litigated out of existence. Charters began to appear giving the management broad independent discretion to engage in a variety of businesses. The delegation of control to voting trusts was legalized. Disfranchised stock appeared. And finally a majority of shareholders was given power by lease or sale to turn over the entire corporation to a management independent of former participants. At the same time the dominant subject in the stockholding scene has changed from a comparatively small, localized group with a common interest to a scattered, unorganized multitude of individuals who know almost nothing about the enterprise in which they own equities. The holder of shares in one of the Two Hundred, if his shares carry a voting power, if a particular question is one on which he is author-

ized to exercise that power, if he is intelligent enough to make a decision on that question and if he is interested enough to attend the meeting, may vote as it is theoretically contemplated that he should. The "control" will remain unruffled.

The growth of independent corporate "control" was undoubtedly a natural concomitant of the growth of large corporate units. It was inevitable that the power to make quickly important decisions would have to be lodged in the management or in some unified small group back of the management, for the shareholders' voting machinery is too cumbersome and the shareholders are too greatly dispersed both geographically and mentally. But the fact that independent "control" has developed has never been emphasized sufficiently. The concept of "control" as such must be made an important element of legal thought. One has but to compare the picture of actual corporate activity disclosed in this book with the conventional orthodox legal picture to realize to what an extent the actual government and the paper government have become separated. The utmost postulates of corporation thinking must be retested. If the shareholders have virtually surrendered their power and "control" is unregulated we have fundamental questions to answer as to whose interests we are to recognize in attempting some form of regulation. Shall we recognize the interests of the millions whose jobs and livelihood depend upon corporate employers? Shall we recognize the interests of the public at large, the consumers whom every hour finds dependent upon some corporate product or service? To what extent shall we try to protect the corporate creditor and the holder of bonds and notes? Shall we attempt to recover for the shareholding owner some of the powers he has lost? Shall we (and can we) reestablish him as the sovereign of corporate government? How much are we to emphasize each of these interests, and how are we to provide them with practical legal sanctions? These questions lie stretched across the fields of almost all social sciences, but the main burden of them rests squarely on the law. To the extent that the lawyer is bigger than a pleader in a particular dispute he must be aware of their responsibility and conscious of his duty to lead in their solution.

To say that *The Modern Corporation and Private Property* illuminates these important problems is sufficient high praise for the book.

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